NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 260

19 JUNE 2018

7 AUGUST 2018

RALEIGH
2020

CITE THIS VOLUME

260 N.C. APP.

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CASES REPORTED

CASES REPORTED WITHOUT PUBLISHED OPINIONS

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

THE COMMITTEE TO ELECT DAN FOREST, A POLITICAL COMMITTEE, PLAINTIFF
v.
EMPLOYEES POLITICAL ACTION COMMITTEE (EMPAC), DEFENDANT

No. COA17-569

Filed 19 June 2018

1. Jurisdiction—condition precedent—statutory requirement—agency complaint—timeliness of notice

The committee to elect a political candidate satisfied the statutory requirement of timely filing a notice of complaint with the State Board of Elections prior to bringing suit alleging a violation of a "stand by your ad" law governing political television advertisements. Evidence that the committee appropriately followed statutory procedure included a verified complaint stating when the committee sent its required notice to the state agency; the lack of a file stamp did not negate the jurisdiction of either the superior court or the Court of Appeals.

2. Constitutional Law—standing—injury—actual damage—breach of private right

The committee to elect a political candidate had standing to seek statutory damages for an alleged violation of a "stand by your ad" law regarding political television advertisements even though the candidate won the election, since at least nominal damages may be shown where a private right has been breached, even if no actual damages were inflicted aside from the breach itself. Here, the legislature had the authority to create a private right of action for political candidates and their committees to enforce its policy decision that political television ad sponsors be properly disclosed.

3. Damages and Remedies—statutory damages—not dependent on actual damages

A committee to elect a political candidate did not have to put forth evidence of actual damages in order to recover statutory damages for violation of a "stand by your ad" law governing political television advertisements where the legislature had authority to provide for statutory damages. While it is possible for statutory damages to be unconstitutionally excessive by being wholly disproportionate to the statutory violation, in this case the amount of statutory damages, if any, had yet to be determined.

4. Constitutional Law—facial challenge—political advertisements—disclosure law—content-based restriction

A state statute requiring political ads to disclose the identity of the ad sponsor's CEO or treasurer did not contain a content-based restriction violative of the First Amendment, based on U.S. Supreme Court precedent in *Citizens United v. FEC*, 558 U.S. 310 (2010).

Chief Judge McGEE dissenting.

Appeal by Plaintiff from order entered 15 February 2017 by Judge Allen Baddour in Wake County Superior Court. Heard in the Court of Appeals 16 October 2017.

Walker Law Firm, PLLC, by David "Steven" Walker, for the Plaintiff-Appellant.

Stevens Martin Vaughn & Tadych, PLLC, by C. Amanda Martin, for the Defendant-Appellee.

DILLON, Judge.

During the 2012 election cycle, a political advertisement sponsored by the Employees Political Action Committee ("EMPAC"), the political arm of the State Employees Association of North Carolina ("SEANC"), ran on television supporting Linda Coleman, Democratic candidate for Lieutenant Governor. The Committee to Elect Dan Forest (the "Committee") commenced this action seeking statutory damages, contending that EMPAC's television ad violated the "stand by your ad" law, which was still in effect during the 2012 campaign cycle.

The trial court granted summary judgment for EMPAC, concluding that the law was unconstitutional as applied because Mr. Forest could

not forecast any evidence that he suffered any *actual* damages, presumably because Mr. Forest won the election anyway. We reverse the trial court's order granting summary judgment and remand the matter for further proceedings consistent with this opinion.

I. Background

In 1999, the General Assembly enacted a "stand by your ad" law, codified in N.C. Gen. Stat. § 163-278.39A (hereinafter referred to as the "Disclosure Statute"), to regulate political advertisements. The Disclosure Statute required in relevant part that any television ad sponsored by a political action committee contain: (1) a "disclosure statement" identifying the sponsor of the ad spoken by *either* the sponsor's chief executive officer ("CEO") *or* its treasurer; and (2) a "full-screen picture containing [this] disclosing individual" featured during the disclosure statement. N.C. Gen. Stat. § 163-278.39A(b)(3) and (6) (2012).[1]

The Disclosure Statute creates the right for a candidate to seek statutory damages against an ad sponsor who runs a non-conforming ad in the candidate's race. N.C. Gen. Stat. § 163.278.39A(f).

In 2012, North Carolina's race for Lieutenant Governor featured two candidates: Dan Forest and Linda Coleman. EMPAC ran a television advertisement in support of Ms. Coleman during the 2012 election cycle. There is evidence in the Record that this ad's disclosure statement violated the Disclosure Statute in two different ways: (1) the picture of the disclosing individual was not a "full-screen" picture, but rather was much smaller; and (2) the disclosing individual depicted in the ad was neither EMPAC's CEO nor Treasurer, but was rather Dana Cope, the then-CEO of EMPAC's affiliate entity, SEANC.

Mr. Forest's Committee filed a notice of complaint with the State Board of Elections (the "SBOE"), whereupon EMPAC pulled the offending ad and ran a new ad for the remainder of the 2012 election cycle with a disclosure which complied with the Disclosure Statute. Mr. Forest won the 2012 election for Lieutenant Governor by a narrow margin of 6,858 votes out of over 4 million votes cast. After the election, Mr. Forest's Committee commenced this action seeking statutory damages against EMPAC for its nonconforming ad supporting Ms. Coleman. The trial court granted summary judgment to EMPAC. The Committee timely appealed.

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1. The Disclosure Statute was repealed by the General Assembly during its 2013 session, effective 1 January 2014. *See* Session Law 2013-381, § 44.1. Neither party made any argument concerning any effect the repeal may have had on the Committee's right to bring this action; and, therefore, we do not consider the issue.

II. Condition Precedent

[1] Before addressing the arguments of the parties, we address the argument raised by our dissenting colleague. Specifically, the Disclosure Statute requires that in order to preserve the right to bring an action for damages, a candidate's committee must first "complete and file a Notice of Complaint" *with the SBOE* regarding the nonconforming ad no later than three days after the election. N.C. Gen. Stat. § 163-278.39A(f)(1).[2] Our dissenting colleague contends that the Record fails to demonstrate that the Committee filed a notice of complaint with the SBOE by the Friday following the 2012 election as required by the Disclosure Statute.

We agree with our dissenting colleague that the requirement to file a notice of complaint with the SBOE is a statutory "condition precedent" which cannot be waived; that is, by the terms of the Disclosure Statute, it was a condition precedent to bringing this matter that Mr. Forest's Committee first have lodged a complaint with the SBOE regarding EMPAC's ad by the Friday following the election. *See Bolick v. American Barmag Corp.*, 306 N.C. 364, 368-69, 293 S.E.2d 415, 419 (1982). However, we disagree with our dissenting colleague that the Record lacks sufficient evidence to create an issue of fact that the Committee satisfied this condition precedent. Specifically, the Record contains a *verified* Complaint[3] in which the Committee alleges that it indeed sent a notice of complaint regarding EMPAC's nonconforming ad to the SBOE *before* the election, in late October 2012. Additionally, the Record contains a copy of this notice of complaint, which was attached as an exhibit to the verified Complaint. This notice of complaint is dated 26 October 2012, it states that it is being filed that same day, and it too is verified. There was no other evidence before the trial court at the summary judgment hearing concerning this issue; EMPAC never raised the issue at summary judgment nor has EMPAC raised the issue in its brief on appeal. Accordingly, we conclude that the Record shows that the Committee met its burden at summary judgment of presenting evidence that it timely filed a notice of complaint with the SBOE.

We note the dissent's argument concerning the lack of a file stamp of the SBOE on the copy of the notice of complaint contained in the

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2. The Disclosure Statute also requires a complaining candidate to bring the action within ninety (90) days of the election. Here, there is no dispute that Mr. Forest's committee brought action on 28 December 2012, well within ninety (90) days of the election. That action was dismissed pursuant to Rule 41; however, this present action was commenced within the time required in Rule 41.

3. The Committee's Complaint was verified by Mr. Forest.

Record. We disagree with the dissent that this lack of a file stamp is fatal to the Committee's claim. First, the lack of a file stamp does not bear on our *appellate* jurisdiction; and therefore, *Crowell v. State*, 328 N.C. 563 (1991) and *McKinney v. Duncan*, ___ N.C. App. ___, ___, 808 S.E.2d 509, 512 (2017), cited in the dissent, are inapposite. It is clear from the Record that our Court has *appellate* jurisdiction to consider the trial court's summary judgment.

Secondly, the lack of a file stamp was not fatal to the superior court's jurisdiction. Though the Committee bears the burden to show that it filed a notice of complaint with the SBOE within three days of the 2012 election, we note that providing a filed stamped copy of the notice is not the only way in which the Committee may meet its burden. Indeed, even the cases cited by our dissenting colleague, *State v. High*, 230 N.C. App. 330, 750 S.E.2d 9 (2013) and *State v. Moore*, 148 N.C. App 568, 559 S.E.2d 565 (2002), suggest that producing a file-stamped copy is not the *only* means to meet the burden of showing that a document was filed. These cases stand for the proposition that a trial court lacks jurisdiction to revoke a criminal defendant's probation based on a probation violation report which was not filed prior to the expiration of the defendant's probation period. In each case, we held that the State failed to meet its burden to show that the probation violation report was filed prior to the expiration of the defendant's probation period. However, we recognized that presenting a filed-stamped copy was not the only way which the State could have met its burden. For instance, in *High*, we vacated the trial court's order because "the [violation] reports were not filed stamped, *nor [was] there any other evidence in the record* indicating that the reports were actually filed within the period of probation." *High*, 230 N.C. App. at 336, 750 S.E.2d at 14 (emphasis added). And in *Moore*, we vacated the trial court's order, stating that "[i]n the absence of a filed stamped motion *or any other evidence of the motion's timely filing*[,] the trial court is without jurisdiction." *Moore*, 148 N.C. App. 570, 559 S.E.2d at 566 (emphasis added). But in the matter before us, though the copy of the notice of complaint in the Record lacks the file stamp of the SBOE, the Record does contain other evidence showing that the notice of complaint was timely filed with the SBOE, as outlined above.

III. Analysis

We now turn to the arguments raised by the parties in their appellate briefs. In this matter, the trial court granted summary judgment in favor of EMPAC on the Committee's claim for statutory damages, concluding that "in the absence of any forecast of actual demonstrable damages [suffered by Mr. Forest], the statute at issue is unconstitutional

as applied." In essence, the trial court did not declare the Disclosure Statute unconstitutional *per se*, but rather held that Mr. Forest lacked standing to seek damages under the Statute since he did not suffer any actual damages, apparently because he won the election.

On appeal, the Committee contends that the trial court erred in its ruling. EMPAC argues that the trial court correctly determined that the Disclosure Statute is unconstitutional as applied *and further argues* that the Disclosure Statute is unconstitutional on its face. We review these constitutional arguments *de novo*. *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) ("The standard of review for summary judgment is de novo."); *State ex rel. McCrory v. Berger*, 368 N.C. 633, 639, 781 S.E.2d 248, 252 (2016) ("We review constitutional questions de novo.").

A. Dan Forest's Committee Has Standing To Seek Damages.

[2] The trial court essentially concluded that Dan Forest's Committee lacked standing to bring this suit based on the absence of any evidence that Mr. Forest suffered any actual damage. That is, because Mr. Forest *won* the 2012 election, he had no standing, in the constitutional sense, to seek statutory damages allowed under the Disclosure Statute. However, based on controlling precedent, it is clear that Mr. Forest's Committee does have standing: simply because Mr. Forest won his election does not mean that he did not suffer an injury sufficient in a constitutional sense to confer standing.

The North Carolina Constitution provides in regard to standing as follows:

> All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay.

N.C. Const. art. I, § 18 (emphasis added). According to our Supreme Court, "[t]he North Carolina Constitution confers standing on those who suffer harm[,]" *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008), and that one must have suffered some "injury in fact" to have standing to sue, *Dunn v. Pate*, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993).

Our Supreme Court has held in a variety of contexts that a party has standing to bring suit where a private right has been breached, even where the party has not suffered actual damages beyond that fact that a breach occurred. The breach itself is an "injury in fact." For instance, one has standing to seek nominal damages "where some legal right has

been invaded but no actual loss or substantial injury has been sustained. Nominal damages are awarded in recognition of the right and of the technical injury resulting from its violation." *Potts v. Howser*, 274 N.C. 49, 61, 161 S.E.2d 737, 747 (1968). A party to a contract has standing to bring suit where the other party has breached the contract, even if no actual damage is shown. *Kirby v. Stokes County*, 230 N.C. 619, 627, 55 S.E.2d 322, 327 (1949). An owner of land has the right to exclusive possession of his property and has standing to bring suit against anyone who trespasses, even where the owner suffers no actual damage; the owner's legal right to exclusive enjoyment of his property has been invaded. *Hildebrand v. Southern Bell*, 219 N.C. 402, 408, 14 S.E.2d 252, 257 (1941) (holding that a landowner "is entitled to be protected as to that which is his without regard to its money value").

If EMPAC had *slandered* Mr. Forest in its political ad, Mr. Forest would have had standing to seek at least nominal damages for this tort, even though he won the election. *Wolfe v. Montgomery Ward*, 211 N.C. 295, 296, 189 S.E.2d 772, 772 (1937) (holding that a plaintiff who has been slandered has standing to seek nominal damages even where there is no evidence that he suffered actual damages).

The private right at issue in the present case was not one that existed at common law but rather was one created by our General Assembly in the Disclosure Statute to provide an enforcement mechanism. This private right is a right expressly conferred by our General Assembly on a candidate to participate in an election where sponsors of political ads supporting his or her opponent must make themselves known to the public in their ads. The General Assembly acted within its authority to create a private right not recognized in the common law:

> The legislative branch of government is without question the policy-making agency of our government, and when it elects to legislate in respect to the subject matter of any common law rule, the statute supplants the common law rule[.]

Rhyne v. K-Mart Corp., 358 N.C. 160, 169, 594 S.E.2d 1, 8 (2004). *See also Bumpers v. Cmty. Bank*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013) (recognizing our General Assembly's authority to prohibit unfair and deceptive trade practices and to create a private cause of action in favor of a class of individuals to enforce this prohibition).

Our Court has held that a party has standing to sue for *statutory* damages without having to demonstrate actual damages where the statute at issue creates a private cause of action as a mechanism to enforce

the provisions of the statute at issue. *See Addison v. Britt*, 83 N.C. App. 418, 421, 350 S.E.2d 158, 160 (1986) (Chief Judge Eagles, joined by future Chief Justice Parker and future Justice Webb, writing that "[o]nce a violation of an actionable portion of the [Truth In Lending Act] is established, the debtor is entitled to recover statutory damages [and that b]ecause the purpose of that section is to encourage private enforcement of the Act, proof of actual damages is unnecessary").

Concerning the Disclosure Statute at issue here, in 2012, in an opinion joined by Judge (now Justice) Beasley, our Court recognized that by enacting the Disclosure Statute in 1999, the General Assembly made the policy decision to create disclosure rules in political advertising and to enforce those rules through a "private cause of action," by which candidates may seek statutory damages when those rules have been broken. *Friends of Queen v. Hise*, 223 N.C. App. 395, 735 S.E.2d 229 (2012) (footnote 7). The General Assembly expressly created a private right of action for political candidates and their committees to enforce its policy decision to require that political television ad sponsors be properly disclosed. It is equally clear that a candidate suffers an "injury in fact" for a breach, even a technical breach, of this right when an ad is run in the candidate's election which runs afoul of the Disclosure Statute. This "injury in fact" is a breach of a private right similar to a breach of a private right suffered by a party to a contract who has suffered a breach by the other party to that contract, or by a landowner whose land has been trespassed upon, or by an individual who has been slandered. Even though there may not be any other actual damage, like the loss of an election; the breach of the private right, itself, constitutes an injury which provides standing to seek recourse.[4]

We are not to be concerned with the "wisdom or expediency" of the Disclosure Statute, but rather we are only concerned with whether the General Assembly had the "power" to enact the law. *In re Denial*, 307 N.C. 52, 57, 296 S.E.2d 281, 284 (1982). We conclude that the General Assembly acted within its authority in 1999 when it enacted the Disclosure Statute to require that political ads disclose their sponsors and to provide the committee of a political candidate running for office with a private cause of action to seek damages against the sponsor

4. The United States Supreme Court has recently explained that an "injury in fact" need not be "tangible" for standing to exist. *Spokeo v. Robins*, 136 S. Ct. 1540, 1549 (2016). *Spokeo* addressed the issue of standing in the federal context. Our Supreme Court has instructed that federal cases may be instructive, though they are not binding, noting that "the nuts and bolts of North Carolina standing doctrine are not coincident with federal standing doctrine." *Goldston v. State*, 361 N.C. 26, 35, 637 S.E.2d 876, 882 (2006).

of a nonconforming ad, just as we conclude that the General Assembly acted within its authority in 2013 to repeal the law.

B. Dan Forest's Committee May Seek Statutory Damages Without Showing Evidence of Actual Damage.

[3] Having concluded that Mr. Forest's Committee has standing to bring this action, we now consider whether the Committee may recover the statutory damages provided under the Disclosure Statute without presenting any evidence that Mr. Forest suffered any actual monetary damages.

The Disclosure Statute provides that a candidate receiving a favorable verdict is entitled to statutory damages equal to the "total dollar amount" spent by the ad sponsor to air the nonconforming ad. N.C. Gen. Stat. § 163-278.39A(f)(2). In this case, while the exact amount EMPAC spent on the nonconforming ad has yet to be determined, EMPAC argues that *any* amount of statutory damages would be an unconstitutional "windfall" to Mr. Forest's Committee, since Mr. Forest won the election. The Committee, though, argues that the statutory damages imposed by the Disclosure Statute is not unconstitutional "as applied" here *even if* the Committee fails to present evidence of actual quantifiable damages.

We conclude that the General Assembly has the authority to provide for statutory damages and, therefore, that the Committee may seek statutory damages. Specifically, our Court has recognized this authority in the context of the Disclosure Statute. *See Friends of Queen*, *supra*. There are other contexts where an award of statutory damages, without a showing of actual damages, has been sustained. *See*, *e.g.*, *Simmons v. Kross Lieberman*, 228 N.C. App. 425, 431, 746 S.E.2d 311, 315 (2013) (holding that a party may recover a civil penalty as provided by statute without showing actual damages for violations of our Debt Collection Act under Chapter 58); *State v. Beckham*, 148 N.C. App. 282, 558 S.E.2d 255 (2002) (holding that an award of statutory damages of $150 under N.C. Gen. Stat. § 1-538.2, where actual damages shown was less, was civil in nature and appropriate); *see also* N.C. Gen. Stat. § 25-9-625(e) (providing that debtors may recover $500 per violation).[5]

5. In the federal context, there are a number of situations where a plaintiff may recover statutory damage relief without any showing of actual damages: the Copyright Act (17 U.S.C. § 504(c)) which allows a plaintiff to recover between $750 and $30,000 for each act of infringement instead of actual damages; the Cable Piracy Act (47 U.S.C. § 605(e)) which allows a plaintiff to recover between $1,000 and $10,000 in lieu of actual damages; the Anti-Cybersquatting Consumer Protection Act (15 U.S.C. § 1125(d)) which allows a plaintiff to recover between $1,000 and $100,000 from any person who registers in bad

Furthermore, statutory damages which may exceed a plaintiff's actual damages are not unconstitutional unless the statutory damage award "prescribed is so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable." *St. Louis v. Williams*, 251 U.S. 63, 66-67 (1919). Our Supreme Court has recognized this principle. *N.C. School Board v. Moore*, 359 N.C. 474, 496-97, 614 S.E.2d 504, 517-18 (2004) (recognizing the principle that "rough justice, not absolute precision, was sufficient in evaluating the amount of [statutory] damages so long as the amount of the penalty was not severely disproportionate [to the actual damages]").

Therefore, we conclude that the Committee need not put forth evidence of actual damages in order to seek statutory damages. Such is not required in other contexts where statutory damages are allowed. However, we recognize that there may be situations where an award of statutory damages might be unconstitutionally excessive and would need to be reduced. For example, if a political action committee spent $1 million running an ad which did not feature the picture of the disclosing individual until a second after the disclosure statement commenced (where the Disclosure Statute requires the picture be displayed "*throughout the duration* of the disclosure statement"), an award of $1 million might be deemed unconstitutionally excessive. Such an award may be viewed as "oppressive" and "wholly disproportionate" to such a minor technical violation, and it might be appropriate to reduce such award.

But, here, it could be argued that EMPAC's violation was more substantial. Specifically, it is possible that having Dana Cope, a then-popular executive director of EMPAC's affiliate entity, SEANC, shown as the disclosing individual may have given the ad a level of gravitas that it would not have enjoyed if an unknown officer of EMPAC had been depicted. We conclude, however, that it is premature to decide whether the statutory damages allowed under the Disclosure Statute would be unconstitutionally excessive in this case, as *the amount* of statutory damages, if any, has yet to be determined.

C. The Disclosure Statute is Facially Constitutional.
(First Amendment Challenge)

[4] EMPAC argues, as an alternate legal ground to support the trial court's summary judgment, that the Disclosure Statute is unconstitutional *on*

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faith a domain name that is confusingly similar to the plaintiff's distinctive mark; and the Fair Debt Collection Practices Act of 1978 (15 U.S.C. § 1692k(a) which allows plaintiffs to recover from debt collectors as much as $1,000 per violation of the Act's requirements.

its face. Specifically, EMPAC contends that the Disclosure Statute constitutes a content-based restriction on speech, in violation of the First Amendment, because it requires that political ads contain a disclosure, while not requiring other forms of advertisement to contain a disclosure. We must disagree. Specifically, the United States Supreme Court has expressly held that a law requiring a disclaimer or a disclosure identifying the sponsor of a political ad is *not* a content-based restriction on speech requiring strict scrutiny review. *Citizens United v. FEC*, 558 U.S. 310, 366 (2010) ("Disclaimer and disclosure requirements . . . 'do not prevent anyone from speaking.' ") (quoting *McConnell v. FEC*, 540 U.S. 93, 201 (2003)). Rather, the Court held that such laws limit only the *manner* of speech and are, therefore, subject only to "exacting scrutiny" review. *Citizens United*, 558 U.S. at 366. And we are bound by that determination.

To survive "exacting scrutiny" review, which is generally considered to be synonymous with "intermediate scrutiny" review, the law "need not [provide] the least restrictive or least intrusive means" of reaching a government objective. *Ward v. Rock Against Racism*, 491 U.S. 781, 784 (1989). Rather, there need only be a "substantial relation" between the law and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366-67.

In *Citizens United*, the Court found that a law requiring disclosures in political advertising can survive "exacting scrutiny" review "based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending," *Id.* at 367, and that such disclosures "permit[] citizens and shareholders to react to the speech of corporate entities in a proper way, [which] enables the electorate to make informed decisions and give proper weight to different speakers and messages," *Id.* at 371.

The Disclosure Statute here, requiring a sponsor's CEO or treasurer read a short disclaimer while his or her picture is displayed, is similar to and not any more onerous than the statute sustained by the United States Supreme Court in *Citizens United*, a statute which required that political ads contain a disclosure statement which:

> [M]ust be made in a "clearly spoken manner," and displayed on the screen in a "clearly readable manner" for at least four seconds. It must state that the communication "is not authorized by any candidate or candidate's committee"; it must also display the name and address (or Web site address) of the person or group that funded the advertisement.

Id. at 366. EMPAC's argument concerning the facial validity of the Disclosure Statute is, therefore, overruled.

IV. Conclusion

This matter involves the partisan political process. And there is an element of political irony; a Republican invoking a law passed by a Democratic-controlled General Assembly and later repealed by a Republican-controlled General Assembly. However, our job is not to consider the politics of the parties involved. Rather, our job is simply to apply the law, irrespective of politics.

Applying the law, we must conclude that our General Assembly acted within its authority in 1999 when it enacted the Disclosure Statute, creating a private cause of action in favor of political candidates against the sponsors of political ads who fail to properly disclose their identity, just as the General Assembly acted within its authority when it took away this statutory right in 2013. Therefore, we must conclude that the trial court erred in granting summary judgment in favor of EMPAC. We reverse the order of the trial court and remand the matter for further proceedings consistent with this opinion. In so ordering, we note that whether the Disclosure Statute is unconstitutional as applied because the amount of statutory damages allowed thereunder is unconstitutionally excessive is not before us since the amount of statutory damages has yet to be determined in this case.

REVERSED AND REMANDED.

Judge CALABRIA concurs.

Chief Judge McGEE dissents.

McGEE, Chief Judge, dissenting.

Because I believe this Court lacks subject matter jurisdiction over the appeal, I respectfully dissent. This Court lacks jurisdiction to consider Plaintiff's appeal for two reasons: (1) Plaintiff has failed to demonstrate that it had standing to initiate this action, and (2) Plaintiff has failed to prove that it met a condition precedent required for the trial court to obtain subject matter jurisdiction.

I. Standing

Plaintiff failed in its burden of demonstrating that it had standing to bring the present action. Because I believe the necessary elements of

standing, as set forth in the appellate opinions of this State, are based on rights and protections guaranteed by the North Carolina Constitution, I do not believe the General Assembly is empowered to confer standing on plaintiffs that have not alleged any actual harm.

The majority opinion repeatedly states its assumption that the trial court based its ruling on a determination that "because Dan Forest won his election . . . he did not suffer an injury sufficient in a constitutional sense to confer standing." However, the trial court did not reference the outcome of the election anywhere in its order – it simply stated that "Plaintiff has failed to allege any forecast of damage other than speculative damage." More importantly, the reasoning of the trial court is not relevant to our standing review. My analysis is based solely upon the allegations in Plaintiff's 9 March 2016 Complaint ("Plaintiff's Complaint").

"No person shall be . . . in any manner deprived of his . . . property, but by the law of the land." N.C. Const. art. I, § 19. "[U]nder the law of the land clause of the State Constitution a judgment of a court cannot bind a person unless he is brought before the court in some way sanctioned by law[.]" *Eason v. Spence*, 232 N.C. 579, 586, 61 S.E.2d 717, 722 (1950) (citations omitted). "All courts shall be open; every person for an *injury* done him in his lands, goods, person, or reputation shall have remedy by due course of law[.]" N.C. Const. art. I, § 18. "As a general matter, the North Carolina Constitution confers standing on *those who suffer harm*[.]" *Willowmere Cmty. Ass'n v. City of Charlotte*, __ N.C. __, __, 809 S.E.2d 558, 561 (2018) (quoting art. I, § 18 and *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 642, 669 S.E.2d 279, 281 (2008)) (emphasis added). Therefore, the North Carolina Constitution does not confer standing on those who *have not suffered harm*. *Id.*

In order to establish standing to bring this action based on violations of N.C. Gen. Stat. § 163-278.39A, Plaintiff was required to meet two separate burdens: (1) prove that it was a party authorized to bring the action pursuant to the requirements of the statute itself, *see*, *e.g.*, *Applewood Props., LLC v. New S. Props., LLC*, 366 N.C. 518, 522–24, 742 S.E.2d 776, 779-80 (2013), and (2) prove that it met the general constitutional standing requirements as determined by our appellate courts. *See*, *e.g.*, *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 175, 684 S.E.2d 41, 52 (2009); *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 390–91, 617 S.E.2d 306, 310 (2005), *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461 (2006). "Since standing is a jurisdictional requirement, the party seeking to bring [its] claim before the court must include allegations which demonstrate why [it] has standing in the particular case[.]" *Cherry v. Wiesner*, __ N.C. App. __, __, 781 S.E.2d 871, 877, *disc. review denied*,

369 N.C. 33, 792 S.E.2d 779 (2016) (citations omitted). The allegations in Plaintiff's complaint were sufficient to meet Plaintiff's first burden, but insufficient to meet its second.

North Carolina courts are not constitutionally bound by the standing jurisprudence established by the United States Supreme Court. *See*, *e.g.*, *Cedar Greene, LLC v. City of Charlotte*, 222 N.C. App. 1, 17, 731 S.E.2d 193, 204–05 (2012), *rev'd*, 366 N.C. 504, 739 S.E.2d 553 (2013) (adopting Court of Appeals dissent in appeal from declaratory action challenging constitutionality of a statute); *but see Dunn v. Pat*e, 334 N.C. 115, 119, 431 S.E.2d 178, 181 (1993) (citation omitted) (Our Supreme Court, in determining the issue of standing in a constitutional challenge to a statute, stated: "The [Court of Appeals] correctly stated that the petitioner 'must allege she has sustained an "injury in fact" as a direct result of the statute to have standing.' "). However, since at least the 1960s, our courts, both trial and appellate, have applied requirements established by the United States Supreme Court to the standing jurisprudence of this State. *See*, *e.g.*, *id.*; *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990); *Stanley v. Dept. Conservation & Development*, 284 N.C. 15, 28, 199 S.E.2d 641, 650 (1973).

When this Court or our Supreme Court adopts a standard from another jurisdiction and applies that standard in order to decide an issue before it, that standard becomes part of the holding, and part of the law of this State. Therefore, though standing requirements set by the United States Supreme Court are not inherently binding on this Court, they become binding once adopted and applied by our appellate courts in order to decide an issue. Both this Court and our Supreme Court have adopted and applied federal standing requirements for decades, and this Court is bound by those adopted standards as much as it is bound by the common law standards that developed independently in this State.[1]

When discussing the underlying requirements for demonstrating standing in regular civil actions, this Court has repeatedly held that

> [t]he irreducible constitutional minimum of standing [is]: (1) "injury in fact" – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or

1. I refer only to standards found in opinions with precedential value, and to those standards that constitute holdings in that the application of the standard was "necessary to the decision." *See Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted) (distinguishing holdings from *obiter dictum* by stating: "Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby.").

> imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Teague v. Bayer AG, 195 N.C. App. 18, 22, 671 S.E.2d 550, 554 (2009) (citations and quotation marks omitted). Because federal constitutional standards do not dictate standing requirements in North Carolina, the "irreducible constitutional minimum" discussed in *Teague* and other opinions must logically refer to the minimum requirements of the North Carolina Constitution. *See* N.C. Const. art. I, § 18; *Willowmere*, __ N.C. at __, 809 S.E.2d at 561. Our Supreme Court has recognized "injury in fact" as a required element of standing in opinions filed both prior and subsequent to *Cedar Greene*. *See Hart v. State*, 368 N.C. 122, 140, 774 S.E.2d 281, 293–94 (2015); *Empire Power Co. v. N.C. Dept. of E.H.N.R.*, 337 N.C. 569, 590, 447 S.E.2d 768, 780–81 (1994).

A recent United States Supreme Court opinion, *Spokeo, Inc. v. Robins*, __ U.S. __, 194 L. Ed. 2d 635 (2016), addressed the issue presently before us – whether standing can be created by statute for plaintiffs that cannot meet the general constitutional standing requirements. In *Spokeo*, the Court held that the plaintiff's burden to prove injury-in-fact *cannot* be abolished by statute. *Id.* at __, 194 L. Ed. 2d at 646 (citations omitted). The Court held: "Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.' " *Id.* at __, 194 L. Ed. 2d at 643-44. The injury-in-fact standard applied in *Spokeo* is the same that this Court applies: " 'To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 644 (citation omitted). "For an injury to be 'particularized,' it 'must affect the plaintiff in a personal and individual way.' " *Id.* (citations omitted). "Particularization is necessary to establish injury in fact, but it is not sufficient. An injury in fact must also be 'concrete.' " *Id.* "A 'concrete' injury must be '*de facto*'; that is, it must actually exist. When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term – 'real,' and not 'abstract.' " *Id.* at __, 194 L. Ed. 2d at 644-45 (citations omitted); *compare Teague*, 195 N.C. App. at 22, 671 S.E.2d at 554. The "*de facto*" requirement is also recognized by this Court. *See Coker*, 172 N.C. App. at 391–92, 617 S.E.2d at 310 (citations omitted) (emphasis removed) (defining "injury in fact" as an injury that is "concrete and particularized and

. . . actual or imminent, not conjectural or hypothetical[,]" "distinct and palpable" and not "abstract").

In *Spokeo*, the Court recognized that "the violation of a procedural right granted by statute *can* be sufficient *in some circumstances* to constitute injury in fact[,]" *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 646 (emphasis added), but that "does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right." *Id.* at __, 194 L. Ed. 2d at 645. The Court held that because the Ninth Circuit failed to consider whether violation of the *specific procedures* alleged in Robins' complaint constituted a sufficiently concrete harm, remand was required.

> On the one hand, Congress plainly sought to curb the dissemination of false information by adopting procedures designed to decrease that risk. On the other hand, Robins cannot satisfy the demands of Article III by alleging a bare procedural violation [because] *violation of . . . FCRA's procedural requirements may result in no harm.*

Id. at __, 194 L. Ed. 2d at 646 (emphasis added). The Court held that the relevant analysis was "whether the particular procedural violations alleged *in this case* entail *a degree of risk sufficient to meet the concreteness requirement.*" *Id.* (emphasis added). Stated differently:

> [A]n alleged procedural violation can by itself manifest concrete injury where Congress conferred the procedural right to protect a plaintiff's concrete interests and where the procedural violation presents a "risk of real harm" to that concrete interest. But even where Congress has accorded procedural rights to protect a concrete interest, a plaintiff may fail to demonstrate concrete injury where violation of the procedure at issue presents no material risk of harm to that underlying interest.

Strubel v. Comenity Bank, 842 F.3d 181, 190 (2d Cir. 2016) (citing and paraphrasing *Spokeo*). In the wake of *Spokeo*, multiple federal jurisdictions have held that minor or technical violations of statutes do not satisfy the injury-in-fact requirement. *See, e.g.*, *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 346 (4th Cir. 2017) ("As *Spokeo* demonstrated, a statutory violation absent a concrete and adverse effect does not confer standing."); *Kleg v. SP Plus Corp.*, 2018 WL 1807012 (N.D. Ga. Mar. 5, 2018) (including thorough review of federal district and circuit courts that have found no standing for non-injurious statutory violations).

I believe the North Carolina Constitution requires the same level of particularization and concreteness with regard to statutory violations.[2] *See*, *e.g.*, *Empire Power*, 337 N.C. at 590, 447 S.E.2d at 780–81 (citation omitted) (emphasis added) ("the 'procedural injury' implicit in the failure of an agency to prepare an environmental impact statement was itself a sufficient '*injury in fact*' to support standing as an 'aggrieved party' under former N.C.G.S. § 150A–43, *as long as* such injury was alleged by a plaintiff having sufficient geographical nexus to the site of the challenged project that *he might be expected to suffer whatever environmental consequences the project might have*.").

In the present case, Plaintiff argues, and the majority opinion agrees, that allegation of a "bare procedural violation" of N.C.G.S. § 163-278.39A was sufficient to confer standing. Plaintiff contends in its reply brief: "In light of [N.C.G.S. § 163-278.39A], the General Assembly has declared that a candidate has been injured when an opposing organization fails to follow advertising disclosure laws. Thus, there is injury in fact [in this case.]" Plaintiff further contends that because the General Assembly created a private cause of action as the enforcement mechanism for N.C.G.S. § 163-278.39A, the General Assembly eliminated the need to show "actual demonstrable damages:" "[W]hen [the General Assembly] created [N.C.G.S.] § 163-278.39A (2011), by modifying the common law requirement that actual damages must be demonstrable, it provided a different way to calculate otherwise incalculable actual damages." To the extent, if any, that Plaintiff is using "damages" to mean "injury," conflating these terms is incorrect. "[T]he term 'wrong' has a legal signification distinct from 'damage,' and is synonymous with '*injuria*' – signifying a legal injury – hence the maxim *damnum absque injuria*, which 'is used to designate damage which is not occasioned by anything which the law esteems an injury.' " *Thomason v. R. R.*, 142 N.C. 318, 330, 55 S.E. 205, 209–10 (1906) (citations omitted). It was evidence of injury, not damages, that Plaintiff was required to properly plead in order to confer standing.

The General Assembly unquestionably has the authority to supplant common law through legislation. However, I do not agree that this State's standing requirements are susceptible to abrogation through legislative enactments – they are the minimum constitutional requirements a plaintiff must satisfy in order to *force a defendant into court*. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 281-82; *see also* N.C. Const. art. I, §§ 18 and 19;

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2. In contrast, the majority opinion holds that "even a technical breach" of N.C.G.S. § 163-278.39A constitutes a *per se* injury in fact.

N.C. Const. art. IV, § 1 ("The General Assembly shall have no power to deprive the judicial department of any power or jurisdiction that rightfully pertains to it as a co-ordinate department of the government[.]"); *City of Asheville v. State of N.C.*, 369 N.C. 80, 88, 794 S.E.2d 759, 766 (2016) (citations and quotation marks omitted) ("[i]f there is a conflict between a statute and the Constitution, this Court must determine the rights and liabilities or duties of the litigants before it in accordance with the Constitution").

I cannot locate any other enactment by the General Assembly that has created a private right of action conferring standing on a plaintiff without requiring any showing of a particularized and concrete injury proximately caused by an act of the defendant. For example, N.C. Gen. Stat. § 75-16 (2017) of our Unfair and Deceptive Practices Act specifically requires an allegation of injury, and this Court has held that a plaintiff must allege facts in support of *both* the standing requirements created by the legislation, *and* the constitutional requirements for standing. *Coker*, 172 N.C. App. at 391, 401, 617 S.E.2d at 310, 316, *aff'd per curiam*, 360 N.C. 398, 627 S.E.2d 461.

In *Friends of Queen*, this Court recognized the peculiarity of the use of a *private cause of action* as an enforcement mechanism for violations of N.C.G.S. § 163-278.39A:

> The enforcement mechanism chosen by our legislature is *unique in the world of election law*. Many other jurisdictions have analogous disclosure laws. However, after diligent searching, it appears that *North Carolina has the only statute that provides candidates with a private cause of action against their opponents for advertising disclosure violations, rather than enforcement through government-enforced criminal or civil penalties.*

Friends of Joe Sam Queen v. Ralph Hise for N.C. Senate, 223 N.C. App. 395, 403 n.7, 735 S.E.2d 229, 235 n.7 (twelve citations to statutes from different jurisdictions omitted) (emphasis added). It is this unprecedented use in N.C.G.S. § 163-278.39A of a *private cause of action* to enforce what was essentially a *public right* to information that is responsible for the unique standing issue now before us. As suggested by *Friends of Queen*, 223 N.C. App. at 403 n.7, 735 S.E.2d at 235 n.7, it is the State, not private entities, that has the superior interest in enforcing public rights, and the inherent standing to do so.

I do not agree that N.C.G.S. § 163-278.39A was enacted to create or enforce "a political candidate's right to participate in a campaign where

sponsors of political ads supporting his or her opponent must make themselves known to the public in their ads." The majority opinion suggests that N.C.G.S. § 163-278.39A was intended to create a private, rather than public, right. If this were true, it would represent a complete break with the traditional state interests motivating the enactment of disclosure statutes, and would raise concerning constitutional questions. Political disclosure laws have been enacted, and constitutionally justified, as a means to enforce the *public's* right to access relevant information concerning political candidates. In fact, it is this governmental interest in ensuring an informed electorate that serves to provide constitutional justification for the coincident invasion of First Amendment rights associated with political disclosure statutes:

> In this case, the state interest at stake is that of "provid[ing] the electorate with information as to where political campaign money comes from and how it is spent." *Buckley*, 424 U.S. at 66, 96 S.Ct. 612 (internal quotation marks omitted). This "informational interest" is sufficiently important to support disclosure requirements. In *Buckley*, the Court recognized that campaign finance disclosure was a critical tool for maintaining transparency in the political marketplace: "In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation." Disclosure requirements advance the public's interest in information by "allow[ing] voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches." By revealing "the sources of a candidate's financial support," disclosure laws "alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office."

Ctr. for Individual Freedom v. Madigan, 697 F.3d 464, 477–78 (7th Cir. 2012) (citations omitted); *see also State v. Wright*, 206 N.C. App. 239, 243, 696 S.E.2d 832, 836 (2010) ("the whole purpose of the campaign finance laws is to make the information available to the public at all times for voters' review"). It is at least in question whether the majority opinion's stated interpretation of N.C.G.S. § 163-278.39A – that it created a private right for the political candidates themselves instead of a public right for the electorate – would serve to justify the countervailing First

Amendment rights involved. *See*, *generally*, *Davis v. FEC*, 554 U.S. 724, 744, 171 L. Ed. 2d 737, 754-55 (2008). Although N.C.G.S. § 163-278.39A created a private cause of action, that cause of action was created to protect a *public*, not private, right – the right to insure an informed electorate. Under federal standing jurisprudence, "Congress cannot authorize private plaintiffs to enforce *public* rights in their own names, absent some showing that the plaintiff has suffered a concrete harm particular to him." *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 650 (Justice Thomas concurring).[3] I would hold that no less requirement should be applied here.

The majority opinion holds: "It is . . . clear that a candidate suffers an 'injury in fact' for a breach, even a technical breach, . . . when an ad is run which runs afoul of the Disclosure Statute." Though "intangible" injuries, such as violations of fundamental rights, can confer standing to pursue a statutorily created cause of action, it is only those intangible injuries that *meet minimum constitutional requirements* that can do so. *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 646. Neither Plaintiff, nor the majority opinion, indicates which allegations in Plaintiff's complaint meet the minimum requirements set forth in *Hart*, 368 N.C. at 140, 774 S.E.2d at 293–94, *Teague*, 195 N.C. App. at 22, 671 S.E.2d at 554, or any other appellate opinion of this State. I can identify no allegation of any harm in Plaintiff's complaint that is "*de facto*," or otherwise "real, and not abstract," "conjectural or hypothetical." *Coker*, 172 N.C. App. at 391–92, 617 S.E.2d at 310. Nor can I identify how the alleged violations constitute a particularized harm that " 'affect[s] [P]laintiff in a personal and individual way.' " *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 644 (citation omitted).

There is *nothing* inherently injurious to Plaintiff that flows from Defendant's alleged violations of N.C.G.S. § 163-278.39A. Plaintiff's two allegations are that Defendant failed to include in its television advertisement "an unobscured, full-screen picture containing the disclosing individual, either in photographic form or through the actual appearance of the disclosing individual on camera, . . . featured throughout the duration of the disclosure statement[,]" and that the disclosure statement was not "spoken by the chief executive officer or treasurer of the political action committee[.]" Plaintiff's own argument on appeal illustrates the "abstract or conjectural or hypothetical" nature of any potential injury suffered by Plaintiff. Plaintiff states: "It is difficult to prove

3. For an in depth review of the differing standing requirements attached to "private" and "public" rights, *see Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 647-50.

whether the offending advertisements closed the electoral gap and led to [Plaintiff] being required to hire a legal team to monitor provisional vote counting and prepare for the possibility of a recount." Whether the advertisements were in some general sense effective in "closing the electoral gap" is, of course, irrelevant. In order to make an argument of relevance, Plaintiff would have had to allege that *the manner in which the alleged violations of N.C.G.S. § 163-278.39A altered the television advertisement* negatively impacted Plaintiff's campaign in some tangible manner, or otherwise resulted in actual injury. However, Plaintiff's complaint failed to allege even this hypothetical injury.

The majority opinion cites *Kirby v. Board of Education*, 230 N.C. 619, 55 S.E.2d 322 (1949), *Hildebrand v. Telegraph Co.*, 219 N.C. 402, 14 S.E.2d 252 (1941), and *Wolfe v. Montgomery Ward & Co.*, 211 N.C. 295, 189 S.E. 772 (1937), for the proposition that violations of N.C.G.S. § 163-278.39A(3) and (6) constituted injury sufficient to confer standing, because "a party has standing to bring suit where a private right has been breached, even where the party has not suffered actual damages beyond the fact that a breach occurred." As argued above, I believe N.C.G.S. § 163-278.39A(3) and (6) created public rights, not any private rights in Plaintiff (or in Mr. Forest). Further, damages and injury are not synonymous, and the well-established common law causes of action at issue in *Kirby*, *Hildebrand*, and *Wolfe* – breach of contract, trespass, and slander – are in no manner similar to violations of the (then) newly created statutory provisions of N.C.G.S. § 163-278.39A. In certain instances, an allegation that a defendant committed a particular tort is itself an allegation of an injury-in-fact. *Spokeo*, __ U.S. at __, 194 L. Ed. 2d at 647 (Justice Thomas concurring) (citations omitted) (" 'Private rights' have traditionally included rights of personal security (including security of reputation), property rights, and contract rights. In a suit for the violation of a private right, courts historically presumed that the plaintiff suffered a *de facto* injury merely from having his personal, legal rights invaded. Thus, when one man placed his foot on another's property, the property owner needed to show nothing more to establish a traditional case or controversy. Many traditional remedies for private-rights causes of action – such as for trespass, infringement of intellectual property, and unjust enrichment – are not contingent on a plaintiff's allegation of damages beyond the violation of his private legal right."). Breach of contract, trespass, and slander also fall into this category, and when a plaintiff proves the tort but fails to prove actual *damages*, nominal damages are awarded to acknowledge the *injury* committed. *Hildebrand*, 219 N.C. at 408, 14 S.E.2d at 257 (emphasis added) ("The fact that the

injury may be trivial, though material in determining the amount of the owner's damages, does not affect his constitutional rights or the principle of law involved. He is entitled to be protected as to that which is his without regard to its money value."). This difference between traditional common law private causes of action, and causes of action created by statute, has long been recognized and, unlike breach of contract, trespass, or slander, violations of N.C.G.S. § 163-278.39A(3) and (6) could not have resulted in *per se* injury to Plaintiff.

The majority opinion cites *Addison v. Britt*, 83 N.C. App. 418, 350 S.E.2d 158 (1986), involving the federal Truth in Lending Act. *Addison* was decided long before *Spokeo* and, as cited above, multiple federal courts have since applied *Spokeo* to find lack of standing on similar facts. Further, this Court *expressly declined* to address the issue for which the majority opinion cites *Addison*:

> Whether liability attaches to creditors for technical or minor violations of the Act is subject to some dispute among the various jurisdictions. We need not decide the question of whether "technical" violations of the actionable provisions of section 1638 give rise to creditor liability since, in any event, the particular violation we address here *is not technical in nature*.

Id. at 420, 350 S.E.2d at 159 (citation omitted) (emphasis added).

I disagree with the majority opinion's contention that footnote 7 of *Friends of Queen* supports a finding of standing in the present case. This footnote more accurately recognizes the novelty of the private cause of action enforcement mechanism included in N.C.G.S. § 163-278.39A(f), and thereby anticipated the standing issue now before us. Finally, Plaintiff fails to make any argument that "it is likely, as opposed to merely speculative, that the [alleged] injury will be redressed by a favorable decision." *Teague*, 195 N.C. App. at 22, 671 S.E.2d at 554. I cannot identify an injury, much less how a monetary award could redress any "injury" resulting from violations of N.C.G.S. § 163-278.39A(3) or (6). Because I would hold that Plaintiff has failed in its burden of proving standing, I would dismiss Plaintiff's appeal. *Stanley*, 284 N.C. at 28–29, 199 S.E.2d at 650.

II. Condition Precedent

Plaintiff filed the record in this appeal on 2 June 2017. In Plaintiff's Complaint, Plaintiff alleged it had "alerted the State Board of Election[s]

[(the 'Board')] of [] Defendant's violation" of N.C.G.S. § 163-278.39A(b)(6),[4] and stated that "[t]he filing of the Notice of Complaint on October 25, 2012 has preserved [] Plaintiff's right to bring this action[.]" The Notice of Complaint was signed and notarized on 26 October 2012, but it does not include a file stamp or any other method by which this Court can determine when or if it was actually filed with the Board. We allowed amendment of the record on 23 March 2018, but the copy of the Notice of Complaint included therein was identical to the copy already in the record – lacking a file stamp.

N.C. Gen. Stat. § 163-278.39A(f)(1), which created the cause of action, stated:

> Any plaintiff candidate in a statewide race in an action under this section *shall complete and file a Notice of Complaint Regarding Failure to Disclose on Television or Radio Campaign Advertising* with the State Board of Elections after the airing of the advertisement but *no later than the first Friday after the Tuesday on which the election occurred. . . . . The timely filing of this notice preserves the candidate's right to bring an action* in superior court any time within 90 days after the election.

Id. (emphasis added); *see also Friends of Queen*, 223 N.C. App. at 400 n. 4, 735 S.E.2d at 233 n. 4 ("The plaintiff must . . . file the necessary notices under § 163–278.39A(f) to preserve the right to bring the action."). The majority opinion agrees that the filing requirement in N.C.G.S. § 163-278.39A(f)(1) constituted a statute of repose, or a jurisdictional condition precedent to the initiation of the present action.

Our Supreme Court has discussed the difference between statutes of limitations – enforcement of which may be waived – and statutes of repose – which are unwaivable conditions precedent to the right to initiate an action:

> Generally, a statute of limitations has been recognized as a procedural bar to a plaintiff's action, which "does not begin to run until after the cause of action has accrued and the plaintiff has a right to maintain a suit." It also has been long recognized that certain time limitations may operate, not as procedural bars after an action has accrued, but as conditions precedent to the action itself.

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4. The Notice of Complaint references both N.C.G.S. § 163-278.39A(b)(3) and (6), but only alleges a violation of N.C.G.S. § 163-278.39A(b)(6).

Bolick v. American Barmag Corp., 306 N.C. 364, 368–69, 293 S.E.2d 415, 419 (1982) (citations omitted). Therefore, "the commencement of the action within the time [the statute] fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right." *Id.* (citation and quotation marks omitted).

Compliance with the "Notice of Complaint" filing requirement was jurisdictional and unwaivable, and non-compliance would have served to prevent the trial court from exercising jurisdiction. *In re T.R.P.*, 360 N.C. 588, 590-91, 636 S.E.2d 787, 790 (2006). Absent subject matter jurisdiction at the trail court level, this Court is without jurisdiction to consider the matter on appeal. *State v. Earley*, 24 N.C. App. 387, 389, 210 S.E.2d 541, 543 (1975) ("[T]he jurisdiction of the appellate courts on an appeal is derivative. If the trial court has no jurisdiction, the appellate courts cannot acquire jurisdiction by appeal.").

The majority opinion relies on the allegations in Plaintiff's Complaint as the sole evidence that the Notice of Complaint was timely filed with the Board. The majority opinion's view is that Plaintiff's allegation in Plaintiff's Complaint that Plaintiff filed the Notice of Complaint on 25 October 2012 was self-proving, and no additional record evidence is required. I disagree with the majority opinion's position that Plaintiff's mere allegation that it had timely filed the Notice of Complaint can suffice to meet Plaintiff's burden of proving jurisdiction. Further, Mr. Forest's signature on the Notice of Complaint was notarized on 26 October 2012. Plaintiff's allegation that the Notice of Complaint was filed on 25 October 2012, a day before it was signed by Mr. Forest, cannot be correct and, therefore, should not be relied on to prove a jurisdictional requirement.

Rule 9 of our Rules of Appellate Procedure requires all record copies of filed documents to include the file stamp so that this Court can verify the date of filing. N.C. R. App. P. 9(b)(3). Failure to include a properly executed and filed *jurisdictionally required* document in the record generally results in dismissal of an appeal. *See Crowell Constructors, Inc. v. State ex rel. Cobey*, 328 N.C. 563, 563–64, 402 S.E.2d 407, 408 (1991); *McKinney v. Duncan*, __ N.C. App. __, __, 808 S.E.2d 509, 512 (2017) ("The order is devoid of any stamp-file or other marking necessary to indicate a filing date, and therefore it was not 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.");[5] *State v. High*, 230 N.C. App. 330, 335–37, 750 S.E.2d 9, 13–14 (2013); *State v. Moore*, 148 N.C. App. 568, 571, 559 S.E.2d 565, 567 (2001). I agree with the majority opinion that including a file-stamped copy of the Notice of Complaint was not the only manner in which Plaintiff could have proven the Notice of Complaint was timely filed. For instance, an affidavit from the Board averring timely filing would likely have served as an adequate substitute. However, I cannot find any law of this State advocating that Plaintiff's own allegations can serve to meet Plaintiff's burden to demonstrate that the trial court had jurisdiction, and I do not believe that is the law of this State.

Absent evidence of compliance with the N.C.G.S. § 163-278.39A(f)(1) Notice of Complaint filing requirement, the record fails to establish that the trial court obtained subject matter jurisdiction. S*ee Hargett v. Holland*, 337 N.C. 651, 654–55, 447 S.E.2d 784, 787 (1994) (citations and quotation marks omitted) ("A statute of repose creates an additional element of the claim itself which must be satisfied in order for the claim to be maintained."). Absent proof of jurisdiction at the trial court level, this Court is without jurisdiction to consider Plaintiff's appeal. *Earley*, 24 N.C. App. at 389, 210 S.E.2d at 543. I would also dismiss Plaintiff's appeal for this reason.

III. Conclusion

This appeal should be dismissed for lack of subject matter jurisdiction. First, I believe it is ultimately our Supreme Court that determines what elements are constitutionally required in order to confer standing and, in the present case, our constitution requires more than a bare allegation of a statutory violation. Plaintiff did not allege any injury to itself resulting from the alleged violations of N.C.G.S. § 163-278.39A, and I would hold that Plaintiff lacked standing to bring this action. Second, by failing to include a file-stamped copy of the Notice of Complaint, or other sufficient evidence that the Notice of Complaint was timely filed, Plaintiff has failed in its burden of proving it complied with a jurisdictional condition precedent to the filing of this action.

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5. I also disagree with the majority opinion's statement that "the lack of a file stamp does not bear on our *appellate* jurisdiction" and, therefore, these opinions are "inapposite." If, as I believe based on the evidence in this case, the absence of a file-stamped copy of the Notice of Complaint in the record deprived the trial court of jurisdiction, it necessarily deprives this Court of jurisdiction as well, as our jurisdiction is derivative. *Shepard v. Leonard*, 223 N.C. 110, 112, 25 S.E.2d 445, 447 (1943) ("Our jurisdiction is derivative. If the Superior Court judge who signed the order was without jurisdiction we have none and it has been the consistent policy of this Court, in the absence of motion, to dismiss *ex mero motu* so soon as a defect in jurisdiction is made to appear.").

SERAFINO "VINCE" CORDARO, Plaintiff
v.
HARRINGTON BANK, FSB, n/k/a BANK OF NORTH CAROLINA, a North Carolina Bank, Defendant, and BANK OF NORTH CAROLINA, Third-Party Plaintiff,
v.
DANNY D. GOODWIN D/B/A DANNY GOODWIN APPRAISALS, Third-Party Defendant

No. COA17-1032

Filed 19 June 2018

1. Negligence—construction loan—bank appraisal—justifiable reliance by borrower

A borrower failed to properly plead the element of justifiable reliance in his claims for negligence and negligent misrepresentation against a lender by not including allegations that he undertook his own independent inquiry about the validity of the lender's appraisal prior to taking out a residential construction loan or that he was prevented from doing so.

2. Contracts—construction loan—duty of care

A residential construction loan agreement provision stating that an appraisal must account for applicable regulatory requirements did not create a duty of care for the lender to ensure the accuracy of the appraisal or its compliance with government standards where the appraisal was for the sole benefit of the lender, rendering the borrower's claims for breach of contract and breach of implied covenant of good faith and fair dealing subject to dismissal.

3. Unfair Trade Practices—misrepresentation—reliance—sufficiency of pleadings

A borrower asserting a claim for unfair and deceptive trade practices against a lender failed to sufficiently allege that he reasonably relied on the appraisal obtained by the lender before entering into an agreement for a residential construction loan.

Appeal by plaintiff from order entered 8 August 2017 by Judge Lindsay R. Davis, Jr. in Chatham County Superior Court. Heard in the Court of Appeals 7 March 2018.

Sigmon Law, PLLC, by Mark R. Sigmon, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P, by S. Wilson Quick and Reid L. Phillips for defendant-appellee.

DAVIS, Judge.

In this appeal, we consider the potential liability of a bank for providing an inaccurate appraisal value to its borrower in connection with a residential loan. Serafino "Vince" Cordaro filed this civil action asserting claims against Harrington Bank[1] ("Harrington") premised upon theories of negligence, negligent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices pursuant to N.C. Gen. Stat. § 75-1.1. Because we conclude that Cordaro's complaint failed to sufficiently plead justifiable reliance upon the appraisal information at issue or the existence of a contractual duty owed to him by Harrington with regard to the appraisal, we hold that the trial court properly granted Harrington's motion to dismiss.

Factual and Procedural Background

We have summarized the pertinent facts below using Plaintiff's own statements from his complaint, which we treat as true in reviewing a trial court's order granting a motion to dismiss. *See*, *e.g.*, *Stein v. Asheville City Bd. of Educ.*, 360 N.C. 321, 325, 626 S.E.2d 263, 266 (2006) ("When reviewing a complaint dismissed under Rule 12(b)(6), we treat a plaintiff's factual allegations as true." (citation omitted)).

In 2011, Cordaro purchased a lot in the Governor's Club subdivision of Chapel Hill where he intended to build a home. Cordaro paid $294,500 for the lot. He hired an architect in May 2012 to design the planned residence. His contract with the architect provided that the completed house would consist of approximately 3,000 square feet and cost approximately $800,000 to build.

I. Loan Application and Construction Appraisal

In November 2012, Cordaro began looking for a lender to provide him with a construction loan that could later be converted into a mortgage once the home was built. He visited Harrington's website and began filling out a loan application online. Prior to completing the application, Cordaro called John MacDonald, a loan officer employed by Harrington, to discuss the potential loan. During this conversation, Cordaro informed MacDonald that if the value contained in Harrington's internal appraisal of the planned home was less than the price he paid

1. At some point during the time period relevant to this litigation, Harrington Bank was acquired by Bank of North Carolina.

for the lot plus the cost of construction then he would not go forward with either the loan or the construction of the house.

Following his discussion with MacDonald, Cordaro signed a construction contract with Brightleaf Development Company ("Brightleaf") on 28 November 2012. The contract listed the total cost to build the house as $835,359. Cordaro and Brightleaf also verbally agreed that if the house was not appraised at a value equal to the cost of the lot plus the cost of construction then the home would not be built and the contract would be void.

On 4 December 2012, Cordaro submitted a loan application to Harrington seeking a loan of $850,000. In connection with the loan application, MacDonald ordered an appraisal through Community Bank Real Estate Solutions ("CBRES"), an appraisal management company. Along with his request, MacDonald submitted to CBRES Cordaro's construction contract, construction drawings, and the lot's purchase price. An appraiser named Danny Goodwin was assigned by CBRES to appraise Cordaro's prospective residence. On 10 December 2012, Goodwin appraised the home at a value of $1,150,000.

MacDonald emailed Goodwin's appraisal (the "Construction Appraisal") to Cordaro on 12 December 2012. An hour after receiving the Construction Appraisal, Cordaro sent an email to his architect informing him of the appraisal amount and asking him to tell Brightleaf that construction could begin on the home.

On 19 December 2012, MacDonald emailed Cordaro once again, informing him that Harrington's loan committee had approved his loan on the condition that Cordaro put $100,000 in escrow as a cash reserve. Cordaro responded later that day, asking why he was being asked to provide a cash reserve and inquiring whether this requirement was a standard practice of Harrington's. MacDonald replied that the loan committee was concerned about the proposed residence's high cost per square foot. Cordaro then asked MacDonald if he should be concerned about the value of the house. MacDonald responded that there was no reason for concern and told Cordaro that the committee was simply being "overly cautious." Cordaro refused to place $100,000 in escrow but instead offered to put down $58,000 in cash. Harrington accepted this proposal.

Harrington proceeded to conduct an internal review of the Construction Appraisal. On 21 December 2012, MacDonald signed an appraisal review form stating his belief that the Construction Appraisal

was a reasonable estimate of the value of Cordaro's home and that it complied with applicable regulatory requirements. The review form was also signed by a second employee of Harrington on 24 December 2013. Both reviews were required under Harrington's Consumer & Mortgage Loan Policy & Product Manual, which provided that every appraisal received by Harrington "shall be reviewed for conformity with minimum regulatory requirements" and that appraisals "with transactions in excess of $500,000 will receive a secondary review by the Manager of Mortgage Lending."

II. Construction Loan Agreement

On 29 January 2013, Cordaro submitted a second loan application that was identical in all respects to the first application except that it provided for a decreased loan amount of $777,250. The following day, Cordaro signed a contract (the "Construction Loan Agreement") with Harrington. This agreement contained language stating as follows:

> Appraisal. If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

Construction began on the house in early 2013. The total acquisition and construction cost of the property was ultimately $1,250,000.

III. Mortgage Appraisal

As construction neared completion in late 2013, Cordaro began working with MacDonald to refinance his construction loan and receive a permanent mortgage loan from Harrington. Unbeknownst to Cordaro, Harrington planned to provide him with a mortgage loan and then immediately sell the mortgage to Amerisave Mortgage Company ("Amerisave").

In January 2014, Harrington ordered a new appraisal of Cordaro's home for purposes of the mortgage loan. An individual named Luther Misenheimer was assigned to conduct the new appraisal. On 28 January 2014, MacDonald emailed Misenheimer a copy of Goodwin's earlier Construction Appraisal, informing Misenheimer that he should "[c]all if you need additional info." Several hours later, MacDonald emailed Misenheimer again and stated that "[w]e need a BIG number . . . . . ☺."

Misenheimer ultimately declined to perform the appraisal for Harrington. The appraisal was then reassigned to Goodwin. Goodwin issued his second appraisal (the "Mortgage Appraisal") on 10 February 2014, valuing the property at $1,250,000.

Upon receiving Goodwin's Mortgage Appraisal, Harrington requested that CBRES run the Mortgage Appraisal through the Uniform Collateral Data Portal ("UCDP"), a system that performs independent automated risk assessments of submitted appraisals. CBRES submitted the Mortgage Appraisal to the UCDP on 11 February 2014, and the system flagged ten separate flaws with the appraisal. Among the flaws noted were the fact that (1) Goodwin's valuation of Cordaro's home was "significantly different" than the sale price of a comparable property used by Goodwin in arriving at his valuation; and (2) the three comparable properties utilized by Goodwin in conducting his appraisal were not similarly situated to Cordaro's home.

Also in February 2014, Amerisave commissioned an outside company called Clear Capital to perform a Collateral Desktop Analysis ("CDA") of the Mortgage Appraisal, which was conducted on 18 February 2014. The CDA valued Cordaro's home at $625,000 — exactly one-half the amount of the Mortgage Appraisal. The CDA also highlighted many of the same flaws with the Mortgage Appraisal that were noted by the UCDP.

On 18 February 2014, an Amerisave employee emailed MacDonald to inform him that Amerisave would not buy the loan from Harrington due to the results of the CDA. MacDonald emailed a coworker on 26 February 2014, stating that "I think [Cordaro's] loan is dead but I'm going to restart with another lender tomorrow." The other lender that MacDonald was referring to in his email was Sierra Pacific Mortgage Company ("Sierra Pacific").

In late February or early March 2014, Cordaro became aware that Harrington intended to sell his mortgage loan to another lender such that third-party approval would be required in order to fund his loan. Nevertheless, Cordaro applied for a new loan from Harrington in the proposed amount of $783,000 on 27 February 2014.

Sierra Pacific hired an appraiser named Jan Faulkner to conduct an appraisal of Cordaro's home. On 10 March 2014, Faulkner valued the property at $800,000. Following Faulkner's appraisal, MacDonald emailed Cordaro new proposed financing terms that consisted of a $600,000 mortgage loan and a $120,000 equity loan. On 21 March 2014, MacDonald emailed Cordaro the results of the CDA that had been commissioned by Amerisave. In the email, MacDonald stated that "[w]e think this appraisal is poor. We fought it and lost."

In mid-April 2014, Harrington informed Cordaro that it could not offer him the permanent mortgage loan of $783,000 for which he had applied and could instead only loan him approximately $600,000. In the

meantime, the balloon payment on Cordaro's construction loan was due at the end of the month. Cordaro took out a $600,000 loan from Sierra Pacific and covered the shortfall between the mortgage loan and the amount due on the construction loan balloon payment by selling off several of his personal investments. On 18 April 2016, an appraiser commissioned by Cordaro valued his property at $765,000.

IV. Lawsuit

On 18 October 2016, Cordaro filed a complaint against Harrington in Chatham County Superior Court alleging claims for negligence, negligent misrepresentation, breach of contract, breach of the implied covenant of good faith and fair dealing, and unfair and deceptive trade practices. Harrington filed an answer along with a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on 26 December 2016. Harrington also filed a third-party complaint against Goodwin on 10 February 2017 in which it asserted claims for breach of contract, negligent misrepresentation, indemnity, and contribution.

On 8 August 2017, the Honorable Lindsay R. Davis, Jr. entered an order granting Harrington's motion to dismiss Cordaro's complaint and also dismissing Harrington's third-party complaint against Goodwin as moot. Cordaro filed a timely notice of appeal to this Court.

Analysis

Cordaro's sole argument on appeal is that the trial court erred by granting Harrington's motion to dismiss. He contends that he has alleged viable claims for relief based on Harrington's actions in obtaining an appraisal that it should have known contained an inflated valuation of his home. He further asserts that Harrington was aware of the fact that he was relying upon the result of the appraisal in deciding whether to go forward with the construction of the home and to take out the accompanying loans. Finally, he contends that MacDonald had a conflict of interest in that he was entitled to receive a commission if the loan was completed yet Harrington nevertheless improperly allowed him to participate in the bank's internal review of the Construction Appraisal.[2]

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations

2. Cordaro alleges that MacDonald ultimately received a commission of $5,829 in connection with Harrington's loan to Cordaro.

> included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

Feltman v. City of Wilson, 238 N.C. App. 246, 251, 767 S.E.2d 615, 619 (2014). "Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citation omitted).

I. Negligence-Based Claims

A. Negligence

[1] We first consider Cordaro's argument that he successfully stated a claim for negligence. He asserts that Harrington owed him a duty of care arising under either the North Carolina Secure and Fair Enforcement Mortgage Licensing Act[3] (the "SAFE Act") or general common law principles of negligence and that Harrington breached this duty by failing to properly discover and inform him that the appraisal amount was inflated. Cordaro further contends that he "justifiably relied on both the Construction Appraisal and [Harrington's] review and approval of that appraisal, including after [Harrington] asked him to put more money down."

The essential elements of any negligence claim are "the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Harris v. Daimler Chrysler Corp.*, 180 N.C. App. 551, 555, 638 S.E.2d 260, 265 (2006) (citation and quotation marks omitted). "[T]he first prerequisite for recovery of damages for injury by negligence is the existence of a legal duty, owed by the defendant to the plaintiff, to use due care. If no duty exists, there logically can be neither breach of duty nor liability." *Id.* (internal citation and quotation marks omitted). Furthermore, "[e]ven if a plaintiff can show circumstances giving rise to a duty . . . , absent a sufficient allegation and showing of justifiable reliance, a plaintiff's negligence claims fail." *Arnesen v. Rivers Edge Golf Club & Plantation, Inc.*, 368 N.C. 440, 449, 781 S.E.2d 1, 8 (2015) (citation omitted).

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3. *See* N.C. Gen. Stat. § 53-244.010, *et seq.* (2017).

As an initial matter, we note that this case does not involve the existence of a fiduciary duty between Cordaro and Harrington. "A fiduciary duty generally arises when one reposes a special confidence in another, and the other in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* (citation and quotation marks omitted). Our Supreme Court has made clear that "[o]rdinary borrower-lender transactions . . . are considered arm's length and do not typically give rise to fiduciary duties." *Dallaire v. Bank of Am., N. A.*, 367 N.C. 363, 368, 760 S.E.2d 263, 266 (2014) (citation omitted). Moreover, "the law does not typically impose upon lenders a duty to put borrowers' interests ahead of their own." *Id.* at 368, 760 S.E.2d at 267.

Instead, Cordaro argues that a legal duty existed through the General Assembly's enactment of the SAFE Act. In addition to regulating the licensure status of mortgage lenders, the SAFE Act also imposes certain duties upon them and prohibits them from taking various specified actions in connection with mortgage loans. The Act contains prefatory language stating that its primary purpose "is to protect consumers seeking mortgage loans and to ensure that the mortgage lending industry operates without unfair, deceptive, and fraudulent practices on the part of mortgage loan originators." N.C. Gen. Stat. § 53-244.020 (2017). Cordaro contends that Harrington violated subsections (1), (8), (11), and (14) of N.C. Gen. Stat. § 53-244.111 — one of the statutes that comprise the SAFE Act. Those subsections provide, in pertinent part, as follows:

> [I]t shall be unlawful for any person in the course of any residential mortgage loan transaction:
>
> (1) To misrepresent or conceal the material facts or make false promises likely to influence, persuade, or induce an applicant for a mortgage loan or a mortgagor to take a mortgage loan, or to pursue a course of misrepresentation through agents or otherwise.
>
> . . . .
>
> (8) To engage in any transaction, practice, or course of business that is not in good faith or fair dealing or that constitutes a fraud upon any person in connection with the brokering or making or servicing of, or purchase or sale of, any mortgage loan.

. . . .

(11) To improperly influence or attempt to improperly influence the development, reporting, result, or review of a real estate appraisal sought in connection with a mortgage loan. . . .

. . . .

(14) To fail to comply with applicable State and federal laws and regulations related to mortgage lending or mortgage servicing.

N.C. Gen. Stat. § 53-244.111 (2017).

This Court ruled in *Guyton v. FM Lending Servs., Inc.*, 199 N.C. App. 30, 681 S.E.2d 465 (2009), that North Carolina's Mortgage Lending Act[4] — the predecessor statute to the SAFE Act — could serve as the source of a legal duty owed by a lender to a borrower for purposes of a negligence claim. *Id.* at 44, 681 S.E.2d at 476. In that case, the borrowers asserted claims for fraud, negligent misrepresentation, and unfair and deceptive trade practices against their mortgage lender for failing to disclose that their home was located in a flood hazard area. We reversed the trial court's dismissal of the borrowers' claims, stating that "a legal duty of the type claimed by Plaintiffs does exist under the North Carolina Mortgage Lending Act." *Id.* at 36, 681 S.E.2d at 471.

In reaching this conclusion, we examined various provisions of the Act that prohibited certain actions by lenders in connection with mortgage loans. Based on the similarities between the Mortgage Lending Act and the SAFE Act, Cordaro argues that our holding in *Guyton* recognizing the existence of a legal duty under the Mortgage Lending Act applies equally to the SAFE Act.

Even assuming — without deciding — that the SAFE Act can serve as the source of a legal duty owed by a lender to a borrower in the residential loan context, Cordaro is still required to have properly alleged justifiable reliance upon Harrington's actions in order to prevail on his negligence claim. Cordaro contends that his complaint adequately alleged that he justifiably relied upon "both the Construction Appraisal and [Harrington's] review and approval of that appraisal" in signing the Construction Loan Agreement on 30 January 2013. We disagree.

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4. *See* N.C. Gen. Stat. § 53-243.01, *et seq.*, *repealed by* 2009 N.C. Sess. Laws 374, sec. 1 (effective 31 July 2009).

In determining whether Cordaro sufficiently pled justifiable reliance, we find instructive two cases from our appellate courts. *Arnesen* involved nineteen individual investors who decided to invest in undeveloped real estate based upon allegedly faulty appraisal information provided by a bank. *Arnesen*, 368 N.C. at 441, 781 S.E.2d at 3. The investors brought an action against both the bank and its appraisers in which they asserted, *inter alia*, claims for negligence, negligent misrepresentation, fraud, and unfair and deceptive trade practices. *Id.* at 445, 781 S.E.2d at 6. In their complaint, the plaintiffs alleged that "they would not have purchased [the] real property but for [the] faulty appraisal information and that, in any event, the bank should have discovered and disclosed the inflated appraised property values to them." *Id.* at 441, 781 S.E.2d at 3. However, the plaintiffs did not allege that they had reviewed or inquired about the appraisal information prior to making the decision to purchase or that their decision to buy the property was contingent upon the flawed appraisals. *Id.*

Our Supreme Court held that the bank was entitled to dismissal of all claims due to the plaintiffs' failure to sufficiently allege justifiable reliance. The Court explained that "[r]eliance is not reasonable if a plaintiff fails to make any independent investigation, or fails to demonstrate he was prevented from doing so[.]" *Id.* at 449, 781 S.E.2d at 8 (internal citations and quotation marks omitted). Rather, "to establish justifiable reliance a plaintiff must sufficiently allege that he made a reasonable inquiry into the misrepresentation and allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Id.* at 454, 781 S.E.2d at 11 (citation, quotation marks, brackets, and ellipsis omitted). Consequently, the Supreme Court concluded as follows:

> It is undisputed . . . that plaintiffs decided to purchase the investment properties without consulting an appraisal. Moreover, . . . [p]laintiffs have not alleged that they ordered, viewed, or requested appraisal information at any time, or that they were prevented from doing so.

Id. at 448, 781 S.E.2d at 7.

In *Fazarri v. Infinity Partners, LLC*, 235 N.C. App. 233, 762 S.E.2d 237 (2014), a group of real estate investors brought claims for negligence and negligent misrepresentation against their lenders. *Id.* at 235, 762 S.E.2d at 239. The plaintiffs purchased individual lots as part of a real estate development plan that were all identically appraised at $500,000 — regardless of the lot's specific characteristics or location.

The plaintiffs alleged that, in actuality, the true value of the lots "ranged from $40,000-$81,000." *Id.* at 235, 762 S.E.2d at 238. This Court upheld the trial court's grant of summary judgment for the lenders on the ground that the plaintiffs "forecast no evidence that they undertook their own independent inquiries into the value of the lots (such as obtaining their own independent appraisals) or were prevented from doing so." *Id.* at 241, 762 S.E.2d at 242. Therefore, we concluded that the plaintiffs could not demonstrate justifiable reliance. *Id.*

While we are mindful of the fact that we must accept all of Cordaro's allegations as true for purposes of this appeal from the trial court's Rule 12(b)(6) order, his allegations fail to satisfy the requirement of justifiable reliance.[5] Prior to completing a loan application with Harrington, Cordaro had already purchased a lot in the Governor's Club subdivision, hired an architect, and signed a construction contract with a builder. Within an hour of receiving the Construction Appraisal from MacDonald, Cordaro took steps to inform his builder that construction could begin on the house. Furthermore, he made no additional inquiries to anyone other than MacDonald to confirm the accuracy of Goodwin's Construction Appraisal prior to signing the Construction Loan Agreement on 30 January 2013. In short, the allegations in his complaint fail to show that he either engaged in any type of independent inquiry as to the validity of the appraisal value or that he was in any way prevented from doing so.

Cordaro contends that the present case is distinguishable from *Arnesen* and *Fazarri* because he — unlike the plaintiffs in those cases — has alleged that he actually did rely upon the Construction Appraisal in entering into the Construction Loan Agreement. It is true that the *Arnesen* and *Fazarri* plaintiffs did not allege their decisions to purchase the properties at issue in those cases were contingent upon their review of their lenders' appraisals. Nevertheless, both cases make clear that in order to demonstrate justifiable reliance Cordaro was required to allege either that he undertook his own independent inquiry regarding the validity of the Construction Appraisal or that he was somehow prevented from doing so. For this reason, we hold that the trial court did not err in dismissing his negligence claim.[6]

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5. We note that *Arnesen* — like the present case — involved an appeal from a trial court's dismissal of a complaint under Rule 12(b)(6).

6. In light of our ruling that Cordaro has failed to plead facts supporting the existence of justifiable reliance, we need not address Cordaro's alternative argument that Harrington breached a duty it owed to him under common law principles of negligence.

B. Negligent Misrepresentation

It is well established that "the tort of negligent misrepresentation occurs when (1) a party justifiably relies, (2) to his detriment, (3) on information prepared without reasonable care, (4) by one who owed the relying party a duty of care." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 30, 712 S.E.2d 239, 244 (2011) (citations, quotation marks, and brackets omitted). Having already determined that the allegations in Cordaro's complaint failed to demonstrate justifiable reliance, we likewise hold that this same defect bars his negligent misrepresentation claim.

C. Negligent Supervision

In his appellate brief, Cordaro further contends that the trial court erred in dismissing his claim against Harrington for negligent supervision of MacDonald. However, Cordaro did not assert such a claim in his complaint. Although North Carolina recognizes the doctrine of notice pleading, *see Haynie v. Cobb*, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010), a plaintiff is still required to expressly allege in his complaint the specific claims for relief that it is asserting against the defendant. *See Curl v. Am. Multimedia, Inc.*, 187 N.C. App. 649, 656, 654 S.E.2d 76, 81 (2007) ("[N]one of the three causes of action proposed by Plaintiffs were asserted in their complaint. . . . This Court has long held that issues and theories of a case not raised below will not be considered on appeal." (citations, quotation marks, and brackets omitted)). Accordingly, we do not consider Cordaro's arguments as to negligent supervision.

II. Contract-Based Claims

A. Breach of Contract

[2] In addition to asserting claims grounded in negligence, Cordaro's complaint also contains two contract-based claims. Primarily, Cordaro contends that Harrington "breached the Construction Loan Agreement in failing to ensure that the Construction Appraisal complied with [the Uniform Standards of Professional Appraisal Practice] and various other state and federal appraisal requirements."

The elements of a claim for breach of contract are "(1) existence of a valid contract and (2) breach of the terms of that contract." *Johnson v. Colonial Life & Accident Ins. Co.*, 173 N.C. App. 365, 369, 618 S.E.2d 867, 870 (2005) (citation and quotation marks omitted). "[W]here the complaint alleges each of these elements, it is error to dismiss a breach of contract claim under Rule 12(b)(6)." *Woolard v. Davenport*, 166 N.C. App. 129, 134, 601 S.E.2d 319, 322 (2004) (citation omitted).

Cordaro's breach of contract claim is based upon the following provision contained in the Construction Loan Agreement:

> Appraisal. If required by Lender, an appraisal shall be prepared for the Property, at Borrower's expense, which in form and substance shall be satisfactory to Lender, in Lender's sole discretion, including applicable regulatory requirements.

Harrington asserts that this language did not create any contractual duty on its part toward Cordaro. We agree.

By the plain terms of this provision of the Construction Loan Agreement, the preparation of any appraisal was for the sole benefit of Harrington. Moreover, the contractual language further provided that any appraisal prepared "shall be satisfactory to Lender, in Lender's sole discretion[.]" This language reinforces the notion that Harrington was under no contractual obligation to Cordaro to ensure the accuracy of the Construction Appraisal. Rather, any appraisal commissioned by Harrington was entirely for its own internal use.[7]

For these reasons, we conclude that Cordaro's breach of contract claim fails as a matter of law. Therefore, it was properly dismissed by the trial court.

B. Breach of Implied Covenant of Good Faith and Fair Dealing

The invalidity of Cordaro's breach of contract claim on these facts is likewise fatal to his claim for breach of the implied covenant of good faith and fair dealing. Under North Carolina law, every contract contains "an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Auth. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation and quotation marks omitted). *See Maglione v. Aegis Family Health Ctrs.*, 168 N.C. App. 49, 56, 607 S.E.2d 286, 291 (2005) ("In addition to its express terms, a contract contains all terms that are necessarily implied to effect the intention of the parties and which are not in conflict with the express terms." (citation and quotation marks omitted)).

As a general proposition, where a party's claim for breach of the implied covenant of good faith and fair dealing is based upon the same

7. Cordaro contends that the phrase "including applicable regulatory requirements" supports his argument on this issue. However, while the precise meaning of this phrase in the context of this contractual provision is unclear, its inclusion does not alter the fact that the document is devoid of language conferring upon Harrington any contractual obligation to Cordaro with respect to appraisals required by the bank.

acts as its claim for breach of contract, we treat the former claim as "part and parcel" of the latter. *Murray v. Nationwide Mut. Ins. Co.*, 123 N.C. App. 1, 19, 472 S.E.2d 358, 368 (1996), *disc. review denied*, 345 N.C. 344, 483 S.E.2d 172-73 (1997); *see Suntrust Bank v. Bryant/Sutphin Props., LLC*, 222 N.C. App. 821, 833, 732 S.E.2d 594, 603 ("As the jury determined that plaintiff did not breach any of its contracts with defendants, it would be illogical for this Court to conclude that plaintiff somehow breached implied terms of the same contracts."), *disc. review denied*, 366 N.C. 417, 735 S.E.2d 180 (2012).

Here, the basis for Cordaro's claim that Harrington breached the implied covenant of good faith and fair dealing is identical to the basis for his breach of contract claim. Therefore, the trial court properly dismissed this claim as well.

III. Unfair and Deceptive Trade Practices Claim

[3] Finally, Cordaro argues that the trial court erred in granting Harrington's motion to dismiss his unfair and deceptive trade practices claim pursuant to Chapter 75 of the North Carolina General Statutes. Once again, we disagree.

N.C. Gen. Stat. § 75-1.1 provides, in relevant part, that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." N.C. Gen. Stat. § 75-1.1(a) (2017). It is well established that "[a] claim of unfair and deceptive trade practices under section 75-1.1 of the North Carolina General Statutes requires proof of three elements: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, which (3) proximately caused actual injury to the claimant." *Nucor Corp. v. Prudential Equity Grp., LLC*, 189 N.C. App. 731, 738, 659 S.E.2d 483, 488 (2008) (citation omitted). Our Supreme Court has held that "a claim under section 75-1.1 stemming from an alleged misrepresentation . . . require[s] a plaintiff to demonstrate reliance on the misrepresentation in order to show the necessary proximate cause." *Bumpers v. Cmty. Bank of N. Va.*, 367 N.C. 81, 88, 747 S.E.2d 220, 226 (2013).

> We previously likened such burden of proof to that of the detrimental reliance requirement under a fraud claim. In making this inquiry we examine the mental state of the plaintiff. Two key elements specific to the plaintiff combine to determine detrimental reliance: (1) actual reliance and (2) reasonable reliance.

Id. at 89, 747 S.E.2d at 227 (internal citation and quotation marks omitted).

As discussed above, Cordaro has failed to sufficiently allege that he reasonably relied on the Construction Appraisal. Therefore, he cannot satisfy the elements of a claim under N.C. Gen. Stat. § 75-1.1. Accordingly, the trial court did not err in dismissing this claim.

Conclusion

For the reasons stated above, we affirm the trial court's 8 August 2017 order.

AFFIRMED.

Judges STROUD and BERGER concur.

JEFFREY HUNT, Petitioner
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, Respondent

No. COA17-1244

Filed 19 June 2018

1. Administrative Law—dismissed State employee—Office of Administrative Hearings—subject matter jurisdiction

Where a state agency refused to allow an employee to return to work on the ground that he had resigned from his employment, refused to consider his grievance denying the alleged resignation, and moved to dismiss his petition for a contested case in the Office of Administrative Hearings (OAH) based on lack of subject matter jurisdiction due to his failure to exhaust the internal agency grievance process and timely file his grievance, the Court of Appeals rejected the agency's argument that OAH lacked subject matter jurisdiction over the appeal. Even assuming the employee said "I quit" to his unit manager, she had no authority to accept his resignation, so his separation from employment was an involuntary discharge rather than a voluntary resignation. The agency failed to comply with its statutory duty to send a statement of appeal rights to the employee following his involuntary discharge, so the deadline for filing a grievance was not triggered. He filed his OAH petition within 30 days of the agency's letter stating its refusal to consider his grievance.

2. Public Officers and Employees—discharge—just cause—resignation

An administrative law judge properly determined that a correction officer's discharge was not in accord with North Carolina law where the agency's argument consistently hinged on the notion that the employee voluntarily resigned and that proposition was rejected by the Court of Appeals. The agency did not argue that it had just cause to terminate the employee's employment.

3. Attorney Fees—administrative hearing—award—separate order

An administrative law judge (ALJ) did not err by awarding attorney fees to a dismissed State employee. The agency did not cite any legal authority specifically prohibiting the award of attorney fees in a separate order, nor did the agency show that it was prejudiced by the ALJ's failure to allow the agency ten days to reply to the petition for attorney fees.

Appeal by respondent from orders entered 5 April 2017, 17 August 2017, and 28 August 2017 by Administrative Law Judge Melissa Owens Lassiter in the Office of Administrative Hearings. Heard in the Court of Appeals 16 May 2018.

Law Offices of Michael C. Byrne, by Michael C. Byrne, for petitioner-appellee.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for respondent-appellant.

DAVIS, Judge.

In this case, a state agency refused to allow an employee to return to work on the ground that he had resigned from his employment. When the employee attempted to file a grievance in which he denied that he had, in fact, resigned, the agency refused to consider the grievance, and the employee filed a petition for a contested case hearing in the North Carolina Office of Administrative Hearings ("OAH"). An administrative law judge ruled in favor of the employee and ordered that he be reinstated to his former position. Because we hold that no legally effective resignation occurred and the agency lacked just cause to terminate his employment, we affirm.

Factual and Procedural Background

In November 2016, Jeffrey Hunt was a career status state employee who worked for the North Carolina Department of Public Safety ("DPS") as a correctional officer at Scotland Correctional Institution. During the summer of 2016, Hunt received two warnings about his tardiness and absenteeism.

On 2 November 2016, Hunt's unit manager, Queen Gerald, asked him to report to the prison before his shift began the following day. At 5:27 p.m. on 3 November 2016, Hunt entered the facility and met with Gerald in an administration area room. Gerald informed him that she was investigating his alleged absence from work on 18 August 2016 and asked him to sign paperwork regarding the absence. Hunt informed Gerald that he would not sign documents regarding an absence for which he had no recollection. He became upset and walked out of the prison through the main door.

Gerald later testified that she heard Hunt say either "I quit" or "I'm quitting" as he walked away. Hunt denied making such a statement. An individual in the vicinity recalled hearing Hunt state: "I'm tired of this s[***]."

Hunt left the prison without "swiping out," and Gerald informed the officer-in-charge that Hunt had resigned. Several minutes later, Hunt tried to re-enter the prison to begin working his shift but was denied entry by the officer-in-charge.

On 4 November 2016, Hunt attempted to contact Superintendent Katy Poole by telephone to discuss his job status but learned that she was on vacation. Poole returned to the office on 7 November 2016, and an assistant superintendent informed her that Hunt had verbally resigned to Gerald.

On 9 November 2016, Poole spoke with Hunt by telephone. Hunt inquired whether "he could return to work." Poole asked him if he was rescinding his resignation to which Hunt responded: "Yes." Poole informed him that she had already accepted his verbal resignation and that she was unwilling to rescind it based on "his history of pending investigations and corrective actions" as well as his behavior toward Gerald during the 3 November 2016 incident.

That same day, Hunt received a letter from DPS confirming that he had resigned on 3 November 2016. The letter did not contain any information about his ability to appeal the separation of his employment. On 21 November 2016, DPS received a letter from Hunt in which he stated

that "at no time during my conversation with Mrs. Gerald (Unit Manager) on 11/3/2016 did I give a resignation."

On 20 January 2017, Hunt submitted a Step 1 grievance letter to DPS's Grievance Intake Office. DPS notified Hunt by letter on 14 February 2017 that his internal grievance could not be processed by the agency because he had resigned from his employment.

On 22 February 2017, Hunt filed a petition for a contested case hearing in OAH. DPS moved to dismiss the petition on 24 March 2017 based on lack of subject matter jurisdiction. In its motion, DPS asserted that Hunt had "failed to exhaust the internal agency grievance process" and "failed to file his grievance within fifteen (15) days of the event pursuant to DPS policy."

On 5 April 2017, Administrative Law Judge Melissa Owens Lassiter (the "ALJ") entered an order denying DPS's motion to dismiss. A hearing was held before the ALJ on 15 June 2017.

On 17 August 2017, the ALJ issued a Final Decision pursuant to N.C. Gen. Stat. § 150B-34 in which she determined that Hunt had "never submitted a verbal statement of resignation to any DPS employee authorized to accept it." The ALJ concluded that DPS had, therefore, acted unlawfully by terminating Hunt's employment without just cause. The ALJ ordered that Hunt be reinstated to the same — or a similar — position held by him prior to his separation and that he receive back pay and attorneys' fees.

On 22 August 2017, Hunt filed a petition for attorneys' fees, which the ALJ granted in an order entered 28 August 2017 (the "Attorneys' Fees Order") awarding him $11,720.00 in attorneys' fees and $20.00 in filing fees. DPS filed a timely notice of appeal as to the 5 April 2017 order, the Final Decision, and the Attorneys' Fees Order.

Analysis

On appeal, DPS contends that the ALJ erred by (1) denying its motion to dismiss Hunt's contested case petition for lack of jurisdiction; (2) concluding that the separation of Hunt from his employment resulted from a discharge rather than a voluntary resignation; and (3) awarding attorneys' fees to Hunt. We address each argument in turn.

I. Subject Matter Jurisdiction of OAH

[1] DPS's first argument is that the ALJ improperly denied DPS's motion to dismiss because OAH did not possess subject matter jurisdiction over Hunt's appeal. DPS contends that jurisdiction was lacking because Hunt

failed to properly follow the mandatory grievance procedure required under North Carolina law before filing a contested case petition in OAH. Hunt, conversely, asserts that because DPS refused to consider his grievance the agency made it impossible for him to follow the grievance procedure.

"Our standard of review of a motion to dismiss for lack of [subject matter] jurisdiction . . . is *de novo*." *Brown v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 808 S.E.2d 322, 324 (2017) (citation and quotation marks omitted), *disc. review denied*, __ N.C. __, 811 S.E.2d 589 (2018). "Under *de novo* review, the Court considers the matter anew and freely substitutes its own judgment for that of the trial court." *Id.* at __, 808 S.E.2d at 324 (citation and quotation marks omitted).

In order to assess DPS's arguments, it is necessary to review the pertinent statutes that apply to these facts. Prior to 2013, the statutory scheme governing personnel actions against State employees was known as the State Personnel Act. "In 2013, our General Assembly significantly amended and streamlined the procedure governing state employee grievances and contested case hearings, applicable to cases commencing on or after 21 August 2013." *Harris v. N.C. Dep't of Pub. Safety*, __ N.C. App. __, __, 798 S.E.2d 127, 131, *aff'd per curiam*, __ N.C. __, 808 S.E.2d 142 (2017). The revised set of statutes remains codified in Chapter 126 of the North Carolina General Statutes but is now called "the North Carolina Human Resources Act."

N.C. Gen. Stat. § 126-35(a) sets out the procedure by which a career state employee may appeal disciplinary action taken against him and states as follows:

> (a) No career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. *In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights. The employee shall be permitted 15 days from the date the statement is delivered to appeal to the head of the agency through the agency grievance procedure for a final agency decision.* However, an employee may be suspended without warning for causes relating to personal conduct detrimental to State service, pending the giving of written reasons, in

> order to avoid undue disruption of work or to protect the safety of persons or property or for other serious reasons. If the employee is not satisfied with the final agency decision *or is unable, within a reasonable period of time, to obtain a final agency decision*, the employee may appeal to the Office of Administrative Hearings. Such appeal shall be filed not later than 30 days after receipt of notice of the final agency decision. The State Human Resources Commission may adopt, subject to the approval of the Governor, rules that define just cause.

N.C. Gen. Stat. § 126-35(a) (2017) (emphasis added). "In order for the OAH to have jurisdiction over [a] petitioner's appeal pursuant to N.C. Gen. Stat. §[ ] 126-35 . . . , [the] petitioner is required to follow the statutory requirements outlined in Chapter 126 for commencing a contested case." *Nailing v. UNC-CH*, 117 N.C. App. 318, 324, 451 S.E.2d 351, 355 (1994) (citation omitted), *disc. review denied*, 339 N.C. 614, 454 S.E.2d 255 (1995).

N.C. Gen. Stat. § 126-34.01 establishes a grievance procedure that employees are generally required to follow in situations involving a discharge, suspension, or demotion.

> Any State employee having a grievance arising out of or due to the employee's employment shall first discuss the problem or grievance with the employee's supervisor, unless the problem or grievance is with the supervisor. Then the employee shall follow the grievance procedure approved by the State Human Resources Commission. The proposed agency final decision shall not be issued nor become final until reviewed and approved by the Office of State Human Resources. The agency grievance procedure and Office of State Human Resources review shall be completed within 90 days from the date the grievance is filed.

N.C. Gen. Stat. § 126-34.01 (2017).

"Once a final agency decision is issued, a potential, current, or former State employee may appeal an adverse employment action as a contested case pursuant to the method provided in N.C. Gen. Stat. § 126-34.02 . . . ." *Harris*, __ N.C. App. at __, 798 S.E.2d at 131. N.C. Gen. Stat. § 126-34.02(a) states, in relevant part, as follows:

> (a) Once a final agency decision has been issued in accordance with G.S. 126-34.01, an applicant for

> State employment, a State employee, or former State employee may file a contested case in the Office of Administrative Hearings under Article 3 of Chapter 150B of the General Statutes. The contested case must be filed within 30 days of receipt of the final agency decision. . . . In deciding cases under this section, the Office of Administrative Hearings may grant the following relief:
>
> (1) Reinstate any employee to the position from which the employee has been removed.
>
> (2) Order the employment, promotion, transfer, or salary adjustment of any individual to whom it has been wrongfully denied.
>
> (3) Direct other suitable action to correct the abuse which may include the requirement of payment for any loss of salary which has resulted from the improper action of the appointing authority.
>
> An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed with the Office of Administrative Hearings and served on all parties to the contested case hearing.

N.C. Gen. Stat. § 126-34.02(a) (2017).

This Court recently held that "[w]hile Chapter 126 is silent on the issue, Chapter 150B, the Administrative Procedure Act, specifically governs the scope and standard of this Court's review of an administrative agency's final decision." *Harris*, __ N.C. App. at __, 798 S.E.2d at 132. Chapter 150B of the North Carolina General Statutes states, in pertinent part, the following:

> The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:

> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C. Gen. Stat. § 150B-51(b) (2017).

Having reviewed the applicable provisions of the Human Resources Act, we must next apply them to the facts of the present case. DPS contends that OAH lacked jurisdiction over this action for two reasons. First, it argues that N.C. Gen. Stat. § 126-35(a) does not apply to Hunt because his employment with DPS ended as a result of his own voluntary resignation rather than from a discharge. Second, it contends that the Step 1 grievance letter submitted by Hunt was untimely in that he was required to submit a grievance within fifteen days of receiving the 9 November 2016 letter confirming his resignation but did not actually do so until 20 January 2017.

Hunt, in turn, asserts that (1) he did not resign and was instead effectively discharged from his employment with DPS; and (2) because he was never provided by DPS with a statement of his appeal rights, the deadline for his filing of a Step 1 grievance was never triggered. Furthermore, he argues, his OAH petition for a contested case hearing was timely because it was filed within thirty days of DPS's l4 February 2017 letter stating its refusal to consider his grievance.

A. Validity of Alleged Resignation

In order to untangle the jurisdictional knot that exists in this case, we must first determine whether Hunt resigned or was discharged. This is so because the nature of the parties' respective obligations under the Human Resources Act hinges on the answer to this question.

Pursuant to 25 N.C.A.C. 1C.1002,

> [a]n employee may terminate his services with the state by submitting a resignation *to the appointing authority*.

25 N.C.A.C. 1C.1002 (2016) (emphasis added).

The pertinent findings of fact made by the ALJ on this issue stated as follows:

> 7. Around 5:27 p.m. on November 3, 2016, [Hunt] reported to work and entered the facility. He and Ms. Gerald met in the lobby of the prison, and then stepped into an administration area room. Ms. Gerald informed [Hunt] that she was investigating [Hunt]'s alleged absence from work on August 18, 2016, and asked [Hunt] to sign a disciplinary form about [Hunt]'s alleged absence from work on that date. [Hunt] advised Ms. Gerald that he did not recall being absent from work on August 18, 2016, and he wasn't going to sign paperwork about an absence for which he had no recollection. [Hunt] became upset, and loud. [Hunt] stated, "I'm tired of this s[***]." [Hunt] made that statement, because he was tired of being accused of wrongdoing, was written up recently . . . , and because he was upset that he was being investigated for an absence from work that occurred three months prior. [Hunt] walked through the main door of the prison towards the gatehouse as night shift staff gathered in the lobby for the night shift line-up.
>
> 8. Per Ms. Gerald's testimony at hearing, [Hunt] said either "I quit," or "I'm quitting," as he walked out the administration area door. . . .
>
> 9. In contrast, [Hunt] consistently denied telling Ms. Gerald that "I quit" on November 3, 2016, in [Hunt]'s November 21, 2016 request for a hearing . . . , his internal appeal . . . , and at the contested case hearing.
>
> 10. On November 3, 2016, [Hunt] walked out of the prison through the gatehouse without swiping out at the security check point. Ms. Gerald advised the Officer-in-Charge, Captain Delgado, that [Hunt] had stated he quit, and walked out of the prison facility.
>
> . . . .
>
> 14. While Ms. Gerald was a unit manager, she was not [Hunt]'s supervisor in any capacity, and did not have the authority to accept a resignation from [Hunt], or have the authority to terminate a correctional officer's employment.
>
> . . . .

17. On November 9, 2016, Superintendent Poole, along with Assistant Superintendent Dean Locklear, telephoned [Hunt], and spoke with [Hunt] via the speaker phone in Ms. Poole's office. Poole advised [Hunt] that Locklear was present and witnessing the call. Poole asked [Hunt] what could she do for him. [Hunt] asked if he could return to work. Poole told [Hunt] that she understood that he had verbally informed Ms. Gerald that he had quit when she questioned him about an internal investigation. [Hunt] asked again if he could return to work. Poole asked [Hunt] if he was requesting her to rescind his resignation, and [Hunt] replied, "Yes." Poole advised [Hunt] that, after reviewing his history of pending investigations and corrective actions, and based on his behavior toward Ms. Gerald when Gerald questioned him about the investigation, she accepted his verbal resignation and would not rescind his resignation. . . .

. . . .

19. On November 10, 2016, Ms. Poole completed a Correctional Officer Separation Information form showing [Hunt]'s effective date of separation as November 4, 2016. She wrote the following as the reason and circumstances surrounding [Hunt]'s separation:

> Verbal Resignation
>
> Spoke with Ofr. Hunt on 11/9/16 accepted his verbal resignation. Ofr. Hunt had several . . . allegations of misconduct that were being investigated.

. . . .

22. There was no evidence presented at hearing that [Hunt] resigned, either verbally or otherwise, to any DPS employee who was authorized to accept a resignation from [Hunt] on November 3, 2016. Ms. Gerald was the only person who testified at hearing that [Hunt] stated he was quitting his job. Ms. Gerald was not [Hunt]'s direct supervisor, did not work with [Hunt], and did not have much direct interaction with [Hunt], as Gerald worked the day shift, and [Hunt] worked the night shift. In direct contrast, [Hunt] denied telling Ms. Gerald, "I quit." [Hunt] attempted to return to the workplace on November 3, 2016 before his shift started, but [DPS] refused to allow him to do so

> per Capt. Delgado's orders. The fact that [Hunt] knew about Capt. Delgado's orders corroborated [Hunt]'s account that he attempted to return to work on November 3, 2016.
>
> 23. At hearing, neither Superintendent Poole nor Asst. Superintendent Locklear testified that [Hunt] said he quit his job during their November 9, 2016 telephone conversation. Instead, [Hunt] informed Poole that he wanted to go back to work.
>
> . . . .
>
> 26. The preponderance of the evidence at hearing proved that [DPS] involuntarily separated [Hunt] from employment on November 3, 2016, as opposed to a voluntary resignation by [Hunt], when Superintendent Poole refused to allow [Hunt] to return to work. Ms. Poole admitted that her "acceptance" of [Hunt]'s "resignation" was based upon [Hunt]'s pending investigation and past corrective actions, and [Hunt]'s behavior toward Ms. Gerald when Gerald questioned him about the investigation. By basing her "acceptance" of [Hunt]'s alleged "resignation" on [Hunt]'s pending investigation and past corrective actions, Ms. Poole's decision to deny [Hunt] to return to work became a disciplinary action against [Hunt]'s employment under NCGS 126-35, without first following the disciplinary procedures required by Chapter 126 of the North Carolina General Statutes. . . .

Based on our review of these findings, it is clear that the ALJ did not resolve the factual dispute arising from the testimony of the witnesses as to whether or not Hunt actually stated to Gerald that he was quitting. It is the duty of an ALJ as the finder of fact in OAH proceedings to resolve material facts that are in dispute. *Harris*, __ N.C. App. at __, 798 S.E.2d at 137 ("As the sole fact-finder, the ALJ has both the duty and prerogative to determine the credibility of the witnesses, the weight and sufficiency of their testimony, to draw inferences from the facts, and to sift and appraise conflicting and circumstantial evidence." (citation and quotation marks omitted)). We agree, however, with the ALJ's implicit determination that a resolution of this issue was not necessary because even taking as true Gerald's testimony that Hunt stated he was quitting, such a statement would not have amounted to a legally effective resignation.

As noted above, 25 N.C.A.C. 1C.1002 requires that resignations be submitted to the "appointing authority." Our appellate courts have not yet had the opportunity to consider the meaning of the term "appointing authority" as it is used in 25 N.C.A.C. 1C.1002. Moreover, neither the North Carolina Administrative Code nor our General Statutes define the term.

In construing this term, we must first look to the plain meaning of these words. *Britt v. N.C. Sheriffs' Educ. & Training Standards Comm'n*, 348 N.C. 573, 576, 501 S.E.2d 75, 77 (1998) ("When the language of regulations is clear and unambiguous, there is no room for judicial construction, and courts must give the regulations their plain meaning." (citation omitted)). "In the absence of a contextual definition, courts may look to dictionaries to determine the ordinary meaning of words . . . ." *Perkins v. Ark. Trucking Servs.*, 351 N.C. 634, 638, 528 S.E.2d 902, 904 (2000) (citation omitted).

The word "appoint" is defined as "to name or select officially for an office, position, etc." Webster's New World College Dictionary 69 (4th ed. 2010). "Authority" is defined as "persons, esp[ecially] in government, having the power or right to enforce orders, laws, etc." *Id.* at 95. Thus, on these facts, we deem it appropriate to construe the phrase "appointing authority" in 25 N.C.A.C. 1C.1002 as referring to the person or persons who have the power to make personnel decisions at Scotland Correctional Institution.

Such a definition is consistent with the usage of this term in Title 25 of the Administrative Code as referring to persons who initiate personnel actions against State employees. *See*, *e.g.*, 25 N.C.A.C. 1J.0604 (2016) ("Any employee, regardless of occupation, position or profession may be warned, demoted, suspended or dismissed by *the appointing authority*." (emphasis added)).

At the 15 June 2017 hearing, Gerald testified as follows:

> [COUNSEL:] . . . Do you have the authority, that you know of, to independently hire an employee?
>
> [GERALD:] No, I do not.
>
> [COUNSEL:] Do you have the authority, to your knowledge, to independently fire an employee?
>
> [GERALD:] I do not have that authority either.
>
> . . . .

> [COUNSEL:] . . . As a part of this investigation, were you or were you not given the specific authority to accept his resignation?
>
> [GERALD:] No, I was not.

Thus, Gerald's testimony demonstrates that she lacked the authority to make hiring and firing decisions as to employees at the prison. This means that she cannot be deemed to have been the "appointing authority" pursuant to 25 N.C.A.C. 1C.1002, which — in turn — leads to the conclusion that Gerald had no legal authority to accept Hunt's resignation.

Although the parties agree that Poole would qualify as the "appointing authority" based on her position as superintendent at Scotland Correctional Institution, the record is devoid of any indication that Hunt ever informed Poole that he wished to resign. Indeed, to the contrary, the undisputed testimony was that he told her he wished to continue working at the prison during their conversation on 9 November 2016.

Thus, because Gerald had no authority to accept Hunt's resignation, Hunt did not submit a legally effective resignation *even if* Gerald's testimony as to the words he used during their 3 November 2016 encounter is accepted as true. As a result, Hunt's separation from employment constituted an involuntary discharge rather than a voluntary resignation.

B. Compliance With Grievance Process

Having determined that Hunt was discharged by DPS, we must still address whether — as DPS claims — his appeal to OAH was untimely on the ground that his grievance letter was not submitted within fifteen days of the 9 November 2016 letter stating that DPS had accepted his "resignation." In response to this argument, Hunt contends that (1) the fifteen-day deadline for submission of his grievance was never triggered because DPS failed to furnish him with a statement of his appeal rights; and (2) he was not required to complete the grievance procedure because DPS refused to process his grievance.

As stated above, N.C. Gen. Stat. § 126-35(a) requires that "[i]n cases of [discharge], the employee shall, before the action is taken, be furnished with a statement in writing setting forth the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights." N.C. Gen. Stat. § 126-35(a). Here, DPS does not dispute the fact that it never provided Hunt with a statement of his appeal rights. Instead, it sent Hunt a letter stating that his 3 November 2016 resignation had been accepted by DPS. This letter contained no

information regarding his right to appeal that decision. Approximately twelve days later, Hunt responded by letter to Poole in which he denied ever having resigned. Even after receiving this letter that clearly put DPS on notice of Hunt's disagreement with the notion that he had resigned, DPS still did not inform him of his appeal rights.

Thus, DPS failed to comply with its statutory duty under N.C. Gen. Stat. § 126-35(a). *See*, *e.g.*, *Nix v. Dep't of Admin.*, 106 N.C. App. 664, 668, 417 S.E.2d 823, 827 (1992) (notification of appeal rights was required where petitioner took disability retirement after being told he would be terminated because his resignation was not voluntary). Accordingly, because no statement of appeal rights was ever sent to Hunt, the fifteen-day time limit set out in N.C. Gen. Stat. § 126-35(a) for filing a grievance was never triggered.

This Court has also refused to find that an employee's appeal to OAH was untimely in cases where the agency failed to send a valid notice of appeal rights to the aggrieved employee. *See*, *e.g.*, *Early v. Cty. of Durham Dep't of Soc. Servs.*, 172 N.C. App. 344, 357, 616 S.E.2d 553, 562 (2005) (because employee did not receive notice of appeal rights as required by statute, petition for contested case hearing was timely filed and OAH possessed subject matter jurisdiction over employee's appeal), *disc. review improvidently allowed*, 361 N.C. 113, 637 S.E.2d 539 (2006); *Gray v. Dep't of Env't, Health & Nat. Res.*, 149 N.C. App. 374, 379, 560 S.E.2d 394, 398 (2002) (because of incorrect listing of address of OAH in statement of appeal rights given to employee, deadline for filing petition in OAH was not triggered); *Jordan v. N.C. Dep't of Transp.*, 140 N.C. App. 771, 774-75, 538 S.E.2d 623, 625 (2000) (petitioner's request for contested case hearing was timely filed where agency's statement of appeal rights sent to her did not inform her of her right to contest the designation of her position as "exempt policymaking," the procedure for contesting the designation, or the time limit for filing an objection to the designation), *disc. review denied*, 353 N.C. 376, 547 S.E.2d 412 (2001).[1]

In the present case, Hunt filed his petition in OAH within thirty days of the date he received the letter from DPS refusing to process his grievance. Given DPS's stated refusal to allow Hunt to grieve his discharge, Hunt did not have a duty to take any further steps pursuant to the grievance process. Instead, he was justified in filing his petition in OAH at the

1. While the cases cited above were decided before the General Assembly's 2013 statutory amendments, DPS has failed to direct our attention to any provision of the amendments that excuses the failure of an agency to provide an employee with an adequate statement of his right to appeal an adverse personnel action.

time he did so. Accordingly, we reject DPS's argument that the ALJ erred in denying its motion to dismiss for lack of subject matter jurisdiction.

II. Absence of Just Cause

[2] Having determined that Hunt did not resign and that the ALJ properly concluded OAH possessed subject matter jurisdiction over his appeal, the only remaining question is whether Hunt's discharge was lawful. N.C. Gen. Stat. § 126-35 states that "[n]o career State employee subject to the North Carolina Human Resources Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause." N.C. Gen. Stat. § 126-35(a). In order to discharge a state employee, an agency must demonstrate the employee's "unsatisfactory job performance" or "unacceptable personal conduct." 25 N.C.A.C. 1J.0604(b) (2016).

Our resolution of this issue requires no analysis at all. Neither at the OAH proceeding nor in this appeal has DPS argued that it possessed just cause to terminate Hunt's employment. Instead, its entire argument has consistently hinged on the notion that Hunt voluntarily resigned — a proposition that we have rejected. Thus, we agree with the ALJ that Hunt's discharge was not in accordance with North Carolina law. Accordingly, we affirm the ALJ's Final Decision.[2]

III. Award of Attorneys' Fees

[3] Finally, DPS argues that the ALJ erred by awarding attorneys' fees to Hunt because the award was issued (1) in a separate order despite the legal requirement that the ALJ "dispose of all issues in a final decision;" and (2) before the expiration of the ten-day period for DPS to respond to Hunt's petition for fees.

As to its first argument, DPS has failed to cite any legal authority specifically prohibiting an ALJ from awarding attorneys' fees by means of a separate order after issuing a final decision on the merits of the employee's appeal. Thus, this argument is overruled.

With regard to DPS's second argument, it cites 25 N.C.A.C. 3.0115, which states, in pertinent part, as follows: "Any application to the administrative law judge for an order shall be by motion, which shall be in writing unless made during a hearing, and must be filed and served upon all parties not less than ten days before the hearing, if any, is to be held either on the motion or the merits of the case. *The nonmoving*

2. To the extent that DPS's appellate brief seeks to challenge other findings of fact made by the ALJ, none of these additional findings are material to our analysis.

party shall have ten days from the date of service of the motion to file a response." 26 N.C.A.C. 3.0115 (emphasis added).

In its Final Decision, the ALJ directed Hunt to file a petition for attorneys' fees within ten days. Hunt proceeded to file such a petition on 22 August 2017. Six days later, the ALJ issued an order requiring DPS to pay $11,720.00 in attorneys' fees. Even assuming — without deciding — that the ALJ should have allowed DPS ten days in which to respond to Hunt's petition, DPS has failed to show that it was prejudiced by the ALJ's failure to do so.

> Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error complained of was material and prejudicial, amounting to a denial of some substantial right. The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.

Faucette v. 6303 Carmel Rd., LLC, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015) (internal citations and quotation marks omitted).

In its brief, DPS has not asserted that the amount of attorneys' fees awarded was unreasonable or that the fees were not recoverable under applicable law. Thus, because DPS has failed to show that it was actually harmed by the ALJ's failure to allow ten days for it to respond to Hunt's petition, we dismiss this argument.

Conclusion

For the reasons stated above, we affirm.

AFFIRMED.

Judges DILLON and INMAN concur.

IN RE J.D.M.-J.

[260 N.C. App. 56 (2018)]

IN THE MATTER OF J.D.M.-J., O.M.L.J.

No. COA17-1328

Filed 19 June 2018

1. Child Abuse, Dependency, and Neglect—neglect—termination of juvenile proceeding—civil custody action—required findings of fact

The trial court erred by failing to make required findings pursuant to N.C.G.S. § 7B-911(c) when it terminated a juvenile proceeding and initiated a civil custody action under Chapter 50.

2. Child Custody and Support—placement—out-of-state relatives—Interstate Compact on the Placement of Children requirements—interests of children

The trial court erred by awarding custody of minor children to their out-of-state aunt and uncle without ensuring that the provisions of the Interstate Compact on the Placement of Children (ICPC) had been satisfied through notification from the other state that the placement did not appear to be contrary to the interests of the children. Where prior decisions were in conflict on this issue, the Court of Appeals followed the older line of cases.

3. Child Custody and Support—custody award—relatives—adequate resources and understanding of significance—evidence

The trial court erred by awarding custody of neglected juveniles to their relatives without first verifying that the relatives had adequate resources to care for the children and understood the legal significance of the placement, pursuant to N.C.G.S. § 7B-906.1(j). The testimony regarding the relatives' income did not state the amount of the income or whether it was sufficient to care for the children, and there was no evidence regarding the relatives' understanding of the legal significance of assuming custody.

4. Child Custody and Support—visitation—children adjudicated neglected—statutory findings

The trial court erred by failing to make necessary findings concerning a mother's visitation rights in a permanency planning review order pursuant to N.C.G.S. § 7B-905.1(c). While the order did address visitation in the event the mother moved to Arizona, where the children were placed with relatives, the order failed to provide any direction as to the frequency or length of visits in the event the

mother did not move to Arizona, and it failed to specify whether visits should be supervised or unsupervised.

Appeal by respondent from order entered 25 August 2017 by Judge Christy E. Wilhelm in Cabarrus County District Court. Heard in the Court of Appeals 31 May 2018.

Hartsell & Williams, PA, by H. Jay White and Austin "Dutch" Entwistle III, for petitioner-appellee Cabarrus County Department of Human Services.

J. Thomas Diepenbrock for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie, for guardian ad litem.

DAVIS, Judge.

A.M. ("Respondent") appeals from an order that awarded custody of her minor children J.D.M.-J. ("Jacob")[1] and O.M.L.J. ("Opal") to their aunt and uncle in Arizona, terminated the juvenile proceeding, and transferred the matter for entry of a civil custody order under Chapter 50 of the North Carolina General Statutes. On appeal, she argues that the trial court failed to (1) comply with the statutory procedure for terminating the proceeding in juvenile court; (2) ensure compliance with the Interstate Compact on the Placement of Children (the "ICPC"); (3) verify that the custodians possessed adequate resources and understood the legal significance of the placement of the children in their custody; and (4) comply with statutory requirements in establishing Respondent's visitation rights. After a thorough review of the record and applicable law, we vacate the trial court's order and remand for further proceedings.

Factual and Procedural Background

Respondent is the mother of Opal and Jacob.[2] Opal was born in December 2006 and Jacob in September 2008. In December 2014, the Cabarrus County Department of Human Services ("DHS") received a report that Respondent had not been properly monitoring Jacob's blood sugar levels in connection with his juvenile diabetes and that the house was not clean or safe for the children.

1. Pseudonyms and initials are used throughout this opinion to protect the identities of the minor children and for ease of reading.

2. The children's father is deceased.

In December 2015 and January 2016, DHS received numerous reports alleging that (1) there was fighting in the home between Respondent and her oldest child ("April")[3]; (2) Respondent was not properly caring for Jacob's diabetes; (3) Opal was not receiving her ADHD medication as prescribed; (4) Jacob was missing school; and (5) Opal and Jacob were attending school with inadequate clothes and inattention to personal hygiene.

DHS began providing in-home services to the family in response to these reports. In April and May 2016, DHS received new reports stating that Respondent was providing inadequate care for both children's medical needs, Opal had been disruptive at school, and Opal was being physically abused by April at home.

On 20 June 2016, Respondent was hospitalized, and Opal and Jacob were staying with a family friend. The friend reported that she was not comfortable caring for the children while Respondent was in the hospital. On 22 June 2016, DHS filed juvenile petitions alleging that Opal and Jacob were neglected juveniles. The children were placed in nonsecure custody with DHS the same day. On 11 August 2016, Respondent consented to an order that adjudicated the children to be neglected, established a primary permanent plan of reunification with a secondary permanent plan of guardianship, and required her to comply with a case plan.

A permanency planning hearing was held on 10 August 2017 before the Honorable Christy E. Wilhelm in Cabarrus County District Court. Respondent testified at the hearing along with Lisa Fullerton and Rachel Willert, two social workers employed by DHS.

On 25 August 2017, the trial court entered a permanency planning order awarding custody of Opal and Jacob to Beverly and Johnnie Worley (the children's maternal aunt and uncle), who lived in Phoenix, Arizona. The court terminated jurisdiction in the juvenile action and ordered that the matter be transferred to a Chapter 50 civil custody action. Respondent filed a timely notice of appeal.

Analysis

On appeal, Respondent argues that the trial court erred by failing to (1) make necessary findings required under N.C. Gen. Stat. § 7B-911 before terminating jurisdiction in the juvenile action; (2) ensure

3. April was not a subject of the order from which appeal is being taken and, therefore, her status is not at issue in this appeal.

compliance with the ICPC; (3) verify that the Worleys had adequate resources to serve as custodians and that they understood the legal significance of the placement of the children in their custody; and (4) make statutorily required findings regarding Respondent's visitation rights. We address each argument in turn.

I. Findings Required by N.C. Gen. Stat. § 7B-911

[1] Respondent initially contends — and both DHS and the guardian *ad litem* ("GAL") concede — that the trial court failed to make required findings in connection with the portion of its order terminating the juvenile proceeding and initiating a civil action under Chapter 50. N.C. Gen. Stat. § 7B-911(c) provides, in relevant part, as follows:

> (a) Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to G.S. 50-13.1, 50-13.2, 50-13.5, and 50-13.7.
>
> (b) When the court enters a custody order under this section, the court shall either cause the order to be filed in an existing civil action relating to the custody of the juvenile or, if there is no other civil action, instruct the clerk to treat the order as the initiation of a civil action for custody.
>
> . . . .
>
> If the court's order initiates a civil action, the court shall designate the parties to the action and determine the most appropriate caption for the case. . . . The order shall constitute a custody determination, and any motion to enforce or modify the custody order shall be filed in the newly created civil action in accordance with the provisions of Chapter 50 of the General Statutes. . . .
>
> (c) *When entering an order under this section, the court shall* . . . .
>
> . . . .
>
> (2) *Make the following findings*:

> *a. There is not a need for continued State intervention on behalf of the juvenile through a juvenile court proceeding.*
>
> *b. At least six months have passed since the court made a determination that the juvenile's placement with the person to whom the court is awarding custody is the permanent plan for the juvenile, though this finding is not required if the court is awarding custody to a parent or to a person with whom the child was living when the juvenile petition was filed.*

N.C. Gen. Stat. § 7B-911 (2017) (emphasis added).

Here, it is undisputed that the trial court made no findings satisfying either subsection (2)(a) or (2)(b). Nor do the findings it did make allow this Court to infer that these statutory provisions were met. *See In re A.S.*, 182 N.C. App. 139, 144, 641 S.E.2d 400, 403-04 (2007) (upholding order that failed to contain explicit findings under N.C. Gen. Stat. § 7B-911(c)(2) but made findings demonstrating that trial court no longer considered DSS intervention necessary).

Indeed, the trial court's order is internally inconsistent. On the one hand, it requires continued involvement with the juveniles by DHS by stating the following:

> 6. CCDHS should continue to make reasonable efforts to prevent or eliminate the need for placement of the juveniles.
>
> . . . .
>
> 9. The juveniles's [sic] placement and care are the responsibility of CCDHS and the agency shall arrange for the foster care or other placement of the juvenile. CCDHS is granted the authority or [sic] to obtain medical treatment, educational, psychological, or psychiatric treatment and services as deemed appropriate by CCDHS.

On the other hand, however, the order states as follows:

> 3. The court grants custody of the juveniles to Beverly and Johnnie Worley.
>
> . . . .

> 8. This matter is closed. CCDHS and the GAL are released from this matter.
>
> 9. This case is transferred to a Chapter 50 Action.

These conflicting provisions cannot be reconciled. On remand, we instruct the trial court to determine whether or not DHS should continue to have a role over the placement and care of the children or, alternatively, whether it should be released from further obligations. In the event the trial court determines that no further involvement by DHS is necessary, we direct the court to make the findings required by N.C. Gen. Stat. § 7B-911(c)(2).

II. Noncompliance With ICPC

[2] Respondent next contends that the trial court erred in awarding custody to the Worleys in Arizona without ensuring that the provisions of the ICPC had been satisfied. We agree.

In entering a dispositional order that places juveniles in out-of-home care,

> the court shall first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. . . . Placement of a juvenile with a relative outside of this State must be in accordance with the Interstate Compact on the Placement of Children.

N.C. Gen. Stat. § 7B-903(a1) (2017).

The ICPC provides, in pertinent part, as follows:

> No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for *placement in foster care or as a preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this Article and with the applicable laws of the receiving state governing the placement of children therein.

N.C. Gen. Stat. § 7B-3800, Article III(a) (2017) (emphasis added). The ICPC further requires that before a child is sent to the receiving state, "the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." N.C. Gen. Stat. § 7B-3800, Article III(d).

DHS and the GAL argue that the children's placement with the Worleys was neither a "placement in foster care" nor "as a preliminary to a possible adoption," meaning that the ICPC does not apply. We have previously rejected a similar argument. *In re V.A.*, 221 N.C. App. 637, 727 S.E.2d 901 (2012), involved a child who was placed in the custody of an out-of-state relative without notification from the receiving state that the placement did not appear to be contrary to the interests of the child. *Id.* at 639-40, 727 S.E.2d at 903. We determined that the trial court was required to comply with the ICPC, stating as follows:

> The ICPC requires that before a juvenile can be placed with an out-of-state relative "the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child." N.C. Gen. Stat. § 7B-3800, Article III(d). This Court has previously interpreted the statutory preference for relative placements in harmony with the ICPC, and held that "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *In re L.L.*, 172 N.C. App. 689, 702, 616 S.E.2d 392, 400 (2005) (holding that the statutory preference for relative placement and compliance with the ICPC are not mutually exclusive).

Id. at 640, 727 S.E.2d at 904.

We further rejected the argument that the child's placement with relatives did not constitute "foster care."

> According to Regulation 3(4)(26), "foster care" is "24-hour substitute care for children placed away from their parents or guardians and for whom the state agency has placement and care responsibility . . . [which] includes . . . foster homes of relatives" "regardless of whether the foster care facility is licensed and payments are made by the state or local agency for the care of the child." Ass'n of Adm'rs of the ICPC (AAICPC), Reg. No. 3 (amended May 1, 2011). The ICPC defines "placement" as "the care of a child in a family free or boarding home . . . ." N.C. Gen. Stat. §7B-3800, Article II(d). A "family free" home, counter intuitively, is "the home of *a relative or unrelated individual* whether or not the placement recipient receives compensation for care or maintenance of the child." AAICPC, Reg. No. 3(4)(24) (emphasis added).

Id. at 641 n.1, 727 S.E.2d at 904 n.1. Thus, we concluded that the custody placement with the out-of-state relatives was a "placement in foster care," thereby triggering the requirements of the ICPC. *Id.* at 641, 727 S.E.2d at 904.

In arguing that the ICPC does not apply on these facts, DHS and the GAL direct our attention to *In re J.E.*, 182 N.C. App. 612, 643 S.E.2d 70, *disc. review denied*, 361 N.C. 427, 648 S.E.2d 504 (2007). In that case, the respondent-mother argued that the trial court had erred because DSS had not conducted a home study pursuant to the ICPC before placing her children with their maternal grandparents, who lived in Virginia. We held that placement of the minor children with their grandparents did not constitute "foster care" and was not "preliminary to adoption" for purposes of the ICPC. *Id.* at 615, 643 S.E.2d at 72 (citation and quotation marks omitted). Thus, we held that compliance with the ICPC was not required. *Id.*

We acknowledge that the holdings of *J.E.* and *V.A.* are in conflict on this issue. It is axiomatic that we are bound by the prior decisions of this Court. *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, 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."). However, "it is also well settled that where there is a conflicting line of cases, a panel of this Court should follow the older of those two lines." *Graham v. Deutsche Bank Nat'l Tr. Co.*, 239 N.C. App. 301, 306, 768 S.E.2d 614, 618 (2015) (citation and quotation marks omitted).

Although *J.E.* predates *V.A.*, this Court in *V.A.* expressly relied on our earlier decision in *In re L.L.*, 172 N.C. App. 689, 616 S.E.2d 392 (2005), that "a child cannot be placed with an out-of-state relative until favorable completion of an ICPC home study." *Id.* at 702, 616 S.E.2d at 400. Because *L.L.* was decided before *J.E.*, we conclude that we are bound by the *L.L./V.A.* line of cases.

Based on that line of cases, the ICPC required that Arizona notify DHS the proposed placement of Jacob and Opal did not appear to be contrary to the interests of the children. Because DHS had not received such notification from the appropriate Arizona agency prior to entry of the permanency planning order, the trial court was not authorized to award custody of Opal and Jacob to the Worleys. Accordingly, before any decision is made on remand to once again award custody of the juveniles to the Worleys, the trial court must first confirm that DHS received the required notification from the Arizona agency as mandated by the ICPC.

III. Verifications Concerning Proposed Custodians

[3] Respondent next contends that the trial court erred in awarding custody of the juveniles to the Worleys without first verifying both that (1) the couple had adequate resources to care for the children; and (2) understood the legal significance of the placement. We agree.

N.C. Gen. Stat. § 7B-906.1(j) states as follows:

> If the court determines that the juvenile shall be placed in the custody of an individual other than a parent or appoints an individual guardian of the person pursuant to G.S. 7B-600, the court shall verify that the person receiving custody or being appointed as guardian of the juvenile understands the legal significance of the placement or appointment and will have adequate resources to care appropriately for the juvenile.

N.C. Gen. Stat. § 7B-906.1(j) (2017).

In its order, the trial court made the following findings of fact regarding the Worleys:

> 8. CCDHS initiated an Interstate Compact on Placement of Children, hereinafter referred to as ICPC. All of the paperwork and information needed to comply with the ICPC submission to the state office in Raleigh, North Carolina has been provided by Mr. and Mrs. Worley including criminal checks and financial background information. CCDHS did an independent assessment by using the ICPC template to verify on their own the other steps and requirements taken in an ICPC. An ICPC assessment by Arizona has not been completed.
>
> 9. CCDHS FCS Supervisor Rachel Willert assessed the appropriateness and feasibility for possible placement . . . of [Opal] and [Jacob] with a maternal aunt and uncle, Beverly and Johnnie Worley in Phoenix, AZ. CCDHS FCS Supervisor Rachel Willert traveled to the Worley home, interviewed the family members, the Worley children, and extended relatives. CCDHS found no concerns and the Worley home was safe and appropriate.
>
> 10. Beverly and Johnnie Worley are the maternal aunt and uncle of the juveniles. The juveniles have had substantial contact with Mr. and Mrs. Worley during their lifetime.

Most recently, Mrs. Worley and the juveniles' cousin came to stay with mother for approximately one month. During that time, Mrs. Worley had significant interaction with the juveniles. CCDHS met with mother, the juveniles, and Mrs. Worley during this visit. It was apparent that the juveniles had a strong bond in connection with their relatives.

11. Beverly Worley recently retired from a human services position after 25 years of service. Mr. Worley works with a funeral home on an as-needed basis. The Worley home currently has Mr. and Mrs. Worley along with their 18-year-old son who recently graduated from high school. The Worley's [sic] have two other children who are grown and out of the home. One is working and college [sic] and one is in the military. The Worley's [sic] comfortably live off of Mrs. Worley's retirement and Mr. Worley's income from the funeral home work.

12. Mr. and Mrs. Worley are financially stable and able to provide for the financial needs of the juveniles. Mr. and Mrs. Worley have proven the ability to provide medical care to their own child . . . . Mr. and Mrs. Worley have family within their community as well as extended family outside of their community for support and contact. Mr. and Mrs. Worley are willing and able to provide for the support and care for the juveniles. Mr. and Mrs. Worley have investigated the potential schools and medical care for the children to attend.

13. CCDHS met with or interviewed the Worley children. The youngest child was interviewed in Cabarrus County as well as in his home in Phoenix, AZ. Both CCDHS worker's [sic] found this Worley son to be engaging, respectful, and attentive.

This Court has held that N.C. Gen. Stat. § 7B-906.1(j) does not require the trial court to "make any specific findings in order to make the verification." *J.E.*, 182 N.C. App. at 616-17, 643 S.E.2d at 73. However, we have made clear that the record must show the trial court received and considered reliable evidence that the guardian or custodian had adequate resources and understood the legal significance of custody or guardianship. *See, e.g.*, *In re E.M.*, __ N.C. App. __, __, 790 S.E.2d 863, 872 (2016) ("[N]o evidence in the record supports the court's finding that either of the custodians understand the legal significance of the placement."); *In re P.A.*, 241 N.C. App. 53, 65, 772 S.E.2d 240, 248 (2015)

(trial court's order was not compliant with N.C. Gen. Stat. § 7B-906.1(j) because "there [wa]s no evidence at all of what [the custodian] considered to be 'adequate resources' or what her resources were, other than the fact that she had been providing a residence for [the child]").

Here, although the trial court made findings regarding the adequacy of the Worleys' financial resources to provide for the needs of Jacob and Opal, the court did not receive evidence that was sufficient to support these findings. The court accepted into evidence a report created by DHS that made no mention of the Worleys' actual income or their specific financial resources. The report merely stated that DHS was "currently in the process of assessing the appropriateness and feasibility of placement for [Opal] and [Jacob] with [the] maternal aunt and uncle."

The trial court also heard testimony from Fullerton regarding the Worleys' financial resources:

> [COUNSEL:] And have you checked [the prospective guardians'] finances?
>
> [FULLERTON:] Yes.
>
> [COUNSEL:] And what did you do to check their finances?
>
> [FULLERTON:] Well, we gave them some forms to fill out to list their finances on. And, you know, I didn't have a reason to question what they stated was retirement, you know, benefits that [the maternal aunt] is receiving every month, and then they have additional information [sic] income that is not -- for her husband. He works at the funeral home and that's not always consistent [sic] job. It's kind of based on when the services are needed, so they don't count on that income. It's extra for them.
>
> [COUNSEL:] Have you done any criminal background checks?
>
> [FULLERTON:] Yes.
>
> [COUNSEL:] Have you requested an ICPC home study?
>
> [FULLERTON:] Yes, we did.
>
> [COUNSEL:] And what does that normally include? What do they do when they complete that home study?
>
> [FULLERTON:] I'm not sure.

> [COUNSEL:] Have you been able to do any independent verification of their finances?
>
> [FULLERTON:] I haven't had a reason to, no.
>
> [COUNSEL:] How much time have you spent with the Worleys?
>
> [FULLERTON:] Probably a limited amount. We've just had a number of telephone conversations when Miss Worley was here for about a month in the month of June. And, you know, we spent some time together in conjunction with visits to Miss Miller's home. She also participated in CFT meeting [sic], and we had some conversations after that meeting after that. We have continued to maintain phone contact with her and to discuss her interest in and feasibility of her, you know, receiving custody of the children if it didn't work out with Miss Miller and so those conversations have just -- I guess increased as we've gotten a lot closer to the time.

Willert also testified as follows on this issue:

> [COUNSEL:] How about the finances in regards to Mr. and Mrs. Worley?
>
> [WILLERT:] A financial affidavit was completed . . . .
>
> [COUNSEL:] Were there any concerns?
>
> [WILLERT:] No.
>
> [COUNSEL:] Was there any independent verification of the incomes and the information in the affidavit?
>
> [WILLERT:] We didn't do the checks. It was sent off with the ICPC for verification, but that would be as easy as looking generally for a home study when they have that -- all it is is verifying a bank statement for deposit.

While this testimony constituted evidence that the Worleys did possess *some* income, it did not state the amount of that income or demonstrate that it was sufficient to provide necessary care for the juveniles. Moreover, the social worker's statement that there were no concerns with the Worleys' financial affidavit is too vague to constitute adequate evidence that they did, in fact, possess adequate resources to care for the juveniles.

DHS and the GAL cite *J.E.* in support of their argument regarding the adequacy of the evidence on this issue. In *J.E.*, a department of social services report was provided to the trial court stating that a home study of the custodians' house had been conducted by the department. *J.E.*, 182 N.C. App. at 617, 643 S.E.2d at 73. We held that the home study report supported the trial court's determination that the custodians had adequate resources to care for the minor child. *Id.* Here, conversely, while a home study had been requested, there was no testimony as to the results of the study or whether it had even been completed.

DHS and the GAL point to additional testimony stating that the Worleys (1) have three children of their own; (2) maintain "a stable home and a good home;" and (3) arranged schooling for Opal and Jacob in Arizona and made medical appointments for them. However, none of this evidence is sufficient to comply with N.C. Gen. Stat. § 7B-906.1(j). As discussed above, the trial court did not receive evidence regarding the Worleys' financial resources that was specific enough to enable the court to verify that they possessed adequate resources to provide for the needs of the juveniles. *See P.A.*, 241 N.C. App. at 65, 772 S.E.2d at 248 (vacating and remanding permanency planning and review order where trial court failed to verify whether individual awarded guardianship had adequate resources to care for juvenile).

Furthermore, in addition to the lack of sufficient evidence regarding the Worleys' resources, the trial court also heard no evidence from which it could verify that the Worleys understood the legal significance of assuming custody of Jacob and Opal. "Evidence sufficient to support a factual finding that a potential guardian understands the legal significance of guardianship can include, *inter alia*, testimony from the potential guardian of a desire to take guardianship of the child, the signing of a guardianship agreement acknowledging an understanding of the legal relationship, and testimony from a social worker that the potential guardian was willing to assume legal guardianship." *E.M.*, __ N.C. App. at __, 790 S.E.2d at 872. Neither of the Worleys testified at the 10 August 2017 hearing, and no testimony was offered by DHS that the Worleys were aware of the legal significance of assuming custody of the juveniles. Nor did the Worleys sign a guardianship agreement acknowledging their understanding of the legal relationship.

Thus, for these reasons as well, we must vacate the trial court's award of custody of Jacob and Opal to the Worleys and remand for further proceedings. *See id.* at __, 790 S.E.2d at 872 (vacating award of custody where no evidence was presented supporting court's finding that custodians understood legal significance of placement).

IV. Findings Regarding Visitation

[4] Finally, Respondent contends that the trial court failed to make necessary findings concerning Respondent's visitation rights in the permanency planning review order. DHS and the GAL once again concede error on this issue, and we agree that the court's findings did not fully comply with the applicable statutory requirements.

N.C. Gen. Stat. § 7B-905.1(c) provides, in pertinent part, as follows:

> If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised. . . .

N.C. Gen. Stat. § 7B-905.1(c) (2017).

In the present case, after concluding that visitation with Respondent was in Opal and Jacob's best interests, the trial court ordered that

> [v]isitation between [Opal] and [Jacob] with [Respondent] be coordinated between [Respondent] and [the maternal aunt]. If [Respondent] were to return to live in Arizona, that visitation between [Respondent, Opal, and Jacob] occur weekly for a minimum of 2 hours.

This portion of the court's order is deficient in several respects. First, it fails to provide any direction as to the frequency or length of Respondent's visits in the event that she does *not* return to live in Arizona. Second, it fails to specify whether the visits with Respondent should be supervised or unsupervised. On remand, we instruct the trial court to make new findings on this issue that comply with N.C. Gen. Stat. § 7B-905.1(c). *See In re J.P.*, 230 N.C. App. 523, 530, 750 S.E.2d 543, 548 (2013) (remanding for new findings where trial court failed to specify conditions of visitation as required by statute).

Conclusion

For the reasons stated above, we vacate the trial court's 25 August 2017 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and BERGER concur.

IN THE MATTER OF R.L.G.

No. COA17-1433

Filed 19 June 2018

1. Child Abuse, Dependency, and Neglect—consent adjudication order—consent by parent—mere stipulation of facts

An order adjudicating a child as neglected was not a valid consent adjudication order under N.C.G.S. § 7B-801(b1) where the order simply contained a stipulation by the parties as to certain facts and the parties did not consent to the child being adjudicated as neglected.

2. Child Abuse, Dependency, and Neglect—neglect—adjudication—sufficiency of findings

The trial court's findings of fact were not sufficient to support its adjudication of neglect where the only findings in support of the adjudication were the mother's admission that the child was a "neglected juvenile," the mother's failure to ensure the child attended school regularly, the child's failing grades in three classes, and the mother's failure to take the child to "well care visits" to address her "medical needs." The mother's admission was a question of law and therefore an invalid stipulation, and the bare facts of the child's missed classes and medical visits—without more information, such as the reason for the problems in school or what medical conditions necessitated the medical visits—were insufficient to support the adjudication.

3. Child Abuse, Dependency, and Neglect—factual stipulations—invited error

The doctrine of invited error did not apply in a child neglect case where the mother admitted at a pre-adjudication hearing that her child was a neglected juvenile. The mother was merely admitting certain facts concerning her daughter's problems in school and missed medical visits, and there was no indication that the mother asked the trial court to adjudicate her child as a neglected juvenile or to remove her from her care.

4. Child Abuse, Dependency, and Neglect—neglect—adjudication—sufficiency of findings

A finding in a pre-hearing order could not serve as a substantive basis for an adjudication of neglect where the trial court did not indicate an intent for any part of the pre-hearing order to do so

and the finding was not one made independently by the trial court but was merely a recitation of a finding made by the Department of Social Services during its investigation.

Appeal by respondent-mother from orders entered 13 September 2017 by Judge W. Fred Gore in Brunswick County District Court. Heard in the Court of Appeals 31 May 2018.

Elva L. Jess for petitioner-appellee Brunswick County Department of Social Services.

Anné C. Wright for respondent-appellant.

Poyner Spruill LLP, by Kate C. Dewberry and Dylan J. Castellino, for guardian ad litem.

DAVIS, Judge.

This case requires us to examine (1) the requirements for a valid consent adjudication order in an abuse, neglect or dependency case; and (2) the extent to which findings in a pre-hearing order can be used to support an adjudication of neglect. A.F. ("Respondent") appeals from adjudication and disposition orders finding her daughter R.L.G. ("Rory")[1] to be a neglected juvenile and continuing her custody with the Brunswick County Department of Social Services ("DSS"). Because we conclude the trial court's determination that Rory was a neglected juvenile was not supported by sufficient evidence or findings of fact, we vacate the adjudication and disposition orders and remand the case to the trial court for further proceedings.

Factual and Procedural Background

Respondent is the mother of Rory, who was born in August 2006. On 25 June 2017, DSS obtained non-secure custody of Rory and filed a petition in Brunswick County District Court alleging that she was a neglected and dependent juvenile. In its petition, DSS stated that in 2013 the Bladen County Department of Social Services had substantiated allegations that Rory was sexually abused by Respondent's boyfriend. The petition further asserted that the boyfriend lived in Respondent's home with Rory and that Respondent had not expressed any concerns

1. Pseudonyms and initials are used throughout this opinion for ease of reading and to protect the juvenile's privacy.

regarding the abuse. In addition, the petition alleged that Rory had also recently been the victim of sexual abuse inflicted by a family friend. According to the petition, Respondent did not seek therapy for Rory as recommended by DSS and failed to meet with the District Attorney's office on two occasions to assist with the prosecution of the case. Finally, the petition stated that Respondent had been unable to provide Rory with an alternative childcare arrangement since 2013.

On 6 July 2017, DSS filed a motion to amend the 25 June 2017 petition to include additional allegations. The amended petition stated, *inter alia*, that Rory was absent from school for twenty-five days during the 2016-17 school year and was tardy on thirty-seven occasions. The motion to amend the petition was subsequently allowed by the court.

The trial court conducted a pre-adjudication hearing on 12 July 2017, and on 21 July 2017 the trial court entered an "Order on Pre-Hearing." An adjudication hearing was held on 16 August 2017. At this hearing, DSS read the following prepared admission by Respondent into the record:

> That admission is that the juvenile is a neglected juvenile in that she did not receive proper care and supervision by her mother in that her mother did not ensure the child attended school regularly, having missed 25 days during the 2016-17 calendar year and having been tardy 37 times. The child did not pass the core classes of English, science, and social studies, and a copy of the report card is tendered in support of said admission. In addition, the mother has not taken the child to well care visits with a physician to address her medical needs.

Respondent stated under oath her agreement to the truth of the above-quoted admission. At that point, the trial court stated that it would "accept the admission and adjudicate based upon the neglect."[2] Morgan Traynham (a social worker for DSS) and Roberta Lerner (the guardian *ad litem* for Rory) testified with regard to a potential trial home placement with Rory's father and the possibility of supervised visitation between Respondent and Rory.

On 13 September 2017, the trial court entered an order (the "Adjudication Order") adjudicating Rory to be a neglected juvenile. That same day, the trial court entered a separate disposition order that (1) continued custody of Rory with DSS; (2) granted Respondent

2. DSS took a voluntary dismissal as to the allegation of dependency that was contained in the petition.

supervised visitation; and (3) ordered DSS to pursue the goal of reunification with Respondent. Respondent filed a timely notice of appeal.[3]

Analysis

I. Trial Court's Order as a Consent Adjudication Order

[1] "[T]he Juvenile Code provides two procedural paths for an adjudication of abuse, neglect, or dependency: an adjudicatory hearing or an adjudication by consent." *In re J.S.C.*, __ N.C. App. __, __, 800 S.E.2d 126, 128 (2017). A consent adjudication "is the agreement of the parties, their decree, entered upon the record with the sanction of the court[.]" *In re Thrift*, 137 N.C. App. 559, 562, 528 S.E.2d 394, 396 (2000) (citation and quotation marks omitted). N.C. Gen. Stat. § 7B-801(b1) permits a trial court to enter a "consent adjudication order" *only if* (1) all parties are present or represented by counsel, who is present and authorized to consent; (2) the juvenile is represented by counsel; and (3) the court makes sufficient findings of fact. N.C. Gen. Stat. § 7B-801(b1) (2017).

Separate and apart from the statutory authorization for consent adjudication orders contained in N.C. Gen. Stat. § 7B-801(b1), a different statute — N.C. Gen. Stat. § 7B-807 — allows factual stipulations made by a party to be used in support of an adjudication. In such cases, a record of the stipulation "shall be made by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them." N.C. Gen. Stat. § 7B-807(a) (2017).

The initial question before us is whether the trial court's 13 September 2017 order was a valid consent adjudication order such that no additional evidence of neglect needed to be introduced at the adjudication hearing and no further substantive findings of fact by the trial court establishing neglect were necessary to support its adjudication as to Rory. We find our decision in *In re L.G.I.*, 227 N.C. App. 512, 742 S.E.2d 832 (2013), to be particularly instructive. In *L.G.I.*, an adjudicatory hearing took place during which the trial court "read the facts into the record[,]" noting that the juvenile in that case had tested positive for morphine at birth and that the respondent-mother had used illegal substances during her pregnancy. *Id.* at 515, 742 S.E.2d at 835 (citation, quotation marks and brackets omitted). The respondent-mother then agreed under oath to those facts. On appeal, however, she argued that this stipulation was

3. Rory's father is not a party to this appeal.

not sufficient to convert the trial court's adjudication order into a consent adjudication order. We agreed with this argument, concluding that "[a]t most, respondent-mother entered into a stipulation as to certain facts during the adjudication phase of the hearing." *Id.*

In re K.P., __ N.C. App. __, 790 S.E.2d 744 (2016), involved a challenge by the respondent-mother to the trial court's order adjudicating her children to be neglected and dependent in which she contended that the order was not a valid consent adjudication order. *Id.* at __, 790 S.E.2d at 747. The parties had attended a Child Planning Conference prior to an adjudication hearing. At the hearing, the department of social services submitted a report to the trial court indicating that a "Consent Agreement could not be reached at the conference." *Id.* at __, 790 S.E.2d at 748 (quotation marks omitted). The trial court then entered an order adjudicating the children to be neglected and dependent "supported solely by two written reports submitted by DSS at the hearing." *Id.* at __, 790 S.E.2d at 748.

On appeal, DSS argued that the trial court's order was, in fact, a valid consent adjudication order. The order, however, contained no findings that the parties "consented to the children being adjudicated as neglected and dependent." *Id.* at __, 790 S.E.2d at 749. Nor was there any evidence in the record "that a consent agreement had been reached for adjudication or that a consent order had been drafted. . . . Specifically, neither of the parties' attorneys nor the trial court ever stated that respondent was consenting to the adjudication of her children as neglected and dependent." *Id.* at __, 790 S.E.2d at 749. Consequently, we held that the trial court's order failed to meet the requirements of a valid consent adjudication order. *Id.* at __, 790 S.E.2d at 749.

Based on the principles set out in *L.G.I.* and *K.P.*, we conclude that the trial court's Adjudication Order here was not a valid consent adjudication order under N.C. Gen. Stat. § 7B-801(b1). Instead, the Adjudication Order simply contained a stipulation by the parties as to certain facts. Therefore, having determined that the Adjudication Order failed to meet the requirements for a consent adjudication order, we must next consider whether it contained sufficient findings of fact based on competent evidence to support the trial court's determination that Rory was a neglected juvenile.

II. Sufficiency of Findings of Fact in Adjudication Order

[2] We review a trial court's adjudication of neglect "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). "The findings need to be stated with sufficient specificity in order to allow meaningful appellate review." *In re S.C.R.*, 217 N.C. App. 166, 168, 718 S.E.2d 709, 712 (2011) (citation omitted).

N.C. Gen. Stat. § 7B-101 defines a "neglected juvenile" as follows:

> 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.

N.C. Gen. Stat. § 7B-101(15) (2017).

In order for a child to be properly adjudicated as neglected, "this Court has consistently required that there be some physical, mental or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline. " *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993) (citation and quotation marks omitted). "Whether a child is neglected is a conclusion of law which must be supported by adequate findings of fact." *In re McLean*, 135 N.C. App. 387, 390, 521 S.E.2d 121, 123 (1999) (citation and quotation marks omitted).

In the present case, the findings of fact contained in the trial court's Adjudication Order consisted entirely of the following:

> 1. That the petition alleging the child to be a neglected and dependent juvenile was filed on May 4, 2017 and an order was entered placing the juvenile in the physical and legal custody of [DSS]. The petition was properly signed by the social worker and verified by the Deputy Clerk of Superior Court.
>
> 2. A pre-hearing was conducted on [12 July] 2017 when the Court addressed jurisdictional issues as required by 7B-800.1. The order was entered and filed on July 21, 2017. The findings in said order are incorporated herein by reference as if set out in full.

> 3. The mother, under oath and with the advice of counsel, acknowledged and admitted that the juvenile is a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15) in that she did not receive proper care and supervision by her mother as her mother did not insure that the child attended school regularly, having missed twenty-five days during the 2016-17 calendar year and having been tardy thirty-seven times. The child did not pass the core classes of English, Science, and Social Studies. A copy of the child's report card was introduced into evidence in support of said admission. In addition, the child was not taken to well care visits with a physician to address her medical needs.
>
> 4. The child's father does not oppose the admission entered by [Respondent].
>
> 5. That [DSS], in open court, took a voluntary dismissal of the allegation of dependency without prejudice.

Thus, the specific findings purporting to support the court's conclusion of neglect are contained solely in Finding No. 3. First, the trial court stated that Respondent had admitted Rory was a "neglected juvenile." However, the determination of whether a juvenile is neglected within the meaning of N.C. Gen. Stat. § 7B-101(15) is a conclusion of law. *See In re Everette*, 133 N.C. App. 84, 86, 514 S.E.2d 523, 525 (1999) ("Determination that a child is not receiving proper care, supervision, or discipline, requires the exercise of judgment by the trial court, and is more properly a conclusion of law."). It is well established that "stipulations as to questions of law are generally held invalid and ineffective, and not binding upon the courts, either trial or appellate." *In re A.K.D.*, 227 N.C. App. 58, 60, 745 S.E.2d 7, 9 (2013) (citation, quotation marks, and brackets omitted). Consequently, any "admission" by Respondent that Rory was a neglected juvenile was ineffective to support the trial court's adjudication of neglect.

Second, the trial court stated in Finding No. 3 that (1) Respondent had failed to ensure Rory attended school regularly; (2) Rory had not passed three core classes; and (3) Rory was not taken to "well care visits" with a physician in connection with her "medical needs."

In *In re McMillan*, 30 N.C. App. 235, 226 S.E.2d 693 (1976), this Court upheld an adjudication of neglect where a father refused to allow his children to attend school at all. *Id.* at 236, 226 S.E.2d at 694. In *McMillan*, the father was Native American and testified that he would

not send his children to school because he believed they would not be taught about "Indians and Indian heritage and culture." *Id.* In addition, this Court determined that the children were not provided with "any sufficient alternative education or training" at home. *Id.* at 238, 226 S.E.2d at 695. In affirming the trial court's neglect determination, we concluded that "[i]t is fundamental that a child who receives proper care and supervision in modern times is provided a basic education[,]" and that "when [a child] is deliberately refused this education," she is neglected within the meaning of the Juvenile Code. *Id.*

The facts of the present case are easily distinguishable from *McMillan*. Here, no evidence was presented that Rory was "deliberately refused" an education by Respondent. Furthermore, the trial court made no findings as to the reasons for Rory's missed classes and tardiness or as to how many of Rory's absences were excused. Moreover, the trial court did not expressly find that Rory's failure to pass three classes directly resulted from her absences or from Respondent's failure to provide proper care, supervision, or discipline. Therefore, the stipulated facts regarding Rory's missed classes and the accompanying findings by the trial court fall far short of the scenario presented in *McMillan* and are insufficient to support the conclusion that Rory was a neglected juvenile.

Finally, although N.C. Gen. Stat. § 7B-101(15) includes in its definition of a neglected juvenile one who does not receive "necessary medical care," the trial court's bare finding that Rory was not taken to "well care visits" — without more — is insufficient to support a finding of neglect. There are no findings as to the actual number of missed visits, the reasons they were missed, the medical conditions that necessitated the visits, or the nature or existence of any accompanying adverse effects on Rory's health. Accordingly, we hold that the trial court's findings on this issue are likewise inadequate to support its adjudication of neglect.

[3] DSS makes the following two arguments as to why the trial court's Adjudication Order should nevertheless be upheld: (1) any error by the trial court was "invited" by Respondent; and (2) a finding contained in the Order on Pre-Hearing was sufficient to support the adjudication of neglect. We address each of these arguments in turn.

DSS initially contends that Respondent is prohibited from challenging the trial court's adjudication because she "invited the outcome reached by the trial court" by stipulating to the allegation of neglect. The doctrine of invited error applies to "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.*, 244 N.C. App. 657, 669, 781 S.E.2d 655, 663 (2016) (citation and quotation marks omitted); *see also Frugard v. Pritchard*, 338 N.C. 508, 512, 450 S.E.2d 744, 746 (1994) ("A party may not complain of action which he induced." (citation omitted)).

In arguing that Respondent invited the trial court to adjudicate Rory as a neglected juvenile, DSS relies on *In re K.C.*, 199 N.C. App. 557, 681 S.E.2d 559 (2009). In that case, the respondent-mother argued on appeal that the trial court erred by "failing to adopt an appropriate visitation plan in its disposition order." *Id.* at 561, 681 S.E.2d at 563. However, the court found that the respondent-mother had "disclaimed any interest in seeing the children until DSS 'fixed' them" and that she had "flatly refused to work with DSS towards reunification even though DSS has offered such things as visitation." *Id.* at 563-64, 681 S.E.2d at 564 (quotation marks and brackets omitted). As a result, this Court held that the respondent-mother was not entitled to appellate relief because she "specifically invited the trial court to honor her wishes by not providing for visitation between herself and the children[.]" *Id.* at 564, 681 S.E.2d at 564.

K.C. is clearly distinguishable from the present case. Here, the record is devoid of any indication that Respondent requested the trial court to adjudicate Rory as a neglected juvenile or remove her daughter from her care. Rather, she merely stipulated to certain facts concerning Rory's school attendance, grades, and missed medical visits. Therefore, the doctrine of invited error is inapplicable.

[4] Next, DSS argues that a finding contained in the trial court's Order on Pre-Hearing supported a finding of neglect as to Rory based on allegations of sexual abuse. In making this argument, DSS directs our attention to the last sentence of Finding No. 2 of the Adjudication Order, which provides that "[t]he findings in [the Order on Pre-Hearing] are incorporated herein by reference as if set out in full." DSS then points to Finding of Fact No. 9 of the Order on Pre-Hearing, which stated as follows:

> 9. There is no reasonable means other than continued custody with [DSS] to protect the juvenile and ensure her safety and the custody order should continue in effect. Efforts to prevent removal of the child from her parents' custody and care were precluded by an immediate threat of harm to the juvenile, and placement of the juvenile in the absence of such efforts was reasonable. [DSS], during an investigation based

> upon allegations received on June 23, 2017, found that [Respondent's] boyfriend, who has been identified as a sexual perpetrator against [Rory], was living in the home. [Respondent] did not find this to be a concern.

The Adjudication Order did not contain any specific references at all to Rory being sexually abused or indicate any concerns on this subject. Nor was any evidence offered on this issue at the adjudication hearing. Nevertheless, DSS contends that the trial court's wholesale incorporation by reference of the findings from the Order on Pre-Hearing properly served as the basis for the adjudication of neglect based on the proposition that Rory was sexually abused by a person living in Respondent's home. We disagree.

The trial court's Order on Pre-Hearing was issued pursuant to N.C. Gen. Stat. § 7B-800.1, which provides, in pertinent part, as follows:

> (a) Prior to the adjudicatory hearing, the court shall consider the following:
>
> (1) Retention or release of provisional counsel.
>
> (2) Identification of the parties to the proceeding.
>
> (3) Whether paternity has been established or efforts made to establish paternity, including the identity and location of any missing parent.
>
> (4) Whether relatives, parents, or other persons with legal custody of a sibling of the juvenile have been identified and notified as potential resources for placement or support.
>
> (5) Whether all summons, service of process, and notice requirements have been met.
>
> (5a) Whether the petition has been properly verified and invokes jurisdiction.
>
> (6) Any pretrial motions, including (i) appointment of a guardian ad litem in accordance with G.S. 7B-602, (ii) discovery motions in accordance with G.S. 7B-700, (iii) amendment of the petition in accordance with G.S. 7B-800, or (iv) any motion for a continuance of the adjudicatory hearing in accordance with G.S. 7B-803.

(7) Any other issue that can be properly addressed as a preliminary matter.

N.C. Gen. Stat. § 7B-800.1 (2017).

As an initial matter, we observe that the trial court did not indicate in Finding No. 2 — or in any other finding — of the Adjudication Order that it believed any specific provisions of the Order on Pre-Hearing were relevant to its determination of neglect. Instead, as noted above, the *only* substantive findings in the Adjudication Order related to missed classes and medical visits. Given that the Adjudication Order describes the Order on Pre-Hearing as having addressed "jurisdictional issues[,]" there is no indication that the court intended for any of the provisions of the Order on Pre-Hearing to constitute a substantive basis for the adjudication of neglect.

Moreover, it is important to note that the portion of Finding of Fact No. 9 in the Order on Pre-Hearing upon which DSS relies is not actually a "finding" at all. Instead, the court simply stated that *DSS* made the finding referenced therein. This Court has held that "[i]n juvenile proceedings, it is permissible for trial courts to consider all written reports and materials submitted in connection with those proceedings. Nevertheless, despite this authority, the trial court may not delegate its fact finding duty by relying wholly on DSS reports and prior court orders." *In re Z.J.T.B.*, 183 N.C. App. 380, 386-87, 645 S.E.2d 206, 211 (2007) (internal citations, quotation marks, and brackets omitted); *see also In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (stating that trial court may not simply recite allegations but must instead find facts that support its conclusions of law). Therefore, for all of these reasons, Finding of Fact No. 9 in the Order on Pre-Hearing did not serve as a valid basis for the trial court's adjudication of Rory as a neglected juvenile.

Conclusion

For the reasons stated above, we vacate the trial court's 13 September 2017 adjudication and disposition[4] orders and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Judges DILLON and BERGER concur.

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4. Because we are vacating the trial court's adjudication order, we must likewise vacate its disposition order.

JESSIE M. McCLEASE, Plaintiff
v.
DOVER VOLUNTEER FIRE DEPT., Defendant

No. COA17-1123

Filed 19 June 2018

1. Negligence—volunteer fire department—structure fire—reasonableness of response

A resident's claim for negligence against a volunteer fire department for failing to timely respond to a structure fire at her house and to maintain the operability of a fire hydrant by her house was properly dismissed where the resident failed to produce sufficient evidence of either basis for her claim.

2. Emotional Distress—negligent infliction of severe emotional distress—sufficiency of evidence

Plaintiff's evidence was insufficient to support a claim for negligent infliction of severe emotional distress where it did not show that a volunteer fire department acted in a negligent manner when responding to a structure fire at her house, nor that she suffered severe emotional distress where she only attended one appointment with a counselor and never filled a prescription provided by the counselor.

Appeal by plaintiff from order entered 2 June 2017 by Judge John E. Nobles in Craven County Superior Court. Heard in the Court of Appeals 4 April 2018.

J. Elliott Field for plaintiff-appellant.

Sumrell, Sugg, Carmichael, Hicks and Hart, P.A., by Scott C. Hart, for defendant-appellee.

ZACHARY, Judge.

Jessie McClease ("plaintiff") appeals from an order granting Dover Volunteer Fire Department's ("defendant" or "Dover VFD") motion for summary judgment on plaintiff's claims for negligence and negligent infliction of emotional distress. On appeal, plaintiff argues that the trial court erred by granting summary judgment in favor of defendant because genuine issues of material fact existed as to whether defendant was

negligent in that defendant: (1) failed to respond to the structure fire in a timely manner, and (2) failed to maintain or otherwise ensure that the North Oak Street fire hydrant was working properly. After careful review, we affirm the trial court's order.

Background

Plaintiff is a former resident of the Town of Dover, which is located in Craven County, North Carolina. In 1983, plaintiff and her husband purchased a residence on North Oak Street in Dover, where they lived until the residence was destroyed by a fire on 3 August 2013. Defendant is a non-profit corporation established under Chapter 55A of the North Carolina General Statutes that "provides fire suppression services to a six square mile area within Craven County." Plaintiff's residence was located within defendant's fire district.

On 14 October 2015, plaintiff filed a verified complaint in which she asserted claims for negligence and negligent infliction of emotional distress against defendant and the Town of Dover arising from a structure fire on 3 August 2013 that resulted in the destruction of plaintiff's residence. Plaintiff specifically alleged that defendant was negligent in that defendant (1) failed to respond to the structure fire in a timely manner, and (2) failed to maintain or otherwise ensure that the North Oak Street fire hydrant near her home was working properly.

In support of her claims, plaintiff submitted three affidavits. In the first affidavit, plaintiff's niece, Monica Garris, asserts that when she arrived at plaintiff's residence on 3 August 2013, (1) plaintiff's house "was already burned-down to the ground"; (2) "[t]he fire was out and the house was gone"; (3) "the Dover [] VFD was not there"; (4) "Dover VFD came after I arrived"; and (5) "[w]hen Dover VFD got there, they were asking the other fire departments . . . what happened." In the second affidavit, plaintiff's former son-in-law, James Mock, asserts that when he arrived at plaintiff's residence on 3 August 2013, (1) "[t]he house was engulfed in flames"; and (2) "I did not see the Dover VFD at the scene." In the third affidavit, Burt Staton, a former volunteer for defendant, asserts that (1) he heard a fire alarm for fire assistance on Oak Street and drove toward defendant's fire station; (2) there was no response from defendant for assistance after dispatch; (3) when he arrived at the scene, he saw Cove City Volunteer Fire Department had arrived; (4) Cove City Volunteer Fire Department could not use the fire hydrant in front of plaintiff's house so they hooked up a fire hydrant approximately 20 feet away; and (5) Dover VFD finally arrived and was followed by the Jones County Volunteer Fire Department, Fort Barnwell Volunteer

Fire Department, and Township 9 Volunteer Fire Department. Staton asserted that he stayed at the scene for approximately thirty minutes.

The affidavits submitted by defendant and the parties' pleadings allege the following additional facts: Craven County's Communications Center is responsible for receiving all emergency 9-1-1 calls within the county and for dispatching the appropriate response units. If a dispatch remains unanswered for two minutes, the dispatcher will contact additional response units. The dispatch keeps an electronic "Detail Call For Services Report" ("Report") of the total communications made to and from all responding emergency personnel.

When a structure fire is reported, Craven County has an automatic aid policy pursuant to which more than one fire department is automatically dispatched. When a structure fire is reported within defendant's fire district, the Cove City Volunteer Fire Department and the Fort Barnwell Volunteer Fire Department are also dispatched. Because defendant operates with an entirely volunteer staff, there is no internal policy requiring staffing of the station house where defendant's apparatuses are stored. However, each volunteer is issued a pager by which the volunteer is notified when an emergency call is received from within defendant's fire district. Additionally, defendant's leadership, including the Fire Chief, Assistant Chief, and Captains, keep VHF radios in their personal vehicles with which they respond to the Communications Center whenever a call is received. A response from defendant's leadership via VHF radio is transmitted to the other volunteers' pagers to inform them that an emergency call has been received and that defendant is responding.

Upon confirmation that defendant is responding to an emergency, its volunteers may proceed either to defendant's fire station or directly to the location of the emergency, whichever is closer to their location at the time. As defendant's volunteers could be spread throughout the county upon dispatch, many of its volunteers keep their "turnout-gear" in their personal vehicles rather than at the fire house to put on at the scene of the fire.

On 3 August 2013, plaintiff's husband, Mr. McClease, was mowing grass in the yard when he observed smoke coming from the attic of plaintiff's residence and realized that the residence was on fire. He immediately asked the neighbor to call 9-1-1. At 3:07 p.m., the Communications Center received an emergency call from plaintiff's neighbor reporting that plaintiff's residence was on fire. At 3:08 p.m., the Communications Center placed a dispatch call to defendant. Pursuant to the automatic aid agreement, the Cove City Volunteer Fire Department

and the Fort Barnwell Volunteer Fire Department were dispatched at that time as well.

Assistant Chief Eric Pitts and his brother, Captain Ethan Pitts, were at their parents' house when the dispatch came through. They proceeded directly to plaintiff's residence, arriving at 3:11 p.m. according to the Communications Center Report. Defendant's Captain Tyler Whitney was already at the scene performing a "size-up" to determine the appropriate course of action. Capt. Pitts remained at the scene with Capt. Whitney, while Asst. Chief Pitts proceeded to defendant's fire station to get a pumper truck.

Asst. Chief Pitts returned with the pumper truck at 3:21 p.m., and defendant's volunteers hooked up the apparatus to a fire hydrant on Johnson Street, approximately 500 feet from plaintiff's residence. Defendant had notified the Town of Dover that the hydrant across from plaintiff's residence was inoperable approximately a month prior to the fire. However, according to Asst. Chief Pitts, even if the McClease hydrant had been operable, "[i]t was safer and more efficient to simply pull water from the Johnson Street hydrant" because "[c]onnecting either apparatus to the McClease fire hydrant would [have] require[d] a hose to be run around the apparatus thereby creating a trip hazard and limiting the mobility of both apparatus at the scene."

Defendant filed its motion for summary judgment on 12 May 2017, which the trial court granted on 2 June 2017. Plaintiff gave timely notice of appeal.

Standard of Review

This Court reviews a trial court's order granting or denying summary judgment *de novo*. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). "Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist." *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (citing *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979)).

The burden of proof governing motions for summary judgment is well established. Initially, the movant "bears the burden of establishing that there is no triable issue of material fact." *DeWitt v. Eveready Battery*

Co., 355 N.C. 672, 681, 565 S.E.2d 140, 146 (2002) (citing *Nicholson v. American Safety Util. Corp.*, 346 N.C. 767, 774, 488 S.E.2d 240, 244 (1997)). The movant may meet this burden " 'by proving that an essential element of the opposing party's claim is non-existent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim . . . .' " *Id.* (quoting *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989)). " '[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial.' " *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 448, 579 S.E.2d 505, 507 (2003) (quoting *Gaunt v. Pittaway*, 139 N.C. App. 778, 784-85, 534 S.E.2d 660, 664 (2000), *cert. denied*, 353 N.C. 371, 547 S.E.2d 810 (2001)).

"Summary judgment is seldom appropriate in a negligence action. A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim." *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861 (2005) (citing *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79 (2002)). Nonetheless,"[a] '[p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.' " *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

Discussion

I. Negligence Claim

[1] Plaintiff argues that the trial court erred by granting summary judgment for defendant on plaintiff's claim for negligence because there existed genuine issues of material fact. After careful review, we conclude that plaintiff failed to produce evidence of genuine issues for trial on the issue of negligence.

It is well established that in order to establish a *prima facie* case of negligence against the defendant, the plaintiff must demonstrate that "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury." *Wallen*, 173 N.C. App. at 411, 618 S.E.2d at 861

(quoting *Vares v. Vares*, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576-77 (2003)).

In the present case, plaintiff alleged that defendant was negligent in that defendant (1) failed to respond to the structure fire in a timely manner, and (2) failed to maintain or otherwise ensure that the North Oak Street fire hydrant was working properly. However, plaintiff failed to produce evidence of each element of these claims.

There was no evidence before the trial court that defendant failed to respond in a timely manner. The record established that defendant responded within three minutes of the dispatch and was the primary unit at the scene of the fire. This is a reasonable response time and does not amount to a breach of the duty of reasonable care. Moreover, the affidavits submitted by plaintiff do not support her claim that defendant did not respond in a timely manner. Garris was not at the scene until after the fire was extinguished, and Mock merely asserts that he "did not see [defendant]" at the scene, which does not establish that defendant was not present. Staton's affidavit states that defendant arrived shortly after Cove City Volunteer Fire Department; defendant's apparatus did arrive after a Cove City Rescue Squad's ambulance, but this does not establish that none of defendant's volunteers were on scene and responding to the fire.

In addition, there was no evidence before the trial court that defendant acted in a negligent manner with regard to the fire hydrant in front of plaintiff's residence. Plaintiff failed to put forth any evidence that defendant had a duty to maintain the fire hydrant. The evidence showed that it was the duty of the Town of Dover to maintain the fire hydrant, not that of defendant. Moreover, plaintiff produced no evidence that the inoperability of the fire hydrant was the proximate cause of plaintiff's damages. In fact, the evidence showed that defendant would not have used this fire hydrant, even if it had been operable at the time of the fire.

Plaintiff failed to meet her burden to set forth specific facts establishing every element of her negligence claim. Therefore, defendant was entitled to judgment as a matter of law.

II. Claim for Negligent Infliction of Severe Emotional Distress

[2] Plaintiff also argues that the trial court erred by granting summary judgment for defendant on plaintiff's claim for negligent infliction of emotional distress because there existed genuine issues of material fact. We conclude that plaintiff failed to produce specific facts showing any genuine issues for trial on this claim as well.

A claim of negligent infliction of emotional distress requires proof of negligent conduct. *Pittman v. Hyatt Coin & Gun, Inc.*, 224 N.C. App. 326, 330, 735 S.E.2d 856, 858-59 (2012). Given that plaintiff failed to present evidence establishing a *prima facie* negligence claim, she cannot recover on this cause of action.

Furthermore, no evidence tends to show that plaintiff suffered *severe* emotional distress. Plaintiff attended one appointment with a counselor and never filled the prescription that the counselor provided. This does not establish a "severe and disabling emotional or mental condition," as such is defined under North Carolina law. *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 675-76, 748 S.E.2d 154, 159 (2013) (citation and quotation marks omitted).

Plaintiff failed to produce evidence to support a *prima facie* case of negligent infliction of emotional distress. Therefore, defendant was entitled to judgment as a matter of law.

III. Immunity

The issues of sovereign, governmental, and statutory immunity were raised in the parties' complaint and answer. However, neither party addresses these issues in their briefs submitted to this Court. Accordingly, we do not consider these issues on appeal.

Conclusion

For the reasons set forth above, the trial court's summary judgment order is

AFFIRMED.

Judges ELMORE and TYSON concur.

RUSSELL v. WOFFORD

[260 N.C. App. 88 (2018)]

VERONICA RUSSELL, PLAINTIFF
v.
DONALD WOFFORD, DEFENDANT

No. COA17-1191

Filed 19 June 2018

1. Firearms and Other Weapons—no contact order—firearms provision added sua sponte—no authority

The provisions of a no-contact order (not a domestic violence prevention order) regarding firearms were reversed. The district court does not have the authority under Chapter 50C of the North Carolina General Statutes sua sponte to order defendant to surrender his firearms, revoke his concealed carry permit, or order defendant not to purchase firearms during the period the order is in effect.

2. Stalking—no-contact order—findings—supporting evidence sufficient

A no-contact order was affirmed (except for provisions regarding firearms) where defendant argued that he did not commit the acts alleged but acknowledged that there was sufficient evidence to support the trial court's findings of fact and did not actually challenge the conclusions of law.

Appeal by defendant from order entered 2 June 2017 by Judge Jeffrey E. Noecker in District Court, New Hanover County. Heard in the Court of Appeals 7 March 2018.

No brief filed on behalf of plaintiff.

Sherman Law, P.C., by Scott G. Sherman, for defendant-appellant.

STROUD, Judge

Defendant appeals no-contact order under North Carolina General Statute Chapter 50C which ordered him to surrender his firearms. Because the trial court had no authority under North Carolina General Statute Chapter 50C to order defendant not to possess or purchase any firearms, to surrender his firearms, or to revoke his concealed carry permit, we reverse and remand the portion of the order with these provisions. We affirm the remaining portions of the order.

I. Background

On or about 23 May 2017, plaintiff filed COMPLAINT FOR NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT on form AOC-CV-520, Rev. 8/14 against defendant under North Carolina General Statute § 50C-2. Plaintiff alleged defendant grabbed her breasts without her consent, came to her house "making false accusations" and refused to leave, and had his erectile dysfunction medication delivered to her home. Plaintiff marked boxes on the form requesting an *ex parte* temporary order and a permanent no-contact order.[1] Plaintiff also marked all of the boxes 4 through 9 on the form which request that defendant be ordered not to visit her or interfere with her in various ways and to stay away from her children's schools. Plaintiff made no request in the blank areas under box 10 entitled "Other: (specify)[.]" Plaintiff also made no allegations regarding firearms or any threat of physical violence.

The trial court entered an *ex parte* TEMPORARY NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT, form AOC-CV-523, rev. 10/15, granting the relief as plaintiff requested and setting a hearing on the permanent no-contact order on 2 June 2017. On 2 June 2017, the trial court held the hearing on the permanent no-contact order; plaintiff and defendant were both present and defendant was represented by counsel. Plaintiff did not mention guns or make any request related to guns during her testimony. Defendant mentioned during his testimony he was a former FBI agent, retired police officer, and a veteran; he owned a firearm, and was "authorized to be armed in fifty states twenty-four seven." The trial court entered a NO-CONTACT ORDER FOR STALKING OR NONCONSENSUAL SEXUAL CONDUCT on form AOC-CV-524, Rev. 4/17 under North Carolina General Statute § 50C-7. The order included findings of fact regarding nonconsensual sexual conduct by defendant and concluded that defendant had "committed acts of unlawful conduct against the plaintiff."

In the decree portion of the order, the trial court checked boxes 1 through 6, ordering defendant not to commit various acts such as visiting or stalking the plaintiff. The trial court also checked box 7, entitled "Other: (specify)" and made a handwritten notation ordering:

> Defendant shall surrender to the NH Sheriff's office any and all firearms that he owns, to be held by NH Sheriff

1. Under North Carolina General Statute § 50C-8(b), "[a] permanent civil no-contact order shall be effective for a fixed period of time not to exceed one year[,]" but it can be extended under § 50C-8(c). N.C. Gen. Stat. § 50C-8 (2017).

> for the duration of this order. Defendant's concealed carry permit is revoked for the period of this order. Defendant is prevented from purchasing possessing any firearm for the term of this order.

Defendant filed a timely notice of appeal from the order.

II. Surrender of Firearms

[1] Defendant first contends that the trial court exceeded its authority as granted in North Carolina General Statute § 50C-7 by ordering him to surrender his firearms, not to purchase or possess any firearms, and revoking his concealed carry permit. The order was entered under North Carolina General Statute, Chapter 50C, and presents a question of statutory interpretation. "Questions of statutory interpretation are questions of law, which are reviewed *de novo* by an appellate court." *State v. Largent*, 197 N.C. App. 614, 617, 677 S.E.2d 514, 517 (2009) (citations and quotation marks omitted).

North Carolina General Statute § 50C-7 (2017) provides,

> Upon a finding that the victim has suffered an act of unlawful conduct committed by the respondent, a permanent civil no-contact order may issue if the court additionally finds that process was properly served on the respondent, the respondent has answered the complaint and notice of hearing was given, or the respondent is in default. No permanent civil no-contact order shall be issued without notice to the respondent. Hearings held to consider permanent relief pursuant to this section shall not be held via video conference.

Nothing in North Carolina General Statute Chapter 50C addresses surrender of firearms. North Carolina General Statute § 50C-5 sets forth a list of remedies for a civil no-contact order:

> (b) The court may grant one or more of the following forms of relief in its orders under this Chapter:
>
> (1) Order the respondent not to visit, assault, molest, or otherwise interfere with the victim.
>
> (2) Order the respondent to cease stalking the victim, including at the victim's workplace.
>
> (3) Order the respondent to cease harassment of the victim.

> (4) Order the respondent not to abuse or injure the victim.
>
> (5) Order the respondent not to contact the victim by telephone, written communication, or electronic means.
>
> (6) Order the respondent to refrain from entering or remaining present at the victim's residence, school, place of employment, or other specified places at times when the victim is present.
>
> (7) Order other relief deemed necessary and appropriate by the court, including assessing attorneys' fees to either party.

N.C. Gen. Stat. § 50C-5 (2017). North Carolina General Statute § 50C-11 further provides that "[t]he remedies provided by this Chapter are not exclusive but are additional to other remedies provided under law." N.C. Gen. Stat. § 50C-11 (2017).

This case presents the question of what "other relief" or "additional" remedies the trial court has statutory authority to order, and in particular, whether the court may order surrender of firearms. N.C. Gen. Stat. §§ 50C-5; -11. Because Chapter 50B is a similar statutory scheme which addresses orders issued to protect against acts of domestic violence ("DVPO") arising in a "personal relationship" it is useful to compare the language of the two Chapters and consider the types of relief allowed under Chapter 50B to determine whether surrender of firearms is also a proper remedy under Chapter 50C.[2] *Compare generally* N.C. Gen. Stat. Chap. 50B, 50C (2017). Chapter 50C addresses those situations not covered by Chapter 50B, where the parties are not in a "personal relationship." *See Tyll v. Willets*, 229 N.C. App. 155, 159, 748 S.E.2d 329, 331 (2013) ("North Carolina General Statute § 50C–1 incorporates the definitions of 'personal relationship' from North Carolina General Statute

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2. Chapter 50B addresses parties in a "personal relationship" which is defined as "(1) [a]re current or former spouses; (2) Are persons of opposite sex who live together or have lived together; (3) Are related as parents and children, including others acting in loco parentis to a minor child, or as grandparents and grandchildren. For purposes of this subdivision, an aggrieved party may not obtain an order of protection against a child or grandchild under the age of 16; (4) Have a child in common; (5) Are current or former household members; (6) Are persons of the opposite sex who are in a dating relationship or have been in a dating relationship. For purposes of this subdivision, a dating relationship is one wherein the parties are romantically involved over time and on a continuous basis during the course of the relationship. A casual acquaintance or ordinary fraternization between persons in a business or social context is not a dating relationship." N.C. Gen. Stat. 50B-1(b) (2017).

Chapter 50B and excludes them from the category of relationships upon which a Chapter 50C no-contact order can be premised. *See* N.C. Gen. Stat. § 50C–1(8). In doing so, Chapter 50C provides a method of obtaining a no-contact order against another person when the relationship is not romantic, sexual, or familial. *See* N.C. Gen. Stat. §§ 50B–1(b), 50C–1(8).").

North Carolina General Statute § 50B-3(a) sets forth similar types of relief as § 50C-5. *Compare* N.C. Gen. Stat. §§ 50B-3; 50C-5 (2017). North Carolina General Statutes 50B-3 and 50C-5 are not identical, since Chapter 50B includes provisions needed to address possession of a residence, child custody and support, and property issues common between those in a "personal relationship[.]" *Compare* N.C. Gen. Stat. §§ 50B-3; 50C-5; *see generally* N.C. Gen. Stat. 50B-1. North Carolina § 50B-3(a)(13) is a "catch-all" provision which allows the trial court to "[i]nclude any additional prohibitions or requirements the court deems necessary to protect any party or any minor child." N.C. Gen. Stat. § 50B-3(a)(13) (emphasis added). Our Supreme Court has interpreted the "catch-all" provision of § 50B-3(a)(13) and held that the word "any" does not give the trial court unlimited power to order additional relief. *See State v. Elder*, 368 N.C. 70, 773 S.E.2d 51 (2015).

Notably, in comparing Chapters 50B and 50C, Chapter 50C does not mention firearms, while North Carolina General Statute § 50B-3.1, entitled, "Surrender and disposal of firearms; violations; exemptions[,]" sets forth detailed requirements for any DVPO which orders surrender of firearms. *See* N.C. Gen. Stat. § 50B-3.1 (2017). The trial court must make specific findings of fact in the DVPO to justify ordering the surrender of firearms. *See id.* The statute also sets forth the procedure for returning weapons to their owner and disposal of firearms not returned. *See id.* Here, neither the complaint nor the *ex parte* no-contact order mentioned firearms – nor does Chapter 50C – so defendant had no notice of the possibility of an order requiring surrender. Since the trial court imposed this provision after the hearing, *sua sponte*, neither party had an opportunity to address it at the hearing or to object.

In *State v. Elder*, the trial court granted a DVPO which, in addition to the relief enumerated by § 50B-3 provided

> that any Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found. Notably, the court made no findings or conclusions that probable cause existed to search defendant's property or that defendant even owned or possessed a weapon.

Id. at 71, 773 S.E.2d at 52 (quotation marks and brackets omitted). Upon conducting the search directed by the DVPO, law enforcement officers discovered a marijuana growing operation in the defendant's home, leading to criminal charges. *See id.* In his criminal case, our Supreme Court held that the trial court should have allowed the defendant's motion to suppress the evidence obtained from their search of his home under the DVPO because the district court did not have authority to order a search of a home without probable cause or a search warrant:

> Our General Assembly enacted the Domestic Violence Act, N.C.G.S. Chapter 50B, to respond to the serious and invisible problem of domestic violence. Subsection 50B–3(a) states that if a court finds a defendant committed an act of domestic violence, the court must grant a DVPO restraining the defendant from further acts of domestic violence. The statute then lists thirteen types of relief that the court may order in a DVPO. The first twelve are specific prohibitions or requirements imposed on a party to the DVPO. The last type of relief is a catch-all provision that authorizes the court to order any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.
>
> We disagree with the State's contention that the General Assembly intended a broad interpretation of the word "any." The plain language of section 50B–3 does not authorize courts to order law enforcement to search a defendant's person, vehicle, or residence under a DVPO. The word "any" in the catch-all provision modifies "additional prohibitions or requirements," N.C.G.S. § 50B–3(a)(13), and this provision follows a list of twelve other prohibitions or requirements that the judge may impose on a party to a DVPO. For example, the court may prohibit a party from harassing the other party or from purchasing a firearm, and it may require a party to provide housing for his or her spouse and children, to pay spousal and child support, or to complete an abuser treatment program. It follows, then, that the catch-all provision limits the court to ordering a party to act or refrain from acting; the provision does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence.

> Not only is this interpretation demanded by the plain language of the statute, but it is consistent with the protections provided by the Federal and State Constitutions. The Federal and State Constitutions protect fundamental rights by limiting the power of the government. Yet under the State's broad interpretation here, district courts would have seemingly unfettered discretion to order a broad range of remedies in a DVPO so long as the judge believes they are necessary for the protection of any party or child. This interpretation contravenes the Fourth Amendment to the United States Constitution and Article I, Section 20 of the North Carolina Constitution.

Id. at 72–73, 773 S.E.2d at 53 (citations and quotation marks omitted).

Although the particular issue in *Elder* is different, the same sort of analysis applies here. *See generally Elder*, 368 N.C. 70, 773 S.E.2d 51. Furthermore, the list of relief in North Carolina General Statute Chapter 50C is even more limited than the list of remedies in Chapter 50B; *compare* N.C. Gen. Stat. Chap. 50B; 50C, all of the remedies in § 50C-5 are "ordering a party to act or refrain from acting" in relationship to, in this case, plaintiff. *Elder*, 368 N.C. at 72–73, 773 S.E.2d at 53; *see* N.C. Gen. Stat. § 50C-5. If we were to interpret Chapter 50C to allow the district court to order, *sua sponte*, surrender of firearms, revocation of a concealed carry permit, and forbidding the purchase or possession of firearms, even with no evidence of threatened use of a firearm or any threat of physical harm, this interpretation would allow far broader relief than North Carolina General Statute Chapter 50B does, with no notice to a defendant that he may be required to surrender or not possess firearms. *See generally Elder*, 368 N.C. at 72–73, 773 S.E.2d at 53; N.C. Gen. Stat. Chap. 50B. Even if this order had been entered under Chapter 50B, the order requiring surrender of firearms would have been in error because there was no evidence to support the required findings of fact under North Carolina General Statute § 50B-3.1. *See* N.C. Gen. Stat. § 50B-3.1. District Courts do not have "unfettered discretion to order a broad range of remedies" in a Chapter 50B protective order "so long as the judge believes they are necessary for the protection of any party or child" nor do they have "unfettered discretion" under Chapter 50C to order any relief the judge believes necessary to protect a victim. *Elder*, 368 N.C. at 73, 773 S.E.2d at 52. We understand that the motivation of the trial court was simply to protect plaintiff, but the district court does not have authority under Chapter 50C *sua sponte* to order defendant to

surrender his firearms, revoke his concealed carry permit, or to order him not to purchase or possess any firearms during the period of the no-contact order. We reverse these provisions of the no-contact order.

III. No-Contact Order

[2] Defendant also argues that the trial court should not have entered a no-contact order because he did not commit the acts plaintiff alleged and testified about at the hearing. But defendant's brief acknowledges there was sufficient evidence to support the trial court's findings of fact: "Although the Defendant disagrees with the Court's actual finding, the Defendant concedes that the Court had the right and opportunity to view the evidence in the way the Court did and that the evidence, so construed, may uphold an Order for Non-Consensual Sexual Conduct." Defendant does not actually challenge either the findings of fact or the conclusions of law in the no-contact order, so we affirm the order except as to the provisions regarding firearms discussed above.

IV. Conclusion

The district court exceeded its authority under North Carolina General Statute Chapter 50C by ordering defendant to surrender his firearms, revoking his concealed carry permit, and ordering him not to purchase or possess firearms during the period of the no-contact order. We reverse the provisions of the order addressing firearms. We remand to the trial court to determine if any additional order is needed to direct the New Hanover Sheriff's Office to return defendant's firearms, and if so, to enter such an order. We affirm the remainder of the order.

AFFIRMED in part; REVERSED and REMANDED in part.

Judges DAVIS and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
BRANDON MARQUIS COZART, DEFENDANT

No. COA17-535

Filed 19 June 2018

1. Satellite-Based Monitoring—no written notice of appeal at trial—writ of certiorari denied

Defendant's petition for certiorari from the imposition of lifetime satellite-based monitoring (SBM) was denied where defendant gave only an oral notice of appeal and no written notice appeal was served on the parties. Since SBM is a civil proceeding, the requirements of Appellate Rule 3 must be met to confer appellate jurisdiction, including a written notice of appeal.

2. Appeal and Error—Rules of Appellate Procedure—motion to suspend

Defendant's motion to suspend the Appellate Rules of Procedure to reach the merits of his satellite-based monitoring (SBM) sentence was denied where he did not argue how his failure to object to the imposition of lifetime SBM resulted in fundamental error or manifest injustice.

3. Constitutional Law—right to counsel—substitution of appointed counsel

The trial court did not abuse its discretion by denying defendant's motion to discharge appointed counsel where the trial court allowed defendant the opportunity to explain his desire to discharge his appointed counsel, inquired into defendant's competence before ruling, and treated the motion as one for a continuance and to substitute counsel.

4. Constitutional Law—effective assistance of counsel—pre-trial plea bargaining

Defendant's argument that he received inadequate representation was dismissed where the record was not sufficient to determine whether trial counsel was ineffective.

Judge ZACHARY concurring.

Appeal by defendant from an order entered 8 September 2016 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 2 November 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Sherri H. Lawrence, for the State.

Paul F. Herzog for defendant-appellant.

BERGER, Judge.

On September 8, 2016, a Wake County jury found Brandon Marquis Cozart ("Defendant") guilty of three counts of statutory rape and two counts of indecent liberties with a child. Defendant appeals, contending the trial court failed to conduct a *Grady* hearing prior to imposing lifetime satellite-based monitoring ("SBM"), failed to substitute court appointed counsel upon his request, and he received ineffective assistance of counsel ("IAC"). We hold that Defendant failed to properly appeal the imposition of SBM. Further, we deny his petition for writ of certiorari, find no error regarding the trial court's inquiry concerning discharge of counsel, and dismiss his IAC claim without prejudice.

Factual and Procedural Background

In 2014, Defendant, along with his fiancée and infant son, moved into the home of his friend, Montrail Alexander ("Alexander"). Fourteen year old Mary[1] lived across the street with her mother, siblings, and grandparents. Mary would frequently visit Alexander's house for sleepovers and family events because Mary's mother was close friends with Alexander. Mary regarded Alexander as a "big brother," and had been visiting him for seven or eight years.

Mary met Defendant at Alexander's house for the first time in February 2014. Mary and her siblings would visit Alexander's house three to four times a week, and sleep over every other weekend. Defendant made remarks to Mary and her younger sister about their appearance that made them uncomfortable, and, as a result, their visits to Alexander's house became less frequent.

Mary testified that in March or mid-April of 2014, she decided to spend the night at Alexander's house with her two younger sisters and two step-brothers, despite feeling uneasy. That night, Alexander's

1. Pseudonyms are used throughout to protect the juveniles' identities and for ease of reading pursuant to N.C.R. App. P. 3.1(b).

family slept in their own bedroom, Defendant slept in his bedroom with his family, and the children all slept in the living room, with Mary on the couch. Mary heard Defendant go to the bathroom, and when he came out, he approached her, put his hand over her mouth, and told her to be quiet. Defendant forcibly undressed Mary and made her have unprotected vaginal intercourse with him. Mary testified there was blood in her underwear and she did not know what to do because she was scared. Mary returned to her home the next morning and did not tell anyone what happened.

A few weeks later, Mary went over to Alexander's house again to see his newborn baby. Defendant was the only adult in the house. After she entered, Defendant forced Mary against the living room couch while she said "no" repeatedly. Defendant then made Mary go into the hallway where he forcibly removed her pants and underwear and engaged in sexual intercourse with her. Defendant stopped after Mary told him her stomach was hurting. When Alexander's girlfriend came home, Mary left. After this incident, Mary was bleeding heavily and had semen in her vagina. Mary did not tell her mother about the specific encounters because she was afraid her family would not believe her.

Defendant moved out of Alexander's house in June 2014, and Mary had no further sexual encounters with him. In late June, Mary found out that she was pregnant after taking two pregnancy tests, and messaged Defendant on Facebook regarding the pregnancy.

After reporting the incident to law enforcement, the Garner Police Department started an investigation. Investigators obtained DNA samples from Mary, Defendant, and Mary's child who was born in January 2015. DNA analysis showed there was a 99.9999 percent probability that Defendant was the father of Mary's child. On September 30, 2014, the Garner Police Department arrested Defendant for two counts of felony statutory rape of a person thirteen, fourteen, or fifteen years old.

On September 25, 2014, prior to Defendant's arrest, Chelsea, a fifteen-year-old runaway, met Defendant on the street at Moore Square in downtown Raleigh. Defendant approached Chelsea and initiated a conversation. Defendant told her about his son's birthday party at a local hotel. Chelsea went with Defendant to the hotel, thinking that it would be a birthday party. Defendant initiated a sexual encounter with Chelsea. Chelsea testified that she did not want Defendant to have sex with her, but eventually acquiesced. Defendant had sexual intercourse with Chelsea twice at his insistence in the hotel room.

After the encounter, Chelsea left the hotel and did not talk about the incident until she spoke with Detective William Tripp with the Raleigh Police Department on September 26, 2014. Chelsea underwent a child medical exam at SAFEchild Advocacy Center in Raleigh based on a recommendation by Detective Tripp. Chelsea again identified Defendant as the man who had sexual intercourse with her in an interview at the center.

On September 30, 2014, Defendant was arrested for three counts of felony statutory rape of a person thirteen, fourteen, or fifteen years old, and two counts of indecent liberties with a child. On October 27 and 28, 2014, a Wake County Grand Jury indicted Defendant for five counts of statutory rape of a person thirteen, fourteen, or fifteen years old and three counts of taking indecent liberties with a child. The offenses were joined for trial.

At the close of the State's evidence at trial, one count of statutory rape was dismissed by the trial court for lack of evidence. The jury found Defendant guilty of three counts of statutory rape of a person thirteen, fourteen, or fifteen years old, and two counts of taking indecent liberties with a child. Defendant was sentenced to two consecutive active sentences of 300 to 420 months imprisonment. Upon his release, Defendant was ordered to register as a sex offender for life and enroll in lifetime SBM. Defendant gave oral notice of appeal.

Analysis

I. Satellite-Based Monitoring

[1] Defendant concedes that the oral notice of appeal was insufficient to confer jurisdiction to this Court to consider his SBM claim. On July 28, 2017, Defendant filed a petition for writ of certiorari pursuant to Rule 21 of the North Carolina Rules of Appellate Procedure regarding the imposition of SBM upon his release for the remainder of his natural life. *See* N.C.R. App. P. 21(c). Defendant requests that this Court grant a petition for writ of certiorari to hear his appeal on this issue, and then suspend the Appellate Rules under Rule 2 to reach the merits of his unpreserved constitutional argument. We deny Defendant's requests.

"Our Court has held that SBM hearings and proceedings are not criminal actions, but are instead a civil regulatory scheme." *State v. Brooks*, 204 N.C. App. 193, 194, 693 S.E.2d 204, 206 (2010) (citation, internal quotation marks, and brackets omitted). "In light of our decisions interpreting an SBM hearing as not being a criminal trial or proceeding for purposes of appeal, we must hold that oral notice pursuant to N.C.R.

App. P. 4(a)(1) is insufficient to confer jurisdiction on this Court. *Id.* at 194-95, 693 S.E.2d at 206. Here, Defendant gave oral notice of appeal in open court. Defendant concedes his oral notice of appeal was defective regarding this issue since SBM hearings are civil proceedings. Oral notice of appeal is insufficient in civil proceedings to confer jurisdiction to this Court under Rule 3 of the North Carolina Rules of Appellate Procedure.

Rule 3 provides that, for appeals from civil proceedings,

> Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by *filing notice of appeal with the clerk of superior court* and serving copies thereof upon all other parties within the time prescribed by subsection (c) of this rule.

N.C.R. App. P. 3(a) (emphasis added). "Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 (citation omitted), *appeal dismissed and disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990).

On September 8, 2016, Defendant gave oral notice of appeal in open court after being sentenced in the instant case. However, Defendant's appeal only concerns SBM, and not the underlying crime or conviction; therefore, it is wholly civil in nature, and compliance with Rule 3(a) is imperative. *Brooks*, 204 N.C. App. at 194, 693 S.E.2d at 206. No written notice of appeal was served upon the parties in this case.

"[W]rit of certiorari *may* be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ." N.C.R. App. P. 21(a)(1) (emphasis added). "If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017), *disc. review denied*, ___ N.C. ___, 811 S.E.2d 159 (2018). "[A]s with other constitutional arguments, a defendant's Fourth Amendment SBM challenge must be properly asserted at the hearing in order to preserve the issue for appeal." *State v. Grady* ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, COA17-12, 2018 WL 2206344, *3 (2018).

We recognize that in various prior cases, this Court has issued a writ of certiorari to hear SBM appeals. However, the cases relied upon

by Defendant were heard when "neither party had the benefit of this Court's analysis in [*State v.*] *Blue* and [*State v.*] *Morris*." *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 369 (citation and brackets omitted); *see State v. Blue*, ___ N.C. App. ___, ___, 783 S.E.2d 524, 526-27 (2016); *State v. Morris*, ___ N.C. App. ___, ___, 783 S.E.2d 528, 529-30 (2016). Defendant had full knowledge and notice of the proper procedure necessary to notice an appeal concerning SBM implementation in the instant case. Accordingly, we decline to grant certiorari.

[2] Defendant also requests we suspend the North Carolina Rules of Appellate Procedure to reach the merits of SBM implementation by the trial court because the trial court committed a "sentencing error" that was "so fundamental as to have resulted in a clear miscarriage of justice." Defendant relies on two cases, *State v. Dudley*, 319 N.C. 656, 356 S.E.2d 361 (1987) and *State v. Mulder*, 233 N.C. App. 82, 755 S.E.2d 98 (2014), to support his argument. However, both *Dudley* and *Mulder* concern double jeopardy appeals for a criminal trial, and are not relevant to our analysis.

Defendant has not properly argued on appeal how his failure to object to the imposition of lifetime SBM resulted in a fundamental error or manifest injustice. As in *Bishop*, because Defendant is

> 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.

Bishop, ___ N.C. App. at ___, 805 S.E.2d at 370. Therefore, we deny Defendant's petition for writ of certiorari to review the imposition of SBM on appeal.

II. Motion to Discharge Counsel in Criminal Trial

[3] Defendant contends the trial court erred in failing to appoint substitute trial counsel, and this failure resulted in Defendant suffering prejudicial error due to ineffective assistance of counsel. We disagree. This issue arises from a judgment from a superior court in a criminal action, and therefore is properly before this Court pursuant to Rule 4(a) of the North Carolina Rules of Appellate Procedure.

"Absent a showing of a sixth amendment violation, the decision of whether appointed counsel shall be replaced is a matter committed to the sound discretion of the trial court." *State v. Hutchins*, 303 N.C. 321,

336, 279 S.E.2d 788, 798 (1981) (citation omitted). The right to appointed counsel does not "include the privilege to insist that counsel be removed and replaced with other counsel merely because defendant becomes dissatisfied with his attorney's services." *State v. Sweezy*, 291 N.C. 366, 371, 230 S.E.2d 524, 528 (1976) (citations omitted).

Here, the trial court allowed Defendant the opportunity to explain why he wanted to discharge his appointed counsel. Defendant explained that his family was attempting to hire an attorney; that he was dissatisfied with the amount of contact and visitation that trial counsel had afforded him prior to going to trial; and he was dissatisfied with the content of one of the visits concerning the discussion of a plea agreement. Upon its own motion, the trial court inquired as to Defendant's competence, and deemed him competent to proceed before ruling on his motion. The trial court treated Defendant's request as both a motion to substitute counsel and a motion to continue, and denied both motions. There is no evidence in the record indicating the trial court abused its discretion in denying Defendant's motion to discharge appointed counsel, and we hold the trial court did not err.

[4] Defendant further asserts that his trial counsel provided ineffective assistance during pre-trial plea bargaining. "It is manifest that there are no hard and fast rules that can be employed to determine whether a defendant has been denied the effective assistance of counsel." *Hutchins*, 303 N.C. at 336, 279 S.E.2d at 798 (citations omitted). "Instead, each case must be examined on an individual basis so that the totality of its circumstances are considered." *Id.* (citations omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524, *reconsideration denied*, 354 N.C. 576, 558 S.E.2d 862 (2001), *cert. denied*, 535 U.S. 1114, 153 L. Ed. 2d 162 (2002). This Court "limits its review to material included in 'the record on appeal and the verbatim transcript of proceedings, if one is designated.' " *Id.* at 166, 557 S.E.2d at 525 (citing N.C.R. App. P. 9(a)).

In the case *sub judice*, the record is insufficient to determine whether trial counsel was ineffective. Therefore, we dismiss Defendant's IAC claim without prejudice. *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017).

Conclusion

Defendant did not properly file civil notice of appeal to this Court regarding the trial court's imposition of SBM, and, in our discretion, we deny his petition for writ of certiorari. The trial court did not err in its denial of Defendant's motion to substitute counsel in the criminal trial. There is insufficient evidence in the record on appeal to reach the merits of Defendant's IAC claim for the criminal trial, and we dismiss without prejudice.

NO ERROR IN PART AND DISMISSED IN PART.

Judge DAVIS concurs.

Judge ZACHARY concurs with separate opinion.

ZACHARY, Judge, concurring.

As Defendant did not object in the trial court to the constitutionality of his enrollment in satellite-based monitoring, in order to reach the merits of that argument this Court would be required—in addition to allowing certiorari—to take the extraordinary step of invoking Rule 2. The Majority declines to do so, and I concur. I write separately to convey my disquiet with this outcome.

In *State v. Bishop*, we noted that a petition for writ of certiorari " 'must show merit[.]' " *State v. Bishop*, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369 (2017) (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)). Given that the defendant's argument in *Bishop* concerning the constitutionality of the satellite-based monitoring order was "procedurally barred because he failed to raise it in the trial court," we declined to issue "a writ of certiorari to review [that] unpreserved argument on direct appeal." *Id.* at ___, 805 S.E.2d at 369, 370.

While the case at bar is in all relevant points similar to *Bishop*, whether to invoke Rule 2 in any particular case remains within the sound discretion of this Court. *State v. Hill*, ___ N.C. App. ___, ___, 785 S.E.2d 178, 182 (2016). Nevertheless, " 'inconsistent application' of Rule 2 . . . leads to injustice when some similarly situated litigants are permitted to benefit from it but others are not." *Bishop*, ___ N.C. App. at ___, 805 S.E.2d at 370 (quoting *State v. Hart*, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007)). I therefore concur in the Majority's decision not to invoke Rule 2 in the instant case.

I write separately to express my concern with the harshness of this result. A defendant is left with no recourse in the event that his counsel fails to object to the constitutionality of satellite-based monitoring before the trial court, which happens with some frequency. *E.g.*, *State v. Spinks*, ___ N.C. App. ___, 808 S.E.2d 350 (2017); *State v. Harding*, ___ N.C. App. ___, ___ S.E.2d ___, 2018 N.C. App. LEXIS 245. Moreover, where a defendant is denied appellate review based on an error of counsel, ordinarily the last avenue of relief is to file a motion for appropriate relief alleging ineffective assistance of counsel. However, where counsel's error pertains to satellite-based monitoring, an ineffective assistance of counsel claim is not available to the defendant. *State v. Wagoner*, 199 N.C. App. 321, 332, 683 S.E.2d 391, 400 (2009) ("[A] claim for ineffective assistance of counsel is available only in criminal matters, and we have already concluded that [satellite-based monitoring] is not a criminal punishment."). I regret the application of our Appellate Rules in such a manner that a defendant is deprived of any relief from a potentially unconstitutional order, particularly in light of this Court's recent holding in *State v. Grady*, 2018 N.C. App. LEXIS 460.

STATE OF NORTH CAROLINA
v.
EDWARD EARL JONES, DEFENDANT

No. COA17-114

Filed 19 June 2018

1. Appeal and Error—direct appeal and motion for appropriate relief—resolution on direct appeal—MAR denied

Defendant's motion for appropriate relief from an assault conviction was denied where the issue could be resolved on direct appeal.

2. Constitutional Law—effective assistance of counsel—failure to raise self-defense—obvious claim

Defendant received effective assistance of counsel in an assault prosecution even though he contended that his trial counsel failed to present self-defense. Defense counsel stipulated to the State's introduction of defendant's interview with the police in which he asserted self-defense, defendant did not argue that there was additional evidence beyond that evidence, and the issue of self-defense

was obvious. This was a bench trial, and there was no evidence that the trial judge did not consider self-defense.

Appeal by defendant from judgment entered on or about 1 August 2016 by Judge Ola M. Lewis in Superior Court, Brunswick County. Heard in the Court of Appeals 23 August 2017.

Attorney General Joshua H Stein, by Assistant Attorney General Jeremy D. Lindsley, for the State.

New Hanover County Public Defender Jennifer Harjo, by Assistant Public Defender Brendan O'Donnell, for defendant.

STROUD, Judge.

Defendant Edward Earl Jones ("defendant") appeals from his conviction of assault with a deadly weapon with intent to kill inflicting serious injury. On appeal, defendant contends that he was denied his fundamental right to effective assistance of counsel and contends that his defense counsel failed to argue self-defense on his behalf. But the record indicates that counsel did stipulate to the State's admission of evidence of self-defense and argued self-defense in the closing argument. We therefore hold that defendant did not receive ineffective assistance of counsel and find no error with the trial court's judgment.

Background

On 15 November 2015, Brunswick County 911 operators received three phone calls from a male, later identified as defendant, who stated that he had stabbed his wife, she was bleeding badly, and he had left their home in Southport, North Carolina. Defendant's wife, Mary,[1] also called 911 and reported that she had been stabbed in her chest and arm by her husband. Mary told the 911 operator that defendant had left their home and may be driving a black Chrysler 200 vehicle. An officer received a radio call describing the vehicle and realized that he had just passed a vehicle fitting that description, so he turned around and stopped the vehicle. Defendant, the driver of the vehicle, put his hands up and told the officer he was on his way to the Brunswick County Sheriff's Office to turn himself in after stabbing his wife during an argument that morning.

1. We use a pseudonym to protect the identity of the victim.

Defendant was arrested and charged with felony assault with a deadly weapon with intent to kill inflicting serious injury. He voluntarily submitted to an interview with police. Defendant explained his version of events during that interview with police, stating that just prior to the incident, he received a call from his daughter claiming that Mary had just told her not bring her daughter -- defendant's granddaughter -- to the house that day for defendant to watch because he was going to be arrested. Defendant said that when he confronted Mary in the bedroom about the phone call, she threatened him and produced a kitchen knife, so he removed his pocketknife from his pocket and stabbed Mary at least once to get her to drop the knife.

Defendant was indicted on or about 7 December 2015. Defendant waived his right to a jury trial, and the matter proceeded to a bench trial on 28 and 29 July 2016 and concluded on 1 August 2016. Mary testified at defendant's trial that defendant entered the bedroom and said " 'Bitch, . . . I'm going to kill you. You turned against me for everybody else.' " He stabbed her with the kitchen knife, said " 'You're going to die[,]' " and then stabbed her again with his pocketknife. She could not remember the third stabbing, but afterward he stabbed her in the chest, she started hollering " 'I'm dying.' " The trial court found defendant guilty as charged and entered a judgment on or about 1 August 2016. Defendant timely filed notice of appeal to this Court.

Defendant's MAR

[1] Defendant contemporaneously filed a Motion for Appropriate Relief ("MAR") with his direct appeal. Defendant's MAR includes an attachment of an affidavit from his trial attorney. We would only consider granting defendant's MAR if we could not address his claims on the face of the record on direct appeal; and if that were the case, we would have to remand the matter to the trial court for an evidentiary hearing. *See, e.g.*, *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524-25 (2001) ("IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. This rule is consistent with the general principle that, on direct appeal, the reviewing court ordinarily limits its review to material included in the record on appeal and the verbatim transcript of proceedings, if one is designated." (Citations and quotation marks omitted)). Because we can resolve this issue on direct appeal, remanding for a hearing on defendant's MAR is unnecessary. We deny defendant's MAR.

Direct Appeal: IAC Claim

[2] Defendant's sole argument on appeal is that he was denied his fundamental right to effective assistance of counsel because his trial counsel "inexplicably" failed to present the defense of self-defense.

> To prevail on a claim of ineffective assistance of counsel, a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance prejudiced his defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and quotation marks omitted).

First, we note that we generally refrain from critiquing trial counsel's decision to pursue or not pursue a particular defense. *See State v. Prevatte*, 356 N.C. 178, 236, 570 S.E.2d 440, 472 (2002) ("Decisions concerning which defenses to pursue are matters of trial strategy and are not generally second-guessed by this Court."). Defendant notes that his counsel did not give pre-trial notice of his intention to present a defense of self-defense as required in certain circumstances under N.C. Gen. Stat. § 15A-905(c) (2017), and that he failed to "mention self-defense in his opening statement, failed to ask the court at the close of evidence to consider self-defense, and failed to argue in his closing that [defendant] was entitled to acquittal based on self-defense."

The sanction for failure to give notice of a defense of self-defense is normally exclusion of evidence upon the State's objection or refusal to give a jury instruction on self-defense. *See State v. Pender*, 218 N.C. App. 233, 243, 720 S.E.2d 836, 842 (2012) ("If at any time during the course of the proceedings the court determines that a party has failed to comply with [N.C. Gen. Stat. § 15A-905(c)(1)] or with an order issued pursuant to this Article, the court in addition to exercising its contempt powers may prohibit the party from introducing evidence not disclosed. Which of the several remedies available under G.S. 15A-910(a) should be applied in a particular case is a matter within the trial court's sound discretion." (Citations, quotation marks, brackets, and ellipses omitted)). But at trial, the State did not object to presentation of evidence regarding

self-defense. As noted by the State, defendant's counsel stipulated to the State's introduction of evidence of portions of defendant's interview with the police which presented his assertion of self-defense. The facts summarized above regarding defendant's explanation of the stabbing are based upon that evidence. Defendant does not argue or allege that there is additional evidence of self-defense that he would have presented at trial or that he was prevented from presenting any evidence supporting his defense; his argument as to the evidence of self-defense is based entirely upon his police interview, the physical evidence, and cross-examination testimony of the State's witnesses.

In the evidence presented at trial, the issue of self-defense was obvious. Defendant called and admitted to 911 operators he had stabbed his wife, but emphasized in his interview with police he did so only because she was coming at him wielding a knife. The recording of defendant's interview with police was entered into evidence, with both defendant and the State agreeing on which portions to include. During the police interview, defendant claimed that his wife had a kitchen knife first and that he only pulled out his pocket knife to defend himself and get her to drop her knife. Defense counsel did extensive cross-examination seeking to support the defendant's claim that Mary was the first person to produce a knife. The opening and closing arguments to the court by both the State and defendant were very brief, which is not unusual in a bench trial. But defendant's counsel did refer to self-defense in his closing argument:

> He did stab her. He testified in his interview when they're tussling over the knife, he popped her in the arm with his -- he reached in with his pocketknife, popped her in the arm to -- to get her to release. So, yeah, in that sense, he did stab her; in self-defense to extricate himself from a situation where they're fighting over a -- a big nasty knife.

Because defendant waived his right to a trial by jury, the matter proceeded to a bench trial, and the trial court, as factfinder, determined whether to convict defendant. Defendant argues that his counsel's failure to give notice of his defense of self-defense prior to trial somehow eliminated the trial court's ability or authority to consider this defense, but he cites no authority for this assertion. Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise. *See State v. Williams*, 274 N.C. 328, 333, 163 S.E.2d 353, 357 (1968) ("An appellate court is not required to, and should not,

assume error by the trial judge when none appears on the record before the appellate court."). We follow this presumption in many contexts. For example, in a jury trial, if the trial court allows the jury to hear inadmissible evidence, this may be reason for reversal and a new trial, if such errors were material and prejudicial. *See*, *e.g.*, *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983) ("Evidence without any tendency to prove a fact in issue is inadmissible, although the admission of such evidence is not reversible error unless it is of such a nature to mislead the jury. The defendant is not entitled to a new trial based on trial errors unless such errors were material and prejudicial." (Citations omitted)). But in a bench trial, we presume the trial court ignored any inadmissible evidence unless the defendant can show otherwise. *See State v. Jones*, __ N.C. App. __, __, 789 S.E.2d 651, 656 (2016) ("Because trial judges are presumed to ignore inadmissible evidence when they serve as the finder of fact in a bench trial, no prejudice exists simply by virtue of the fact that such evidence was made known to them absent a showing by the defendant of facts tending to rebut this presumption."). We presume the trial court has followed "basic rules of procedure" in bench trials. *Williams v. Illinois*, 567 U.S. 50, 69-70, 183 L. Ed. 2d 89, 106, 132 S. Ct. 2221, 2235 (2012) ("There is a well-established presumption that the judge has adhered to basic rules of procedure when the judge is acting as a factfinder." (Citation, quotation marks, brackets, and emphasis omitted)).

If this were a jury trial, and defense counsel had failed to request a jury instruction on self-defense, that could likely be ineffective assistance of counsel in this case, since we could not presume the jury knows the law of self-defense. *See*, *e.g.*, *State v. Davis*, 177 N.C. App. 98, 101, 627 S.E.2d 474, 477 (2006) ("It is prejudicial error to fail to include a possible verdict of not guilty by reason of self-defense in the final mandate to the jury. This error warrants a new trial." (Citations, quotation marks, brackets, and ellipses omitted)). Similarly, if this were a jury trial, and the State objected to evidence of self-defense and the trial court sustained this objection because defense counsel failed to give proper notice of this defense under N.C. Gen. Stat. § 15A-905(c), that might be ineffective assistance of counsel. But from the evidence and arguments at this trial, defendant's claim of self-defense was obvious, and defendant has not shown any indication the trial judge failed to consider that defense. After trial, the trial judge concluded -- without further comment -- that defendant was "guilty beyond a reasonable doubt." The trial judge made no statement regarding her reasoning or whether or not she considered the defense of self-defense. We do not make assumptions of error where none is shown. *See*, *e.g.*, *Lovett v. Stone*, 239 N.C. 206, 212,

79 S.E.2d 479, 483 (1954) ("Under the law of evidence, it is presumed unless the contrary appears that judicial acts and duties have been duly and regularly performed."). Defendant has offered no evidence that the trial court did not consider self-defense during its evaluation, so he has not shown a "reasonable probability" that the "result of the proceeding would have been different" if his counsel had given notice prior to trial of his intent to present a defense of self-defense. *Allen*, 360 N.C. at 316, 626 S.E.2d at 286 (citations and quotation marks omitted). We therefore conclude that defendant has not shown that his counsel's performance was deficient.

As this is the type of case where we can address an ineffective assistance of counsel claim on direct appeal -- because the cold record demonstrates that the trial court heard evidence supporting a defense of self-defense -- we hold that defendant received effective assistance of counsel.

Conclusion

We find no error with the trial court's judgment.

NO ERROR.

Judges ELMORE and TYSON concur.

STATE OF NORTH CAROLINA, Plaintiff
v.
NOE ONASIS ORELLANA, Defendant

No. COA17-1133

Filed 19 June 2018

1. Evidence—mother of child sexual assault victim—vouching for child's credibility—no plain error

There was no plain error in a prosecution for indecent liberties where the victim's mother testified that she believed her daughter was truthful in her accusations. Assuming that the testimony was improper, defendant did not demonstrate that the jury would probably have reached a different result absent the error.

2. Evidence—instantaneous conclusion of fact—detective's interview with minor

There was no error in an indecent liberties prosecution where a detective testified about his observations of the victim's demeanor when he was interviewing her. Rather than constituting an opinion about the victim's credibility, the detective's testimony contained the type of instantaneous conclusion admissible as a shorthand statement of fact.

3. Evidence—indecent liberties—expert witness—opinion testimony

A certified Sexual Assault Nurse Examiner did not vouch for the victim's credibility in an indecent liberties prosecution where she testified that a finding of erythema, or redness, was consistent with touching, but could also be consistent with "a multitude of things."

4. Jury—questions—answers not given in courtroom

While the trial court erred in an indecent liberties prosecution by not conducting the jury into the courtroom to answer questions, there was no showing that defendant was prejudiced or that there was a constitutional violation. The bailiff brought notes containing questions into the courtroom to the judge and delivered the judge's written responses to the jury; the judge did not interact with or provide instructions to less than a full jury panel. The trial court could not allow the jury to review police reports that were not in evidence and there was no showing of prejudice from a failure to delay deliberations while a trial transcript was produced.

Appeal by defendant from judgment entered 16 June 2017 by Judge John O. Craig, III in Guilford County Superior Court. Heard in the Court of Appeals 18 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Narcisa Woods, for the State.

Meghan Adelle Jones for defendant-appellant.

ZACHARY, Judge.

Defendant appeals from the judgment entered upon his conviction of taking indecent liberties with the minor victim, V.R.[1] On appeal,

1. To protect her privacy, in this opinion we refer to the alleged victim by her initials.

defendant argues that the trial court erred by allowing witnesses to vouch for V.R.'s credibility and by failing to receive and address jury questions in the courtroom before the entire jury panel. We find no error.

Background

On 8 September 2014, the Guilford County Grand Jury indicted defendant for one count of taking indecent liberties with a minor. This matter came on for trial at the 13 July 2017 criminal session of Guilford County Superior Court, the Honorable John O. Craig, III presiding. At trial, the State presented evidence tending to establish the following facts:

On 21 March 2014, V.R., her mother Ms. Isaacs, and V.R.'s younger sibling drove from their home in Beaufort, North Carolina to Greensboro, North Carolina to the home of defendant and V.R.'s maternal grandmother, Mrs. R. They arrived at the home of Mrs. R. and defendant around 3:00 a.m. Upon their arrival, Mrs. R. was still awake and defendant was in their bedroom. V.R. asked Mrs. R. if she could sleep with her, and Mrs. R. agreed. When V.R. went to the bedroom to greet defendant, he asked her for a hug. V.R., who was fully dressed, climbed in the bed and hugged defendant. During the hug, V.R. testified that defendant started "patting [her] bottom, calling [her] his little princess," and then defendant touched the "inside of [her] privates" with his fingers. As defendant was touching V.R.'s privates, he asked her if she "liked it" and she responded, "no, I don't" and "jumped out of bed."

V.R. went to the kitchen and told her grandmother what had happened. Mrs. R. confronted defendant immediately and he denied that he had touched V.R. in an inappropriate manner. Defendant then went to bed, and Mrs. R. slept between V.R. and defendant.

The next morning, Mrs. R. informed Ms. Isaacs that "V.R. . . . told [her] that [defendant] rubbed her bottom." Ms. Isaacs testified that she did not think Mrs. R. was telling her the entire story, so she asked V.R. about it when V.R. woke up. V.R. told her, "defendant touched me on my bottom and on my front . . . he went under my underwear. He touched me on my bottom and then went around to the front and touched me there." Ms. Isaacs took V.R. to the magistrate's office, and V.R. was then transported by ambulance to the hospital. At the hospital, V.R. was interviewed separately by Greensboro Police Officer NB Fisher and Greensboro Police Detective Fred Carter. Detective Carter testified that V.R. told him that defendant put "his hand under her panties and touch[ed] her buttock and her vagina, which she described as her privates, front and back."

Later that day, V.R. was examined and interviewed by Lechia Davis, a certified Sexual Assault Nurse Examiner (SANE). SANEs are registered nurses who specialize in forensic collection of evidence and the medical care of victims of sexual assault. Nurse Davis used a magnifying device called a colposcope to conduct an examination of V.R.'s external genitalia, and she noted erythema, or redness, in the inner aspect of V.R.'s labia. Nurse Davis testified as an expert witness that erythema could have been caused by touching, improper hygiene, infection, or "a multitude of things." She also opined, over defendant's objection, that erythema was consistent with touching, but that it could also be consistent with "other things, as well."

During jury deliberations, the jury submitted requests to the presiding judge. The bailiff brought notes from the jury into the courtroom to Judge Craig. The first note requested the police reports, and Judge Craig wrote, signed, and had the bailiff deliver a note to the jury which stated: "The police reports were not introduced into evidence[,] so we are unable to give them to you. Only marked and admitted exhibits are available for your review." Another note requested a transcript of the witnesses' testimonies. Judge Craig again wrote, signed, and had the bailiff deliver a note to the jury which stated: "Trial transcripts are not [produced] contemporaneous[ly] with the testimony and the Court reporter would have to work many hours to get them into readable form. Therefore, I regrettably deny your request, in my discretion, because it would cause a significant delay in your deliberations."

Discussion

On appeal, defendant contends that the trial court erred by allowing witnesses to vouch for V.R.'s credibility and by failing to receive and address jury questions in the courtroom before the jurors as a whole.

I. Witness Testimony

In the present case, defendant contends that the trial court erred in allowing three witnesses to improperly vouch for V.R.'s credibility: Ms. Isaacs, Detective Carter, and Nurse Davis. Defendant concedes that he did not object at trial to the testimony of Detective Carter or Ms. Isaacs. Accordingly, we review the admission of both Detective Carter's and Ms. Isaacs's testimony for plain error. *See*, *e.g.*, N.C.R. App. P. 10(a)(4) (2017). In order to establish plain error, "a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the

entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378) (other citation omitted).

Defendant objected at trial to the testimony of Nurse Davis. Accordingly, we review the trial court's admission of Nurse Davis's testimony for abuse of discretion. *See State v. Livengood*, 206 N.C. App. 746, 747, 698 S.E.2d 496, 498 (2010).

A. Ms. Isaacs's Testimony

[1] Defendant first contends that the trial court erred by allowing Ms. Isaacs to vouch for V.R.'s credibility, and that this constituted plain error. We disagree.

Under N.C. Gen. Stat. § 8C-1, Rule 701, lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2017). In the portion of Ms. Isaacs's testimony to which defendant assigns error, Ms. Isaacs states as follows:

> I knew that my daughter would tell me the truth because that's what I had instilled in her. So I was debating on whether to wake her up. I didn't want to traumatize her. I didn't want to scare her. I knew that when she would come to me at that moment when I asked her that she would tell me the truth.

In sum, Ms. Isaacs testified that she believed that her daughter was truthful in her accusations.

This Court confronted a similar issue in *State v. Dew*, 225 N.C. App. 750, 738 S.E.2d 215 (2013), *disc. review denied*, 366 N.C. 595, 743 S.E.2d 187 (2013). In *Dew*, the defendant appealed his conviction for taking indecent liberties with a minor and argued that the trial court had committed plain error in admitting the following testimony from the two victims' mother:

> They said just—they—I don't remember even which one of it was, but they said they had been messed with. And I said, what? They said, "We've been molested." And I said, "By who?" And they said, "Uncle John." And I just jumped up and down and screamed because I couldn't, you know, it was hard to believe. And I said, "No he didn't, no he

> didn't." And I mean, not telling them that he really didn't, but just—I couldn't believe that he'd done it. But I believe my girls and I looked at them and I—and I just remember hugging them and I said, oh God. You know what this means? And I said, you know, I'll do whatever I have to do to prosecute and they understood that.

Id. at 755, 738 S.E.2d at 219. We concluded as follows:

> When taken in context, Ms. M.'s statement that she believed her daughters was made in the course of a discussion of her emotional state at the time that Violet and Becky informed her that Defendant had sexually abused them. Assuming, without in any way deciding, that the admission of this portion of Ms. M.'s testimony was improper, Defendant has failed to show that, absent the error, the jury would have probably reached a different result. Simply put, in view of the relatively incidental nature of the challenged statement and the fact that most jurors are likely to assume that a mother will believe accusations of sexual abuse made by her own children, we cannot conclude that the challenged portion of Ms. M.'s testimony had any significant impact on the jury's decision to convict Defendant.

Id. at 755-56, 738 S.E.2d at 219 (citing *State v. Ramey*, 318 N.C. 457, 466, 349 S.E.2d 566, 572 (1986) (stating that "[i]t is unlikely that the jury gave great weight to the fact that a mother believed that her son was truthful")).

Assuming, *arguendo*, that the admission of this portion of Ms. Isaacs's testimony was improper in the present case, defendant has failed to demonstrate that the jury would have probably reached a different result absent the error, for the same reasons that this Court stated in *Dew*. *See Dew*, 225 N.C. App. at 756, 738 S.E.2d at 219. It is not likely that the jury's decision to convict defendant was significantly impacted by a mother's statement that her daughter "would tell [her] the truth" about an incident of sexual abuse. We find no plain error.

B. Detective Carter's Testimony

[2] Defendant next argues that Detective Carter's testimony at trial improperly vouched for V.R.'s credibility and was plain error. We disagree.

Again, lay witness "testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701. However, as our Supreme Court has stated:

> The instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time, are, legally speaking, *matters of fact*, and are admissible in evidence.

State v. Lloyd, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001) (citation omitted) (emphasis added).

Here, Detective Carter testified about his observation of V.R.'s demeanor during Detective Carter's interview with V.R., as follows:

> Q. And did you make any observations of [V.R.]'s demeanor during the time that you interacted with her?
>
> A. Her responses seemed to be thoughtful. She paused several times while telling the story, just trying to recollect, and with each account she looked at the ground or looked downward several times, seemed to be genuinely affected by what had occurred.

Defendant maintains that this testimony was the functional equivalent of vouching for V.R.'s credibility. We disagree.

This testimony concerning V.R.'s demeanor does not constitute an opinion as to the credibility of V.R. that is subject to Rule 701. *See State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007). Rather, Detective Carter's testimony contains precisely the type of "instantaneous conclusions" our Supreme Court considers to be admissible "shorthand statements of fact." *Id.*; *State v. Braxton*, 352 N.C. 158, 187, 531 S.E.2d 428, 445 (2000), *cert. denied*, 531 U.S. 1130, 148 L. Ed. 2d 797 (2001). Accordingly, there was no error in the admission of this testimony.

C. Nurse Davis's Testimony

[3] Defendant also argues that the trial court abused its discretion in admitting certain opinion testimony from Nurse Davis as in effect vouching for V.R.'s credibility, over defendant's objection at trial. We find defendant's argument to be without merit.

Under North Carolina law, it is well established 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) (citations omitted). "In a sexual offense prosecution involving a child victim, the trial court should not admit expert opinion that sexual abuse has *in fact* occurred because, absent physical evidence supporting a diagnosis of sexual abuse, such testimony is an impermissible opinion regarding the victim's credibility." *State v. Stancil*, 355 N.C. 266, 266-67, 559 S.E.2d 788, 789 (2002) (per curiam) (citation omitted) (emphasis in original). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *Id.* (citations omitted).

In the present case, Nurse Davis gave the following testimony to which defendant assigns error:

> Q. . . . With regard to a finding, such as the erythema or redness, could that sort of redness be caused by touching of some sort?
>
> A. Yes, it could.
>
> Q. Could it also be caused by other things?
>
> A. Yes.
>
> Q. And what other types of things might cause that?
>
> A. If a little girl doesn't clean herself well. If there were more aggressive touching, it would probably be redder. There could be abrasions there and they weren't noted. So as far as what else, if there were infection, I mean, it could be, you know, a multitude of things.
>
> . . .
>
> Q. Yes. Do you have an opinion to a reasonable degree of medical certainty as to whether your physical examination of [V.R.] was consistent with the medical history that you received of touching?
>
> A. Yes. It was consistent.
>
> Q. And it's fair to say, again, that it could also be consistent with other things, as well?
>
> A. Yes.

Nurse Davis stated that the erythema was consistent with touching, but also could be consistent with "a multitude of things." We fail to see how this testimony improperly vouches for V.R.'s credibility and we find defendant's arguments unconvincing. This testimony, that erythema is "consistent" with touching, is not tantamount to vouching for V.R.'s credibility. Accordingly, the admission of this testimony was not an abuse of discretion by the trial court, nor did it constitute prejudicial error.

II. Jury Questions

[4] Next, defendant contends that the trial court committed reversible error by failing to receive and address jury questions before the entire jury panel in the courtroom, in violation of both N.C. Gen. Stat. § 15A-1233(a) and Article I, Section 24 of the North Carolina Constitution. After careful review, we conclude that while the trial court erred by failing to conduct the jury to the courtroom as required by N.C. Gen. Stat. § 15A-1233(a), there was no showing that this error was prejudicial or that there was a constitutional violation.

N.C. Gen. Stat. § 15A-1233(a) provides, in relevant part:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

N.C. Gen. Stat. § 15A-1233(a) (2017). Article I, Section 24 of the North Carolina Constitution states that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." N.C. Const. Art I, § 24. This provision of our Constitution has been interpreted as prohibiting "the trial court [from] provid[ing] explanatory instructions to less than the entire jury [as a] violat[ion] [of] the defendant's constitutional right to a unanimous jury verdict." *State v. Wilson*, 363 N.C. 478, 483, 681 S.E.2d 325, 329 (2009).

In advancing his argument, defendant relies on our Supreme Court's decisions in *State v. Ashe*, 314 N.C. 28, 331 S.E.2d 652 (1985), and *State v. Wilson*, 363 N.C. 478, 681 S.E.2d 325 (2009). In *Ashe*, the jury foreman returned to the courtroom alone after the jury had retired to deliberate, where he had the following exchange with the presiding judge:

> The Court: Mr. Foreman, the bailiff indicates that you request access to the transcript?
>
> Foreman: We want to review portions of the testimony.
>
> The Court: I'll have to give you this instruction. There is no transcript at this point. You and the other jurors will have to take your recollection of the evidence as you recall it and as you can agree on that recollection in your deliberations.

Ashe, 314 N.C. at 33, 331 S.E.2d at 655-56. Our Supreme Court held that the trial court violated Article I, Section 24 and N.C. Gen. Stat. § 15A-1233(a) by failing to summon all of the jurors to the courtroom before hearing and responding to the jury's request to review the trial transcript. *Id.* at 40, 331 S.E.2d at 659.

In *Wilson*, after being notified by the jury of concerns regarding the foreperson, "the trial court summoned only the foreperson and provided him with instructions on and off the record that it did not provide to the rest of the jury." *Wilson*, 363 N.C. at 487, 681 S.E.2d at 332. Furthermore,

> following the third unrecorded bench conference with the foreperson, the trial court informed the foreperson that it needed to give him 'one other instruction' and instructed him that '[t]he issues about which we had talked in this courtroom, *both here at the bench and also openly on the record*, are issues [that you] are not to share with the other jurors.'

Id. Applying the principles from *Ashe*, the Court concluded that "the trial court provided the foreperson with instructions that it did not provide to the rest of the jury in violation of defendant's right to a unanimous jury verdict." *Id.* at 486, 681 S.E.2d at 331. The Court further held "that where the trial court instructed a single juror in violation of defendant's right to a unanimous jury verdict under Article I, Section 24, the error is deemed preserved for appeal notwithstanding defendant's failure to object." *Id.*

The facts of the instant case are, however, more closely analogous to those presented in *State v. McLaughlin*, 320 N.C. 564, 359 S.E.2d 768 (1987). In *McLaughlin*, after retiring for deliberation, the jury sent the trial judge a note requesting that the trial testimony of two witnesses be reread. *McLaughlin*, 320 N.C. at 567, 359 S.E.2d at 770. "The trial judge sent a message to the jury, through the bailiff, denying the jury's request. The record [did] not indicate whether the judge's message was in written form or transmitted orally by the bailiff." *Id.* at 567-68, 359

S.E.2d at 771. Our Supreme Court held that, while the trial court erred "by not adhering to the requirements of [N.C. Gen. Stat. § 15A-1233(a)]," it was not a prejudicial error or a violation of Article I, Section 24. *Id.* at 568, 359 S.E.2d at 771. Moreover, the Court clarified that the reference to Article I, Section 24 in *Ashe* "was intended to convey no more than the seemingly obvious proposition that for a trial judge to give explanatory instructions to fewer than all jurors violated only the unanimity requirement imposed on jury verdicts by Article I, [S]ection 24." *McClaughlin*, 320 N.C. at 569, 359 S.E.2d at 772.

In the present case, the jury sent two notes to the trial court, one requesting the police reports, and another requesting transcripts of trial testimony. On both occasions, the bailiff brought these notes into the courtroom to the judge and delivered the judge's written responses to the jury. While this is error because the trial court failed to comply with the provisions of N.C. Gen. Stat. § 15A-1233(a), there was no violation of defendant's right to a unanimous verdict under Article I, Section 24. The trial court did not interact with or provide instructions to less than a full jury panel.

Additionally, a new trial is not warranted as there is no showing that the error prejudiced defendant. "A new trial may be granted only if the trial court's error was such that 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached.' " *Id.* at 570, 359 S.E.2d at 772 (quoting N.C. Gen. Stat. § 15A-1443(a) and citing *State v. Loren*, 302 N.C. 607, 276 S.E.2d 365 (1981)). Here, the trial court could not allow the jury to review police reports that were not in evidence, and there was no showing of prejudice to defendant in the trial court's decision not to delay deliberations in order to have a transcript produced of the testimony of the State's witnesses. We find no prejudicial error.

Conclusion

For the reasons stated herein, we conclude that defendant received a fair trial, free from plain or prejudicial error.

NO ERROR.

Judges ELMORE and TYSON concur.

RUSSELL WALKER, PLAINTIFF
v.
HOKE COUNTY ET AL., DEFENDANTS

No. COA17-341

Filed 19 June 2018

1. Jurisdiction—standing—citizen—county transfer of land

Plaintiff did not have standing for his claims arising from Hoke County's conveyance of land for an ethanol plant where he did not allege that he was a taxpayer and did not assert a traceable, concrete, and particularized injury resulting from the transfer of the land.

2. Public Officers and Employees—amotion—lack of standing

The trial court did not err by dismissing plaintiff's claim to remove elected county officials for lack of standing. Removal by "amotion" is a quasi-judicial procedure employed by the board or commission from which the member is being removed for cause. Plaintiff did not allege that he was a member of any of the boards from which he sought to remove members.

Appeal by plaintiff from order entered 16 February 2017 by Judge James F. Ammons, Jr. in Hoke County Superior Court. Heard in the Court of Appeals 18 September 2017.

Russell F. Walker, pro se, plaintiff-appellant.

Locklear, Jacobs, Hunt & Brooks, by Grady L. Hunt, for defendant-appellee Hoke County.

Moser and Bruner, P.A., by Jerry L. Bruner, for defendant-appellee Fifth Third Bank, Inc.

Horack Talley Pharr & Lowndes, P.A., by Robert B. McNeill and Christopher T. Hood, for defendant-appellee Tyton NC Biofuels LLC.

BERGER, Judge.

Russell F. Walker ("Plaintiff") appeals an order granting Hoke County, Fifth Third Bank, Inc., and Tyton NC Biofuels, LLC's (collectively "Defendants") motion to dismiss Plaintiff's complaint for lack of

standing and failure to state a claim under Rules 12(b)(1) and (6) of the North Carolina Rules of Civil Procedure. Plaintiff argues the trial court erred because he sufficiently established standing as a taxpayer of Hoke County, and has suffered an injury from which a favorable judgment on his claims can grant him relief. We disagree.

Factual and Procedural Background

On March 26, 2008, Hoke County conveyed a 500 acre tract of land by Special Warranty Deed ("the Deed") to Clean Burn Fuels, LLC ("Clean Burn"). Clean Burn built an ethanol plant on the land, but after financial problems the lender foreclosed on the property in 2011. In 2014, Tyton NC Biofuels, LLC purchased the property and obtained a loan from Fifth Third Bank, Inc. The loan was secured by a deed of trust on the 500 acre tract of land.[1]

On December 20, 2016, Plaintiff filed a complaint in Hoke County Superior Court seeking to set aside the original deed from Hoke County to Clean Burn, revoke the deed of trust, and remove from office elected officials who approved the transfer. In January 2017, Defendants filed answers to Plaintiff's complaint and motions to dismiss for lack of standing and failure to state a claim for which relief can be granted. On January 19, 2017, Plaintiff filed a motion for summary judgment alleging no genuine issue of material fact. A hearing was held on Defendants' motions to dismiss and Plaintiff's motion for summary judgment. The trial court denied Plaintiff's motion for summary judgment and granted Defendants' motions to dismiss with prejudice. Plaintiff appeals.

Analysis

[1] "In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party." *Mangum v. Raleigh Bd. of Adjust.*, 362 N.C. 640, 644, 669 S.E.2d 279, 283 (2008).

"Standing is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Aubin v. Susi*, 149 N.C. App. 320, 324, 560 S.E.2d 875, 878, *disc. rev. denied*, 356 N.C. 610, 574 S.E.2d 474 (2002) (citation omitted). "[O]nly one with a genuine grievance" can bring a valid complaint. *Mangum*, 362 N.C. at 642, 669 S.E.2d at 282 (citations omitted). To establish standing, three elements must be satisfied:

1. Specific prices, dates, and transactions are not included in the record on appeal.

> (1) injury in fact – an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., Inc. v. Smithfield Foods, Inc., 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002) (citation and internal quotation marks omitted), *disc. rev. denied*, 356 N.C. 675, 577 S.E.2d 628 (2003). "Standing most often turns on whether the party has alleged 'injury in fact' in light of the applicable statutes or caselaw." *Id.* Further, "a plaintiff must demonstrate standing separately for each form of relief sought." *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC) Inc.*, 528 U.S. 167, 185, 145 L. Ed. 2d 610, 629 (2000).

Historically, "taxpayers have standing to challenge the allegedly illegal or unconstitutional disbursement of tax funds by local officials." *Goldston v. State*, 361 N.C. 26, 31, 637 S.E.2d 876, 879-80 (2006). However, to establish an injury as a taxpayer, the individual must allege "a misuse of public funds in violation of state statute," instead of merely "challenging the wisdom of the County's decision." *Reese v. Mecklenburg Cnty., N.C.*, 204 N.C. App. 410, 426, 694 S.E.2d 453, 464, *disc. rev. denied*, 364 N.C. 326, 700 S.E.2d 924 (2010).

In prior cases before our Supreme Court, taxpayers have been granted standing to bring an action against local and state government bodies when they have alleged an injury that is concrete, traceable, and particular to a specific action in violation of an applicable statute. *See Goldston*, 361 N.C. at 30-33, 637 S.E.2d at 879-81; *McIntyre v. Clarkson*, 254 N.C. 510, 513-14, 119 S.E.2d 888, 890-91 (1961) (holding a taxpayer had standing to facially challenge the constitutionality of a statute). *Goldston v. State* noted "the right of a citizen and taxpayer to maintain an action in the courts to restrain the unlawful use of public funds *to his injury* cannot be denied." *Goldston*, 361 N.C. at 33, 637 S.E.2d at 881 (citation and quotation marks omitted) (emphasis added).

In the case *sub judice*, Plaintiff has failed to establish standing for each of his claims for relief. In his complaint, Plaintiff failed to allege that he is a taxpayer. Moreover, even if we were to assume Plaintiff is a Hoke County taxpayer, he has not asserted a traceable, concrete, and particularized injury resulting from the transfer of the 500 acre tract of land between the parties named in his complaint. Even in the light most favorable to the non-moving party, we find no injury in fact under

"any set of facts to support his claim which would entitle him to relief." *Block v. County of Person*, 141 N.C. App. 273, 277-78, 540 S.E.2d 415, 419 (2000).

[2] In addition, Plaintiff seeks removal of various elected officials stemming from transfer of the property. However, standing pursuant to N.C. Gen. Stat. § 153A-77 and the common law removal procedure known as "amotion" does not derive from taxpayer status, but instead from the county board of commissioners. Section 153A-77 provides in pertinent part:

> A member may be removed from office by the county board of commissioners for (i) commission of a felony or other crime involving moral turpitude; (ii) violation of a State law governing conflict of interest; (iii) violation of a written policy adopted by the county board of commissioners; (iv) habitual failure to attend meetings; (v) conduct that tends to bring the office into disrepute; or (vi) failure to maintain qualifications for appointment required under this subsection. A board member may be removed only after the member has been given written notice of the basis for removal and has had the opportunity to respond.

N.C. Gen. Stat. § 153A-77(c) (2017).

Removal by amotion is a "quasi-judicial" procedure employed by the board or commission from which the member is being removed for cause. *Russ v. Board of Education*, 232 N.C. 128, 129-30, 59 S.E.2d 589, 591 (1950); *see also Burke v. Jenkins*, 148 N.C. 25, 61 S.E. 608 (1908).[2] An amotion proceeding "could not be taken without notice and an opportunity to be heard, except where the officer is removable without cause at the will of the appointing power." *Stephens v. Dowell*, 208 N.C. 555, 561, 181 S.E. 629, 632 (1935) (citations omitted). Plaintiff has not alleged in his complaint or on appeal that he is a member of any elected or appointed office. Because Plaintiff is not a member of any of the boards from which he seeks to remove members, we affirm the trial court's order dismissing Plaintiff's claims for lack of standing.

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2. The most recent amotion proceeding in North Carolina was in 2013 in *Berger v. New Hanover County Bd. of Comm'rs.*, 2013 NCBC 45, 2013 WL 4792508 (2013) (unpublished), where the New Hanover County Superior Court upheld the removal of a local County Commissioner and recognized the validity of the amotion procedure when "accompanied by appropriate procedural safeguards and the Board's findings and conclusions were supported by sufficient competent evidence." *Id.* at *11.

Accordingly, we find the trial court did not err by dismissing Plaintiff's complaint for lack of standing pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Because we find that Plaintiff does not have standing to pursue the claims in his complaint, we need not reach any further issues argued by Plaintiff on appeal.

Conclusion

The trial court did not err in granting Defendants' motion to dismiss Plaintiff's complaint for lack of standing under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure. Accordingly, we affirm the trial court's order.

AFFIRMED.

Chief Judge McGEE and Judge DIETZ concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 JUNE 2018)

AMELIO v. REAL ESTATE BY DESIGN, LLC No. 17-724	Durham (15CVS5263)	Dismissed
BATES v. GOMEZJURADO No. 16-242-2	Union (15CVD1688)	Vacated and Remanded
CABARRUS CTY. DEP'T OF HUM. SERVS. v. MORGAN No. 17-487	Cabarrus (13CVD2783)	Reversed and Remanded
CARROLL v. MANVILLE No. 17-1172	N.C. Industrial Commission (13-706566)	Affirmed
DANIELS v. DANIELS No. 18-73	Cumberland (17CVD2693)	Dismissed
GIUSTO v. ROBERTSON VENTURES, INC. No. 17-1205	Wake (16CVS3081)	Dismissed
HOMESTEAD AT MILLS RIVER PROP. OWNERS ASS'N, INC. v. HYDER No. 17-606	Henderson (11CVS784)	Dismissed
IN RE A.B. No. 17-1321	Cabarrus (13JT121-124)	Affirmed
IN RE A.J. No. 17-1334	Durham (14JA61) (15JA163)	Affirmed
IN RE J.R. No. 18-103	Wake (15JT163)	Affirmed
IN RE K.K.-K.C. No. 18-18	Guilford (15JT292) (15JT294)	Affirmed
IN RE N.L.M. No. 17-1346	Guilford (15JT52-53)	Affirmed
IN RE P.B. No. 18-83	Harnett (16JT58)	Affirmed

IN RE S.S. No. 17-1383	Tyrrell (16JA5) (16JA6)	AFFIRMED IN PART. VACATED AND REMANDED IN PART.
IN RE T.S.P. No. 18-118	Granville (16SPC156)	Vacated and Remanded.
STATE v. BIAS No. 17-1236	Wake (16CRS217819-22)	No Error
STATE v. BROWN No. 17-1271	Cherokee (15CRS50801) (15CRS50817-21) (15CRS50823-24) (16CRS226) (17CRS1000) (17CRS445)	Affirmed in part; Remanded for resentencing in part.
STATE v. BURNETTE No. 17-847	Lincoln (15CRS51438) (16CRS166)	No Error
STATE v. COLE No. 17-1196	Moore (17CRS635)	Reversed
STATE v. DAIL No. 17-294	Lenoir (11CRS51547)	No Error
STATE v. GREENE No. 17-916	Wilson (16CRS51279)	Vacated and remanded in part, remanded for correction of a clerical error in part.
STATE v. HEWITT No. 17-1157	Catawba (11CRS3822-23) (11CRS4077) (11CRS51398) (11CRS51400-401)	No Error
STATE v. MILLIGAN No. 18-307	Burke (15CRS51782) (17CRS49)	Affirmed
STATE v. MILLS No. 17-1350	Mecklenburg (15CRS237939) (15CRS237941-42)	Affirmed
STATE v. PRATT No. 17-1294	Johnston (16CRS1735) (16CRS52616)	No Error

STATE v. PRUITT No. 17-883	Mecklenburg (14CRS204260)	No error in part; vacated and remanded in part
STATE v. RABORN No. 17-1105	Cleveland (15CRS50051)	No Error
STATE v. RAMIREZ No. 17-1273	Harnett (15CRS50328)	Affirmed
STATE v. WILLIAMS No. 17-518	Wake (14CRS205973)	No plain error
WOLFE v. POINDEXTER No. 17-1366	Lincoln (16CVD1442)	Reversed

ANDERSON v. WALKER

[260 N.C. App. 129 (2018)]

DAVID ANDERSON, Plaintiff
v.
CHRISTOPHER DAVID WALKER, GEORGE TSIROS and CURTIS T, LLC,
a North Carolina limited liability company, Defendants

No. COA17-782

Filed 3 July 2018

Contracts—real property—right of first refusal to purchase—preemptive right—lack of recordation—actual notice

The trial court did not err in ordering defendants to convey commercial real property to the plaintiff, who had signed an agreement giving him the right of first refusal to buy the property in the event the owners decided to sell. Unlike option contracts, a right of first refusal is a preemptive right that does not have to be recorded in order to be valid, and even if it had been recorded, defendants could not claim to be innocent purchasers for value where they had actual notice of the existence of the right and of plaintiff's interest in exercising that right.

Appeal by defendants from judgment entered 9 January 2017 by Judge Sharon Tracey Barrett in Buncombe County Superior Court. Heard in the Court of Appeals 10 January 2018.

Dungan, Kilbourne & Stahl, P.A., by Robert C. Carpenter, for plaintiff-appellee.

Matney & Associates, P.A., by David E. Matney, III, and Sonya N. Rikhye, for defendant-appellants George Tsiros and Curtis T, LLC.

No brief filed on behalf of defendant-appellee Christopher David Walker.

CALABRIA, Judge.

George Tsiros ("Tsiros") and Curtis T, LLC (collectively, "defendants") appeal from the trial court's judgment ordering Christopher David Walker ("Walker") to convey certain commercial real property to David Anderson ("plaintiff"). After careful review, we affirm.

I. Factual and Procedural Background

On 7 March 2014, plaintiff filed the instant complaint and *lis pendens* in Buncombe County Superior Court. Plaintiff alleged that, in December 2010, he entered into an agreement with Walker to lease a piece of real estate at 1022 Haywood Road in Asheville ("the property"), to operate plaintiff's business. In January 2013, plaintiff and Walker executed a new lease that included a notarized right of first refusal in plaintiff's benefit ("the ROFR Agreement"). Subsequently, Curtis T, LLC, through its member and manager Tsiros, entered into an agreement ("the Option Agreement" or "Memorandum of Option") to purchase the property from Walker. In his complaint, plaintiff sought specific performance and a declaratory judgment of the rights of the parties. Specifically, plaintiff sought to exercise his interest in the property pursuant to the ROFR Agreement, and to have defendants' Memorandum of Option declared null and void.

On 9 May 2014, defendants filed a responsive pleading, which included an answer, multiple motions to dismiss, a motion for judgment on the pleadings, and a crossclaim requiring Walker to tender the property, or alternatively to pay liquidated damages. On 21 May 2014, the Clerk of Superior Court of Buncombe County entered a default against Walker, with regard to plaintiff's complaint, for failure to plead or appear.

On 31 October 2014, the trial court entered an order denying plaintiff's motion for summary judgment, denying defendants' motion for judgment on the pleadings, and granting in part defendants' motions to dismiss. Specifically, the trial court granted in part and denied in part the motions to dismiss, "in that Plaintiff's claim to have the Memorandum of Option declared null and void is dismissed and no other claims of Plaintiff are dismissed."

On 27 October 2016, the Clerk of Superior Court of Buncombe County entered a default against Walker, with regard to defendants' crossclaim, for failure to plead or appear. On 9 January 2017, the trial court entered its judgment in this matter. The court noted the defaults entered against Walker with respect to both plaintiff's complaint and defendants' crossclaim. The court found that although plaintiff and Walker had executed a notarized right of first refusal with respect to the property in 2013, the document was never recorded. The court also found that when defendants executed agreements to purchase the property, Walker gave Tsiros a copy of plaintiff's lease, and that the ROFR Agreement specifically referenced in the lease had not yet expired. In addition, in 2014, defendants met with plaintiff, who informed them of his intent to exercise his right of first refusal.

The court further found that in January of 2014, defendants executed agreements to purchase the property, which were recorded. The court found that it was only after plaintiff became aware of defendants' Option Agreement that he gave formal notice of his intent to exercise the right of first refusal. However, the court found that "it would be unjust and inequitable to enforce the Option Agreement procured by [defendants] so as to deprive Plaintiff of" his right of first refusal, and that defendants, inasmuch as they relied upon equity, failed to comport with the maxim, "he who comes into equity must come with clean hands."

The trial court therefore determined that defendants' conduct in securing the option contract was "overreaching and oppressive[,]" that plaintiff's right of first refusal took precedence, and that defendants maintained a claim against Walker for breach of contract. The court ordered Walker to convey the property to plaintiff by a general warranty deed pursuant to the right of first refusal, with the same terms and conditions, and concluded that defendants had no rights in the property. The court further ordered Walker to pay damages to defendants for breach of contract, payable from the proceeds of the sale of the property to plaintiff.

Defendants appeal.

II. Right of First Refusal

In two separate arguments, defendants contend on appeal that the trial court erred in specifically enforcing an unrecorded right of first refusal in favor of plaintiff. We disagree.

A. Standard of Review

"The sole function of the equitable remedy of specific performance is to compel a party to do that which in good conscience he ought to do without court compulsion. The remedy rests in the sound discretion of the trial court, and is conclusive on appeal absent a showing of a palpable abuse of discretion." *Munchak Corp. v. Caldwell*, 46 N.C. App. 414, 418, 265 S.E.2d 654, 657 (1980) (citations omitted), *modified on other grounds*, 301 N.C. 689, 273 S.E.2d 281 (1981).

B. Analysis

It is well established that "a binding contract to convey land, when there has been no fraud or mistake or undue influence or oppression, will be specifically enforced." *Hutchins v. Honeycutt*, 286 N.C. 314, 318, 210 S.E.2d 254, 256-57 (1974) (citations and quotation marks omitted). Specific performance "is granted or withheld according to the equities

that flow from a just consideration of all the facts and circumstances of the particular case." *Id.* at 319, 210 S.E.2d at 257.

A right of first refusal, also known as a "preemptive right," "requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor or his heirs, or to some specially designated person." *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) (citation and quotation marks omitted). Although analogous to option contracts, preemptive provisions "are technically distinguishable." *Id.* Whereas "[a]n option creates in its holder the power to compel sale of land, . . . [a] preemptive provision, on the other hand, creates in its holder only the right to buy land before other parties if the seller decides to convey it." *Id.* at 61, 269 S.E.2d at 610-11 (citations omitted). "Preemptive provisions may be contained in leases, in contracts, or . . . in restrictive covenants contained in deeds or recorded in chains of title." *Id.* at 61, 269 S.E.2d at 611 (citations omitted).

A right of first refusal is enforceable against a subsequent purchaser for value who has "actual or constructive knowledge of the preemptive right." *Legacy Vulcan Corp. v. Garren*, 222 N.C. App. 445, 449, 731 S.E.2d 223, 226 (2011). Generally, a person is

> charged with notice of what appears in the deeds or muniments in his grantor's chain of title, including . . . instruments to which a conveyance refers. . . . Under this rule, the purchaser is charged with notice not only of the existence and legal effects of the instruments, but also of every description, recital, reference, and reservation therein. . . . If the facts disclosed in a deed in the chain of title are sufficient to put the purchaser on inquiry, he will be charged with notice of what a proper inquiry would have disclosed.

Id. at 449, 731 S.E.2d at 226-27 (citation and quotation marks omitted).

However, "[a]n innocent purchaser takes title free of equities of which he had no actual or constructive notice." *Id.* at 449, 731 S.E.2d at 227 (citation and quotation marks omitted). Accordingly,

> [w]here the defense of "innocent purchaser" is interposed and there has been a bona fide purchase for a valuable consideration, the matter which debases the apparent fee must have been expressly or by reference set out in the muniments of record title or brought to the notice of the purchaser *in such a manner as to put him upon inquiry*.

Id. (citation and quotation marks omitted).

In the instant case, plaintiff and Walker executed the ROFR Agreement on 29 January 2013. Plaintiff paid Walker $2,000.00 in consideration for a two-year preemptive right to the property. This ROFR Agreement was incorporated by reference in a new, 1.5-year lease. The agreement was effective until 31 December 2014, barring a mutual written agreement or an offer to purchase between plaintiff and Walker. Nonetheless, on 18 December 2013, Walker signed an Offer to Purchase and Sale Memorandum with Tsiros, without giving plaintiff any written notice. At that time, Walker provided Tsiros with a copy of the lease and the ROFR Agreement that was specifically referenced in the lease. On 10 January 2014, defendants informed plaintiff that Walker had contracted to sell the property to Tsiros.

On appeal, defendants contend that Curtis T, LLC's right to purchase the property was superior to plaintiff's, because unlike the Option Agreement, neither the lease nor the ROFR Agreement were ever recorded. We disagree.

Our recordation statute, N.C. Gen. Stat. § 47-18, provides, in pertinent part:

> No (i) conveyance of land, or (ii) contract to convey, or (iii) option to convey, or (iv) lease of land for more than three years shall be valid to pass any property interest as against lien creditors or purchasers for a valuable consideration from the donor, bargainer or lesser but from the time of registration thereof in the county where the land lies[.] . . . [I]nstruments registered in the office of the register of deeds shall have priority based on the order of registration as determined by the time of registration[.]

N.C. Gen. Stat. § 47-18(a) (2017). Therefore, according to the plain language of the statute, a right of first refusal need not be recorded in order to be valid.

Furthermore, "[o]ur registration statute does not protect all purchasers, but only innocent purchasers for value." *Hill v. Pinelawn Mem'l Park, Inc.*, 304 N.C. 159, 165, 282 S.E.2d 779, 783 (1981). "While actual notice of another unrecorded conveyance does not preclude the status of innocent purchaser for value, actual notice of pending litigation affecting title to the property does preclude such status." *Id.* Where a purchaser claims protection under our registration laws, he has the burden of proving by a preponderance of the evidence that he is an innocent purchaser for value, i.e., that he paid valuable consideration and

had no actual notice, or constructive notice by reason of *lis pendens*, of pending litigation affecting title to the property.

According to the terms of the ROFR Agreement, if Walker wanted to transfer his interest in the property within two years of the date of the agreement, he was to give plaintiff at least ninety days' notice before the date of the proposed transfer. Later, plaintiff agreed to only sixty days to exercise his right of first refusal. Defendants were aware that plaintiff was interested in exercising his right of first refusal, because all three parties signed a document acknowledging the sixty-day notice requirement. Despite this knowledge, defendants subsequently signed and recorded the Option Agreement.

The trial court found that, after discovering the existence of the Option Agreement in the Buncombe County Register of Deeds, plaintiff "made arrangements as quickly as possible to secure the funding he would need to purchase the Property. Plaintiff gave formal notice of his intent to purchase the Property under the ROFR by way of the Complaint[.]" Plaintiff secured a lender to loan him the money and was ready, willing and able to purchase the Property on 7 March 2014, which was within the sixty-day period. That day, immediately after filing the complaint, plaintiff also filed a *lis pendens* upon the property, asserting a right to enforce his preemptive right. On 9 May 2014, defendant Curtis T, LLC gave notice of its intent to exercise its purchase rights under the Option Agreement by letter to defendant Walker. It is clear, therefore, that defendant Curtis T, LLC only exercised its rights after the filing of plaintiff's complaint and *lis pendens*, at which point all parties had knowledge of plaintiff's rights under the ROFR Agreement. Therefore, defendants had actual notice.

Moreover, the trial court found that defendant Tsiros was personally aware of plaintiff's right of first refusal as early as 18 December 2013. The trial court found that Tsiros had multiple meetings with Walker and plaintiff; that "[a]ll present knew that Plaintiff was interested in exercising the ROFR"; and that plaintiff had explicitly informed Tsiros "that [plaintiff] was working to line up investors to allow him to exercise his rights under the ROFR." The trial court found that it was only after one such meeting that Tsiros "arranged to have an Option Agreement prepared[,]" despite knowing "that Plaintiff was a tenant in possession who had preemptive rights under the ROFR and that Plaintiff was planning to exercise those rights."

The right of an innocent purchaser for value to take priority over an unrecorded right in real property only applies to those purchasers who

acquire title without knowledge, actual or constructive, of another's unrecorded rights. Here, defendants knew – whether from personally speaking with plaintiff or from the filing of plaintiff's complaint and *lis pendens* – that plaintiff had rights in the property which he sought to exercise. Therefore, defendants were not innocent purchasers for value. Furthermore, the fact that the ROFR Agreement was not recorded did not protect their subsequent Option Agreement.

We hold therefore that the trial court did not err in ruling that the ROFR Agreement was enforceable, ordering that it be enforced, and concluding that defendants were not entitled to specific performance of the Option Agreement. We affirm the trial court's judgment.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

THE CITY OF CHARLOTTE, A MUNICIPAL CORPORATION, PLAINTIFF
v.
UNIVERSITY FINANCIAL PROPERTIES, LLC, A NORTH CAROLINA LIMITED LIABILITY COMPANY F/K/A UNIVERSITY BANK PROPERTIES LIMITED PARTNERSHIP; BANK OF AMERICA, N.A. F/K/A NCNB NATIONAL BANK OF NORTH CAROLINA, TENANT; AND ANY OTHER PARTIES IN INTEREST, DEFENDANTS

No. COA17-388

Filed 3 July 2018

1. Appeal and Error—interlocutory order—condemnation action—substantial right—statutory rights of landowners

The trial court's order allowing the city of Charlotte to amend its complaint, deposit, and declaration of taking in a condemnation proceeding, while interlocutory, was immediately appealable where it implicated a substantial right of the landowner. Without appellate review, the order had the effect of forcing the landowner to proceed to trial despite its right under N.C.G.S. § 136-105 to accept the deposit as full compensation and bring the litigation to an end. Condemnation cases put the parties in an unusual posture, since the defendant landowner's right to claim compensation put that party in a position comparable to that of a plaintiff in other types of civil cases; here, the denial of the landowner's attempt to take a voluntary dismissal and assert its statutory rights affected a substantial right.

2. Civil Procedure—voluntary dismissal—condemnation action—defendant's right to file—effect of dismissal

Due to the special nature of condemnation proceedings where the right to just compensation vests in the landowner, a defendant landowner had the right to file a voluntary dismissal pursuant to Rule 41(a). Since a voluntary dismissal ends any pending claim, in this case the landowner's claim for determination of just compensation, the dismissal here served as an admission pursuant to N.C.G.S. § 136-107 that the amount deposited constituted just compensation for the taking. The dismissal also removed any authority from the trial court to enter any further orders in the case, including on plaintiff's pending motion to amend the deposit, other than the entry of judgment in the amount deposited.

Appeal by defendant from order entered 29 September 2016 by Judge Daniel A. Kuehnert in Superior Court, Mecklenburg County. Heard in the Court of Appeals 15 November 2017.

Parker Poe Adams & Bernstein, LLP, by Nicolas E. Tosco, Benjamin R. Sullivan, and Charles C. Meeker, for plaintiff-appellee.

Johnston, Allison & Hord, P.A., by Martin L. White, R. Susanne Todd, and David V. Brennan, for defendant-appellant University Financial Properties, LLC.

STROUD, Judge.

Defendant University Financial Properties, LLC ("defendant") appeals from the trial court's order entered 29 September 2016 granting plaintiff's motion to amend its "Complaint, Declaration of Taking and Notice of Deposit and Service of Plat." On appeal, defendant argues that the trial court erred by ruling that defendant's voluntary dismissal had no effect to end the case and in granting plaintiff's motions to amend its complaint. We reverse the trial court's order because after defendant filed its notice of voluntary dismissal, the trial court no longer had authority to rule on plaintiff's motion to amend its complaint, declaration of taking, and deposit. Under N.C. Gen. Stat. § § 136-105 and 136-107 (2017), defendant was in the position of the claimant and had the right to elect to accept the deposit or to go to trial, and plaintiff had no right to force defendant to proceed to trial after defendant elected to dismiss its claim for determination of just compensation. We reverse and remand for entry of a final judgment in accord with N.C. Gen. Stat. § 136-107, setting compensation based on the deposit.

Facts

Plaintiff filed its complaint, declaration of taking, notice of deposit, and service of plat in April 2013. Plaintiff estimated the sum of $570,425.00 to be just compensation for the taking. Plaintiff deposited that sum with the superior court and stated that defendant could "apply to the Court for disbursement of the money as full compensation, or as a credit against just compensation, to be determined in this action." Defendant applied for disbursement of the deposit on 22 July 2013. An order granting the disbursement request was entered the next day, 23 July 2013.

Defendant filed its answer on 9 April 2014, requesting a jury trial to determine just compensation for the taking. On 24 October 2014, plaintiff filed a motion for determination of issues other than damages under N.C. Gen. Stat. § 136-108 (2017), asking the trial court to determine what impact, if any, construction of a bridge on an existing public right-of-way may have in this action and whether the interference with the view of the property is a compensable taking. On or about 19 November 2014, plaintiff filed a motion for partial summary judgment, arguing that plaintiff was "entitled to partial summary judgment on the question of whether an elevated bridge that the City plans to build at the intersection of North Tryon Street and W.T. Harris Boulevard is part of the taking in this case and is an element of the just compensation owed to [defendant] University Financial." Plaintiff argued that construction of the bridge was not part of the taking but rather was part of the construction of a public project on existing public property, so defendant should not be entitled to compensation for any impacts from the bridge. On 17 December 2014, the trial court denied all of plaintiff's motions and concluded that defendant was entitled to present evidence at trial of the bridge's impact on defendant's remaining property.

On 5 April 2016, this Court reversed the trial court, holding that the loss of visibility due to the bridge is not a compensable taking and remanded the case for further proceedings consistent with its opinion. *City of City of Charlotte v. Financial Properties*, __ N.C. App. __, __, 784 S.E.2d 587, 594 (2016), *disc. review denied*, 369 N.C. 37, 792 S.E.2d 789 (2016).

Plaintiff then filed a motion to amend its complaint on 22 August 2016, asking that the complaint be amended to state the lesser sum of $174,475.00 as its estimate of just compensation for the taking. Plaintiff asserted that it is entitled to a jury trial on the amount of compensation and under N.C. Gen. Stat. § 136-121 (2017) to a refund from defendant

"to the extent that Plaintiff's previous deposit exceeds the amount of just compensation determined by the final judgment in this action." Plaintiff filed a second motion to amend its complaint on 25 August 2016 after the North Carolina Supreme Court declined to review this Court's earlier opinion.

On 1 September 2016, defendant filed a notice of voluntary dismissal without prejudice under Rule 41(a) of the North Carolina Rules of Civil Procedure. A corrected notice of voluntary dismissal without prejudice was filed one day later, 2 September 2016, to correct a clerical error regarding the file number. The notice stated:

> Defendant, University Financial Properties, LLC, through the undersigned counsel, pursuant to Rule 41(a) of the North Carolina Rules of Civil Procedure hereby gives notice of voluntary dismissal without prejudice of all pending claims against Plaintiff, including claims for additional compensation and attorney's fees, said Defendant accepting the amount of deposit in the above-entitled action. Each party shall bear its own costs and attorneys' fees.

In addition, on 6 September 2016, defendant filed a motion for judgment on the pleadings, alleging that defendant "is entitled to final judgment as a matter of law against Plaintiff in the amount deposited."

On 29 September 2016, the trial court entered an order granting plaintiff's motions to amend its complaint, declaration of taking, and notice of deposit and service of plat. The trial court made findings of fact regarding the procedural history of the case, generally as described above, and then addressed the pending motions as follows:

> 9. On August 22, 2016, the City filed a Motion to Amend Its Complaint in order to decrease the Complaint's estimate of just compensation to One Hundred Seventy-Four Thousand Four Hundred Seventy-Five Dollars ($174,475.00). This decrease would remove from the Complaint's estimate of just compensation any compensation for the bridge to be built within North Tryon Street, which the Court of Appeals has held is not a part of this condemnation.
>
> 10. The North Carolina Court of Appeals later issued an Order formally certifying to this Court that University Financial's Petition for Discretionary Review had been

denied. That Order was received by this Court on August 25, 2016. Later that day, the City filed with this Court its Second Motion to Amend its Complaint, which was identical to its first Motion to Amend its Complaint.

11. On September 1, 2016, University Financial filed a "Notice of Voluntary Dismissal Without Prejudice," which purported to dismiss, under North Carolina Rule of Civil Procedure 41(a), the demand for additional compensation in University Financial's Answer.

12. On September 6, 2016, University Financial filed a Motion for Judgment on the Pleadings requesting that this Court enter final judgment awarding University Financial compensation of $570,425.00, the estimated just compensation in the City's un-amended Complaint.

13. This action has not been scheduled for trial, nor have any other deadlines been set in this case. As a result, granting the City's request to amend its Complaint would not delay or disrupt any proceeding already scheduled in this action.

14. Good cause exists to allow the City to amend its Complaint as requested by the City's two motions to amend.

Based on these findings, the Court concludes as follows:

1. University Financial's "Notice of Voluntary Dismissal Without Prejudice" was not a proper or valid dismissal under North Carolina Rule of Civil Procedure 41. The voluntary dismissal was a nullity and did not have the effect of concluding this case by acknowledging satisfaction with the amount of the deposit and waiving further proceedings to determine just compensation as contended by University Financial. To conclude otherwise would be to fail to follow the Court of Appeals' mandate in this case.

2. University Financial's voluntary dismissal does not prevent this Court from considering the City's motions to amend or from allowing the City to amend its Complaint.

3. The Court is mandated by the Court of Appeals' ruling in this case to allow the City's timely motions to amend and give no impact whatsoever to University Financial's voluntary dismissal.

4. The Court concludes that this Order is a final ruling as to the meaning and effect of University Financial's voluntary dismissal because it has cut off some of University Financial's claim for the full amount of the deposit. *See* N.C. R. Civ. P. 54(b).

5. Given the uniqueness of the facts and applicable law in this case, the Court certifies that there is no just reason to delay an appeal of this matter. A trial would be a waste of the Court's time and resources at this point in time given this Order, and the prior Court of Appeals' mandate. Whereas, if [University] Financial is correct in its interpretation of the effect of its filing a voluntary dismissal, then a trial would be presented in a significantly different manner.

IT IS THEREFORE ORDERED as follows:

1. For good cause shown, the City of Charlotte's Motion to Amend its Complaint, Declaration of Taking and Notice of Deposit and Service of Plat and Second Motion to Amend its Complaint, Declaration of Taking and Notice of Deposit and Service of Plat are hereby granted. The City may file an Amended Complaint, Declaration of Taking and Notice of Deposit and Service of Plat within fourteen (14) days after entry of this Order.

2. University Financial may file an answer or otherwise plead in response to the Amended Complaint, Declaration of Taking and Notice of Deposit and Service of Plat within thirty (30) days after being served with that pleading.

3. University Financial's voluntary dismissal had no effect to end this case and does not limit University Financial's ability to answer or otherwise plead in response to the Amended Complaint or its ability to seek compensation beyond that estimated in the Amended Complaint.

> 4. At the hearing, University Financial withdrew its Motion for Judgment on the Pleadings, and consequently the Court is not ruling on that Motion.
>
> 5. Pursuant to North Carolina Rule of Civil Procedure 54(b), this matter is certified for immediate appeal as there is no just reason for delay.
>
> 6. Pursuant to the provisions of N.C. Gen. Stat. § 1-270, *et. seq.*, and N.C. Rule of Appellate Procedure 8(a), all further proceedings in this action shall be stayed upon University Financial's filing of a Notice of Appeal until further order of this Court. The Clerk is directed to enter this Stay on the docket.

Defendant timely appealed to this Court.

Discussion

I. Interlocutory Order

[1] The order on appeal is not a final resolution of all issues as to all parties, so it is an interlocutory order. *See*, *e.g.*, *Wilfong v. North Carolina Dept. of Transp.*, 194 N.C. App. 816, 817, 670 S.E.2d 331, 332 (2009) ("An order is either interlocutory or the final determination of the rights of the parties. An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. Defendant appeals from an interlocutory order entered following a hearing under N.C. Gen. Stat. § 136-108 (2007). Because G.S. 136-108 hearings do not finally resolve all issues, an appeal from a trial court's order rendered in such hearings is interlocutory." (Citations and quotation marks omitted)). As this Court explained previously:

> It is well established that interlocutory orders, which are made during the pendency of an action, are generally not immediately appealable. If, however, the order implicates a substantial right that will be lost absent our review prior to the entry of a final judgment, an immediate appeal is permissible.
>
> In condemnation proceedings, our appellate courts have identified certain "vital preliminary issues," such as the trial court's determination of the title or area taken, which affect a substantial right and are subject to immediate appeal. In its order pursuant to N.C. Gen. Stat.

> § 136-108, the trial court concluded that the City's construction of the Bridge was "part of the taking in this action." Because this ruling concerns the area encompassed by the taking, we have jurisdiction over the City's appeal with regard to the trial court's determination of this issue.

City of Charlotte v. Univ. Fin. Properties, LLC, __ N.C. App. __, __, 784 S.E.2d 587, 590 ("*University Financial I*"), *review dismissed*, 369 N.C. 37, 792 S.E.2d 518 (2016), *and disc. review denied*, 369 N.C. 37, 792 S.E.2d 789 (2016) (citations and quotation marks omitted).

In this appeal, defendant argues that it has a substantial right which would be lost without an immediate appeal of the trial court's order, because the order "deprives [defendant] University of its ability to end the litigation short of trial for the initial deposit in which it has a vested right." Defendant contends that N.C. Gen. Stat. § 136-105 (2017) gives the landowner a right to accept the deposit as full compensation and the condemnor has no right to force a landowner to submit its claim to a jury trial. In addition, defendant argues that plaintiff has no right to decrease its deposit under N.C. Gen. Stat. § 136-103 (2017), so trial court's order deprived it of the protection of this statute as well.

Plaintiff argues that defendant has not shown a substantial right which would entitle it to an interlocutory appeal because avoiding a trial is not a substantial right and motions to amend under Rule 15(a) of the North Carolina Rules of Civil Procedure should be freely granted in the trial court's discretion. Plaintiff's arguments are based on generally correct statements of law but ignore the substantive and procedural rights set forth in North Carolina General Statutes Chapter 136, Article 9 regarding condemnation cases. We must view this issue in the context of those procedures and rights.

We addressed the extent of the compensable taking in *University Financial I*, __ N.C. App. __, 784 S.E.2d 587, and on remand, the trial court entered the order on appeal, which does not resolve the case but would require defendant to proceed to a jury trial on just compensation. In *University Financial I*, plaintiff was required to appeal from the trial court's order immediately or it would have lost the right to challenge the extent of the compensable taking in an appeal after a final judgment. *Id.* at __, 784 S.E.2d at 590.

This appeal presents issues similar to those in an order addressing the title or area taken, because it raises an issue other than determining just compensation, but it is not one of the issues which must be appealed

immediately. In eminent domain cases, interlocutory orders concerning title or area taken must be appealed immediately or the right to appeal is lost. *See*, *e.g.*, *Stanford v. Paris*, 364 N.C. 306, 312, 698 S.E.2d 37, 41 (2010) ("This Court has said that in condemnation cases, after a hearing pursuant to N.C.G.S. § 136-108, appeal of an issue affecting title to land or area taken by the State is mandatory and the interlocutory appeal must be taken immediately.").

Plaintiff argues that the *only* issues in a condemnation action which affect a substantial right and are immediately appealable are issues relating to ownership of land or what parcel is being taken, quoting from *N.C. Dep't of Transp. v. Stagecoach Village*, 166 N.C. App. 272, 601 S.E.2d 279 (2004), *vacated sub nom.*, 360 N.C. 46, 48, 619 S.E.2d 495, 496 (2005), as follows: "[T]hese are the only two condemnation issues affecting substantial rights[.]" *Id.* at 274, 601 S.E.2d at 280. Plaintiff conveniently omits the remainder of the quoted sentence: "from which immediate appeal *must* be taken." *Stagecoach Village*, 166 N.C. App. at 274, 601 S.E.2d at 280 (emphasis added). In addition, the quote is taken from the Court of Appeals' opinion in *Stagecoach Village*, which was vacated by the North Carolina Supreme Court for erroneously concluding that the underlying order did not concern title to the property being condemned. 360 N.C. at 48, 619 S.E.2d at 497. It is true that these particular issues -- ownership and parcel taken -- must be appealed immediately or any potential challenge to the interlocutory order is lost; they cannot be raised on appeal after the final judgment. *See Highway Commission v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967) ("One of the purposes of G.S. 136-108 is to eliminate from the jury trial any question as to what land the State Highway Commission is condemning and any question as to its title. Therefore, should there be a fundamental error in the judgment resolving these vital preliminary issues, ordinary prudence requires an immediate appeal, for that is the proper method to obtain relief from legal errors."). But this does not mean that these are the *only* two issues a party to a condemnation case may appeal prior to a final judgment. If a landowner can show impairment of a substantial right which would be lost based on some other issue, an interlocutory appeal can be proper. *See*, *e.g.*, *SED Holdings*, *LLC v. 3 Star Properties*, *LLC*, __ N.C. App. __, __, 791 S.E.2d 914, 919 (2016) ("Immediate review is available where an interlocutory order affects a substantial right that will clearly be lost or irremediably adversely affected if the order is not reviewed before final judgment. As our Supreme Court has acknowledged, this determination must be made on a case-by-case basis: The substantial right test for appealability of interlocutory orders is more easily stated than applied. It is usually necessary to resolve the question in each case by

considering the particular facts of that case and the procedural context in which the order from which appeal is sought was entered." (Citations, quotation marks, and brackets omitted)).

Plaintiff also argues that an order granting a motion to amend a complaint does not affect a substantial right and there is no right of immediate appeal, citing to *LendingTree, LLC v. Anderson*, 228 N.C. App. 403, 407, 747 S.E.2d 292, 296 (2013), which addresses the issue as presented in that case with one sentence: "However, we do not have jurisdiction to review the Business Court's decision granting LendingTree's motion to amend its complaint since that decision does not affect a substantial right." As a general rule in other civil proceedings, it is true that an order allowing a motion to amend is not immediately appealable. *See, e.g.*, *Howard v. Ocean Trail Convalescent Center*, 68 N.C. App. 494, 496, 315 S.E.2d 97, 99 (1984) ("The order granting the motion to amend is obviously not a final judgment but is interlocutory. No substantial right is at stake, so there is no right to immediate appeal on this issue." (Citation and quotation marks omitted)). But the Plaintiff moved to amend not just the complaint but also the deposit and declaration of taking, and we must consider this case in the context of the detailed condemnation statutes which dictate the requirements of the complaint, declaration of taking, deposit, and some procedures -- including amendment of the complaint and deposit.

Here, as addressed in more detail below, plaintiff did not have the right to amend the complaint to reduce the deposit, and the trial court's order granting the amendment and refusing to recognize the effect of the voluntary dismissal has the effect of taking away defendant's right under N.C. Gen. Stat. § 136-105 to accept the original deposit, thus forcing defendant to choose between accepting the reduced deposit or proceeding with a jury trial. Because of these statutory rights in condemnation cases, granting the motion to amend did affect a substantial right of defendant which would be lost otherwise. Although generally there is no right to an interlocutory appeal to avoid a trial, *see, e.g.*, *Lee v. Baxter*, 147 N.C. App. 517, 520, 556 S.E.2d 36, 38 (2001) ("[A]voiding the time and expense of trial is not a substantial right justifying immediate appeal."), the defendant-landowner in a condemnation case does have the right under N.C. Gen. Stat. § 136-105 to avoid a trial by accepting the deposit. *See* N.C. Gen. Stat. § 136-105. Under N.C. Gen. Stat. § 136-107, the landowner's failure to file an answer within 12 months from service of a complaint is treated as a waiver of the landowner's right to any further proceeding to determine just compensation. *Id.* Because the claim to compensation is the defendant's claim, defendant's

position is comparable to that of the plaintiff in other types of civil proceedings. And in a typical action, if there is no counterclaim which would prevent the plaintiff from taking a voluntary dismissal, the plaintiff "may take a voluntary dismissal at any time prior to resting his or her case." *Brandenburg Land Co. v. Champion International Corp.*, 107 N.C. App. 102, 103, 418 S.E.2d 526, 527 (1992).

We also accord deference to the trial court's certification there is no just reason for delay under Rule 54(b). The trial court certified there was no just reason for delay of this appeal and included in the order detailed findings of fact supporting its determination that an immediate appeal is proper. The trial court concluded:

> Given the uniqueness of the facts and applicable law in this case, the Court certifies that there is no just reason to delay an appeal of this matter. A trial would be a waste of the Court's time and resources at this point in time given this Order, and the prior Court of Appeals' mandate. Whereas, if [University] Financial is correct in its interpretation of the effect of its filing a voluntary dismissal, then a trial would be presented in a different manner.

"Initially, we note with approval that the trial court's order sets forth the basis upon which it determined there existed 'no just reason to delay,' thus facilitating appellate review." *First Atl. Mgmt. Corp. v. Dunlea Realty Co.*, 131 N.C. App. 242, 249, 507 S.E.2d 56, 61 (1998). Although we give great deference to the trial court's certification, we still must consider the propriety of the trial court's certification. *See, e.g.*, *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277, 679 S.E.2d 512, 515 (2009) ("We generally accord great deference to a trial court's certification that there is no just reason to delay the appeal. However, such certification cannot bind the appellate courts because ruling on the interlocutory nature of appeals is properly a matter for the appellate division, not the trial court." (Citations and quotation marks omitted)). We agree with the trial court that this case presents an unusual procedural issue due to the prior appeal and competing filings of both parties on remand. In addition, the underlying claim is the defendant's claim for just compensation, despite the fact that the plaintiff filed this action.

In condemnation actions, the statutes set forth specific procedures and rights of the parties, and some of these procedures are unique to condemnation cases. Had the trial court ruled in the opposite way and granted defendant's voluntary dismissal, this matter would have been completely resolved. As the landowner, defendant has a substantial

right to accept the deposit of just compensation plaintiff made pursuant to N.C. Gen. Stat. § 136-105 and to avoid a jury trial to determine just compensation, and this right will be lost unless we consider defendant's appeal of the trial court's order. Accordingly, we will address the issues raised in this interlocutory order.

II. Voluntary Dismissal

[2] The trial court's order concluded that defendant's voluntary dismissal "had no effect to end this case[.]" Defendant argues that the filing of a notice of voluntary dismissal by a defendant in a condemnation case abandons any claims for a greater recovery and serves as an admission that the deposit tendered is just compensation.

Under Rule 41(a) of the Rules of Civil Procedure, it is well established that if a plaintiff takes a voluntary dismissal of a claim, it strips the trial court of its authority to enter further orders in the case, other than orders taxing costs or attorney fees. *See Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000). A voluntary dismissal leaves the plaintiff exactly where he or she was before the action was commenced. *Id.* A plaintiff may take a voluntary dismissal at any time before he rests the case, even if the defendant has motions pending, as long as there is no counterclaim. *See Carter v. Carter*, 102 N.C. App. 440, 445, 402 S.E.2d 469, 471 (1991) ("If there is no counterclaim pending at the time the plaintiff desires to enter a voluntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(a)(1) or if there is a counterclaim and that counterclaim is independent and does not arise out of the same transaction as the complaint, a party may voluntarily dismiss his suit without the opposing party's consent by filing a notice of dismissal." (Citation and quotation marks omitted)).

But in civil proceedings other than condemnation, the plaintiff is the party who brought the claim, not the defendant. Condemnation proceedings differ from other types of cases due to the detailed statutes giving authority to take property for a public purpose:

> Article 9 sets forth the procedure for acquiring land by condemnation. These proceedings commence when DOT files a complaint and declaration of taking accompanied by a deposit of the estimated just compensation in the superior court in the county where the land is located. DOT must include in its complaint, inter alia, a prayer for determination of just compensation. Upon filing and deposit, title to the land vests in DOT. The right to just compensation vests in the landowner, who may apply to

> the court for disbursement of the deposit, file an answer requesting a determination of just compensation, or both.
>
> The statutes provide that just compensation includes damages for the taking of property rights plus interest on the amount by which the damages exceed DOT's deposit.

Department of Transp. v. M.M. Fowler, Inc., 361 N.C. 1, 5, 637 S.E.2d 885, 889 (2006) (citation omitted).

The condemnor's only "claim" in a condemnation action is to acquire title to the real property. When the condemner files the condemnation action, notice of taking, and deposit, title to the land immediately vests in the condemnor. N.C. Gen. Stat. § 136-104 (2017). The plaintiff-condemner need not take any other action to accomplish the purpose of its claim, which is to take the land for a public use. *Id.* At this point, only the defendant-landowner has the option of causing the case to become a dispute over the proper amount of just compensation, and the defendant-landowner must file an answer to bring this "claim" for additional compensation. N.C. Gen. Stat. § 136-106 (2017). The defendant in a condemnation proceeding -- the property owner -- is in the position of the plaintiff in other types of civil claims. The defendant is the only party who has a right to file a claim, by way of the answer, for additional compensation in addition to the deposit. *See id.* At trial, the defendant-landowner, not the plaintiff, must prove that it is entitled to compensation of a particular amount; the amount of the deposit is not admissible evidence of just compensation. *See, e.g.*, *Board of Transportation v. Brown*, 34 N.C. App. 266, 269, 237 S.E.2d 854, 856 (1977) ("The landowner who has a part of his tract taken has the burden of proving by competent evidence this relationship, that is, how the use of the land taken results in damage to the remainder."), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978).

Chapter 136 does not expressly address the effect of the filing of a voluntary dismissal, but it does recognize the need to reconcile the procedures for condemnation with the Rules of Civil Procedure to accomplish the stated intent to make "the practice in [actions under Chapter 136] . . . conform as near as may be to the practice in other civil actions in said courts." N.C. Gen. Stat. § 136-114 (2017). North Carolina General Statutes Chapter 136, Article 9, sets forth detailed pleading requirements and procedures unique to condemnation actions. The Rules of Civil Procedure apply to condemnation cases, but where Article 9 makes specific provisions for the "mode or manner" of the action, the specific provisions of Article 9 are controlling:

> In all cases of procedure under this Article where the mode or manner of conducting the action is not expressly provided for in this Article or by the statute governing civil procedure or where said civil procedure statutes are inapplicable the judge before whom such proceeding may be pending shall have the power to make all the necessary orders and rules of procedure necessary to carry into effect the object and intent of this Chapter and the practice in such cases shall conform as near as may be to the practice in other civil actions in said courts.

N.C. Gen. Stat. § 136-114.

We are required to address the effect of a Rule 41(a) dismissal in a way which make the practice in a condemnation case "conform as near as may be to the practice in other civil actions in said courts." *Id.* Only one published[1] case has addressed the effect of a voluntary dismissal by a defendant-landowner in a condemnation case, and that case is somewhat confusing, since it said that the dismissal had no effect because defendants cannot take voluntary dismissals, but then the Court held that the attempted dismissal had the effect of a voluntary dismissal under Rule 41 and ended the case entirely. *See generally Dept. of Transportation v. Combs*, 71 N.C. App. 372, 322 S.E.2d 602 (1984). In *Combs*, a condemnation case, the defendant filed a voluntary dismissal without prejudice under Rule 41 of the North Carolina Rules of Civil Procedure the morning the matter was set to go to trial, apparently because the defendant was not prepared to proceed. *Id.* at 373-74, 322 S.E.2d at 603. This Court acknowledged the "unusual and novel procedure" of a defendant filing a voluntary dismissal, *id.* at 373, 322 S.E.2d at 603, but concluded:

> Our research has failed to disclose any rule, statute, or case which grants a defendant the right to take a voluntary dismissal, whether with or without prejudice, unless the party-defendant taking the dismissal has a pleading which contains a counterclaim, crossclaim, or third party claim. Since the rules contain no provision which would

1. There is also one unpublished case, *Department of Transp. v. Ashcroft Development, LLC*, __ N.C. App. __, 788 S.E.2d 684 (2016) (COA 15-1080) (unpublished), which addresses a voluntary dismissal by a defendant in a condemnation proceeding. While, under Rule 30 of the Rules of Appellate Procedure, "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority[,]" N.C. R. App. P. Rule 30(e)(3), we note this decision because it addressed the same issue and came to the same conclusion as we do in this case.

> permit a defendant to take the action done in this case by Attorney Smith, and since ordinarily such action would be held a nullity, we are constrained to hold that the filing of the voluntary dismissal by Attorney Smith constituted an abandonment of the case by the defendants and also constituted an acknowledgment of satisfaction with the amount of the deposit as being full and just compensation for the quantity of property taken for the project[.]"

Id. at 375, 322 S.E.2d at 604 (citation and quotation marks omitted) (emphasis added). Thus, although it was not the defendant's intent in *Combs* for the dismissal to serve as an complete abandonment of his claim and acceptance of the deposit as just compensation, that is the effect the Court gave to the dismissal. *Id.* The *Combs* Court did not refuse to recognize the voluntary dismissal as having any effect; if it had, the claim would not have been concluded and the defendant-landowner could have proceeded to a jury trial after the appeal.

In other types of civil proceedings, a plaintiff would have a right to re-file an action once after taking a voluntary dismissal under Rule 41(a). Because the landowner-defendant who had filed the dismissal was the appellant, challenging the entry of judgment for the amount of the deposit on appeal, the *Combs* Court was essentially holding that the defendant-landowner could not take advantage of this benefit of Rule 41 since the defendant was not the party who filed the action. *Id.* This distinction makes sense in the context of condemnation, since title to the land has already vested in the condemnor-plaintiff, and the defendant-landowner's dismissal has no effect upon the ownership of the land. The only claim in dispute (once any issues under N.C. Gen. Stat. § 136-108 have been resolved) is just compensation, and only the defendant-landowner can assert that claim, by way of answer. Voluntary dismissal of a claim ends the case. *See Doe v. Duke University*, 118 N.C. App. 406, 408, 455 S.E.2d 470, 471 (1995) ("Once a party voluntarily dismisses her action pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a)(1) (1990), it is as if the suit had never been filed, and the dismissal carries down with it previous rulings and orders in the case." (Citations, quotation marks, and brackets omitted)).

N.C. Gen. Stat. § 136-107 provides:

> Failure to answer [12 months from service of complaint] shall constitute an admission that the amount deposited is just compensation and shall be waiver of any further proceeding to determine just compensation;

> in such event the judge *shall enter final judgment in the amount deposited* and order disbursement of the money deposited to the owner.

(Emphasis added). If a voluntary dismissal has the effect of making the case as though a suit was never filed -- or in this case, an answer was never filed -- then under N.C. Gen. Stat. § 136-107 the dismissal must be treated as an admission by defendant that the amount deposited is just compensation for the taking. *Id.* This result is consistent with the effect the *Combs* Court gave to the defendant-landowner's dismissal. *See Combs*, 71 N.C. App. at 376, 322 S.E.2d at 605. After the defendant-landowner files a voluntary dismissal, the trial court must "enter final judgment in the amount deposited[.]" N.C. Gen. Stat. § 136-107. The statute specifically requires entry of the judgment in the amount *deposited*— not the amount alleged in the complaint. *See id.*

Plaintiff claims this Court previously determined that defendant "is not entitled to compensation for the loss of visibility from University Financial's remaining property that would result from the Bridge" and argues that the trial court's order granting the motion to amend plaintiff's complaint was simply following the mandate this Court set out in its first opinion. The trial court's order also concluded this result was dictated by the prior opinion. But this Court's prior opinion resulted from plaintiff's request for a hearing under N.C. Gen. Stat. § 136-108 to resolve a specific issue of the extent of the compensable taking. *University Financial I*, __ N.C. App. at __, 784 S.E.2d at 589-90. This Court's opinion concluded only that the trial court "erred in ruling that University Financial is entitled to present evidence concerning all damages resulting from the impact of the construction of the BLE Project, including construction of the Bridge, on its remaining property during the trial on just compensation." *Id.* at __, 784 S.E.2d at 594 (quotation marks omitted). We did not consider how plaintiff determined its alleged value or deposit; we addressed only the area or interest taken as required in a hearing under N.C. Gen. Stat. § 136-108. *University Financial I*, __ N.C. App. at __, 784 S.E.2d at 590. And this Court could not anticipate how the parties would proceed on remand, nor could we address any issue which might arise later. After remand, both parties were free to file motions and proceed as they wished; this Court's ruling did not dictate any particular result in those future proceedings regarding the amount of just compensation.

This analysis reconciles the rights and procedures established under Chapter 136 with the usual effect of voluntary dismissals under Rule 41. If the defendant-landowner is deprived of the option of taking a voluntary dismissal under Rule 41, condemnors would have the ability

to force a property owner to proceed to a jury trial on just compensation if the landowner has filed an answer with this request. If we were to rule as plaintiff urges, a defendant-landowner would not have the right to take a voluntary dismissal to end the case, even if he is satisfied with the deposit and does not wish to proceed to trial. This is inconsistent with N.C. Gen. Stat. §§ 136-105 and 136-107, since the condemnor does not have a right to a trial on just compensation; that right belongs to the landowner. In deciding whether to accept a deposit, the landowner must consider the costs of a trial, such as appraisal fees, expert witness fees, attorney fees, as well as the potential gain or loss from a trial. The condemner has already taken the land upon filing of the declaration of taking, and the landowner has a right to the deposit which cannot be lost unless it is required to refund a portion after a final judgment for an amount less than the deposit, under N.C. Gen. Stat. § 136-121 (2017). The property owner may decide whether to accept the deposit amount as just compensation, under N.C. Gen. Stat. § 136-105, and do nothing, or file an answer under N.C. Gen. Stat. § 136-106 and proceed to trial to allow a jury to determine just compensation, or file a voluntary dismissal of the claim for determination of just compensation at any time before resting its case.

The fact that plaintiff filed its motion to amend first does not change the result. It is well-established that if there is no counterclaim, the plaintiff -- here the landowner -- may take a voluntary dismissal under Rule 41(a) at any time until it rests its case. *See, e.g.*, *Williams v. Poland*, 154 N.C. App. 709, 712, 573 S.E.2d 320, 232 (2002) ("Defendants contend that their assertion of a Rule 12(b)(6) motion constitutes a ground for affirmative relief that prevents plaintiff from entering a voluntary dismissal without prejudice. We disagree. A request for affirmative relief has been defined by this Court as relief for which defendant might maintain an action independently of plaintiff's claim and on which he might proceed to recovery, although plaintiff abandoned his cause of action or failed to establish it. Here, the Rule (12)(b)(6) motion to dismiss by defendants cannot survive independently without the plaintiff's underlying claim. Therefore, the Rule 12(b)(6) motion to dismiss is not a request for affirmative relief that cancel's plaintiff's ability to voluntarily dismiss her case without prejudice."). We therefore hold that the trial court had no authority to rule on plaintiff's motion to amend the complaint after defendant filed its voluntary dismissal under Rule 41(a). The voluntary dismissal ended the only pending claim, which was the defendant's claim for determination of just compensation. The dismissal put defendant in the same position as if it had never filed an answer and instead accepted the deposit as just compensation for the taking.

We conclude that a defendant does have the right to take a voluntary dismissal of its claim for determination of just compensation, as this result is consistent with the practice under Rule 41(a) and in compliance with N.C. Gen. Stat. §§ 136-105 and 136-107.

But one additional twist in this case is that the plaintiff also moved to amend the deposit. Deposits do not exist in other civil proceedings, so we must consider if Chapter 136 could allow amendment of the deposit despite the filing of the voluntary dismissal.

The statute is quite clear that although a complaint or declaration of taking may be amended, a deposit may only be *increased*, not reduced. N.C. Gen. Stat. § §136-103(d) provides as follows:

> (d) The filing of said complaint and said declaration of taking shall be accompanied by the deposit of the sum of money estimated by said Department of Transportation to be just compensation for said taking and upon the filing of said complaint and said declaration of taking and deposit of said sum, summons shall be issued and together with a copy of said complaint and said declaration of taking and notice of the deposit be served upon the person named therein in the manner now provided for the service of process in civil actions. *The Department of Transportation may amend the complaint and declaration of taking and may increase the amount of its deposit with the court at any time while the proceeding is pending, and the owner shall have the same rights of withdrawal of this additional amount as set forth in G.S. 136-105 of this Chapter.*

(Emphasis added).

Although amendment of a complaint is allowed more freely under North Carolina Rules of Civil Procedure 15(a), N.C. Gen. Stat. § 136-103 sets forth specific provisions for amendment in condemnation actions. *See* N.C. R. Civ. P. 15(a); N.C. Gen. Stat. § 136-103. Therefore, we must consider whether plaintiff's motion to decrease the deposit could be allowed under N.C. Gen. Stat. § 136-103, even if the defendant has filed a notice of voluntary dismissal. This is a question of statutory interpretation which we review *de novo*.

> Questions of statutory interpretation are ultimately questions of law for the courts and are reviewed de novo. The principal goal of statutory construction is

> to accomplish the legislative intent. The best indicia of that intent are the language of the statute, the spirit of the act and what the act seeks to accomplish. The process of construing a statutory provision must begin with an examination of the relevant statutory language. It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. In other words, if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.

Wilkie v. City of Boiling Spring Lakes, __ N.C. __, __, 809 S.E.2d 853, 858 (2018) (citations, quotation marks, ellipses, and brackets omitted).

N.C. Gen. Stat. § 136-103(d) allows the condemnor to do two things: (1) "amend the complaint and declaration of taking;" and (2) "increase the amount of its deposit with the court at any time while the proceeding is pending. . . ." The complaint and the deposit are two different things, and they are treated differently.

The language in the statute is clear -- the condemnor may amend its complaint and notice of taking and may increase the deposit, but it may not amend a deposit to *decrease* the amount. We cannot read the word "increase" to mean "change" since a change could include a "decrease." Increase is the opposite of decrease. We construe the statute using its plain meaning. *See Wilkie*, __ N.C. at __, 809 S.E.2d at 858. And the statute plainly allows the condemnor only to increase its deposit "at any time while the proceeding is pending[.]" *See* N.C. Gen. Stat. § 136-103(d). In addition, the next phrase gives the landowner "the same rights of withdrawal of this additional amount" as it had for the initial deposit. *Id.* The statute contemplates only an increase in the deposit and provides for the landowner to withdraw the *additional* amount. *Id.* There is no provision for a decrease in the deposit while the action is pending. And as discussed above, the action is no longer "pending" after defendant's filing of a voluntary dismissal under Rule 41(a). Thus, the existence of a deposit does not change the result under Rule 41(a) in this case. Even if we assume that a deposit could be increased after a landowner takes a voluntary dismissal -- although we cannot imagine why that would ever happen -- the statute does not allow an amendment to decrease the deposit at all, so plaintiff's motion here to decrease the deposit does not change our analysis of the Rule 41(a) dismissal issue.

Plaintiff contends that "the General Statutes contemplate that some of the deposit may need to be refunded by the property owner." Plaintiff cites to N.C. Gen. Stat. § 136-121, which is the only statute on condemnation that addresses a refund of any portion of the deposit by a landowner, but this statute applies only after final judgment has been entered for a sum less than the deposit. *See* N.C. Gen. Stat. § 136-121 ("In the event the amount of the final judgment is less than the amount deposited by the Department of Transportation pursuant to the provisions of this Article, the Department of Transportation shall be entitled to recover the excess of the amount of the deposit over the amount of the final judgment and court costs incident thereto[.]"). This statute does not grant the condemnor the ability to decrease the deposit or to force a landowner to proceed to trial, but entitles it to reimbursement only after entry of final judgment for a lesser amount, normally after a property owner elects to proceed to trial instead of accepting the deposit amount as just compensation and a jury determines an amount of damages for just compensation less than that which was deposited. *Id.*

The amount of the deposit is not competent evidence during a jury trial, so the jury never sees that number in making its determination of just compensation. *See* N.C. Gen. Stat. § 136-109(d) (2017) ("The report of commissioners shall not be competent as evidence upon the trial of the issue of damages in the superior court, nor shall evidence of the deposit by the Department of Transportation into the court be competent upon the trial of the issue of damages." (Emphasis added)). Chapter 136 of the North Carolina General Statutes specifically requires a trial judge to enter judgment in the amount of the deposit when a condemnation defendant -- the landowner -- does not file an answer contesting the deposit amount. *See* N.C. Gen. Stat. § 136-107 ("Any person named in and served with a complaint and declaration of taking shall have 12 months from the date of service thereof to file answer. Failure to answer within said time shall constitute an admission that the amount deposited is just compensation and shall be a waiver of any further proceeding to determine just compensation; in such event the judge shall enter final judgment in the amount deposited and order disbursement of the money deposited to the owner." (Emphasis added)).

Here, defendant's voluntary dismissal ended the case, and the trial court had no authority to rule on plaintiff's pending motion to amend. We need not address the trial court's ruling on the motion to amend any further, since it had no authority to rule on that motion. Once the dispute as to determination of just compensation ended with the dismissal, the trial court must enter final judgment "in the amount deposited. . . ."

N.C. Gen. Stat. § 136-107. We therefore reverse the trial court's order and remand for entry of a final judgment in accord with N.C. Gen. Stat. § 136-107.

Conclusion

The trial court's order is reversed, and this matter is remanded to the trial court for entry of a final judgment.

REVERSED AND REMANDED.

Judges MURPHY and ARROWOOD concur.

LISA A. GARRETT, Employee, Plaintiff
v.
THE GOODYEAR TIRE & RUBBER CO., Employer, LIBERTY MUTUAL INSURANCE CO., Carrier, Defendants

No. COA17-500

Filed 3 July 2018

1. Workers' Compensation—issue preservation—failure of Full Commission to consider argument

The Industrial Commission erred in a worker's compensation case by not considering plaintiff's argument that defendants were estopped from denying the compensability of her claims. Defendants maintained that the issue of whether they were estopped was not before the Full Commission because plaintiff did not appeal the deputy commissioner's opinion and award. However, there were no findings or conclusions in the deputy commissioner's opinion and award addressing the issue and there was nothing to appeal. Plaintiff was deprived of her right to have her case fully and finally determined.

2. Workers' Compensation—low back condition—causation

The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff failed to prove that her low back condition was caused by a workplace accident. The Full Commission's opinion and award included several findings that referred to plaintiff's stipulated medical records and therefore she was unable to show that the Full Commission did not consider those records.

3. Workers' Compensation—evidence—stipulations—Commission to determine weight

In a workers' compensation case, it was for the Full Industrial Commission to determine the weight to be given to the medical records of two doctors. Although the records were stipulated, nothing would have prohibited sworn opinions from the doctors.

4. Evidence—medical—hypothetical—speculative

The Industrial Commission did not err in a workers' compensation case by characterizing a doctor's opinion as speculative where plaintiff claimed a neck and a back injury but this doctor only treated plaintiff for her neck and had no knowledge of her back condition prior to the workplace accident. Although the doctor's opinion on plaintiff's low back symptoms was based on a hypothetical, his testimony demonstrated that his opinion of causation was based exclusively on a temporal relationship.

5. Workers' Compensation—disability—conclusions

The Industrial Commission did not err in a workers' compensation case in its conclusions that plaintiff was only entitled to temporary disability. The weight of the evidence was for the Commission to determine, the Commission's methods were not "too mechanical" as argued by plaintiff, and its unchallenged facts supported the conclusion of an offer of suitable employment despite plaintiff's fear of another injury.

6. Workers' Compensation—neck injury—compensable injury medical evidence

Medical testimony in a workers' compensation action supported the conclusion that the aggravation of plaintiff's pre-existing neck condition was caused by a workplace accident where the doctor treated plaintiff's neck injury before and after the workplace accident and testified that the accident aggravated the existing neck condition. The temporal sequence of events was not the only factor he considered and the opinion was based on more than mere speculation.

7. Workers' Compensation—temporary disability—determination

The Industrial Commission erred in awarding temporary total disability compensation in a workers' compensation action by not making sufficient findings regarding the effect that plaintiff's compensable neck injury had on her ability to earn wages during a particular period. The evidence before the Commission did not show

that plaintiff was incapable of working at any employment during the relevant period.

Appeals by Plaintiff and Defendants from an Opinion and Award filed 10 February 2017 by the Full North Carolina Industrial Commission. Heard in the Court of Appeals 20 September 2017.

Law Offices of Kathleen G. Sumner, by Kathleen G. Sumner and David P. Stewart, for plaintiff-appellant.

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MURPHY, Judge.

Lisa A. Garrett ("Plaintiff") and The Goodyear Tire & Rubber Company ("Goodyear") and Liberty Mutual Insurance Company ("Liberty") (collectively "Defendants") appeal from an Opinion and Award filed 10 February 2017 by the North Carolina Industrial Commission. For the reasons discussed herein, we affirm in part and remand in part.

BACKGROUND

Plaintiff is approximately 56 years old, has a high school diploma, and previously served in the United States Navy. She first worked at the Goodyear plant in Fayetteville beginning on 12 June 2000 until sometime in 2001 when she was laid off. In 2007, Goodyear rehired Plaintiff, and on 15 June 2009, she started a new position with the company as a Production Service Carcass Trucker ("Carcass Trucker"). The Carcass Trucker position required Plaintiff to operate a stand-up, three-wheeled motorized vehicle in an industrial and warehouse setting. The position also included the following physical demands and frequencies:

- One-Hand Pull with Right Hand – 15 pounds of force
- Lift, Push, Pull to Change Battery – 30 pounds
- Pick Up Fallen Tire – 25 pounds

After working approximately one year as a Carcass Trucker, Plaintiff underwent two surgeries, a spinal fusion on 15 October 2010 and a right shoulder surgery on 29 December 2011. On 29 November 2012, Plaintiff's treating physician, Dr. Musante of Triangle Orthopedic Associates, medically released her to return to work, and she resumed employment as a Carcass Trucker with Goodyear.

A year later, on 15 December 2013, another employee driving a stand-up vehicle collided with Plaintiff's vehicle. This is the workplace accident triggering Plaintiff's workers' compensation claim and is the subject of this appeal. After the accident, Plaintiff initially resumed working, but she soon started "feeling something weird," and a numbness in the back of her neck. Plaintiff then reported the accident to her supervisor, received treatment at Goodyear, and went to the emergency room. Goodyear completed Industrial Commission Form 19 (Employer's Report of Employee's Injury) and stated it knew of the incident and that Plaintiff received "[m]inor on-site remedies by employer medical staff." Plaintiff then began to see several health care providers for her symptoms.

On 18 December 2013, Plaintiff saw Dr. Perez-Montes, and complained of pain in her neck and back. Dr. Perez-Montes imposed modified work (i.e. "light-duty") restrictions that included "no repetitive bending or twisting, as well as no pulling, pushing, or lifting of more than 15 pounds." Approximately two weeks after the accident, Plaintiff returned to work as a Carcass Trucker, subject to these light-duty restrictions.

Defendants assigned Plaintiff a nurse case manager, who scheduled a 9 April 2014 appointment with a pain management specialist, Dr. Kishbaugh. Dr. Kishbaugh noted that Plaintiff was suffering from "low back and leg pain, cervical and thoracic back pain, and pain in the shoulder region with numbness and tingling involving the arms." Dr. Kishbaugh referred Plaintiff for physical therapy to address her low back pain and suggested she follow up with a neurosurgeon for her neck complaints. On 21 April 2014, Plaintiff visited the office of Dr. David Musante, her treating physician after her 2010 and 2011 surgeries and the doctor who released her for work in November 2012. Plaintiff complained of neck pain to Dr. Musante's Physician's Assistant. X-rays and an MRI scan of her neck and spinal areas were ordered.

Goodyear initially accommodated Plaintiff's light-duty work restrictions, and Plaintiff continued working there as a Carcass Trucker while she received medical treatment. However, on 12 May 2014, Goodyear notified Plaintiff that it would no longer accommodate her work restrictions. Plaintiff then went on leave and began receiving accident and sickness disability benefits through an employer-sponsored plan.

While on leave, Plaintiff participated in a functional capacity evaluation ("FCE") with physical therapist Frank Murray on 29 October 2014. Two weeks later, on 13 November 2014, Dr. Kishbaugh reviewed the FCE, which concluded that Plaintiff "could perform the physical demands and

essential functions of the … Carcass Trucker position." Dr. Kishbaugh determined that it was appropriate for Plaintiff to return to work, consistent with the conclusions of the 29 October 2014 FCE. Four days after Dr. Kishbaugh's determination that Plaintiff could return to work, on 17 November 2014, Plaintiff sought and obtained a note from Dr. Musante excusing her from driving the carcass truck. Dr. Musante provided the note due to Plaintiff's "treatment for degeneration of a cervical intervertebral disc." Plaintiff continued to remain out of work.

On 2 January 2015, Plaintiff filed a Form 18 with the Industrial Commission giving notice of her workers' compensation claim to Goodyear. On 29 January 2015, Plaintiff underwent an independent medical evaluation ("IME") with Dr. Jon Wilson upon referral of Goodyear's accident and sickness insurance carrier. Dr. Wilson concluded that Plaintiff could not at the time drive a carcass truck safely, but that she could work full time at a sedentary level. On 13 February 2015, Defendants filed a Form 63 Notice to Employee of Payment of Medical Benefits Only Without Prejudice.

Plaintiff then filed a Form 33 on 22 April 2015, requesting a hearing before the Industrial Commission because "Defendants failed to file any forms" and "treated the claims as compensable." Almost three months later, on 16 July 2015, Goodyear made an employment offer to Plaintiff for the Carcass Trucker position at her prior wages, but Plaintiff refused the offer. Plaintiff later testified that she "did not want to return to work as a [C]arcass [T]rucker because of the bouncing nature of the truck." Goodyear then filed a Form 61 on 18 August 2015, denying liability for the 15 December 2013 incident. This was the same day that the claim was assigned for hearing before Deputy Commissioner Phillip Baddour.

Prior to the 18 August 2015 hearing before the Deputy Commissioner, the parties stipulated that the issues to be heard were:

> (a) Whether Plaintiff's claims should be deemed admitted based upon the actions of Defendants?
>
> (b) If not deemed admitted, whether Plaintiff suffered compensable injuries to her neck, low back, and bilateral shoulders?
>
> (c) If so, to what compensation, if any, is Plaintiff entitled?
>
> (d) Whether Dr. Musante should be designated as Plaintiff's authorized treating physician for her neck and low back conditions?

> (e) Whether Plaintiff is entitled to attorney's fees pursuant to [N.C.G.S.] § 97-88.1?

Deputy Commissioner Baddour filed his Opinion and Award on 23 June 2016 and concluded that both Plaintiff's neck and low back conditions were causally related to the work accident and that she was entitled to total disability compensation from "13 May 2014 to the present and continuing until she returns to work or compensation is otherwise legally terminated." Plaintiff's bilateral shoulder condition was not compensable and she was not entitled to attorney's fees. The Deputy Commissioner's Opinion and Award also stated "[t]he Commission may not prohibit Defendants from contesting compensability of Plaintiff's claims as a sanction for Defendants' failure to timely admit or deny the claims." Defendants then filed a notice of appeal to the Full Commission.

On 10 February 2017, the Full Commission filed its Opinion and Award. The Full Commission considered several evidentiary sources, including Dr. Musante's deposition testimony, the stipulated medical records of Dr. Kishbaugh and Dr. Perez-Montes, as well as Plaintiff's statements and testimony. The Full Commission concluded that Plaintiff's low back condition was not a compensable injury but her neck condition was. Plaintiff was awarded total temporary disability compensation for her neck injury from 13 May 2014 (the date Goodyear stopped accommodating her light-duty work restrictions) to 16 July 2015 (the date Plaintiff refused Defendants' offer to return to her previous position at the same wages). Plaintiff and Defendants timely appealed this Opinion and Award. Each party alleges that the Full Commission committed several errors, and we address Plaintiff's and Defendants' issues in turn.

STANDARD OF REVIEW

Our review of an Opinion and Award of the Industrial Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law. This court's duty goes no further than to determine whether the record contains any evidence tending to support the finding." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660, 669 S.E.2d 582, 584 (2008) (citation and quotation marks omitted).

PLAINTIFF-EMPLOYEE'S ISSUES ON APPEAL

Plaintiff's appeal is addressed in three parts: (A) preservation of the estoppel issue for review by the Full Commission; (B) causation

of Plaintiff's low back injury; and, (C) Plaintiff's determination of disability.

A. Issue Preservation

[1] Plaintiff first argues that the Full Commission erred in failing to consider her argument that Defendants were estopped from denying the compensability of her claims through their actions. She contends that Defendants waived their right to contest compensability of her claims because subsequent to her Form 18 Notice of Claim filing, Defendants neither admitted liability, denied liability, nor did they file a Form 63 Notice of Payment Without Prejudice regarding the claim within 30 days as required by statute and Industrial Commission Rules. *See* N.C.G.S. § 97-18(j) (2017); 04 NCAC 10A.0601 (2017) (titled Employer's Obligations Upon Notice; Denial of Liability; And Sanctions). Plaintiff also argues that after her Form 18 filing, Defendants engaged in a course of conduct, including an allegedly improper use of Form 63 designed "to direct and limit every aspect of [Plaintiff's] medical care to her medical and legal detriment" while "avoiding their legal obligation to admit or deny her claim." Without addressing the merits of Plaintiff's substantive argument, we conclude that the Full Commission erred by failing to address this issue of estoppel because Plaintiff properly raised the issue before the Deputy Commissioner and the Full Commission.

When this case was before the Deputy Commissioner, the parties' pre-trial agreement stipulated the issues to be heard. Stipulation 9 (B) of the pre-trial agreement states that Plaintiff contends the issues to be heard are:

> Whether [D]efendant's accepted this claim pursuant to [N.C.G.S.] § 97-18(d), when [D]efendants took a recorded statement, provided medical treatment in the outsourced medical clinic on premises, paid for the emergency room visit, sent [Plaintiff] out for medical treatment and diagnostic studies, and assigned a nurse case manager to the file, and failed to file any Industrial Commission form either accepting or denying this claim in a timely manner and failed to send to the medical providers from whom [D]efendants required [Plaintiff] to treat the mandatory letter stating that they do not accept the claim?

The Deputy Commissioner's Opinion and Award listed the five issues to be heard and one was the issue of whether Goodyear was estopped from denying the compensability of Plaintiff's claims.

> (a) Whether Plaintiff's claims should be deemed admitted based upon the actions of Defendants?

However, the Deputy Commissioner did not adjudicate this specific issue. Conclusion of Law 1 of his Opinion and Award only states:

> 1. The Commission may not prohibit Defendants from contesting compensability of Plaintiff's claims as a sanction for Defendants' failure to timely admit or deny the claims. [N.C.G.S.] § 97-18(j).

When the Full Commission heard this case, it invoked the "law of the case" doctrine and determined that Plaintiff waived the issue because she did not appeal from the Deputy Commissioner's Opinion and Award. The 10 February 2017 Opinion and Award of the Full Commission states:

> Plaintiff did not appeal from the [Deputy Commissioner's] Opinion and Award of June 23, 2016 as to the issues of . . . whether [D]efendants' actions constitute an acceptance of [P]laintiff's claim . . . [.] Accordingly, the Findings of Fact and Conclusions of Law issued by the Deputy Commissioner in the June 23, 2016 Opinion and Award are the law of the case as to those issues from which no appeal was taken by [P]laintiff.

It is well-established that "[t]he law of estoppel does apply in workers' compensation proceedings, and liability may be based upon estoppel to contravene an insurance carrier's subsequent attempt to avoid coverage of a work-related injury." *See e.g.*, *Carroll v. Daniels & Daniels Construction Co.*, 327 N.C. 616, 620, 398 S.E.2d 325, 328 (1990). "[E]stoppel requires proof that the party to be estopped must have misled the party asserting the estoppel either by some words or some action or by silence." *Id.* at 621, 398 S.E.2d. at 328 (citation omitted). In a workers' compensation proceeding, "the burden is on the plaintiff to show that the [defendants] misled the plaintiff by words, acts, or silence." *Id.*

In *Lewis v. Beachview Exxon Serv.*, we addressed a situation similar to the present case. 174 N.C. App. 179, 182, 619 S.E.2d 881, 882 (2005), *rev'd on other grounds*, 360 N.C. 469, 629 S.E.2d 152 (2006). The parties' pre-trial agreement "stipulated that the issues before both the deputy commissioner and the Full Commission included 'whether defendants are estopped from denying plaintiff's pulmonary condition.' " *Lewis*, 174 N.C. App. at 182, 619 S.E.2d. at 882-83. However, the Opinion and Award included "no findings of fact or conclusions of law regarding waiver or estoppel," and we held that the "Commission failed to consider the

application of the doctrine of estoppel to the factual scenario at hand[]" and remanded to the Commission to address the issue. *Id.* at 183, 619 S.E.2d. at 883 (citations omitted).

Regarding the "law of the case doctrine," our Supreme Court has stated:

> [a]s a general rule, when an appellate court passes on questions and remands the case for further proceedings to the trial court, the questions therein actually presented and necessarily involved in determining the case, and the decision on those questions become the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.

Tennessee-Carolina Transp., Inc. v. Strick Corp., 286 N.C. 235, 239, 210 S.E.2d 181, 183 (1974) (internal citations and quotation marks omitted). We have further explained that the law of the case doctrine "provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the 'law of the case' and cannot be challenged in subsequent proceedings in the same case." *Boje v. D.W.I.T., L.L.C.*, 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). In *Boje*, the Deputy Commissioner's Opinion and Award included a finding of fact that the defendant did not have workers' compensation coverage on the date of the plaintiff's accident. *Id.* There, the defendant did not appeal the finding to the Full Commission, and we held that this finding was the law of the case and the defendant was "barred from relitigating that issue in subsequent proceedings." *Id.*

However, "[t]he doctrine of the law of the case is not an inexorable command, or a constitutional requirement, but is, rather, a flexible discretionary policy which promotes the finality and efficiency of the judicial process." *Goetz v. N.C. Dep't of Health & Human Servs.*, 203 N.C. App. 421, 432, 692 S.E.2d 395, 403 (2010) (quotation marks omitted). Moreover, the Full Commission "is not an appellate court" and "[t]he Commission may not use its own rules to deprive a plaintiff of the right to have his case fully determined." *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 482, 374 S.E.2d 610, 613 (1988). In *Joyner*, we observed:

> [a]lthough it hardly need be repeated, that the "[F]ull Commission" is not an appellate court in the sense that it reviews decisions of a trial court. It is the duty and responsibility of the [F]ull Commission to make detailed

> findings of fact and conclusions of law with respect to every aspect of the case before it.

Id.

In the case at bar, Defendants maintain that the issue of whether they should be estopped from denying Plaintiff's claims was not before the Full Commission because Plaintiff did not appeal the Deputy Commissioner's Opinion and Award. However, since there were no findings or conclusions in the Deputy Commissioner's Opinion and Award that addressed the issue of estoppel, the issue was not adjudicated, and there was nothing for Plaintiff to appeal to the Full Commission. Although labeled as a "Conclusion of Law," the Deputy Commissioner's Conclusion of Law 1 is not a legal conclusion because it is not the result of the application of legal principles to evidentiary facts. *See In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) ("As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified a conclusion of law."). Rather, Conclusion of Law Number 1 merely paraphrases a statutory provision with potential relevance to the issue of Plaintiff's estoppel claim. It reads:

> 1. The Commission may not prohibit Defendants from contesting compensability of Plaintiff's claims as a sanction for Defendants' failure to timely admit or deny the claims. [N.C.G.S.] § 97-18(j).[1]

"While the Commission is not required to make findings as to each fact presented by the evidence, it must find those crucial and specific facts upon which the right to compensation depends." *Lewis*, 174 N.C. App. at 182, 619 S.E.2d at 883 (citation omitted). More specifically, "the Commission must address the issue of estoppel[]" when the issue is raised. *Id.* Here the issue of estoppel was raised before the Deputy Commissioner via the pre-trial agreement and in Plaintiff's brief to the Full Commission. Nevertheless, the Full Commission "failed to consider the application of the doctrine of estoppel to the factual scenario at hand." *Id.* Additionally, by invoking the law of the case doctrine, the

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1. Specifically, N.C.G.S. § 97-18(j) provides that the Commission may order reasonable sanctions against an employer that does not, within 30 days following the notice of an employee's claim from the Commission either admit, deny, or initiate payments without prejudice and when such sanctions are ordered, "shall not prohibit the employer or insurer from contesting the compensability of or its liability for the claim." N.C.G.S. § 97-18(j) (2017).

Full Commission avoided its duty to "make detailed findings of fact and conclusions of law with respect to every aspect of the case before it." *Joyner*, 92 N.C. App. at 482, 374 S.E.2d at 613. This deprived Plaintiff of her right to have her case fully and finally determined.[2] We remand this matter to the Industrial Commission to consider whether the facts of this case support a conclusion that Defendants should be estopped from denying the compensability of Plaintiff's claims. Should the Full Commission determine that the doctrine of estoppel applies, it should determine whether Defendants are liable for the workers' compensation benefits. The Full Commission should rely on the findings of fact already made and may make any additional findings it deems necessary.

B. Causation of Plaintiff's Low Back Injury

[2] Plaintiff next contends that the Full Commission erred by concluding she failed to prove that her low back condition was caused by the December 2013 workplace accident. We disagree.

"The claimant in a workers' compensation case bears the burden of initially proving each and every element of compensability, including a causal relationship between the injury and his employment." *Adams v. Metals USA*, 168 N.C. App. 469, 475, 608 S.E.2d 357, 361 (2005) (citations and internal quotation marks omitted). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Young v. Hickory Bus. Furniture*, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (citations omitted). However, "an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility." *Id.*

We have held that an expert medical opinion stating an accident "could," "might have" or "possibly" caused an injury is generally insufficient to prove medical causation. *See Carr v. Dep't of Health & Human*

2. Defendants also argue that Plaintiff waived the issue of whether her claims should be deemed admitted based upon the actions of Defendants because she did not submit a Form 44 Application for Review to the Full Commission. *See* 04 NCAC 10A.0701(d) (April 2018). Since Plaintiff did not appeal any finding or conclusion of the Deputy Commissioner to the Full Commission, from a procedural standpoint, Plaintiff was the appellee before the Full Commission. The Industrial Commission rules do not require an appellee to submit a Form 44, only the appellant. *See* 04 NCAC 10A.0701(e) (April 2018). The appellee is, however, required to submit a brief, and Plaintiff did submit a brief raising the specific issue of whether Plaintiff's claims should be deemed admitted based upon the actions of Defendants.

Servs., 218 N.C. App. 151, 155, 720 S.E.2d 869, 873 (2012) (citations omitted). However, "supplementing that opinion with statements that something 'more than likely' caused an injury or that the witness is satisfied to a 'reasonable degree of medical certainty' has been considered sufficient" to establish causation under the Workers Compensation Act. *Id.* (citing *Young*, 353 N.C. at 233, 538 S.E.2d at 916; *Kelly v. Duke Univ.*, 190 N.C. App. 733, 740, 661 S.E.2d 745, 749 (2008)).

Here, the Full Commission concluded that Plaintiff "failed to present competent medical expert opinion evidence, as required by our case law, to establish a relationship between her low back condition and the December 15, 2013 workplace accident." Plaintiff contends that this conclusion was erroneous because the Full Commission ignored the stipulated medical records of Dr. Perez-Montes and Dr. Kishbaugh, and improperly discounted the medical opinion testimony of Dr. Musante, and characterized it as "speculative." As to both arguments, we disagree.

"It is reversible error for the Commission to fail to consider the testimony or records of a treating physician." *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 348, 581 S.E.2d 778, 784 (2003). In *Whitfield*, the appellant argued that the Commission erred by wholly disregarding the stipulated medical records of the plaintiff's treating physicians. *Id.* at 348, 581 S.E.2d at 783. We disagreed, and noted that the Commission made numerous findings concerning plaintiff's visits to these doctors. *Id.* at 349, 581 S.E.2d at 784. The Commission "simply accorded greater weight" to the expert medical opinion of a doctor who provided sworn deposition testimony, as it is entitled to do. *Id.* Similarly, here the Full Commission's Opinion and Award included several findings of fact that reference Plaintiff's stipulated medical records.[3] Plaintiff is therefore unable to show that the Full Commission failed to consider these medical records because a number of findings in the Opinion and Award expressly reference these records, the physicians who provided them, and the information contained therein.

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3. The Full Commission's consideration of Dr. Perez-Montes and Dr. Kishbaugh's medical records is evinced by Findings of Fact 7, 8, 9, and 10. *See* I.C. No. 13-007190, N.C. Indus. Comm'n, *Opinion And Award*, p. 8 (Feb. 10 2017) ("7. On December 18 2013, [P]laintiff presented to Dr. Marcelo R. Perez-Montes . . . for follow-up after her work incident of December 15, 2013. . . He diagnosed musculoskeletal pain and cervical spasm"); *Id.* at 9 ("8. Dr. Perez-Montes ordered a lumbar spine MRI[.]"); *Id.* ("9. . . . Dr. Perez Montes diagnosed degenerative disc disease/facet syndrome of the lower spine and referred [P]laintiff to pain management treatment."); *Id.* ("10. At Plaintiff's initial appointment on April 9, 2014, Dr. Kishbaugh noted low back and leg pain, cervical and thoracic back pain, and pain in the shoulder region with numbness and tingling involving the arms.").

[3] Plaintiff also claims that the Full Commission did not give "proper weight" to these stipulated medical records during their review. However, "[i]t is for the Commission to determine . . . the weight to be given the evidence, and the inferences to be drawn from it." *Rackley v. Coastal Painting*, 153 N.C. App. 469, 472, 570 S.E.2d 121, 124 (2002). Moreover, when medical records are stipulated to, the only aspect of the records the parties are stipulating to is their authenticity. In *Hawley v. Wayne Dale Const.*, we noted that "stipulating to the record's authenticity is not the same as stipulating to the accuracy of the diagnosis," nor does such stipulation "preclude taking a deposition, calling the author as a witness or introducing contrary evidence." *Hawley v. Wayne Dale Const.*, 146 N.C. App. 423, 429, 552 S.E.2d 269, 273 (2001). Although the medical records of Dr. Perez-Montes and Dr. Kishbaugh were stipulated, nothing would have prohibited these physicians from providing a sworn medical opinion regarding the cause of Plaintiff's lower back condition. However, neither doctor was deposed, and it was for the Full Commission to determine the weight to be given to their records and the inferences to be drawn from them.

[4] Plaintiff's final argument regarding her low back condition is that the Full Commission improperly characterized Dr. Musante's medical opinion as "speculative" because it was based upon a hypothetical. Finding of Fact 27 of the Full Commission stated:

> 27. The Commission finds that Dr. Kishbaugh, having treated [P]laintiff's low back since April 2014, would have been in the best position to provide an expert medical opinion as to the cause of plaintiff's low back condition. However, neither party obtained deposition testimony or a written opinion from Dr. Kishbaugh as to this issue, and the Commission finds that Dr. Musante's opinion as to the cause of [P]laintiff's low back condition is insufficient to establish a causal relationship between [P]laintiff's low back condition and the work incident of December 15, 2013 given its speculative nature and the fact that Dr. Musante has never evaluated or treated [P]laintiff's low back.

This finding was based on Dr. Musante's deposition testimony, which was in part based on a hypothetical. Regarding Plaintiff's back condition, Dr. Musante testified:

> *I can only speculate about her back* because I don't have any recollection of symptoms prior to, or knowledge of

> her back prior to this accident. I would simply answer in terms of what I've seen here and in a *hypothetical*. If she reported to me she had no history of seeking medical attention for her back and had no problems with her back prior to this accident, and then began to have back and leg symptoms, I would conclude that the accident caused or aggravated most likely some previously asymptomatic lumbar pathology.

While an expert medical opinion based on a hypothetical may be admissible as competent evidence in workers' compensation proceedings, it cannot be based on conjecture and speculation. *See Haponski v. Constructor's, Inc.*, 87 N.C. App 95, 100-03, 360 S.E.2d 109, 112-13 (1987). Additionally, a medical opinion that relies exclusively on the maxim of "*post hoc, ergo propter hoc*" is speculative incompetent evidence of causation. *See Young*, 353 N.C. at 232, 538 S.E.2d at 916; *see also Pine v. Wal-Mart Assocs. Inc.*, ___ N.C. App. ___, ___, 804 S.E.2d 769, 777 (2017) ("[E]xpert medical testimony based solely on the maxim '*post hoc, ergo propter hoc*'—which 'denotes the fallacy of ... confusing sequence with consequence'—does not rise to the necessary level of competent evidence.").

In *Young*, a medical expert was asked to provide an opinion on whether the plaintiff's fibromyalgia was causally related to a workplace accident. *Young*, 353 N.C. at 232, 538 S.E.2d at 916. The expert testified:

> I think that she does have fibromyalgia and I relate it to the accident primarily because, as I noted, it was not there before and she developed it afterwards. And that's *the only piece of information that relates* the two.

Id. (emphasis added). Our Supreme Court held that this opinion relied solely on the maxim *post hoc, ergo propter hoc*, and was therefore "not competent evidence of causation." *Id.*

In the instant case, Plaintiff claimed that the December 2013 workplace accident caused a neck injury and a low back injury. However, Dr. Musante only treated Plaintiff for her neck, not for her back, and he had no knowledge of her back condition prior to the December 2013 workplace accident. Although his opinion regarding the cause of Plaintiff's low back symptoms was based on a hypothetical, which is not incompetent evidence *per se*, Dr. Mustante's testimony demonstrated that his opinion as to causation was based exclusively on the temporal relationship between the date the claimant sought medical attention and the date of the workplace accident. Therefore, Dr. Musante's *post hoc ergo*

propter hoc testimony was insufficient to establish a causal relationship between Plaintiff's low back condition and the December 2013 workplace accident.

Based on the foregoing, the Full Commission did not err by concluding Plaintiff failed to prove that her low back condition was caused by the 15 December 2013 workplace accident.

C. Determination of Plaintiff's Disability

[5] Plaintiff's remaining issue contends that the Full Commission misapplied the law in analyzing her disability claims. We disagree.

A determination of disability is a conclusion of law we review de novo. *Pine*, ___ N.C. App. at ___, 804 S.E.2d at 773. "When the Commission acts under a misapprehension of the law, the award must be set aside and the case remanded for a new determination using the correct legal standard." *Ballenger v. ITT Grinnell Indus. Piping, Inc.*, 320 N.C. 155, 158, 357 S.E.2d 683, 685 (1987) (citation omitted); *see also Weaver v. Dedmon*, ___ N.C. App. ___, ___, 801 S.E.2d 131, 133 (2017) ("A decision by the North Carolina Industrial Commission that contains contradictory factual findings and misapplies controlling law must be set aside and remanded to the Commission[.]"). "Disability" is defined as an "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment." N.C.G.S. § 97-2(9) (2017). To support a conclusion of disability, "the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury." *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (citing N.C.G.S. § 97-2(9)). The plaintiff bears the burden of proof to establish disability, but once the plaintiff has done so, the burden shifts to the defendant "to show not only that suitable jobs are available, but also that the plaintiff is capable of getting one, taking into account both physical and vocational limitations." *Wilkes v. City of Greenville*, 369 N.C. 730, 745, 799 S.E.2d 838, 849 (2017) (citations omitted). Additionally, under N.C.G.S. § 97-32, "[i]f an injured employee refuses suitable employment . . . the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified." N.C.G.S. § 97-32 (2017).

Plaintiff does not challenge any specific findings made by the Full Commission as unsupported by the evidence. Rather, Plaintiff argues that the Full Commission erred in concluding she was only entitled to temporary disability for her neck injury from 12 May 2014 (the date Goodyear no longer accommodated her "light-duty" work restrictions imposed by Dr. Perez-Montes) to 16 July 2016 (the date Goodyear extended an offer of employment for Plaintiff to return to her previous position as a Carcass Trucker). Plaintiff advances several different theories, none we find prevailing.

Plaintiff first argues that the Full Commission erred by affording greater weight to the medical opinion of Mr. Murray (the licensed physical therapist who conducted Plaintiff's Functional Capacity Evaluation), than the medical opinion of Dr. Wilson. We again note that it is for the Commission to determine the weight to be given the evidence, and the inferences to be drawn from it. *Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124. "We will not reweigh the evidence before the Commission[.]" *Beard v. WakeMed*, 232 N.C. App. 187, 191, 753 S.E.2d 708, 711 (2014).

Second, Plaintiff contends that the Full Commission erred by "mechanically" employing the disability methods set forth in *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 425 S.E.2d 454 (1993).[4] Plaintiff is correct in that the *Russell* methods "are neither statutory nor exhaustive" and "are not the only means of proving disability." *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849 (citing *Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 422, 760 S.E.2d 732, 737 (2014)). Nonetheless, the Full Commission's findings and conclusions clearly indicate that it understood that it is not limited to the *Russell* methods to determine if the ultimate standard of disability set forth in *Hilliard* and N.C.G.S. § 97-2(9) is met.[5] Moreover, Plaintiff's argument that the Full Commission was "too mechanical" in the application of the *Russell* factors is, in essence, a

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4. Under *Russell*, the employee may prove disability "in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury." *Russell*, 108 N.C. App. at 765, 425 S.E.2d at 457 (internal citations omitted).

5. Conclusion of Law 4 of in the Full Commission's Opinion and Award states that the "*Russell* factors are not exhaustive and do not preclude the Commission from considering other means of satisfying the ultimate standard of disability set forth in *Hilliard*. *See Medlin v. Weaver Cooke Const., LLC*, 367 N.C. 414, 760 S.E.2d 732 (2014)."

request for us to reweigh the evidence, which we will not do. *Hall v. U.S. Xpress, Inc.*, ___ N.C. App. ___, ___, 808 S.E.2d 595, 605 (2017).

Plaintiff also contends that the Full Commission erred by concluding that she unjustifiably refused an offer of suitable employment by refusing to return to her previous position as a Carcass Trucker on 16 July 2015. She challenges Conclusion of Law 5 of the Full Commission's Opinion and Award:

> 5. Plaintiff admittedly refused to return to her pre-injury job, which defendant employer offered to her by letter of July 16, 2015, despite being released to that job by Dr. Kishbaugh and Dr. Musante based upon the valid and reasonable FCE performed by Mr. Murray. Accordingly, the Commission concludes that [P]laintiff unjustifiably refused suitable employment as of July 16, 2015. [N.C.G.S.] § 97-2(22) (2016).

N.C.G.S. § 97-32 precludes compensation if an injured employee unjustifiably refuses to accept an offer of "suitable employment."

> If an injured employee refuses suitable employment as defined by [N.C.G.S. §] 97-2(22), the employee shall not be entitled to any compensation at any time during the continuance of such refusal, unless in the opinion of the Industrial Commission such refusal was justified.

N.C.G.S § 97-32 (2017). N.C.G.S. § 97-2(22) defines "suitable employment" as:

> employment offered to the employee or . . . employment available to the employee that (i) prior to reaching maximum medical improvement is within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider or (ii) after reaching maximum medical improvement is employment that the employee is capable of performing considering the employee's preexisting and injury-related physical and mental limitations, vocational skills, education, and experience and is located within a 50-mile radius of the employee's residence at the time of injury or the employee's current residence if the employee had a legitimate reason to relocate since the date of injury. No one factor shall be considered exclusively in determining suitable employment.

N.C.G.S. § 97-2(22) (2017), amended by 2015 N.C. Sess. Laws 286. Accordingly, our review of this argument is limited to determining whether the Full Commission's unchallenged findings of fact support the conclusion that Goodyear made Plaintiff an offer of "suitable employment," and that Plaintiff unjustifiably refused this offer.

By letter dated 16 July 2015, Goodyear offered Plaintiff her pre-injury position as a Carcass Trucker. Plaintiff did not accept this offer. At the time Goodyear made the offer, the unchallenged findings demonstrate that Plaintiff had already been medically cleared by one of her doctors to perform the duties of a Carcass Trucker. This clearance was based on the results of Plaintiff's 29 October 2014 FCE. Specifically, Finding of Fact 17 states:

> 17. Plaintiff returned to Dr. Kishbaugh on November 13, 2014, at which time he reviewed the FCE by Mr. Murray. As noted by Dr. Kishbaugh, [P]laintiff expressed concern that she would "hurt" after sitting or riding in a truck for a full shift. However, [P]laintiff did not express concerns about cervical rotation needed to drive the carcass truck. Dr. Kishbaugh assessed [P]laintiff at maximum medical improvement . . . and encouraged her to discuss retirement versus return to work options with defendant-employer, although it was appropriate for [P]laintiff to return to work per the FCE conclusions.

Plaintiff maintains that assuming arguendo she was physically capable of returning to her pre-injury employment as a Carcass Trucker, it was still error for the Full Commission to conclude that her refusal to accept Goodyear's 16 July 2015 employment offer was unjustifiable. Plaintiff asserts that her refusal to accept Goodyear's employment offer was not "unjustifiable" because she feared she would suffer another injury while working in that position. Plaintiff principally relies on *Bowden v. Boling Co.* to support her argument. *Bowden v. Boling Co.*, 110 N.C. App. 226, 429 S.E.2d 394 (1993).

In *Bowden*, the employee worked in a furniture factory and was injured when a machine malfunctioned and collapsed on his left arm, trapping him for forty-five minutes. *Id.* at 228-29, 429 S.E.2d at 395-96. The accident caused third-degree burns, as well as severe muscle and nerve damage, and the employee was diagnosed as having a 100% disability of his left arm. *Id.* After the employee reached maximum medical improvement, the defendant-employer offered him three jobs in the same factory. *Id.* However, these jobs would have required the employee

to use the same kinds of machines that trapped, injured, and caused him to lose the ability to use his left arm. The Full Commission concluded that the jobs offered by the employer to the employee "were not suitable for his capacity" and that his refusal to accept them did not preclude compensation. *Id.* at 231, 429 S.E.2d at 397. The employer appealed and argued "that even if [a] plaintiff's fear is reasonable, the fear of returning to work after an injury does not render an employee totally disabled under the Workers' Compensation Act." *Id.* at 213, 429 S.E.2d. at 398. We disagreed and affirmed the Full Commission, reasoning:

> if a person's fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered. Although plaintiff may be able to perform work involving the use of his right arm, the availability of positions for a person with one functional arm does not in itself preclude the Commission from making an award for total disability if it finds upon supported evidence that plaintiff because of other preexisting conditions is not qualified to perform the kind of jobs that might be available in the marketplace. While the positions offered to plaintiff by defendants may in fact be performed by a person with only one functional arm, the question is whether the jobs could be performed safely by this plaintiff.

Id. at 232-33, 429 S.E.2d at 398 (citation omitted).

The instant case is distinguishable from *Bowden* because it involves a drastically different set of factual circumstances. In *Bowden*, the injured employee lost the ability to use his left arm after a "machine used to steam and bend pieces of wood" collapsed on his arm and trapped him for 45 minutes. *Id.* at 228, 429 S.E.2d at 396. This injury was so severe that it required treatment at the Burn Unit at North Carolina Memorial Hospital. Here, Plaintiff was operating a low-speed battery-powered utility vehicle (in essence, a forklift) when another Goodyear employee operating a similar vehicle collided with Plaintiff's vehicle. Unlike *Bowden*, Plaintiff did not go to the ER immediately after the accident. In fact, after the collision, she retained the mental and physical wherewithal to engage in a heated verbal altercation with the employee who struck her vehicle,[6] and resume her normal work activity. After

6. Plaintiff made a recorded statement at her home to a Liberty Mutual Insurance representative, and recounted the altercation as follows: "[a]ll right, someone slammed into me . . . I saw a flash of person flying by going up the main aisle[.] . . . he came flying

feeling "something weird," and reporting "numbness" to Goodyear's in-house medical staff, Plaintiff went to urgent care, took two weeks off, and came back to work. Then, for the next 15 months, Plaintiff continued to drive the same work vehicle she was operating when the accident occurred. In light of these differences between *Bowden* and the present case, we conclude that *Bowden* is not determinative on this issue.

Plaintiff also contends the Full Commission's Opinion and Award failed to address her argument regarding her fear of driving the carcass truck. We reject this contention and have previously held that:

> The Full Commission must make definitive findings to determine the critical issues raised by the evidence, and in doing so must indicate in its findings that it has "considered or weighed" all testimony with respect to the critical issues in the case. It is not, however, necessary that the Full Commission make exhaustive findings as to each statement made by any given witness or make findings rejecting specific evidence that may be contrary to the evidence accepted by the Full Commission. . . . *Such "negative" findings are not required.*

Boylan v. Verizon Wireless, 224 N.C. App. 436, 443, 736 S.E.2d 773, 778 (2012) (citations omitted) (emphasis added). While it is true that the Full Commission did not make any specific findings regarding any potential effect that Plaintiff's alleged "fear" of operating a carcass truck would have on her ability to safely perform the duties of that job, it is clear that the Full Commission made those findings necessary to support its conclusion that Plaintiff unjustifiably refused Goodyear's offer of suitable employment. Plaintiff's contention that the Commission "failed to address" her fear of driving argument is a request for us to require the Industrial Commission to make "negative findings" to support its conclusion (i.e., Plaintiff was not afraid of driving the carcass truck). *See id.* This is something we will not do.

As our review of this is limited to determining whether the Full Commission's findings support its conclusions, we hold that that Findings of Fact 17, 31, 32, 33, 34, 35, and 37 adequately support the conclusion that Goodyear made an offer of "suitable employment" and Plaintiff unjustifiably refused this offer. Finding of Fact 17 states that as of 13 November, 2014, Dr. Kishbaugh was of the opinion that "it was

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back, jumped out of his truck and came at me telling me 'I was a cunt from hell, I was a bitch that needed to be put down' and I told him to 'take your tiny dick and move on.'. . . We had a confrontation for some time."

appropriate for plaintiff to return to work per the FCE conclusions." Finding of Fact 31 states that "[b]y letter dated July 16, 2015, . . . defendant-employer offered [P]laintiff to return to work in her pre-injury position as a Production Service Carcass Trucker." Finding of Fact 32 states that "Plaintiff did not return to her pre-injury position as offered." Finding of Fact 33 states that "Dr. Musante testified that . . . [P]laintiff would not suffer any harm in driving the truck required of her pre-injury job" and though "driving the truck may cause [P]laintiff to suffer a flare in her symptoms and hurt, doing so posed no risk of harm to [P]laintiff." Dr. Musante also testified that "it appeared that Plaintiff was trying to not do that job." Findings of Fact 34 and 35 also demonstrate that Plaintiff's treating physicians believed she was "capable of much more than sedentary-duty work," and the work restrictions recommended in her FCE, if implemented, would allow her to work "in her pre-injury position as a Production Service Carcass Trucker." These findings sufficiently demonstrate that the job offered was "within the employee's work restrictions, including rehabilitative or other noncompetitive employment with the employer of injury approved by the employee's authorized health care provider." *See* N.C.G.S. § 97-2(22) (defining suitable employment).

Furthermore, Finding of Fact 37 supports the conclusion that Plaintiff's refusal to accept Goodyear's offer was unjustifiable. This finding states that Plaintiff "did not want to return to work as a [C]arcass [T]rucker because of the bouncing nature of the truck," and that she testified that she "can't be bounced around like that." Plaintiff's own testimony counters any claim that her refusal was justified under the rationale of *Bowden*, which stands for the proposition that "if a person's fear of returning to work renders the job unsafe for his performance then it is illogical to say that a suitable position has been offered" and that the relevant question is whether the jobs available are jobs that "could be performed safely by this plaintiff." *Bowden*, 110 N.C. App. at 232-33, 429 S.E.2d at 398. Plaintiff's testimony was that she was "afraid of getting hit again," "afraid of her disk getting worse" and she "can't be bounced around like that." She argues that this evidence clearly establishes that her refusal to return to work as a Carcass Trucker was justified. However, Plaintiff's interpretation of her own testimony is not the only reasonable interpretation, and "[i]t is for the Commission to determine the credibility of the witnesses, the weight to be given the evidence, and the inferences to be drawn from it." *Rackley*, 153 N.C. App. at 472, 570 S.E.2d at 124.

Accordingly, we affirm the Full Commission's conclusion that Plaintiff unjustifiably refused an offer of suitable employment on 16 July

2016, and was not entitled to disability compensation for her neck injury after that date.

DEFENDANTS' ISSUES ON APPEAL

Defendants raise two issues on appeal. They first argue that the Full Commission erred in concluding that Plaintiff's cervical neck condition is compensable. Defendants also argue that the Full Commission erred by failing to enter sufficient findings to support the conclusion that Plaintiff was disabled from 13 May 2014 to 16 July 2015.

A. Causation of Plaintiff's Neck Injury

[6] Regarding the compensability of Plaintiff's neck injury, Conclusion of Law 3 of the Full Commission's Opinion and Award states:

> 3. Based on the expert medical opinion of Dr. Musante, the Commission concludes that the workplace accident of December 15, 2013 caused or contributed to [P]laintiff's current neck condition by materially aggravating her pre-existing, asymptomatic neck condition, thereby rendering it a compensable injury by accident.

Dr. Musante was Plaintiff's treating physician for her cervical neck condition during her 2011 and 2012 surgeries and also after the December 2013 workplace accident. During his deposition, Dr. Musante testified that it was his opinion that the workplace accident contributed to or aggravated the underlying pre-existing asymptomatic condition in the neck:

> Q. What is that opinion?
>
> A. The–my opinion is that the accident contributed to or aggravated an underlying preexisting minimally to asymptomatic condition in the neck. . . I can only speculate about her back[.]
>
> . . .
>
> Q. And is that medical opinion within a reasonable degree of medical certainty?
>
> A. Yes.

Dr. Musante based this opinion on his treatment history with Plaintiff and his clinical evaluation of her neck injury:

> Q. And is that medical opinion based upon your training, your clinical evaluation, your education, your experience,

> the medical literature and your familiarity since 2010 with [Plaintiff] and her medical conditions?
>
> A. Yes, for the neck.
>
> . . . .
>
> A. So it would be – it was based – I was actually treating her for her cervical spine in January. I made my conclusion based upon the history that she provided and the imaging that I had.
>
> . . . .
>
> Q. Would you say that what takes you from the incident could have been or is a possible cause of her pain to saying more likely than not it is a cause of her pain is solely the temporal nature of her complaints?
>
> Plaintiff's Counsel: Objection
>
> A. I would say that the temporal nature, the fact that she wasn't seeking attention from me prior to the accident, and then began seeking attention[.]

Defendants argue that Dr. Musante's deposition testimony was insufficient to support the Full Commission's conclusion that Plaintiff's neck condition was a compensable injury. Specifically, Defendants contend that Dr. Musante's testimony only went to whether Plaintiff's "pain complaints" were related to the workplace accident. Defendants also maintain that his testimony was "speculative" because it relied on the temporal nature of Plaintiff's complaint history before and after the incident. As to both theories, we disagree.

Regarding Defendants' theory that Dr. Musante's testimony only went to whether Plaintiff's pain complaints were related to the workplace accident, we initially note that "when treating pain patients, a physician's diagnosis often depends on the patient's subjective complaints, and this does not render the physician's opinion incompetent as a matter of law." *Yingling v. Bank of Am.*, 225 N.C. App. 820, 836, 741 S.E.2d 395, 406 (2013) (citations, quotation marks, and alterations omitted). Furthermore, it is well-established that an aggravation of a pre-existing condition can be a compensable injury under the Workers' Compensation Act. *Morrison v. Burlington Indus.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981) (stating that "[a]n employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses" and a workers' compensation claimant can be compensated for the "aggravation and

acceleration of a pre-existing infirmity."). Here, Dr. Musante's medical opinion was that the December 2013 accident "aggravated an underlying pre-existing minimally to asymptomatic condition in the neck." This is a compensable injury under the Workers' Compensation Act. *Id.* Moreover, his testimony did not only address Plaintiff's own reports of pain. Dr. Musante testified that his medical opinion was also based on Plaintiff's medical history, MRI images and X-rays.

Similarly, Defendants' contention that Dr. Musante's opinion regarding Plaintiff's neck injury was "speculative" incompetent evidence of causation because it relied on the temporal nature of Plaintiff's complaint history is also without merit. *Young*, discussed in greater detail *supra*, held that "expert medical testimony based *solely* on the maxim '*post hoc*, *ergo propter hoc*'—which 'denotes the fallacy of ... confusing sequence with consequence'—does not rise to the necessary level of competent evidence." *See Pine*, ___ N.C. App. at ___, 804 S.E.2d at 777 (citing *Young*, 353 N.C. at 232, 538 S.E.2d at 916). However, an expert is not always precluded from relying on the temporal sequence of events (e.g. "*post hoc*, *ergo propter hoc*") in forming his or her opinion as to the cause of a claimant's injury. For example, in *Pine*, we distinguished that case from *Young* "[b]ecause a full review of [the expert's] testimony demonstrate[d] that his opinion *was based on more than merely post hoc*, *ergo propter hoc*, and went beyond a 'could' or 'might' testimony[.]" *Pine*, ___ N.C. App. at ___, 804 S.E.2d at 778 (emphasis added).

Here, Dr. Musante did consider the temporal relationship between the date of Plaintiff's workplace accident and the dates she sought medical attention. However, the temporal sequence of events was not the only factor he considered. Unlike his opinion regarding the cause of Plaintiff's low back condition, Dr. Musante's opinion regarding the cause of Plaintiff's neck injury was not based "solely" on *post hoc*, *ergo propter hoc* reasoning. Dr. Musante was Plaintiff's treating physician for her neck condition and had been since 2010. He also conducted physical exams of Plaintiff and reviewed MRI images. Relying on all of this information, in addition to the temporal sequence of events surrounding the December 2013 workplace accident, Dr. Musante testified that it was his medical opinion "within a reasonable degree of medical certainty" that the workplace accident caused Plaintiff's neck injury. This medical opinion was based on more than mere speculation.

Our role is "limited to reviewing whether *any competent evidence* supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000) (emphasis

added). In light of this role, we conclude that Dr. Musante's testimony supported the conclusion that the aggravation of Plaintiff's pre-existing neck condition was caused by the December 2013 workplace accident and was a compensable injury.

B. Temporary Disability Determination

[7] The Full Commission concluded that Plaintiff was entitled to temporary total disability compensation for the period of 13 May 2014 to 16 July 2015 for her neck injury. Defendants argue that the Commission erred by failing to enter sufficient findings to support the conclusion that Plaintiff was disabled from 13 May 2014 to 16 July 2015. We agree and conclude that the Commission failed to make sufficient findings regarding the effect that Plaintiff's compensable neck injury had on her ability to earn wages between 13 May 2014 and 16 July 2015.

A determination of disability is a conclusion of law we review de novo, and "the claimant has the burden of proving the existence of his disability and its extent." *Hendrix v. Linn-Corriher Corp.*, 317 N.C. 179, 185, 345 S.E.2d 374, 378 (1986). In addition to proving that a compensable injury occurred as the result of a workplace accident, a plaintiff must also prove (1) she was "incapable after her injury of earning the same wages earned prior to injury in *the same employment*," (2) she was "incapable after her injury of earning the same wages she earned prior to injury in *any other employment*," and (3) her "incapacity to earn wages was caused by [her] injury." *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (emphasis added). "After the plaintiff meets her burden to establish disability, the burden shifts to the employer to show not only that suitable jobs are available, but also that the [employee] is capable of getting one, taking into account both physical and vocational limitations." *Cross v. Falk Integrated Techs., Inc.*, 190 N.C. App. 274, 279, 661 S.E.2d 249, 253-54 (2008) (citations omitted). "An employer can overcome the presumption of disability by providing evidence that: (1) suitable jobs are available for the employee; (2) that the employee is capable of getting said job taking into account the employee's physical and vocational limitations; (3) and that the job would enable employee to earn *some* wages." *Id.* (emphasis added).

We have often stated that the Commission must make specific findings that address the "crucial questions of fact upon which plaintiff's right to compensation depends." *Wilkes*, 369 N.C. at 746, 799 S.E.2d at 850 (citing *Guest v. Brenner Iron & Metal Co.*, 241 N.C. 448, 451, 85 S.E.2d 596, 599 (1955)); *see also Singleton v. Durham Laundry Co.*, 213 N.C. 32, 34-35, 195 S.E. 34, 35 (1938) ("It is the duty of the Commission

to make such specific and definite findings upon the evidence reported as will enable this Court to determine whether the general finding or conclusion should stand, particularly when there are material facts at issue.").

For example, in *Carr*, like the instant case, the Commission concluded that the plaintiff was entitled to temporary total disability. *Carr*, 218 N.C. App. at 151, 720 S.E.2d at 869. We remanded because the Commission failed to make necessary findings. Specifically, we held that before the Commission could conclude that the claimant was entitled to temporary total disability compensation, it must make findings as to "whether plaintiff has made a reasonable effort to obtain employment, but been unsuccessful, or that it would be futile for plaintiff to seek work because of preexisting conditions." *Id.* at 158, 720 S.E.2d at 875. We reached this result because the medical evidence did not show claimant was incapable of working in any employment. *Carr*, 218 N.C. App. at 157, 720 S.E.2d at 875.

More recently, in *Wilkes v. City of Greenville*, our Supreme Court remanded a decision of the Commission because the Commission did not make any findings addressing how the plaintiff's injury "may have affected his ability to engage in wage-earning activities." *Wilkes*, 369 N.C. at 747-48, 799 S.E.2d at 850. The plaintiff in *Wilkes* was employed as a landscaper and was injured in a motor vehicle accident during the course of employment. *Id.* at 732, 799 S.E.2d at 841. In concluding that the plaintiff was disabled, the Commission found that he had suffered "severe tinnitus" as the result of the accident. *Id.* at 732, 799 S.E.2d at 841. However, while the Commission's findings indicated that the plaintiff had "numerous pre-existing limitations" that affected his ability to earn wages in other employment after the workplace accident,[7] "the Commission made no related findings on how the plaintiff's compensable tinnitus . . . affected his ability to engage in wage-earning activities." *Id.* Our Supreme Court remanded to the Commission to "take additional evidence if necessary and to make specific findings addressing the plaintiff's wage-earning capacity, considering his compensable tinnitus in the context of all the pre-existing and coexisting conditions bearing upon his wage-earning capacity." *Id.*

In the present case, the Full Commission concluded that Plaintiff 's neck injury was compensable, and that she was entitled to temporary

7. For example, the plaintiff in *Wilkes* was over the age of sixty, had an IQ under 70, and had a limited education and work experience. *Wilkes*, 369 N.C. at 745, 799 S.E.2d at 849.

total disability for her neck injury. The findings of the Commission support the conclusion that Plaintiff was unable to earn the same wages in the "same employment" during the period of temporary total disability because Goodyear no longer accommodated her light-duty work restrictions after 13 May 2014. However, the Opinion and Award does not sufficiently address how Plaintiff's neck injury affected her ability to engage in all wage-earning activities after 13 May 2014. The evidence before the Commission did not show that Plaintiff was incapable of working in any employment between the dates of 13 May 2014 and 16 July 2015. Plaintiff's "light-duty" work restrictions only required her to refrain from some, but not all work activities.[8] Also, as of 29 January 2015, Plaintiff's doctors believed she was capable of working full time in a sedentary position. Like *Carr*, the evidence here showed that Plaintiff was not incapable of working in any employment. However, the Full Commission failed to make any findings addressing whether after a reasonable effort on Plaintiff's part, she had been unsuccessful in her effort to obtain employment, or it would have been futile for her to seek other employment. As such, there are no findings addressing whether Plaintiff had any limitations that precluded her from obtaining "*any other employment*" at the same wages. *Hilliard*, 305 N.C. at 595, 290 S.E.2d at 683 (emphasis added). As in *Carr*, we cannot determine what evidence Plaintiff introduced to meet her burden to show that her inability to find equally lucrative work in any other employment between the dates of 13 May 2014 and 16 July 2015 was caused by her compensable neck injury.

Based upon the record before us, we cannot affirm the award. Accordingly, we remand this case to the Commission. On remand, the Commission shall make specific findings addressing Plaintiff's wage-earning capacity, considering her compensable neck injury in the context of all the preexisting and coexisting conditions, as well as all vocational limitations bearing upon her wage-earning capacity.

CONCLUSION

We affirm in part and remand in part. We affirm the Commission's conclusions that: (1) Plaintiff failed to prove that her low back condition was caused by the December 2013 workplace accident; (2) Plaintiff met her burden to establish that her neck condition was caused by the December 2013 workplace accident; and (3) the Full Commission did not err in concluding that Plaintiff's refusal of Goodyear's 16 July 2015 employment offer was unjustified. We remand this matter to the

8. Plaintiff's work restrictions required her to refrain from repetitive bending and twisting, and the pulling, pushing, or lifting of more than 15 pounds.

Industrial Commission to: (1) to consider whether the facts of this case support a conclusion that the employer or the insurance carrier should be estopped from denying coverage; and (2) to make specific findings addressing Plaintiff's wage-earning capacity between the dates of 13 May 2014 and 16 July 2015.

AFFIRMED IN PART; REMANDED IN PART.

Judges CALABRIA and ZACHARY concur.

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

No. COA18-54

Filed 3 July 2018

Child Abuse, Dependency, and Neglect—neglect—adjudication—impairment or substantial risk—findings

The trial court properly adjudicated a child as neglected where the child had been in stable voluntary placement outside of her parents' home for an extended period of time when the mother stated her intent to take the child from placement and move her out of state. Even though the trial court failed to make an ultimate finding that the child suffered an impairment or was at substantial risk of impairment as the result of her mother's actions, the evidence supported such a finding, as the trial court found that the father was incarcerated and the mother had issues related to substance abuse, mental health, unstable housing, and prostitution.

Appeal by respondent from orders entered 21 September 2017 and 2 October 2017 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 6 June 2018.

Senior Assistant County Attorney Bettyna B. Abney for petitioner-appellee Durham County Department of Social Services.

Edward Eldred for respondent-appellant.

Melanie Stewart Cranford for guardian ad litem.

DAVIS, Judge.

In this case, we revisit the issue of whether a child can properly be adjudicated as neglected where she has been in a stable voluntary placement outside of her parents' home for an extended period of time prior to the filing of a neglect petition. C.C. ("Respondent") appeals from the trial court's orders adjudicating his daughter, C.C. ("Clarissa"),[1] as a neglected juvenile. Because we conclude the trial court properly determined that Clarissa was a neglected juvenile, we affirm.

Factual and Procedural Background

A.S. ("Anna")[2] gave birth to Clarissa on 7 December 2014. Respondent is Clarissa's putative father. Respondent was incarcerated at the Wake County Correctional Center at all times relevant to this case. When Clarissa was approximately six months old, she began living with Anna's foster mother ("Ms. L."). Clarissa continued living with Ms. L. until December 2016.

On 7 November 2016, Wake County Human Services ("WCHS") received a Child Protective Services report that Clarissa had been neglected while in Anna's care. The report included allegations of "substance abuse, mental health [issues], unstable housing, prostitution by the mother, . . . and inappropriate supervision, as [Clarissa] was left in a hotel (Days Inn) room by herself."

Clarissa's half-sister, A.S. ("Alice"),[3] was born on 12 December 2016. Around this time, Anna decided that Clarissa would live with Respondent's mother ("Ms. C.").

The case was transferred to the Durham County Department of Social Services ("DSS") on 30 January 2017 upon WCHS becoming aware that Anna and Alice had relocated to Durham. On 9 February 2017, Anna was accepted into the Cascade Treatment Program of Durham ("Cascade"), and she began living at Cascade along with Alice. During this time, Clarissa was living with Ms. C. and was allowed to visit Anna at Cascade on the weekends. During her stay at Cascade, Anna tested positive for illegal drugs on eleven out of thirteen drug tests.

On 17 April 2017, Cascade informed DSS of an incident in which Anna had been permitted to leave the agency "on a pass with an

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1. Pseudonyms and initials are used throughout this opinion for the privacy of the minor children and for ease of reading.

2. Anna is not a party to this appeal.

3. Respondent is not Alice's father.

expected return of 8:00 p.m." but had instead returned to the agency "around 1:45 a.m.[,] . . . long after curfew, and appeared intoxicated when she returned." Anna was informed on 18 April 2017 that she would be discharged from Cascade "due to continuously testing positive for illegal substances."

On 19 April 2017, a DSS employee informed Anna that due to her continued substance abuse it intended to file a petition seeking custody of her children and asked Anna who she would prefer to care for them. Anna requested that Clarissa and Alice be placed back with Ms. L. DSS subsequently approved a kinship assessment with Ms. L., and both children began living with her.

On 21 April 2017, Anna was discharged from Cascade. DSS filed a juvenile petition on 25 April 2017 alleging that Clarissa and Alice were neglected juveniles.

On 16 May 2017, Anna called Latisha Martin, a DSS social worker, and informed Martin that "she wanted to go to New Jersey, where she believed she could better access the services needed to sustain recovery." She asked Martin if the children could be placed with Alice's paternal grandmother ("Ms. B.") in New Jersey. Martin replied that Ms. B.'s status as a relative would have to be confirmed through paternity testing and that a request under the Interstate Compact on the Placement of Children would need to be sent to New Jersey before the children could be placed with Ms. B.

On 17 May 2017, DSS sought an order for non-secure custody as to Clarissa and Alice and filed a supplemental petition for neglect, alleging that Anna was making arrangements to immediately remove the children from their placement with Ms. L. and take them to New Jersey. The supplemental petition stated that the children were "exposed to a substantial risk of serious physical injury or sexual abuse" because "the mother is threatening to remove the children [from Ms. L's care] immediately."

An adjudication hearing on DSS's petition for neglect was held on 14 June 2017 before the Honorable Doretta L. Walker in Durham County District Court. Martin and Anna testified at the hearing. A dispositional hearing was held on 17 and 18 July 2017. On 21 September 2017, the trial court issued an order (the "Adjudication Order") finding Clarissa to be a neglected juvenile. On 2 October 2017, the court entered a second order (the "Disposition Order") determining that it was in Clarissa's best interests to remain in the care of Ms. L. and continuing legal custody of

Clarissa with DSS. Respondent file a timely notice of appeal as to both the Adjudication Order and the Disposition Order.[4]

Analysis

On appeal, Respondent contends that the trial court erred by adjudicating Clarissa to be neglected based on his argument that the court made no finding in the Adjudication Order that Clarissa was at a substantial risk of impairment and that the evidence would not have supported such a finding. At the outset, we note that it is undisputed by the parties that Respondent is unable to care for Clarissa because of his incarceration. For this reason, the parties devote their arguments to the issue of whether Clarissa meets the definition of a neglected juvenile based on the actions of Anna.

We review the trial court's order of adjudication 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 Q.A.*, 245 N.C. App. 71, 73-74, 781 S.E.2d 862, 864 (2016) (citation, quotation marks, and brackets omitted). Findings of fact that are supported by competent evidence or are unchallenged by the appellant are binding on appeal. *In re A.B.*, 245 N.C. App. 35, 41, 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).

A neglected juvenile is defined as "[a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker . . . ." N.C. Gen. Stat. § 7B-101(15) (2017). "[T]his Court has consistently required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Safriet*, 112 N.C. App. 747, 752, 436 S.E.2d 898, 901-02 (1993).

However, even where the trial court makes no finding that a juvenile has been impaired or is at substantial risk of impairment there is no error if the evidence would support such a finding. *See In re H.N.D.*, 205 N.C. App. 702, 706, 696 S.E.2d 783, 786 (Wynn, J., dissenting) (holding

4. Although the trial court also adjudicated Alice as a neglected juvenile, that portion of the court's ruling is not at issue in this appeal.

that reversal was improper despite lack of ultimate finding where all the evidence supported adjudication of neglect based on substantial risk of impairment), *rev'd per curiam for reasons stated in dissent*, 364 N.C. 597, 704 S.E.2d 510 (2010); *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003) ("Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding."); *Safriet*, 112 N.C. App. at 753, 436 S.E.2d at 902 ("Although the trial court failed to make any findings of fact concerning the detrimental effect of [parent's] improper care on [child's] physical, mental, or emotional well-being, all the evidence supports such a finding.").

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

> 5. [Respondent], putative father of [Clarissa], is a resident of North Carolina. He has lived in North Carolina for over six months prior to the filing of the petition. [Respondent] is incarcerated within the North Carolina Department of Corrections ("NCDOC") system. . . . [Respondent] is at the Wake County Correctional Center in Raleigh, NC. [Respondent] was served the petitions in the following manner: personal service by Sheriff Deputy on June 14, 2017.
>
> . . . .
>
> 8. The children are neglected in that they are not receiving proper care, supervision, or discipline from the parent, guardian, custodian, or caretaker and live in an environment injurious to their welfare with the parents.
>
> 9. On November 7, 2016, Wake County Human Services received a CPS report alleging neglect of the minor child, [Clarissa]. Concerns noted in the allegations included substance abuse, mental health, unstable housing, prostitution by the mother, [Anna], and inappropriate supervision, as [Clarissa] was left in a hotel (Days Inn) room by herself.
>
> 10. On December 16, 2016, another CPS report was made due to [Anna] giving birth to [Alice] on December 12, 2016. [Anna] tested positive for cocaine at the birth of [Alice]. [Anna] was not required by Wake County DSS to identify any safety resource for [Alice]; however, she

continued to allow [Clarissa] to reside with [the] child's putative paternal grandmother, [Ms. C.]. Wake County DSS completed a kinship assessment on [Ms. C.]'s home on or about March 30, 2017[.]

11. [Clarissa] was living with [Ms. C.] when Durham DSS received the case. She brought [Clarissa] to Cascades [sic] on the weekends to stay with [Anna] and [Alice]. At some point in April 2017, when [Ms. C.] arrived to pick up [Clarissa], [Anna] chose to keep [Clarissa] with her. [Anna] later moved [Clarissa] to the care of [Anna]'s former foster mother, [Ms. L.]. [Clarissa] is two years old now. [Anna] had concerns about the quality of care [Clarissa] was receiving from [Ms. C.] while at Cascades [sic].

12. On December 21, 2016, a case decision of "services needed" for In-Home Services to address [Anna]'s substance abuse issues, parenting skills, and mental health needs was made. Durham County DSS received the case from Wake County DSS on January 30, 2017, stating that [Anna] and [Alice] had relocated to Durham County.

13. [Anna] has two older children . . . who both have been cared for by other individuals due to [Anna]'s instability. Both of these children have been out of [Anna]'s care since they were infants/ toddlers. . . . [Anna] is uncertain where the children are located at this time. Neither child was included on the Wake County CPS report that Durham County DSS received. Arrangements for her other children were made without DSS's intervention.

14. During [Anna]'s initial encounters with Durham DSS Social Worker Latisha Martin, [Anna] admitted that her substance abuse was a major barrier towards her stability and that she was open to entering a mother-child substance abuse treatment program. [Anna] has an extensive history of illegal drug use and instability. [Anna], along with [Alice], w[as] accepted and entered into Cascade Treatment Program of Durham on February 9, 2017. During [Anna]'s stay at Cascade, she tested positive for illegal drugs on 11 out of 13 drug tests. The substances included alcohol, cannabis, and various opiates. Cascade screened [Anna] on several occasions. [Anna] was enrolled in the residential substance abuse treatment

program at Cascade, and remained there for about two and half [sic] months (February 9, 2017 until April 21, 2017). [Anna]'s suboxone/opiate maintenance treatment was outsourced to Hope Center for Advancement, while she was at Cascade. Two weeks prior to her discharge from Cascades [sic], [Anna] completed a mental health assessment at Turning Point. [Anna] did not return to Turning Point for any following mental health services as recommended. Currently, [Anna] is not receiving any mental health services or substance abuse treatment. [Anna] has not received suboxone/opiate maintenance treatment since her discharge from Cascades [sic].

15. On April 17, 2017, Durham DSS received a call from Cascade stating that [Anna] was allowed to leave the agency on a pass with an expected return of 8:00 p.m. [Anna] returned to the agency around 1:45 a.m. on April 18, 2017, long after curfew, and appeared intoxicated when she returned. [Anna] admitted that she was drinking alcohol and smoking marijuana after having transportation issues that evening. [Anna] was asked to leave the Cascade program, after this episode. Upon her return, the location of [Alice] was unknown to Cascade staff. [Anna] had left [Alice] with her niece . . . . When DSS later inquired about the whereabouts of [Clarissa], [Anna] informed DSS that [Clarissa] had been removed from the care of [Ms. C.] and returned to the care of [Ms. L.]. [Clarissa] has been in the care of [Ms. L.] since March 30, 2017.

16. On April 18, 2017, Durham County DSS attended a meeting at Cascade at which [Anna] was informed she would be discharged from the program due to failure to meet curfew on April 17, 2017. Cascade stated that they were willing to allow [Anna] the opportunity to remain at Cascade until April 21, 2017 as long as she followed the agency's rules. However, she was discharged from Cascade on April 21, 2017 due to continuously testing positive for illegal substances.

17. On April 18, 2017, Durham DSS completed a kinship assessment with Ms. [L.], [Anna]'s former foster mother. Due to tensions between [Anna] and [Ms. C.] regarding [Clarissa]'s care, [Anna] requested that both children be

placed in the care of [Ms. L.]. [Clarissa] had resided with [Ms. L.] for several months prior to staying with [Ms. C.]. [Anna] has not provided any day-to-day care or financial support for [Clarissa] on a continuous bas[i]s. The kinship home assessment was approved by Durham DSS.

18. On April 19, 2017, Durham DSS conducted a Child and Family Team meeting ("CFT"), which [Anna] attended. [Anna] admitted to Social Worker that she has a history of major trauma as a child. She admits that she has not properly addressed her mental health needs and substance abuse issues. She continues to use illegal substances and abuses alcohol.

19. [Anna]'s illegal substance abuse and lack of mental health treatment substantially impact her ability to parent her children.

20. After departing from Cascade, [Anna] lived for about a month in the Super Eight Motel on Capital Boulevard in Raleigh, and [Alice's father] sometimes stayed with her there. On or about May 17, 2017, she then moved to an ["]extended stay motel" near Wake Forest Road in Raleigh, where she presently resides.

21. Since leaving Cascade, [Anna] worked at UPS for about a week or two. She quit that job because it was "too much" for her. For the most part, [Alice's father] pays for her motel stay.

22. [Anna] has not enrolled in any parenting class. She is not engaged in any mental health treatment or substance abuse treatment program.

23. On May 17, 2017, Durham DSS filed a supplemental petition in this matter and requested nonsecure custody, as the result of a series of conversations that transpired between [Anna] and DSS staff members on May 16, 2017.

24. On May 17, 2017, [Anna] tested positive for marijuana and cocaine. [Alice's father] tested positive for marijuana, cocaine and PCP. At this court date, [Anna] admitted that she would test positive for marijuana if she was drug tested that same day.

> 25. [Anna] called Social Worker Martin. She indicated that she did not want to be charged with kidnapping, if she took her kids away from [Ms. L.]'s home. The social worker questioned her as to her plans, and [Anna] indicated that she wanted to go to New Jersey, where she believed she could better access the services needed to sustain recovery. [Anna] asked the social worker what would be involved in placing the kids with [Alice's father]'s grandmother in New Jersey. The social worker stated that the grandmother's status as a relative would first have to be confirmed through paternity testing for [Alice's father]. The social worker then informed [Anna] that an ICPC request would have to be sent to New Jersey, so that the local social service agency could investigate the appropriateness of the grandmother's home as a placement for the children.

Respondent challenges, in part, Finding No. 25 to the extent it implies that Anna wanted to move both children to New Jersey. He contends a social worker testified that Anna intended to take only Alice — and not Clarissa — to stay with relatives in New Jersey. The trial court's remaining findings are unchallenged and 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."). We need not resolve Respondent's challenge to Finding No. 25 because for the reasons set out below, we are satisfied that — even construing Finding No. 25 in the manner advocated by Respondent — the trial court's adjudication of neglect was proper.

Respondent's primary argument is that not only did the trial court fail to make an ultimate finding that Clarissa was at substantial risk of impairment but also that the evidence of record would not have supported such a finding. Because Clarissa's needs were met while living with Ms. L., he contends, Clarissa was not a neglected juvenile.

As this Court has previously stated, "[m]ost cases addressing the definition of neglect arise in the context of termination of parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) . . . ." *In re K.J.D.*, 203 N.C. App. 653, 659, 692 S.E.2d 437, 442 (2010). "The factual situation presented in a termination of parental rights case is normally different from that presented by an adjudication case because in a termination case, the child has usually been removed from the parent's home a substantial period of time before the filing of the petition for termination." *Id.*

Conversely, "[a]n adjudication case normally arises immediately following the child's removal from the parent's home." *Id.*

The present appeal from an adjudication of neglect, however, presents the unusual situation where a child had not been living with either of her parents for an extended period of time prior to the filing of a juvenile petition and was doing well in her voluntary placement with a relative.

> 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 H.L., __ N.C. App. __, __, 807 S.E.2d 685, 688 (2017) (internal citation and quotation marks omitted). "Essentially, the trial court must consider the conditions and the fitness of the parent to provide care at the time of the adjudication . . . ." *Id.* at __, 807 S.E.2d at 688 (citation and quotation marks omitted).

We find instructive our decision in *K.J.D.* In that case, the minor child had been living with his maternal grandmother for six months at the time DSS filed an initial petition alleging that his mother had neglected him. The initial petition was dismissed, and DSS filed a second petition nearly a year later. Approximately eighteen months after the child was initially placed with his grandmother, an adjudication hearing was held on the second petition. The trial court determined that even though the child was in a stable placement at the time the second petition was filed, he was nevertheless a neglected juvenile because his mother remained incapable of providing him with proper care and supervision. *K.J.D.*, 203 N.C. App. at 656, 692 S.E.2d at 441. On appeal, we affirmed the trial court's adjudication of neglect, stating as follows:

> The court's findings of fact show that respondent-mother has been and remains unable to adequately provide for her child's physical and economic needs. She has been unable to correct the conditions which led to the child's kinship placement with the maternal grandmother. She continues to engage in assaultive behavior. She has not completed counseling to address her anger issues or sought treatment for her mental disorder. She does not have stable

> housing and she does not have a job. The trial court found that respondent-mother had failed "to correct the conditions that led to the removal of the minor child from [her] care for the past 16 to 18 months." The Court also found that "the minor child would be at substantial risk of harm if either of his parents removed the child from [the] placement [with the maternal grandmother.]" We conclude these findings support a conclusion that the child is a neglected juvenile.

Id. at 661, 692 S.E.2d at 444.

We recently affirmed the holding of *K.J.D.* in *H.L.* In *H.L.*, the juvenile's parents had problems with domestic violence and substance abuse and entered into a safety plan with DSS to place their daughter with her adult sister. Six months later, DSS filed a juvenile petition alleging that the child was neglected because while she was in her sister's care both parents had submitted drug screens that tested positive for methamphetamines. *H.L.*, __ N.C. App. at __, 807 S.E.2d at 687. The trial court adjudicated the child to be a neglected juvenile and awarded guardianship to the child's sister. *Id.* at __, 807 S.E.2d at 687. This Court followed the framework set out in *K.J.D.* and held that the trial court's ultimate finding that the child was neglected was supported because "respondent-father and [the child's] mother had failed to remedy the conditions which required [the child] to be placed with her sister in a safety plan, such that they were unable to provide [the child] with proper care." *Id.* at __, 807 S.E.2d at 690.[5]

Here, Clarissa was voluntarily removed from Anna's care and placed with Ms. L. while DSS was in the process of filing its original petition. The trial court's unchallenged findings demonstrate that Clarissa was put in a kinship placement with Ms. L. because of the inability of both of Clarissa's parents to care for her. Respondent was incarcerated, and Anna had issues related to "substance abuse, mental health, unstable housing, prostitution . . . , and inappropriate supervision . . . ."

Although the trial court failed to make an ultimate finding that Clarissa suffered an impairment or was at substantial risk of impairment

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5. In his brief, Respondent cites *In re B.P.*, __ N.C. App. __, 809 S.E.2d 914 (2018), in which this Court reversed an adjudication of neglect as to a child who was in a stable placement at the time DSS filed its neglect petition. However, the mother in *B.P.* had made significant improvements by the date of the adjudication hearing in correcting the conditions that led to the child's removal from her care. *Id.* at __, 809 S.E.2d at 919. The same cannot be said for Clarissa's parents in the present case.

as a result of Anna's actions, we are satisfied that the evidence here was sufficient to support a finding that Clarissa was at a substantial risk of impairment if she was returned to Anna's care. *See Padgett*, 156 N.C. App. at 648, 577 S.E.2d at 340 ("Where there is no finding that the juvenile has been impaired or is at substantial risk of impairment, there is no error if all the evidence supports such a finding.").

The trial court's findings make it abundantly clear that the conditions leading to the placement of Clarissa outside of the home had not been corrected. At the time of the adjudication hearing, Respondent was still incarcerated, and Anna had not (1) successfully engaged in substance abuse treatment; (2) enrolled in mental health treatment or parenting classes; or (3) obtained permanent employment. Thus, we conclude that the evidence supported the adjudication of Clarissa as a neglected juvenile under N.C. Gen. Stat. § 7B-101(15).

Conclusion

For the reasons stated above, we affirm the trial court's 21 September and 2 October 2017 orders.[6]

AFFIRMED.

Judges DILLON and INMAN concur.

6. Although Respondent's notice of appeal indicated that he was also challenging the trial court's Disposition Order, his appellate brief does not contain any argument as to the validity of that order.

IN RE D.S.

[260 N.C. App. 194 (2018)]

IN THE MATTER OF D.S.

No. COA18-104

Filed 3 July 2018

1. Guardian and Ward—placement with non-relative—parent's standing to appeal

A father had standing to challenge the trial court's failure to consider his child's grandmother as a placement for out-of-home care because the father was asserting his own interest in having the court consider a relative before granting guardianship to a non-relative.

2. Appeal and Error—preservation of issues—prior order vacated in prior appeal—new order appealed

Where a father challenged the trial court's failure to consider his child's grandmother as placement for out-of-home care, the Court of Appeals rejected an argument that he waived review of the issue by not raising it in his prior appeal. In that prior appeal, the Court of Appeals vacated the prior order of the lower court, so the father could raise any argument on appeal from the new order.

3. Jurisdiction—mootness—subsequent order—question not considered by trial court

A subsequent guardianship order ceasing all visitation and contact between a child and her grandmother did not render moot a father's argument that the trial court erred by failing to consider the grandmother as placement for out-of-home care before granting guardianship to a non-relative. Even though the facts relied upon to cease the grandmother's visitation may have been relevant to the issue of guardianship, the question of whether the grandmother should have been given priority placement had not been considered by the trial court.

4. Guardian and Ward—placement with non-relative—consideration of relatives—lack of findings or conclusions

Where a father challenged the trial court's failure to consider his child's grandmother as a placement for out-of-home care, the Court of Appeals rejected an argument by Youth and Family Services that the record contained sufficient facts for the Court of Appeals to determine that the trial court properly considered placement with the grandmother but concluded it was not in the child's best interest. The trial court made no findings or conclusions resolving this

statutorily required question, and resolving the factual issue was beyond the scope of appellate review.

Appeal by respondent-father from order entered 2 November 2017 by Judge Louis A. Trosch in Mecklenburg County District Court. Heard in the Court of Appeals 21 June 2018.

Associate County Attorney Marc S. Gentile for petitioner-appellee Mecklenburg County Department of Social Services, Youth and Family Services Division.

David A. Perez for respondent-appellant father.

Stephen M. Schoeberle for guardian ad litem.

TYSON, Judge.

Respondent-father appeals from an order appointing M.G. ("Ms. Green"), an unrelated individual, as guardian for his minor child, D.S. ("Diana"). The trial court granted guardianship of Diana to a non-relative without explaining why it declined to give placement preference to Diana's paternal grandmother. The court's order is vacated and remanded for a new permanency planning hearing.

I. Background

This case is before the Court for the second time. *In re D.S.*, ___ N.C. App. ___, 803 S.E.2d 873, 2017 WL 41269647 (2017) (unpublished). The Mecklenburg County Department of Social Services, Youth and Family Services Division ("YFS"), instituted the underlying juvenile case on 9 November 2015, when it obtained non-secure custody of Diana and filed a petition alleging she was a neglected and dependent juvenile. The trial court subsequently adjudicated Diana to be a neglected and dependent juvenile, continued custody of Diana with YFS, and set the primary permanent plan for Diana as reunification with a parent and the secondary permanent plan as guardianship.

In its 20 December 2016 permanency planning and guardianship order, the trial court set the sole permanent plan for Diana as guardianship and appointed Ms. Green as her guardian. Respondent appealed, and this Court concluded the trial court's finding that Ms. Green has adequate resources to care appropriately for Diana was not supported by evidence at the permanency planning hearing. *Id.* This Court vacated the trial court's order and remanded the case for further proceedings. *Id.*

The trial court conducted a hearing after remand on 16 October 2017. The court limited the hearing to the issue of whether Ms. Green had the financial resources to appropriately care for Diana. On 2 November 2017, the court entered its order from the hearing on remand, which it titled "Supplementary Order." The trial court incorporated, in its entirety, the 20 December 2016 permanency planning and guardianship order into the Supplementary Order. The court also made numerous findings of fact regarding Ms. Green's financial ability to care for Diana, and made ultimate findings of fact that Ms. Green was financially able to appropriately care for Diana and understood the legal significance of being appointed as her guardian. The court ordered that the permanent plan for Diana would be guardianship, appointed Ms. Green to be Diana's guardian, re-adopted a detailed visitation schedule for Diana's parents and her paternal grandmother, and relieved the parents' attorneys of further responsibility in this matter. Respondent filed timely notice of appeal from the trial court's order.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a) (2017).

III. Issue

Respondent asserts the trial court erred in appointing Ms. Green, a non-relative caretaker of Diana, as Diana's guardian without first finding and showing that it properly considered and rejected her paternal grandmother as a placement. We agree.

IV. Standard of Review

Our review of a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906.1 "is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re J.H.*, 244 N.C. App. 255, 268, 780 S.E.2d 228, 238 (2015) (citation omitted).

V. Analysis

A. N.C. Gen. Stat. § 7B-903(a1)

> In placing a juvenile in out-of-home care under this section, the court *shall* first consider whether a relative of the juvenile is willing and able to provide proper care and supervision of the juvenile in a safe home. If the court finds that the relative is willing and able to provide proper

> care and supervision in a safe home, then the court *shall* order placement of the juvenile with the relative unless the court finds that the placement is contrary to the best interests of the juvenile.

N.C. Gen. Stat. § 7B-903(a1) (2017) (emphasis supplied).

The use of the word "shall" in the statute shows the General Assembly's intent for this requirement to be mandatory. *State v. Johnson*, 298 N.C. 355, 361, 259 S.E.2d 752, 757 (1979) (citation omitted). This Court has held that before placing a juvenile in an out-of-home placement at a permanency planning hearing, "the trial court was required to first consider placing [the juvenile] with [her relatives] unless it found that such a placement was not in [the juvenile's] best interests." *In re L.L.*, 172 N.C. App. 689, 703, 616 S.E.2d 392, 400 (2005) (construing earlier version of N.C. Gen. Stat. § 7B–903 and precursor statute to N.C. Gen. Stat. § 7B-906.1 (2017) governing permanency planning hearings, N.C. Gen. Stat. § 7B-906). "Failure to make specific findings of fact explaining the placement with the relative is not in the juvenile's best interest will result in remand." *In re A.S.*, 203 N.C. App. 140, 141-42, 693 S.E.2d 659, 660 (2010) (citation omitted).

In re L.L. incorporated the requirement set forth in N.C. Gen. Stat. § 7B-903, that a trial court must and "shall" first give consideration to placement of a juvenile with relatives, before it may order the juvenile into placement with a non-relative by a permanency planning order entered pursuant to N.C. Gen. Stat. § 7B-906 (2003).

Section 7B-906 has been repealed and replaced by N.C. Gen. Stat. § 7B-906.1. *See* 2013 N.C. Sess. Laws 129, §§ 25-26. Subsection 7B-906(d) addressed in *L.L.* contains identical mandatory language authorizing dispositions under N.C. Gen. Stat. § 7B-903, as that in current subsection 7B-906.1(i). *L.L.* is still controlling on this issue. *Compare* N.C. Gen. Stat. § 7B-906(d) (2003) *with* N.C. Gen Stat. § 7B-906.1(i) (2017).

B. YFS' Arguments

YFS argues: (1) Respondent lacks standing to raise this argument; (2) Respondent waived the issue by not raising it in his prior appeal; (3) the issue is mooted due to a subsequent guardianship review order; and, (4) there are sufficient facts in the record to conclude that the trial court properly considered placement of Diana with her paternal grandmother and concluded such a placement was not in Diana's best interest. We reject these arguments in turn.

1. Standing

[1] YFS cites to this Court's opinion in *In re C.A.D.*, ___ N.C. App. ___, 786 S.E.2d 745, 752 (2016) to support its argument that Respondent lacks standing to challenge the trial court's failure to properly consider Diana's own grandmother as a placement. In *C.A.D.*, the respondent-mother argued the trial court erred in ceasing reunification efforts in a permanency planning order, because her children should have been placed with the maternal grandparents. *Id.* at ___, 786 S.E.2d at 751. We rejected this argument, because the respondent-mother was not aggrieved by the trial court's conclusion, holding:

> [T]he maternal grandparents have not appealed the trial court's permanency plan. They do not complain of the court's findings of fact or conclusions of law, and they do not complain they were injuriously affected by the trial court's decision to pursue adoption. Respondent cannot claim an injury on their behalf. Therefore, she has no standing to raise [this] claim.

Id. at ___, 786 S.E.2d at 752.

In re C.A.D. is distinguishable from the facts before us. In *C.A.D.*, the maternal grandparents were former custodians of at least one of the children in the juvenile case. *See id.* at ___, 786 S.E.2d at 747. The maternal grandparents in *C.A.D.* could have appealed from the order at issue, but did not. As a result, the respondent-mother lacked standing to present an argument directly affecting the rights of the maternal grandparents. Here, the paternal grandmother was never a party in the juvenile case and could not have independently appealed from the court's order to protect her own statutory rights. Respondent is not attempting to present a grievance of the paternal grandmother, as in *C.A.D.*, but rather asserting his own interest, as Diana's father, to have the trial court consider a potentially viable relative placement for his daughter before granting guardianship to a non-relative. Respondent has standing to raise this issue on appeal.

2. Waiver

[2] YFS' argument that Respondent waived this issue by not raising it in his prior appeal is similarly misplaced. When an order of a lower court is vacated, those portions that are vacated become void and of no effect. *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793, *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).

This Court did not limit its holding in the prior appeal to the trial court's guardianship award, but vacated the entire permanency planning order and remanded the case to the trial court for further proceedings. *See In re D.S.*, ___ N.C. App. ___, 803 S.E.2d 873. The 20 December 2016 permanency planning and guardianship order was void and of no effect. The posture of the case returned to YSF having custody of Diana under prior review and permanency planning orders. The court's new order re-incorporated the findings and conclusions of its 20 December 2016 permanency planning and guardianship order into its new "Supplementary Order," wherein it also made new findings and conclusions regarding Ms. Green's finances. The trial court's re-incorporation of the findings of fact and conclusions of law from the voided order, together with the combination of the two documents, constitutes a single new order that was entered after remand, from which Respondent could raise any argument on appeal. YFS' argument is overruled.

3. Mootness

[3] YFS and the guardian *ad litem* also argue a subsequent guardianship review order, entered 30 November 2017, which ceased all visitation and contact between Diana and the paternal grandmother makes Respondent's arguments moot. We disagree. This order does not moot the issue at hand.

> "A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Roberts v. Madison County Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996). Further, "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131, *disc. review denied*, 337 N.C. 691, 448 S.E.2d 520 (1994) (internal quotation marks omitted).

In re Stratton, 159 N.C. App. 461, 463, 583 S.E.2d 323, 324, *appeal dismissed and disc. review denied*, 357 N.C. 506, 588 S.E.2d 472 (2003). Here, the question of whether the paternal grandmother should have been given priority placement consideration, as compelled by the statute, over a non-relative has never been addressed by the trial court and, if addressed, may have a practical effect on the case. Although the facts

relied upon by the trial court to cease the paternal grandmother's visitation may be relevant when this issue is before the trial court, that is an evidentiary question which does not render the matter moot. This matter is properly before us.

4. Best Interest of the Juvenile

[4] YFS asserts there are sufficient facts in the record for this Court to determine that the trial court properly considered placement of Diana with the paternal grandmother and concluded the placement was not in Diana's best interest. In support of this argument, YFS cites generally to prior hearings in the case, YFS' prior interactions with the paternal grandmother, and Diana's bond with Ms. Green.

Both YFS and Respondent are free to put on evidence before the trial court to resolve this issue. The trial court, however, has never made any findings of fact or conclusions of law resolving this issue, which it is statutorily required to do before placing Diana with a non-relative. *See In re A.S.*, 203 N.C. App. at 141-44, 693 S.E.2d at 660-62. YFS apparently expects this Court to resolve the factual issue in the first instance, which is beyond the scope of our appellate review. *See In re J.H.*, 244 N.C. App. at 268, 780 S.E.2d at 238.

Here, the trial court specifically found that both parents opposed appointing a non-relative guardian for Diana and wished for Diana to be placed with her paternal grandmother if the court determined she could not return to their home. Neither the "Supplementary Order" nor the incorporated 20 December 2016 permanency planning and guardianship order indicate the trial court considered the paternal grandmother as a placement option for Diana.

The trial court relied upon a pre-typed "check-the box" and "fill-in-the-blank" form for the 20 December 2016 permanency planning and guardianship order that does not appear to have a section addressing the statutory requirement that the court must give first consideration to relatives when ordering a juvenile into an out-of-home placement. The court's failure to make any findings or conclusions resolving these issues requires remand. *In re A.S.*, 203 N.C. App. at 141-44, 693 S.E.2d at 660-62.

The record before this Court suggests that more than eighteen months have passed since the last full permanency planning hearing in this case. The trial court's order is vacated and this matter is remanded for a new permanency planning hearing. *See* N.C. Gen. Stat. § 7B-906.1(a).

Because the order is vacated, it is unnecessary to address the merits of Respondent's second argument that the trial court erred by not stating

in its guardianship order what rights and responsibilities remained with respondent. *See* N.C. Gen. Stat. § 7B-906.1(e)(2).

VI. Conclusion

The trial court's order is vacated and this matter is remanded for a new permanency planning hearing in conformity with the mandates of the statute. *It is so ordered.*

VACATED AND REMANDED.

Judges DIETZ and MURPHY concur.

IN THE MATTER OF L.V., A.V.

No. COA18-282

Filed 3 July 2018

Termination of Parental Rights—no-merit brief—no issues on appeal—independent review

Where respondent-mother's counsel in a termination of parental rights case filed a no-merit brief pursuant to Rule of Appellate Procedure 3.1(d) and the mother did not file a pro se brief, the Court of Appeals dismissed the appeal without conducting an independent review of the record for issues not raised on appeal, as Rule 3.1(d) did not explicitly grant indigent parents the right to that review.

Appeal by Respondent-Mother from orders entered 5 December 2017 by Judge Beverly Scarlett in Chatham County District Court. Heard in the Court of Appeals 21 June 2018.

W. Michael Spivey, for respondent-appellant mother.

Holcomb & Stephenson, LLP, by Deana K. Fleming, for petitioner-appellee Chatham County Department of Social Services.

Womble Bond Dickinson (US) LLP, by Jessica L. Gorczynski, for guardian ad litem.

MURPHY, Judge.

Respondent appeals from orders terminating her parental rights to the minor children L.V. and A.V. On appeal, Respondent's appellate counsel filed a no-merit brief pursuant to Rule 3.1(d) stating that, after a conscientious and thorough review of the record on appeal, he has concluded that the record contains no issue of merit on which to base an argument for relief.[1] N.C. R. App. P. 3.1(d). Respondent's counsel complied with all requirements of Rule 3.1(d), and Respondent did not exercise her right under Rule 3.1(d) to file a *pro se* brief. No issues have been argued or preserved for review in accordance with our Rules of Appellate Procedure.[2]

DISMISSED.

Judges DIETZ and TYSON concur.

1. In accordance with Rule 3.1(d), appellate counsel provided Respondent with copies of the no-merit brief, trial transcript, and record on appeal and advised her of her right to file a brief with this Court *pro se* on 11 April 2018.

2. "Rule 3.1(d) does *not* explicitly grant indigent parents the right to receive an *Anders*-type review of the record by our Court, which would allow our Court to consider issues not explicitly raised on appeal." *State v. Velasquez-Cardenas*, ___ N.C. App. ___, ___, 815 S.E.2d 9, 20 (2018) (Dillon, J., concurring).

IN RE M.N.

[260 N.C. App. 203 (2018)]

IN THE MATTER OF M.N., K.S., A.N.

No. COA18-169

Filed 3 July 2018

1. Child Abuse, Dependency, and Neglect—guardianship—grandparents—standing to appeal

A child's grandparents had standing to appeal the trial court's orders adjudicating the child neglected and terminating the grandparents' guardianship even though the Department of Social Services (DSS) argued that a prior order granting them guardianship was deficient as a matter of law. DSS could not avoid review of this petition based on a non-jurisdictional error in the prior guardianship order from a previous neglect petition. Further, even assuming the prior guardianship order was void, an earlier order had granted custody to the grandparents, so they were parties with a right to appeal.

2. Child Abuse, Dependency, and Neglect—neglect—harm or substantial risk of harm—sufficiency of finding

The trial court erred, as conceded by the parties, in an adjudication of juvenile neglect by failing to make any findings showing harm or creation of a substantial risk of such harm, and the Court of Appeals reversed and remanded the issue where no evidence introduced at adjudication supported such findings.

Appeal by respondent maternal grandparents from orders entered 9 November 2017 and 14 November 2017 by Judge Sarah C. Seaton in Onslow County District Court. Heard in the Court of Appeals 6 June 2018.

Appellate Defender Glenn E. Gerding, by Assistant Appellate Defender Joseph Lee Gilliam, for Respondent-Appellant Jason Schindler.

Mercedes O. Chut, P.A., by Mercedes O. Chut, for Respondent-Appellant Shonna Schindler.

Richard Allen Penley for Petitioner-Appellee Onslow County Department of Social Services.

Matthew D. Wunsche for Appellee Guardian Ad Litem.

INMAN, Judge.

Respondents Jason and Shonna Schindler (the "Schindlers") appeal from orders on adjudication and disposition terminating their guardianship of their juvenile grandchild, K.S. ("Kaitlyn").[1] After careful review, we reverse the orders in part and remand for further proceedings.

I. FACTUAL AND PROCEDURAL HISTORY

Kaitlyn was born in August 2007. Three months later, the Onslow County Department of Social Services ("DSS") filed a juvenile petition alleging neglect by Kaitlyn's parents (the "First Petition"). On 11 December 2007, the trial court adjudicated Kaitlyn neglected and abused, and granted physical custody of Kaitlyn to her maternal grandmother, respondent Shonna Schindler. Additional orders continuing Shonna Schindler's physical custody of Kaitlyn were entered on 12 March and 18 April 2008. On 19 September 2008, and by orders entered 19 September 2008 and 4 February 2009, the trial court changed the plan to relative custody and granted primary legal and physical custody of Kaitlyn to the Schindlers (the "Custody Orders"). On 16 September 2009, the trial court entered an order (the "Guardianship Order") granting the Schindlers legal guardianship of Kaitlyn and "ceas[ing] further reviews in this matter."

Nothing further was filed concerning Kaitlyn until 12 July 2016, when DSS filed a second petition alleging neglect and dependency stemming from the Schindlers' arrests on multiple drug-related charges (the "Second Petition"). The petition related not only to Kaitlyn, but also to two additional grandchildren.

Following several continuances, the trial court held an adjudication hearing on the Second Petition on 13 February 2017. DSS dismissed its allegation of dependency and sought adjudication only on the issue of neglect. Following the hearing, the trial court on 9 March 2017 entered an order adjudicating Kaitlyn and the other two grandchildren neglected and dependent, notwithstanding DSS's dismissal of the latter ground. Eight months later, on 9 November 2017, the trial court entered a corrected adjudication order adjudicating the minors neglected and acknowledging the dismissal of the allegations of dependency. In

1. A pseudonym is used to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 3.1(b). No party appeals the orders on grounds pertaining to the two additional grandchildren named in the action, M.N. and A.N., and the only issues on appeal involve Kaitlyn. As a result, this opinion does not address any issues concerning the other grandchildren.

both the original and corrected orders, the trial court found that the Schindlers were granted guardianship of Kaitlyn as of 16 September 2009, the date of the Guardianship Order. While the trial court did find that the Schindlers had been arrested on drug-related charges, it failed to make any findings as to harm or risk of harm to Kaitlyn as a result of her guardians' alleged drug activities. Indeed, neither DSS nor a court-appointed Guardian Ad Litem ("GAL") introduced any evidence to support findings of harm or risk of harm to Kaitlyn, and the lone witness at the hearing did not testify regarding those factual issues.

Following a dispositional hearing on 7 June 2017, the trial court entered an order on 14 November 2017 terminating the Schindlers' guardianship of Kaitlyn. The Schindlers timely appealed both the corrected order on adjudication and the order on disposition.

II. ANALYSIS

[1] Both DSS and the GAL concede that the trial court's corrected adjudicatory order is deficient as a matter of law because it does not include the necessary factual findings of harm or a risk of harm to Kaitlyn resulting from the Schindlers' drug activities and arrests. However, DSS contends that the Schindlers are not parties to the action with right of appeal. Because "[s]tanding is jurisdictional in nature and . . . a threshold issue that must be addressed, and found to exist, before the merits of [the] case are judicially resolved[,]" *In re T.B.*, 200 N.C. App. 739, 742, 685 S.E.2d 529, 531-32 (2009) (citations and internal quotation marks omitted) (second alteration in original), we address this question first.

DSS asserts the Schindlers are without standing under two statutes: N.C. Gen. Stat. § 7B-401.1 (2017) and N.C. Gen. Stat. § 7B-1002(4) (2017). The first concerns who are or may be made parties to abuse, neglect, and dependency proceedings, while the latter limits which parties may appeal from orders rendered in those proceedings. Reviewing the relevant statutes and case law, we hold that the Schindlers have standing to appeal.

Section 7B-401.1 provides that the following persons are parties to abuse, neglect, and dependency proceedings:

> (c) Guardian.—A person who is the child's court-appointed guardian of the person or general guardian when the petition is filed shall be a party. A person appointed as the child's guardian pursuant to G.S. 7B-600 shall automatically become a party but only if the court has found that the guardianship is the permanent plan for the juvenile.

> (d) Custodian.—A person who is the juvenile's custodian, as defined in G.S. 7B-101(8), when the petition is filed shall be a party. A person to whom custody of the juvenile is awarded in the juvenile proceeding shall automatically become a party but only if the court has found that the custody arrangement is the permanent plan for the juvenile.

N.C. Gen. Stat. §§ 7B-401.1(c)-(d). Section 7B-1002 limits parties with the right to appeal to the juvenile if no GAL has been appointed, the GAL if previously appointed, DSS, the party that sought but failed to obtain a termination of parental rights, and "[a] parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party." N.C. Gen. Stat. §§ 7B-1002(1)-(5). DSS contends that the Guardianship Order is deficient as a matter of law and the Schindlers are therefore not guardians within the meaning of Section 7B-401.1(c). "[T]he effect of such failure[,]" DSS reasons, "means that the [Schindlers] have been merely caretakers since that time[,]" and caretakers are not parties with right of appeal under Section 7B-1002. This argument is unavailing.

First, dispositional orders are not subject to collateral attack in a subsequent action when the basis for voiding the prior order is non-jurisdictional. *See*, *e.g.*, *In re Wheeler*, 87 N.C. App. 189, 193–94, 360 S.E.2d 458, 461 (1987) (prohibiting a party from collaterally attacking a prior order adjudicating a child abused and neglected and granting custody to a county department of social services on non-jurisdictional grounds on appeal from an order terminating parental rights). DSS, therefore, cannot avoid review of the Second Petition based on non-jurisdictional errors in orders entered on the First Petition. Because the Schindlers were guardians at the time the Second Petition was filed, they were parties to the action. N.C. Gen. Stat. § 7B-401.1(c) ("A person who is the child's court-appointed guardian of the person or general guardian when the petition is filed shall be a party."). As nonprevailing guardians, they have standing to appeal. N.C. Gen. Stat. § 7B-1002.

Second, assuming *arguendo* that the Guardianship Order is void, DSS does not contend that the earlier Custody Orders are invalid. Section 7B-101 defines "custodians" as "[t]he person . . . that has been awarded legal custody of a juvenile by a court[,]" N.C. Gen. Stat. § 7B-101 (2017), and the earlier Custody Orders made just such an award to the Schindlers. Because the last of the Custody Orders established that "the case plan of relative custody is the plan most likely to achieve permanence for [Kaitlyn,]" awarded the Schindlers legal custody, and changed the case plan to relative custody, the Schindlers were automatically

rendered parties to the First Petition. N.C. Gen. Stat. § 7B-401.1(d).[2] Further, the Schindlers were custodians as defined by Section 7B-101(8) when the Second Petition was filed, and were therefore parties as of that time. N.C. Gen. Stat. § 7B-401.1(d). Finally, because non-prevailing custodians as defined in Section 7B-101 are parties with right to appeal, N.C. Gen. Stat. § 7B-1002(4), the Schindlers have standing to appeal the orders on adjudication and disposition.[3]

[2] We now turn to the merits. We review whether "the findings [made] support the conclusion[ ] of law" that Kaitlyn is neglected. *In re E.P.*, 183 N.C. App. 301, 307, 645 S.E.2d 772, 775 (2007). A trial court adjudicating a juvenile neglected must make sufficient findings "show[ing] . . . harm[ ] . . . or creat[ion of] a substantial risk of such harm[,]" *In re J.R.*, 243 N.C. App. 309, 314, 778 S.E.2d 441, 445 (2015), and, as conceded by all parties, the trial court in this case committed reversible error in failing to make any findings to that effect. Additionally, no evidence introduced at adjudication supports such findings, and reversal is therefore proper. *In re J.R.*, 243 N.C. App. at 315, 778 S.E.2d at 445 (reversing an adjudication of neglect where "neither the evidence nor the trial court's findings are sufficient to establish [the juvenile] as a neglected juvenile"). As a result, and consistent with the relief requested by all parties on this issue, we reverse the adjudication order; since no party has appealed the adjudication of M.N. and A.N. as neglected, we limit our reversal to the portion of the order adjudicating Kaitlyn neglected.

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2. This statute was enacted in 2013, four years after the Custody and Guardianship Orders, and applied "to actions filed or pending on or after [1 October 2013]." 2013 N.C. Sess. Laws 129, § 41. No party contends that a final order had been entered on the First Petition and that the action was no longer pending at the time of Section 7B-401.1's effective date or that the statute does not apply.

3. DSS posits in passing, and without arguing directly, that the trial court somehow lacked personal jurisdiction over the Schindlers at the time of the adjudication hearing on the Second Petition. This position has no merit. The trial court has jurisdiction "over the . . . guardian [or] custodian . . . of a juvenile who has been adjudicated abused, neglected, or dependent, provided [they] . . . ha[ve] (i) been properly served with summons pursuant to G.S. 7B-406, (ii) waived service of process, or (iii) automatically become a party pursuant to G.S. 7B-401.1(c) or (d)." N.C. Gen. Stat. § 7B-200(b) (2017). The Schindlers were both served with process and "bec[a]me automatic parties pursuant to N.C. Gen. Stat. §§ 7B-401.1(c) or (d)[.]" N.C. Gen. Stat. § 7B-200(b). Further, the Schindlers, with their attorneys, appeared at the adjudication hearing without objection on personal jurisdiction grounds; the issue was therefore waived. *In re K.J.L.*, 363 N.C. 343, 347, 677 S.E.2d 835, 837-38 (2009). With all three statutory grounds for personal jurisdiction met in this case, the phantom of a jurisdictional argument intimated by DSS is exactly that—spectral and without substance.

"Since we reverse the adjudication order, the disposition order must also be reversed, obviating our need to address issues pertaining to it." *In re S.C.R.*, 217 N.C. App. 168, 170, 718 S.E.2d 709, 713 (2011). Like the adjudication order, the disposition order is reversed in part, only as to Kaitlyn. In addition, we remand the case for further proceedings not inconsistent with this opinion.

III. CONCLUSION

As court-appointed guardians and persons awarded legal custody of Kaitlyn, the Schindlers are parties to this action pursuant to Section 7B-401.1 and have standing to bring this appeal pursuant to Section 7B-1002. Because the trial court failed to make sufficient findings of fact in its adjudication order to support the conclusion that Kaitlyn is a neglected juvenile, because no evidence was introduced to support those necessary findings of fact, and in light of the concessions by all parties on this issue, we reverse the adjudication order in part and the disposition order in part, with respect to the adjudication and disposition of Kaitlyn, and remand for further proceedings.

REVERSED IN PART AND REMANDED.

Judges DILLON and DAVIS concur.

JULIE MICHELLE KOLCZAK (FORMERLY JOHNSON), PLAINTIFF
v.
ERIC FRANCIS JOHNSON, DEFENDANT

No. COA17-329

Filed 3 July 2018

1. Contempt—civil contempt—findings of fact—temporary parenting agreement

Sufficient competent evidence was presented to support the trial court's findings of fact that a mother willfully violated communication and visitation provisions of a temporary parenting agreement. It is within the trial court's purview to weigh the evidence, determine credibility, and make findings based upon the evidence; the court also properly exercised its discretion in determining the mother's actions were willful.

2. Contempt—civil contempt—purge conditions—inclusion necessary

A civil contempt order entered after a mother was found to have violated a temporary parenting agreement was deficient for failing to provide any method for how the mother could purge the contempt.

3. Evidence—hearsay—custody modification—criminal activity —prejudice

In a hearing to modify custody, evidence of criminal activity by the mother's husband gleaned from online sources and newspaper articles was not prejudicial, even if it constituted impermissible hearsay, given the extensive other similar evidence that was properly before the trial court.

4. Child Custody and Support—modification—substantial change in circumstances—implicit conclusion of law

Even though the trial court did not explicitly state its conclusion that a substantial change of circumstances affecting the welfare of the children occurred which would justify modifying child custody, the court's extensive findings of fact detailing negative changes in the family since the entry of the initial consent order, including but not limited to those resulting from the mother's remarriage to a man with a criminal history, were sufficient to support an order of modification. The findings and the trial court's conclusion that the father was entitled to a modification of custody made clear that the basis for modification was a substantial change in circumstances.

5. Attorney Fees—custody modification—timeliness of objection —waiver

In a proceeding to modify child custody, the mother waived her objection to the father's request for attorney fees where she waited until the third day of the hearing to object when the father submitted a supplemental affidavit in support of his initial request.

Judge TYSON concurring in the result only.

Appeal by plaintiff from order entered on or about 13 October 2016 by Judge Kimberly Best-Staton in District Court, Mecklenburg County. Heard in the Court of Appeals 18 October 2017.

Lynna P. Moen, for plaintiff-appellant.

Horack Talley Pharr & Lowndes, P.A., by K. Mitchell Kelling and Elizabeth J. James, for defendant-appellee.

STROUD, Judge.

For the want of a nail the shoe was lost.
For the want of a shoe the horse was lost.
For the want of a horse the rider was lost.
For the want of a rider the battle was lost.
For the want of a battle the kingdom was lost,
And all for the want of a horseshoe-nail.

Benjamin Franklin, Poor Richard's Almanack (1758). No kingdoms were lost in this appeal, but this opinion is much longer than it should have been for the want of a few words in the district court's order and in defendant-father's motions.

Courts strive mightily to rule based upon the substance of pleadings and orders, but there is a reason certain specific words are important in these legal documents as the correct words make orders clear and can avoid unnecessary appeals. The presence of "magic words" lets the appellate court know that the trial court has used the correct legal standard. While the absence of "magic words" may not result in reversal of an order, it often creates issues on appeal that could be easily avoided.

Plaintiff-mother appeals a trial court order modifying child custody, finding her in contempt, and ordering her to pay defendant-father's attorney fees. The trial court's order regarding civil contempt did not include any "purge" conditions, so we must reverse the portion of the order holding Mother in civil contempt. The trial court's order regarding modification of custody lacked a conclusion of law with the simple phrase "substantial change of circumstances," but after detailed analysis of the trial court's vague conclusion of Father's "entitlement" to modification in conjunction with the findings of fact, we affirm. Finally, the absence of the words "insufficient means to defray the expense of the suit" in defendant-father's motion for modification of custody created plaintiff-mother's entire argument on the award of attorney fees, but again, after a detailed analysis, we affirm because plaintiff-mother raised her objection to attorney fees too late. In summary, we affirm the order as to custody and attorney fees for the custody modification and reverse the order as to civil contempt.

I. Background

Plaintiff ("Mother") and defendant ("Father") were married in 2000, had one child in 2003, one child in 2007, and separated in 2012. In 2012, Mother filed a complaint against Father seeking child custody, child support, post-separation support, alimony, attorney fees, equitable distribution, interim distribution, and an injunction to prevent Father from diverting funds. In February 2013, Father answered Mother's complaint alleging marital misconduct and counterclaiming for child custody, child support, and equitable distribution. From these original pleadings, only child custody is at issue on appeal.

On 6 January 2014, the parties entered into a Consent Order regarding permanent child custody and child support with the parents sharing joint physical custody – Mother having the children Saturday through Wednesday and Father Wednesday through Saturday. On 16 April 2015, Father filed to modify custody alleging in part that Mother had married Mr. Dayton Kolczak in January of 2014.[1] The motion made detailed allegations about Mr. Kolczak's criminal activities. For example, the motion alleges both Mother and Mr. Kolczak were arrested at Mother's home when the children were present in January 2014 and the police had to call Father to pick up the children. Father sought sole legal and physical custody and also attorney fees.

In June of 2015, Father filed a motion for emergency custody and for a temporary parenting agreement ("TPA") again based on the criminal conduct of Mr. Kolczak and the negative effects it was having on the children. On 24 July 2015, the trial court entered an order granting Father's request for emergency custody and a separate order for a TPA which modified the custodial schedule; the orders did not suspend Mother's visitation but imposed additional requirements:

> 2. Mother's visitation with the children shall not be suspended but shall be conditioned upon the following:
>
> a. Dayton Kolczak shall not be at Mother's residence at any time when the minor children are present. The minor children shall have absolutely no contact with Dayton Kolczak at any time during their visitation

1. The allegation does not include the actual date of Mother's marriage to Mr. Kolczak. Even the trial court's finding of fact in the order on appeal simply notes the marriage occurred in January of 2014. Mother also admits in her brief that she married Mr. Kolczak in January of 2014. The Consent Order did not include any finding of fact about Mother's marital status other than her marriage to and separation from Father.

> with Mother. "No contact" shall include but is not limited to, no contact at Mother's residence, in a car driven by Mother or anyone else, in a public place or anywhere else Dayton Kolczak might be present. Additionally, "no contact" shall be no communication via telephone, email, text or any other means of communicating with the boys.
>
> . . . .
>
> d. Mother shall notify Father if she and/or Dayton Kolczak are arrested within 24 hours of said arrest.
>
> e. There shall be no illegal drugs or drug paraphernalia at Mother's home.

The orders also included provisions for no contact between the children and associates of Mr. Kolczak and required Mother to submit to a drug test and provide the results to Father's attorney.

In September 2015, Mother moved for a temporary restraining order ("TRO") and injunction against Father, alleging that he was contacting her "regularly and relentlessly" "for the purposes of harassment and interference." On 6 November 2015, Father filed a motion for contempt alleging Mother's failure to comply with both the Consent Order and the TPA order and requesting attorney fees. In October of 2015, the district court dismissed Mother's motion for a TRO and injunction with prejudice. In November of 2016, Father filed a second motion for contempt alleging Mother's additional failures to comply with both the Consent Order and the TPA order and again requesting attorney fees.

Over the course of five days in March and August of 2016, the trial court held a hearing on Father's motion to modify custody, which included a request for attorney fees, and both of his motions for contempt. In October of 2016, the district court entered an order determining Mother was in civil contempt, awarding Father primary custody with Mother having secondary custody, and awarding Father attorney fees. Mother appeals only the October 2016 order.

II. Civil Contempt

[1] Mother first challenges the district court's determination that she was in contempt.

> The standard of review for contempt proceedings is limited to determining whether there is competent

> evidence to support the findings of fact and whether the findings support the conclusions of law. 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.

Watson v. Watson, 187 N.C. App. 55, 64, 652 S.E.2d 310, 317 (2007) (citations and quotation marks omitted).

A. Findings of Fact

Mother contests eleven of the trial court's findings of fact and argues "[t]here are four major categories in which the trial court found Michelle in civil contempt and they are as follows: (1) notification of arrests, (2) first right of refusal, (3) registration in camps without consulting father, and (4) allowing Dayton at Michelle's residence when the minor children are present." Mother has also challenged the contempt portion of the order based upon the lack of any purge conditions, and as discussed below, we are reversing the portion of the order finding her in contempt for that reason, but because the challenged findings of fact support the portions of the order addressing modification as well as contempt, we must address them.

1. Notification of Arrests

The TPA order required Mother to notify Father himself within 24 hours if she or her husband was arrested. Mother did not identify the findings of fact regarding notification of arrests as unsupported by the evidence. The relevant findings are:

> 25. Mother did not tell Father that her Husband, Dayton Kolczak, had been arrested within twenty-four (24) hours as required by the TPA Order.
>
> 26. Mother's attorney did notify Father's attorney but the requirement was for Mother to notify Father within twenty-four (24) hours and that did not happen.

Mother argues that though she "herself did not notify Father[,]" Father was in fact notified. Mother contends she took "reasonable measures to comply with" the order by her attorney notifying Father's attorney. Thus Mother is not contending she directly notified Father or that she was unable to directly notify Father, but rather that having her attorney contact Father's attorney was close enough and fulfilled the spirit of the order.

The trial court was well within its discretion in finding that Mother willfully violated the Consent Order and TPA order by having Father's attorney notified instead of directly notifying Father. The Consent Order specifically provided that "[t]he parties shall use email or text as their primary method of communication and all communication should be respectful." The TPA order further required direct notification, which has the advantage of generally being faster. If there was an arrest on a weekend or holiday, contacting an attorney who must then contact another attorney who then must contact a client may substantially delay getting the message to Father. In addition, Mother's choice likely caused Father to incur additional attorney fees for a notification which could have been provided directly for free.

2. Right of First Refusal

The Consent Order contains a provision that "[t]he parties agree to offer the other parent the first right of refusal to watch the children if they are going to be more than 3 hours away before leaving them with a third party." Mother argues that the evidence does not support these findings regarding right of first refusal:

> 11. In December 2014, Mother violated the right of first refusal when Mother did not let Father care for the children. The children stayed with someone else instead of the Father. No email was sent to the Father to see if he could care for the children.
>
> 12. Mother violated the right of first refusal when Mother left the children with Nicki St. Claire and did not let Father care for the children.

The parties presented extensive and contradictory evidence regarding Mother's allowing the children to stay with third parties without notifying Father in advance. Mother acknowledges that she had allowed the children to go on sleepovers and day trips without notifying Father, but contends that "allowing a child to have a sleepover and a daytrip is not competent evidence to find that [Mother] willfully failed to comply with the first right of refusal requirement." But Father argues on appeal that Mother did not testify she was at home during the sleepover with Ms. St. Claire; in other words, Mother was using the sleepover as a method of childcare. The trial court considered and weighed the evidence; we cannot reweigh it. Mother does not deny that the children had a sleepover and her intent in allowing that could be interpreted in different ways. Because there was sufficient evidence for the trial court's findings regarding the right of first refusal, they "are conclusive on appeal[.]" *Id.* at 64, 652 S.E.2d at 317.

3. Registration in Camp without Consulting Father

The Consent Order contains a provision that the parties "cannot make plans or schedule activities for the children during the other parent's designated time without the prior consent of the other parent." Regarding Mother registering the children at camp without consulting Father, Mother argues these findings of fact are not supported by the evidence:

> 13. Mother registered the children for camp without consulting with Father first.
>
> . . . .
>
> 15. No option was given to Father to make-up the days that he missed.[2]

Mother does not contest finding of fact 14 which found that her decision to enroll the children in camp "resulted in Father not seeing the children for 18 – 21 days."

Mother's entire argument on the challenged findings regarding camp is that "Father testified that '[w]e talked about camps' in April 2015. T. Vol. 2, pp. 168. The trial court erred in holding [Mother] in civil contempt when [Father's] testimony was that they did talk about camps in April 2015." Father correctly points out there was much testimony regarding the children's camps and the parties' communications about them. Father did say the phrase quoted by Mother—"[w]e talked about camps" – but talking about camps in general is very different than notification of specific camps and the time periods for them. The trial court again weighed the evidence, determined credibility, and made findings based upon the evidence.

4. Mr. Kolczak's Presence at Mother's Residence

The TPA order specifically ordered that Mr. "Kolczak shall not be at Mother's residence at any time when the minor children are present." Mother challenges these findings about Mr. Kolczak's presence in violation of the TPA order:

> 16. On or about August 21, 2015, Dayton Kolczak was in the driveway of Mother's home while the children were present despite the Order stating he was not to be at the home.

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2. The order mistakenly includes two findings of fact numbered as 15. Based upon Mother's argument, this is the finding of fact 15 she challenges.

. . . .

> 46. Despite Mother's agreement with Father that Mr. Kolczak would not have contact with the children, the children have been exposed to Mr. Kolczak and Mr. Kolczak has had contact with the children.

Mother argues that the evidence shows Father

> drove the children to [Mother's] home as [Mr. Kolczak] was leaving the home and was in the driveway. T. Vol. 2, pp. 96. [Mother] had no control over when [Father] was bringing the children to her home. The children were never present at the residence when [Mr. Kolczak] was present, in fact according to [Father] they were in his vehicle the entire time that as [Mr. Kolczak] was leaving. T. Vol. 2, pp. 96.

But Mother herself testified:

> Q: And can you please describe for the Court your recollection of that day when [Mr. Kolczak] was there?
>
> A: Yes.
>
> He was heading out for work, *[Father] had texted me that he was on the way with the boys* and [Mr. Kolczak] left the house, but forgot his eyeglasses and ran in to get 'em.
>
> He was walking out the door when [Father] pulled up. So he stayed around the back and then came out the front.

(Emphasis added.)

Once again, Mother asks us to make a different interpretation of the evidence than the trial court. Based on Mother's own testimony, Mother knew that Father would arrive at any moment but did not ensure that her husband was away from the home before Father and the children arrived. The trial court could have found this incident to be an innocent lapse or it could find otherwise, as it did. Furthermore, the trial court was viewing this isolated incident in the context of criminal activity by both Mother and her husband as there were other findings regarding Mr. Kolczak not challenged on appeal:

> 40. Mr. Kolczak has a criminal history and past as well as run-ins with the police for the past year.

> 41. Mr. Kolczak is associated with Jalen O'Shea Cureton (herein after "Mr. Cureton").
>
> 42. Mr. Cureton has been arrested and charged with a financial crime as a result of Father's financial information being stolen and/or utilized.
>
> 43. Currently, Mr. Kolczak is incarcerated upon information and belief in the State of Illinois for various felony offenses but the Court finds he has been arrested on various dates which the Court will not enumerate. In January 2014, Mr. Kolczak as well as Mother were arrested and charged with an offense. Father bailed Mother out of jail after Mother was arrested.
>
> 44. Father and Mother reached an agreement that the children would have no contact with Mr. Kolczak.
>
> 45. Mother's criminal charges were dismissed after she completed court-ordered directives.
>
> . . . .
>
> 47. Mr. Kolczak's companions, including his brother, Dustin Ko1czak, and his friend, Matthew Roe, have had contact with the children.
>
> 48. Dustin Kolczak as well as Matthew Roe also have criminal records.

There was competent evidence upon which the trial court could find Mother allowed Mr. Kolczak to be present at the home when the children arrived.

B. Willfulness

The remaining challenged findings of fact are regarding willfulness and Mother's ability to comply with the Contempt Order and TPA order. Mother argues that any violations of the Content Order and TPA order were misunderstandings or simply out of her control.

> Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power. Willfulness constitutes: (1) an ability to comply with the court

> order; and (2) a deliberate and intentional failure to do so. Ability to comply has been interpreted as not only the present means to comply, but also the ability to take reasonable measures to comply.

Id. at 66, 652 S.E.2d at 318 (2007) (citations and quotation marks omitted).

We have determined the findings of fact upon which the trial court found Mother in willful contempt are supported by the evidence. Once again, Mother is asking this Court to adopt a different view of her credibility and actions than the district court, but the district court was within its discretion in determining Mother's actions to be in willful violation of the orders in that Mother had the ability to comply and intentionally chose not to do so. *See generally id.* This argument is overruled.

C. Purge Conditions

[2] Mother argues that the "Civil Contempt Order should be vacated since the court failed to specify how [she] might purge herself of contempt." Although the order specifically concluded that Mother "is in civil contempt of Court" for the violations of the two orders, Mother is correct that the order has no purge conditions or punishment for the contempt[3]. Father agrees with Mother that the order is deficient since it has no purge conditions, but he disagrees on the relief. Father argues we should remand to the trial court for entry of purge conditions and cites *Lueallen v. Lueallen*, ___ N.C. App. ___, ___,790 S.E.2d 690, 708 (2016). But in *Lueallen*, the contempt was failure to pay child support, and the order had required the obligor to pay "an additional $75.00 per month" to be applied to arrears, where the order had also required her to pay $100.00 per month toward arrears, and the order set no ending date for the arrears payments. *Id.* at ___ n.9, 790 S.E.2d at 707 n.9. We determined "that the purge conditions in the order are impermissibly vague" and remanded for clarification. *Id.* at ___, 790 S.E.2d at 708-09. In *Lueallen*, the trial court had determined that the obligor owed past-due child support and the question was simply the correct amount and how that amount would be paid. *See generally id.*, ___ N.C. App. ___, 790 S.E.2d at 690.

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3. Although Father specifically asked for Mother to be held in civil contempt, not criminal, and the trial court found Mother in civil contempt, this situation may be better suited for criminal contempt. But neither party has addressed the possibility of criminal contempt, and we will not address this potential issue.

But in this case, the contempt is primarily based upon communication and visitation provisions of the orders, not child support. It is not apparent from the order how an appropriate civil contempt purge condition could "coerce the defendant to comply with a court order" as opposed to punishing her for a past violation. *Wellons v. White*, 229 N.C. App. 164, 181, 748 S.E.2d 709, 722 (2013). And here the trial court did not order vague purge conditions; it ordered none at all.

We believe this case is more similar to *Wellons* than *Lueallen*. *Compare Lueallen*, ___ N.C. App. ___,790 S.E.2d 690; *Wellons*, 229 N.C. App. 164, 748 S.E.2d 709. In *Wellons*, the Court addressed a father's denial of the grandparent's visitation privileges established by a prior order. *See Wellons*, 229 N.C. App. at 165, 748 S.E.2d at 711. In *Wellons*, the trial court held the father in civil contempt for denial of visitation and ordered that he comply with the terms of the prior orders as a purge condition, but this Court reversed the contempt order:

> In the instant case, the district court erred by failing to provide Mr. White a method to purge his contempt.
>
> On 5 July 2012, the district court declared Mr. White to be in direct and wilful [sic] civil contempt of the prior Orders of the Court. It suspended Mr. White's arrest based on the following condition: Defendant can purge his contempt by fully complying with the terms of the 30 March 2012 Interim Order, the prior Orders of 28 December 2007 and 27 July 2010, and this Order. The order did not establish a date after which Mr. White's contempt was purged or provide any other means for Mr. White to purge the contempt.
>
> We have previously reversed similar contempt orders. For instance, in *Cox* a contempt order stated the defendant could purge her contempt by not:
>
> > placing either of the minor children in a stressful situation or a situation detrimental to their welfare. Specifically, the defendant is ordered not to punish either of the minor children in any manner that is stressful, abusive, or detrimental to that child.
>
> There, we reversed because the trial court failed to clearly specify what the defendant can and cannot do to the minor children in order to purge herself of the civil contempt.

> Similarly, in *Scott* a contempt order stated:
>
> > Defendant may postpone his imprisonment indefinitely by (1) enrolling in a Controlled Anger Program approved by this Court on or before August 1, 2001 and thereafter successfully completing the Program; (2) by not interfering with the Plaintiff's custody of the minor children and (3) by not threatening, abusing, harassing or interfering with the Plaintiff or the Plaintiff's custody of the minor children.
>
> There, although we indicated the requirement to attend a Controlled Anger Program may comport with the ability of civil [violators] to purge themselves, we reversed because the other two requirements were impermissibly vague.
>
> In the case at hand, the district court did not clearly specify what Mr. White can and cannot do to purge himself of contempt. Although the district court referenced previous orders containing specific provisions, it did not: (i) establish when Mr. White's compliance purged his contempt; or (ii) provide any other method for Mr. White to purge his contempt. We will not allow the district court to hold Mr. White indefinitely in contempt. Consequently, we reverse the portion of the 5 July 2012 order holding Mr. White in civil contempt.

Id. at 182–83, 748 S.E.2d 709, 722–23 (2013) (citations, quotation marks, ellipses, and brackets omitted). We therefore reverse the conclusion of law and decree provision holding Mother in civil contempt, specifically conclusion of law 4 and paragraph 1 of the decree.

III. Modification of Custody

Mother raises two issues regarding the modification of custody.

A. Hearsay Evidence

[3] Mother contends the trial court erred in modifying custody because some of the critical findings of fact supporting modification were erroneously based upon hearsay. Mother argues that during the hearing, Father's counsel introduced evidence from online searches and a newspaper article regarding Mr. Kolczak's criminal record and activities. Mother contends she objected to the evidence, but the trial court overruled the objection and thus "erred relying on hearsay as a basis to change custody." (Original in all caps.).

> The competency, admissibility, and sufficiency of the evidence is a matter for the trial court to determine. We review the trial court's exclusion of documentary evidence under the hearsay rule for abuse of discretion. 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.

In re Lucks, 369 N.C. 222, 228, 794 S.E.2d 501, 506 (2016) (citations and quotation marks omitted).

Mother's husband, his criminal activities, and the risk to the children from exposure to him and his associates were primary concerns in this hearing, since the motion for modification was based in part upon Mother's failure to comply with the prior orders which required her not to have the children in Mr. Kolczak's presence. Father was not the only one to testify about Mr. Kolczak's crimes. For example, the first witness was Detective Kevin Jones, in the Financial Crimes Unit of the Charlotte/Mecklenburg Police Department. Detective Jones testified about his investigation of Father's report of "credit card accounts being opened or account takeovers as we call them, where his existing accounts had been compromised." This investigation revealed a connection between a man identified as Mr. Kolczak and Mr. Jaylin Curatan, the individual making purchases at a Best Buy store with Father's Best Buy account. Detective Jones discovered the relationship between Mr. Kolczak and Mr. Curatan because "Mr. Kolczak was actually arrested on September 1st, 2015, and Mr. Curatan was with him at the time."

In the TPA order, the district court found that Mr. Kolczak had been "arrested on May 15, 2015 for (1) felony possession of Schedule I Controlled Substance; (2) felony possession of cocaine; (3) resisting public officer; and (4) possession/manufacturing false identification." The district court further found in the TPA order that "[i]n addition to these arrests, Mr. Kolczak was arrested in Cabarrus County in August 2014, in Wake County in January 2015 and Dalton, Georgia in April 2015." Thus, even assuming arguendo the specific evidence Mother challenges regarding her husband's criminal activity was hearsay, it was not prejudicial considering the extensive other similar evidence before the trial court. *See Williams v. Williams*, 91 N.C. App. 469, 473, 372 S.E.2d 310, 312 (1988) ("While we agree that the testimony has characteristics of hearsay under the North Carolina Rules of Evidence, we hold that its admission was not prejudicial. The admission of incompetent testimony will not be held prejudicial when its import is abundantly established

by other competent testimony, or the testimony is merely cumulative or corroborative. Because both plaintiff and defendant presented a considerable amount of conflicting evidence regarding the alleged sexual abuse, we conclude that the admission of this testimony was not prejudicial." (citations and quotation marks omitted)). This argument is overruled.

B. Modification of Custody

[4] Mother next contends the "trial court erred in modifying custody with-out finding a change in circumstances." (Original in all caps.) In her brief Mother contends that if we "exclude" the findings of fact regarding her husband's criminal history, there are no findings of fact regarding a change of circumstances as required for a modification of custody because "remarriage alone is not a change of circumstances." Mother argues "the trial court failed to articulate any substantial change in circumstances since entry of the original orders" and how any changes affect the welfare of the children.

Father's brief seems to recognize that the order included no explicit conclusion of a substantial change in circumstances affecting the best interests of the children. Father argues "[f]indings of fact numbers 86 through 89 are, despite their label, actually conclusions of law in that the trial court exercised its judgment and/or applied legal principles to the specific facts of the immediate case." These findings provide:

> 86. Mother is not able to sever[] ties with Mr. Kolczak.
>
> 87. It is necessary to ensure the children's safety to award Father primary custody.
>
> 88. Father is entitled to a modification of the January 6, 2014 Consent Order.
>
> 89. Father is a fit and proper person to have the care, custody and control of the minor children and it is in the best interests of the minor children for Father to have their care, custody and control.

Findings 86 and 87 are findings of fact, not conclusions of law, but Findings 88 and 89 are conclusions of law. "The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012).

A trial court's determination that there has been a substantial change of circumstances affecting the best interest of the children is a conclusion of law:

> With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 475, 586 S.E.2d 250, 254 (2003). Furthermore, "[w]e review conclusions of law *de novo*." *In re B.S.O.*, 234 N.C. App. 706, 708, 760 S.E.2d 59, 62 (2014).

We have already determined that the findings of fact Mother challenged above, including those regarding Mr. Kolczak's criminal history, are supported by competent evidence, so we must now consider if those findings support the trial court's conclusion of law that "Father is entitled to a modification of the" prior order. *See generally Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. Mother is correct that the order includes no specific conclusion of law – whether phrased as a finding of fact or as a conclusion of law – that there had been a substantial change of circumstances affecting the welfare of the children which justifies modification of custody. But finding 88 is a conclusion that "Father is entitled to a modification" of custody, and Father could only be "entitled" if the trial court concluded there has been a substantial change of circumstances affecting the welfare of the children. *See generally id.* Mother does not argue finding 88 could logically have any other meaning.

In the extensive findings of fact, the trial court detailed the substantial changes since entry of the Consent Order, including the effect these changes had on the children's welfare. Along with many of the findings we have already discussed regarding the contempt portion of the order, the order then addressed Mother's marriage to Mr. Kolczak within the same month as the Consent Order. The findings went on to note Mr. Kolczak's criminal history and "run-ins with the police for the past year."

The order notes that some of his criminal associates, Mr. Cureton, Mr. Roe, and his brother Dustin, also had criminal records, and the children were exposed to them as well. The district court found specifically that at the time of the hearing "Mr. Kolczak is incarcerated upon information and belief in the State of Illinois for various felony offenses[.]" The district court then noted Mr. Kolczak had "various" other arrests, including one in January where both he and Mother were arrested, and Father bailed Mother out of jail. The district court then noted that Mother and Father had agreed that the children would have no contact with Mr. Kolczak, but Mr. Kolczak had contact with the children despite that agreement.

The district court also made findings about both parents' participation in the children's educational, spiritual, and medical needs, noting that both parents had been involved. The district court also found that outside of the contempt issues, the parents worked "well together[,]" although sometimes Father's text messages were "condescending and critical[,]" and Mother failed to keep Father as well-informed as she should. The district court found that Mother and Mr. Kolczak had signed a Separation Agreement in December 2015, but Mother still remained in contact with him while incarcerated; mother had taken the children to see Mr. Kolczak's grandmother; and though Mother had adequate warning and opportunity to ensure her children were not around Mr. Kolczak, she had not done so.

It is apparent from the findings of fact that the trial court determined that Mother's marriage to a convicted felon, the arrest of Mother and Mr. Kolczak in the home when the children were present, exposure to Mr. Kolczak and his criminal associates, Mother's refusal to ensure that Mr. Kolczak had no contact with the children, and Mother's continuing relationship with him, despite claiming to be separated, were substantial changes since entry of the Consent Order. The criminal activity endangered the children. At the time of entry of the Consent Order, Mother had not informed Father she planned to marry Mr. Kolczak, had not been arrested, and had never violated an order regarding custody or visitation.

Mothers seeks to compare this case to *Davis v. Davis*, but in that case, "the trial court did not conclude that there was a substantial change in circumstances, let alone that those changes affected the welfare of the children. Actually, the trial court found just the opposite as to defendant's motion and was silent as to plaintiff's motion." 229 N.C. App. 494, 504, 748 S.E.2d 594, 601–02 (2013). Nor did the *Davis* findings of fact make the reason for the modification "self-evident" but rather

noted the issue for concern arose from an "isolated incident." *Id.* at 504, 748 S.E.2d at 602.

This case is more similar to those where the order was affirmed because it found facts which show the substantial change of circumstances and how that change has affected the children, even though the order did not use exactly the right phrases. *See*, *e.g.*, *Carlton v. Carlton*, 145 N.C. App. 252, 549 S.E.2d 916, *rev'd per curiam*, 354 N.C. 561, 557 S.E.2d 529 (2001). In *Carlton*, our Supreme Court reversed based upon the dissent. *See Carlton*, 354 N.C. 561, 557 S.E.2d 529. In *Carlton*, the trial court had awarded the father primary custody after it modified a joint custody order with of alternating weeks with each parent after the mother had absconded with the child for about two months, and the father had moved to Hawaii. *See Carlton*, 145 N.C. App. at 252-54, 549 S.E.2d at 917-18. The trial court did not specifically conclude there had been a substantial change in circumstances affecting welfare of the minor child, and the majority of this Court vacated and remanded the case to the trial court based upon the lack of the specific conclusion of law of a substantial "change of circumstances affecting the well-being" of the child. *Id.* at 259-60, 549 S.E.2d at 921-22.[4] The dissenting judge, with whom the Supreme Court agreed, *see Carlton*, 354 N.C. 561, 557 S.E.2d 529, would have affirmed the order, since the extensive and detailed findings clarified the reasons for the change and the effect upon the child, stating that "I decline to read the order appealed from so narrowly as to disregard the incorporated findings, or to constrain the trial court to use certain and specific 'buzz' words or phrases beyond that included in the order." *Id.* at 261-63, 549 S.E.2d at 924 (Tyson, J., dissenting). The Supreme Court did not find it necessary to remand to the trial court for additional findings or conclusions of law but agreed with the dissent that the basis for the modification of custody was clear from the detailed findings of fact. *See Carlton*, 354 N.C. 561, 557 S.E.2d 529.

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4. The concurring judge pointed out the obvious change created by the father's move to Hawaii: "The majority correctly states that a mere change in residency is not enough to constitute a substantial change of circumstances. However, on these facts I believe that the defendant has shown more than a mere change in residency. The record reveals that the trial court's original order called for the child to alternate her residence between parents at the end of every week. The court later altered this arrangement to every two weeks. However, even the most well-to-do individuals could not sustain this arrangement given that the defendant's new residence is more than 4,000 miles from Catawba County, North Carolina. The travel expenses alone for a transcontinental transfer every two weeks would be beyond the means of most people. This case presents a situation where the original order is not functional." *Carlton*, 145 N.C. App. at 260-61, 549 S.E.2d at 922 (Eagles, Chief J., concurring).

While Mother is correct in her argument that "remarriage alone" is not necessarily a change of circumstances supporting a modification of custody, remarriage can be an important factor supporting a justification for modification. Here, the district court did not modify custody based on "remarriage alone" but on the fact that the remarriage was to a convicted felon who brought criminal activity and criminal associates into Mother's home and into the presence of the children. Mother's marriage to Mr. Kolczak caused substantial negative changes to the lives of the children, including Mother's arrest and exposure to criminals which resulted in a court order for no contact with Mr. Kolczak that Mother violated. Therefore, we conclude the trial court did not err in concluding that Father was entitled to modification of the custody order. This argument is overruled.

IV. Attorney Fees for Modification of Custody

[5] Mother's last argument is that "the court erred in awarding attorney fees." We first note that the order on appeal set forth two separate sections of findings of fact for attorney fees, one for the contempt motions and one for the modification of custody. Mother does not challenge any of the findings of fact related to the fees for the contempt motions. Mother limits her argument regarding the award of attorney fees to the fees for modification of custody motion only. For example, Mother challenges only one finding of fact, No. 91, in the section for fees for modification of custody which states, "Father is acting in good faith in bringing this Motion. Father does have some means to defray the cost of his legal expenses but it does not appear that he has the ability to defray all of the costs considering the care and provisions made for the children." Mother also challenges only one paragraph of the decree, No. 21, which addresses specifically attorney fees for the motion for modification of custody. Therefore, we conclude Mother has not challenged the attorney fees in relation to the contempt motion so we will not address that award of fees.

Mother's only substantive argument regarding the award of attorney fees is that the district court erred in awarding attorney fees because Father's motion for modification of custody "failed to allege that he has insufficient means to defray his expense of the suit." Father's motion requested that "Mother be ordered to pay Father's costs and fees, including reasonable attorney's fees" in its prayer for relief. Mother first objected to an award of attorney fees based upon the lack of detail in the motion to modify custody during the portion of the hearing held on 2 August 2016. Mother did not cite to the trial court any case requiring specificity in a motion for attorney fees nor does she cite such a case

on appeal. Father argued to the trial court that Mother had waived her objection to the sufficiency of the request for attorney fees since she had not raised it earlier:

> There was in-depth testimony in March about this issue. We put on all the evidence about his inability to pay. That he was acting in good faith.
>
> Ms. Moen did not object then. All we're doing is filing a Supplemental Affidavit . . . . and the evidence has been presented.

The district court overruled Mother's objection because she failed to object to the attorney fees based upon lack of specificity in the motion earlier in the hearing.

In *Byrd v. Byrd*, the plaintiff argued that the trial court erred by awarding attorney fees to the defendant in a child support case because the "defendant's Answer and Counterclaim does not make the required allegations or pray for the appropriate relief[.]" 62 N.C. App. 438, 442-43, 303 S.E.2d 205, 209 (1983). But the defend-ant had offered evidence on attorney fees at the hearing, and thus this Court deter-mined,

> [W]hen issues not raised in the pleadings are tried by the express or implied consent of the parties, North Carolina allows for the pleadings to be amended to conform to the evidence. Where a party offers evidence at trial which introduces a new issue and there is no objection by the opposing party, the opposing party is viewed as having consented to the admission of the evidence and the pleadings are deemed amended to include the new issue.
>
> Here, the required allegations and pleadings were not made in defendant's answer and counterclaim. However, it was found from the evidence at the hearing that the defendant was acting in good faith, that she had insufficient means to defray the expense of the suit and that plaintiff had refused a request to furnish adequate support at the time the action was instituted. These findings are supported by evidence in the record which was introduced at the hearing without objection by plaintiff. Since plaintiff did not object to the admission of this evidence, the pleadings are deemed to be amended to conform to the evidence and the trial court's award of attorney's fees was therefore proper.

Id. (citations omitted).

This case differs from *Byrd* because Father did ask for attorney fees, *contrast id.*, although without specificity in the pleading. Here, also different, Mother did object, but her objection came late in the hearing. Father testified regarding his request for attorney fees and submitted his first attorney fee affidavit on 29 March 2016. Mother did not raise her objection until 2 August 2016, the third day of the hearing, when Husband was submitting a supplemental attorney fee affidavit. We express no opinion on whether Husband's motion for attorney fees was required to be more detailed since we need not reach that issue, but Mother waived any objection to the sufficiency of Father's motion requesting attorney fees by failing to object earlier. *See generally id.*

V. Conclusion

We affirm the order for modification of custody and the award of attorney fees for modification of custody. We also affirm the award of attorney fees for contempt because Mother did not challenge this portion of the award of attorney fees on appeal. We affirm the findings of fact regarding Mother's willful violations of the prior orders, but because the trial court did not set any purge conditions, we reverse the trial court's determination of civil contempt, specifically conclusion of law 4 and paragraph 1 of the decree.

AFFIRMED in part, REVERSED in part.

Judge HUNTER concurs.

Judge TYSON concurs in the result only.

McDANIEL v. SAINTSING

[260 N.C. App. 229 (2018)]

JAMES MARK McDANIEL, JR., PLAINTIFF
v.
BYRON L. SAINTSING AND SMITH DEBNAM NARRON DRAKE SAINTSING & MYERS, LLP, DEFENDANTS

No. COA18-88

Filed 3 July 2018

Jurisdiction—subject matter—standing—right to assert claim—claim conveyed in settlement agreement

In a case involving indebted business entities, the trial court properly granted defendants' motion to dismiss plaintiff indebted business owner's obstruction of justice claim for lack of subject matter jurisdiction. Plaintiff had transferred all of his assets, including any potential claims and causes of action, to the receiver as part of his settlement agreement and release, so, even assuming plaintiff had a colorable claim for obstruction of justice, that claim was conveyed to the receiver and thus plaintiff did not have a sufficient stake in the claim to establish standing.

Appeal by plaintiff from orders entered 11 July 2017 and 12 July 2017 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 6 June 2018.

Douglas S. Harris for plaintiff-appellant.

Smith Debnam Narron Drake Saintsing & Myers, LLP, by Bettie Kelley Sousa, for defendants-appellees.

ZACHARY, Judge.

Plaintiff James Mark McDaniel, Jr. appeals from the trial court's orders setting aside entry of default and granting defendants' Motion to Dismiss. Because plaintiff lacks standing, we affirm the trial court's order dismissing this action.

Background

McDaniel co-owned several businesses with Dr. C. Richard Epes, including Southeastern Eye Center, Inc. ("SEC") and several entities related thereto ("SEC Businesses"). According to McDaniel, "[a]s a part of that partnership, we had an agreement whereby we would each commit our wealth to make sure that the corporations continue to prosper."

However, the SEC Businesses had fallen into a great deal of debt by 2014.

Arthur Nivison and his family own several business entities ("Nivison Entities") that by early 2014 were in the midst of litigation concerning debt owed to them by the SEC Businesses. Defendants Byron L. Saintsing and the law firm Smith Debnam Narron Drake Saintsing & Myers, LLP represented the Nivison Entities in the litigation. Nivison Entities sought additional security for the Nivison loans, including a secured interest in the collection of Andrew Wyeth paintings that Dr. Epes owned, valued at over $20 million. McDaniel maintains that his business agreement with Dr. Epes "specifically included" the Andrew Wyeth paintings, whereby "Dr. Epes agreed to either borrow against or to sell paintings as necessary to protect our business[.]" According to McDaniel,

> Arthur Nivison described his desire to have a secured interest in the Andrew Wyeth art collection (which if such a secured interest were granted would make the art collection unavailable for loans or sale and which would violate the agreement between Dr. Epes and me). I wrote back to Arthur Nivison (with a copy to Byron Saintsing) that under no circumstances were any Andrew Wyeth paintings to be secured and whatever we worked out would have to be worked out some other way.

McDaniel further contends that

> Defendant Saintsing's reaction to hearing the news that he could not have the Andrew Wyeth paintings as security for his clients was to personally prepare and file with the North Carolina Secretary of State a UCC-1 which gave Arthur Nivison a secured interest in the paintings - this was directly against my written instructions. At no time before the UCC-1 lien was filed with the North Carolina Secretary of State against the Andrew Wyeth paintings did Defendant Saintsing nor Defendant Smith Debnam Narron Drake Saintsing & Myers LLP nor anyone else obtain permission from Dr. Epes, from me or from anyone else to file a UCC-1, and therefore, the UCC-1 was legally unauthorized according to the UCC Rules, false and fraudulent and both defendants knew that said document was unauthorized false and fraudulent.

The UCC-1 amendment was filed 10 April 2014.

On 27 April 2015, Chief Justice Mark Martin of the North Carolina Supreme Court designated thirteen cases pending against McDaniel, Dr. Richard Epes, and varied SEC Businesses as exceptional cases, and assigned the cases to the Honorable Louis Bledsoe, III for hearing. Judge Bledsoe appointed a receiver to manage the assets of the various SEC Businesses in litigation. The Receiver demanded, *inter alia*, "payment of money, return of assets and setting aside of various transactions" by McDaniel and his wife "on the grounds of corporate mismanagement, conflict of interest, insider and self-interested transactions, fraudulent transfers, [and] failure to maintain adequate capitalization[.]" In short, McDaniel was accused of engaging in various unlawful actions with intent to defraud and hinder creditors of the SEC Businesses. In order to resolve these and other claims, McDaniel and his wife entered into a Settlement Agreement and Release with the Receiver in August 2015, pursuant to the terms of which the Receiver agreed to release all claims against the McDaniels in exchange for the McDaniels' relinquishment of any interest in virtually all of their non-exempt assets to the Receiver in satisfaction of the claims. The Settlement Agreement and Release provided for the transfer of all of the McDaniels' "tangible personal property including all artwork, furniture including all antiques, art work, collectibles, coins, collectible papers, historic documents, glassware, and any and all other tangible items of value," as well as "[a]ll judgments, rights, claims and causes of action including without limitation, any and all counterclaims or complaints currently pending in any ongoing action or proceeding and any and all unasserted or inchoate claims or causes of action" to the Receiver.

Notwithstanding McDaniel's transfer of all "claims and causes of action" to the Receiver in settlement of various claims against him and his wife, McDaniel filed an obstruction of justice suit against defendants Saintsing and his firm on 10 April 2017 for their conduct relating to the April 2014 filing of the UCC-1 amendment. Default was entered as to McDaniel's claim against defendants on 19 June 2017. Defendants filed a Motion to Dismiss McDaniel's complaint for lack of subject-matter jurisdiction on 20 June 2017 and a Motion to Set Aside Entry of Default on 28 June 2017. The trial court granted defendants' Motion to Set Aside Entry of Default on 11 July 2017. The next day, the trial court granted defendants' Motion to Dismiss.

On appeal, McDaniel argues that the trial court erred (1) when it set aside the entry of default, and (2) when it granted defendants' Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(3).

Discussion

We first address whether the trial court erred when it granted defendants' Motion to Dismiss for lack of subject-matter jurisdiction. Defendants maintain that the trial court properly granted their Motion to Dismiss because McDaniel does not have standing in the instant case and that therefore, ". . . the trial court lacks subject matter jurisdiction. . . ."

At the hearing on defendants' Motion to Dismiss, the trial court summarized defendants' standing argument as twofold: "One is [McDaniel] never owned the artwork and, therefore, any claim related to a false filing, he never had anyway as an initial matter[.] And, then, secondly, if he had a claim, it was transferred by virtue of either the transfer of the artwork or by virtue of the language of the settlement agreement." We first address whether McDaniel lacks standing by virtue of the terms of the Settlement Agreement and Release to which he was a party.

Subject-matter jurisdiction "involves the authority of a court to adjudicate the type of controversy presented by the action before it." *Haker-Volkening v. Haker*, 143 N.C. App. 688, 693, 547 S.E.2d 127, 130 (2001). "A court's lack of subject matter jurisdiction is not waivable and can be raised at any time, including on appeal." *Banks v. Hunter*, ___ N.C. App. ___, ___, 796 S.E.2d 361, 365 (2017) (citing *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961)). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010) (citation omitted).

It is axiomatic that "[s]tanding is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction." *Cook v. Union Cty. Zoning Bd. of Adjustment*, 185 N.C. App. 582, 588, 649 S.E.2d 458, 464 (2007) (citation and quotation marks omitted). Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy so as to properly seek adjudication of the matter." *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 51 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32, 31 L. Ed. 2d 636, 641 (1972)). Three elements must be satisfied in order for a plaintiff to establish standing:

> (1) 'injury in fact'—an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Neuse River Found., Inc., 155 N.C. App. at 114, 574 S.E.2d at 52 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 119 L. Ed. 2d 351, 364 (1992)).

In the instant case, as a part of his Settlement Agreement and Release with the Receiver, McDaniel agreed to "transfer and assign all of [his] assets, both disclosed and undisclosed, known and unknown, tangible and intangible," including any and all "judgments, rights, claims and causes of action including, without limitation, any and all counterclaims or complaints currently pending in any ongoing action or proceeding and any and all unasserted or inchoate claims or causes of action" to the Receiver. Thus, even assuming, *arguendo*, that McDaniel had a colorable claim for obstruction of justice against defendants, the claim would have existed at the time of execution of the Settlement Agreement and Release, pursuant to the terms of which the right to assert that claim was conveyed to the Receiver. Accordingly, in that McDaniel's potential legal claim is held by the Receiver, McDaniel does not have "a sufficient stake" in his obstruction of justice claim to establish standing in the instant matter. *Neuse River Found., Inc.*, 155 N.C. App. at 114, 574 S.E.2d at 51.

McDaniel also argues that the Settlement Agreement and Release has no bearing on his claim against defendants because defendants were neither parties to, nor beneficiaries of that contract. While it is true that defendants were neither parties to, nor beneficiaries of the Settlement Agreement and Release, this is irrelevant. The Settlement Agreement and Release does not affect defendants' ability to defend against the obstruction of justice claim, but rather affects McDaniel's ability to assert that claim from the outset in that the right to assert that claim became vested in the Receiver by operation of the Settlement Agreement and Release.

Accordingly, we conclude that the trial court properly granted defendants' Motion to Dismiss because McDaniel lacks standing to assert the obstruction of justice claim at bar, as any such right to do so would belong not to McDaniel, but to the Receiver. Because there is no subject-matter jurisdiction in the instant case, we need not review the trial court's order setting aside entry of default.

Conclusion

For the reasons contained herein, the trial court's orders granting Defendants' Motion to Dismiss and granting Defendants' Motion to Set Aside Entry of Default are

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

SCHEINERT v. SCHEINERT

[260 N.C. App. 234 (2018)]

JEANNE SOUTHALL SCHEINERT, PLAINTIFF
v.
HARRY STEVEN SCHEINERT, DEFENDANT

No. COA17-1227

Filed 3 July 2018

Divorce—venue—removal of action—necessary findings

The trial court's order transferring the parties' alimony proceeding to another county did not contain sufficient findings pursuant to N.C.G.S. § 50-3 regarding whether defendant resided outside of the presiding county at the time plaintiff filed her alimony action. The Court of Appeals rejected plaintiff's argument that section 50-3 did not apply unless there was some pending motion or trial date to be transferred after reviewing the plain language of the statute, which only required the existence of an ongoing alimony proceeding.

Appeal by plaintiff from judgment entered 25 May 2017 by Judge Robert M. Wilkins in Randolph County District Court. Heard in the Court of Appeals 18 April 2018.

Lee M. Cecil for plaintiff-appellant.

Wyatt Early Harris Wheeler LLP, by Arlene M. Zipp, for defendant-appellee.

DIETZ, Judge.

Plaintiff Jeanne Southall Scheinert appeals from an order transferring this alimony proceeding from Randolph County to Caswell County under N.C. Gen. Stat. § 50-3. As explained below, the trial court's order does not contain sufficient findings to support transfer under Section 50-3, although the record indicates that there is competent evidence to support a transfer. Accordingly, we vacate the trial court's order and remand for the trial court, in its discretion, to enter a new order on the existing record or conduct any further proceedings that the court deems necessary.

Facts and Procedural History

Plaintiff Jeanne Southall Scheinert and Defendant Harry Steven Scheinert married in March 1980 and separated in March 2003. At the

time of separation, both parties lived in North Carolina. After the separation, Ms. Scheinert filed an action for alimony in Randolph County. The court ordered Mr. Scheinert to pay $3,900.00 per month in alimony to Ms. Scheinert. Ms. Scheinert later moved from North Carolina to Indiana and Mr. Scheinert moved to Caswell County.

On 28 March 2017, Mr. Scheinert filed a motion to transfer the alimony proceeding from Randolph County to Caswell County under N.C. Gen. Stat. § 50-3. Section 50-3 provides that in "any action brought under Chapter 50 for alimony or divorce filed in a county where the plaintiff resides but the defendant does not reside, where both parties are residents of the State of North Carolina, and where the plaintiff removes from the State and ceases to be a resident, the action may be removed upon motion of the defendant, for trial or for any motion in the cause, either before or after judgment, to the county in which the defendant resides." N.C. Gen. Stat. § 50-3.

After a hearing, the trial court ordered that the matter be transferred to Caswell County under N.C. Gen. Stat. § 50-3. Ms. Scheinert timely appealed.

Analysis

I. Sufficiency of the trial court's findings of fact

The central issue in this appeal is whether the trial court's order contains sufficient findings to trigger the transfer provision in N.C. Gen. Stat. § 50-3. Our Supreme Court has held that this provision of Section 50-3 "is clearly mandatory. When the particular situation to which it applies is shown to obtain, the trial court has no choice but to order removal upon proper motion by the defendant." *Gardner v. Gardner*, 300 N.C. 715, 718, 268 S.E.2d 468, 470 (1980).

The "particular situation" discussed in *Gardner*, as applicable to this alimony proceeding, is this: (1) at the time the alimony action was brought, both parties resided in North Carolina; (2) at that same time, the plaintiff resided in the county where the action was brought, but the defendant resided in a different county; and (3) the plaintiff has since moved out of the State. *See* N.C. Gen. Stat. § 50-3.

The parties agree that the first and third criteria are satisfied in this case and that the trial court's order properly found facts supporting those criteria. But they dispute whether the trial court found that Mr. Scheinert resided outside of Randolph County when Ms. Scheinert brought the alimony action.

To be sure, there was at least some competent evidence to support a finding that Mr. Scheinert did not reside in Randolph County when the alimony action commenced. In his verified answer and counterclaim, Mr. Scheinert disputed the allegation that he was a resident of Randolph County and averred that he was a resident of Guilford County. But the only finding addressing this issue in the court's order is the following: "On June 5, 2003, Defendant/Husband filed an Answer and Counterclaim alleging that he was a citizen and resident of Guilford County, North Carolina, as he had moved there recently after the date of separation."

This is not a fact-finding; it is merely a recitation of an allegation in Mr. Scheinert's answer. This Court has repeatedly held that a trial court cannot find facts by merely reciting allegations in the parties' pleadings; instead, the court must make a finding that the allegation is indeed a fact. *See*, *e.g.*, *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) ("As indicated by the word 'alleged,' the findings are not the 'ultimate facts' required by Rule 52(a) to support the trial court's conclusions of law, but rather are mere recitations of allegations."). Thus, we agree with Ms. Scheinert that the trial court's order does not contain sufficient findings to support its conclusion that N.C. Gen. Stat. § 50-3 required the case to be transferred to Caswell County. Accordingly, as explained below, we remand for further appropriate proceedings in the trial court's discretion.

II. Applicability of N.C. Gen. Stat. § 50-3 without a separate pending motion

Ms. Scheinert also contends that remand is inappropriate because, as a matter of law, N.C. Gen. Stat. § 50-3 does not apply in this case. She argues that a defendant may invoke Section 50-3 only if there is some pending motion or trial date that will be transferred as part of the Section 50-3 order. We disagree.

"Where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning." *Wilkie v. City of Boiling Spring Lakes*, __ N.C. __, __, 809 S.E.2d 853, 858 (2018). Section 50-3 provides that "the action may be removed upon motion of the defendant, for trial *or for any motion in the cause*, *either before or after judgment*, to the county in which the defendant resides." N.C. Gen. Stat. § 50-3 (emphasis added). The phrase "the action may be removed . . . for any motion in the cause" is forward-looking—its structure indicates that something will happen now for something to happen later. In other words, the statute requires the transfer so that a motion in the cause may be resolved in the new

county at some future point. Nothing in the text of the statute requires that this underlying motion be pending in order to transfer the matter. All that is required is that there is an ongoing alimony proceeding that has not been finally resolved, and that the statutory criteria to transfer the matter are satisfied.

Indeed, at the hearing on this matter, Mr. Scheinert indicated that "[a]t some point, there will be a motion to modify or motion to terminate the alimony" and that he sought to transfer the action to Caswell County so that this future motion could be decided there. This is precisely what the text of the statute anticipates. Accordingly, we reject this argument.

Conclusion

We vacate and remand this matter for additional fact finding as described in this opinion. On remand, the trial court, in its discretion, may enter a new order based on the existing record, or conduct any additional proceedings that the court finds necessary.

VACATED AND REMANDED.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
WILLIAM OSCAR BAKER, Defendant

No. COA17-1423

Filed 3 July 2018

1. Contempt—criminal contempt—hearsay—corroborative evidence

Two transcripts of testimony and statements by a trial witness were properly admitted in a contempt hearing for corroborative purposes and to explain the context of the proceeding in which the defendant made a gun gesture with his hand from his position in the courtroom audience to the witness who was then testifying in a trial against defendant's cousin.

2. Contempt—criminal contempt—willfulness

The trial court's findings that defendant made a gun gesture with his hand while looking directly at the witness testifying on the stand

and that the conduct was intended to interrupt the testimony of the witness was supported by sufficient evidence, and in turn supported the conclusion that defendant's conduct was willful as required by the contempt statute.

3. Attorney Fees—criminal contempt—civil judgment for attorney fees—notice and opportunity to be heard

The trial court erred in entering judgment against defendant for attorney fees after finding him in criminal contempt where defendant was on notice but not given the opportunity to be heard as required by N.C.G.S. § 7A-455(b).

Appeal by defendant from order entered 6 June 2017 by Judge Robert F. Floyd, Jr. in Robeson County Superior Court. Heard in the Court of Appeals 7 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathryn H. Shields, for the State.

Yoder Law PLLC, by Jason Christopher Yoder, for defendant-appellant.

BERGER, Judge.

On June 6, 2017, William Oscar Baker ("Defendant") was held in criminal contempt and sentenced to thirty days in jail in Robeson County Superior Court. Defendant appeals, arguing the trial court erred in holding him in criminal contempt and entering a civil judgment against him for reimbursement of court appointed attorney fees. We affirm the part of the trial court's order for criminal contempt, but vacate the portion assessing attorney's fees and remand for a new hearing on that issue.

Factual and Procedural Background

On September 28, 2016, the matter of *State v. McCormick* ("the trial") was heard in Robeson County Superior Court. Defendant, McCormick's cousin, was sitting in the audience. During the trial, an exchange occurred between a witness and Defendant that interrupted the State's direct examination of that witness. As a result of this exchange, the trial court held a separate hearing outside the presence of the jury to determine the cause of the interruption. The witness testified that Defendant was shaking his head and making a gun gesture at him while he was on the witness stand. After this hearing, the trial court ordered Defendant to show cause for the interruption.

On June 6, 2017, the trial court held a hearing on the order to show cause. The State introduced two transcripts into evidence. The first transcript was a one-page excerpt taken from the testimony of the witness during the trial. The second transcript reflected the additional interview with the witness taken after testimony was over in the trial. Defendant objected to the transcripts as hearsay evidence, and the trial court stated that it would receive the transcripts into evidence for the limited purpose of "setting forth the circumstances in which the inquiry and the allegations of the contemptuous act [were] made."

The State subsequently called three witnesses to testify to the events that occurred in the courtroom on September 28, 2016. The evidence presented tended to show that the witness became agitated on the stand and spoke to Defendant who was sitting in the courtroom behind the defense table. The witness told Defendant to stop shaking his head. Defendant also made a gun gesture with his hand and mouthed incomprehensible words towards the witness. The Assistant District Attorney was present during the trial, and testified to the following at the show cause hearing:

> [Defendant] came in. I saw him move back to the second row, and then I could hear him talk—he was mumbling something. I couldn't make out what. And then I noticed that the witness . . . was looking off in that direction, and it attracted my attention to [Defendant]. And I saw him nodding his head. It looked like he was mouthing something to the witness. Then I saw him make a gun with his hand and sort of put it up like this while he was gesturing and nodding his head towards [the witness].
>
> . . . .
>
> I saw him nodding his head and gesturing with his hands. And at one point—so [he] made what would look like a gun with his hand while he was—it looked like he was addressing [the witness] who was testifying.

Defendant also testified at the hearing, acknowledging that he sat in the second row during the trial on September 28, 2016. Defendant testified that he did not make any gesture, but stated that he was twisting his dreadlocks and talking to McCormick's father during the trial. Defendant stated that he did not say anything to the witness during the trial.

The trial court then made the following findings of fact:

> During the trial of [*State v. McCormick*] the above Defendant was seen by a testifying state witness . . . to have made a hand gesture as to be pointing a gun to his head and shaking his head. Court was stopped and made inquir[ies] from multipl[e] witnesses concerning the incident and issued a show cause order.
>
> A hearing was held this day and witnesses for the State and the defense testified as to the events of September 28, 2016.

Further, the trial court found that "[d]uring [the witness'] testimony, the Defendant did make the hand gesture as to be pointing a gun to his head, which disrupted the court proceedings."

The trial court found Defendant to be in willful contempt of court, in violation of N.C. Gen. Stat. § 5A-11(a)(1) and sentenced Defendant to thirty days in jail. The trial court also entered a civil judgment for attorney's fees and costs against Defendant. After judgment was entered, Defendant gave oral notice of appeal. Defendant filed a petition for writ of certiorari on January 24, 2018 seeking a belated appeal of the court's imposition of the civil judgment.

Petition for Writ of Certiorari

Defendant seeks review of the civil judgment of attorney's fees and costs, but acknowledges his appeal is untimely. Defendant relies on our recent case, *State v. Friend*, ___ N.C. App. ___, 809 S.E.2d 902 (2018), arguing he did not have an opportunity to be heard on the issue of attorney's fees. We agree and grant his petition for certiorari.

"Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (citation omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). It is well-established that without proper notice of appeal, this Court does not acquire jurisdiction to review the appeal. *State v. McCoy*, 171 N.C. App. 636, 638, 615 S.E.2d 319, 320, *appeal dismissed*, 360 N.C. 73, 622 S.E.2d 626 (2005).

In *State v. Friend*, the trial court did not inform the defendant of his right to be heard on the issue of attorney's fees and costs. *Friend*, ___ N.C. App. at ___, 809 S.E.2d at 907. Accordingly, this Court granted the defendant's untimely appeal as to the civil judgment. *Id.* Here, Defendant filed a belated appeal seven months after his hearing. However, as illustrated below, this case is procedurally similar to *State v. Friend*, and

Defendant did not have the opportunity to be heard on the issue of payment of attorney's fees pursuant to N.C. Gen. Stat § 7A-455(b). Based on the facts of the case *sub judice*, we grant Defendant's petition for writ of certiorari to review this issue on appeal under Rule 21(a). *See* N.C.R. App. P. 21(a).

Standard of Review

In contempt cases, the standard of review is "whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (citation and quotation marks omitted), *disc. review denied*, 361 N.C. 702, 653 S.E.2d 158 (2007). In contempt proceedings, "the trial judge's findings of fact are conclusive when supported by any competent evidence and are reviewable only for the purpose of passing on their sufficiency." *State v. Coleman*, 188 N.C. App. 144, 148, 655 S.E.2d 450, 453 (2008) (citation, quotation marks, and ellipses omitted). Furthermore, the "trial court's conclusions of law drawn from the findings of fact are reviewable de novo." *Simon*, 185 N.C. App. at 250, 648 S.E.2d at 855 (citation and quotation marks omitted).

Analysis

[1] Defendant alleges the trial court erred because (1) there was no competent evidence to support the trial court's judgment of criminal contempt due to the trial court admitting inadmissible hearsay, and (2) the trial court did not give Defendant notice and an opportunity to be heard on the order for attorney's fees pursuant to N.C. Gen. Stat. § 7A-455(b). We address each argument in turn.

I. Criminal Contempt

Defendant contends the trial court erred because Defendant was found in criminal contempt based upon inadmissible hearsay. We disagree.

Section 5A-11(a)(1) states that criminal contempt is "[w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings." N.C. Gen. Stat. § 5A-11(a)(1) (2017). "[A] show cause order in a criminal contempt proceeding is akin to an indictment, and the burden of proof beyond a reasonable doubt that the alleged contemptuous acts occurred must be borne by the State." *Coleman*, 188 N.C. App. at 150, 655 S.E.2d at 453-54 (citation omitted).

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of

the matter asserted." N.C. Gen. Stat. § 8C-801(c) (2017). "It is well-settled that a witness' prior consistent statements are admissible to corroborate the witness' sworn trial testimony." *State v. McGraw*, 137 N.C. App. 726, 730, 529 S.E.2d 493, 497 (citation omitted), *disc. review denied*, 352 N.C. 360, 544 S.E.2d 554 (2000). Corroborative evidence "tends to strengthen, confirm, or make more certain the testimony of another witness." *Id.* (citation and quotation marks omitted). "Corroborative evidence need not mirror the testimony it seeks to corroborate, and may include new or additional information as long as the new information tends to strengthen or add credibility to the testimony it corroborates." *Id.* (citation omitted).

Here, the trial court allowed Exhibits 1 and 2 into evidence for the purpose of explaining the context of the proceeding where Defendant's actions occurred and to corroborate the testimony of witnesses for the State. Exhibit 1 was used to illustrate the context in which the incident with Defendant arose, as well as to corroborate State testimony that the witness seemed agitated and distracted on the witness stand, while Exhibit 2 was used to corroborate the Assistant District Attorney's testimony. The Assistant District Attorney testified Defendant was inaudibly speaking throughout the trial, facing the witness stand, and made a hand gesture in the form of a gun while the witness was testifying, causing the interruption. Because Exhibits 1 and 2 were used to corroborate the testimony of the State's witnesses, and were not offered into evidence to prove that Defendant was speaking and making a gun gesture, the trial court did not err when admitting them into evidence.

[2] Defendant next contends that the trial court's findings of fact did not support the conclusion that Defendant's conduct was willful as required under N.C. Gen. Stat. § 5A-11(a)(1). "Willfulness" under Section 5A-11(a)(1) is defined as "an act done deliberately and purposefully in violation of law, and without authority, justification, or excuse." *State v. Phair*, 193 N.C. App. 591, 594, 668 S.E.2d 110, 112 (2008) (citation and quotation marks omitted). Here, the trial court made the following finding:

> The [c]ourt finds that . . . [Defendant's] willful behavior was committed during the sitting of court intended to interrupt the proceedings in that [Defendant] used two fingers and his thumb in the shape of a gun pointing at his own head or hand while looking directly at the witness testifying on stand and mouthing something thereby interrupting the testimony of the witness, . . . resulting in the witness ceasing in testifying and challenging . . . the defendant's action on the stand in front of the jury.

This finding of fact supports the trial court's conclusion of law that Defendant willfully interrupted the proceedings beyond a reasonable doubt. We hold that the State presented sufficient evidence to support the trial court's findings of fact, and that those findings of fact, in turn, support the trial court's conclusions of law. Accordingly, the trial court did not err in holding Defendant in criminal contempt.

II. Attorney's Fees

[3] Defendant contends the trial court erred in entering a civil judgment against him for attorney's fees without first affording him an opportunity to be heard. We agree.

Section 7A-455(b) permits the trial court to enter a civil judgment against an indigent defendant following his conviction in the amount of the fees incurred by the defendant's appointed trial counsel. N.C. Gen. Stat. § 7A-455(b) (2017). However, this Court has required defendants be given notice and an opportunity to be heard prior to entry of a civil judgment for attorney's fees. *See State v. Jacobs*, 172 N.C. App. 220, 235, 616 S.E.2d 306, 316 (2005); *Friend*, ___ N.C. App. ___, 809 S.E.2d 902.

In *State v. Jacobs*, that defendant was notified of the attorney's fees assessed against him, but was not present when the amount of those fees was entered. *Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. This Court vacated the trial court's imposition of attorney's fees because the defendant was given notice of the court's intention to impose fees, but was never notified nor given the opportunity to be heard on the total amount of fees. *Id.* Similarly, in *Friend*, the trial court did not inform the defendant of his right to be heard on the issue of attorney's fees, and nothing in the record indicated that the defendant understood he had that right. *Friend*, ___ N.C. App. at ___, 809 S.E.2d at 907. This Court held that "[a]bsent a colloquy directly with the defendant on [the issue of attorney's fees], the requirements of notice and opportunity to be heard will be satisfied only if there is other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." *Id.*

Here, after Defendant was convicted of criminal contempt, the trial court asked Defendant's attorney how much time she spent on the case:

> The Court: Do you know how much time again?
>
> . . . .
>
> Counsel: I'm sorry. For his case, it would be about nine and a half hours, Your Honor.

> The Court: All right. I'm going to set the attorney fees at five hundred and seventy dollars ($570). No. I'm just going to make a civil judgment. He's serving an active sentence. All right.

Because Defendant was present in the courtroom when the trial court imposed attorney's fees, Defendant was on notice of their imposition. *See Jacobs*, 172 N.C. App. at 236, 616 S.E.2d at 317. However, the record indicates Defendant was not given the opportunity to be heard on the issue. Based upon the record and the transcript, there is no indication that the trial court addressed Defendant with regard to the issue of attorney's fees, or that Defendant knew he had the opportunity to address the trial court. Accordingly, Defendant was not given an opportunity to be heard as required by N.C. Gen. Stat § 7A-455(b), and we vacate the trial court's civil judgment for attorney's fees and remand to the trial court for further proceedings on this issue.

Conclusion

The trial court did not err in finding Defendant guilty of criminal contempt. We therefore affirm this portion of the trial court's order. However, the trial court failed to provide Defendant with an opportunity to be heard on the assessment of attorney's fees, and we vacate in part and remand on this issue.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
JIMMY LEE FORTE, JR., DEFENDANT

No. COA17-669

Filed 3 July 2018

1. Constitutional Law—right to counsel—forfeiture—obstructive conduct

The trial court was not required to conduct an inquiry regarding waiver of counsel in a criminal proceeding pursuant to N.C.G.S. § 15A-1242 where defendant did not waive his right to counsel by seeking to represent himself, but forfeited his right to counsel by refusing to cooperate with more than one appointed counsel, constantly interrupting the trial court as it tried to explain defendant's right to counsel, continuing to be argumentative after being given an opportunity to discuss forfeiture with his lawyer outside of the courtroom, and obstructing court by refusing to hand discovery to his lawyer to submit to the trial court.

2. Larceny—multiple counts—single transaction—entry of one judgment

Seven of eight counts of larceny were vacated where all the property was stolen in a single transaction, constituting a single larceny.

3. Indictment and Information—fatal variance—misdemeanor larceny—evidence at trial

No fatal variance existed between the indictment charging defendant with larceny of a checkbook from a named individual and the evidence at trial showing that the checkbook belonged to that individual's auto salvage shop, where ample evidence indicated the victim had exclusive possession and control of the checkbook since he was the actual owner of the shop, he testified that the checkbook was his, his name was written on it, and it contained stubs of checks he had written.

4. Indictment and Information—fatally defective—habitual felon status—essential elements—date of offense and corresponding date of conviction

An indictment for habitual felon status was fatally defective because it alleged an offense date for a different crime than the one for which defendant was convicted in violation of N.C.G.S. § 14-7.3.

Judge DIETZ concurring.

Appeal by Defendant from judgment entered 27 July 2016 by Judge Robert F. Johnson in Wilson County Superior Court. Heard in the Court of Appeals 22 March 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Hannah H. Love, for defendant-appellant.

HUNTER, JR., Robert N., Judge.

Jimmy Lee Forte, Jr. ("Defendant") appeals from judgments entered upon jury verdicts finding him guilty of seven counts of larceny of a firearm, two counts of breaking and entering, two counts of larceny after breaking and entering, and one count each of breaking and entering a motor vehicle, misdemeanor larceny, and possession of firearm by a felon. The jury also found Defendant attained habitual felon status. On appeal, Defendant contends the trial court erred by (1) allowing Defendant to represent himself because he forfeited his right to counsel; (2) entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction; and (3) failing to dismiss the misdemeanor larceny charge where the evidence at trial failed to comport with the indictment. Defendant also contends the trial court lacked jurisdiction to sentence him as a habitual felon because the indictment was fatally defective. The State concedes the trial court erred in entering judgment for eight counts of felony larceny when the property was all stolen in a single transaction. Accordingly, we vacate seven of the eight counts of felony larceny and remand for sentencing on one count of felony larceny. We also conclude the habitual felon indictment is fatally defective and therefore vacate Defendant's habitual felon status. We otherwise find no error.

I. Factual and Procedural History

On 12 October 2015, a grand jury indicted Defendant on seven counts of larceny with a firearm, three counts of breaking and entering, three counts of larceny after breaking and entering, and one count each of breaking and entering a motor vehicle, misdemeanor larceny, felonious possession of burglary tools, possession of a firearm by a felon, habitual breaking and entering, and having attained habitual felon status.

On 18 July 2016, Defendant's case came on for trial. Darryl Smith ("Smith") represented Defendant. Prior to motions *in limine*, the trial court addressed Smith's motion to withdraw due to "irreconcilable differences" with Defendant.

Smith explained his relationship with Defendant began with a "little difficulty" because Defendant wanted to go to trial within two to three weeks of Smith's appointment. Smith felt he and Defendant had a productive relationship initially, but the relationship deteriorated over discovery disputes. Additionally Smith stated:

> [Defendant] has refused to answer questions about the case, frequently interrupts when we discuss the case. He argues about issues that are not in dispute between him and the State or as far as I know between him and me. States he will present evidence to the Court but refuses to tell me the substance of what it is he wants to present to the Court. . . .
>
> He says that he has said a couple of times he doesn't believe what I have said about the law that applies to the case, has written numerous letters to District Court and Superior Court judges, couple of which have included, which I have not discussed with him, but that his handwriting and he can say no telling what he will do next time he sees me.

Defendant told the court Smith made false statements and had not received com-plete discovery. Defendant also stated if Smith did receive complete discovery, he had not shared it with him. After hearing from Smith and Defendant, the following occurred:

> THE COURT: Listen to me. Time for you to stop talking.
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> [DEFENDANT]: He told me - -
>
> THE COURT: Listen to me. Listen to me.
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> [DEFENDANT]: Yes, sir.
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> THE COURT: You have a right to be represented by an attorney in trial.
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> [DEFENDANT]: I haven't had my Motion For Discovery, sir. I keep saying that over 18 months. It's not a fair trial. It's irreparable prejudice.

THE COURT: Sir, I have told you to stop talking.

You have a right to be represented by an attorney. If you cannot afford an attorney, the Court will appoint one. The Court has appointed an attorney for you. As a matter of fact, Mr. Smith is the third attorney.

[DEFENDANT]: He hasn't given my Motion For Discovery, sir.

THE COURT: Listen to me. Sir - -

[DEFENDANT]: He still ain't answering my question.

THE COURT: Sir, sir, you are making, you are making life tough for yourself.

[DEFENDANT]: Sir, I'm entitled to this. It's a copy right here, Defendant is entitled to the order. So if he got it, I don't have it. I'm entitled to have it, sir. That is prejudice to my case. I'm not going to go up here and - -

THE COURT: Mr. Smith, is this the kind of problems that you've experienced with this client?

MR. SMITH: Yes, sir.

[DEFENDANT]: I have a copy right here.

THE COURT: In other words, when you're trying to talk to him he interrupts? Is that what you've been experiencing?

MR. SMITH: Yes, sir.

THE COURT: He's not been cooperating with you as counsel?

MR. SMITH: That's correct.

THE COURT: Have you explained to him what waiver of counsel, waiver of his right to counsel is, in other words, voluntary waiver and he can go to trial and without the benefit of counsel - -

[DEFENDANT]: I didn't voluntary waiver.

THE COURT: - - by continuing to be uncooperative and continuing to interrupt? Have you talked to him about that kind of thing?

The trial court directed Smith to take Defendant to a conference room and advise Defendant his behavior could result in Defendant "involuntarily waiving" or "forfeiting his right to counsel." The trial court stated if Defendant is "forfeiting his right to counsel then he's going to be on his own representing himself." Defendant disagreed and stated, "I'm right in front of you and I'm saying I'm not forfeiting my right." The trial court explained "that is a determination that I will make as the judge in the case and not one that he as the Defendant will make." Defendant and Smith then exited the courtroom.

Upon their return, Smith summarized his conversation with Defendant for the trial court and stated "[t]here still might be a misunderstanding." Smith also told the court Defendant did not want Smith to represent him, and asked the court to "appoint another lawyer to represent [Defendant]." Here, Defendant again interrupted the trial court, and the court stated:

> Mr. Forte, one of the problems that you have is you keep interrupting. We follow a procedure in court and right now Mr. Smith is addressing the Court. I want to hear what he has to say. When I give you an opportunity I'll give you an opportunity to speak but you need to understand something else. When I'm trying to speak to you or advise you or anything else, you need to listen and not be interrupting and not be trying to argue so right now - -

Defendant interrupted the trial court again.

Later, Defendant addressed the trial court regarding his problems with discovery and stated, "If I would have had a chance, if I may approach the bench, I can let you see all the discovery I have." The trial court responded, "Why don't you take the paper work that you have there, hand it to Mr. Smith and, Mr. Smith, you bring it up to me." Defendant then stated, "I been having such a hard time just to get this part, sir, it's like I'm kind of shell shocked. I hate to get this out of my hands without standing there watching. Can I stand up and see?" The trial court refused Defendant's request. Defendant said, "I don't feel comfortable putting paper work in his hands. I don't feel comfortable." Here, the trial court said, "You don't feel comfortable handing it to your lawyer in the courtroom who's less than 20 feet from me and have him bring it up to me on the bench." Defendant then stated, "There you go, sir. . . . It's been hard enough for me to get these copies that's what being, you know, kind of my behavior, sir." The trial court then concluded, "Well, I'll be honest with you, Mr. Forte, it appears to me your behavior in the court,

something as simple for you to hand it to your lawyer and have him hand it up, appears to me to be obstructive."

Further into the hearing, the trial court tried to understand why Defendant had issues with his second and third counsel, and review with Defendant his right to counsel. The trial court stated, "Mr. Forte - - I want the record to reflect that Mr. Forte continuously interrupts the Court. He has for the last two hours, that Mr. Forte continuously refuses to listen to the questions and answer the questions as the Court is trying to go through his rights to counsel."

Ultimately, the trial court stated:

> This Court finds . . . the Defendant continuously refuses to cooperate fully with his lawyer, continues to be argumentative not only with his counsel but also with this Court. The Court finds that the Defendant's actions are willful, that they are intentional and they are designed to obstruct and delay the orderly trial court proceedings. The Court finds that the Defendant has, therefore, forfeited his right to court-appointed counsel.

The trial court then appointed Smith to serve as Defendant's standby counsel.

The State first called William Hitchcock ("Hitchcock"), a detective with the Wilson Police Department. On 16 January 2015, Hitchcock received a "break-in call." Pursuant to this call, Hitchcock went to a single family residence at 4104 Little John Drive in Wilson, North Carolina. The break-in occurred at this residence where a window was broken, and there was missing property. Hitchcock spoke to the victim, Mrs. Winbourne ("Winbourne") to "gauge" the items taken. Winbourne told Hitchcock, "There were several firearms stolen and several pieces of jewelry." Detective Liggins ("Liggins"), another detective on the scene, surveyed the neighborhood with Hitchcock. Together they knocked on neighbor's doors to look for witnesses. However, no one saw anything.

Hitchcock testified he normally visits pawn shops to look for stolen goods. Before Hitchcock could go to a pawn shop, and while he was still at the Winbourne's residence, he received a phone call from his sergeant. Hitchcock's sergeant informed him Defendant was riding a bike on Lake Wilson Road. Hitchcock then left the Winbourne's residence and went to Lake Wilson Road where he found Defendant, and stopped him. Hitchcock told Defendant there had been a break-in in the area. Hitchcock asked Defendant if he could search him, and Defendant

consented. Upon searching Defendant, Hitchcock found a "tool used to snip metal," and a coin "with the initials "K.H." engraved on it. These items were in Defendant's pockets. The coin was a silver dollar.

Hitchcock believed the "K.H." stood for Keith Hill ("Hill"). Hill was a victim in a Country Club break-in prior to 16 January 2015. Defendant told Hitchcock the coins belonged to his father. Because Hill's missing coins closely matched the coin in Defendant's possession, Hitchcock arrested Defendant for "possession of stolen goods and possession of burglary tools." Hitchcock read Defendant his Miranda rights and transported Defendant to the Wilson Police Department. Also at the police department, Hitchcock called Mr. Hill and "had him describe some of the coins he had stolen which the coin we recovered from [Defendant] did match the description from his break-in."

Hitchcock and Liggins later went to Defendant's home. Hitchcock stated:

> We had been advised that [Defendant] had been locked out of his house during the day and we thought if he had possibly been a suspect in the break-in on Little John [Drive] that the property would be somewhere either near his property or on his property outside, if he didn't have a way to get into the house.

Upon arriving at Defendant's residence, Hitchcock spoke to Defendant's mother, Viola Forte (" Ms. Forte"). There, Hitchcock "asked her for consent to search the outside of her residence as well as any common areas in the residence." Ms. Forte gave a written consent to the search. Hitchcock testified:

> We didn't go inside the house because we thought if you were locked out of the house there was no way he could have brought the property inside if he didn't have a key. So we just searched the, we searched his yard, the front yard, the back yard as well as there was some paths off of Lake Wilson Road.

Hitchcock "was standing next to Detective Liggins when he found a pillowcase underneath the shed in the back yard which contained several pieces of property [they] believed to be stolen at the time." This property included "two handguns, firearms, and jewelry." The handguns appeared to be "Browning handguns," which were "not the most common firearm that we typically have reported stolen[.]"

Hitchcock was later able to "locate" a few of the owners of the property in the pillowcase. There was a "blue and silver some type of tennis bracelet that belonged to Nicole Neamer who had experienced a break-in recently in the Belle Meade subdivision." Additionally, Hitchcock was "able to identify the firearms as some of the ones that were reported stolen from the Little John Drive incident that happened earlier that day."

Later that day, Hitchcock received a phone call from Defendant's father. As a result of that phone conversation, Hitchcock and Liggins returned to Defendant's residence. Once there, Hitchcock and Liggins received verbal consent to search the attic. There was a lot of property in the attic, such as "jewelry, sunglasses, ammunition, [and a] shotgun[.]" Hitchcock and Liggins "seized" the property and returned to the police department.

The State next called Hill. Hill came home from vacation with his wife on 29 December 2014. He noticed the door inside his garage was ajar, and he entered the house. "And then when I went into the house, we went to the bedroom, I found several of the my wife's dresser drawers open. I found several of my dresser drawers open. I found the nightstand drawer open. And there were pieces of jewelry laying on the floor."

Additionally:

> After we, I saw the dresser drawers opened, I looked and my wife has a little box that she keeps her jewelry in. That was gone. I then looked in my dresser drawer. I found - - I have a box that I keep my cuff links and some other items in. That was missing. I have several, right beside that box I had several $2 bills and some silver certificate bills. They were missing.

Hill called the Wilson Police Department, who immediately responded and helped Hill search his house. Hill discovered he was missing a "mint condition silver dollar." Hill knew the silver dollar was from the 1800's, and it had his initials engraved on it. Hitchcock returned the silver dollar to Hill "on or about the 16th or 17th of January."

The State next called Winbourne. Winbourne came home for lunch on 16 January 2015. She pulled her car into her garage and noticed her door inside the garage was ajar. As soon as she entered the kitchen through her garage, she saw broken glass on the floor from her back door. At that point, she screamed and "turned around and ran out of the house" and called 911. The police responded and checked the house to make sure it was safe for Winbourne to go inside.

Winbourne testified she was missing a tennis bracelet after the break-in. She was also missing some silver dollars, some watches, and a "Tiffany key" pendant on a "long Tiffany necklace." Winbourne later identified her stolen items at the police department on the same day as the break-in. The police told Winbourne her items were discovered at Defendant's residence, which was not far from her home. Winbourne also identified the pillowcase containing her stolen items as hers.

The State next called Kenneth Alan Winbourne ("Mr. Winbourne"). On 16 January 2015, Mr. Winbourne was at work when he received a phone call from his wife. Mrs. Winbourne told him "somebody had threw a brick through the back glass on the door[.]" Mr. Winbourne immediately came home. When he arrived home, he could see his "house was in disarray." Mr. Winbourne kept two handguns on the right side of his bed. The bedside drawer was "pulled out" and then "the first thing I done I turned around and looked at the dresser behind me is where I keep my dad's guns and all those were gone and there was a shotgun in the corner and it was gone." Mr. Winbourne was able to identify all his missing guns at the police office later that day.

The State next called Nicole Nemer ("Nemer"). On 11 January 2015, Nemer's friend went to Nemer's house to deliver some flowers. The friend discovered Nemer's house had been broken into, and called the Wilson Police. Nemer arrived at her home approximately 40 minutes later. Nemer saw the window next to her back door had been broken, "so that they could get in to unlock my door." Nemer kept her jewelry "lined up" in her walk-in closet. Nemer was missing her "grandmother's sapphire and diamond ring, a gold necklace . . . [a] sapphire and diamond necklace, sapphire diamond bracelet and a couple of [her] larger more expensive pieces that were given as gifts[.]" She was also missing more than $2,000 in cash. On 16 January 2015, Nemer identified her sapphire and diamond bracelet at the police station. The police found the bracelet in the "very bottom of the pillowcase." She got her bracelet back that same day.

The State next called Glen Cox ("Cox"). Cox is employed by "[f]amily owned business, Cox Auto Salvage." On or about 12 January 2015, Cox contacted Detective Mayo ("Mayo") of the sheriff's department to "let him know [Cox's] truck had been broken into." Cox had business papers inside his truck that "were shuffled around." Cox testified at the time he "didn't see anything missing but somebody had obviously been inside [his] truck." Mayo encouraged Cox to file a police report. A few days later, Cox "needed to pay a customer" and realized his "company

checkbook was missing." Cox contacted Mayo. Mayo returned the checkbook to Cox, but Cox had already canceled the missing checks.

On cross, Cox testified Mayo called him and asked him if he was missing a checkbook. Mayo then brought the checkbook to Cox. Cox was able to identify the checkbook because "[i]t had stubs of checks that [he] had written[,]" and "[i]t had [his] name on it."

The State next called Liggins, a police officer with the Town of Clayton. On 16 January 2015, Liggins was a detective with the Wilson Police Department. That day, Liggins, along with Hitchcock, responded to a break-in at 4104 Little John Drive. Liggins stayed at the scene for about 15 to 20 minutes. Hitchcock received a phone call from his sergeant, and as a result, Liggins accompanied Hitchcock to Lake Wilson Road. There, Liggins encountered Defendant, and stopped him. Liggins watched Hitchcock speak with Defendant. Liggins also watched Hitchcock get Defendant's consent to a search. Liggins then saw Hitchcock arrest Defendant and take him into custody. At this time, Liggins was about five feet from Hitchcock and Defendant, and could hear everything. Defendant "had a coin on him that Detective Hitchcock told [Liggins] it was from a break-in that he was investigating as well as some type of tool." Liggins accompanied Hitchcock and Defendant to the police station.

Liggins later went with Hitchcock to Defendant's residence. There, Defendant's mother gave Liggins and Hitchcock a written consent to search. During the search of the back yard, Liggins "noticed a piece of cloth hanging out from under the storage shed." Liggins then "walked over and pulled it out which ended up being a pillowcase." Liggins opened the pillowcase and found "firearms, handguns, as well as jewelry." Liggins showed the items to Hitchcock. They returned to the police department.

At the police department, Liggins made sure Defendant understood his Miranda rights and, less than one hour later, Liggins took Defendant's statement. Defendant gave his statement orally, and Liggins transcribed Defendant's statement. Once Liggins finished writing Defendant's statement, Liggins allowed Defendant to read his statement. Liggins gave Defendant the opportunity to add to or retract his statement. Defendant signed the statement after he read it. Liggins read Defendant's statement for the jury:

> About two weeks ago I was walking around the Country Club. I walked around for a few days. I noticed nobody was around the house . . . . The little garage door was

> open. I checked it and it was unlocked . . . . I went inside and got some men and women's jewelry and some coins . . . . I also got some $2 bills. I spent the $2 and some bills at the store on Elizabeth Road. I took some of the coins to a store on Airport Boulevard. The guy at the store on Airport bought about three of the coins and he gave me about $15 per coin. My mom left this morning and I can't stay in the house when she is gone because I stole from her. I chose the house this morning because it is a low key area. I walked up to the house and rang the doorbell. . . . [N]obody. . . .
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> Came to the door . . . . I saw a pile of bricks and went and got one. I took the brick and smashed the back door. I went inside and grabbed the stuff. I got two pistols, some jewelry and a few coins . . . . I got a pillowcase and put the stuff in there and left and I was on foot. I walked back to my house. I stashed the stuff under the building in the back yard . . . . I used the money to buy crack . . . . I went behind the laundromat in the woods and smoked crack and then I headed back toward home. Then the police stopped me. The coin I had in my pocket was from the B&E in the Country Club . . . . I'm sorry for what I did and I need help. . . . I did this because I'm on drugs.

The State next called Sarah Sallenger Jones ("Jones"). Jones is an official record keeper and deputy clerk with the Wilson County Clerk's Office. The State handed Jones a file for defendant. The file contained the "Judgment and Commitment for Active Punishment Felony Charge" for breaking and/or entering. The form reflected Defendant committed breaking and/or entering on 27 July 2003, and was convicted of that offense on 8 March 2004. Defendant received "seven to nine months North Carolina D.O.C."

The State rested. Defendant moved to dismiss all the cases against him due to insufficient evidence. The trial court denied Defendant's motion. The trial court then asked Defendant if he planned to put on additional evidence. Defendant responded, "Yes, sir." The trial court advised Defendant of his rights regarding his testifying. The trial court gave Defendant an opportunity to discuss testifying with his stand-by counsel.

Defendant took the stand. On 16 January 2015, Defendant woke up, bathed, dressed, and made breakfast. Defendant's mother left home to go to work. Defendant took his breakfast outside and sat on the porch.

A man named J.T. called Defendant and asked him if he had any "crack." Defendant said he did, and J.T. told Defendant he was on his way to Defendant's home. Defendant then finished his breakfast, threw away his trash, and smoked a cigarette. J.T. wanted to pay for the drugs with some property, but Defendant told him he needed cash. J.T. then "left, came back, got some drugs from me for piece." J.T. paid Defendant with "a bracelet and two watches and three antique coins as well as $30 in change to turn out to be $15 in quarters and $15 in nickel, dimes and pennies[.]" Defendant asked J.T.

A little while later, Defendant rode his bike across town and stopped at an antique coin shop. J.T. had previously sold a coin to Defendant, and Defendant visited that shop to learn the coin's value. Defendant disagreed with the shop's owner over the coin's value. Defendant then rode his bike to Ward Boulevard and got a drink. After that, Defendant went to Southern Bank on Tarboro Street and exchanged $15 dollars in quarters for dollars. Defendant next rode to his cousin's house to smoke marijuana. He stayed there approximately 30 minutes. When Defendant left his cousin's home, he went back across town on West Nash. He took a short cut through the Food Lion parking lot and came out on Lake Wilson Road to escape traffic.

Defendant saw a "detective car" as he came out of the parking lot. Sergeant Lamm and two unknown officers were in that car. Defendant noticed another "detective car" as he turned onto Lake Wilson Road. Hitchcock, Liggins, and another officer were in this second car. Defendant testified, "Detective Hitchcock got his window down like waving me down saying he needed to talk to me which I yelled back, you don't need to talk to me and I don't need to talk to you." Hitchcock then pulled his car into the center lane. Everyone in Hitchcock's car exited and approached Defendant on the sidewalk. The officers in the first "detective car" also stopped and approached Defendant.

Hitchcock asked Defendant where he was headed. Defendant responded, "sir, you don't need to talk to me and I don't need to talk to you. I said, I got my I.D. on me." Hitchcock then told Defendant he would be under arrest if Defendant did not answer his questions. Defendant told Hitchcock he was going to his parents' house. Hitchcock informed Defendant there had been a break-in on St. George Drive, and "one man ring, two men watches . . . one or two women watches, some women rings and a bracelet" were missing. Additionally, there was another break-in at 4104 Little John Drive where "$2 bills, some coins, jewelry, two firearms from the dresser, a shotgun, and four more handguns" were stolen. Hitchcock stated he needed to search Defendant for weapons,

and Defendant did not consent to the search. Hitchcock again said he needed to search for weapons. Since six officers were present, Defendant did not want to "resist." Hitchcock searched Defendant and found a pair of wire cutters and a coin J.T. gave to Defendant in exchange for drugs. Hitchcock asked Defendant why he had wire cutters, and Defendant responded he used them to cut copper wire from an old A.C. unit in his parents' backyard. Defendant also told Hitchcock he got the coin from his father.

Defendant testified:

> I regret not telling him that I had bought it from the guy, J.T., but I really didn't know the guy J.T. name. I only knew his number. And I feel like if I said I got it from J.T., J.T. could have simply denied it and he still would have believed I did these enterings because, as you discovered today, I have had a record.

Hitchcock handcuffed Defendant and informed Defendant he was being detained. Hitchcock then asked Defendant for his father's cell phone number. Defendant complied. Hitchcock then went to Defendant's parents' house.

According to Defendant:

> All three officers get out their unmarked car. One of the officers grabbed my bike which I immediately looked at when they grabbed my bike they was searching my parents' yard when they were not home without my parents' consent which then Detective Hitchcock then asked me my dad's number again.

One officer put Defendant's bike on the porch. That same officer opened Defendant's parents' fence. Before the officer entered the back yard, Hitchcock exited the car. Hitchcock yelled something toward that officer, but Defendant was unable to hear. Liggins and Hitchcock both entered Defendant's car and drove to the police station. Sergeant Lamm and the three other officers stayed at Defendant's home.

At the police station, Hitchcock questioned Defendant about the prior breaking and enterings. Defendant told Hitchcock, "I didn't commit that crime." Hitchcock gave Defendant a form explaining Defendant's rights, and Defendant refused to sign the form. Defendant then heard Hitchcock whisper to Liggins, "see if I can go back to Forte's parents' house and speak with his mother[.]" Hitchcock left, and Detective Battle took Defendant to get fingerprinted and "booked." Defendant

then returned to the interview room where Hitchcock read Defendant his rights. Hitchcock told Defendant, "[W]e just got back to your parents' house; that she gave us consent to search." He also told Defendant, "[W]e found four firearms and a shotgun in plain view under the barn . . . [and] a pillowcase with two more handguns . . . [with] some jewelry and coins." At this point, Defendant denied having knowledge about those items. Hitchcock then told Defendant if he did not know anything, then his parents would be charged. Defendant felt threatened and coerced, so he admitted to the crimes. Defendant testified:

> He actually seen me break down stating that I didn't do it the whole time but he still coerced me, come on, you did it; you did it, like, you know what I'm saying, so he's coercing me through it, which he also during that coercion he actually, the only part he didn't coerce me to I added the part about the crack.

Defendant rested. Defendant moved to dismiss all the charges at the close of the evidence based on the insufficiency of the evidence. The trial court denied Defendant's motion to dismiss on all counts except for the charge of possession of burglary tools.

The jury returned unanimous verdicts of guilty of seven counts of larceny of a firearm; two counts of felony breaking or entering; two counts of larceny after breaking or entering; one count of possession of a firearm by a felon; one count of breaking or entering a motor vehicle; and one count of misdemeanor larceny. The jury also found Defendant not guilty of one count of felony breaking or entering and larceny after breaking or entering. Additionally, the jury found Defendant guilty of obtaining habitual felon status.

The trial court found Defendant had six prior sentencing points making him a prior record level III. The trial court sentenced Defendant to two consecutive terms of 15 days in the county jail for contempt of court. The trial court stated:

> Now, with regard to case file 15-CRS-50200, the Defendant having been found guilty of felony breaking or entering, guilty of felony larceny after breaking or entering and guilty of the felony of larceny of a firearm . . . the Court consolidates those three counts for one judgment and it is the judgment of the Court that the Defendant be confined to a minimum of 84 months, maximum 113 month in the North Carolina Department of Corrections.

This sentence to begin at the expiration of sentences for contempt of court.

. . . .

All right. Now with regard to 15-CRS-50247, the jury having found the Defendant guilty of Class G Felony of possession of firearm by a felon, the Court sentences him as a prior Record Level III to a minimum 96 months, maximum 128 months to commence at the expiration of the sentence imposed in 15-CRS-50200.

With regard to the six counts of felony larceny by firearm, let the record reflect that the Defendant having been found guilty of the six Class H Felonies, those felonies now being punishable as a Class D Felony because of habitual felon status, the Court sentences the Defendant to 84 months minimum, 113 months maximum in the North Carolina Department of Corrections and consolidates those for judgment with possession of firearm by felon which is punishable as a Class G Felon in 15-CRS-50247.

. . . .

Consolidating the six firearms by felon with the possession of firearm by felon. The 96 to 128 months run at the expiration of 15-CRS-50200.

. . . .

In . . . case 15-CRS-50196, and that's the breaking and entering and the larceny from the Hill's home at 4602 St. George's Drive, it is the judgment of the Court that the Defendant be confined North Carolina Department of Corrections for a minimum of 84, maximum 113 months to run at the expiration of the judgment imposed in 15-CRS-50247.

. . . .

All right. In case file 15-CRS-50473, the Defendant having been found guilty of felonious breaking or entering a motor and guilty of misdemeanor larceny, consolidate those two counts into one judgment. The breaking and entering of a motor vehicle ordinarily being a Class I Felony is elevated because of the Defendant's habitual

> felon status to a Class E punishment. It is the judgment of the Court that the Defendant be confined to the North Carolina Department of Corrections for a minimum of 33, maximum 52 months.
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> That sentence will run concurrent with the judgment imposed in 15-CRS-50196.

Following sentencing, Defendant orally appealed.

II. Standard of Review

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009), *appeal dismissed and disc. review denied*, 363 N.C. 857, 694 S.E.2d 766 (2010).

"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).

Additionally, this Court "review[s] the issue of insufficiency of an indictment under a *de novo* standard of review." *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008).

III. Analysis

[1] In his first assignment of error, Defendant argues the trial court erred in allowing Defendant to represent himself because he did not waive his right to counsel, forfeit his right to counsel, or lose his right to counsel through waiver by conduct. Specifically, Defendant contends the trial court erred in allowing Defendant to represent himself because it didn't conduct the required inquiry under N.C. Gen. Stat. § 15A-1242 for a defendant who voluntarily waives counsel. Defendant bases his argument on the premise the trial court found Defendant voluntarily waived his right to counsel. However, our review of the record indicates Defendant did not waive his right to counsel, but rather forfeited counsel through his conduct. Because we conclude Defendant forfeited his right to counsel, the trial court did not err in failing to conduct the § 15A-1242 inquiry.

A defendant's right to counsel is a "fundamental component of our criminal justice system," guaranteed by the Sixth and Fourteenth Amendments of the U.S. Constitution and Article I of the North Carolina Constitution. *United States v. Cronic*, 466 U.S. 648, 653, 80 L. Ed. 2d 657, 668 (1984). This includes the right of an indigent defendant to appointed counsel. N.C. Gen. Stat. § 7A-450 (2017); *Gideon v. Wainwright*, 372 U.S. 335, 339-56, 9 L. Ed. 2d 799, 802-06 (1963). However, our State appellate

courts have recognized two circumstances under which a defendant may no longer have the right to be represented by counsel. *State v. Blakeney*, 245 N.C. App. 452, 459, 782 S.E.2d 88, 93 (2016). First, a defendant may voluntarily waive the right to be represented by counsel. *Id.* at 459, 782 S.E.2d at 93. Second, a defendant who engages in serious misconduct may forfeit his constitutional rights to counsel. *Id.* at 460, 782 S.E.2d at 93.

Courts have referred to the situation where a defendant loses counsel though his own conduct as waiver. *State v. Montgomery*, 138 N.C. App. 521, 524, 530 S.E.2d 66, 69 (2000). However, "a better term to describe this situation is forfeiture." *Id.* at 524, 530 S.E.2d at 69. " 'Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.' " *Id.* at 524, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)). " 'Any willful actions on the part of the defendant that result in the absence of defense counsel constitutes a forfeiture of the right to counsel.' " *State v. Leyshon*, 211 N.C. App. 511, 518, 710 S.E.2d 282, 288 (2011) (quoting *State v. Quick*, 179 N.C. App. 647, 649-50, 634 S.E.2d 915, 917 (2006)). Typically, forfeiture occurs when a defendant obstructs or delays the proceedings by refusing to cooperate with counsel or refusing to participate in the proceedings. *See Blakeney* at 460, 782 S.E.2d at 94-95.

However, unlike forfeiture, a "[d]efendant's waiver of counsel must be 'knowing and voluntary, and the record must show that the defendant was literate and competent, that he understood the consequences of his waiver, and that, in waiving his right, he was voluntarily exercising his own free will.' " *State v. Reid*, 224 N.C. App. 181, 190, 735 S.E.2d 389, 396 (2012) (quoting *State v. Thacker* 301 N.C. 348, 354, 271 S.E.2d 252, 256 (1980)). Before a trial court allows a defendant to waive representation by counsel, "the trial court must insure that constitutional and statutory standards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (internal quotation marks and citations omitted). A trial court will satisfy both the statutory and constitutional standards if it conducts its inquiry pursuant to N.C. Gen. Stat. § 15A-1242. *Id.* at 322, 661 S.E.2d at 724 (citations omitted).

N.C. Gen. Stat. § 15A-1242 (2017) provides the following:

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

Id.

Here, neither Defendant nor the State asserts Defendant ever asked to represent himself at trial. Additionally, our review of the record does not reveal any indication Defendant requested to proceed *pro se*. This Court concludes the case at bar is not governed by appellate cases addressing a trial court's responsibility to ensure a defendant who wishes to represent himself is "knowingly, intelligently, and voluntarily" waiving his right to counsel. *State v. Thomas*, 331 N.C. 671, 674, 417 S.E.2d 473, 476 (1992).

As to forfeiture, "there is no bright-line definition of the degree of misconduct that would justify forfeiture of a defendant's right to counsel." *Blakeney* at 461, 782 S.E.2d at 94. This Court has stated:

> [F]orfeiture has generally been limited to situations involving "severe misconduct" and specifically to cases in which the defendant engaged in one or more of the following: (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Id. at 461-62, 782 S.E.2d at 94.

The record indicates at the time this matter came to trial, Defendant was with his third attorney, Smith. The trial court appointed Defendant's first attorney, Randall Hughes ("Hughes"), in January and February of 2015. Hughes withdrew in March 2015 after discovering a conflict of interest. The trial court appointed Defendant's second attorney, Andrew Boyd ("Boyd"), on 9 March 2015. On 8 December 2015, Defendant asked the court to remove Boyd and appoint a new attorney. Defendant asserted this was due to ineffective assistance of

counsel. Here, Defendant stated, "It's been a bit of a conflict of interest from day one, me and him have not seen eye-to-eye. We go back and forth and get nowhere." The trial court denied Defendant's request at that time, but then allowed Boyd to withdraw on 28 January 2016. At Defendant's request, the trial court appointed Defendant's third attorney, Smith.

On 5 July 2016, thirteen days prior to trial, Smith filed a motion to withdraw. In that motion, Smith stated Defendant asked him to withdraw, asserted he and Defendant had "irreconcilable differences," and noted the best interests of the parties would be served by allowing him to withdraw. The trial court heard Smith's motion to withdraw on 18 July 2016, the first day of Defendant's trial.

Defendant tried to speak twice as the trial court called the case for trial. Defendant interrupted Smith as Smith addressed his motion to withdraw. Smith explained to the trial court how Defendant refused to answer Smith's questions about the case, and how Defendant frequently interrupted him. Defendant argued with Smith about undisputed issues. Defendant also told Smith he would present evidence, but refused to tell Smith the substance of the evidence. Additionally, Defendant did not believe Smith's explanation of the law. Finally, Defendant filed a complaint against Smith with the State Bar.

Defendant constantly interrupted the trial court as it tried to explain to Defendant his right to be represented by counsel. Because Defendant would not allow the trial court to discuss Defendant's rights to counsel, the trial court excused Defendant and Smith from the courtroom in order for Smith to explain involuntary waiver or forfeiture of counsel. Additionally, in addressing a discovery dispute, the trial court instructed Defendant to hand up everything he had for the court to review. Defendant obstructed handing discovery to Smith to hand to the trial court. The court found Defendant continually interrupted the court for two hours, and he often refused to listen to questions and answer the questions as the trial court was trying to go over his right to counsel. The trial court found Defendant was not trying to understand the process, but was rather just being difficult.

In finding Defendant had forfeited his right to counsel, the trial court noted Defendant and his counsel had discussed forfeiture, and Defendant continued to be argumentative upon returning to the courtroom following the discussion. The trial court also found Defendant was deliberately difficult with his lawyers and the court. Defendant couldn't cooperate with two of his three attorneys. As for Defendant's relationship with his third attorney, the trial court stated:

> [T]he Defendant refuses to answer questions that are asked of him, that the Defendant refuses to share with him certain documents that the Defendant says he has in his possession, that the Defendant argues with him and that the Defendant will not listen to him and that he is unable to represent him on that basis.

Additionally,

> The Defendant continuously has interrupted the Court as the Court asks questions or tries to address the defendant or tries to address Mr. Forte regarding his rights to Counsel. The Court further finds that the Court gave the Defendant's Counsel, Mr. Smith, and the Defendant and opportunity to leave the courtroom to go to a conference room to discuss the matter, among other things, the illegal forfeiture of Counsel. The Defendant returned to the courtroom. The Defendant continues to be argumentative with this Court.
>
> This Court does find that the Defendant has deliberately been difficult, not only to his lawyer but difficult toward the Court, and that the Defendant refuses to listen, that the Defendant when asked direct questions tries to answer collateral issues and the Defendant claims that he has not been provided discovery.

Based on the foregoing we conclude Defendant forfeited his right to counsel in this case. This assignment of error is overruled.

[2] In his second assignment of error, Defendant contends the trial court erred by entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction. The State concedes the case law clearly states where multiple items are stolen in a single transaction, there is but one larceny. *See State v. Adams*, 331 N.C. 317, 333, 416 S.E.2d 380, 389 (1992) ("[A] single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place."). There is nothing in the facts of this case to distinguish it from controlling authority. Because the eight counts of felony larceny all involve property stolen during a single transaction, we vacate seven of the felony larceny convictions. *See State v. Boykin*, 78 N.C. App. 572, 577, 337 S.E.2d 678, 682 (1985).

[3] In his third assignment of error, Defendant contends there was a fatal variance between the indictment for misdemeanor larceny and

the evidence at trial. Defendant acknowledges he did not argue fatal variance at trial as a basis for his motion to dismiss. Defendant therefore requests this Court to exercise its discretion to invoke Rule 2 of the Rules of Appellate Procedure to review the alleged variance. As explained below, we exercise our discretion and invoke Rule 2 in order to address Defendant's argument.

This Court has held a "[d]efendant must preserve the right to appeal a fatal variance." *State v. Mason*, 222 N.C. App. 223, 226, 730 S.E.2d 795, 798 (2012). If the fatal variance was not raised in the trial court, this Court lacks the ability to review that issue. *Id.* at 226, 730 S.E.2d at 798. Rule 2 of the Rules of Appellate Procedure allows this Court to suspend the rules regarding the preservation of issues for appeal. However, this Court can invoke Rule 2 only in "exceptional circumstances . . . in which a fundamental purpose of the appellate rules is at stake." *State v. Pender*, 243 N.C. App. 142, 149, 776 S.E.2d 352, 358 (2015).

Defendant argues there was a fatal variance between the allegation he stole a checkbook from Glenn Cox, and the proof at trial, which showed the checkbook belonged to Cox Auto Salvage. The indictment states:

> The jurors for the State upon their oath present that on or about the date of offense shown and in the county named above the defendant named above unlawfully, willfully and feloniously did break and enter a motor vehicle, a 2003 Dodge Ram, vehicle identification number 1D7HA18DX3J659263, belonging to Glenn F. Cox, which contained things of value, with the intent to commit larceny therein.

Under North Carolina law, "the indictment in a larceny case must allege a person who has a property interest in the property stolen and that the State must prove that that person has ownership, meaning title to the property or some special property interest." *State v. Gayton-Barbosa*, 197 N.C. App. 129, 135, 676 S.E.2d 586, 590 (2009) (quoting *State v. Greene*, 289 N.C. 578, 584, 223 S.E.2d 365, 369 (1976)).

While there is no evidence tending to show Glenn Cox was the actual owner of Cox Auto Salvage, there is ample evidence indicating Cox had a special property interest in the checkbook. Cox testified the checkbook was his, had his name written on it, and contained stubs of checks he had written. Cox always kept a company checkbook, and he realized the checkbook was missing when he needed to pay a customer. We conclude this evidence establishes Cox was in exclusive possession

and control of the checkbook, and that he viewed it as being his checkbook. Therefore, Cox had a special property interest in the checkbook. *See State v. Carr*, 21 N.C. App. 470, 471-72, 204 S.E.2d 892, 893-94 (1974) (where a car was registered to a corporation, the son of the owner of that corporation had a special property interest in the car because he was the sole user of the car and in exclusive possession of it). This assignment of error is overruled.

[4] In his final assignment of error, Defendant contends the habitual felon indictment was fatally defective because the indictment stated Defendant was charged with one offense and convicted of a different offense. We agree.

This issue is controlled by *State v. Langley*, ___ N.C. App. ___, 803 S.E.2d 166, *disc. review allowed*, ___ N.C. ___, 805 S.E.2d 483 (2017). In *Langley*, this Court held for a habitual felon indictment to comply with N.C. Gen. Stat. § 14-7.3, the indictment must state the two dates listed for each prior felony conviction: "the date the defendant committed the felony and the date the defendant was convicted of *that same felony* in the habitual felon indictment." *Id.* at ___, 803 S.E.2d at 171 (emphasis in original). "The dates of offense and the corresponding dates of conviction are essential elements of the habitual felon indictment because of the temporal requirements of N.C.G.S. § 14-7.1" *Id.* at ___, 803 S.E.2d at 172.

The habitual felon indictment in *Langley* stated, *inter alia*:

> [2. T]hat on or about October 8, 2009, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87, and that on or about September 21, 2010, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina[.]
>
> [3. T]hat on or about August 24, 2011, the defendant did commit the felony of Robbery with a Dangerous Weapon, in violation of North Carolina General Statute 14-87.1, and that on or about May 5, 2014, the defendant was convicted of the felony of Common Law Robbery in the Superior Court of Pitt County, North Carolina[.]

Id. at ___, 803 S.E.2d at 171.

This Court held the allegations in the second and third paragraphs of the habitual felon indictment in Langley failed to comply with N.C. Gen. Stat. § 14-7.3 because the indictment did not provide the offense dates

for common law robbery and instead "alleged offense dates for robberies with a dangerous weapon, and then gave conviction dates for two counts of common law robbery." *Id.* at ___, 803 S.E.2d at 171. Therefore, this Court concluded the habitual felon indictment failed to comply with N.C. Gen. Stat. § 14-7.3 because it "did not provide an offense date for the crime the State *convicted* Defendant for committing." *Id.* at ___, 803 S.E.2d at 172. Because the habitual felon indictment was facially defective, this Court vacated the defendant's status as a habitual felon and remanded for resentencing without the habitual felon enhancement. *Id.* at ___, 803 S.E.2d at 172.

The indictment in the instant case is indistinguishable from the indictment in *Langley*. The first paragraph of Defendant's habitual indictment alleged:

> [T]hat on or about September 15, 1998, Jimmy Lee Forte, Jr. was charged with the felony of Robbery With Dangerous Weapon in violation of G.S. 14-87, and that on or about July 19, 2000, Jimmy Lee Forte, Jr. was convicted of the felony of Common Law Robbery in the Superior Court of Wilson County, North Carolina[.]

As in *Langley*, the habitual felon indictment in the current case is facially defective because the indictment did not allege an offense date for the crime Defendant was convicted (common law robbery). *See id.* at ___, 803 S.E.2d at 171-72. Because the indictment does not comply with N.C. Gen. Stat. § 14-7.3 as interpreted by this Court in *Langley*, we vacate the judgment sentencing Defendant as a habitual felon.

AFFRIMED IN PART, VACATED AND REMANDED IN PART.

Judge ZACHARY concurs.

Judge Dietz concurs in a separate opinion.

DIETZ, Judge, concurring.

I cannot join in the majority's decision to invoke Rule 2 of the Rules of Appellate Procedure to reach Forte's unpreserved fatal variance argument. "As our Supreme Court has instructed, we must be cautious in our use of Rule 2 not only because it is an extraordinary remedy intended solely to prevent manifest injustice, but also because 'inconsistent application' of Rule 2 itself leads to injustice when some similarly situated

litigants are permitted to benefit from it but others are not." *State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 370 (2017).

There is nothing extraordinary about this case, and the majority does not even bother to assert that there is. Indeed, the majority concludes that Forte's fatal variance argument is meritless (and I agree). Why then, does the majority invoke the "extraordinary remedy" of Rule 2, which is limited solely to cases in which it is needed to prevent manifest injustice? I can't explain it. But our Supreme Court has explained the danger of using Rule 2 in cases that are not extraordinary and do not raise issues of manifest injustice:

> Fundamental fairness and the predictable operation of the courts for which our Rules of Appellate Procedure were designed depend upon the consistent exercise of this authority. Furthermore, inconsistent application of the Rules may detract from the deference which federal habeas courts will accord to their application. Although a petitioner's failure to observe a state procedural rule may constitute an "adequate and independent state ground[ ]" barring federal habeas review, *Wainwright v. Sykes*, 433 U.S. 72, 81, 97 S. Ct. 2497, 2503, 53 L.Ed.2d 594, 604 (1977), a state procedural bar is not "adequate" unless it has been "consistently or regularly applied." *Johnson v. Mississippi*, 486 U.S. 578, 589, 108 S. Ct. 1981, 1988, 100 L.Ed.2d 575, 586 (1988). Thus, if the Rules are not applied consistently and uniformly, federal habeas tribunals could potentially conclude that the Rules are not an adequate and independent state ground barring review. Therefore, it follows that our appellate courts must enforce the Rules of Appellate Procedure uniformly.

State v. Hart, 361 N.C. 309, 317, 644 S.E.2d 201, 206 (2007).

The majority's decision to invoke Rule 2 in a case where there is nothing extraordinary and no risk of manifest injustice is flatly inconsistent with Supreme Court precedent. I will not join the majority in further eroding the consistent, uniform application of our State's procedural rules.

STATE v. GENTLE

[260 N.C. App. 269 (2018)]

STATE OF NORTH CAROLINA
v.
DARREN WAYNE GENTLE

No. COA17-696

Filed 3 July 2018

1. Rape—jury instruction—serious personal injury—mental or emotional harm

In a trial for rape, sexual offense, kidnapping, and crime against nature, the trial court did not commit plain error by instructing the jury it could find that the victim suffered a "serious personal injury" based on a mental injury which would elevate the first two offenses to the first degree, since the State presented sufficient evidence from which the jury could find a serious personal injury based on the physical injuries defendant inflicted on the victim.

2. Crimes, Other—crime against nature—committed in a public place—sufficiency of evidence

In a prosecution for crime against nature, evidence that the offense occurred near the bottom of the stairs in a parking lot was sufficient to support the theory of the crime being committed in a "public place," despite other evidence describing the location as being "dark and wooded," since there is no requirement that the sexual acts giving rise to the crime occur in public view.

3. Appeal and Error—preservation of issues—constitutional argument—untimely request

Defendant's petition for writ of certiorari was denied and his request for appellate review dismissed regarding whether the trial court erred by ordering defendant to submit to lifetime satellite-based monitoring before making a reasonableness determination where defendant failed to raise the issue before the trial court and failed to argue specific facts demonstrating manifest injustice.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by defendant from judgment and order entered 6 October 2016 by Judge Lindsay R. Davis in Randolph County Superior Court. Heard in the Court of Appeals 7 February 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph E. Elder, for the State.

Richard J. Costanza, for defendant-appellant.

CALABRIA, Judge.

Darren Wayne Gentle ("defendant") appeals from the trial court's judgment entered upon jury verdicts finding him guilty of first-degree forcible rape, first-degree forcible sexual offense, second-degree kidnapping, and committing a crime against nature. After careful review, we conclude that defendant received a fair trial, free from prejudicial error. Defendant has also filed a petition for writ of certiorari requesting review of the trial court's order requiring him to enroll in satellite-based monitoring ("SBM") for the remainder of his natural life. However, defendant failed to preserve his constitutional challenge to the SBM order by raising the argument at trial. Accordingly, we deny defendant's petition for writ of certiorari and dismiss his appeal of the issue for lack of jurisdiction.

I. Factual and Procedural Background

In August 2015, Jane Smith ("Smith"),[1] age 25, was approximately seven months pregnant and living with her boyfriend at his mother's house in Asheboro, North Carolina. At around 4:00 p.m. on 28 August 2015, Smith had an argument with her boyfriend's mother and left the residence. She walked to a gas station to purchase cigarettes. However, when Smith arrived to the gas station at 5:00 p.m., the clerk refused to sell cigarettes to her because she did not have identification. Smith saw defendant staring at her and asked him to purchase cigarettes for her; he agreed. Defendant invited Smith to purchase crack cocaine, and she did so. Smith and defendant met with a drug dealer, purchased crack cocaine, and then walked to a shed at defendant's parents' house, which contained a bed, chairs, and a television. At the shed, Smith injected crack cocaine, while defendant smoked it and some marijuana. After using the drugs, Smith walked back to the gas station to meet a friend. Defendant subsequently returned to the gas station and invited Smith to use more drugs; she agreed. They walked to a parking lot surrounded by a dark, wooded area.

Once they were in the parking lot, defendant approached Smith from behind and threatened her. Smith resisted and attempted to flee, but defendant caught up to her near the stairs of the parking lot. As Smith struggled to protect her stomach, defendant dragged her down the

1. A pseudonym is used for the privacy of the victim.

stairs, forced her into the woods, and removed her clothing. Defendant disrobed and inserted his fingers into Smith's anus and vagina. She told him to stop, but he did not. He then placed his penis in her anus and vagina. Smith did not consent to these acts. Afterwards, defendant repeatedly expressed concern that Smith would contact law enforcement, but she assured him that she would not, due to outstanding warrants for her arrest. Instead, she asked if they could return to defendant's shed. Defendant led Smith back to the shed, where they both fell asleep.

When Smith awoke, defendant prevented her from leaving. She told defendant that she needed to get to a hospital to receive treatment for the scrapes she incurred during the struggle. She changed clothes, and defendant allowed her to leave the shed. He invited her back into the woods, but she declined. Smith saw a neighbor, and as she approached him, defendant fled into the woods. Smith asked the neighbor for something to drink and contacted her father. Smith's father arrived and took her to the hospital.

At the hospital, Smith informed medical staff that she had been raped. She denied having used drugs. Smith also spoke with a detective, who photographed her injuries. The next day, she turned herself in for her outstanding warrants.

On 14 March 2016, defendant was indicted for first-degree rape, kidnapping, crime against nature, and first-degree sexual offense. Trial commenced on 4 October 2016 in Randolph County Superior Court. Defendant did not present evidence but moved to dismiss all charges at the close of the State's evidence and at the close of all the evidence. The trial court denied both motions.

On 6 October 2016, the jury returned verdicts finding defendant guilty of first-degree rape, second-degree kidnapping, crime against nature, and first-degree sexual offense. The trial court arrested judgment on the kidnapping charge. The trial court then consolidated judgments on the remaining charges, and sentenced defendant to a minimum of 365 months and a maximum of 498 months in the custody of the North Carolina Division of Adult Correction. The court further ordered that defend-ant register as a sex offender and, upon his release from prison, be enrolled in SBM for the remainder of his natural life.

Defendant appeals.

II. Jury Instruction

[1] In his first argument, defendant contends that the trial court erred by instructing the jury that it could find that the victim suffered a "serious

personal injury" in the form of a mental injury, because the State presented no evidence to sup-port such instruction. Because he failed to object to the allegedly erroneous instruction at trial, defendant requests plain error review of this issue.

A. Standard of Review

"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). The plain error standard of review applies "to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *Id.* (citation and internal quotation marks omitted). 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) (citation and quotation marks omitted).

B. Analysis

For several decades, our appellate courts consistently held "that it was *per se* plain error for a trial court to instruct the jury on a theory of the defendant's guilt that was not supported by the evidence." *State v. Robinson*, __ N.C. App. __, __, 805 S.E.2d 309, 318 (2017) (citation omitted). However, in *State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013) (per curiam), our Supreme Court adopted a dissent from this Court which advocated a "shift away from the *per se* rule . . . that a reviewing court 'must assume' that the jury relied on the improper theory." *State v. Martinez*, __ N.C. App. __, __, 801 S.E.2d 356, 361 (2017) (citation omitted); *see also State v. Boyd*, 366 N.C. 548, 742 S.E.2d 798 (2013) (reversing per curiam for the reasons stated in *State v. Boyd*, 222 N.C. App. 160, 730 S.E.2d 193 (2012) (Stroud, J., dissenting)). "Rather, under *Boyd*, a reviewing court is to determine whether a disjunctive jury instruction constituted reversible error, without being required in every case to assume that the jury relied on the inappropriate theory." *Martinez*, __ N.C. App. at __, 801 S.E.2d at 361 (concluding that the defendant "failed to meet his burden of showing that the trial court's inclusion of 'analingus' in the jury instruction had any *probable* impact on the jury's

verdict[,]" because the victim "was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred").

In North Carolina, the offenses of forcible rape and forcible sexual offense may be elevated to the first degree when the offender "[i]nflicts serious personal injury upon the victim . . . ." N.C. Gen. Stat. § 14-27.21(a)(2) (2017); *id.* § 14-27.26(a)(2). The State may offer evidence of bodily or mental injuries to prove that the victim suffered a "serious personal injury." *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982), *overruled on other grounds by State v. Richmond*, 347 N.C. 412, 495 S.E.2d 677, *cert. denied*, 525 U.S. 843, 142 L. Ed. 2d 88 (1998). "In determining whether serious personal injury has been inflicted, the court must consider the particular facts of each case." *State v. Herring*, 322 N.C. 733, 739, 370 S.E.2d 363, 367 (1988). The element may be established through evidence of

> a series of incidents forming one continuous transaction between the rape or sexual offense and the infliction of the serious personal injury. Such incidents include injury inflicted on the victim to overcome resistance or to obtain submission, injury inflicted upon the victim or another in an attempt to commit the crimes or in furtherance of the crimes of rape or sexual offense, or injury inflicted upon the victim or another for the purpose of concealing the crimes or to aid in the assailant's escape.

Id. (citation omitted).

In order to prove a serious personal injury based on mental or emotional harm, the State must show that (1) the defendant caused the harm; (2) the harm extended for some appreciable period of time beyond the incidents surrounding the crime; and (3) the harm was more than the *res gestae* results that are inherent to every forcible rape or sexual offense. *State v. Finney*, 358 N.C. 79, 90, 591 S.E.2d 863, 869 (2004). "*Res gestae* results are those so closely connected to an occurrence or event in both time and substance as to be a part of the happening." *Id.* (citation, quotation marks, and brackets omitted).

In the instant case, the State presented substantial evidence that defendant inflicted bodily harm upon Smith as he attempted to overcome her resistance. *See Herring*, 322 N.C. at 739, 370 S.E.2d at 367. Although she attempted to fight, Smith was approximately seven months pregnant, and she struggled to protect her stomach while defendant forcibly dragged her down 33 concrete stairs and into the nearby woods. Smith sustained extensive bruises and abrasions to most of the

left side of her body, including her leg, abdomen, back, side, arm, and shoulder. Although some of her wounds were superficial, others were "much, much deeper" abrasions that stripped off the first layer of skin and exposed the dermis. At trial, Jennifer Whitley, the Sexual Assault Nurse Examiner who treated Smith at the hospital, compared her injuries to the "road rash" that a person might suffer after falling off a motorcycle traveling at 55 miles per hour. Smith testified that her injuries were very painful, and she still bore extensive scars at trial.

On appeal, defendant asserts that the trial court's erroneous mental injury instruction probably impacted the jury's verdicts, because the evidence supporting the seriousness of Smith's *bodily* injuries was "equivocal." For support, defendant cites the following testimony:

> [THE STATE:] Let me ask you this. How were you treated at the hospital? What did they do for your injuries?
>
> [SMITH:] There wasn't much—they gave me antibiotics for the scrapes, bandaged up my legs, but there wasn't more they could do.
>
> Q. No broke bones, internal injuries, nothing like that? *Nothing serious?*
>
> A. No.

(Emphasis added).

The trial court, however, rejected this very same argument in denying defendant's motion to dismiss the charges of first-degree forcible rape and sexual offense. Once the trial court determined that the State presented sufficient evidence to withstand defendant's motion to dismiss, it was for the jury, as finders of fact, to determine whether Smith sustained a serious personal injury. The trial court instructed the jury that second-degree rape and sexual offense differ from the first-degree offenses "only in that it is not necessary for the State to prove beyond a reasonable doubt that the defendant inflicted serious personal injury upon the alleged victim." During deliberations, the jury requested to review pictures of Smith's "personal injuries down her left side." After the jury found defendant guilty of both offenses in the first degree, defense counsel requested that the jury be individually polled on the charge of first-degree rape. The jurors unanimously affirmed their verdict.

Consequently, even assuming, *arguendo*, that there was no evidence to support the trial court's instruction on mental injury, defendant failed to meet his burden of showing that the alleged error

had any probable impact on the jury's verdict. *Martinez*, __ N.C. App. at __, 801 S.E.2d at 361. This argument is overruled.

III. Motion to Dismiss

[2] Defendant next argues that the trial court erred by denying his motion to dismiss the crime against nature charge, because the State failed to offer substantial evidence that the offense was committed in a "public place." We disagree.

A. Standard of Review

In reviewing a criminal 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). We review the trial court's denial of a criminal defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Analysis

Pursuant to N.C. Gen. Stat. § 14-177 (2017), "[i]f any person shall commit the crime against nature, with mankind or beast, he shall be punished as a Class I felon." "[P]enetration by or of a sexual organ is an essential element" of the crime against nature. *State v. Stiller*, 162 N.C. App. 138, 140, 590 S.E.2d 305, 307 (citation and quotation marks omitted), *appeal dismissed and disc. review denied*, 358 N.C. 240, 596 S.E.2d 19 (2004). "[T]he offense is broad enough to include all forms of oral and anal sex, as well as unnatural acts with animals." *Id.*

N.C. Gen. Stat. § 14-177 "punish[es] persons who undertake by unnatural and indecent methods to gratify a perverted and depraved sexual instinct which is an offense against public decency and morality." *State v. Hunt*, 365 N.C. 432, 440, 722 S.E.2d 484, 490 (2012) (citation and quotation marks omitted). The statute "is unconstitutional when used

to criminalize acts within private relations protected by the Fourteenth Amendment liberty interest." *State v. Whiteley*, 172 N.C. App. 772, 779, 616 S.E.2d 576, 581 (2005) (citing *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed 2d 508 (2003)). However, N.C. Gen. Stat. § 14-177 is facially constitutional and "may properly be used to prosecute conduct in which a minor is involved, conduct involving non-consensual or coercive sexual acts, conduct occurring in a public place, or conduct involving prostitution or solicitation[.]" *Id.*

In the instant case, the trial court instructed the jury on the "public place" theory of the crime against nature. In this context, "[a] place is public if it is open or available for all to use, share, or enjoy." *In re R.L.C.*, 179 N.C. App. 311, 318, 635 S.E.2d 1, 5 (2006) (citation and quotation marks omitted), *aff'd on other grounds*, 361 N.C. 287, 643 S.E.2d 920, *cert. denied*, 552 U.S. 1024, 169 L. Ed. 2d 396 (2007). "A parking lot is available for all to use and is thus a public place." *Id.*

On appeal, defendant contends that the State failed to prove that the offense occurred in a "public place" because "the events described by [Smith] occurred well outside the public view in an area . . . described as 'dark' and 'wooded.' " We disagree.

It is a violation of N.C. Gen. Stat. § 14-177 to engage in sexual acts in a public place; there is no requirement that the prohibited conduct occur *in public view*. *See id.* (explaining that "whether anyone saw respondent engaged in sexual behavior in a parked car in a public parking lot is immaterial to whether he engaged in the activity in a public place"). Similarly, Smith's description of the "dark" and "wooded" area does not foreclose its status as a public place. Indeed, Smith consistently testified that the offenses occurred at the bottom of the stairs in the parking lot:

> [THE STATE:] . . . Did you say anything or scream anything while you were being pulled down the steps?
>
> [SMITH:] I was telling him to stop. I was screaming stop.
>
> Q. Did he stop?
>
> A. No.
>
> Q. Okay. When you got to the bottom of the steps, what happened then?
>
> A. He got on top of me. He started pulling his clothes off, his shorts and his underwear off. He pulled my shorts off, pulled my underwear off, and began to finger me.

. . .

[THE STATE:] Okay. Just so we're clear, where this happened, how far did he drag you into the woods?

[SMITH:] Well we weren't even probably like 10, 5 feet from the stairs.

. . .

[THE STATE:] Okay. Did you ask him to take you anywhere, at some point?

[SMITH:] I—yeah. I did ask to go back to his shed. That was an attempt to hopefully get him to walk me back through the roads so I could try and get some help from someone.

Q. Okay. Now, this happened at the bottom of the stairway, correct?

A. Yes.

Q. Okay. After he did this to you, did ya'll go back up the stairs? Where did ya'll go?

A. No. We went through the woods? [sic]

Q. Did you know where you were?

A. No.

Q. Were you familiar with those woods?

A. No.

Q. Okay. At what point, after walking in the woods with him, did you ask him if you could go back to the shed with him?

A. This was when we were still at the bottom of the stairs, before we ever started walking anywhere.

Investigating officers subsequently discovered Smith's shorts, underwear, and a flip-flop in the woods approximately 30 feet away from the bottom of the parking lot stairs.

Taken in the light most favorable to the State, this is sufficient evidence from which a reasonable juror could conclude that defendant unlawfully engaged in sexual acts in a public place. Therefore, the trial

court did not err by denying defendant's motion to dismiss the crime against nature charge.

IV. Satellite-Based Monitoring

[3] In his last argument, defendant requests that we grant his petition for writ of certiorari to review the trial court's order requiring him to enroll in SBM for the remainder of his natural life. Defendant argues that the trial court erred by ordering him to submit to SBM without first making a reasonableness determination as required by *Grady v. North Carolina*, 575 U.S. __, 191 L. Ed. 2d 459 (2015) (per curiam). However, defendant concedes that he failed to make this constitutional argument to the trial court, and that his appeal from the SBM order is untimely. Accordingly, defendant implicitly "asks this Court to take *two* extraordinary steps to reach the merits, first by issuing a writ of certiorari to hear th[e] appeal, and then by invoking Rule 2 of the North Carolina Rules of Appellate Procedure to address his unpreserved constitutional argument." *State v. Bishop*, __ N.C. App. __, __, 805 S.E.2d 367, 369 (2017), *disc. review denied*, __ N.C. __, 811 S.E.2d 159 (2018). We decline to do so.

As we explained in *Bishop*, "[a] writ of certiorari is not intended as a substitute for a notice of appeal. If this Court routinely allowed a writ of certiorari in every case in which the appellant failed to properly appeal, it would render meaningless the rules governing the time and manner of noticing appeals." *Id.* Rather, "a petition for the writ must show merit or that error was probably committed below." *Id.* (quoting *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)).

As in *Bishop*, defendant's Fourth Amendment argument "is procedurally barred because he failed to raise it in the trial court." *Id.* Like the *Bishop* defendant, he had the benefit of our Court's decisions in *State v. Morris*, 246 N.C. App. 349, 783 S.E.2d 528 (2016) and *State v. Blue*, 246 N.C. App. 259, 783 S.E.2d 524 (2016), which "outlined the procedure defendants must follow to preserve a Fourth Amendment challenge to satellite-based monitoring in the trial court." *Id.* Therefore, "the law governing preservation of this issue was settled at the time [defendant] appeared before the trial court." *Id.* Since defendant "is 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 deny defendant's petition for writ of certiorari and dismiss his appeal of this issue. *Id.* at __, 805 S.E.2d at 370.

V. Conclusion

Even assuming, *arguendo*, that the trial court erroneously instructed the jury that it could find that Smith suffered a serious personal injury based on mental harm, defendant failed to prove that such error probably impacted the jury's verdicts finding him guilty of first-degree forcible rape and forcible sexual offense. The trial court did not err by denying defendant's motion to dismiss the crime against nature charge, because the State presented substantial evidence that the offense occurred in a "public place." In our discretion, we deny defendant's petition for writ of certiorari and dismiss his untimely appeal of the trial court's SBM order.

NO ERROR IN PART; DISMISSED IN PART.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in part and dissents in part by separate opinion.

ARROWOOD, Judge, concurring in part, dissenting in part.

I agree with the majority opinion that defendant failed to show that any alleged error with respect to the mental injury instruction had a probable impact on the jury's verdict, and that the trial court did not err by denying defendant's motion to dismiss the charge of committing a crime against nature. With respect to the third issue, given that the State has conceded error, I respectfully dissent. Unlike the majority, I would issue a writ of certiorari to hear defendant's third argument on appeal, and then invoke Rule 2 of the North Carolina Rules of Appellate Procedure to address the merits of the argument.

Our Court has discretion to allow a petition for a writ of certiorari to review judgments and orders below when, as here, "the right to prosecute an appeal has been lost by failure to take timely action." N.C.R. App. P. 21(a)(1) (2018). Such relief "is not intended as a substitute for a notice of appeal." *State v. Bishop*, 255 N.C. App. 767, 768, 805 S.E.2d 367, 369 (2017), *disc. review denied*, 370 N.C. 695, 811 S.E.2d 159 (2018). Thus, our Court must only allow writs of certiorari that "show merit or that error was probably committed below." *Id.* (citation omitted).

Under Rule 2, "[t]o prevent manifest injustice to a party[ ] . . . either court of the appellate division may[ ] . . . suspend or vary the requirements or provisions of any of [the North Carolina Rules of Appellate

Procedure] in a case pending before it upon application of a party or upon its own initiative[.]" N.C.R. App. P. 2 (2018). Our Court only invokes Rule 2 in exceptional circumstances to address "significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (emphasis, citations, and quotation marks omitted). A determination as to "whether a particular case is one of the rare 'instances' appropriate for Rule 2 review—must necessarily be made in light of the specific circumstances of individual cases and parties, such as whether 'substantial rights of an appellant are affected.' " *Id.* (quoting *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007)). Invoking Rule 2 is a case-specific decision that "rests in the discretion of the panel assigned to hear the case and is not constrained by precedent." *State v. Bursell*, 258 N.C. App. 527, 532, 813 S.E.2d 463, 467 (2018) (citation omitted).

Defendant argues the trial court erred by ordering defendant to submit to the satellite-based monitoring ("SBM") program without first determining whether the order was reasonable. As the majority explains, defendant failed to appeal the SBM order, and did not object at trial to preserve the issue for appeal; therefore, a writ of certiorari must be granted and Rule 2 must be invoked before our Court can address this argument.

In *Grady v. North Carolina*, 575 U.S. 306, 191 L. Ed. 2d 459 (2015) (per curiam), the Supreme Court of the United States held that North Carolina's SBM program effectuates a continuous warrantless search, subject to the Fourth Amendment. *Id.* at 310, 191 L. Ed. 2d at 462. Accordingly, before ordering a defendant to enroll in the SBM program, a trial court must "determine, based on the totality of the circumstances, if the SBM program is reasonable when properly viewed as a search." *State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016) (citations omitted). Here, nothing in the record indicates the trial court considered the reasonableness of the order before ordering defendant to enroll in the SBM program for the rest of his natural life. This failure violated defendant's Fourth Amendment rights. *See id.* Therefore, it would be appropriate to grant writ of certiorari to hear this issue, and I would exercise the discretion to do so.

To prevent manifest injustice, I would also invoke Rule 2. The trial court deprived defendant of a substantial right when it did not address the reasonableness of subjecting him to SBM for the rest of his life. *See Bursell*, 258 N.C. App. at 533, 813 S.E.2d at 467 ("It is axiomatic that a constitutional right is a 'substantial right.' "). Although this deprivation

does not *require* us to invoke Rule 2, in view of the gravity of subjecting defendant to a potentially unreasonable search for life in violation of his substantial rights under the Fourth Amendment, and the State's concession that, had this issue been properly preserved, the trial court's failure would amount to reversible error, I would invoke Rule 2 to review defendant's argument.

I now turn to the merits of defendant's argument. Because nothing in the record indicates the trial court considered the reasonableness of ordering defendant's lifelong participation in the SBM program, as required by *Grady*, there was *Grady* error. The State concedes this error. I would vacate the SBM order without prejudice to the State's ability to file a subsequent SBM application.

STATE OF NORTH CAROLINA
v.
DONALD JOSEPH KUHNS

No. COA17-519

Filed 3 July 2018

Criminal Law—jury instruction—defenses—defense of habitation

The trial court erred in a prosecution for first-degree murder by denying defendant's request for a jury instruction on defense of habitation where the victim continued to return to defendant's property and threaten him with bodily harm despite numerous requests to leave and multiple orders from law enforcement, and it was not disputed that the victim was within the curtilage of defendant's property. There was prejudice because a person who uses permissible force is immune from civil or criminal liability.

Appeal by defendant from judgment entered 13 May 2016 by Judge Julia Lynn Gullett in Alexander County Superior Court. Heard in the Court of Appeals 29 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for defendant-appellant.

CALABRIA, Judge.

Donald Joseph Kuhns ("defendant") appeals from a judgment entered upon a jury's verdict finding him guilty of voluntary manslaughter. After careful review, we conclude that the trial court committed prejudicial error by denying defendant's request for a jury instruction on the defense of habitation, N.C.P.I.–Crim. 308.80. Therefore, we reverse the trial court's judgment and remand for a new trial.

I. Factual and Procedural Background

In October 2014, defendant lived across the road from his son ("George") in the Johnny Walker Mobile Home Park ("JWMHP") in Hiddenite, North Carolina. Kenneth Nunnery ("Nunnery") and Johnny Dockery ("Dockery") lived in separate homes on nearby Ervin Lane. Defendant, George, Nunnery, and Dockery were friends and frequently spent time together.

After defendant came home from work at 4:30 p.m. on 2 October 2014, he went over to George's home to drink beer. Nunnery joined them around 5:30 p.m., although he does not drink alcohol. Approximately an hour later, the three men were talking outside George's home when Dockery and his girlfriend ("Kim") arrived. Dockery had a jar of "moonshine" and two shot glasses with him. Dockery and Kim were already intoxicated and started arguing. After defendant told him to "leave her alone," Dockery became angry and "started saying [he] better not catch nobody with his girlfriend, he'd kill them." Kim drove away, and Dockery ran after her.

The dispute between defendant and Dockery continued to escalate over the next several hours. At 8:17 p.m., Dockery called 911 to report that Kim was driving while intoxicated. When Deputy Terry Fox ("Deputy Fox") arrived, he heard loud voices coming from the JWMHP and went to investigate. Dockery was standing in the middle of the road, shouting in the direction of defendant's home. Dockery told Deputy Fox that he was arguing with defendant, but that defendant was his friend whom he sometimes called "Dad." During their conversation, defendant exited his home, walked over to George's, and reappeared with a 12-pack of beer. As he returned home, defendant warned Deputy Fox that Dockery needed to leave before "something bad" happened. Deputy Fox ordered Dockery to go home and watched him to ensure that he complied.

However, at 9:15 p.m., defendant called 911 and reported that Dockery was standing in defendant's yard, "threatening [his] life" and "running his mouth. He's been drinking white liquor and . . . he's a friend

of mine, but today he's not a friend." Defendant explained that he did not want to press charges or "hurt nobody"; rather, he "just want[ed Dockery] out of [his] face." When law enforcement arrived, Dockery was "yelling pretty loud." He told the officers that "people were being rude to him" and "called him names." Defendant warned them to tell Dockery "not to come back or he would do something about it." The officers again instructed Dockery to go home, and followed him to ensure that he complied.

At approximately 10:00 p.m., the argument culminated in a final confrontation in defendant's yard, which ended when defendant fatally shot Dockery. However, conflicting evidence was presented at trial to explain how these events transpired. Defendant's next-door neighbor, Angela McFee, testified that minutes before the shooting, she was sitting on her porch when she overheard defendant taunting Dockery as he walked home through a nearby field. According to McFee, defendant said, "[T]hat's right, take your f—ing a-- home," and used a racial slur. At that point, Dockery walked over to defendant's yard, and the men began "cursing and fussing." Dockery asked defendant "if he had his gun out, and [defendant] said yeah."

However, according to defendant, he was inside his home, attempting to sleep, when he heard Dockery yelling, "[C]ome on out here, you son of a bitch, I'm going to kill you." Defendant retrieved his .32-caliber pistol and went outside onto the porch, approximately six and one-half feet above the yard. Dockery was in the yard just beside the porch, "cussing and hollering" at defendant. Defendant told Dockery to go home. When Dockery saw the gun, he said, "[Y]ou're going to need more than that P shooter, motherf---er, I've been shot before." According to defendant, Dockery was pacing back and forth, and then "came at [him] really fast." Defendant took a step back and fired one shot. The bullet struck Dockery just above his left eyebrow, killing him.

On 3 October 2014, Alexander County Sheriff's Office deputies executed an arrest warrant charging defendant with first-degree murder. Defendant was indicted for the same offense on 27 October 2014. Trial commenced during the 3 May 2016 session of Alexander County Superior Court. Following the State's presentation of evidence, defendant presented evidence, including his own testimony.

At the charge conference, after the trial court included self-defense within its list of proposed jury instructions, defense counsel requested that the court exclude all references to defendant as the aggressor. In addition, defense counsel requested that the trial court deliver

N.C.P.I.–Crim. 308.80, the pattern jury instruction pertaining to the defense of habitation. After considering arguments from both parties, the trial court denied both of defendant's requests. The trial court concluded that there were "factual issues that must be resolved by the jury with respect to the aggressor issue," and that N.C.P.I.–Crim. 308.80 "did not apply because there was no evidence that [Dockery] was trying to break in." Following the jury charge, defendant renewed his objection to the trial court's denial of his requested instructions.

On 13 May 2016, the jury returned a verdict finding defendant guilty of the lesser-included offense of voluntary manslaughter. The trial court sentenced defendant to 73 to 100 months in the custody of the North Carolina Division of Adult Correction. Defendant appeals.

II. Defense of Habitation

On appeal, defendant first argues that the trial court erred by denying his request for a jury instruction on the defense of habitation, pursuant to N.C.P.I.–Crim. 308.80. We agree.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). Accordingly, "[i]t is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). In determining whether the evidence is sufficient to entitle the defendant to jury instructions on a defense, the trial court must consider the evidence in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988). The "trial court must give a requested instruction that is a correct statement of the law and is supported by the evidence." *State v. Wilson*, 354 N.C. 493, 516, 556 S.E.2d 272, 287 (2001) (citation omitted). Whether the trial court erred in instructing the jury is a question of law, reviewed *de novo* on appeal. *State v. Bass*, __ N.C. App. __, __, 802 S.E.2d 477, 481, *temp. stay allowed*, __ N.C. __, 800 S.E.2d 421 (2017).

North Carolina has long recognized that "[a] man's house, however humble, is his castle, and his castle he is entitled to protect against invasion[.]" *State v. Gray*, 162 N.C. 608, 613, 77 S.E. 833, 835 (1913). Commonly known as the "castle doctrine," the defense of habitation "is based on the theory that if a person is bound to become a fugitive from her own home, there would be no refuge for her anywhere in the world." *State v. Stevenson*, 81 N.C. App. 409, 412, 344 S.E.2d 334, 335 (1986).

"The principle that one does not have to retreat regardless of the nature of the assault upon him when he is in his own home and acting in defense of himself, his family and his habitation is firmly embedded in our law." *State v. McCombs*, 297 N.C. 151, 156, 253 S.E.2d 906, 910 (1979). At common law, the use of deadly force in defense of the habitation was justified only to prevent a forcible entry under circumstances where the occupant reasonably apprehended death or great bodily harm to himself or others, or believed that the assailant intended to commit a felony. *Id.* at 156-57, 253 S.E.2d at 910. "Once the assailant . . . gained entry, however, the usual rules of self-defense replace[d] the rules governing defense of habitation," although there remained no duty to retreat. *Id.* at 157, 253 S.E.2d at 910.

The common-law rule limiting the defense of habitation to circumstances where the defendant was acting to prevent forcible entry into the home was eliminated in 1993, when our General Assembly enacted N.C. Gen. Stat. § 14-51.1. *State v. Blue*, 356 N.C. 79, 89, 565 S.E.2d 133, 139 (2002). N.C. Gen. Stat. § 14-51.1 "broadened the defense of habitation to make the use of deadly force justifiable whether to *prevent* unlawful entry into the home or to *terminate* an unlawful entry by an intruder." *Id.* In 2011, the General Assembly repealed N.C. Gen. Stat. § 14-51.1 and enacted our current defensive force statutes, N.C. Gen. Stat. §§ 14-51.2, -51.3, and -51.4. *See generally* An Act To Provide When A Person May Use Defensive Force And To Amend Various Laws Regarding The Right To Own, Possess, Or Carry A Firearm In North Carolina, 2011 N.C. Sess. Laws 268.

Our amended "statutes provide two circumstances in which individuals are justified in using deadly force, thus excusing them from criminal culpability." *State v. Lee*, __ N.C. __, __, 811 S.E.2d 563, 566 (2018). Pursuant to N.C. Gen. Stat. § 14-51.3(a), "a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if either of the following applies": (1) the person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another"; or (2) under the circumstances permitted by N.C. Gen. Stat. § 14-51.2.

N.C. Gen. Stat. § 14-51.2, entitled "Home, workplace, and motor vehicle protection; presumption of fear of death or serious bodily harm," provides, in pertinent part:

> (a) The following definitions apply in this section:
>
> (1) Home.—A building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or permanent, mobile

> or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.
>
> . . .
>
> (b) The lawful occupant of a home, motor vehicle, or workplace is presumed to have held a reasonable fear of imminent death or serious bodily harm to himself or herself or another when using defensive force that is intended or likely to cause death or serious bodily harm to another if both of the following apply:
>
> (1) The person against whom the defensive force was used was in the process of unlawfully and forcefully entering, or had unlawfully and forcibly entered, a home, motor vehicle, or workplace, or if that person had removed or was attempting to remove another against that person's will from the home, motor vehicle, or workplace.
>
> (2) The person who uses defensive force knew or had reason to believe that an unlawful and forcible entry or unlawful and forcible act was occurring or had occurred.
>
> (c) The presumption set forth in subsection (b) of this section shall be rebuttable . . . .
>
> . . .
>
> (d) A person who unlawfully and by force enters or attempts to enter a person's home, motor vehicle, or workplace is presumed to be doing so with the intent to commit an unlawful act involving force or violence.
>
> (e) A person who uses force as permitted by this section is justified in using such force and is immune from civil or criminal liability for the use of such force . . . .
>
> (f) A lawful occupant within his or her home, motor vehicle, or workplace does not have a duty to retreat from an intruder in the circumstances described in this section.
>
> (g) This section is not intended to repeal or limit any other defense that may exist under the common law.

N.C. Gen. Stat. § 14-51.2.

During the charge conference, defendant requested that the trial court provide N.C. Gen. Stat. § 14-51.2's corresponding pattern jury instruction, N.C.P.I.–Crim. 308.80 "Defense of Habitation – Homicide and Assault." The trial court, however, determined that defendant was not entitled to the requested instruction because there was no evidence that he "was trying to prevent an entry." According to the trial court, defendant's evidence demonstrated that he was attempting to prevent injury to himself, "not that he was trying to prevent somebody from coming into his curtilage or home."

The trial court's ruling was in error. As explained in the "Note Well" preceding the pattern instruction, "[t]he use of force, including deadly force, is justified when the defendant is acting to prevent a forcible entry into the defendant's home, other place of residence, workplace, or motor vehicle, *or to terminate an intruder's unlawful entry.*" N.C.P.I.–Crim. 308.80 (emphasis added). This language accurately summarizes the presumption accorded to the lawful occupant of a home who utilizes deadly force to defend the habitation. N.C. Gen. Stat. § 14-51.2(b). Moreover, for purposes of the statute, "home" means "[a] building or conveyance of any kind, *to include its curtilage*, whether the building or conveyance is temporary or permanent, *mobile or immobile*, which has a roof over it, including a tent, and is designed as a temporary or permanent residence." N.C. Gen. Stat. § 14-51.2(a)(1) (emphases added).

On appeal, the State concedes that Dockery was "standing beside the porch on the ground, within the curtilage" of defendant's property when defendant fired the fatal shot. However, the State contends that defendant was not entitled to the requested defense of habitation instruction, because Dockery "never came on Defendant's porch and never tried to open the door to Defendant's trailer." We disagree.

The State's interpretation defies the plain language of the statute. "If the language of a statute is free from ambiguity and expresses a single, definite, and sensible meaning, judicial interpretation is unnecessary and the plain meaning of the statute controls." *State v. Holloman*, 369 N.C. 615, 628, 799 S.E.2d 824, 832-33 (2017) (citation omitted). The language of N.C. Gen. Stat. § 14-51.2(b) is clear: the same rebuttable presumption of lawfulness applies if the person against whom defensive force is used "was in the process of unlawfully and forcefully entering, *or had unlawfully and forcibly entered*, a home," and the person using defensive force knew or had reason to believe that "an unlawful and forcible entry . . . was occurring *or had occurred*." N.C. Gen. Stat. § 14-51.2(b)(1)-(2) (emphases added).

Viewed in the light most favorable to defendant, the evidence supports a jury instruction on the defense of habitation. Despite numerous requests to leave and multiple orders from law enforcement, Dockery continued to return to defendant's property while repeatedly threatening him with bodily harm. As the State acknowledges, it is undisputed that Dockery was within the curtilage of defendant's property—and therefore, within his home, N.C. Gen. Stat. § 14-51.2(a)(1)—when defendant utilized defensive force against him. Accordingly, we hold that the trial court erred by denying defendant's request for a jury instruction on the defense of habitation, N.C.P.I.–Crim. 308.80.

Furthermore, defendant was prejudiced by the trial court's failure to provide the requested instruction, because a person who uses permissible defensive force pursuant to N.C. Gen. Stat. § 14-51.2 "is justified in using such force and *is immune from civil or criminal liability* for the use of such force[.]" N.C. Gen. Stat. § 14-51.2(e) (emphasis added). Moreover, our Supreme Court has noted that a jury instruction on the common-law defense of habitation "would be more favorable to a defendant than would an instruction limited to self-defense." *McCombs*, 297 N.C. at 158, 253 S.E.2d at 911. This remains true pursuant to N.C. Gen. Stat. §§ 14-51.2 and 14-51.3. *See Lee*, __ N.C. at __, 811 S.E.2d at 566 ("The relevant distinction between the two statutes is that a rebuttable presumption arises that the lawful occupant of a home, motor vehicle, or workplace reasonably fears imminent death or serious bodily harm when using deadly force at those locations under the circumstances in [N.C. Gen. Stat.] § 14-51.2(b). This presumption does not arise in [N.C. Gen. Stat.] § 14-51.3(a)(1).").

III. Conclusion

The trial court committed prejudicial error by failing to provide defendant's requested jury instruction on the defense of habitation, N.C.P.I.–Crim. 308.80. Therefore, we reverse the judgment entered upon the jury's verdict finding defendant guilty of voluntary manslaughter and remand for a new trial. Because we have reversed and remanded for a new trial, we need not address defendant's remaining arguments on appeal.

NEW TRIAL.

Judges DAVIS and TYSON concur.

STATE OF NORTH CAROLINA
v.
GEORGE LEE NOBLES

No. COA17-516

Filed 3 July 2018

1. Native Americans—jurisdiction—Qualla Boundary—non-Cherokee defendant

The federal Indian Major Crimes Act normally preempts state criminal jurisdiction when an Indian (using the statutory term) commits an enumerated major crime in the Qualla Boundary of the Eastern Band of Cherokee Indians.

2. Native Americans—Cherokee—status as Indian—criminal jurisdiction

Qualification as an Indian under the federal Indian Major Crimes Act is an issue of first impression in North Carolina and the Fourth Circuit. Federal Courts of Appeal use a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846). Neither party disputed that the first prong of *Rogers* was satisfied in this case because defendant had sufficient Indian blood.

3. Native Americans—jurisdiction—Cherokee—determination of status—recognition by tribe

For criminal jurisdiction purposes, the determination of whether a person is a member of the Eastern Band of Cherokee Indians involves a two-pronged test under *United States v. Rogers*, 45 U.S. 567 (1846). There is a split in federal circuits on assessing the second prong—recognized as an Indian by a tribe or the federal government. Defendant would not qualify as an Indian under either test and the trial court did not err by denying his motion to dismiss a state court prosecution.

4. Native Americans—jurisdiction—first descendants of enrolled tribal members

A prior decision of the Eastern Band of Cherokee Indians to exercise its criminal tribal jurisdiction over first descendants of enrolled members implicated only one factor that may be used to satisfy the second prong of *United States v. Rogers*, 45 U.S. 567 (1846), for determining who is an Indian under the federal Indian Major Crimes Act. While it indicates a degree of tribal recognition,

which is relevant, the *Rogers* test contemplates a balancing of multiple factors to determine Indian status.

5. Native Americans—jurisdiction—test for Indian status

The trial court properly determined that defendant did not satisfy the first prong of *St. Cloud v. United States*, 702 F. Supp. 1456 (1988), for determining Indian status. Defendant was not an enrolled member of the Eastern Band of Cherokee Indians but claimed First Descendant status; however, that status carried little weight because defendant was not classified as a First Descendant even though there was evidence that he would qualify for the designation.

6. Native Americans—jurisdiction—status as Indian—receipt of assistance

The trial court properly determined that a criminal defendant who claimed to be Cherokee did not satisfy the factor of receipt of assistance available only to members of a federally recognized tribe. Defendant received free health care services on five occasions when he was a minor, with the last instance approximately 22 years before his arrest.

7. Native Americans—status as Indian—benefits of tribal affiliation—First Descendant status

The trial court did not err by determining that a criminal defendant's evidence did not satisfy the factor for determining Indian status that he had received the benefits of affiliation with a federally recognized tribe. To the degree that defendant may have benefited from his First Descendant status and received free medical care when he was a minor 23 years earlier, it was irrelevant in light of the evidence that he never enjoyed any other tribal benefits based on his First Descendant status.

8. Native Americans—jurisdiction—status as Indian—socially recognized affiliation with tribe

The trial court properly determined that a criminal defendant's social and cultural connection with the Eastern Band of Cherokee Indians had little weight in determining his status as a Cherokee for purposes of criminal jurisdiction.

9. Native Americans—findings—jurisdiction—status as Indian

The trial court's findings and conclusions concerning a criminal defendant's status as a Cherokee were supported by sufficient evidence and the sufficiency of other findings were not addressed.

Erroneous or irrelevant findings that did not affect the trial court's conclusions were not grounds for reversal.

10. Native Americans—jurisdiction—state criminal—Indian status—no special instruction

The trial court did not err by denying defendant's motion for a special instruction on the issue of his Indian status as it related to criminal jurisdiction. Defendant failed to adduce sufficient evidence to create a jury question on the issue.

11. Constitutional Law—invocation of right to counsel—ambiguous

The trial court properly denied defendant's motion to suppress statements made to police during a custodial interview after he invoked his right to counsel where defendant explicitly asked if he could consult with a lawyer. His invocation of his right to counsel was ambiguous considering the totality of the circumstances; moreover, he immediately initiated further communication with law enforcement.

12. Criminal Law—motion for appropriate relief—dismissed without prejudice

Defendant's motion for appropriate relief based on alleged constitutional violations was dismissed without prejudice to refile in superior court where the materials before the appellate court were not sufficient to make a determination.

13. Judgments—clerical error—remanded

A clerical error in an order arresting judgment in an action involving several offenses resulted in the matter being remanded for the correction of the order to accurately reflect the offense for which judgment was arrested.

Appeal by defendant from judgments entered 15 April 2016 by Judge Bradley B. Letts in Jackson County Superior Court. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kathleen N. Bolton, for the State.

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

ELMORE, Judge.

Defendant George Lee Nobles, a non-enrolled member of any federally recognized Native American[1] tribe but a first descendant of an enrolled member of the Eastern Band of Cherokee Indians ("EBCI"), appeals from judgments sentencing him to life in prison after a North Carolina jury convicted him of armed robbery, first-degree felony murder, and firearm possession by a felon.

He argues the trial court erred by (1) denying his motions to dismiss the charges on the grounds that the State of North Carolina lacked subject-matter jurisdiction to prosecute him because he is an "Indian" and thus criminal jurisdiction lie exclusively in federal court under the Indian Major Crimes Act ("IMCA"), 18 U.S.C. § 1153 (2013); (2) denying his request to submit the question of his Indian status to the jury for a special verdict on subject-matter jurisdiction; and (3) denying his motion to suppress incriminating statements he made to police during a custodial interview after allegedly invoking his right to counsel. Defendant has also (4) filed a motion for appropriate relief ("MAR") with this Court, alleging that his convictions were obtained in violation of his constitutional rights. Finally, defendant (5) requests we remand the matter to the trial court with instructions to correct a clerical error in its order arresting judgment on the armed-robbery conviction, since although that order lists the correct file number of 12 CRS 1363, it lists the wrong offense of firearm possession by a felon.

As to the first three issues presented, we hold there was no error. As to the MAR, we dismiss the motion without prejudice to defendant's right to file a new MAR in the superior court. As to the clerical error, we remand the matter to the trial court with instructions to correct its order by listing the accurate offense of armed robbery.

I. Background

On 30 September 2012, Barbara Preidt, a non-Indian, was robbed at gunpoint and then fatally shot outside the Fairfield Inn in the Qualla Boundary, land held in trust by the United States for the EBCI. On 30 November 2012, officers of the Cherokee Indian Police Department arrested defendant, Dwayne Edward Swayney, and Ashlyn Carothers for Preidt's robbery and murder. Soon after, tribal, federal, and state prosecutors conferred together to determine which charges would be brought and in which sovereign government criminal jurisdiction was proper for each defendant. After discovering that Swayney was an enrolled tribal

1. While we use the terms "Native American" and "Indian" interchangeably, we often use "Indian" to comport with the language used in the federal statute at issue in this case.

member of the EBCI, and that Carothers was an enrolled tribal member of the Cherokee Nation of Oklahoma, authorities brought these two defendants before an EBCI tribal magistrate. After discovering that defendant was not an enrolled member of any federally recognized tribe, the three sovereignties agreed that North Carolina would exercise its criminal jurisdiction to prosecute him, and authorities brought defendant before a Jackson County magistrate, charging him with armed robbery, murder, and firearm possession by a felon.

In August 2013, defendant moved to dismiss those charges for lack of jurisdiction. He argued North Carolina lacked subject-matter jurisdiction because he was an Indian, and thus the offenses were covered by the IMCA, which provides for exclusive federal jurisdiction over "major crimes" committed by "Indians" in "Indian Country." *See* 18 U.S.C. § 1153. After a two-day pretrial jurisdictional hearing, the state trial court judge, applying a Ninth Circuit test to determine if someone qualifies as an Indian for purposes of criminal jurisdiction, *see United States v. Bruce*, 394 F.3d 1215 (9th Cir. 2005), concluded in a detailed forty-two page order entered on 26 November 2013 that defendant was not an Indian and thus denied defendant's motion to dismiss for lack of subject-matter jurisdiction. On 18 December 2013, the trial court granted defendant's motion to stay criminal proceedings pending resolution of his appeal from its 26 November 2013 order. On 30 January 2014, defendant petitioned our Supreme Court for *certiorari* review of that order, which it denied on 11 June 2014. On 23 June 2014, the trial court dissolved the stay.

In March 2016, defendant moved to suppress incriminating statements he made to police during a custodial interview, which the trial court denied by an order entered *nunc pro tunc* on 24 March. Also in March, defendant renewed his motion to dismiss the charges for lack of state criminal jurisdiction and moved, alternatively, to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction. By another order entered *nunc pro tunc* on 24 March, the trial court denied both motions, reaffirming its prior ruling that criminal jurisdiction properly lie in North Carolina, and concluding that a special instruction to the jury on defendant's Indian status as it implicated North Carolina's subject-matter jurisdiction was unwarranted.

From 28 March until 15 April 2016, defendant was tried in Jackson County Superior Court, yielding jury convictions of armed robbery, first-degree felony murder, and firearm possession by a felon. The trial court arrested judgment on the armed-robbery conviction; entered a

judgment on the murder conviction, sentencing defendant to life imprisonment without parole; and entered another judgment on the firearm-possession-by-a-felon conviction, sentencing defendant to an additional fourteen to twenty-six months in prison. Defendant appeals.

II. Arguments

On appeal, defendant asserts the trial court erred by (1) denying his motions to dismiss the state-law charges for lack of subject-matter jurisdiction because North Carolina was preempted from prosecuting him under the IMCA; (2) denying his request to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction because he presented sufficient evidence at the jurisdictional hearing from which a jury could find that he is an Indian, and he thus raised a factual issue as to jurisdiction; and (3) denying his motion to suppress the incriminating statements he made to police during his custodial interview because he invoked his right to counsel. Defendant also asserts (4) the case must be remanded to correct a clerical error.

III. Denial of Motion to Dismiss

Defendant first asserts the State of North Carolina lacked criminal jurisdiction to prosecute him because he is an "Indian" and thus the IMCA applied to preempt state criminal jurisdiction. *See* 18 U.S.C. § 1153 (providing for exclusive federal jurisdiction when an "Indian" commits certain enumerated "major crimes" in "Indian Country"). The State asserts North Carolina enjoys concurrent criminal jurisdiction over all crimes committed in the Qualla Boundary, regardless of whether a defendant is an Indian. Alternatively, the State argues that even if the IMCA would preempt North Carolina from exercising criminal jurisdiction over these major crimes if they occurred in the Qualla Boundary, it is inapplicable here because defendant is not an "Indian."

A. Review Standard

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *State v. Herman*, 221 N.C. App. 204, 209, 726 S.E.2d 863, 866 (2012) (citing *State v. Abbott*, 217 N.C. App. 614, 616, 720 S.E.2d 437, 439 (2011)).

B. IMCA Preempts State Criminal Jurisdiction

[1] The State first argues that Fourth Circuit and North Carolina precedent establishes that "North Carolina at least has concurrent criminal jurisdiction over the Qualla Boundary without regard to whether the defendant is an Indian or non-Indian." Among other distinguishing

reasons, those cases[2] are not controlling because they were decided before *United States v. John*, 437 U.S. 634, 98 S. Ct. 2541 (1978) (holding that the State of Mississippi lacked criminal jurisdiction over a Choctaw Indian for a major crime committed on the Choctaw Reservation pursuant to the IMCA, regardless of Choctaw Indians' dual status as citizens of Mississippi and members of a federally recognized Indian tribe). *Cf. Eastern Band of Cherokee Indians v. Lynch*, 632 F.2d 373, 380 (4th Cir. 1980) (relying on *John*'s rationale to hold that, although EBCIs enjoy dual status as "citizens of North Carolina and Indians living on a federally held reservation," North Carolina lacked authority to impose an income tax on EBCI tribal members who derived their income from activities on the reservation).

"[T]he exercise of state-court jurisdiction . . . is preempted by federal law. . . . upon a showing of congressional intent to 'occupy the field' and prohibit parallel state action." *Jackson Cty. v. Swayney*, 319 N.C. 52, 56, 352 S.E.2d 413, 415–16 (1987) (citations omitted). The IMCA provides in pertinent part:

> (a) Any *Indian* who commits against . . . [any] other person . . . murder, . . . [or] robbery[ ] . . . within . . . Indian country, *shall be subject to* the same law and penalties as all other persons committing any of the above offenses, within *the exclusive jurisdiction of the United States.*

18 U.S.C. § 1153(a) (emphasis added). This language demonstrates clear Congressional intent for "exclusive" federal criminal jurisdiction ousting parallel state action when the IMCA applies. *See Negonsott v. Samuels*, 507 U.S. 99, 102–03, 113 S. Ct. 1119, 1121–22 (1993) ("As the text of § 1153[ ] . . . and our prior cases make clear, federal jurisdiction over the offenses covered by the [IMCA] is 'exclusive' of state jurisdiction." (citations omitted)); *see also John*, 437 U.S. at 651, 98 S. Ct. at 2550 (affirming that "§ 1153 ordinarily is pre-emptive of state jurisdiction when it applies").

Accordingly, when an "Indian" commits one of the enumerated "major crimes" in the "Indian Country" of the Qualla Boundary, the IMCA would ordinarily oust North Carolina's criminal jurisdiction. Murder and armed robbery are "major crimes" under the IMCA, and the offenses here were committed in undisputed "Indian Country." *See Lynch*, 632 F.2d at 380. At issue is whether defendant qualifies as an "Indian," such

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2. *United States v. Hornbuckle*, 422 F.2d 391 (4th Cir. 1970) (per curiam); *State v. McAlhaney*, 220 N.C. 387, 17 S.E.2d 352 (1941); *State v. Ta-Cha-Na-Tah*, 64 N.C. 614 (1870).

that the IMCA applied to preempt North Carolina from exercising its state criminal jurisdiction.

C. The *Rogers* Test

[2] Defendant claims Indian status with the EBCI. Both parties concede the issue of whether someone qualifies as an Indian under the IMCA is an issue of first impression for both the Fourth Circuit and our state appellate courts. While the ICMA does not explicate who qualifies as an "Indian" for federal criminal jurisdiction purposes, to answer this question federal circuit courts of appeal employ a two-pronged test suggested by *United States v. Rogers*, 45 U.S. 567, 573, 11 L. Ed. 1105 (1846). To satisfy the first prong, a defendant must have some Indian blood; to satisfy the second, a defendant must be recognized as an Indian by a tribe and/or the federal government. *See*, *e.g.*, *United States v. Zepeda*, 792 F.3d 1103, 1106–07 (9th Cir. 2015) (en banc) (interpreting *Rogers* as requiring the "government [to] prove that the defendant (1) has some quantum of Indian blood and (2) is a member of, or is affiliated with, the federally recognized tribe"); *United States v. Stymiest*, 581 F.3d 759, 762 (8th Cir. 2009) ("The [IMCA] does not define Indian, but the generally accepted test—adapted from . . . *Rogers*[ ] . . . —asks whether the defendant (1) has some In-dian blood, and (2) is recognized as an Indian by a tribe or the federal government or both."). Here, the trial court found, and neither party disputes, that *Rogers*' first prong was satisfied because defendant has an Indian blood quantum of 11/256 or 4.29%. At issue is *Rogers*' second prong.

[3] While the Fourth Circuit has not addressed how to apply *Rogers* to determine whether someone qualifies as an Indian, there is a federal circuit split in assessing *Rogers*' second prong. The Ninth Circuit considers only the following four factors and "in declining order of importance":

> (1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

Zepeda, 792 F.3d at 1114. The Eighth Circuit also considers these factors but assigns them no order of importance, other than tribal enrollment which it deems dispositive of Indian status, and allows for the

consideration of other factors, such as whether a defendant has been subjected to tribal court jurisdiction and whether a defendant has held himself out as an Indian. *See Stymiest*, 581 F.3d at 763–66.

Here, the trial court applied the Ninth Circuit's test and determined defendant was not an Indian for criminal jurisdiction purposes. Because defendant would not qualify as an Indian under either test, we find no error in the trial court's denial of his motion to dismiss. *Cf. State v. Austin*, 320 N.C. 276, 290, 357 S.E.2d 641, 650 (1987) ("A correct decision of a lower court will not be disturbed on review simply because an insufficient or superfluous reason is assigned. The question for review is whether the ruling of the trial court was correct and not whether the reason given therefor is sound or tenable." (citing *State v. Blackwell*, 246 N.C. 642, 644, 99 S.E.2d 867, 869 (1957)).

D. *Rogers*' Second Prong

[4] *Rogers*' second prong "asks whether the defendant . . . is recognized as an In-dian by a tribe or the federal government or both." *Stymiest*, 581 F.3d at 762. Defendant first argues he satisfied this prong as a matter of law because he presented evidence that he is a first descendant of an enrolled member of the EBCI, and the EBCI recognizes all first descendants as Indians for purposes of exercising tribal criminal jurisdiction.

Defendant relies on the Cherokee Court of the EBCI's decision in *Eastern Band of Cherokee Indians v. Lambert*, No. CR 03-0313, 2003 WL 25902446, at *2–3 (EBCI Tribal Ct. May 29, 2003) (holding that the EBCI had tribal criminal jurisdiction over a non-enrolled first descendant), and its subsequent decisions interpreting *Lambert* as "[h]olding that First Lineal Descendants are Indians for the purposes of the exercise of this Court's [tribal criminal] jurisdiction," *Eastern Band of Cherokee Indians v. Prater*, No. CR 03-1616, 2004 WL 5807679, at *1 (EBCI Tribal Ct. Mar. 18, 2004); *see also In re Welch*, No. SC 03-13, 2003 WL 25902440, *4 (EBCI Tribal Ct. Oct. 31, 2003) (interpreting *Lambert* as holding that "first lineal descendants, children of enrolled members who do not possess sufficient blood quanta to qualify for enrollment themselves[,] are nevertheless subject to the criminal jurisdiction of the Court"). Additionally, defendant relies on Rule 6 of the Cherokee Rules of Criminal Procedure that instructs tribal magistrates when determining jurisdiction that tribal criminal jurisdiction exists if a suspect is a first descendant. *See* Cherokee Code § 15-8, Rule 6(b).

The State argues in relevant part that even if the EBCI recognizes all first descendants as Indians for purposes of exercising its tribal criminal jurisdiction, this is only one factor to consider when assessing *Rogers*' second prong. We agree.

While exercising tribal criminal jurisdiction over first descendants reflects a degree of tribal recognition, the Ninth Circuit has determined that "enrollment, and, indeed, even eligibility therefor, is not dispositive of Indian status." *Bruce*, 394 F.3d at 1225. As tribal enrollment has been declared insufficient to satisfy *Rogers*' second prong as a matter of law, it follows that the exercise of criminal tribal jurisdiction over first descendants is also insufficient. *Cf. United States v. Cruz*, 554 F.3d 840, 851 (9th Cir. 2009) ("[A] showing that a tribal court on one occasion may have exercised jurisdiction over a defendant is of little if any consequence in satisfying the [Indian] status element [beyond a reasonable doubt] in a § 1153 prosecution."). As the Ninth Circuit's application of the *Rogers* test contemplates a balancing of multiple factors to determine Indian status, we reject defendant's argument that the EBCI's decision to exercise its criminal tribal jurisdiction over first descendants satisfies *Rogers*' second prong as a matter of law.

E. *St. Cloud* Factors

Alternatively, defendant argues, he satisfied *Rogers*' second prong under the Ninth Circuit's test as applied by the trial court. In *St. Cloud v. United States*, 702 F. Supp. 1456, 1461 (D.S.D. 1988), the Central Division of the United States District Court of South Dakota set forth four factors to be considered in declining order of importance when evaluating *Rogers*' second prong. The Ninth Circuit adopted these "*St. Cloud*" factors, *see Bruce*, 394 F.3d at 1223, and its later *en banc* articulation of its test instructs that "the criteria are, in declining order of importance":

> (1) enrollment in a federally recognized tribe; (2) government recognition formally and informally through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes; (3) enjoyment of the benefits of affiliation with a federally recognized tribe; (4) social recognition as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe.

Zepeda, 792 F.3d at 1114.

1. First St. Cloud *Factor*

[5] The first and most important *St. Cloud* factor asks whether a defendant is an enrolled member of a federally recognized tribe. *Id.* Here, the trial court found, and defendant concedes, he is not an enrolled tribal

member of the EBCI or any federally recognized tribe, nor is he eligible to become an enrolled member of the EBCI, as his 4.29% Indian blood quantum fails to satisfy the minimum 16% necessary for enrollment.

Nonetheless, defendant argues, this factor weighs in his favor because "he has been afforded a special status as a First Descendant." The Ninth Circuit has stated that while descendant status "does not carry similar weight to enrollment, and should not be considered determinative, it reflects some degree of recognition." *United States v. Maggi*, 598 F.3d 1073, 1082 (9th Cir. 2010), *overruled on other grounds by United States v. Zepeda*, 792 F.3d 1103 (9th Cir. 2015). However, we find defendant's first descendant status carries little weight in this case.

First descendants are eligible for certain tribal benefits unavailable to non-members or members of other tribes. While the evidence showed that defendant would qualify for designation as a first descendant, it also showed that he is not classified by the EBCI as a first descendant, and he is thus currently ineligible to receive those benefits. The trial court's unchallenged findings established that individuals designated as first descendants are issued a "Letter of Descent" by the EBCI tribal enrollment office, which is used to establish eligibility for first descendant benefits, and that no "Letter of Descent" for defendant was found after a search of the official documents in the tribal enrollment office. *Cf. Cruz*, 554 F.3d at 847 (concluding that "mere eligibility for benefits is of no consequence under [the *St. Cloud* factors]" and rejecting "the dissent's argument that mere descendant status with the concomitant eligibility to receive benefits is effectively sufficient to demonstrate 'tribal recognition' "). Accordingly, the trial court properly determined the evidence presented failed to satisfy the first *St. Cloud* factor.

2. Second St. Cloud *Factor*

[6] The second *St. Cloud* factor asks whether a defendant has been recognized by the government "through receipt of assistance available only to individuals who are members, or are eligible to become members, of federally recognized tribes." *Zepeda*, 792 F.3d at 1114. Defendant argues this factor was satisfied because he received health care services reserved only for Indians. The record evidence indicated that defendant received free health care services on five occasions—31 October 1985, 1 October 1987, 12 March 1989, 16 March 1989, and 28 February 1990—from the Cherokee Indian Hospital ("CIH"), which at the time was a federally funded Indian Health Service ("IHS").

Applying this evidence to the second *St. Cloud* factor, the trial court found:

> 264. . . . [U]nder the second *St. Cloud* factor the only evidence of government recognition of the Defendant as an Indian is the receipt of medical services at the CIH. The Federal government through the Indian Health Service provide[s] benefits reserved only to Indians arising from the unique trust relationship with the tribes. Also, the government of the Eastern Band of Cherokee provides additional health benefits to the enrolled members. The only evidence Defendant presents of the receipt of health services available only to Indians is medical care at the CIH more than two decades ago as documented in his medical chart. While it is true that he did receive care from the CIH it is likewise true he sought acute care, this care was when he was a minor and he was taken for treatment by his mother. Since becoming an adult he has never sought further medical care from the providers in Cherokee. Moreover, the last time he sought care from the CIH was over 23 years ago.
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> . . . .
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> 266. [E]xcept for the five visits to the CIH, there is no other evidence Defendant received any services or assistance reserved only to individuals recognized as Indian under the second *St. Cloud* factor.

Defendant relies on *United States v. LaBuff*, 658 F.3d 873 (9th Cir. 2011), to argue that receipt of free health care services from an IHS satisfies the second *St. Cloud* factor. *LaBuff* is distinguishable because the defendant there, "since 1979, . . . was seen at the Blackfeet Community Hospital for Well Child care services, walk-in visits, urgent care, and mental health assistance[,]" and "since 2009, [he] sought medical care approximately 10 to 15 times." *Id.* at 879 n.8. Here, defendant only sought medical care from the CIH five times when he was a minor, his last visit occurring approximately twenty-two years before he was arrested on the charges at issue in this case. *Cf. Zepeda*, 792 F.3d at 1113 ("In a prosecution under the IMCA, the government must prove that the defendant was an Indian *at the time of the offense* with which the defendant is charged." (emphasis added)). The trial court properly determined this evidence failed to sufficiently satisfy the second *St. Cloud* factor.

3. Third St. Cloud *Factor*

[7] The third *St. Cloud* factor asks whether a defendant has "enjoy[ed] . . . the benefits of affiliation with a federally recognized tribe." *Zepeda*,

792 F.3d at 1114. Defendant argues he satisfied this factor based on the same five CIH visits when he was a minor.

As to this third factor, the trial court found:

> 267. . . . [U]nder the third *St. Cloud* factor the Court must examine how Defendant has benefited from his affiliation with the Eastern Band of Cherokee. The Defendant suggests he has satisfied the third factor under the *St. Cloud* test in that Cherokee law affords special benefits to First Descendants. To be sure the Cherokee Code as developed over time since the ratification of the 1986 Charter and Governing Document does afford special benefits and opportunities to First Descendants. *Whilst it is accurate the Cherokee Code is replete with special provisions for First Descendants in areas of real property, education, health care, inheritance, employment and access to the Tribal Court, save however for use of medical services a quarter of a century ago Defendant has not demonstrated use of any of his rights as a First Descendant of the Eastern Band of Cherokee.*
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> 268. . . . [T]he third *St. Cloud* factor is 'enjoyment' of the benefits of tribal affiliation. *Enjoyment connotes active and affirmative use. Such is not the case with Defendant. Defendant directs the undersigned to no positive, active and confirmatory use of the special benefits afforded to First Descendants.* Defendant has never 'enjoyed' these opportunities which were made available for individuals similarly situated who enjoy close family ties to the Cherokee tribe. Rather, Defendant merely presents the Cherokee Code and asks the undersigned to substitute opportunity for action. To ascribe enjoyment of benefits where none occurred would be tantamount to finding facts where none exist.

(Emphasis added.)

In his brief, defendant challenges the following factual finding on this factor:

> 275. . . . [A]ccordingly after balancing all the evidence presented to the undersigned using the *Rogers* test and applying the *St. Cloud* factors in declining order of importance, . . . while Defendant does have, barely, a small degree of

> Indian blood he is not an enrolled member of the Eastern Cherokee, never benefited from his special status as a First Descendant and is not recognized as an Indian by the Eastern Band of Cherokee Indians, any other federally recognized Indian tribe or the federal government. Therefore, the Defendant for purposes of this motion to dismiss is not an Indian.

Specifically, defendant challenges as unsupported by the evidence the part of this finding that he "never benefited from his special status as a First Descendant and is not recognized as an Indian by the EBCI . . . or the federal government" because he was recognized by the federal government when he was benefited from his first descendant status by receiving federally-funded services from an IHS. To the degree defendant may have benefited from his first descendant status and was recognized by the federal government by receiving free medical care from the CIH on those five instances last occurring when he was a minor twenty-three years before the hearing, we conclude it is irrelevant in assessing this factor in light of the absence of evidence that defendant enjoyed any other tribal benefits he may have been eligible to receive based on his first descendant status. Accordingly, the trial court properly determined this evidence failed to satisfactorily satisfy the third *St. Cloud* factor.

4. Fourth St. Cloud *Factor*

[8] The fourth and least important *St. Cloud* factor asks whether a defendant is "social[ly] recogni[zed] as someone affiliated with a federally recognized tribe through residence on a reservation and participation in the social life of a federally recognized tribe." *Zepeda*, 792 F.3d at 1114. Defendant asserts he satisfied this factor because he "lived on or near the Qualla Boundary for significant periods of time," attended Cherokee schools as a minor, and, after leaving prison in Florida in 2011, he "returned to living on or near the Qualla Boundary, often with enrolled tribal members," "got a job on the reservation, and lived on the reservation with Carothers, a member of another tribe." Defendant also argues his two tattoos—an eagle and a Native American wearing a headdress—"show an attempt to hold himself out as an Indian."

As to this factor, the trial court issued, *inter alia*, the following finding:

> 271. . . . [T]he Defendant simply has no ties to the Qualla Boundary. . . . [U]nder the fourth *St. Cloud* factor Defendant points to no substantive involvement in the fabric of the Cherokee Indian community at any time. The Defendant

> did reside and work on or near the Cherokee reservation for about 14 months when his probation was transferred from Florida to North Carolina. Yet in these 14 months near Cherokee the record is devoid of any social involvement in the Cherokee community by the Defendant.

While the record evidence showed defendant returned to the Qualla Boundary in 2011 for about fourteen months, resided on or near the Qualla Boundary with an enrolled member of another tribe, and worked for a restaurant, Homestyle Fried Chicken, located within the Qualla Boundary, no evidence showed he participated in EBCI cultural or social events, or in any EBCI religious ceremonies during that time.

Myrtle Driver Johnson, a sixty-nine-year old enrolled EBCI member who has lived on the Qualla Boundary her entire life and was bestowed the honor of "Beloved Woman" by tribal leaders for her dedication and service to the EBCI, testified about EBCI social and cultural life, and EBCI religious ceremonies. The trial court's unchallenged findings establish that Johnson is "richly versed in the history of the Eastern Cherokee" and "deeply involved in and a leader of the Cherokee community regarding the language, culture and tradition of the [EBCI]." Johnson testified she participated in various EBCI social and cultural events and ceremonies on the Qualla Boundary over the years and was unfamiliar with defendant or his enrolled mother. Johnson also testified about the potential EBCI cultural symbolism of defendant's tattoos, opining that "[a]ll Native American Tribes honor the eagle" and it thus represented nothing unique to the EBCI, and that the headdress depicted on defendant's tattoo was worn not by the Cherokee but by "western plains Native Americans." The trial court properly determined this evidence carried little weight under the fourth *St. Cloud* factor.

F. Sufficiency of Factual Findings

[9] Defendant also challenges the evidentiary sufficiency of ten of the trial court's 278 factual findings, and eight subsections of another finding. However, most of those findings either recite the absence of evidence pertaining to defendant's tribal affiliation with the EBCI as to assessing his Indian status under *Rogers*, or were based on probation documents indicating defendant's race was "white/Caucasian," which were presented after the jurisdictional hearing. Erroneous or irrelevant findings that do not affect the trial court's conclusions are not grounds for reversal. *See*, *e.g.*, *State v. Hernandez*, 170 N.C. App. 299, 305, 612 S.E.2d 420, 424 (2005) ("[A]n order 'will not be disturbed because of . . . erroneous findings which do not affect the conclusions." (citation

omitted)); *Goodson v. Goodson*, 145 N.C. App. 356, 360, 551 S.E.2d 200, 204 (2001) ("[I]rrelevant findings in a trial court's decision do not warrant a reversal of the trial court." (citations omitted)). Because we conclude the trial court's other factual findings adequately supported its conclusions, we decline to address the sufficiency of those findings.

G. Conclusion

Because the evidence presented did not demonstrate that defendant is an "Indian" or that he sufficiently satisfied any of the *St. Cloud* factors, the trial court properly concluded defendant did not qualify as an Indian for criminal jurisdiction purposes when applying the Ninth Circuit's test. Accordingly, the trial court properly denied defendant's motion to dismiss the charges for lack of jurisdiction.

IV. Denial of Motion for Special Jury Verdict

[10] Defendant next asserts the superior court erred by denying his pretrial motion to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction.

"[W]hen jurisdiction is challenged[ ] . . . the State must carry the burden [of proof] and show beyond a reasonable doubt that North Carolina has jurisdiction to try the accused." *State v. Batdorf*, 293 N.C. 486, 494, 238 S.E.2d 497, 502–03 (1977). In the territorial jurisdiction context, our Supreme Court has explained:

> When jurisdiction is challenged, the defendant is contesting the very power of this State to try him. We are of the view that a question as basic as jurisdiction is not an 'independent, distinct, substantive matter of exemption, immunity or defense' and ought not to be regarded as an affirmative defense on which the defendant must bear the burden of proof. Rather, jurisdiction is a matter which, *when contested*, should be proven by the prosecution as a prerequisite to the authority of the court to enter judgment.

Id. at 493, 238 S.E.2d at 502 (internal citation omitted); *see also State v. Rick*, 342 N.C. 91, 100–01, 463 S.E.2d 182, 186 (1995) ("[T]he State, when jurisdiction is challenged, [is required] to prove beyond a reasonable doubt that the crime with which defendant is charged occurred in North Carolina." (citing *Batdorf*, 293 N.C. at 494, 238 S.E.2d at 502–03); other citation omitted)). However, unless sufficient evidence is adduced to create a jury question on jurisdiction, "a jury instruction regarding jurisdiction is not warranted." *State v. White*, 134 N.C. App. 338, 340,

517 S.E.2d 664, 666 (1999) (citation omitted). The "preliminary determination that sufficient evidence exists" to create a jury question on the factual basis of jurisdiction is a question of law for the court. *Rick*, 342 N.C. at 100–01, 463 S.E.2d at 187 (citations omitted).

Here, defendant filed a pretrial motion to dismiss the charges against him for lack of state criminal jurisdiction. But his motion was grounded not in a challenge to North Carolina's territorial jurisdiction, but in a challenge to its subject-matter jurisdiction, based on his claim that he was an Indian. After the pretrial jurisdictional hearing, the trial court entered an order denying defendant's motion on the basis that defendant was not an Indian for criminal jurisdiction purposes and the State therefore satisfied its burden of proving jurisdiction beyond a reasonable doubt. Upon defendant's renewed jurisdictional motion to dismiss or, in the alternative, to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction, the trial court entered another order denying both motions.

In this second order, the trial court reaffirmed its prior ruling that North Carolina had criminal jurisdiction and thus denied the renewed jurisdictional motion to dismiss on that basis. As to defendant's alternative motion for a special jurisdictional instruction to the jury, the trial court concluded that because the crimes undisputedly occurred within North Carolina, and the only special instruction on jurisdiction concerned territorial jurisdiction, such an instruction was unwarranted. As to defendant's specific request that his Indian status be submitted to the jury, the trial court concluded that because it "already determined the Defendant is not an Indian for purposes of criminal jurisdiction" and "there exists no requirement that in order to convict the Defendant in the North Carolina state court of murder the State must prove beyond a reasonable doubt that the defendant is an Indian," submitting that issue to the jury was unwarranted. We conclude the trial court did not err in denying defendant's motion for a special instruction on the issue of his Indian status as it related to state criminal jurisdiction.

Defendant's cited authority concerns factual matters implicating territorial jurisdiction, not subject-matter jurisdiction. Unlike IMCA prosecutions, under which Indian status is a jurisdictional prerequisite that the Government must prove beyond a reasonable doubt, *see Zepeda*, 792 F.3d at 1110 ("Under the IMCA, 'the defendant's Indian status is an essential element . . . which the government must allege in the indictment and prove beyond a reasonable doubt.' " (quoting *Bruce*, 394 F.3d at 1229)), neither have our General Statues nor our state appellate court decisions burdened the State when prosecuting major state-law crimes

that occurred in Indian Country to prove a defendant is *not* an Indian beyond a reasonable doubt. But even if the State had such a burden, in this particular case, we conclude defendant failed to adduce sufficient evidence to create a jury question on his Indian status.

The record evidence established that defendant failed to satisfy the first and most important *St. Cloud* factor of tribal enrollment, or even eligibility for tribal enrollment. While defendant presented evidence that on five instances during his childhood he received free health care based on his first descendant status, he presented no evidence he received or enjoyed any other tribal benefits based on that status. Indeed, the evidence showed that while defendant would qualify to be designated by the EBCI as a first descendant for purposes of receiving such benefits, he was not currently recognized by the EBCI as a first descendant based on his failure to apply for and obtain a "Letter of Descent." While defendant returned to living on or near the Qualla Boundary in 2011 for fourteen months, he presented no evidence that during that time he was involved in any EBCI cultural or social activities or events or activities, or any EBCI religious ceremonies. Finally, while defendant is tattooed with an eagle and a Native American wearing a headdress, the State presented evidence that the EBCI affords no unique significance to the eagle, and that headdress was never worn during any EBCI ritual or tradition but was worn by western plain Native Americans.

Based on defendant's showing at the jurisdictional hearing, we conclude he failed to adduce sufficient evidence to create a jury question as to whether he qualifies as an Indian for criminal jurisdiction purposes. Accordingly, the trial court properly denied defendant's motion to submit the issue of his Indian status to the jury for a special verdict on subject-matter jurisdiction.

V. Denial of Motion to Suppress

[11] Defendant contends the trial court erred by denying his motion to suppress incriminating statements he made to police during a custodial interview after allegedly invoking his constitutional right to counsel.

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) (citations omitted). Conclusions of law are reviewed *de novo*. *State v. McCollum*, 334 N.C. 208, 237, 433 S.E.2d 144, 160 (1993) (citation omitted).

The objective standard used to determine whether a custodial suspect has unambiguously invoked his right to counsel is whether "a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." *Davis v. United States*, 512 U.S. 452, 459, 114 S. Ct. 2350, 2355 (1994). "But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." *Id.* (citing *McNeil v. Wisconsin*, 501 U.S. 171, 178, 111 S. Ct. 2204, 2209 (1991)). For instance, "if a suspect is 'indecisive in his request for counsel,' the officers need not always cease questioning." *Id.* at 460, 114 S. Ct. at 2356 (quoting *Miranda v. Arizona*, 384 U.S. 436, 485, 86 S. Ct. 1602, 1633 (1966)).

Further, even if a suspect unambiguously invokes his right to counsel during a custodial interview, "he is not subject to further questioning until a lawyer has been made available *or the suspect himself reinitiates conversation*." *Id.* at 458, 114 S. Ct. at 2354–55 (emphasis added) (citing *Edwards v. Arizona*, 451 U.S. 477, 484–85, 101 S. Ct. 1880, 1884–85 (1981)); *see also Edwards*, 451 U.S. at 484–85, 101 S. Ct. at 1885 ("[A]n accused . . . [after invoking his right to counsel], is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police*." (emphasis added)).

Here, the trial court found, unchallenged on appeal, that before his custodial interview, defendant "was advised and read his *Miranda* . . . rights," that he "initialed and signed the *Miranda* rights form," that he "understood his *Miranda* rights and at no time subsequent to the commencement of the interview indicated he failed to understand his *Miranda* rights," and that he "then waived his *Miranda* rights and spoke with law enforcement." The trial court also issued the following unchallenged and thus binding findings:

> 80. In this case Defendant said "Can I consult with a lawyer, I mean, or anything? I mean, I-I - I did it. I'm not laughing, man, I want to cry because it's f[*]cked up to be put on the spot like this."
>
> 81. Applying an objective standard in analyzing the statement of Defendant, the undersigned finds there never was an assertion of a right but rather simply a question. Further, Defendant did not stop talking after asking the

> question to allow law enforcement to respond. Defendant did not cease talking or refuse to answer more questions but rather continued talking to investigators for the entirety of the interview. The undersigned determines that no assertion of a right to counsel was made by Defendant.
>
> . . . .
>
> 83. This ambiguous statement by Defendant fails to support a finding that *Miranda* rights were asserted.
>
> 84. Furthermore, the undersigned has also examined the claimed request for counsel by Defendant in the context of the questions posed and answers given both before and after page 58. Again, with the expanded examination of the statement made by Defendant and considering the context of that section of the interview, Defendant also fails to objectively establish he unequivocally and unambiguously invoked his *Miranda* rights to counsel.
>
> 85. Reviewing the entire transcript, the Defendant asked about the attorney as a question on page 58. Law enforcement clearly and appropriately answered the question posed. Most telling, Det. Iadonisi in response told Defendant he had a right to have an attorney followed immediately by SBI Agent Oaks further clarifying and explaining that law enforcement can never make the decision to invoke *Miranda* rights for a defendant. After answering Defendant's question, explaining he did have and continued to possess *Miranda* rights and that no person except Defendant could elect to assert and invoke *Miranda* rights, the Defendant continued to talk to law enforcement.
>
> 86. With further import, it is essential to note that for the entire remainder of the interview the Defendant never again mentioned an attorney or told law enforcement he wished to stop talking.

Our review of the video recording of defendant's interrogation comports with the trial court's findings and its ultimate conclusion that defendant's statements were not obtained in violation of his constitutional rights. Merely one-tenth of a second elapsed between the time that defendant asked, "[c]an I consult with a lawyer, I mean, or anything?" and then stated, "I mean I – I – I did it. I'm not laughing man, I

want to cry because its f[*]cked up to be put on the spot like this." The officers then immediately reminded defendant of his *Miranda* rights, that they had just read him those rights, that defendant "ha[d] the right to have [his attorney] here," and that the officers "[could] never make that choice for [him] one way or another." After police attempted to clarify whether defendant's question was an affirmative assertion of his *Miranda* rights, defendant declined to unambiguously assert that right, continued communications, and never again asked about counsel for the rest of the interview.

Although defendant explicitly asked if he could consult with a lawyer, considering the totality of the circumstances, we agree that defendant's invocation of his *Miranda* rights was ambiguous or equivocal, such that the officers were not required to cease questioning. Defendant did not pause between the time he asked for counsel and gave his initial confession, the officers immediately reminded defendant of his *Miranda* rights to clarify if he was indeed asserting his right to counsel, and defendant declined the offered opportunity to unambiguously assert that right but in-stead continued communicating with the officers. Even if defendant's question could be objectively construed as an unambiguous invocation of his *Miranda* rights, it was immediately waived when he initiated further communication. Accordingly, the trial court properly denied defendant's motion to suppress.

VI. Motion for Appropriate Relief

[12] After defendant's appeal was docketed, he filed a motion for appropriate relief ("MAR") with this Court. *See* N.C. Gen. Stat. § 15A-1418(a) (2017) (authorizing the filing of MARs in the appellate division). Section 15A-1418(b), governing the disposition of MARs filed in the appellate division, provides in relevant part that "[w]hen a motion for appropriate relief is made in the appellate division, the appellate court must decide whether the motion may be determined on the basis of the materials before it, or whether it is necessary to remand the case to the trial division for taking evidence or conducting other proceedings[.] . . ." *Id.* § 15A-1418(b) (2017).

Defendant's MAR is primarily grounded in a claim that his convictions were obtained "in violation of the Constitution of the United States or the Constitution of North Carolina." *See* N.C. Gen. Stat. § 15A-1415(b)(3) (2017). Where, as here, "[t]he materials before [our appellate courts] are not sufficient for us to make that determination," our Supreme Court has instructed that despite section 15A-1418(b)'s "suggest[ion] that the motion be remanded to the trial court for hearing and determination, . . .

the better procedure . . . is to dismiss the motion and permit defendant, if he so desires, to file a new motion for appropriate relief in the superior court." *State v. Hurst*, 304 N.C. 709, 712, 285 S.E.2d 808, 810 (1982) (per curiam) (footnote omitted). Accordingly, we dismiss defendant's motion without prejudice to his right to refile a new MAR in the superior court.

VII. Clerical Error

[13] Both parties agree the matter must be remanded to the trial court to correct a clerical error in an order. After the jury convicted defendant of first-degree felony murder in 12 CRS 51720, armed robbery in 12 CRS 1363, and firearm possession by a felon in 12 CRS 1362, the trial judge rendered an oral ruling arresting judgment on the armed-robbery conviction. The written order arresting judgment reflects the correct file number of 12 CRS 1363; however, it incorrectly lists the offense as "possess firearm by felon," an offense for which defendant was separately sentenced. We remand the matter to the trial court for the sole purpose of correcting its order arresting judgment on 12 CRS 1363 to accurately reflect the offense of armed robbery.

VIII. Conclusion

Because the evidence presented at the jurisdictional hearing failed to satisfactorily satisfy any *St. Cloud* factor, the trial court properly concluded under the Ninth Circuit's test that defendant does not qualify as an Indian for criminal jurisdiction purposes and thus properly denied defendant's motions to dismiss the charges for lack of subject-matter jurisdiction. Because the evidence of defendant's Indian status raised no reasonable factual jury question implicating the State's burden of proving North Carolina's criminal jurisdiction, the trial court properly refused defendant's request to submit the issue of his Indian status to the jury for a special verdict on the matter of subject-matter jurisdiction. Because defendant's incriminating statements were not obtained in violation of his constitutional rights, the trial court properly denied his motion to suppress. Accordingly, we conclude defendant received a fair trial, free of error. Additionally, because the materials before us are insufficient to decide defendant's MAR, we dismiss his motion without prejudice to his right to file a new MAR in the superior court. Finally, we remand this matter to the trial court for the sole purpose of correcting the order arresting judgment on 12 CRS 1363 to accurately reflect the offense of armed robbery.

NO ERROR IN PART; DISMISSED IN PART; REMANDED IN PART.

Judges INMAN and BERGER concur.

STATE v. PEREZ

[260 N.C. App. 311 (2018)]

STATE OF NORTH CAROLINA
v.
JUAN CARLOS GOMEZ PEREZ

No. COA17-1147

Filed 3 July 2018

Constitutional Law—Confrontation Clause—stipulation and waiver —admission of forensic laboratory report

The trial court was not required to conduct a colloquy with defendant before allowing him, through counsel, to stipulate to the admission of multiple forensic laboratory reports identifying substances as cocaine, even though such stipulation acted as a waiver of defendant's constitutional rights, including the right to cross-examine witnesses.

Appeal by defendant from judgments entered 1 December 2016 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Melissa H. Taylor, for the State.

Paul F. Herzog for defendant.

DIETZ, Judge.

Defendant Juan Carlos Gomez Perez appeals his convictions on multiple serious drug offenses. He argues that the trial court violated his Confrontation Clause rights and other related constitutional rights when the court permitted him to stipulate to the admission of a forensic laboratory report without first addressing him personally and ensuring that he understood the stipulation would waive those rights.

As explained below, the trial court was not required to personally address Perez about his stipulation and corresponding waiver. Both Perez and his counsel signed the stipulation. It is for his counsel—not the trial court—to discuss the strategic implications of that stipulation and the effect it has on his right to confront the witnesses against him. If Perez did not understand the implications of the stipulation, his recourse is to pursue a claim for ineffective assistance of counsel. Accordingly, we find no error in the trial court's judgments.

Facts and Procedural History

The State indicted Defendant Juan Carlos Gomez Perez for conspiracy to traffic by possession of 400 grams or more of cocaine, trafficking by possession of 400 grams or more of cocaine, and trafficking by transportation of 400 grams or more of cocaine. The charges stemmed from a drug task force investigation that intercepted a truck containing multiple "bricks" of cocaine.

At trial, the prosecutor informed the court that Perez intended to stipulate to admission of forensic laboratory reports confirming that the substance seized from the truck was cocaine. The following exchange occurred:

> THE COURT: Is there a written stipulation to that effect?
>
> [DEFENSE COUNSEL]: There is, Your Honor.
>
> THE COURT: Okay.
>
> [PROSECUTOR]: In retrospect, I should have included the signature line for the defendant.
>
> THE COURT: Go ahead and just write that in.
>
> [PROSECUTOR]: Alright.
>
> Brief pause
>
> [PROSECUTOR]: May I approach, Your Honor?
>
> THE COURT: Yes. Just a minute. So I have three exhibits . . . . They're not exhibits yet. They're unmarked stipulations, attached to each stipulation; there are a total of three. These are unmarked exhibits that indicates whatever the State is going to identify, whatever the potential exhibit will be admitted, is going to be admitted without requiring further authentication, if otherwise deemed admissible by the Court. So is there going to be an objection to any of this evidence?
>
> [DEFENSE COUNSEL]: No, sir.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: My understanding is that we're talking about the drugs themselves and the absence of any latent fingerprint evidence on the packaging.

> THE COURT: One of them there is a U.S. Department of Justice Drug Enforcement Administration, DEA, dated March 10th, 2016, regarding the fact that there were no latent prints developed; another one is from the same agency, dated January 28, 2016, indicating 2,994 grams of cocaine were identified, whatever was analyzed, that's what was identified, and the weight. So it identified the substance being cocaine, and weight being what I just said it was. And finally, the last one is dated January 28, 2016, the same date as the last one. Again, it is the substance that was analyzed was identified as being cocaine, and then the weight of this is stated to be 5,995 grams.
>
> [DEFENSE COUNSEL]: That is correct.
>
> THE COURT: Then the State is going to then -- how do you intend to offer these into evidence, just so there is no confusion?
>
> [PROSECUTOR]: At the appropriate time, Your Honor, with the Case Agent responsible ultimately for collecting the substances, I would move to introduce the stipulations at the same time as the physical evidence, and then move to publish the documents themselves.
>
> THE COURT: Mr. Baucino?
>
> [DEFENSE COUNSEL]: No objection.
>
> THE COURT: If you'll approach, at the appropriate time, please do so. I note that all the parties, both attorneys and the defendant have all signed each stipulation; again, there being a total of three stipulations, with the exhibits identified in cursory fashion attached to each stipulation.

The trial court admitted the stipulated evidence later in the trial. The jury found Perez guilty on all charges. The court sentenced him to three consecutive sentences of 175 to 222 months in prison. Perez timely appealed.

Analysis

On appeal, Perez argues that the trial court erred by permitting him to stipulate to the admission of the forensic laboratory reports without engaging in a colloquy to ensure he understood the consequences of that decision. He contends that "a trial judge is required to personally address a defendant whose attorney seeks to waive any of his constitutional

rights via stipulation with the State." As explained below, we reject this argument.

We begin by acknowledging that Perez's stipulation acted as a waiver of his Confrontation Clause rights and other corresponding constitutional rights. Without the stipulation, the State would have been required to call a witness to discuss the lab reports. That witness could be cross-examined by Perez. Thus, by stipulating to the admission of the lab reports, Perez waived his right to cross-examine the State's witness. *See State v. Moore*, 275 N.C. 198, 210, 166 S.E.2d 652, 660 (1969).

But the waiver of Confrontation Clause rights does not require the sort of extensive colloquy needed to waive the right to counsel or enter a guilty plea. *Cf. Boykin v. Alabama*, 395 U.S. 238 (1969). Perez argues that our decision in *State v. English*, 171 N.C. App. 277, 283–84, 614 S.E.2d 405, 409–10 (2005), imposed a requirement for trial courts to engage in a personal colloquy directly with the defendant before stipulating to the admission of evidence, but that is not what *English* holds. Instead, *English* simply reaffirmed that defendants can waive their Confrontation Clause rights by stipulating to the admission of evidence that otherwise would be admissible only when accompanied by live testimony. *Id.*

To be sure, the trial court in *English* engaged in the sort of colloquy that Perez believes should be a constitutional requirement in every case. But *English* did not hold that this colloquy was necessary. *Id.* Indeed, in his concurrence in *English*, Judge Steelman suggested that the Court should have sanctioned the defendant's appellate counsel for asserting the Confrontation Clause argument because the trial court's colloquy "went above and beyond" what is required and rendered defendant's argument frivolous. *Id.* at 286, 614 S.E.2d at 411.

Here, both Perez and his counsel signed written stipulations to admit the lab reports without the requirement that they be accompanied by witness testimony. On appeal, this Court is not permitted to determine whether there were strategic reasons for Perez and his counsel to stipulate to the admission of this evidence, but there certainly are conceivable strategic reasons for doing so. *See State v. Todd*, 369 N.C. 707, 711–12, 799 S.E.2d 834, 838 (2017). For example, the stipulation also ensured that the portion of the lab report showing there were no fingerprints on the bricks of cocaine was admissible. Likewise, Perez and his counsel may have been concerned that detailed testimony about the testing of this large amount of seized cocaine may have simply reinforced for the jury that this was a serious drug trafficking case.

Notably, Perez does not argue that his counsel failed to discuss these strategic issues with him, or that his counsel failed to explain that stipulating to admission of the lab reports would waive his Confrontation Clause rights. Instead, he argues that the trial court should have discussed these issues with him in open court.

We decline Perez's request to impose on the trial courts an obligation "to personally address a defendant whose attorney seeks to waive any of his constitutional rights via stipulation with the State." If Perez did not understand the implications of stipulating to the admission of the lab reports at trial, his recourse is to pursue a motion for appropriate relief asserting ineffective assistance of counsel. Accordingly, we reject Perez's argument and find no error in the trial court's judgments.

NO ERROR.

Judges DILLON and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
DENNIS RAYNARD STEELE, DEFENDANT

No. COA17-868

Filed 3 July 2018

1. Constitutional Law—Confrontation Clause—statements by confidential informant—nonhearsay

The admission of statements made by a confidential informant to law enforcement at defendant's trial for trafficking cocaine did not violate defendant's Sixth Amendment right to confront witnesses against him where the statements were nonhearsay evidence offered not to prove the truth of the matter asserted but to explain how and why the investigation against defendant began. Further, the trial court gave a limiting instruction to the jury before accepting the testimony to ensure the statements would be properly considered for the purpose for which they were admitted.

2. Evidence—admissibility—statements by confidential informant

The admission of statements made by a confidential informant to law enforcement at defendant's trial for trafficking cocaine was not unfairly prejudicial where the statements were relevant and

explained the steps law enforcement took during its investigation, and the trial court gave the jury a limiting instruction on how the statements could be considered.

3. Drugs—trafficking cocaine by possession—constructive possession—sufficiency of evidence

In a trial for trafficking cocaine by possession, sufficient evidence was presented from which the jury could infer that defendant had constructive possession of cocaine found at a residence. Among other things, defendant shared a bedroom in which drug paraphernalia and illegal contraband were found, and defendant made a statement to another arrestee showing his knowledge about the weight of cocaine found in the bedroom.

Appeal by defendant from judgment entered 2 March 2017 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 30 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Matthew L. Liles, for the State.

Nils E. Gerber for defendant-appellant.

BERGER, Judge.

On March 2, 2017, a Forsyth County jury convicted Dennis Raynard Steele ("Defendant") of trafficking cocaine. Defendant asserts on appeal that (1) his Sixth Amendment right to confront witnesses testifying against him was violated, (2) the trial court abused its discretion by admitting out-of-court statements of a confidential informant, and (3) the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree.

Factual and Procedural Background

On September 16, 2014, Investigator Jeremy Webster with the Forsyth County Sheriff's Department's vice and narcotics unit met with a confidential informant who had previously provided reliable information to the department several times. The informant told Investigator Webster that a black male named "Dennis" was manufacturing and selling cocaine, described Dennis as a stocky, dark-skinned black male in his mid-thirties who was known on the streets as "Black," and provided a phone number at which Dennis could be contacted. According to the informant, Dennis would sell crack cocaine packaged in plastic baggies

for twenty dollars. Typically, Dennis would sell one-tenth of a gram of crack cocaine, but had sold as much as one-quarter ounce.

Investigator Webster set up a controlled purchase of crack cocaine from Dennis. He had the informant call the phone number for Dennis. The call was answered by a male subject, and the informant arranged a meeting on September 17, 2014 to purchase an eight-ball (one-eighth of an ounce or three and one-half grams) of cocaine. Defendant drove a black Hyundai registered to Tyrice Lenard Hauser to conduct the drug transaction with the informant. Following the controlled purchase, the informant provided Investigator Webster with a plastic bag containing three and one-half grams of crack cocaine.

Members of the narcotics unit subsequently became involved in a multi-agency investigation in a neighboring jurisdiction, and, therefore, made no significant progress in this case until December of 2014 when Investigator Webster observed the black Hyundai from the controlled purchase parked at a home on Hanes Avenue in Winston-Salem. By this time, according to the informant, Dennis continued to sell crack cocaine. However, because Dennis was not accepting new customers, investigators were unable to proceed further with an undercover investigation.

In January and February 2015, investigators conducted five trash-pulls at 631 Hanes Avenue to gather additional information, and found evidence of drug use and distribution. The trash also contained dry cleaning tags with the name "Dennis Still" and mail addressed to "Dennis Steele."

Investigators executed a search warrant at the Hanes Avenue location on March 4, 2015. Defendant and Monchea Cunningham were exiting one of the bed-rooms when officers first entered the house. Tyjuan Hauser was also found in the residence, along with a two-year-old child. Investigators located digital scales and a razor blade with white residue in the kitchen. Marijuana and a plastic bag containing a capsule with white powder on it were found in a bedroom which also contained mail addressed to Tyrice Hauser.[1] A receipt with Defendant's name on it to a local pawn shop was found in the dining room.

When investigators searched the bedroom of Defendant and Cunningham, they observed an unlatched padlock on the door. Defendant and Cunningham had the only keys to the padlock, and used it to prevent others from accessing the bedroom. A search of the room uncovered marijuana, mail addressed to Defendant, two cell phones, a

1. Tyrice and Tyjuan Hauser are adult children of Monchea Cunningham.

wallet containing Defendant's driver's license, and more than $400.00 in cash. A box located near the nightstand contained latex gloves, a pair of goggles, and two boxes of plastic baggies.

Three plastic bags containing cocaine and crack cocaine were found in a dresser drawer, along with oxymorphone tablets. One bag contained eighteen individual baggies of crack cocaine packaged for sale. The total weight of the drugs and packaging was 65.8 grams. Chemical analysis of the materials showed 53.78 grams of cocaine were recovered from the residence.

A Ford Crown Victoria registered to Defendant and the black Hyundai registered to Tyrice Hauser that had been observed by officers at the controlled buy were parked at the residence. A medical invoice was found in the Crown Victoria addressed to Defendant at 631 Hanes Avenue, Winston-Salem, North Carolina.

Following the search of the premises, Defendant and Cunningham were ar-rested. Defendant declined to speak with investigators. However, while being processed at the jail, Defendant was asked for his address. Defendant was unable to provide an address, stating, "The one on my license. 5919 or 5919 – 5939 Clemmons – 5909 – whatever is on my license." Defendant also told Corporal Michael Hudak that he wanted to send a letter from the jail to his home, and asked Corporal Hudak if he could write down the address listed on his license because he was unable to remember the address.

While waiting in the magistrate's office, officers overheard Defendant speaking with another arrestee. The two discussed a heroin dealer in Mocksville, and Defendant told the other individual he had been arrested for a little crack, but "he wasn't concerned because it was just a little over two ounces." At the time, officers had not weighed the cocaine, and could not have communicated to Defendant that 53.78 grams, or 1.9 ounces, had been recovered from the residence.

Cunningham waived her *Miranda* rights and told officers she had known Defendant for more than ten years. She admitted that Defendant had keys to the residence at 631 Hanes Avenue, and testified at trial that Defendant lived at the residence. She also stated that she and Defendant had the only keys to the padlock on the bedroom door, but denied knowledge of any controlled substances in the residence, except marijuana. Regarding the cocaine found in the bedroom, Cunningham told investigators, "I didn't put it there."

On August 17, 2015, the Forsyth County Grand Jury indicted Defendant for trafficking in cocaine and possession of a Schedule II controlled substance. Defend-ant was tried in Forsyth County Superior Court, and the jury convicted Defendant of trafficking cocaine. Defendant was sentenced to thirty-five to fifty-one months in prison and assessed a fine of $50,000.00. Defendant gave oral notice of appeal.

Analysis

I. Sixth Amendment

[1] Defendant contends the trial court erred by admitting statements made by the confidential informant through the testimony of Investigator Webster. He specifically argues that the informant's hearsay statements about Defendant's prior sale and manufacture of cocaine should not have been admitted because Defendant was given no opportunity to confront and cross-examine the informant in violation of his constitutional rights as protected by the Sixth Amendment. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009) (citation omitted), *appeal dismissed*, 363 N.C. 857, 694 S.E.2d 766 (2010).

The Sixth Amendment guarantees that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" U.S. Const. amend. VI. The United States Supreme Court has held the Confrontation Clause applies only to testimonial evidence. *Crawford v. Washington*, 541 U.S. 36, 68, 158 L. Ed. 2d 177, 203 (2004). Testimonial evidence includes

> material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially, extra-judicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions, and statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]

Id. at 51-52, 158 L. Ed. 2d 177 (cleaned up). However, "[t]he [Confrontation] Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Id.* at 59 n.9, 158 L. Ed. 2d at 198 n.9.

" 'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-801(c) (2017). The Rules of Evidence generally exclude the use of hearsay statements. N.C. Gen. Stat. § 8C-802 (2017).

However, "[o]ut of court statements offered for purposes other than to prove the truth of the matter asserted are not considered hearsay." *State v. Anthony*, 354 N.C. 372, 403-04, 555 S.E.2d 557, 579 (2001) (citation and quotation marks omitted), *cert. denied*, 536 U.S. 930, 153 L. Ed. 2d 791 (2002). Moreover, "statements of one person to another to explain subsequent actions taken by the person to whom the statement was made are admissible as nonhearsay evidence." *Id.* at 404, 555 S.E.2d at 579 (citation omitted). "[A]dmission of nonhearsay raises no Confrontation Clause concerns." *State v. Gainey*, 355 N.C. 73, 87, 558 S.E.2d 463, 473 (citation and quotation marks omitted), *cert. denied*, 537 U.S. 896, 154 L. Ed. 2d 165 (2002).

This Court has consistently held that statements by a confidential informant to law enforcement officers which explain subsequent steps taken by officers in the investigative process are admissible as nonhearsay and "not barred by the Confrontation Clause." *State v. Wiggins*, 185 N.C. App. 376, 384, 648 S.E.2d 865, 871 (citing *Crawford*, 541 U.S. at 59 n.9, 158 L. Ed. 2d at 198 n.9), *disc. review denied*, 361 N.C. 703, 653 S.E.2d 160 (2007); *see also State v. Batchelor*, 202 N.C. App. 733, 690 S.E.2d 53 (2010); *State v. Leyva*, 181 N.C. App. 491, 640 S.E.2d 394 (2007); *State v. Rogers*, ___ N.C. App. ___, 796 S.E.2d 91, *writ allowed*, 369 N.C. 526, 797 S.E.2d 2 (2017).

Here, Investigator Webster testified about the information provided by the confidential informant and the subsequent steps he took to investigate Defendant.

> [The State:] What did the confidential informant tell you at that time?
>
> [Webster:] On that date, the confidential informed us -- informant -- excuse me -- advised us that they had knowledge of a black male who was using the name "Dennis" and occasionally using the street name of "Black," who was selling and manufacturing crack cocaine. The C.I. described Dennis as being a 34-year-old, dark-skinned, black male, average height, stocky build, who kept a short haircut. C.I. stated that Dennis was selling crack cocaine in $20 bags, with a $20 bag typically being around a tenth

> of a gram in their estimation. They said that Dennis had sold up to a quarter ounce of crack cocaine in the past, that the crack cocaine was typically packaged in plastic bags. The C.I. also provided the phone number . . . as a phone number to reach Dennis.
>
> [The State:] Investigator Webster, based on that information you received, were you able to set up what's known as a controlled purchase?
>
> [Webster:] We did. On that particular date, September 16th, the C.I. placed a phone call in my presence to the [phone] number and spoke to a male subject. They priced the -- inquired as to the price of 3 1/2 grams of cocaine, or what's commonly referred to as an eight ball of cocaine.

Investigator Webster then described the controlled purchase and law enforcement's subsequent actions to investigate Defendant.

The trial court gave a limiting instruction to the jury before accepting this testimony to ensure the statements would be properly considered by the jury.

> [THE COURT:] Members of the jury, I anticipate you're going to hear some testimony about a confidential informant and what this investigator and other officers may have done as a result of their contact with that confidential informant.
>
> Now, ordinarily any statements that that informant may have made would be hearsay because that informant is not here testifying in front of you under oath, but the State is not offering that evidence for the truth of it, and you're not to consider any evidence of what the statement the confidential informant made for its truth. You may consider it for what this officer and other officers may have done as a result of that confidential informant's information.
>
> The defendant in this case, Mr. Steele, is not charged with anything relating to any alleged contact he had with the confidential informant. He is not charged with anything related to that. But you can consider this testimony for what these officers did subsequently in their investigation for the charges that he is on trial for.

Does everybody understand that?

ALL JURORS: (Indicating in the affirmative.)

THE COURT: And can you follow that instruction?

ALL JURORS: (Indicating in the affirmative.)

THE COURT: All right. We'll let the record reflect that all jurors have indicated they do understand that.

The nonhearsay statements were not offered to prove the truth of the matter asserted, but rather to explain how and why the investigation of Defendant began. Such statements are not precluded by *Crawford v. Washington*, and admission of the same does not violate Defendant's Sixth Amendment rights under the Confrontation Clause. Therefore, the trial court did not err in admitting the confidential informant's statements.

II. Rule 403

[2] Defendant contends the admission of the confidential informant's statements was unfairly prejudicial. We disagree.

"We review a trial court's decision to exclude evidence under Rule 403 for abuse of discretion." *State v. Whaley*, 362 N.C. 156, 160, 655 S.E.2d 388, 390 (2008) (citation omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citation omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C. Gen. Stat. § 8C-403 (2017). Probative evidence in criminal cases tends to have a prejudicial effect on defendants; however, "the question . . . is one of degree." *State v. Mercer*, 317 N.C. 87, 93-94, 343 S.E.2d 885, 889 (1986).

Here, Defendant asserts he was prejudiced by admission of the confidential informant's statements. Specifically, Defendant contends the statements concerning his distribution of illegal drugs were used to show he acted in conformity with the charge of trafficking in cocaine. However, the confidential informant's statements were relevant, and explained the steps taken by officers during the investigation. Further, the trial court's limiting instruction demonstrated that the trial court thoughtfully considered the nature of the testimony and how it could potentially be used by the jury. Defendant has failed to demonstrate that the trial court abused its discretion.

III. Motion to Dismiss

[3] Defendant argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence. We disagree.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (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). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980) (citations omitted). "Evidence must be viewed in the light most favorable to the State with every reasonable inference drawn in the State's favor." *State v. Coley*, ___ N.C. App. ___, ___, 810 S.E.2d 359, 363 (2018) (citation omitted). "[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." *State v. Miller*, 363 N.C. 96, 99, 678 S.E.2d 592, 594 (2009) (citation and quotation marks omitted).

To be convicted of trafficking in cocaine by possession, the State must prove, (1) the defendant knowingly possessed cocaine, and (2) the amount was at least twenty-eight grams. N.C. Gen. Stat. § 90-95(h)(3) (2017). Defendant contests the first element, and argues there was no evidence presented by the State that he possessed the cocaine.

"[P]ossession of contraband can be either actual or constructive[.]" *State v. McNeil*, 359 N.C. 800, 806, 617 S.E.2d 271, 275 (2005) (citation omitted). "Constructive possession exists when a person, while not having actual possession, has the intent and capability to maintain control and dominion over a controlled substance." *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983) (citation omitted). "Unless a defendant has exclusive possession of the place where the contraband is found, the State must show other incriminating circumstances sufficient for the jury to find a defendant had constructive possession." *Miller*, 363 N.C. at 99, 678 S.E.2d at 594 (citation omitted). This Court has held that constructive 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. McBride*, 173 N.C. App. 101, 106, 618 S.E.2d 754,

758, *disc. review denied*, 360 N.C. 179, 626 S.E.2d 835 (2005) (citation and quotation marks omitted).

Here, the totality of the evidence tended to show, and the jury could reasonably infer, that Defendant lived with Cunningham in the home at 631 Hanes Avenue. Defendant was unable to provide officers with the address on his driver's license, or any other information regarding his living arrangements. Defendant and Cunningham shared a bedroom which also contained drug paraphernalia and illegal contraband, and was padlocked from the outside to prevent entry. Defendant and Cunningham had the only keys to the padlock barring access to the bedroom.

The jury could infer that the items on the nightstand, where Defendant's wallet and mail were located, also belonged to Defendant. Officers found more than four hundred dollars in cash on this nightstand. A box located near the nightstand contained latex gloves, a pair of goggles, and two boxes of plastic baggies, which the jury could infer were used to manufacture, package, or otherwise distribute crack cocaine. A reasonable juror could infer from Cunningham's statement to officers that she did not put the cocaine in the dresser. Moreover, Cunningham stated that she only knew about the marijuana in the home, and that the cocaine did not belong to her. The jury could reasonably infer that Defendant, the only other individual with access to the bedroom, was the individual who had control and dominion over the cocaine found by officers. In addition, Defendant's knowledge of the weight of cocaine found in the bedroom, as demonstrated by his conversation with the other arrestee in the magistrate's office, is yet another incriminating circumstance from which the jury could find Defendant's constructive possession of cocaine.

When viewed in the light most favorable to the State, there was substantial evidence that Defendant was in constructive possession of more than twenty-eight grams of cocaine. Defendant's motion to dismiss for insufficiency of the evidence was properly denied.

Conclusion

The trial court properly admitted statements by the confidential informant which were used to explain the steps officers took in their investigation, and admission of these statements did not violate Defendant's Sixth Amendment rights under the Confrontation Clause. The trial court did not abuse its discretion by admitting the confidential informant's statements. Finally, the trial court did not err in denying Defendant's motion to dismiss for insufficiency of the evidence because

the State introduced substantial evidence of constructive possession. Therefore, Defendant received a fair trial free from error.

NO ERROR.

Judges BRYANT and DIETZ concur.

TOWN OF NAGS HEAD, PLAINTIFF
v.
RICHARDSON, ET AL., DEFENDANTS

No. COA17-498

Filed 3 July 2018

1. Eminent Domain—temporary easement—beach restoration—applicability of public trust rights

In a condemnation action by a coastal town seeking a ten-year easement to private property in order to carry out a beach restoration project, the trial court erred in entering judgment notwithstanding the verdict (JNOV) in favor of the town eight months after final judgment, since it based its decision on grounds that were not raised at directed verdict or JNOV. The trial court's determination that the town already possessed easement rights through the public trust doctrine and that the taking was therefore non-compensable was improper where the issue was not previously raised by the town in accordance with the Rules of Civil Procedure or the condemnation statutes.

2. Eminent Domain—temporary easement—beach restoration—compensation—sufficiency of evidence

Landowners presented sufficient evidence through the expert opinion of an appraiser to support the jury's conclusion that the temporary easement taken by a town for a beach restoration project was compensable in the amount of $60,000.00, representing the fair market value of the easement.

3. Eminent Domain—temporary easement—beach restoration—expert testimony—compensable value

The trial court abused its discretion in admitting the expert testimony of an appraiser in an action by a town taking a ten-year easement to private property to carry out a beach restoration project

where the appraiser did not provide the method used to derive the value of the easement.

Judge DILLON concurring in part and dissenting in part.

Appeal by Defendants from Judgment Notwithstanding the Verdict entered 17 October 2016 by Judge Gary E. Trawick in Dare County Superior Court. Cross-appeal by Plaintiff from orders entered 17 December 2014 and 25 August 2015 by Judge Gary E. Trawick in Dare County Superior Court. Heard in the Court of Appeals 16 November 2017.

Hornthal, Riley, Ellis & Maland, LLP, by Benjamin M. Gallop and M. H. Hood Ellis, for Plaintiff.

Nexsen Pruet, by Norman W. Shearin, for Defendants.

INMAN, Judge.

This appeal, following a jury verdict for property owners and entry of judgment notwithstanding the verdict ("JNOV"), presents an issue of first impression: whether a municipality that takes an easement in privately owned oceanfront property to replenish the beach can avoid compensating the private property owner by asserting public trust rights vested in the State. On the record before us, we hold that the property owner is entitled to compensation as provided by the eminent domain statute.

We also hold that the jury's verdict was supported by a scintilla of evidence and reverse the trial court's entry of JNOV. But because expert testimony supporting the verdict was admitted in error, we remand for a new trial.

Defendants William W. Richardson and Martha W. Richardson (the "Richardsons") appeal the entry of JNOV that set aside a jury verdict of $60,000.00 compensating them for an easement taken by the Town of Nags Head (the "Town") through eminent domain. The Town took the easement across a portion of the Richardsons' property to complete a beach nourishment project. In entering the JNOV, the trial court concluded that the Richardsons were entitled to no compensation, reasoning that: (1) the land subject to the easement was encumbered by public trust rights, so the easement was already implied in favor of the Town to protect and preserve those public trust rights; and (2) in the event the easement was not already implied and thus constituted a compensable taking, the Richardsons failed to introduce evidence supporting the

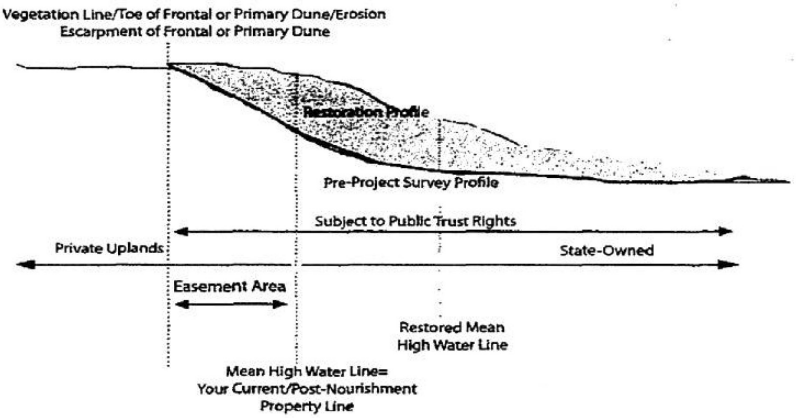
jury's verdict based on the fair market value of the temporary easement. The Town cross-appeals the denial of its motions *in limine* seeking to exclude testimony by the Richardsons' expert witnesses. We reverse both entry of JNOV and denial of the motions *in limine* and remand for new trial.

I. FACTUAL AND PROCEDURAL HISTORY

In early 2011, the Town undertook a beach nourishment project along ten miles of its coastline to combat erosion and improve flood and hurricane protections. The Town mailed a notice of condemnation to owners of oceanfront property along the affected coastline, including the Richardsons. In the notice, the Town informed private property owners of the purposes of the project and asked them to grant the Town an easement across the sand beach portion of their properties. Specifically, the Town requested the following:

> The property on which the Town will need to work lies waterward of the following locations, whichever is most waterward: the Vegetation Line; the toe of the Frontal Dune or Primary Dune; or the Erosion Escarpment of the Frontal Dune or Primary Dune.
>
> . . .
>
> Please be aware that this is not a perpetual easement; the Town only requests that it have the easement rights through April 1, 2021.
>
> You will not lose land or access rights if you sign the easement. We are simply asking for your approval to deposit sand and work on a specific section of your property on one or perhaps more occasions, during a ten year period. Except for the brief periods when construction or repairs are ongoing, you will still be able to access the beach from your property and construct a dune walkover . . . .
>
> At the outset of the nourishment project, a survey will be conducted to establish the existing mean high water line, which is currently your littoral property line and will remain your property line after the project. . . . As set forth on the enclosed Notice, the Town may need to enter the beach in front of your property.

The notice also included this rendering, which identifies the portion of beach subject to the requested easement and the Town's understanding of related rights and interests:



Finally, the notice stated that the Town would bring a condemnation action to take, by eminent domain, the easement rights requested in the notice if no voluntary grant of the easement was executed.

The Richardsons did not grant the Town the easement rights requested in the notice and, on 28 March 2011, the Town filed a condemnation action. The Town sought the following easement rights (the "Easement Rights") in the Richardsons' dry-sand beach property lying between the toe of the dune and the mean high water mark (the "Easement Area;" together with the Easement Rights as the "Easement"):

> The Town, its agents, successors and assigns may use the Easement Area to evaluate, survey, inspect, construct, preserve, patrol, protect, operate, maintain, repair, rehabilitate, and replace a public beach, a dune system, and other erosion control and storm damage reduction measures together with appurtenances thereof, including the right to perform the following on the property taken:
>
> - deposit sand together with the right of public use and access over such deposited sand;
> - accomplish any alterations of contours on said land;
> - construct berms and dunes;
> - nourish and renourish periodically;
> - perform any other work necessary and incident to the construction, periodic Renourishment and maintenance of the Town's Beach Nourishment Project . . . .

Consistent with the Town's earlier notice, the Easement terminates on 1 April 2021.

The Richardsons filed an answer and motion to dismiss in response to the complaint. On 20 July 2011, the trial court entered a consent order denying the Richardsons' motion to dismiss, vesting title to the Easement in the Town as of the date the complaint was filed pursuant to Section 40A-42 of our General Statutes, and continuing all other hearings authorized by statute until after the Town deposited sand on the beach and Easement Area as part of the nourishment project. The action was then designated an exceptional case and assigned for all purposes to a single superior court judge.

In 2014, after the nourishment project was completed, Judge Gary Trawick presided over a hearing pursuant to Section 40A-47 on all issues other than damages. By order entered 17 December 2014 (the "40A-47 Order"), Judge Trawick decreed that: (1) the area affected by the taking of the Easement was the Richardsons' entire lot consisting of 30,395.2 square feet; (2) the property taken, *i.e.*, the Easement Area, was approximately 7,280.54 square feet of beach lying between the toe of the dune and the mean high water mark at the time of condemnation; and (3) the rights taken were those described in the Town's complaint.[1] Judge Trawick denied a motion by the Town requesting a ruling that the Easement Area, or any portion of it, was subject to public trust rights.

The damages issue was scheduled for trial before a jury in August 2015. In pre-trial motions, both parties raised the issue of the public trust doctrine. After reviewing the issue further, Judge Trawick continued the trial and entered an order revising the 40A-47 Order (the "Revised 40A-47 Order").

The Revised 40A-47 Order concluded that the entire Easement Area was located within the State's "ocean beaches" as defined in N.C. Gen. Stat. § 77-20(e) (2015), and therefore was subject to public trust rights as described in N.C. Gen. Stat. § 1-45.1.[2] The Revised 40A-47 Order provided

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1. The Richardsons present several arguments concerning various other rights that they contend were taken by the Town, including littoral rights, secondary easement access rights vesting in the Town, and a complete loss of title to the Easement Area. None of these rights falls within the ambit of the taking declared in the 40A-47 Order, nor do we need to address their compensability. Resolution of the Richardsons' appeal concerns only whether: (1) public trust rights preclude recovery of damages; and (2) the Richardsons presented evidence sufficient to support the jury's verdict.

2. This Court would later reach the same holding as that decreed by Judge Trawick in his Revised 40A-47 Order. *See Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 92–93, 780

both parties with the opportunity to seek new appraisals in light of Judge Trawick's ruling. Judge Trawick certified the Revised 40A-47 Order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure, but neither party noticed an appeal.

In advance of the trial on damages, the Town filed motions *in limine* seeking to exclude testimony by two appraisers hired by the Richardsons, Gregory Bourne ("Mr. Bourne") and Dennis Gruelle ("Mr. Gruelle"). The trial court prohibited all expert witnesses from testifying to opinions not disclosed prior to or at the time of their respective depositions. The trial court otherwise denied the motions.

At trial, Messrs. Bourne and Gruelle provided testimony and portions of their written appraisal reports were published to the jury. Mr. Bourne's report and testimony asserted that the taking had diminished the fair market value of the remainder of the Richardsons' property by $160,000. Mr. Gruelle's report and testimony asserted that the taking had diminished the value of the remainder of the Richardsons' property by $233,000.00.

Mr. Bourne testified that, in valuing only the land constituting the Richardsons' entire lot, he first determined the "[h]ighest and best use[, which] is that use which you can physically and possibly build that is legally permissible, that is financially feasible, and that reflects the maximum value, that will generate the maximum value of the property." After determining the best and highest use of the Richardsons' entire lot to be residential, he employed sales comparison and cost approaches to reach a "before [taking] land value [of] $855,000." After including the improvements to the property and other adjustments, Mr. Bourne arrived at a pre-taking value of the improved lot of $1,040,000.

To determine the impact of the Easement taking on the fair market value of the Richardsons' lot, Mr. Bourne reviewed comparable sales and found an eight percent difference in the value of oceanfront lots that extended all the way to the mean high water mark and beachfront lots that stopped short of the ocean. He made this comparison because, per Section 146-6(f), title to new land seaward of the former mean high water mark created by the nourishment project would vest

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S.E.2d 187, 196–97 (2015) (holding that N.C. Gen. Stat. § 77-20 and the common law vest in the State public trust rights in "ocean beaches" as measured on the landward side by the more seaward of the toe of the frontal dune or the first vegetation line; where neither exists, it is measured by the storm trash line "or any other reliable indicator of the mean regular extent of the storm tide").

in the State.[3] The Town's use of the Easement, therefore, affixed the Richardsons' property line at the former mean high water mark and created a strip of State-owned land between the Richardsons' property line and the ocean. After considering damage to the unencumbered portion of the lot, Mr. Bourne testified that the proper measure of damages was "[t]he difference between the before and the after [fair market values of the Richardsons' property] and I came up with $160,000." Applying his calculation to the entire lot's unimproved value of $855,000, Mr. Bourne "came up with an after the taking land value, that is the value of the land now encumbered by this easement for 10 years, of $70,000."

The Richardsons' other appraiser, Mr. Gruelle, testified that the highest and best use of the Richardsons' lot was residential and, after comparing sales of similar properties, concluded that "the value of the site was [$]880,000. . . . [$]880,000 is attributable to the value of the land."

Taking the $880,000 value of the entire lot with its highest and best use as residential property, Mr. Gruelle calculated a value of $28.95 per square foot. He then multiplied that number by the total square footage of the Easement Area, 7,280, and arrived at a total value of $210,756 for the Easement Area. Mr. Gruelle estimated that, based on the Easement Rights taken, the Town's use of the Easement Area for ten years exploited 90 percent of its land value; as a result, Mr. Gruelle testified that the value of the Easement taken was approximately $190,000.[4] Mr. Gruelle combined the Easement value with other negative impacts on the unencumbered property—including the effect on the view and ease of beach access resulting from the increased height of the dunes—to which he assigned a value of $43,000, and opined that "the total impact of the property is $233,000. . . . That is the just compensation to leave the property owner whole."

At the close of the Richardsons' evidence, the Town moved for directed verdict. Reasserting the grounds raised in its motions *in limine*, the Town argued that Messrs. Bourne's and Gruelle's valuations were unreliable and should be stricken; if that evidence were stricken, the Richardsons would have failed to prove damages, and the Town would be entitled to a directed verdict. The trial court denied the motion.

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3. Section 146-6(f) provides, in relevant part: "title to land in or immediately along the Atlantic Ocean raised above the mean high water mark by publicly financed projects which involve hydraulic dredging or other deposition of spoil materials or sand vests in the State." N.C. Gen. Stat. § 146-6(f) (2017).

4. By mathematical formula, Mr. Gruelle calculated the value of the Easement as follows: (($28.95/ft^2) * 7,280ft^2) * 0.9 = $189,680.4.

Michael Moody, an expert witness for the Town, provided an opinion on two distinct fair market values: (1) the difference in fair market value of the Richardsons' entire lot before the taking and the remainder after the taking under the "before and after method;" and (2) the fair market value of the Easement. Mr. Moody determined the difference in total market value to be zero and determined the fair market value of the Easement to be $330. He arrived at the second number through the "market extraction" method, whereby he found two comparable vacant ocean-front lot sales, one encumbered by a permanent easement for beach nourishment and one unencumbered. Mr. Moody then calculated the difference in those sale prices, which came out to $1,000, and attributed that difference to the presence of the permanent easement. Because the Easement in this case was for a ten-year period rather than perpetual in duration, he reduced the extracted amount by two-thirds and arrived at a fair market value of $330 for the Town's taking.

The Town renewed its earlier motion for directed verdict at the close of its evidence, and the motion was denied. Following instruction by Judge Trawick and deliberations, the jury returned a verdict finding that the fair market value of the Easement was $60,000, and the difference in fair market value of the Richardsons' property pre-taking and the remainder post-taking was zero. The jury awarded the Richardsons $60,000 as the greater value.

The Town timely filed a motion for JNOV, arguing, among other things, that the Richardsons had failed to introduce evidence showing the fair market value of the Easement. Joined in the motion for JNOV was a motion for new trial and a motion for remittitur. Neither motion was ruled on by the trial court.

Eight months later, following a hearing and additional briefing, Judge Trawick entered JNOV in favor of the Town, declaring that the Richardsons should recover nothing. Judge Trawick identified two bases for his ruling: (1) there was no compensable taking, as the Town already possessed an easement by implication to protect and preserve the State's ocean beaches by virtue of the State's public trust rights; and (2) in the event there was a compensable taking, there was no evidence from which the jury could find a fair market value of the Easement,[5] so the only available calculation of damages was the "before and after" value of the

5. This conclusion contradicts the trial court's earlier conclusion in the same order that "competent expert testimony introduced at trial on the . . . market value of the [Easement shows a] $330.00 market value . . . ."

unencumbered property. Because the jury found that value to be $0, that was the proper amount of damages.

The Richardsons appealed the JNOV; the Town cross-appealed the 40A-47 Order and Judge Trawick's denial of its motions *in limine*.

II. DISCUSSION

The Richardsons contend that the trial court erred in entering JNOV on grounds not asserted in the Town's motions for directed verdict and despite relevant evidence, provided by Mr. Gruelle, to support the jury verdict. We agree and reverse the entry of JNOV. However, we also agree with the Town that the trial court abused its discretion in admitting Mr. Gruelle's expert testimony over the Town's motions *in limine* and objections. As a result, we remand the case for a new trial.

A. Standard of Review

We review the entry of JNOV *de novo*, substituting our judgment for that of the trial court. *Austin v. Bald II, L.L.C.*, 189 N.C. App. 338, 342, 658 S.E.2d 1, 4 (2008). In exercising that judgment, we ask "whether the evidence was sufficient to go to the jury," *Tomika Invs., Inc. v. Macedonia True Vine Pentecostal Holiness Church of God, Inc.*, 136 N.C. App. 493, 499, 524 S.E.2d 591, 595 (2000), and "[t]he essential question is whether the [non-movant] met his burden at trial of presenting substantial evidence of his claim when all the evidence is taken in the light most favorable to the [non-movant] and all inconsistencies are resolved in favor of the [non-movant]." *Asfar v. Charlotte Auto Auction, Inc.*, 127 N.C. App. 502, 504, 490 S.E.2d 598, 600 (1997). "The hurdle is high for the moving party [on JNOV] as the motion should be denied if there is more than a scintilla of evidence to support the [non-movant's] *prima facie* case." *Tomkia Invs.*, 136 N.C. App. at 499, 524 S.E.2d at 595 (citations omitted). However, JNOV is proper "when the evidence is insufficient as a matter of law to support the verdict." *Beal v. K. H. Stephenson Supply Co., Inc.*, 36 N.C. App. 505, 507, 244 S.E.2d 463, 465 (1978). Critically, we are concerned only with the evidence's relevancy and probative value, as opposed to its admissibility, on review of JNOV. *See, e.g., Bishop v. Roanoke Chowan Hosp., Inc.*, 31 N.C. App. 383, 385, 229 S.E.2d 313, 314 (1976) ("All *relevant* evidence admitted by the trial court, whether competent or not, must be accorded its full *probative force* in determining the correctness of its ruling upon a motion for [JNOV.]" (citation and quotation marks omitted) (emphasis added)).

B. Public Trust Doctrine

The public trust doctrine, established by the common law of this State, involves two concepts: (1) public trust lands, which are "certain land[s] associated with bodies of water [and] held in trust by the State for the benefit of the public[;]" and (2) public trust rights, which are "those rights held in trust by the State for the use and benefit of the people of the State in common." *Fabrikant v. Currituck Cty.*, 174 N.C. App. 30, 41, 621 S.E.2d 19, 27 (citation and internal quotation marks omitted) (2005); *see also Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 88, 780 S.E.2d 187, 194 (2015) ("This Court has recognized both public trust lands and public trust *rights* as codified by our General Assembly[.]" (emphasis added)). Public trust lands include "the watercourses of the State and . . . the State's ocean and estuarine beaches[,]" *Fabrikant*, 174 N.C. App. at 41, 621 S.E.2d at 27 (citation and internal quotation marks omitted), regardless of whether they are publicly or privately owned. *Nies*, 244 N.C. App. at 93, 780 S.E.2d at 196–97. Public trust rights attach to the privately and publicly owned lands between the ocean waters and the most seaward of the following: the first line of stable natural vegetation, the toe of the frontal dune, or "any other reliable indicator of the mean regular extent of the storm tide." *Id.* at 93, 780 S.E.2d at 197.

Public trust rights "include, but are not limited to, the right to navigate, swim, hunt, fish, and enjoy all recreational activities" offered by public trust lands, as well as "the right to freely use and enjoy the State's ocean and estuarine beaches and public access to the beaches." N.C. Gen. Stat. § 1-45.1 (2017); *see also Nies*, 244 N.C. App. at 88, 780 S.E.2d at 194. The State is tasked with protecting these rights pursuant to the North Carolina Constitution:

> It shall be the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry, and to this end it shall be a proper function of the State of North Carolina and its political subdivisions to acquire and preserve park, recreational, and scenic areas, to control and limit the pollution of our air and water, to control excessive noise, and in every other appropriate way to preserve as a part of the common heritage of this State its forests, wetlands, estuaries, beaches, historical sites, openlands, and places of beauty.

N.C. Const. art. XIV, § 5.

Towns "may, by ordinance, define, prohibit, regulate, or abate acts, omissions, or conditions upon the State's ocean beaches and prevent or

abate any unreasonable restriction of the public's rights to use the State's ocean beaches." N.C. Gen. Stat. § 160A-205(a) (2017).[6] Thus, municipalities may "limit[ ] the public's right to use the public trust dry sand beaches . . . through appropriate use of the State's police power[,]" *Nies*, 244 N.C. App. at 93, 780 S.E.2d at 197, enforce ordinances regulating the public trust through injunction and abatement actions, N.C. Gen. Stat. § 160A-175 (2017), and may assert the public trust doctrine as a defense to suits challenging such non-compensable regulatory exercises as Fifth Amendment takings requiring compensation. *Nies*, 244 N.C. App. at 94, 780 S.E.2d at 197; *cf. Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 136-37, 693 S.E.2d 208, 213 (2010) (allowing a private defendant to assert the public trust doctrine as a defense to an action for trespass).

The legislature also has delegated the State's eminent domain powers to municipalities and counties for the purposes of:

> [e]ngaging in or participating with other governmental entities in acquiring, constructing, reconstructing, extending, or otherwise building or improving beach erosion control or flood and hurricane protection works, including, but not limited to, the acquisition of any property that may be required as a source for beach renourishment.

N.C. Gen. Stat. § 40A-3(b1)(10) (2017).

C. Application to This Case

[1] We now consider whether public trust rights render the taking here non-compensable and hold, on the procedural facts before us, that they do not.

The trial court concluded in the Revised 40A-47 Order that the Easement Area, though the private property of the Richardsons, was public trust land subject to public trust rights.[7] But the Town did not

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6. This same authority has also been delegated to the State's counties. N.C. Gen. Stat. § 153A-145.3 (2017).

7. The Richardsons conceded in their briefs that public trust rights attached to the Easement Area. Despite this concession, the Richardsons argue that the Revised 40A-47 Order was "erroneous[,]" and that the original 40A-47 Order, decreeing the Easement Area free of public trust rights, is the law of the case. Rule 54(b) of the North Carolina Rules of Civil Procedure states that "in the absence of entry of . . . a final judgment, any order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." N.C. Gen. Stat. § 1A-1, Rule 54(b) (2017). Because orders entered under Section 40A-47 are interlocutory rather than final judgments, *City of Winston-Salem v. Slate*, 185 N.C. App. 33, 37, 647 S.E.2d 643, 646 (2007), Judge Trawick, who entered the earlier 40A-47 Order, was permitted to

argue at trial that the public trust doctrine rendered the taking non-compensable. The trial court erred in entering JNOV eight months after the verdict on a basis not argued during the trial.

A motion for JNOV may be granted only "in accordance with [the movant's] motion for a directed verdict." N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2017); *see also Couch v. Private Diagnostic Clinic*, 133 N.C. App. 93, 100, 515 S.E.2d 30, 36 (1999) ("A motion for JNOV is treated as a renewal of the motion for directed verdict. Thus, a movant cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion." (internal citations omitted)). Because the trial court's entry of JNOV grants the Town's motion for JNOV "pursuant to Rule 50(b)[,]" it is proper only if it accords with the Town's earlier motion for directed verdict.

The Town's motion for directed verdict and motions *in limine* presented no argument that it already possessed the Easement Rights through the public trust doctrine. Nor did the Town argue that the public trust doctrine rendered the taking non-compensable. The motions sought only to limit expert testimony that would deny the effect of public trust rights on the compensable value of the Richardsons' property and, specifically, the Easement Area.

During the hearing on the motions *in limine*, when asked by the trial court why the public trust did not eliminate the need for condemnation, the Town expressly argued that the Easement Rights were *not* public trust rights and the condemnation was still necessary:

> [THE TOWN]: . . . The public trust rights [are] not about what we took, it's about the value of what we took.
>
> . . .
>
> THE COURT: Now let me ask you, then why did you have to do a taking?
>
> [THE TOWN]: Because we wanted to put trucks and pipes and wanted to put sand on the property. That is what is in the complaint. . . . Those are the rights we took. *Public*

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enter the Revised 40A-47 Order. The Revised 40A-47 Order was also certified for immediate appeal pursuant to Rule 54(b), and neither party timely noticed an appeal therefrom; as a result, they may not contest its contents months after its entry. *See, e.g.*, *Guthrie v. Conroy*, 152 N.C. App. 15, 19, 567 S.E.2d 403, 407 (2002) (noting that appeal of an order certified pursuant to Rule 54(b) must be immediately appealed within the time proscribed by N.C. R. App. P. 3(c)(1)). We leave the Revised 40A-47 Order undisturbed in resolving this appeal.

> *trust rights doesn't go to the rights we took.* It goes to the value of what we took. It limits the value because some of their rights and their bundle of rights weren't there in the first place. . . . [A]ny time [the Richardsons] say it's got something to do with the rights we took, it has nothing to do with the rights we took. It has to do with the rights that were there to take.
>
> . . .
>
> [W]e don't want a ruling of this Court to preclude people from being able to walk on this beach. And we also don't want their perspective to keep us from showing that the value of this area was reduced by people having the ability to walk on the beach. It may or may not have been reduced by much and that is what we want. We want the ability to be able to say that people can walk on the beach in this easement area.

(emphasis added). The Town's motions for directed verdict at trial were likewise devoid of any argument that the Town already possessed Easement Rights or that the public trust doctrine precluded recovery, as they were simply renewals of the earlier motions *in limine* regarding expert testimony offered by the Richardsons, and the Town's motion for JNOV conceded that the taking was compensable and expressly requested entry of a judgment in the Richardsons' favor in the amount of $330.

During the JNOV hearing, Judge Trawick, unprompted by either party, advanced the question of whether the Town already possessed the Easement Rights through the public trust and requested additional briefing on the issue at the hearing on the motion for JNOV. Judge Trawick ultimately granted the JNOV motion based on the conclusion that public trust rights precluded an award of compensation to the Richardsons.

But a trial court may only enter a *sua sponte* order on JNOV within ten days of entry of judgment; the JNOV here was entered months after final judgment. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1); *see also Jones v. S. Gen. Ins. Co.*, 222 N.C. App. 435, 436–37, 731 S.E.2d 508, 509 (2012) (reversing a trial judge's *sua sponte* order for new trial entered more than ten days after judgment as "not properly entered" and "not permissible"). Further, such a *sua sponte* order may only "grant, deny, or redeny a motion for directed verdict made at the close of all the evidence . . . ." N.C. Gen. Stat. § 1A-1, Rule 50(b)(1). So, eight months after final judgment, the trial court could only enter JNOV under Rule 50(b)(1)

consistent with those arguments raised by the Town in its timely filed motions for directed verdict and JNOV. As a result, we hold that the trial court erred in concluding on JNOV that the Town already possessed the Easement Rights and that the public trust doctrine rendered the taking non-compensable because neither argument was raised at directed verdict or JNOV.

Our holding finds further support in precedent interpreting procedural condemnation statutes and related caselaw. Section 40A-47 of our General Statutes provides that the trial court is required to determine "any and all issues *raised by the pleadings* other than the issue of compensation, including . . . title to the land, interest taken, and area taken." N.C. Gen. Stat. § 40A-47 (2017) (emphasis added). This Court has read virtually identical language in highway condemnation statutes to mean that "at a minimum, a party must argue all issues of which it is aware, or reasonably should be aware, in [such] a hearing." *City of Wilson v. The Batten Family, L.L.C.*, 226 N.C. App. 434, 439, 740 S.E.2d 487, 491 (2013) (interpreting language almost identical to Section 40A-47 in Section 136-108). Also, in *In re Simmons*, 5 N.C. App. 81, 167 S.E.2d 857 (1969), this Court reviewed a host of treatises and decisions from other jurisdictions concerning the condemnor's admission of ownership in a condemnation action, and quoted with approval the following:

> [T]he petitioner is estopped from showing that title is in the public or in itself, by dedication prescription or otherwise, if it has alleged in its petition that the respondent is the owner. . . . The institution of the [condemnation] proceeding admits the ownership. The condemnor cannot claim the beneficial ownership of the land and at the same time assert that the condemnee claims all or some part of that interest[.] . . . A party cannot proceed to condemn land as the property of another and then in that same proceeding set up a paramount right or title in itself either by prescription, dedication or otherwise.

5 N.C. App. at 86–87, 167 S.E.2d at 861 (internal citations and quotation marks omitted).

Here, the Town alleged in its complaint that the Richardsons, and not the Town, possessed the Easement Rights; the Richardsons' answer admits such possession. Assuming *arguendo* that the Town could still request a determination of the issue by the trial court when no issue as to the Town's pre-existing possession of the rights was "raised by the pleadings," N.C. Gen. Stat. § 40A-47, it was required to assert such an

argument in the hearing provided by that statute. *City of Wilson*, 226 N.C. App. at 439, 740 S.E.2d at 491.

In the initial hearing to determine all issues other than damages pursuant to Section 40A-47, counsel for the Town stated that "our theory of the taking here, [is] that the Town doesn't have the right to place the sand and do the work for this project without acquiring the easement rights we have condemned in this case." The hearing continued:

> [THE TOWN]: We're talking about the rights—*clearly they have the right to exclude the contract which—but for our acquisition of the easement rights.*
>
> . . .
>
> THE COURT: . . . You can't file a declaration for taking and then ask me to say that you took less than what the declaration says.
>
> [THE TOWN]: *I completely agree.*

(emphasis added). As recounted *supra*, the Town maintained that position through the hearing on its motions *in limine* even when alerted to the question by the trial court. Indeed, that was the Town's apparent position through its motions for directed verdict, final judgment, and its motion for JNOV. On appeal from a post-judgment order, the Town's argument comes too late.

Finally, although orders entered following an "all other issues" hearing are interlocutory, errors pertaining to "vital preliminary issues" determining what land is being condemned and "any question[s] as to its title" must be immediately appealed. *N.C. State Highway Comm'n v. Nuckles*, 271 N.C. 1, 14, 155 S.E.2d 772, 784 (1967); *see also Dep't of Transp. v. Rowe*, 351 N.C. 172, 176, 521 S.E.2d 707, 709 (1999) (limiting the immediate appeal rule in *Nuckles* to those two questions); *but see Town of Apex v. Whitehurst*, 213 N.C. App. 579, 583–85, 712 S.E.2d 898, 901–02 (2011) (holding that whether condemnation was for a public purpose, though not an issue of title or identification of land, was nonetheless a vital issue requiring immediate appeal, as it was necessary to determine whether a lawful taking had occurred at all).

The Town's argument that it already possessed the Easement Rights under the public trust doctrine raises an issue of vital importance concerning a question of title: whether the Richardsons' title included the rights the Town sought to take from them through condemnation. Because the Revised 40A-47 Order decreed that the Easement Rights

were taken by the Town through condemnation, the Town was required to assert any argument to the contrary by appeal within 30 days of the order's entry pursuant to N.C. R. App. P. 3(c)(1). *See Nuckles*, 271 N.C. at 14, 155 S.E.2d at 784; *Rowe*, 351 N.C. at 176, 521 S.E.2d at 709; *City of Wilson*, 226 N.C. App. at 440, 740 S.E.2d at 491; *Whitehurst*, 213 N.C. App. at 585, 712 S.E.2d at 902. This it failed to do, and we dismiss those arguments.[8]

D. Sufficiency of the Evidence

[2] Having resolved whether the taking in this case was compensable, we consider whether the Richardsons presented evidence sufficient as a matter of law to support a jury verdict of $60,000 for the fair market value of the Easement. We hold that they did.

Section 40A-64(b) provides:

> If there is a taking of less than the entire tract, the measure of compensation is the greater of either (i) the amount by which the fair market value of the entire tract immediately before the taking exceeds the fair market value of the remainder immediately after the taking; or (ii) the fair market value of the property taken.

N.C. Gen. Stat. § 40A-64(b) (2017). Valuation under the first subpart, Section 40A-64(b)(i), is commonly referred to as the "before and after method[,]" *Town of Midland v. Wayne*, 368 N.C. 55, 63, 773 S.E.2d 301, 307 n. 6 (2015), while the second method, per the plain language of the statute, is simply a fair market valuation of the discrete portion of property taken. N.C. Gen. Stat. § 40A-64(b)(ii). Thus, to measure the proper award to the Richardsons, the jury was required to: (1) calculate a value employing the "before and after method;" (2) calculate the fair market value of the Easement taken by the Town; and (3) award the Richardsons the greater of those two values.

Because the jury calculated the "before and after" measure of value to be zero and the Richardsons request reinstatement of the final

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8. Though we hold that the Town is estopped from advancing the argument that it already possessed the Easement Rights pursuant to the public trust doctrine in this action, nothing in this opinion should be read to preclude condemnors in other actions from asserting such an argument prior to a 40A-47 hearing, timely and appropriately amending their complaints and pleadings if able, or otherwise raising the issue when proper before the trial court. Nor should this opinion be read to preclude a trial court from amending its 40A-47 order pursuant to Rule 54(b) of our Rules of Civil Procedure prior to final judgment, or under any other available authority, when doing so would not run afoul of the

judgment on the jury verdict, our review concerns only the jury's calculation of the market value of the Easement itself.

While the statute does not define "fair market value," our Supreme Court has described it as follows:

> [T]he well established rule is that in determining fair market value the essential inquiry is "what is the property worth in the market, viewed not merely with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for all valuable uses?"

State v. Johnson, 282 N.C. 1, 14, 191 S.E.2d 641, 651 (1972) (quoting *Barnes v. N.C. State Highway Comm'n*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) (alteration in original)). Stated in other terms, "the fair market value is 'the highest market price [property] would bring for its most advantageous uses [at the time of taking] and in the foreseeable future.' " *In re Appeal of Parsons*, 123 N.C. App. 32, 41, 472 S.E.2d 182, 188 (1996) (quoting *United States v. Cunningham*, 166 F.Supp. 76, 78 (E.D.N.C. 1958), *rev'd on other grounds*, 270 F.2d 545 (4th Cir. 1959), *cert. denied*, 362 U.S. 989, 4 L. Ed. 2d 1022, (1960)). In calculating that value, "[a]ll factors pertinent to a determination of what a buyer, willing to buy but not under compulsion to do so, would pay and what a seller, willing to sell but not under compulsion to do so, would take for the property must be considered." *City of Charlotte v. Charlotte Park & Recreation Comm'n*, 278 N.C. 26, 34, 178 S.E.2d 601, 606 (1971).

Evidence of fair market value may be introduced through, among other means, the expert opinions of appraisers or the lay testimony of the landowner. *Dep't. of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006). "Methods of appraisal acceptable in determining fair market value include: (1) comparable sales, (2) capitalization of income, and (3) cost. While the comparable sales method is the preferred approach, the next best method is capitalization of income when no comparable sales data are available." *Id.* at 13, 637 S.E.2d at 894 n. 5 (internal citations omitted). That said, "our courts have recognized that 'expert real estate appraisers should be given latitude in determining the value of property' in eminent domain cases[.]" *City of Charlotte v. Combs*, 216 N.C. App. 258, 263, 719 S.E.2d 59, 63 (2011) (quoting *Duke*

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prohibition against superior court judges modifying, overruling, or changing another superior court judge's ruling. *See, e.g.*, *Bruggeman v. Meditrust Co., LLC*, 165 N.C. App. 790, 795, 600 S.E.2d 507, 510-11 (2004) (detailing the rule prohibiting superior court judges from altering one another's orders and exceptions thereto).

Power Co. v. Mom 'n' Pops Ham House, Inc., 43 N.C. App. 308, 312, 258 S.E.2d 815, 819 (1979)).

Here, the jury heard evidence concerning the "before and after method" valuation by the Richardsons' appraisers, who employed the sales comparison and cost approaches. The jury ultimately found this value to be zero. By contrast, it found the fair market value of the Easement taken to be $60,000 and awarded the Richardsons that amount as the greater of the found values. The Town contends that verdict is unsupported by legally sufficient evidence. We disagree.

Mr. Bourne, an expert witness for the Richardsons, estimated the Easement's value to be $70,000 by calculating the difference in value between properties that were oceanfront, in other words, those with property lines extending to the mean high water mark, and those that were merely beachfront, in other words, those with property lines abutting the beach but stopping short of the mean high water mark. This calculation, however, is derived solely from the beach nourishment project's impacts and is outside the statutory scope of a taking's compensable fair market value.

"The value of the property taken . . . does not include an increase or decrease in value before the date of valuation that is caused by (i) the proposed improvement or project for which the property is taken[.]" N.C. Gen. Stat. § 40A-65 (2017). The fair market value of the Easement, as a discrete value under Section 40A-64(b)(ii), cannot be derived from factors resulting from the Town's beach nourishment project under Section 40A-65.[9] Mr. Bourne's $70,000 valuation, statutorily excluded from the fair market value of the Easement, is therefore neither relevant to nor probative of the issue, so this evidence does not support the jury's award on this question. *See*, *e.g.*, *Asfar*, 127 N.C. App. at 504, 490 S.E.2d at 600 (recognizing that only substantial, *i.e.* relevant, evidence is considered on JNOV).

Our holding in this context accords with statutory and caselaw governing condemnations by the North Carolina Department of Transportation. Compensation for a partial taking for highway condemnations is measured through application of the "before and after method." N.C. Gen. Stat. § 136-112(1) (2017). If an entire tract is condemned, the condemnee is entitled to "the fair market value of the property at the time of taking." N.C. Gen. Stat. § 136-112(2). Because the damages statute applicable to this case, Section 40A-64(b), requires the calculation

9. The Town asserted this argument in its directed verdict motion.

of both measures of damages contained in Section 136-112, *i.e.*, the fair market value of the discrete taking and the "before and after method" value, reference to our caselaw on damages in highway condemnations is instructive. *See Town of Midland*, 368 N.C. at 63, 773 S.E.2d at 307 (construing Section 40A-64(b) through reference to Section 136-112 and related caselaw).

In applying Section 136-112, this Court has held that "[t]he market value of the condemned property is to be determined on the basis of the conditions existing *at the time of the taking*." *Dep't of Transp. v. Mahaffey*, 137 N.C. App. 511, 518, 528 S.E.2d 381, 385 (2000) (emphasis added) (citation omitted). And, while it is true that the post-condemnation impacts of a partial taking may be considered in arriving at a fair market value under that statute, this applies only "to the fair market value *of the remainder* immediately after the taking . . . ." *N.C. State Highway Comm'n v. Gasperson*, 268 N.C. 453, 455, 150 S.E.2d 860, 862 (1966) (emphasis added) (citation omitted). Assuming *arguendo* that Mr. Bourne's $70,000 valuation, derived from post-taking impacts, was relevant to the issues of damages in this case, it could only be relevant to the difference in fair market value calculation pursuant to Section 40A-64(b)(i) and not the discrete fair market value of the Easement at the time of taking under Section 40A-64(b)(ii).

We next consider Mr. Gruelle's testimony and hold that, without regard to its admissibility, it is sufficient as a matter of law to support the jury's verdict.

"[T]he measure of damages for a temporary taking is the 'rental value of the land actually occupied' by the condemnor." *Combs*, 216 N.C. App. at 261, 719 S.E.2d at 62 (quoting *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 170, 43 S.E. 632, 633 (1903)); *see also United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) ("[W]hen the Government takes property only for a period of years, . . . it essentially takes a leasehold in the property. Thus, the value of the taking is what rental the marketplace would have yielded for the property taken."). The United States Supreme Court's discussion concerning the determination of the value of a temporary taking is instructive:

> The value compensable under the Fifth Amendment, therefore, is only that value which is capable of transfer from owner to owner and thus of exchange for some equivalent. Its measure is the amount of that equivalent. . . . But when the property is of a kind seldom exchanged, it

> has no 'market price,' and then recourse must be had to other means of ascertaining value, including even value to the owner as indicative of value to other potential owners enjoying the same rights. These considerations have special relevance where 'property' is 'taken' not in fee but for an indeterminate period.
>
> . . .
>
> [D]etermination of the value of temporary occupancy can be approached only on the supposition that free bargaining between petitioner and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations. . . . [T]he proper measure of compensation is the rental that probably could have been obtained . . . .

Kimball Laundry Co. v. United States, 338 U.S. 1, 5–7, 93 L.Ed. 1765, 1772–73 (1949). Because temporary easements are valued as rentals rather than sales under North Carolina law, *Combs*, 216 N.C. App. at 261, 719 S.E.2d at 62, the fair market value of the Easement taken by the Town is the "fair market rental value for the period of time the property is taken[.]" 4 *Nichols on Eminent Domain* § 12E.01[4] (rev.3d ed. 2006) (citing *Leigh*, 132 N.C. at 170, 43 S.E. at 633).

As recounted *supra*, Mr. Gruelle testified that the Easement was valued at $190,000. He reached this value by determining the best and highest use of the entire lot, calculating a value per square foot based on that use, and applying that value to the square footage of the Easement Area. He then reduced that total value by ten percent, reasoning that the Town's use of the Easement Area "represented 90 percent of the value of the easement area." Mr. Gruelle explained that this valuation "look[s] at [the Easement] as the land rental because that's what it is[,]" and testified that his number was "consistent with the way the market looks at ground lease or renting, use of the land for a period of time." In seeking to arrive at the fair rental value of the Easement, Mr. Gruelle provided a scintilla of evidence relevant to that issue. "A scintilla of evidence is defined as very slight evidence," *Everhart v. O'Charley's Inc.*, 200 N.C. App. 142, 149, 683 S.E.2d 728, 735 (2009) (citation and quotation marks omitted), and Mr. Gruelle's $190,000 valuation provided, at a minimum, very slight evidence sufficient to support the jury's finding that the Easement's fair market value was $60,000.

The Town argues in support of its cross-appeal that Mr. Gruelle's testimony is incompetent. It further contends that such an argument is

properly asserted under our Rules of Appellate Procedure as "an alternative basis in law for supporting the [JNOV.]" N.C. R. App. P. 28(c). This is not so; in appellate review of JNOV, "[a]ll relevant evidence admitted by the trial court, whether competent or not, must be accorded its full probative force in determining the correctness of its ruling . . . . *Bishop v. Roanoke Chowan Hosp., Inc.*, 31 N.C. App. 383, 385, 229 S.E.2d 313, 314 (1976) (citation and quotation marks omitted); *cf. Huff v. Thornton*, 23 N.C. App. 388, 391, 209 S.E.2d 401, 403 (1974) ("We hold . . . that an assignment of error directed to the trial court's ruling on a motion for directed verdict . . . *does not present for review rulings on the admission or exclusion of evidence*." (emphasis added)). This limitation on our review is designed to avoid unfairness, as "the admission of such evidence may have caused the [Richardsons] to omit competent evidence of the same import." *Huff*, 23 N.C. App. at 390, 209 S.E.2d at 403. We therefore do not reach the issue as raised in the Town's appellee brief under Rule 28(c). Mr. Gruelle's testimony was admitted—albeit in error, as we hold *infra* Part II.E.—and because it provides a scintilla of evidence to support the jury's verdict, we reverse the trial court's entry of JNOV.

E. The Town's Cross-Appeal

[3] Beyond its appellee brief, the Town also cross-appeals the denial of its motions *in limine* on the grounds that Mr. Gruelle's testimony is incompetent. The Richardsons contend that the Town is without standing to appeal, as it is not a "party aggrieved" within the meaning of N.C. Gen. Stat. § 1-271 (2017). Seeing merit in the Town's cross-appeal and assuming *arguendo* that the Town does not otherwise have the right to appeal the interlocutory orders, we elect to treat the Town's cross-appeal as a petition for writ of *certiorari* and grant it in our discretion. N.C. R. App. P. 21(a)(1) (2017) ("The writ of certiorari may be issued . . . when no right of appeal from an interlocutory order exists . . . .").[10]

The Town argues that Mr. Gruelle's testimony was inadmissible because it failed to meet the criteria of Rule 702(a) of the North Carolina

10. The Richardsons' brief on cross-appeal contains a purported "motion for sanctions." However, "[m]otions to an appellate court may not be made in a brief" and must instead be made in accordance with the applicable Rules of Appellate Procedure. *Horton v. New South Ins. Co.*, 122 N.C. App. 265, 268, 468 S.E.2d 856, 858 (1996); *see also Johnson v. Schultz*, 195 N.C. App. 161, 164, 671 S.E.2d 559, 562 (2009) (declining to address a motion presented in a brief for noncompliance with N.C. R. App. P. 25 and 37). We decline to consider the Richardsons' "motion," particularly in light of the Town's meritorious argument.

Rules of Evidence.[11] A trial court's ruling on the admissibility of expert opinion is subject to review only for an abuse of discretion. *State v. McGrady*, 368 N.C. 880, 893, 787 S.E.2d 1, 11 (2016). *McGrady* adopted the standard of admissibility applicable to expert testimony pursuant to Rule 702(a) as set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993), and clarified in *General Elec. v. Joiner*, 522 U.S. 136, 139 L.Ed.2d 508 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238 (1999). The North Carolina Supreme Court in *McGrady* noted that this admissibility standard "is not new to North Carolina law[,]" 368 N.C. at 892, 787 S.E.2d at 10, and that it did not overrule existing caselaw "as long as those precedents do not conflict with the rule's . . . text or with *Daubert*, *Joiner*, or *Kumho*." 368 N.C. at 888, 78 S.E.2d at 8. The principal change in the standard post-*McGrady* regarding reliability is a heightened "level of rigor that our courts must use to scrutinize expert testimony before admitting it." *Id.* at 892, 787 S.E.2d at 10 (citations omitted).

The Town directs us to this Court's pre-*McGrady* decision in *City of Charlotte v. Combs*, 216 N.C. App. 258, 719 S.E.2d 59 (2011), which reversed a judgment on a jury verdict in a temporary construction easement condemnation action and ordered a new trial on the basis that the condemnor's expert appraiser's methodology was not sufficiently reliable to be admissible. 216 N.C. App. at 266–67, 719 S.E.2d at 65–66. That decision, in turn, relied on the North Carolina Supreme Court's decision in *Haywood*, which affirmed a directed verdict in favor of the condemnor after holding that the condemnee's experts' opinions were unreliable. 360 N.C. at 352–53, 626 S.E.2d at 647. In *Haywood*, experts testified that certain percentages used in arriving at damages were based on "feelings and personal opinions," which the Supreme Court

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11. The Richardsons rightly point out that, when a motion *in limine* seeking to exclude certain evidence has been denied, the movant must object to the admission of that evidence at trial to preserve the matter for appeal. *State v. Patterson*, 194 N.C. App. 608, 616, 671 S.E.2d 357, 362 (2009), *overruled on separate grounds*, *State v. Campbell*, 368 N.C. 83, 772 S.E.2d 440 (2015). The Town did so here. The trial transcript discloses six instances in which Mr. Gruelle testified on direct to the $190,000 value of the Easement; each one was followed by an objection from the Town's attorneys. While it is true that Mr. Gruelle discussed the number as part of lengthy answers that were uninterrupted by either party's counsel, the trial court acknowledged that the nature of the Richardsons' questioning and Mr. Gruelle's answers made it difficult for the Town to know when to object, and the Town did lodge objections at the conclusion of each answer from Mr. Gruelle. Finally, the Town's counsel stated on the record his intention to object to the opinions given by Mr. Gruelle. On the transcript before us, we hold that the Town preserved the issue for appellate review.

concluded were "unsupported by objective criteria," and amounted to "hunches and speculation." *Id.* at 352, 626 S.E.2d at 647. As a result, our Supreme Court held that the experts' opinions were not based on "any method used to arrive at [their] figures," and therefore were not reliable. *Id.* at 352, 626 S.E.2d at 647. *Combs* reversed a judgment based on a jury verdict because the condemnor's expert "based his valuation of the [easement] on his experience that such temporary takings do not affect the remainder of the condemnee's property, rather than an actual assessment that the [condemnee's] property outside of the [easement] was not affected[.]" 216 N.C. App. at 266–67, 719 S.E.2d at 65. We therefore held that the appraiser's "method of proof lacked sufficient reliability." *Id.* at 266–67, 719 S.E.2d at 65. As recounted *supra*, Mr. Gruelle arrived at his $190,000 value for the Easement by calculating a dollar-per-square-foot value for the property, applying that value to the square footage of the Easement Area, and reducing that total amount by ten percent. Mr. Gruelle then opined that the Easement "represented 90 percent of the value of [the Easement Area]." When asked how he arrived at the 90 percent number, he stated that it was "based on the broad nature of those rights, [which] in [his] opinion . . . represented 90 percent of the value of the easement area."[12] He then "check[ed] . . . if that 90 percent was reasonable" by evaluating the taking as a temporary construction easement or a ground lease.

Rather than attempting to compare the Easement to actual temporary construction easements and ground leases, and even after recognizing that "there are many indicators based on the value of the property" in calculating the value of such property rights, Mr. Gruelle assumed that the "typical" temporary construction easement and ground lease is valued at "a ten percent return to the land for the duration[.]" That formulation, applied to the ten-year duration of the Easement, resulted in a complete taking of 100 percent of the Easement Area's value. After conceding that his calculation was equivalent to a total taking in fee of the Easement Area, Mr. Gruelle decided to depart from that result as he did not "think it would exceed the value of the fee[,]" and instead asserted that 90 percent was the correct value because "it would come close to

12. Mr. Gruelle's written report provides no indication of how he arrived at the 90 percent number; rather it simply states that "the property owners will lose control of approximately 24% of their whole property and 100% of their beach property. As such, the percentage of the rights acquired are concluded to represent 90% of the fee value of the easement area."

the fee value . . . because it was total . . . utilization of that property for 10 years."[13]

Mr. Bourne, who was retained by the Richardsons in part to review and support Mr. Gruelle's appraisal, testified at deposition that Mr. Gruelle's assumption that the typical ground lease or temporary construction easement was valued at a ten-percent-per-year return was unfounded. Specifically, Mr. Bourne stated that: (1) ground leases and temporary construction easements are different; (2) "[t]hey all have different terms, so it's difficult to generalize[;]" (3) he would not assume a return of ten percent per year, but instead "would look at some doc — yes, some information[;]" and (4) there was no "rule of thumb" that ground leases are valued at a ten-percent-per-year return.

As in *Haywood*, Mr. Gruelle did not articulate a method for reaching his opinion that the easement was valued at $190,000. *Haywood*, 360 N.C. at 352, 626 S.E.2d at 647; *see also Combs*, 216 N.C. App. at 266–67, 719 S.E.2d at 65. Testimony based solely on a conclusory opinion does not present *any* method to which a trial judge can apply the three-part reliability test from *Daubert* under Rule 702, and admitting such evidence is an abuse of discretion. *Combs*, 216 N.C. App. at 266–67, 719 S.E.2d at 65–66.[14]

To the extent that Mr. Gruelle attempted to verify his 90 percent opinion by treating the Easement as a "typical" ground lease or temporary construction easement, his testimony "seemed to deny the sufficiency of his own . . . methodology[,]" *Kumho*, 526 U.S. at 155, 143 L.Ed.2d at 255, as he recognized that such a calculation would value the Easement at 100 percent of its fee value, not his preferred value of 90 percent. Rather than accept this illogic, he "made [an] adjustment" back down to his 90 percent number, but did not explain why an adjustment

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13. Mr. Gruelle's deposition testimony largely comports with his testimony at trial, with the added details at deposition that: (1) he did not discuss the valuation of beach nourishment easements with appraisers and real estate agents local to the Nags Head area in preparing his written report; and (2) he could not further "br[eak] [the 90 percent number] out" to explain it, and instead explained that he just "looked at it as a ten percent return on the land, . . . like a temporary construction easement."

14. We note that the trial court's JNOV order implicitly acknowledges that Mr. Gruelle's testimony was inadmissible as to the fair market value of the Easement, as it concluded "[t]he only competent expert testimony introduced at trial on the first preliminary question regarding market value of the temporary beach nourishment easement was the $330.00 market value testified to by the Town's expert witness Michael N. Moody, MAI." *See Blair Invs., LLC v. Roanoke Rapids City Council*, 231 N.C. App. 318, 321, 752 S.E.2d 524, 527 (2013) ("[C]ompetent evidence is generally defined as synonymous with admissible evidence[.]") (citation omitted).

by ten percent, and not some other percentage, was appropriate. Finally, Mr. Bourne demonstrated that Mr. Gruelle's method was unreliable, testifying at deposition that there is no "typical" ten percent return per year for ground leases or construction easements, that every such valuation was different, and that engaging in such a valuation would require a review of external data. Mr. Gruelle's unfounded assumption that the "typical" ground lease or temporary construction easement carried a ten percent return per year was simply "based on hunches and speculation . . . lack[ing] sufficient reliability." *Haywood*, 360 N.C. at 352, 626 S.E.2d at 647. Such "conjecture, speculation, or surmise is not allowed by the law to be a basis of proof in respect of damages or compensation" in condemnation cases, *Raleigh, C. & S. Ry. Co. v. Mecklenburg Mfg. Co.*, 169 N.C. 156, 160, 85 S.E. 390, 392 (1915).[15] Therefore, Mr. Gruelle's testimony fails the requirement of Rule 702 that "[t]he testimony [must be] the product of reliable principles and methods." N.C. R. Evid. 702(a)(2) (2015). The trial court abused its discretion in admitting this testimony, and remand for a new trial is appropriate. *Combs*, 216 N.C. App. at 267, 719 S.E.2d at 66 (remanding for new trial in light of improperly admitted expert testimony as to just compensation); *see also M. M. Fowler*, 361 N.C. at 15, 637 S.E.2d at 895 (remanding for new trial on damages in condemnation action where expert testimony was erroneously admitted).

III. CONCLUSION

The Town is not entitled to JNOV on the ground that it already possessed the Easement Rights through the public trust doctrine, nor on the ground that the doctrine otherwise precludes all recovery, because these arguments were not raised until months after final judgment. Further, the Town is estopped from asserting that no condemnation occurred and that it already possessed these rights because: (1) it admitted it did not possess them in its complaint; (2) it did not raise the issue at the "all other issues" hearing under Section 40A-47; (3) it expressly disavowed reliance on the public trust doctrine at that hearing and at its hearing on its motions *in limine*; and (4) it did not raise the issue at trial, in its motions for directed verdict, or in its motion for JNOV. Further, the Richardsons introduced evidence sufficient to support the jury verdict. We therefore reverse the entry of JNOV. We nonetheless remand for a new trial on the Town's cross-appeal, as we hold that the trial court abused its discretion in admitting Mr. Gruelle's expert testimony. At the new trial the parties may introduce additional new evidence on the issue of damages in conformity with this opinion.

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15. This opinion was reprinted in 1955 at 169 N.C. 204.

REVERSED AND REMANDED FOR NEW TRIAL.

Judge HUNTER concurs.

Judge DILLON concurs in part and dissents in part in a separate opinion.

DILLON, Judge, concurring in part and dissenting in part.

I concur in the portions of the majority opinion concerning the "public trust doctrine" contained in subsections A, B, and C of the "Discussion" section of that opinion. Indeed, the issue of whether the actions of the Town in engaging in the beach nourishment project in the public trust portion of the beach constituted a compensable taking of Defendants' property rights is not before us. The Town admitted to the taking. Rather, the only issue concerns the calculation of damages.

For the reasons stated below, I dissent from the portion of the majority's analysis contained in subsections D and E, concerning Defendants' evidence on damages. My disagreement with the majority involves a very nuanced evidentiary issue. Indeed, I agree with much of the majority's concern regarding the testimony offered by Defendants' experts. But based on my disagreement, I must conclude that a new trial is not necessary in this case; the trial court correctly granted the Town's judgment JNOV to the extent it set aside the jury's verdict of $60,000. Rather, the matter should be remanded to the trial court for the limited purpose of reducing the judgment to $330 based on the only *relevant* evidence (which came from the Town's expert) to support the value of the easement that the Town admitted to taking.

As noted by the majority, under the applicable statute, Defendants are entitled to the GREATER of (1) the diminution in the fair market value of *their entire lot* caused by the taking of the easement and (2) the fair market value of *the easement itself* that was taken. The jury determined that the diminution in value of Defendants' lot due to the taking of the easement was $0; that is, the jury determined that the value of Defendants' entire lot was not affected by the taking at all. But the jury also determined that *the easement itself* had a value of $60,000. Therefore, the jury returned a verdict of $60,000.

Following the verdict, the trial court granted the Town's JNOV motion, concluding that the only evidence concerning the value of the easement itself offered at trial was from the Town's expert, who valued the easement for $330. Indeed, experts for Defendants did make

statements during their testimony suggesting that the value of the easement itself exceeded $60,000. These statements made by Defendants' experts concerning the value of the easement itself is the subject of my disagreement with the majority.

The majority essentially holds that (1) Defendants' experts each gave an opinion of value concerning the easement itself, (2) the basis of these opinions, however, were not sufficiently reliable and, therefore, the trial court should not have allowed the opinions into evidence, (3) the portion of the verdict concerning the value of the easement itself was not otherwise supported by competent evidence. Based on this reasoning, the majority concludes that Defendants should get a new trial to have another opportunity to offer evidence concerning the value of the easement itself, essentially reasoning that since the trial court erroneously allowed Defendants' evidence, Defendants felt no need to offer *other* evidence concerning the value of the easement itself. That is, so the majority concludes, had the trial court ruled correctly and excluded the opinion of Defendants' expert concerning the value of the easement itself, Defendants may have then offered *other* evidence on the issue.

I disagree with the majority's understanding of the statements made by Defendants' experts concerning the value of the easement itself. I believe that while Defendants' experts did make such statements, they never intended these statements to amount to their expert opinion regarding the value of the easement itself. Rather, Defendants offered their testimonies for the *sole purpose* of giving their opinions of the "before" and "after" values of the entire lot; Defendants did not offer these experts for the purpose of offering evidence on the value of the easement itself, as Defendants were relying on their testimonies to show that their lot as a whole had suffered a large diminution in value. It is true that both appraisers in their testimonies did make statements concerning the value of the easement itself. However, in each case, the appraiser was simply making an *assumption* concerning the value of the easement itself to show how he derived the "after" value of the entire lot.[1]

To explain my point, consider that the *assumption* by Defendants' appraisers concerning the value of the easement itself is analogous to other *assumptions* made by appraisers in valuing property. For instance, in deriving the "before" value of Defendants' lot as a whole,

1. For example, one of Defendants' experts testified that he arrived at a large diminution in value of the lot as a whole based on a calculation containing several components, one of which was his estimate of the value of the easement itself.

one of Defendants' appraisers, Mr. Gruelle, relied upon the reported sales price of three comparable beach-front homes, a common practice by appraisers in valuing a home. Mr. Gruelle's analysis contains statements of value of these comparable homes (based on what they sold for), but these values do not represent his expert opinion regarding the value of those homes. Indeed, it is doubtful that he had first-hand knowledge of what those other homes sold for but rather relied upon hearsay (tax records or data from a multiple listing service). But the values provide data points that he relied upon to come up with his expert opinion of value of Defendants' lot itself. Though these data points would be inadmissible if they were offered to show the value of the comparable homes themselves, they are admissible under Rule 703[2] to show the data he relied upon to derive his opinion concerning the value of Defendants' lot.

In the same way, Mr. Gruelle's statement that he estimated the value of the easement portion of Defendants' lot to be $190,000 was intended to be an educated assumption he used in deriving the "after" value of Defendants' lot as a whole. Mr. Gruelle did not intend for the $190,000 estimate of the easement itself to be viewed as his expert opinion of the value of the easement itself; he certainly did not derive this valuation by comparing the easement itself to the sales of other beach strips.

The trial court did not err in allowing Defendants' experts to make statements concerning the value of the easement itself, since they were offered only for the purpose of explaining how they were deriving the "after" value of Defendants' lot as a whole. While such statements would have been inadmissible as evidence to support a conclusion of value of the easement itself, the statements were certainly admissible to show the basis of the opinions concerning the "after" value of the lot as a whole, under Rule 703.

In conclusion, the only *relevant* evidence offered concerning the value of the easement itself came from the Town's expert, who testified that its value was a mere $330. Defendants did not offer any relevant evidence concerning the value of the easement itself, nor did they ever intend to offer relevant evidence, competent or incompetent, on the value of the easement itself. Their experts merely made statements concerning the value of the easement itself to explain their opinions

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2. Rule 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the facts or data need not be admissible in evidence*." N.C. Gen. Stat. § 8C-1, Rule 703 (emphasis added).

of value of the lot as a whole. The record does not reveal how the jury came up with their $60,000 valuation of the easement itself. There was no *relevant* evidence offered to support such a verdict. Therefore, the trial court properly set aside the verdict. However, I see no need for a new trial. Defendants were not prejudiced by the trial court's evidentiary ruling. Indeed the ruling was correct under Rule 703, and Defendants never intended to offer any evidence to prove the value of the easement anyway.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 3 JULY 2018)

BAUCOM v. VLAHOS No. 17-858	Mecklenburg (01CVD22905)	Reversed and Remanded
BRANTON v. BRANTON No. 17-1207	Alexander (14CVD418) (15CVD336)	Affirmed
BRYAN v. DAILEY No. 17-788	New Hanover (11CVD822)	Affirmed
FIFE v. ETERNAL WOODWORKS, LLC No. 17-645	N.C. Industrial Commission (15-744035)	Affirmed
GRODENSKY v. McLENDON No. 17-1258-2	Durham (15CVS4722)	Affirmed in part, reversed and remanded in part.
IN RE A.M. No. 17-1257	Onslow (15JA83)	Reversed
IN RE C.S. No. 18-160	Durham (15JT37-38)	Affirmed
IN RE E.A.V. No. 17-1235	Mecklenburg (14JT693)	Affirmed
IN RE FORECLOSURE OF WORSHAM No. 17-1268	Mecklenburg (16SP2777)	Reversed and Remanded
IN RE L.S. No. 18-48	Durham (17J89-90)	Affirmed
IN RE R.W. No. 18-172	Orange (17JA41)	Affirmed
IN RE Y.T. No. 18-58	Forsyth (17J137-139)	Affirmed
KENNIHAN v. KENNIHAN No. 17-1154	Chatham (14CVD762)	Dismissed
KRAUSE v. RK MOTORS, LLC No. 17-1168	Mecklenburg (15CVS8568)	Affirmed in part; Dismissed in part.

McGUIRE v. OLSON No. 18-44	Watauga (17CVD125)	Affirmed
McNAMARA v. McNAMARA No. 17-1411	Moore (13CVD754)	Reversed and Remanded
MOCH v. A.M. PAPPAS & ASSOCS., LLC No. 17-1126	Orange (15CVS1475)	Affirmed
STATE v. BEAM No. 17-1232	Mecklenburg (16CRS19043) (16CRS205180) (16CRS205181)	No Error in Part, Dismissed in Part
STATE v. DEGAND No. 17-1026	Wake (15CRS206409)	No Error; Remanded in Part
STATE v. FULLER No. 17-495	Davidson (15CRS54724) (16CRS165)	No Error
STATE v. GRADY No. 17-731	Brunswick (13CRS56129)	No Error
STATE v. JOHNSON No. 17-634	Duplin (15CRS51856)	No Plain Error
STATE v. McKNIGHT No. 17-1240	Brunswick (15CRS51051) (16CRS18)	Affirmed
STATE v. McRAVION No. 17-1177	Lincoln (16CRS53384)	New Trial
STATE v. PETERSON No. 17-1336	Beaufort (13CRS52488)	Affirmed
STATE v. POORE No. 17-1387	Wilkes (14CRS50680) (14CRS52851) (15CRS163) (15CRS188-89) (15CRS249) (15CRS43)	Vacated and Remanded
STATE v. PORTER No. 17-738	Pender (15CRS61) (15CRS838-839)	No Error

STATE v. REYNOLDS No. 17-1239	Polk (15CRS190)	No Error
STATE v. SMITH No. 17-1378	Pender (16CRS51012)	Dismissed
STATE v. TAYLOR No. 17-730	New Hanover (13CRS9336)	No Error
STEWART v. STEEL CREEK PROP. OWNERS ASS'N No. 17-1213	Transylvania (14CVS216)	Reversed and Remanded in Part; Affirmed in Part.

HAMBY v. THURMAN TIMBER CO., LLC

[260 N.C. App. 357 (2018)]

DERRICK HAMBY, PLAINTIFF
v.
THURMAN TIMBER COMPANY, LLC, AND TIMOTHY W. THURMAN,
DEFENDANTS-APPELLEES
v.
LLOYD ALVIS CLINE, THIRD PARTY DEFENDANT-APPELLEE

No. COA17-1371

Filed 17 July 2018

1. Trespass—trespass to land—timber removal—independent contractor

In an action for trespass after timber was removed from plaintiff's land, summary judgment was properly granted to defendant timber company which had not done the actual removal. The logging company defendants hired was an independent contractor and not an agent of defendants', and therefore liable for its own wrongful torts, and there was no evidence that defendants contracted with the company to trespass on plaintiff's land.

2. Conversion—elements—wrongful conversion—timber removal—evidence

Summary judgment was properly granted for defendants on plaintiff's conversion claim in a case involving the unwanted removal of timber from plaintiff's land, because defendants presented evidence that they hired an independent contractor to cut timber from plaintiff's neighbor's land, and there was no evidence that defendants personally converted any of the timber cut from plaintiff's land or purchased the same.

3. Negligence—elements—defendant's conduct—timber removal—evidence

The trial court did not err in granting summary judgment for defendant timber company on a negligence claim where plaintiff presented no evidence that defendants personally removed timber from his land, much less negligently, that the logging company hired to remove timber from land adjacent to plaintiff's was defendants' employee, or that defendants were negligent in hiring the logging company.

4. Appeal and Error—preservation of issues—not argued on appeal—damage to real property

In plaintiff's action for damages related to the unwanted removal of timber from his property, his failure to provide any argument or

legal citation on appeal regarding the trial court's dismissal of his cause of action for damage to real property signaled his abandonment of this issue.

5. Corporations—piercing the corporate veil—not a theory of liability—not discussed on appeal where summary judgment upheld

Plaintiff's request on appeal for permission to pursue his claim for piercing the corporate veil was inapposite where the Court of Appeals upheld the trial court's grant of summary judgment in favor of defendant timber company in plaintiff's action to recover damages for the unwanted removal of timber from his property. Piercing the corporate veil is not its own theory of liability but, rather, a means to pursue claims against corporate officers or directors who would otherwise be shielded by the corporate form.

Appeal by plaintiff from order granting summary judgment entered 22 May 2017 by Judge Richard S. Gottlieb in Stokes County Superior Court. Heard in the Court of Appeals 16 May 2018.

Smith Law Group, PLLC, by Matthew L. Spencer and Steven D. Smith, for plaintiff-appellant.

Dean & Gibson, PLLC, by Michael G. Gibson and Michael R. Haigler, for defendants-appellees.

Henson & Talley, LLP, by Karen Strom Talley, for third party defendant-appellee.

ZACHARY, Judge.

Plaintiff Derrick Hamby appeals the trial court's order granting defendants' motion for summary judgment. For the reasons explained herein, we affirm.

Background

On 18 December 2015, plaintiff filed an unverified complaint in which he asserted claims for (1) trespass to land, (2) damage to real property, (3) conversion, and (4) negligence against defendants Timothy Thurman and Thurman Timber Company, LLC. Plaintiff also asked that the court pierce the corporate veil and hold defendant Timothy Thurman personally liable to plaintiff. In his complaint, plaintiff alleged that "[i]n August 2011, [p]laintiff's neighbor . . . [Loyd Alvis Cline] hired [d]efendants to

perform tree cutting on trees owned by Neighbor." He also alleged that "[d]efendants cut down eight (8) acres of trees on [p]laintiff's property ("Property") that [d]efendant did not have permission to cut."

In June 2010, Cline and Timberland Properties, Inc. entered into a "Timber Purchase and Sales Agreement" for the purchase of certain timber located on Cline's property. Subsequently, Timberland Properties, Inc. assigned the timber rights under the agreement to Thurman Timber Company, LLC. The "Assignment of Timber Deed" provided that Thurman Timber Company, LLC would have until 8 June 2011 "to remove timber from the described property."

The cutting operations on Cline's property occurred during the summer of 2011. Plaintiff had been approached by several individuals, including defendant Timothy Thurman, "to inquire if [he] would be interested in selling timber located on [his] property." In August 2011, plaintiff was informed by Mrs. Cline "that the [d]efendants had cut timber on [his] property . . . ." After inspecting his property, plaintiff "realized that approximately 8 acres of [his] land had been harvested for timber[.]" As a result, plaintiff filed this action.

On 14 February 2017, defendants moved for summary judgment on all claims, and the parties engaged in discovery. After a hearing on 15 May 2017, the trial court granted defendants' motion for summary judgment as to all of plaintiff's claims, and dismissed the claims with prejudice. Plaintiff now appeals from this order.

Standard of Review

This Court reviews *de novo* the trial court's ruling on a motion for summary judgment. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008). Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017).

Initially, " 'the burden of establishing the lack of any triable issue of fact' " rests on the moving party. *Draughon v. Harnett County Bd. of Educ.*, 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003) (quoting *Pacheco v. Rogers & Breece, Inc.*, 157 N.C. App. 445, 447, 579 S.E.2d 505, 507 (2003)). "A defendant may show he is entitled to summary judgment by '(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or

(3) showing the plaintiff cannot surmount an affirmative defense which would bar the claim.' " *Williams v. Advance Auto Parts, Inc.*, __ N.C. App. __ , __ , 795 S.E.2d 647, 651 (2017), *disc. review denied*, 369 N.C. 563, 799 S.E.2d 45 (2017) (quoting *Frank v. Funkhouser*, 169 N.C. App. 108, 113, 609 S.E.2d 788, 793 (2005)). "If [the] moving party shows that no genuine issue of material fact exists for trial, the burden shifts to the nonmovant to adduce specific facts establishing a triable issue." *Self v. Yelton*, 201 N.C. App. 653, 658-59, 688 S.E.2d 34, 38 (2010) (citing *Will of Jones*, 362 N.C. at 573, 669 S.E.2d at 576).

Discussion

On appeal, plaintiff argues that the trial court erred in granting defendants' motion for summary judgment. We address each claim individually.

I. Trespass to Land Claim

[1] Plaintiff argues that the trial court erred in granting defendants' motion for summary judgment on plaintiff's claim of trespass to land, asserting that a genuine issue of material fact existed as to whether Otis Hill Logging was an independent contractor, and that, "even if [d]efendants[']contention that they did not personally or manually remove the timber themselves is true, . . . they are liable as a joint tortfeasor . . . ." We disagree.

As our Supreme Court has stated, " 'a claim of trespass requires: (1) possession of the property by the plaintiff when the alleged trespass was committed; (2) an unauthorized entry by the defendant; and (3) damage to [the] plaintiff [from the trespass].' " *Singleton v. Haywood Elec. Mbrshp. Corp.*, 357 N.C. 623, 627, 588 S.E.2d 871, 874 (2003) (quoting *Fordham v. Eason*, 351 N.C. 151, 153, 521 S.E.2d 701, 703 (1999)).

"The general rule is that a company is not liable for the torts of an independent contractor committed in the performance of the contracted work." *Coastal Plains Utilities, Inc. v. New Hanover County*, 166 N.C. App. 333, 344, 601 S.E.2d 915, 923 (2004) (citing *Page v. Sloan*, 12 N.C. App. 433, 439, 183 S.E.2d 813, 817 (1971), *aff'd*, 281 N.C. 697, 190 S.E.2d 189 (1972)). "A contractor meeting the requirements of an independent contractor is, subject to exceptions discussed below, solely responsible for his own wrongful acts." *Horne v. Charlotte*, 41 N.C. App. 491, 493, 255 S.E.2d 290, 292 (1979) (citations omitted). In determining whether a person is an independent contractor or an employee, the following factors are examined:

> whether the person (1) is engaged in an independent business, calling, or occupation; (2) is to have the independent

> use of his special skill, knowledge, or training in the execution of the work; (3) is doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) is not subject to discharge because he adopts one method of doing the work rather than another; (5) is not in the regular employ of the other contracting party; (6) is free to use such assistants as he may think proper; (7) has full control over such assistants; and (8) selects his own time.

Coastal Plains, 166 N.C. App. at 346, 601 S.E.2d at 924 (citing *McCown v. Hines*, 353 N.C. 683, 687, 549 S.E.2d 175, 177-78 (2001)). " 'No particular one of these factors is controlling in itself, and all the factors are not required. Rather, each factor must be considered along with all other circumstances to determine whether the [person] possessed the degree of independence necessary for classification as an independent contractor.' " *Id.* (quoting *McCown*, 353 N.C. at 687, 549 S.E.2d at 178).

In the present case, plaintiff presented no evidence to the trial court that an agency relationship existed between defendants and Otis Hill Logging. As a result, the only evidence before the trial court was that of defendants, supporting their contention that Otis Hill Logging was an independent contractor and not an agent of defendants.

Plaintiff further argues that, even if Otis Hill Logging was an independent contractor, "[d]efendants are still liable in that they employed Otis Hill Logging to do an act allegedly unlawful in itself, committing a trespass on [plaintiff's] property." This argument is without merit.

It is well established that "when a contractor, whether as an independent contractor or employee, is employed to do an act allegedly unlawful in itself, such as committing a trespass, the municipality is solely liable for the resulting damages." *Horne*, 41 N.C. App. at 493-94, 255 S.E.2d at 292 (citations omitted).

Here, plaintiff bases his argument on the contention that:

> [b]y all accounts, Mr. Cline, Mr. Thurman and an employee from Otis Hill Logging met prior to any timbering . . . to observe the property boundaries, [and] a dispute about which boundaries [were] shown exists. Despite this meeting and the inclusion of the legal description of the land to be cut in the timber assignment, an overcut occurred.

However, this evidence does not support the allegation that defendants contracted with Otis Hill Logging to trespass on plaintiff's property.

Accordingly, there existed no genuine issue of material fact and defendants were entitled to summary judgment on plaintiff's claim for trespass to land.

II. Conversion Claim

[2] Next, plaintiff argues that the trial court erred in granting defendants' motion for summary judgment on plaintiff's claim for conversion. We disagree.

Under North Carolina law, "the tort of conversion is well defined as 'an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights.' " *Variety Wholesalers, Inc., v. Salem Logistics Traffic Servs., LLC*, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (quoting *Peed v. Burleson's, Inc.*, 244 N.C. 437, 439, 94 S.E.2d 351, 353 (1956) (alterations omitted)). "Two essential elements are necessary in a claim for conversion: (1) ownership in the plaintiff, and (2) a wrongful conversion by the defendant." *Bartlett Milling Co. v. Walnut Grove Auction & Realty Co.*, 192 N.C. App. 74, 86, 665 S.E.2d 478, 489 (2008) (citing *Lake Mary Ltd. P'ship. v. Johnston*, 145 N.C. App. 525, 532, 551 S.E.2d 546, 552, *disc. rev. denied*, 354 N.C. 363, 557 S.E.2d 539 (2001)).

Plaintiff asserts that the trial court erred in granting summary judgment on his claim for conversion because "[d]efendants exercised the right of ownership over timber belonging to [p]laintiff," and because "[p]laintiff is the true owner of the timber that was cut and harvested and which [d]efendant paid a total of $21,112.60 to Otis Hill for the timber Otis Hill allegedly removed from [p]laintiff's property." Defendants maintain that plaintiff's assertion regarding the payment is incorrect; this payment was for Cline's timber, not Hamby's. Defendants further assert that "[p]laintiff has failed to put forward any evidence in the record that either Timothy Thurman or Thurman Timber Company, LLC entered the [p]laintiff's property or cut down any trees." We agree with defendants.

Defendants presented evidence that they hired Otis Hill as an independent contractor to cut the timber from Cline's property. Plaintiff presented no evidence that defendants personally converted any of his property, or that defendants purchased the timber cut from plaintiff's property. As a result, plaintiff failed, as a matter of law, to establish a claim for conversion. Defendants were entitled to summary judgment on plaintiff's claim for conversion.

III. Negligence Claim

[3] Plaintiff argues that "genuine issues of material fact exist as to [who] entered onto [p]laintiff's land, if Otis Hill Logging is an independent contractor or employee and whether [d]efendant[s] exercised the same degree of care which a reasonable and prudent person would in similar conditions." Plaintiff further argues that, "to the extent Otis Hill Logging is an independent contractor, the work which they were contracted to perform was unlawful in itself, therefore their negligence can be imputed on [d]efendant." We disagree.

"Summary judgment is seldom appropriate in a negligence action. A trial court should only grant such a motion where the plaintiff's forecast of evidence fails to support an essential element of the claim." *Wallen v. Riverside Sports Ctr.*, 173 N.C. App. 408, 411, 618 S.E.2d 858, 861 (2005) (citing *Bostic Packaging, Inc. v. City of Monroe*, 149 N.C. App. 825, 830, 562 S.E.2d 75, 79 (2002)). Nonetheless,"[a] '[p]laintiff is required to offer legal evidence tending to establish beyond mere speculation or conjecture every essential element of negligence, and upon failure to do so, [summary judgment] is proper.' " *Frankenmuth Ins. v. City of Hickory*, 235 N.C. App. 31, 34, 760 S.E.2d 98, 101 (2014) (quoting *Young v. Fun Services-Carolina, Inc.*, 122 N.C. App. 157, 162, 468 S.E.2d 260, 263 (1996)).

Actionable negligence has been defined as the "failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions. A defendant is liable for his negligence if the negligence is the proximate cause of injury to a person to whom the defendant is under a duty to use reasonable care." *Hart v. Ivey*, 332 N.C. 299, 305, 420 S.E.2d 174, 177-78 (1992) (citations omitted). In order to establish a *prima facie* case of negligence against the defendant, the plaintiff must demonstrate that: "(1) the defendant owed the plaintiff a duty of care; (2) the defendant's conduct breached that duty; (3) the breach was the actual and proximate cause of the plaintiff's injury; and (4) plaintiff suffered damages as a result of the injury." *Wallen*, 173 N.C. App. at 411, 618 S.E.2d at 861 (quoting *Vares v. Vares*, 154 N.C. App. 83, 87, 571 S.E.2d 612, 615 (2002), *disc. review denied*, 357 N.C. 67, 579 S.E.2d 576-77 (2003)).

As discussed above, plaintiff presented no evidence that defendants personally removed the timber from plaintiff's property, much less removed it in a negligent manner. Moreover, plaintiff presented no evidence that Otis Hill Logging was an employee of defendants, and made no assertion that defendants were negligent in hiring Otis Hill Logging

to remove the timber from Cline's property. Accordingly, the trial court properly granted summary judgment in favor of defendants with regard to plaintiff's negligence claim.

IV. Damage to Real Property Claim

[4] In plaintiff's complaint, he alleged a separate cause of action for damage to real property. The claim of damage to real property was dismissed with prejudice by the trial court in its order granting summary judgment, from which plaintiff appeals. However, in his brief, plaintiff fails to support this issue with either cogent argument or citation to relevant legal authority. Accordingly, this argument has been abandoned. *See Wilson v. Pershing, LLC*, __ N.C. App. __, __, 801 S.E.2d 150, 156 (2017) (quoting N.C.R. App. P. 28(b)(6)) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned.").

V. Piercing the Corporate Veil

[5] Finally, plaintiff asks that this Court permit him to resume litigation of his "claim for piercing the corporate veil," so that the usual limited liability of corporate officers and directors may be disregarded. Piercing the corporate veil is a mechanism that "allows injured parties to bring claims against individuals who otherwise would have been shielded by the corporate form." *Green v. Freeman*, 367 N.C. 136, 145, 749 S.E.2d 262, 270 (2013). As our Supreme Court has recognized, "[t]he doctrine of piercing the corporate veil is not a theory of liability. Rather, it provides an avenue to pursue legal claims against corporate officers or directors who would otherwise be shielded by the corporate form." *Id.* at 146, 749 S.E.2d at 271.

In the present case, summary judgment was granted on plaintiff's claims against defendants. Accordingly, it is unnecessary for this Court to address plaintiff's additional arguments with regard to piercing the corporate veil.

Conclusion

For the reasons set forth above, the trial court's order granting summary judgment is

AFFIRMED.

Judges ELMORE and HUNTER, JR. concur.

IN RE B.O.A.

[260 N.C. App. 365 (2018)]

IN THE MATTER OF B.O.A.

No. COA18-7

Filed 17 July 2018

1. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—sufficiency of findings—reasons for removal

In a termination of parental rights case, the trial court's findings of fact were insufficient to support its conclusion that the mother failed to make reasonable progress under the circumstances toward correcting the conditions that led to the child's removal from her care. The child was removed due to a domestic violence incident between the parents and an unexplained bruise on the child's arm; neither the mother's call to the police about her boyfriend not leaving the home nor her lack of focus during visitation implicated the reasons for the child's removal from the home.

2. Termination of Parental Rights—grounds for termination—failure to make reasonable progress—conditions not alleged in petition

Where the Department of Social Services (DSS) alleged in the juvenile petition that a domestic violence incident between the parents and an unexplained bruise on the child's arm were the conditions necessitating the child's removal, DSS could not later assert that other issues related to substance abuse, mental health issues, and parenting skills led to the child's removal, such that those other issues could serve as a basis for terminating the mother's parental rights on the ground of failure to make reasonable process to correct the conditions that led to the child's removal.

Appeal by respondent-mother from order entered 8 September 2017 by Judge Caroline S. Burnette in Granville County District Court. Heard in the Court of Appeals 21 June 2018.

Hopper, Hicks & Wrenn, PLLC, by Holly Williamson Batten and N. Kyle Hicks, for petitioner-appellee Granville County Department of Social Services.

Edward Eldred, Attorney at Law, PLLC, by Edward Eldred, for respondent-appellant mother.

Bell, Davis & Pitt, P.A., by Derek M. Bast, for guardian ad litem.

TYSON, Judge.

Respondent, the mother of B.O.A. ("Bev"), appeals from the trial court's order terminating her parental rights on the ground of failure to make reasonable progress to correct the conditions that led to Bev's removal from the home. We reverse and remand.

I. Background

The Granville County Department of Social Services ("DSS") obtained nonsecure custody of Bev on August 10, 2015 and filed a juvenile petition alleging she was neglected, in that she lived in an injurious environment due to domestic violence occurring in the home. The petition alleged that on 9 August 2015, law enforcement officers had responded to a call for a domestic violence incident between Respondent-mother and Bev's father. Respondent reported the father had choked her during the incident in the presence of Bev, who was four months old at the time. The law enforcement officers also found a bruise on Bev's right arm. The petition further alleged the Granville County Sheriff's Department had filed charges against Respondent in June 2015 for allegedly injuring Bev's sibling, who now resides in Durham County with that child's father and paternal grandparents.

After a hearing on 17 and 18 December 2015, the trial court entered an order on 19 January 2016 adjudicating Bev as neglected. The trial court found Respondent admitted she was in an abusive relationship with the child's father. A roommate had witnessed acts of domestic violence between the parents while Bev was present in the home. The trial court also found that the parents did not know how Bev had received the bruise on her arm, but Respondent believed it was the result of an infant carrier. The child was placed with the paternal grandmother and has remained in her care for the duration of the case.

In the dispositional order entered 8 February 2016, the trial court ordered Respondent to follow her Out of Home Service Agreement. The Service Agreement required Respondent: (1) to obtain mental health and psychological assessments and follow recommendations; (2) complete the domestic violence program and follow recommendations; (3) submit to random drug screens; (4) participate in weekly group therapy for substance abuse; (5) continue participating in medication management; (6) complete the parenting class and apply the skills learned during the visits with the child; (7) refrain from any criminal activity; (8) obtain

and maintain stable income for at least three consecutive months; and (9) submit proof of income and budgeting to maintain household bills. Respondent was allowed 90 minutes of supervised visitation with her child per week.

After a permanency planning hearing was held on 12 May 2016, the trial court entered an order continuing reunification as the permanent plan. The trial court found Respondent had tested positive for amphetamines with an "astronomically high" level, and Respondent had continued to make inconsistent reports in regard to her medication, diagnosis, and substance abuse. The court ordered Respondent to continue to work on her Out of Home Service Agreement.

In a review order entered 12 January 2017, the trial court ceased reunification efforts with Respondent and changed the permanent plan from reunification to adoption, and did not enter an alternative plan. *See* N.C. Gen. Stat. § 7B-906.2(b) (2017). The trial court found Respondent had not complied with the terms of her Out of Home Service Agreement, and continued to be hostile and uncooperative with DSS. The court also found that Respondent had not remained free of illegal substances, had not completed the court ordered psychological assessment, and had not visited with her child since September 2016.

On 24 January 2017, DSS filed a petition to terminate Respondent's parental rights on the grounds of neglect and willfully failing to make reasonable progress to correct the conditions which led to the child's removal from the home. *See* N.C. Gen. Stat. § 7B-1111(a)(1) and (2) (2017). After a hearing, the trial court entered an order on 8 September 2017, concluding a ground existed to terminate Respondent's parental rights based on N.C. Gen. Stat. § 7B-1111(a)(2) (failure to make reasonable progress to correct conditions which led to removal of the juvenile), and that termination was in the juvenile's best interest. The trial court terminated Respondent's parental rights. Respondent appealed.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7B-1001(a)(6) (2017).

III. Standard of Review

> On appeal, our standard of review for the termination of parental rights is whether the trial court's findings of fact are based on clear, cogent and convincing evidence and whether the findings support the conclusions of law.

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

In re J.S.L., 177 N.C. App. 151, 154, 628 S.E.2d 387, 389 (2006) (citations and internal quotation marks omitted).

IV. Issue

Respondent argues the trial court erred in terminating her parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2), failure to make reasonable progress to correct conditions which led to removal of the juvenile, because the findings of fact are insufficient to support the court's conclusion that she failed to show reasonable progress in correcting the conditions which led to Bev's removal. Respondent contends the petition shows Bev was removed from the home due to issues of domestic violence and a bruise on Bev's arm, and the clear and convincing evidence and the court's findings fail to show she did not correct those conditions.

V. Analysis

[1] The trial court terminated Respondent's parental rights only on the ground of failure to make reasonable progress under N.C. Gen. Stat. § 7B-1111(a)(2). Parental rights may be terminated under N.C. Gen. Stat. § 7B-1111(a)(2) if the court finds and concludes there is clear, cogent, and convincing evidence to support a finding and conclusion that the parent "willfully left the juvenile in foster care or placement outside the home for more than 12 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile." N.C. Gen. Stat. § 7B-1111(a)(2).

The trial court's order must contain adequate findings of fact of whether (1) the parent acted willfully and (2) the parent made reasonable progress under the circumstances. *See In re C.C.*, 173 N.C. App. 375, 384, 618 S.E.2d 813, 819 (2005). Reasonable progress is not present if the conditions leading to removal have continued with little or no signs of progress. *In re Nolen*, 117 N.C. App. 693, 700, 453 S.E.2d 220, 224-25 (1995).

The juvenile Bev was adjudicated neglected and removed from Respondent's care and custody due to an incident of domestic violence in the home and a bruise on Bev's arm when she was 4 months old. The trial court made the following findings of fact regarding those conditions:

> 9. That the Respondent mother, . . . signed an Out of Home Service Agreement with [DSS] on August 20, 2015, but she has not met the terms of that Agreement.
>
> 10. That Respondent mother completed a domestic violence class at Families Living Violence Free, but has not demonstrated the skills that she was to learn in that. In the last six months, the Respondent mother has called the police on her live-in boyfriend and father of her new born child.
>
> . . . .
>
> 30. That there is no credible evidence that the Respondent mother is able to protect her child.
>
> . . . .
>
> 33. That the Respondent mother continues to make excuses and cannot demonstrate what she has learned during her parenting classes and continues to shift her focus away from the juvenile during multiple visitations.
>
> . . . .
>
> 35. That the Respondent mother has remained hostile and combative to [DSS] and has not completed her Out of Home Service Agreement.
>
> 36. That the Respondent mother has not demonstrated an ability to put her child first.

The trial court then made the ultimate finding of fact:

> 39. That the Respondent mother has willfully left the minor child in an out of home placement for more than twelve months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made in correcting those conditions which led to the removal of the juvenile; pursuant to N.C.G.S. §7B-1111(a)(2).

A. Finding of Fact 10

Respondent challenges the portion of finding of fact 10 relating to her failure to demonstrate learned skills. Respondent asserts that the sole evidentiary fact supporting this finding, she called the police on her

live-in boyfriend when he refused to leave, was not a domestic violence incident. She argues the trial court's evidentiary findings do not support its ultimate finding and conclusion that she had failed to correct the condition of domestic violence which led to Bev's removal. We agree.

At the termination of parental rights hearing, the social worker testified that Respondent did not complete the domestic violence element of the case plan because she continued to be hostile and argumentative toward DSS workers. The social worker also testified it was unverified whether Respondent had "participat[ed] in supportive counseling focused on domestic violence and remain[ed] free of [domestic violence] actions" because the therapist had refused to provide reports to DSS for an unknown reason.

This testimony does not provide clear, cogent, and convincing evidence to support the finding that Respondent failed to demonstrate learned domestic violence skills. Under N.C. Gen. Stat. § 50B-1 (2017), domestic violence is limited to acts "by a person with whom the aggrieved party has or has had a personal relationship[.]" Respondent's relationship with DSS does not fall within the meaning of a "personal relationship" as defined in N.C. Gen. Stat. § 50B-1(b). Presuming Respondent exhibited argumentative behavior toward or disagreement with the DSS social worker, that fact does not correlate with the domestic violence component of her case plan to demonstrate progress in applying learned skills.

As to the portion of finding of fact 10 stating Respondent had called the police on her live-in boyfriend, Respondent does not dispute she called the police. Respondent asserts this was not a domestic violence incident and she put into practice what she was taught.

At the hearing, when asked whether Respondent had been involved in any more domestic violence complaints, the social worker testified regarding this incident where Respondent "called the law" on her then live-in boyfriend because "she was trying to get him out of the house [and] he refused to leave."

This "called the law" conduct does not fall within the definition of an act of domestic violence under section 50B-1(a), and is not clear, cogent, and convincing evidence to support a finding that Respondent failed to demonstrate learned domestic violence skills or an ultimate conclusion that Respondent failed to correct the condition of domestic violence. Both Respondent and the social worker testified that the incident regarding the Respondent's boyfriend involved Respondent seeking law enforcement assistance to remove the boyfriend from her home.

No evidence was presented that the incident involved violence, force, or any actions constituting domestic violence under the statute. *See* N.C. Gen. Stat. § 50B-1(a). The boyfriend left the home before law enforcement officers arrived, and there was no evidence in the record of any report of complaint being filed. Respondent's decision to call the police for help as a result of a verbal disagreement and prior to domestic violence occurring with another person does not provide clear, cogent, and convincing evidence to support a finding that Respondent failed to demonstrate learned skills or continued to be involved in domestic violence. This evidence supports a contrary finding.

The portion of finding of fact 10 indicating Respondent failed to demonstrate learned domestic violence skills is unsupported by clear, cogent, and convincing evidence, and cannot support the court's ultimate finding and conclusion that Respondent failed to make reasonable progress in correcting the domestic violence conditions which led to Bev's removal and that grounds existed to terminate Respondent's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(2).

The evidence shows that Respondent had obtained a 50B order against the father and had no further contact with him after the original 9 August 2015 incident. The evidence presented at the hearing does not suggest a failure by Respondent to alleviate this condition of domestic violence. Seeking assistance demonstrates an attempt by Respondent-mother to prevent further domestic violence from occurring.

B. Finding of Fact 30

In finding of fact 30, the trial court found "[t]hat there is no credible evidence that the Respondent mother is able to protect her child." This finding implies that Respondent did not prove she is capable of protecting the child. DSS, not Respondent, bears the burden of proving the grounds to terminate Respondent's parental rights, by clear, cogent and convincing evidence. *See In re McMillon*, 143 N.C. App. 402, 408, 546 S.E.2d 169, 173-74 ("At the adjudication stage, the petitioner has the burden of proof to demonstrate by clear, cogent, and convincing evidence that one or more of the statutory grounds for termination exist."), *disc. review denied*, 354 N.C. 218, 554 S.E.2d 341 (2001).

DSS did not present any evidence to support a conclusion that Respondent was not capable of protecting Bev and it was not Respondent's burden to prove the nonexistence of the ground. This finding is stricken and disregarded.

C. Finding of Fact 33

In finding of fact 33, the trial court found that Respondent could not demonstrate what she learned from the parenting class "and continues to shift her focus away from the juvenile during multiple visitations." DSS' concerns pertained to Respondent not focusing her full attention on Bev at visitation, getting distracted, and needing to be redirected from trying to talk about the case.

However, Bev was not removed from the home due to Respondent's lack of focus with the child, but rather for domestic violence between the parents and an unexplained bruise on a four-month-old child that was determined not to be self-inflicted. DSS did not present any evidence, however, of any issues regarding inappropriate interactions between Respondent and Bev or any concerns of physical abuse. The social worker testified that she did not have any concerns of Respondent hurting Bev and had "never witnessed her hurting the child." This finding does not support the trial court's ultimate finding that Respondent failed to correct the conditions which led to Bev's removal.

Here, the evidence and findings are insufficient to support the trial court's ultimate finding and conclusion that Respondent had not made reasonable progress under the circumstances toward correcting the conditions which led to Bev's removal from her care. DSS' arguments are overruled.

D. Conditions Not Alleged in the Petition

[2] DSS argues that the 9 August 2015 incident and bruise were not the only conditions which led to removal, but were "symptoms of much deeper issues in [the] family[,]" and that the Out of Home Service Agreement identified the "real issues in this matter" pertaining to substance abuse, medication management, mental health/psychological issues, and parenting skills. DSS failed to allege any of these conditions in either the nonsecure custody order or neglect petition to put Respondent on notice of these conditions. Bev was not adjudicated neglected based upon any of these conditions. Without prior notice or allegations, they cannot now be asserted as conditions which led to Bev's removal for the purposes of N.C. Gen. Stat. § 7B-1111(a)(2).

"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." *Lanvale Properties, LLC v. Cty. of Cabarrus*, 366 N.C. 142, 154, 731 S.E.2d 800, 809 (2012) (internal citations and quotation marks omitted). The plain language of N.C.

Gen. Stat. § 7B-1111(a)(2) states that the court may terminate parental rights if the parent willfully fails to make reasonable progress "in correcting *those conditions which led to the removal of the juvenile*." (Emphasis supplied). Although the case plan expressed concerns regarding Respondent's purported substance abuse, mental health, and income, those were not the conditions alleged, which led to Bev's removal from Respondent's care. Respondent's progress or alleged lack of progress in complying with those other terms of her case plan is not relevant in determining whether grounds exist under N.C. Gen. Stat. § 7B-1111(a)(2) to terminate her parental rights for failure to make reasonable progress to alleviate the conditions that led to Bev's removal.

VI. Conclusion

The evidence and findings of fact do not support the trial court's ultimate finding and conclusion that Respondent failed to make reasonable progress in correcting those conditions which led to the removal of Bev from her care. The trial court's order is reversed. *It is so ordered.*

REVERSED.

Judges DIETZ and MURPHY concur.

IN THE MATTER OF K.G.

No. COA17-1409

Filed 17 July 2018

Child Abuse, Dependency, and Neglect—dependency—parents able to provide for supervision of child—child unwilling to return home

On appeal from an order adjudicating a minor child who had a history of involvement with the Juvenile Justice System to be a dependent juvenile, the Court of Appeals held that the trial court erred by denying the parents' Rule 12(b)(6) motion to dismiss the juvenile petition. Taking the allegations in the petition as true, the petition failed to allege the child was a dependent juvenile—no allegations suggested that the parents were unable to provide for the supervision of the child, who expressed unwillingness to return home.

IN RE K.G.

[260 N.C. App. 373 (2018)]

Appeal by Respondent-Parents from order entered 19 September 2017 by Judge Sherri Murrell in Orange County District Court. Heard in the Court of Appeals 28 June 2018.

Holcombe & Stephenson, LLP, by Deana K. Fleming, for Petitioner-Appellee Orange County Department of Social Services.

Edward Eldred for Respondent-Appellant parents.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

Dillon, Judge.

Respondents appeal from an order adjudicating their minor child K.G. ("Ken") to be a dependent juvenile and continuing Ken's custody with the Orange County Department of Social Services ("DSS").[1] We hold the trial court erred in denying Respondents' motion to dismiss the juvenile petition pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Ken is the oldest of Respondents' five children and has a history of running away from home, unruly and defiant behavior at home, resistance to Respondents' authority, and involvement with the North Carolina Juvenile Justice System.

In January 2017, juvenile delinquency petitions were filed against Ken alleging he had committed a number of offenses, including felony larceny. Ken admitted to committing misdemeanor larceny and misdemeanor possession of stolen goods, and the State dismissed the felony charge. Based on Ken's admissions, the juvenile delinquency court entered an order adjudicating Ken to be a delinquent juvenile. In its disposition order entered that same day, the court found Ken's delinquency history was low and entered a Level 1 disposition. The court placed Ken on supervised probation for 12 months with a number of conditions.

In May 2017, Ken was arrested and charged as an adult for felony safecracking and felony larceny of Respondents' property. In an attempt to allow Ken to be released from jail, the Assistant Public Defender in his delinquency case filed a motion seeking the appointment of a guardian of the person for Ken. In June 2017, after a hearing on the matter,

1. We use the pseudonym "Ken" throughout for ease of reading and to protect the juvenile's privacy.

the trial court entered an order that awarded custody of Ken to DSS and granted DSS placement authority for Ken. DSS initially placed Ken with his grandparents, but within a few weeks, the grandparents indicated they could no longer serve as a placement for him because he had attempted to obtain their ATM and cellphone PIN numbers. DSS then placed Ken at a youth shelter known as the "Wrenn House" and afterwards to the Boys and Girls Home in Lake Waccamaw.

DSS instituted a dependency proceeding and alleged Ken to be a dependent juvenile based on the following facts:

> 1. [DSS] received a report 6/5/17 regarding the juvenile, who was and is incarcerated at the Orange County Jail. He has been in jail for approximately 1 month due to stealing money out of his parents' safe. During a criminal court appearance, the juvenile refused to return to his parents' home.
>
> 2. The child has a history of stealing and a possible addiction to gaming. The parents did not want the child to go to Wrenn House as he would [have] access to computers and/or games[,] nor with relatives because he would likely steal from them. The family wanted the child to return home, but the child refuses.
>
> 3. During [juvenile delinquency] court on 6/6/17, the judge ordered the juvenile into DSS custody.
>
> 4. [DSS] has had one prior CPS report regarding the family received 11/5/16. The report alleged improper care, discipline, and supervision. Per the report, the juvenile has a history of running away. He stole money from his parents and the reporter alleged that the child was kicked out of the house and sleeping in a tent outside without provisions.
>
> 5. During the CPS assessment it was found that the juvenile does have a history of running away and accessing pornography via electronic devices. When the electronic devices are taken away, the juvenile runs away from the home. The parents report all incidences of the child running away to law enforcement. The parents admitted to trying numerous different tactics to manage the juvenile's behaviors and tried to modify his behavior by having the juvenile stay in a tent. They were allowing the

> child to come inside at meal times and after finishing his chores and homework. During the CPS assessment, the parents stopped having the juvenile stay in the tent and the parents sought services through [the Department of Juvenile Justice] to help manage the child's behavior. Due to the parents' willingness to seek services for the child and agreement to ensure the juvenile's basic needs were met, ongoing services were not warranted and the case was closed.

Respondents filed a Rule 12(b)(6) motion to dismiss the petition, arguing the allegations in the petition, even if true, could not support an adjudication that Ken was a dependent juvenile. *See* N.C. R. Civ. P. 12(b)(6). In September 2017, after hearings on the matter, the trial court entered an order denying Respondents' motion to dismiss and adjudicating Ken to be a dependent juvenile. The court continued custody of Ken with DSS and imposed other conditions. Respondents filed timely notice of appeal from the court's order.

We first address Respondents' argument that the trial court erred in denying their Rule 12(b)(6) motion to dismiss.

> 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. 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.

In re J.S.K., ___ N.C. App. ___, ___, 807 S.E.2d 188, 190 (2017) (internal citations and quotation marks omitted).

Here, taking the allegations in the petition as true, we agree with Respondents that the petition fails to allege Ken is a dependent juvenile. A dependent juvenile is defined as:

> A juvenile in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) 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) (2017). Respondents are Ken's biological parents with whom he lived prior to his arrest on felony charges and thus were responsible for Ken's care and supervision. Therefore, to survive Respondent's Rule 12(b)(6) motion, the petition must set forth allegations that Respondents were unable to provide for Ken's care or supervision and lacked an appropriate alternative child care arrangement.

We conclude that none of the allegations in the petition, taken as true, suggest that Respondents were unable to provide for Ken's care or supervision or lacked an appropriate alternative child care arrangement. Rather, the allegations at best establish that Ken is a delinquent or undisciplined juvenile, *see* N.C. Gen. Stat. § 7B-1501(7), (27) (2017), matters to be addressed in his pending juvenile delinquency court cases, and that Respondents were working with juvenile justice officials to obtain services for Ken.

DSS and the guardian ad litem argue that Respondents' failure to rein in Ken's behavior and Ken's refusal to return to their home rendered them "unable" to care for him. We do not look, however, to the juvenile's willful acts to determine a parent's ability to care for the juvenile, because doing so would necessarily require every undisciplined juvenile to be adjudicated a dependent juvenile. Respondents remained willing and able to care for and supervise Ken, and Ken's unwillingness to return to their custody cannot negate that fact.

Accordingly, we reverse the trial court's adjudication and disposition order and remand for entry of an order dismissing the petition. We note that because DSS may retain lawful custody of Ken pursuant to the order entered in his delinquency case, our holding in this case may not require that custody of Ken be returned to Respondents. *See* N.C. Gen. Stat. § 7B-2506 (2017); *see also In re K.T.L.*, 177 N.C. App. 365, 375, 629 S.E.2d 152, 159 (2006) (affirming the placement of a juvenile in DSS custody where the juvenile delinquency court found the juvenile's parents were unwilling to consent to the level of evaluation juvenile needed).

REVERSED AND REMANDED.

Judges DAVIS and BERGER concur.

IN THE MATTER OF T.T.E.

No. COA17-648

Filed 17 July 2018

1. Juveniles—delinquency—disorderly conduct—public disturbance—sufficiency of evidence

The trial court erred in adjudicating a juvenile delinquent for disorderly conduct because evidence that he threw a chair in a school cafeteria when no other person was nearby was insufficient to show violence or the imminent threat of fighting or other violence so as to meet the definition of a public disturbance pursuant to N.C.G.S. § 14-288.4(a)(1).

2. Juveniles—delinquency—resisting a public officer—sufficiency of evidence

The trial court erred in adjudicating a juvenile delinquent based on evidence that a school resource officer "snuck up on" the juvenile without letting the juvenile know who he was before grabbing him. That evidence, along with the absence of any evidence that the juvenile resisted or physically engaged with the officer, was insufficient to support the grounds of resisting a public officer.

Judge ARROWOOD concurring in part and dissenting in part.

Appeal by juvenile from adjudication and disposition entered 27 February 2017 by Judge Susan M. Dotson-Smith in District Court, Buncombe County. Heard in the Court of Appeals 13 December 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Janelle E. Varley, for the State.

Morgan & Carter PLLC, by Michelle F. Lynch, for juvenile-appellant.

STROUD, Judge.

Juvenile appeals adjudication and disposition orders for disorderly conduct and resisting a public officer. Because there was insufficient evidence to support the adjudication for either offense, we vacate the juvenile court's adjudication and disposition orders.

I. Background

On 8 November 2016, a JUVENILE PETITION (DELINQUENT) was filed alleging juvenile had engaged in disorderly conduct and resisting a public officer. The State called two witnesses to testify. The primary witness was the school resource officer, Mickey Ray. Officer Ray testified he saw the juvenile throw a chair in the cafeteria. No one was hit with the chair and the officer testified "I didn't see anybody, you know, around that could have been hit by the chair." After throwing the chair, juvenile ran out of the cafeteria; the officer followed and without calling out to juvenile, grabbed him from behind. Juvenile initially cursed when Officer Ray caught him and then told him he was playing with his brother. The district court adjudicated the juvenile as delinquent for disorderly conduct and resisting a public officer. Juvenile appeals.

II. Petition for Disorderly Conduct

Juvenile first contends that his petition for disorderly conduct under North Carolina General Statute § 14-288.4 was defective because it is not clear which subsection of this statute he violated. The State contends it is "clear" it was proceeding under North Carolina General Statute § 14-288.4(a)(1): "Because the charging language so closely tracks the statutory language of § 14-288.4(a)(1), the petition was sufficiently clear and provided the juvenile with adequate notice of the charged offense and the conduct which was the subject of the allegation." We need not address juvenile's argument regarding the petition because he will prevail on his second argument regarding his motion to dismiss. But we also note that based upon the State's argument that only North Carolina General Statute § 14-288.4(a)(1) applies, we will analyze the motion to dismiss for disorderly conduct under the elements of that subsection only.

III. Motion to Dismiss

Juvenile argues the trial court erred in denying his motion to dismiss both of the charges against him due to the insufficiency of the evidence.[1] "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, and (2) of juvenile's being the perpetrator of such

1. The State contends juvenile did not preserve his argument to challenge the disorderly conduct adjudication when his motion to dismiss was for "no evidence of a disruption caused by" juvenile. We disagree because the sufficiency of the evidence was plainly raised in juvenile's attorney's motion despite use of the word "disruption" instead of "disorderly conduct."

offense." *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (citation, quotation marks, ellipses, and brackets omitted).

> In reviewing a challenge to the sufficiency of evidence, it is not our duty to weigh the evidence, but to determine whether there was substantial evidence to support the adjudication, viewing the evidence in the light most favorable to the State, and giving it the benefit of all reasonable inferences.

Id. at 29, 550 S.E.2d at 819.

A. Disorderly Conduct

[1] Juvenile contends the trial court erred in denying his motion to dismiss due to the insufficiency of the evidence. North Carolina General Statute § 14-288.4(a)(1) provides that "[d]isorderly conduct is a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence." N.C. Gen. Stat. § 14-288.4(a)(1) (2015). The State's argument focuses on the general definition of a "public disturbance" in North Carolina General Statute § 14-288.1:

> (8) Public disturbance.– Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C. Gen. Stat. § 14-288.1(8) (2015).

The State does not cite any cases interpreting or discussing North Carolina General Statute § 14-288.1(8) or -288.4(a)(1). Not surprisingly, the issue in several of the cases addressing the specific subsections of North Carolina General Statute § 14-288.4 is whether the statute is unconstitutionally vague as many things could be considered "annoying, disturbing, or alarming" by one person but not by another. *See*, *e.g.*, *State v. Orange*, 22 N.C. App. 220, 223, 206 S.E.2d 377, 379 (1974) ("Defendant does contend that G.S. 14—288.4(a)(2) is unconstitutionally vague under the First Amendment."); *State v. Clark*, 22 N.C. App. 81, 87, 206 S.E.2d 252, 256 (1974) ("Defendant also argues that section (a)(2) of

G.S. 14—288.4, as amended in 1971, is unconstitutionally vague and overbroad."). But in *State v. Strickland*, 27 N.C. App. 40, 42-43, 217 S.E.2d 758, 759-60 (1975), this Court determined that although North Carolina General Statute § 14-288.1(8) -- the definition of "public disturbance" -- may be unconstitutionally vague standing alone, it must be read in conjunction with the specific acts which constitute a "public disturbance" under North Carolina General Statute § 14-288.4, and when considered together, the statute is not unconstitutionally vague:

> The statute, G.S. 14—288.4(a), initially defines disorderly conduct in general terms as a public disturbance and then sets forth in subsequent subsections specific examples of conduct which is prohibited as disorderly conduct. It is a rule of construction, that when words of general import are used, and immediately following and relating to the same subject words of a particular or restricted import are found, the latter shall operate to limit and restrict the former. *In order to ascertain what actions are violative of the statute as constituting disorderly conduct, one must look, not to the general definition of public disturbance, but to the specific examples of prohibited conduct as set forth in the subsections of the statute itself.*

Id. at 43, 217 S.E.2d at 760 (emphasis added) (citations and quotation marks omitted). In fact, the State focuses on the portion of the definition in North Carolina General Statute § 14-288.1(8) which the *Strickland* Court "assum[ed] *arguendo*" was "unconstitutionally vague" and ignores the part of the statute which renders it constitutional, which is the additional detail regarding prohibited acts provided in North Carolina General Statute § 14—288.4(a)(4). *Id.*

Here, under North Carolina General Statute § 14-288.4(a)(1) the State must present evidence that the juvenile engaged in:

1. "fighting *or*"

2. "other violent conduct *or*"

3. "conduct creating the threat of imminent fighting or other violence"

N.C. Gen. Stat. § 14-288.4(a)(1). There was no evidence that the juvenile was "fighting" with anyone, so the only question before this Court is whether there was evidence of "other violent conduct or . . . conduct creating the threat of imminent fighting or other violence." *Id.* The State

argues based almost entirely on the language of the general definition of "public disturbance" in North Carolina General Statute § 14-288.1(8) that "throwing a chair at another student is arguably an alarming act that exceeds the bounds of what is normally tolerated in a school cafeteria." The State contends the evidence shows "arguably violent conduct" because *if* the juvenile had thrown the chair at another student and *if* it hit them, "it presumably would have hurt them."

Although we view the evidence in the light most favorable to the State, *see Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819, we do not go so far as to come up with hypothetical events that could have happened if juvenile actually did something in addition to what the actual evidence shows. Since the State does not address the elements of North Carolina General Statute § 14-288.4(a)(1) directly, it does not note any evidence which shows "violent conduct" or "conduct creating the threat of imminent fighting or other violence[,]" but that omission is likely because there is no such evidence. N.C. Gen. Stat. § 14-288.4(a)(1). In fact, the officer was specifically asked if he though juvenile "was playing, or did it seem like something that was a little more violent?" to which he responded, "I couldn't really tell[.]" The State simply asks we infer too much from the evidence it presented.

The evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. *See id.* Although there were other students in the cafeteria – a very large room – when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not "violent conduct or . . . conduct creating the threat of imminent fighting or other violence." *Id.* No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct as defined by North Carolina General Statute § 14-288.4(a)(1). We vacate juvenile's adjudication and disposition for disorderly conduct.

B. Resisting a Public Officer

[2] Juvenile also contends there was insufficient evidence he resisted a public officer. To adjudicate a juvenile for resisting a public officer there must be evidence:

> (1) that the victim was a public officer;
>
> (2) that the defendant knew or had reasonable grounds to believe that the victim was a public officer;
>
> (3) that the victim was discharging or attempting to discharge a duty of his office;
>
> (4) that the defendant resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office; and
>
> (5) that the defendant acted willfully and unlawfully, that is intentionally and without justification or excuse.

State v. Dammons, 159 N.C. App. 284, 294, 583 S.E.2d 606, 612 (2001); *see* N.C. Gen. Stat. § 14-223 (2015).

There is no dispute that Officer Ray was a public officer discharging a duty of his office. But the evidence does not support the remaining elements of North Carolina General Statute § 14-223. *See generally Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612. Officer Ray testified he never told juvenile to stop before he grabbed him by the shirt from behind. Officer Ray specifically testified that he "kind of, snuck up on him" and then grabbed juvenile by his shirt. Officer Ray was cross-examined on this point:

> Q. Deputy Ray, in your earlier testimony, you say that you snuck up on . . . [juvenile], correct?
>
> A. I was, kind of, being sleek about it.
>
> Q. And you did so, because you didn't want him to not come with you, correct?
>
> A. Yes, ma'am.
>
> Q. So at any point before you decided -- before you grabbed him by the shirt, did you talk to him and explain to him why you were behind him?
>
> A. No, ma'am.

Officer Ray never asked the juvenile to stop and intentionally snuck up on juvenile; the uncontroverted evidence shows juvenile was suddenly grabbed without any way of knowing who was grabbing him. Thus, the juvenile did not know or have "reasonable grounds to believe that the victim was a public officer" until *after* Officer Ray stopped him

and he saw that it was a police officer who grabbed him, not another student. *Id.*

There is also no evidence that juvenile "resisted, delayed, or obstructed the victim in discharging or attempting to discharge a duty of his office[.]" *Id.* After juvenile saw that Officer Ray was the person who grabbed him, he did not hit, fight, or physically engage with the officer. While the State focuses on the fact that the juvenile yelled "no" and cursed when the officer grabbed him, his language does not rise to the level of a violation of North Carolina General Statute § 14-223, particularly as his statements appear to have been made when he was grabbed and before he knew who was grabbing him from behind:

> Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer;
>
> Vague, intemperate language used without apparent purpose is not sufficient.

The Supreme Court of the United States has said that:

> Although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duties, mere remonstrances or even criticisms of an officer are not usually held to be the equivalent of unlawful interference.

State v. Allen, 14 N.C. App. 485, 491–92, 188 S.E.2d 568, 573 (1972) (citations, quotation marks, ellipses, and brackets omitted).

In addition, the evidence does not show that by saying "no" and cursing, juvenile "acted willfully and unlawfully, that is intentionally and without justification or excuse." *Dammons*, 159 N.C. App. at 294, 583 S.E.2d at 612. Most people would probably have some sort of similar reaction if grabbed from behind without knowing who was grabbing them. The State's other witness, Mr. Tate McQueen – teacher and soccer coach at the school – testified that during the ordeal,

> there was a lot of adrenaline, and you know, after things settled down into the conference room, *he was remarkably calm at that point. And he was very respectful in the conference room*, once everything calmed down. I think in the moment with everybody watching him, and how that can play a role in the way young people behave, I think

> once he was calming down in that environment, it settled down. It was between the point of where I came around the corner and saw that part, *it was probably, maybe a minute-and-a-half, maybe.*

(Emphasis added.) Within less than two minutes after being "snuck up on" and grabbed from behind, juvenile was "remarkably calm" and "very respectful[.]" Again, even considering the evidence in the light most favorable to the State, *see Heil*, 145 N.C. App. at 29, 550 S.E.2d at 819, the facts do not indicate resisting an officer. We vacate juvenile's adjudication and disposition for resisting a public officer.

IV. Conclusion

Because the State did not present sufficient evidence of disorderly conduct and resisting a public officer, we vacate the adjudication and disposition orders.

VACATED.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in part and dissents in part.

ARROWOOD, Judge, concurring in part and dissenting in part.

I concur in the majority's opinion that there was insufficient evidence to support juvenile's adjudication for resisting a public officer. However, I respectfully dissent from the majority's holding that there was insufficient evidence to support the adjudication for disorderly conduct.

At the outset, juvenile argues that his petition for disorderly conduct under N.C. Gen. Stat. § 14-288.4 was defective because it is not clear which subsection of the statute he was charged with violating. The majority did not address this argument because it held that juvenile prevailed on his second argument – that there was insufficient evidence of disorderly conduct. Because I disagree with this holding, I address the jurisdictional argument.

"[I]t is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time." *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 279-80 (2006) (citations omitted). "When a petition is fatally deficient it . . . fails to evoke the jurisdiction of the court." *Id.* at 153, 636 S.E.2d at 280 (citations and internal quotation marks omitted). A juvenile petition in a juvenile delinquency

action "serves essentially the same function as an indictment in a felony prosecution and is subject to the same requirement that it aver every element of a criminal offense, with sufficient specificity that the accused is clearly apprised of the conduct for which he is being charged." *Id.* (citation and internal quotation marks omitted).

The petition at issue alleged juvenile violated N.C. Gen. Stat. § 14-288.4 when he "did intentionally cause a public disturbance at Clyde A. Erwin High School, Buncombe County NC, by engaging in violent conduct. This conduct consisted of throwing a chair toward another student in the school's cafeteria." Because this language closely tracks the statutory language of N.C. Gen. Stat. § 14-288.4(a)(1), "[d]isorderly conduct is a public disturbance intentionally caused by any person who . . . [e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence[,]" and the petition lists the offense as N.C. Gen. Stat. § 14-288.4, I would hold that, based on the totality of the circumstances, the petition averred the charge with sufficient specificity that juvenile was clearly apprised of the conduct for which he was charged. *See State v. Simpson*, 235 N.C. App. 398, 402-403, 763 S.E.2d 1, 4-5 (2014) (holding an indictment was not fatally defective even though it did not list which subsection of a statute the defendant was charged with violating because it was clear from the indictment which subsection was charged). Therefore, the petition was not fatally defective, and the trial court had jurisdiction to enter the adjudication and disposition orders against juvenile.

Next, juvenile argues, and the majority opinion agrees, that the trial court erred by denying juvenile's motion to dismiss the charge of disorderly conduct for insufficiency of the evidence. I disagree.

"We review a trial court's denial of a [juvenile's] motion to dismiss *de novo*." *In re S.M.S.*, 196 N.C. App. 170, 171, 675 S.E.2d 44, 45 (2009) (citation omitted). "Where the juvenile moves to dismiss, the trial court must determine whether there is substantial evidence (1) of each essential element of the offense charged, . . . and (2) of [juvenile's] being the perpetrator of such offense." *In re Heil*, 145 N.C. App. 24, 28, 550 S.E.2d 815, 819 (2001) (citation and internal quotation marks omitted) (alterations in original). "The evidence must be such that, when it is viewed in the light most favorable to the State, it is sufficient to raise more than a suspicion or possibility of the respondent's guilt." *In re Walker*, 83 N.C. App. 46, 48, 348 S.E.2d 823, 824 (1986) (citation omitted).

Here, the State's evidence tended to show that juvenile lifted a chair and threw it across the cafeteria at his brother and then fled the scene.

Despite this evidence, juvenile argues that the State did not put forth sufficient evidence of disorderly conduct because it did not present substantial evidence (1) that he caused a public disturbance or (2) that he engaged in "fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence[,]" as required under N.C. Gen. Stat. § 14-288.4(a)(1). A public disturbance under N.C. Gen. Stat. § 14-288.4(a)(1) is:

> Any annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place in question which occurs in a public place or which occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access. The places covered by this definition shall include, but not be limited to, highways, transport facilities, schools, prisons, apartment houses, places of business or amusement, or any neighborhood.

N.C. Gen. Stat. § 14-288.1(8) (2017). The statute does not define "violent conduct." *See* N.C. Gen. Stat. § 14-288.1.

Here, the State's evidence that juvenile threw a chair at another student was substantial evidence of a public disturbance under the statute as an act that was alarming or exceeded the bounds of social toleration. However, "[i]n order to ascertain what actions are violative of the statute as constituting 'disorderly conduct,' one must look, not to the general definition of 'public disturbance,' but to the specific examples of prohibited conduct as set forth in the subsections of the statute itself." *State v. Strickland*, 27 N.C. App. 40, 43, 217 S.E.2d 758, 760, *appeal dismissed*, 288 N.C. 512, 219 S.E.2d 348 (1975). Therefore, at issue here is whether the State put forth substantial evidence that juvenile engaged in violent conduct. The majority agrees with juvenile that this evidence was not sufficient to show that juvenile engaged in violent conduct under N.C. Gen. Stat. § 14-288.4(a)(1). Therefore, the majority vacated the adjudication and disposition order as to this charge. I disagree.

I would hold that, viewing this evidence in the light most favorable to the State, the safety resource officer's testimony that juvenile threw a chair, which the juvenile admitted he was throwing at another student, his brother, provided substantial evidence of violent conduct, from which the trial court could reasonably determine that juvenile's act of throwing a chair at another student amounted to violent conduct. Accordingly, I would find no error in the trial court's denial of juvenile's motion to dismiss the disorderly conduct charge.

LMSP, LLC, Plaintiff`
v.
TOWN OF BOONE, a North Carolina Municipal Corporation, Defendant

No. COA17-1241

Filed 17 July 2018

1. Pleadings—prior pending action doctrine—federal courts —dismissal

The trial court did not err by granting defendant-Town's motion to dismiss an action arising from a towing ordinance on the grounds that it was barred by the prior pending action doctrine. There was no question that the prior federal action and the current action involved the same parties, implicated the same towing ordinances, and requested similar relief; the existence of minute, immaterial variances between the original and an amended ordinance did not change the fact that the crux of both actions was whether the ordinance exceeded the Town's authority.

2. Injunctions—preliminary—likelihood of success on the merits

The trial court did not err by denying plaintiff's motion for a preliminary injunction in an action arising from a towing ordinance on the grounds that plaintiff could not show a likelihood of success on the merits.

Appeal by plaintiff from orders entered 23 February 2017 by Judge Bradley B. Letts and 5 June 2017 by Judge Richard L. Doughton in Watauga County Superior Court. Heard in the Court of Appeals 18 April 2018.

Miller & Johnson, PLLC, by Nathan A. Miller, for plaintiff-appellant.

Cranfill Sumner & Hartzog LLP, by Patrick H. Flanagan and Meredith FitzGibbon, for defendant-appellee.

ZACHARY, Judge.

Plaintiff appeals from orders denying its motion for preliminary injunction and granting defendant Town of Boone's motion to dismiss. We affirm.

Background

In March 2016, plaintiff LMSP, LLC filed suit against the Town of Boone in state court seeking declaratory and injunctive relief on the grounds that the Town's towing ordinance, Chapter 73, violated plaintiff's right to substantive due process, plaintiff's right to equal protection, and plaintiff's rights under the First Amendment to the United States Constitution, as well as plaintiff's rights under Article I, Section 1 of the North Carolina Constitution and the provisions of N.C. Gen. Stat. § 160A-174. The Town had that action removed to the United States District Court for the Western District of North Carolina based on the existence of federal question jurisdiction.

On 17 November 2016, while the federal action was still pending, the Town's council met and passed several amendments to the towing ordinance at its regularly scheduled meeting. Plaintiff thereafter filed another suit against the Town in state court ("the present action"). The present action alleges causes of action for violations of the provisions of N.C. Gen. Stat. § 160A-174 and of the right to earn a livelihood, the right to due process, and the right to equal protection under the North Carolina Constitution. Like the pending federal action, the present action also seeks declaratory and injunctive relief.

The Town's council met again on 15 December 2016 and passed additional amendments to the towing ordinance. However, plaintiff claims that those amendments were passed "in violation of the North Carolina laws governing open meetings pursuant to N.C.G.S. § 143-318.10(a)." Plaintiff accordingly filed an amended complaint in the present action on 22 December 2016 setting forth a new cause of action based on the open meeting laws. The federal action was still pending at the time.

On 9 January 2017, plaintiff's motion for preliminary injunction came on for hearing before the Honorable Bradley B. Letts. Judge Letts denied plaintiff's motion for preliminary injunction by order entered 23 February 2017 on the grounds that "Plaintiff cannot show a likelihood of success on the merits[,]" and that "Plaintiff has also failed to allege facts that show it will be irreparably harmed if the preliminary injunction is not granted." Judge Letts's conclusion that plaintiff could not establish a likelihood of success on the merits was based upon his determination that, in light of the pending federal action, the present action was "likely barred by the doctrine of prior action pending."

The Town filed a Rule 12(b)(6) motion to dismiss plaintiff's present action on 6 January 2017. The Town's motion to dismiss was heard on 22 May 2017 before the Honorable Richard L. Doughton, and the parties

argued whether the prior action pending doctrine barred this action. Judge Doughton granted the Town's motion, and dismissed the present action by order entered 5 June 2017. Plaintiff timely appealed.

On appeal, plaintiff argues that the trial court erred (1) by denying plaintiff's motion for preliminary injunction, and (2) by granting the Town's motion to dismiss. The thrust of plaintiff's contentions on appeal is that the present action is, in fact, not barred by the prior action pending doctrine. We disagree.

Motion to Dismiss

Standard of Review

It is axiomatic that "[o]n appeal of a 12(b)(6) motion to dismiss, this Court conducts 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." *Burgin v. Owen*, 181 N.C. App. 511, 512, 640 S.E.2d 427, 429 (2007) (citation and quotation marks omitted). This Court must ascertain "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." *Block v. County of Person*, 141 N.C. App. 273, 277, 540 S.E.2d 415, 419 (2000) (citation and quotation marks omitted).

Prior Action Pending Doctrine

[1] Invocation of the prior action pending doctrine is a form of "plea in abatement," *State ex rel. Onslow County v. Mercer*, 128 N.C. App. 371, 375, 496 S.E.2d 585, 587 (1998), that is, one "that objects to the place, time, or method of asserting the plaintiff's claim but does not dispute the claim's merits." *Plea in Abatement*, BLACK'S LAW DICTIONARY, 1189 (10th ed. 2014). Specifically, the prior action pending doctrine applies whenever "a prior action is pending between the same parties, affecting the same subject matter in a court within the state or the federal court having like jurisdiction[.]" *Onslow County*, 128 N.C. App. at 375, 496 S.E.2d at 587. In determining whether abatement of the subsequent action under the prior action pending doctrine is required, "the ordinary test is this: 'Do the two actions present a substantial identity as to parties, subject matter, issues involved and relief demanded?' " *Id.* at 375, 496 S.E.2d at 588 (quoting *Clark v. Craven Reg'l Med. Auth.*, 326 N.C. 15, 21, 387 S.E.2d 168, 172 (1990)). When such a substantial identity is presented, it is evident that "the subsequent action is wholly unnecessary and therefore, in the interest of judicial economy, should be subject to a plea in abatement." *Id.* at 375, 496 S.E.2d at 587 (citations omitted); *Houghton v. Harris*, 243 N.C. 92, 95, 89 S.E.2d 860, 863 (1955). "An action is pending for the purpose of

abating a subsequent action between the same parties for the same cause from the time of the issuance of the summons until its final determination by judgment." *McDowell v. Blythe Bros. Co.*, 236 N.C. 396, 398-99, 72 S.E.2d 860, 862 (1952) (citations omitted); *see also Gilliam v. Sanders*, 198 N.C. 635, 637, 152 S.E. 888, 889-90 (1930).

When applicable, the prior action pending doctrine will operate as grounds for dismissal under Rule 12(b) of the North Carolina Rules of Civil Procedure. *Brooks v. Brooks*, 107 N.C. App. 44, 47, 418 S.E.2d 534, 536 (1992) ("A plea in abatement based on a prior pending action, although not specifically enumerated in Rule 12(b) of the Rules of Civil Procedure, is a preliminary motion of the type enumerated in Rule 12(b)[.]"); *see also Morrison v. Lewis*, 197 N.C. 79, 81, 147 S.E. 729, 731 (1929) ("Where an action is instituted, and it appears to the court . . . that there is another action pending between the same parties and substantially on the same subject-matter, and that all the material questions and rights can be determined therein, such action will be dismissed.").

In the instant case, there is no question but that the prior filed federal action and the present action involve the same parties, implicate the towing ordinances of the Town of Boone, and request similar relief. However, plaintiff argues that the federal action and the present action do not present a substantial identity as to the issues involved, and the trial court erred in granting the Town's motion to dismiss.

Plaintiff attempts to demonstrate a lack of substantial identity between the two causes of action by parsing the particulars of the original and amended versions of the towing ordinance. For instance, in the present action, "Plaintiff takes particular issue with Section 73.03(A)(3)" of the amended towing ordinance, which requires that there

> be a *minimum of one* warning sign for each vehicular entrance to the parking lot and such other signs as are required so that an ordinary driver who is not familiar with that parking lot is warned by the signage upon entering the parking lot, exiting his or her vehicle, and/or upon exiting the parking lot *as a pedestrian* that the lot is private and that unauthorized vehicles are subject to towing or booting[,]

whereas Section 73.09 of the prior ordinance at issue in the federal action required "*[t]wo signs* per each vehicle entrance to the parking lot . . . which are conspicuous to and can easily be seen by every unauthorized person entering the parking lot or *exiting a parked vehicle* in the parking lot[.]" (emphasis added).

The existence of minute, immaterial variations between the two ordinances does not change the fact that the crux of both the federal and present action is plaintiff's contention that the towing ordinance exceeds the scope of the Town's authority. In essence, as Judge Doughton expressed, plaintiff had a "beef against the Town of Boone" because of its towing ordinance. Plaintiff filed suit against the Town in response. In the meantime, the Town amended its towing ordinance. Plaintiff then sued the Town once again, while the federal action remained pending. Both complaints provide practically identical descriptions of the suits: plaintiff's complaint in the federal action stated that "this action involves the constitutionality of various portions of Defendant Boone's immobilization ordinance known as Chapter 73 and whether or not Defendant Boone exceeded the scope of their authority granted to them in N.C.G.S. § 160A-174[,]" while its complaint in the present action asserts that "this action involves the constitutionality of Defendant's towing and booting ordinance known as Section 73 and whether or not Defendant exceeded the scope of their authority granted to them in N.C.G.S. § 160A-174." These issues are substantially identical, thereby rendering the subsequent present action "wholly unnecessary." *Shoaf v. Shoaf*, 219 N.C. App. 471, 475, 727 S.E.2d 301, 305 (2012) (citations and quotation marks omitted). Moreover, the fact that plaintiff filed an amended complaint in the present action asserting the open meetings laws as an additional ground for relief does not change the fact that the federal court could "dispose of the entire controversy in the prior action[,]" thus rendering "the subsequent action . . . wholly unnecessary." *Clark*, 326 N.C. at 20, 387 S.E.2d at 171.

It is clear that plaintiff did not "want to go to federal court[,]" and that it "would rather have [its] case" heard in state court. However, after plaintiff remained dissatisfied with the Town's amended towing ordinance, a proper procedure would have been either for plaintiff to amend its complaint in the federal action in light of the amended ordinance; voluntarily dismiss the federal action; or wait for the federal court to dismiss the action as moot. Instead of opting for one of these routes, plaintiff filed the present action in State court, this time alleging only state causes of action in order to avoid federal question jurisdiction. This maneuver, however, did not negate the fact that the issues raised in the subsequent action were so substantially similar as to have been proper for determination by the federal court as a single litigation in the prior action. *See City of Chicago v. Int'l Coll. of Surgeons*, 522 U.S. 156, 165, 139 L. Ed. 2d 525, 535 (1997) ("[I]n any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III[.]").

Accordingly, we affirm the trial court's order granting the Town's motion to dismiss the present action on the grounds that it is barred by the prior action pending doctrine.

Preliminary Injunction

[2] For the reasons discussed above, we also affirm the trial court's denial of plaintiff's motion for a preliminary injunction.

A preliminary injunction is "an extraordinary measure" that "will be issued only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued[.]" *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977) (citations omitted). "The standard of review from a preliminary injunction is 'essentially *de novo*.' " *VisionAIR, Inc. v. James*, 167 N.C. App. 504, 507, 606 S.E.2d 359, 362 (2004) (quoting *Robins & Weill, Inc. v. Mason*, 70 N.C. App. 537, 540, 320 S.E.2d 693, 696 (1984)). "Nevertheless, 'a trial court's ruling on a motion for a preliminary injunction is presumed to be correct, and the party challenging the ruling bears the burden of showing it was erroneous.' " *Id.* (quoting *Analog Devices, Inc. v. Michalski*, 157 N.C. App. 462, 465, 579 S.E.2d 449, 452 (2003)) (citation omitted).

In the instant case, Judge Letts's order denying plaintiff's motion for a preliminary injunction stated that "[t]he claims in the Plaintiff's Amended Complaint are likely barred by the doctrine of prior action pending. As such, there is a likelihood that the Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted." "Because there is a high likelihood that Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted," Judge Letts concluded that "Plaintiff cannot show a likelihood of success on the merits. . . . Therefore, Plaintiff is not entitled to preliminary injunction." Indeed, Judge Letts was correct: Judge Doughton dismissed plaintiff's action, and the dismissal was appropriate. Accordingly, we affirm the trial court's order denying plaintiff's motion for a preliminary injunction.

Conclusion

For the reasoning explained herein, the orders denying plaintiff's motion for a preliminary injunction and granting the Town's motion to dismiss are

AFFIRMED.

Judges ELMORE and TYSON concur.

STATE OF NORTH CAROLINA
v.
CEDRIC THEODIS HOBBS, JR.

No. COA17-1255

Filed 17 July 2018

1. Criminal Law—requested instructions—denied—no abuse of discretion

The trial court did not abuse its discretion in a prosecution for murder and robbery by not giving defendant's requested instructions on defendant's mental and emotional condition and whether he had the capacity to consider the consequences of his actions. Such language is present in the Pattern Jury Instructions, the jury was clearly instructed on their ability to consider defendant's mental illness and condition, and defendant was found guilty of first-degree murder under both the felony murder rule and premeditation and deliberation, so that any error in denying the instructions would not be prejudicial.

2. Criminal Law—jury selection—Batson challenge—prima facie case—mootness

The trial court did not err during jury selection for a first-degree murder prosecution by finding that defendant had not made a prima facie showing that two prospective jurors were excluded based on race where the trial court improperly asked the State to articulate for the record its reasons for challenging certain prospective jurors after finding that defendant had not made a prima facie showing. However, the issue did not become moot where, as here, the trial court merely asked for the State's reasoning underlying its decision to challenge for the record.

3. Criminal Law—jury selection—Batson challenge—disparate treatment

The trial court did not err in a first-degree murder prosecution by denying defendant's Batson challenge to the striking of a particular prospective juror where the combination of the prospective juror's answers and demeanor led to his dismissal. Defendant could not show disparate treatment where the same factors were not present in the jurors the State passed.

4. Criminal Law—jury selection—Batson challenge—race-neutral factors

The trial court did not err in a first-degree murder prosecution by denying a Batson challenge to the striking of a potential juror where the State identified race-neutral factors and defendant did not show disparate treatment.

Appeal by defendant from judgments entered 18 December 2014 by Judge Robert F. Floyd in Cumberland County Superior Court. Heard in the Court of Appeals 7 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant-appellant.

TYSON, Judge.

Cedric Theodis Hobbs, Jr. ("Defendant") appeals from a jury's guilty verdicts, convicting him of first-degree murder, robbery with a dangerous weapon, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. We find no error.

I. Background

Rondriako Burnett was murdered on 5 November 2010 in or around Thomson, Georgia. Keon, Burnett's brother, testified that the last time he had seen his brother alive was that afternoon when he had left with Defendant, who was riding in Burnett's red Suburban SUV. The next morning, Burnett's sister received a call informing her that a body, later confirmed to be Burnett, had been found. Burnett's red Suburban SUV was not found with his body. A .380-caliber bullet was recovered from Burnett's body during the autopsy.

On the morning of 6 November 2010, Kyle Harris and Demarshun Sanders, were working at Cumberland Pawn Shop, located in a small shopping center in Fayetteville, North Carolina. At approximately 8:45 a.m., Sanders observed Defendant and a woman sitting inside of a red SUV in the parking lot of the center. Shortly thereafter, around 9:00 a.m., Defendant entered the store to pawn a CD player. Harris told Defendant he would not accept the CD player because it was not working. Subsequently, Defendant returned to the store seeking to pawn car

speakers. He told Harris that his SUV was broken down and he needed help. Upon hearing Defendant's reasoning, Harris agreed to accept the speakers and paid Defendant $45.00. The red SUV remained parked in the parking lot for the rest of the day and was observed there by several employees and customers.

Later that evening, Harris, Derrick Blackwell, and Sean Collins were working inside the pawn shop when Defendant re-entered, carrying a backpack. Defendant was accompanied by the woman previously seen inside the red SUV, later identified as Alexis Mattocks, who was carrying a suitcase. Defendant and his companion casually browsed the store, while the employees played video games on their laptops.

Defendant pulled a gun, identified as a silver-chromed Lorcin .380 caliber handgun, and pointed it at all three employees. Defendant told the employees to empty their pockets, demanded their phones, wallets, and keys, and for the cash register be emptied.

To fulfill Defendant's request, Harris began walking toward the cash register. Defendant pulled the trigger and shot Harris in the upper chest. Defendant then walked behind the counter, pointed the gun at Blackwell, and instructed him to empty the cash register. After taking the money inside the register, Defendant directed his attention to Collins, who was instructed to empty his pockets. Collins complied, and threw the contents of his pockets on the ground towards Defendant. Defendant took money off the floor and proceeded to grab the wounded Harris' car keys from his belt loop.

Defendant exited the store and moved some items from the red SUV, later confirmed to be Burnett's stolen Suburban, and drove off in Harris' silver colored Saturn Ion. When first responders arrived on the scene, Harris was unresponsive. Harris died from the injuries resulting from the gunshot wound.

On the night of 6 November 2010, Washington, D.C. Police Officer Jerry Reyes observed a Saturn Ion bearing a North Carolina license plate. Officer Reyes checked the plate, learned the vehicle was stolen, and began pursuit. When back-up officers arrived, Officer Reyes executed a traffic stop. There were three people inside the car: Defendant, who was driving, Mattox, and their young child. Officer Reyes pulled Defendant out of the car, handcuffed and arrested him.

The Washington, D.C. Police learned an occupant of the stolen Saturn was a "person of interest" in connection with a robbery/homicide in Fayetteville, North Carolina, and contacted the Fayetteville Police

Department. After verifying Defendant was the "person of interest" and seeing blood located on Defendant's shoes, Washington D.C. Police obtained a search warrant for the Saturn. The subsequent search recovered a .380-caliber Lorcin handgun. The bullets removed from the bodies of Rondriako Burnett and Kyle Harris matched with a test shot later fired from the recovered Lorcin .380-caliber handgun.

The Fayetteville Police Department obtained North Carolina warrants, and Detective Sondergaard traveled to Washington D.C. to interview Defendant. Defendant stated his purpose for the robbery was to get "[m]oney and guns" and he had fired his weapon to "scare" the employees of the pawn shop, but he "wasn't trying to shoot" Harris.

On 4 August 2014, Defendant was indicted for first-degree murder, first-degree kidnapping, two counts of second-degree kidnapping, two counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. Defendant gave notice to assert the defenses of mental infirmity, diminished capacity, and automatism.

A capital first-degree murder trial and for the other related charges commenced against Defendant. At the close of the State's evidence, Defendant moved to dismiss all charges. The court dismissed the three kidnapping charges, but denied Defendant's motion to dismiss any of the remaining charges.

Defendant did not testify at trial, but presented evidence of his background though the testimony of various family members, and evidence of his mental health through expert witnesses. The testimony of his family members stated Defendant had survived a troubled childhood. He had lived in bad neighborhoods where drive-by shootings were frequent, and drug use and violence were present. His father abused alcohol and drugs during Defendant's childhood and adolescence. His mother abused Defendant by spanking him repeatedly. Defendant's mother was described as "different" and "real strange" by Defendant's aunts.

Abandoned by his parents, Defendant went to live with his aunt and uncle, who suffered through many evictions and also lived in crime-ridden neighborhoods. Even though Defendant was described as a bright student, his behavior and performance began to change drastically in high school. In 1997, Defendant was arrested for armed robbery and was placed into a drug treatment program. Defendant lost interest in the marching band, his grades began to drop, and his absences from school increased. His probation was revoked and he served time in

prison. After meeting Alexis Mattocks, and after the birth of their daughter, Defendant was described as beginning to turn his life around.

Defendant returned to Georgia in August 2010 after residing in Washington, D.C. for several years, when his family was evicted from their home. A couple of months after moving back to Georgia, Defendant relapsed into drug use and bought drugs from Rondriako Burnett.

Dr. Ginger Calloway, a psychologist, testified regarding Defendant's and his parents' prior mental health diagnoses and Defendant's substance abuse. Dr. Calloway asserted Defendant's background and experiences were all influential on Defendant's actions at the time of the murders.

Defendant told Dr. Calloway he had routinely carried a gun when he lived in D.C. because of the violence, began committing robberies in 1997 to obtain money, and he had used and sold drugs. He also stated to Dr. Calloway he had not intended to kill Harris.

Dr. George Corvin, a psychiatrist, testified about his diagnoses of Defendant, which included persistent depressive disorder, post-traumatic stress disorder, multiple substance abuse disorder, and characteristics of borderline personality disorder and paranoid personality disorder. Dr. Corvin opined that Defendant's mental abilities were affected by mental illness at the time of the offenses.

Defendant told Dr. Corvin he had relapsed and began using cocaine again approximately two weeks before the offenses. Defendant also told Dr. Corvin that the day before he shot Burnett, he and Burnett had engaged in an altercation over money. Burnett had shot a gun into the air, which startled Defendant, upset Mattocks, and made their baby cry. Defendant shot Burnett the next day and stated he was mad at Burnett and wanted to kill him.

Dr. Corvin testified that he understood Defendant had taken Mattocks and their baby out of Georgia, because Defendant's family had been talking about taking the baby away from them. They hid Burnett's SUV until after dark, then drove to Fayetteville, North Carolina, to the Cumberland Pawn Shop.

Once there, the vehicle would not start, and they came up with a plan to rob the pawn shop. They bought duct tape and planned to have Defendant hold the gun. Mattocks was to restrain the employees with the duct tape, take money and guns from the pawn shop, steal Harris' Saturn, and then they would drive to Washington, D.C. to sell the guns.

Dr. Corvin stated Defendant had told him that he did not intend to hurt anyone during the robbery, and displayed remorse for killing Harris, but not for killing Burnett, who Defendant thought was a "very bad person." Dr. Corvin opined Defendant's ability to think, reason, and make judgments was compromised at the time of the robbery. Dr. Corvin stated while Defendant did plan and intended the robbery, he personally doubted Defendant had intended to kill Harris.

Based upon the evidence presented, defense counsel made three written requests for jury instructions at the charge conference. Defense counsel proposed instructions on: (1) first-degree murder with premeditation and deliberation; (2) lack of mental capacity; and (3) deliberation. The trial court denied the requests for deliberation and first-degree murder with premeditation and deliberation. The court indicated that these proposed instructions were covered in substance in the pattern jury instructions, but granted defense counsel's request for a proposed instruction on lack of mental capacity.

The jury found Defendant guilty of all charges, including first-degree murder on both the basis of premeditation and deliberation and under the felony murder rule. The jury deadlocked 11-to-1 in favor of a capital sentence. The trial judge sentenced Defendant to life imprisonment without parole for the first-degree murder conviction, consolidated with one of the attempted robbery with a dangerous weapon convictions, followed by consecutive sentences on each of the remaining convictions. Defendant filed timely notice of appeal.

II. Jurisdiction

An appeal of right lies with this court from a final judgment of the superior court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 15A-1444(a) (2017).

III. Issues

Defendant argues the trial court erred when it denied defense counsel's proffered jury instructions and denied Defendant's first three *Batson* challenges.

IV. Jury Instructions

A. Standard of Review

This Court has recognized "the proper standard of review depends upon the nature of a defendant's request for a jury instruction." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015). Defendant

argues the standard of review for this issue is *de novo*, and cites *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009).

The issue in *Osorio* was whether sufficient evidence existed to support a jury instruction on acting in concert. *Id.* "Whether evidence is sufficient to warrant an instruction . . . is a question of law[.]" *State v. Cruz*, 203 N.C. App. 230, 242, 691 S.E.2d 47, 54 (2010). We review questions of law *de novo*. *Edwards*, 239 N.C. App. at 393, 768 S.E.2d at 621 (citation omitted).

Where the issue is not a question of law or reviewed *de novo*, the appropriate standard of review is for an abuse of discretion. *State v. Lewis*, 346 N.C. 141, 145, 484 S.E.2d 379, 381 (1997) ("[w]hether the trial court instructs using the exact language requested by counsel is a matter within its discretion and will not be overturned absent a showing of abuse of discretion.") (quoting *State v. Herring*, 322 N.C. 733, 742, 370 S.E.2d 363, 369 (1988)); *State v. Shepherd*, 156 N.C. App. 603, 607, 577 S.E.2d 341, 344 (2003) ("the choice of instructions given to a jury 'is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion.' ") (quoting *State v. Nicholson*, 355 N.C. 1, 66, 558 S.E.2d 109, 152, *cert. denied*, 537 U.S. 845, 154 L. Ed. 2d 71 (2002)).

As the issue here involves the judge's choice in the instructions given to the jury, we review the trial court's ruling for an abuse of discretion. *See Lewis*, 346 N.C. at 145, 484 S.E.2d at 381.

B. Abuse of Discretion

[1] "This Court has consistently held that a trial court is not required to give a [defendant's] requested instruction verbatim. Rather, when the [defendant's] request is correct in law and supported by the evidence, the court must give the instruction in substance." *State v. Wallace*, 351 N.C. 481, 525, 528 S.E.2d 326, 353 (2000) (citation and internal quotation marks omitted). This rule applies even when the requested instructions are based on language from opinions of the Supreme Court of North Carolina. *State v. Harden*, 344 N.C. 542, 555, 476 S.E.2d 658, 664 (1996), *cert. denied*, 520 U.S. 1147, 137 L. Ed. 2d 483 (1997).

The additional jury instructions defense counsel proffered all relate to the mental and/or emotional condition of Defendant at the time of the murder and whether Defendant had the mental capacity to consider the consequences of his actions. Such language is present in the Pattern Jury Instructions. Defendant has failed to show the trial court abused its discretion in denying Defendant's additional language, the substance of which

was included in the jury instructions the trial court gave. *See Wallace*, 351 N.C. at 525, 528 S.E.2d at 353; *see also State v. Jones*, 342 N.C. 628, 632-33, 467 S.E.2d 233, 235 (1996).

Further, the trial court allowed and gave Defendant's proposed instruction on lack of mental capacity. This instruction informed the jury that "[i]f, as a result of post-traumatic stress disorder, persistent depressive disorder, or some other mental infirmity, the defendant did not have the specific intent to kill, formed after premeditation and deliberation, he is not guilty of first degree murder." The jury was clearly instructed concerning their ability to consider Defendant's mental illnesses and condition as part of their deliberation.

Finally, Defendant was found guilty of first-degree murder based upon premeditation and deliberation and under the felony murder rule. Presuming, *arguendo*, the trial court erred by denying Defendant's requested instructions, such error would not be prejudicial. *See State v. Farmer*, 333 N.C. 172, 194, 424 S.E.2d 120, 133 (1993) (finding that where the defendant was convicted of first-degree murder under both the felony murder rule and the theory of premeditation and deliberation, "it would not have been reversible error for the trial court to have failed to give any instructions concerning premeditation and deliberation.").

V. *Batson* Challenges

Defendant challenges the State's exclusion of potential jurors, who are the same race as Defendant, by the State's use of peremptory challenges under *Batson v. Kentucky*, 476 U.S. 79, 90 L. Ed. 2d 69 (1986).

A. Standard of Review

Defendant cites *Piedmont Triad Regional Water Authority v. Sumner Hills, Inc.*, 353 N.C. 343, 348, 543 S.E.2d 844, 848 (2001), to support his assertion that this issue should be reviewed *de novo*, as it presents a constitutional question. However, in ruling on criminal cases involving *Batson* challenges, the Supreme Court of North Carolina has upheld "the trial court's determination unless [the Court was] convinced it is clearly erroneous." *State v. Golphin*, 352 N.C. 364, 427, 533 S.E.2d 168, 211 (2000), *cert. denied*, 532 U.S. 931, 149 L. Ed. 2d 305 (2001) (citing *State v. Kandies*, 342 N.C. 419, 434-35, 467 S.E.2d 67, 75, *cert. denied*, 519 U.S. 894, 136 L. Ed. 2d 167 (1996)); *State v. Lawrence*, 352 N.C. 1, 14, 530 S.E.2d 807, 816 (2000) (" 'Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous' ") (quoting *State v. Thomas*, 329 N.C. 423, 433, 407 S.E.2d 141, 148 (1991)). "When the trial court explicitly rules that a defendant

failed to make out a *prima facie* case, review by this Court is limited to whether the trial court's finding was error." *Golphin*, 352 N.C. at 426, 533 S.E.2d at 211.

B. Three-Prong *Batson* Test

"In *Batson* the United States Supreme Court set out a three-pronged test to determine whether a prosecutor impermissibly excluded prospective jurors on the basis of their race." *State v. Bonnett*, 348 N.C. 417, 433, 502 S.E.2d 563, 574 (1998) (citing *Hernandez v. New York*, 500 U.S. 352, 358-59, 114 L. Ed. 2d 395, 405 (1991)), *cert. denied*, 525 U.S. 1124, 142 L. Ed. 2d 907 (1999).

"First, the defendant must make a *prima facie* showing that the state exercised a peremptory challenge on the basis of race." *State v. Fair*, 354 N.C. 131, 140, 557 S.E.2d 500, 509 (2001) (citing *Lawrence*, 352 N.C. at 14, 530 S.E.2d at 815). This showing is "based on all relevant circumstances, such as defendant's race, the victim's race, the race of key witnesses, questions and statements of the prosecutor which tend to support or refute an inference of discrimination, a pattern of strikes against minorities, or the State's acceptance rate of prospective minority jurors." *State v. White*, 349 N.C. 535, 548, 508 S.E.2d 253, 262 (1998) (citation omitted). Numerical analysis of the accepted and dismissed jurors of a particular race is not dispositive proof of discrimination, but it "can be useful in helping us and the trial court determine whether a *prima facie* case of discrimination has been established." *State v. Barde*n, 356 N.C. 316, 344, 572 S.E.2d 108, 127 (2002).

"The first step of the *Batson* analysis is not intended to be a high hurdle for defendants to cross. Rather, the showing need only be sufficient to shift the burden to the State to articulate race-neutral reasons for its peremptory challenge." *State v. Wiggins*, 159 N.C. App. 252, 262, 584 S.E.2d 303, 311-12 (2003) (citation and internal quotation marks omitted), *cert. denied*, 541 U.S. 910, 158 L. Ed. 2d 256 (2004).

If a *prima facie* showing is made by a defendant,

> the burden shifts to the State to articulate a race-neutral reason for striking the particular juror. The State's explanation must be clear and reasonably specific, but does not have to rise to the level of justifying a challenge for cause. Moreover, unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Golphin, 352 N.C. at 426, 533 S.E.2d at 211 (citations and internal quotation marks omitted). A defendant may "submit evidence to show that the state's proffered reason is merely a pretext for discrimination." *Fair*, 354 N.C. at 140, 557 S.E.2d at 509.

Finally,

> the trial court must decide whether the defendant has proven purposeful discrimination. This involves weighing various factors such as susceptibility of the particular case to racial discrimination, whether the State used all of its peremptory challenges, the race of witnesses in the case, questions and statements by the prosecutor during jury selection which tend to support or refute an inference of discrimination, and whether the State has accepted any African-American jurors.

Id. (citations and internal quotation marks omitted).

Upon review, this Court considers several non-exclusive factors:

> (1) the characteristic in question of the defendant, the victim and any key witnesses;
>
> (2) questions and comments made by the prosecutor during jury selection which tend to support or contradict an inference of discrimination based upon the characteristic in question;
>
> (3) the frequent exercise of peremptory challenges to prospective jurors with the characteristic in question that tends to establish a pattern, or the use of a disproportionate number of peremptory challenges against venire members with the characteristic in question;
>
> (4) whether the State exercised all of its peremptory challenges; and,
>
> (5) the ultimate makeup of the jury in light of the characteristic in question.

Wiggins, 159 N.C. App. at 263, 584 S.E.2d at 312 (citations omitted).

C. Trial Court's Determination

During *voir dire*, defense counsel raised four challenges to the jury venire under *Batson*, and argued the State had exercised peremptory challenges to excuse prospective jurors based upon their race. Three of

these challenges are argued on appeal: prospective jurors Robert Layden and Brian Humphrey, prospective juror Curtis Landry, and prospective juror William McNeill. By failing to raise and argue the fourth challenge on appeal, Defendant has abandoned his assertion of error to this challenge. N.C.R. App. P. 28(a). We address each remaining challenge in turn.

1. Jurors Layden and Humphrey

[2] For the first challenge, defense counsel asserted the State had used six out of their eight peremptory challenges to excuse black jurors, even though the responses elicited from the excused black potential jurors were allegedly similar in substance to white jurors who had remained in the pool.

The trial court found Defendant had failed to make a *prima facie* showing. However, the trial court improperly requested the State to articulate for the record its reasons for challenging these prospective jurors. After hearing arguments, the trial court reaffirmed its finding that Defendant had failed to make a *prima facie* showing.

Defendant argues that the trial court's ruling became moot once the State gave its reasons for its peremptory challenges. It is true that

> [i]f the prosecutor volunteers his reasons for the peremptory challenges in question before the trial court rules whether the defendant has made a *prima facie* showing or if the trial court requires the prosecutor to give his reasons without ruling on the question of a *prima facie* showing, the question of whether the defendant has made a *prima facie* showing becomes moot[.]

State v. Williams, 343 N.C. 345, 359, 471 S.E.2d 379, 386 (1996). However, if, as here, the trial court rules the defendant did not make a *prima facie* showing, and merely asks for the State's reasoning underlying its decision to challenge "for the record," the issue is not moot. *Id.* at 359, 471 S.E.2d at 386-87. On this challenge, "our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing." *Id.* at 359, 471 S.E.2d at 387; *State v. Smith*, 351 N.C. 251, 262, 524 S.E.2d 28, 37 (2000) ("Where the trial court rules that a defendant has failed to make a *prima facie* showing, our review is limited to whether the trial court erred in finding that defendant failed to make a *prima facie* showing, even if the State offers reasons for its exercise of the peremptory challenges.").

In *State v. Smith*, the defendant made a *Batson* challenge after the State had exercised six of its eight peremptory challenges to excuse

black potential jurors. 351 N.C. at 262, 524 S.E.2d at 37. As here, the defendant in *Smith* did not assert his first *Batson* challenge until after the State had exercised its eighth peremptory strike. *Id.* 351 N.C. at 263, 524 S.E.2d at 37. Where a defendant has not made any previous, specific *Batson* challenge, the trial court has "no obligation to inquire into the reasons for striking those [previously excused] jurors." *Id.*

"Although not dispositive, one factor tending to refute an allegation of peremptory challenges being exercised on the basis of race is the acceptance rate of black jurors by the prosecution." *Id.* (citation omitted). At the time of Defendant's challenge, eleven black potential jurors were examined by the State, and the State passed five, one of whom was later dismissed by the trial court for cause. Defendant used two of five peremptory challenges to strike black jurors.

At the time of Defendant's first *Batson* challenge, the jury consisted of two white males, two black males, and two white females. If Defendant had not used his two peremptory strikes, the composition of the jury at the time of his first challenge would have been four black jurors, three males and one female, and four white jurors.

As to the other factors, Defendant is black, and while the murder victim was white, at least one of the other victims of the robbery was black. Further, key witnesses relating to the homicide of Burnett in Georgia and Defendant's arrest in Washington, D.C. were black. After reviewing the record, "we also conclude that the prosecutor did not make any racially motivated comments, nor did he ask racially motivated questions of the black prospective jurors." *Id.*

Considering all the relevant factors, we conclude the trial court did not err in finding Defendant had failed to establish a *prima facie* showing for prospective jurors Layden and Humphrey. *See White*, 349 N.C. at 548, 508 S.E.2d at 262. Defendant's arguments are overruled.

2. Juror Landry

[3] Defendant raised his second *Batson* challenge after the State had exercised its ninth peremptory challenge. Defense counsel indicated that they "ha[d] nothing to add" and renewed what they had "earlier said" in regards to the "general opposition to why [they] needed to make a *prima facie* case." The trial court noted the State had used seven out of their nine peremptory challenges to excuse black prospective jurors and, considering the previous facts cited, found Defendant had made a *prima facie* showing and convened a hearing. After the hearing, Defendant's *Batson* challenge was denied.

When a trial court finds a defendant has made a *prima facie* showing, the first prong of the analysis is satisfied. *Wiggins*, 159 N.C. App. at 264, 584 S.E.2d at 312 (citation omitted). We consider the State's proffered reasoning for striking Landry, and whether the trial court properly found these reasons were not pretextual. *Id.*

The prosecutor asserted potential juror Landry was excused because: (1) he believed drugs and alcohol can make people do things they did not want to do; (2) he had mentored individuals with substance abuse issues in his church; (3) his uncle had died in prison while serving two life sentences; (4) he had stated he believed a life sentence was taking a life; (5) he had left several questions on the juror questionnaire unanswered; (6) he had given some "perplexing" responses to questions; (7) he had allegedly walked out of court once singing "the sun will come out tomorrow"; (8) he had nodded affirmatively when another juror, who was excused for cause, mentioned her religious belief against the death penalty; (9) he had previously been in a gang and had heard Defendant was in a gang; (10) he had failed to appear in court on previous occasions; and, (11) he had stated he would hold it against the State if it did not present all the evidence.

Defendant has failed to show any error in the trial court's conclusion that the State's reasons for dismissing Landry were race-neutral. *See State v. Bell*, 359 N.C. 1, 13-16, 603 S.E.2d 93, 103-05 (2004) (valid and race-neutral reasons for excusing a juror include: views on the death penalty, concern a juror might be unduly sympathetic to the defendant, work in prison ministry, and work with Alcoholics Anonymous); *see also State v. Robinson*, 336 N.C. 78, 95, 443 S.E.2d 306, 313 (1994) (not answering questions in a direct manner and confusing the meaning of questions asked were valid and race-neutral reasons to excuse jurors).

Defendant argues there were similar concerns with several of the white jurors who the State did not strike but passed on to Defendant, and asserts the State did not properly follow up with several of Landry's responses to see if they would be a problem. However, Defendant does not specify which white jurors had given similar answers and were not excused. After a close reading of the record and transcript, we do not find this argument to have merit. While some jurors had one factor in common with Landry, none presented the range and multiplicity of issues the State stated for challenging Landry.

The combination of factors present with Landry's answers and demeanor led to his dismissal. Defendant cannot show disparate treatment "because the same combination of factors was not present" in

the white jurors whom the State passed. *Bell*, 359 N.C. at 14, 603 S.E.2d at 104. Defendant fails to show any error in the trial court's denial of Defendant's second *Batson* challenge of prospective juror Landry.

3. Juror McNeill

[4] Defendant's third *Batson* challenge was asserted after the State had exercised its eleventh peremptory challenge. Defense counsel reiterated the same arguments previously asserted and reminded the court that Defendant had successfully established a *prima facie* case based upon those grounds. After a hearing, the trial court denied this *Batson* challenge.

At the time of the third challenge, the State had used eight out of eleven peremptory challenges to excuse black prospective jurors, and had passed on eight black prospective jurors to Defendant. Two of those black jurors were seated on the jury panel, one had been dismissed for cause, and five of those prospective black jurors were struck by Defendant's peremptory challenges.

In support of its neutral justification, the State stated McNeill was excused after he hesitated to reply when asked if he could vote to impose the death penalty, and then stated he preferred life in prison over the death penalty. Further, he disclosed he had family members with substance abuse issues, a sister with apparent anxiety, and as a pastor, he had often counseled individuals with substance abuse issues.

As with the previous venireman, we conclude the State presented valid, race-neutral reasons for excusing prospective juror McNeill. *See Robinson*, 336 N.C. at 97, 443 S.E.2d at 314 (finding a dismissal of a juror who stated a preference of life imprisonment over the death penalty was "clear and reasonable"); *see also State v. Maness*, 363 N.C. 261, 272, 677 S.E.2d 796, 804 (2009) (excusing a juror who had mental illness and who had worked with substance abusers, causing the State to fear she would "overly identify with defense evidence" was valid and race-neutral).

Defendant argues McNeill's involvement with family and parishioner substance abuse had occurred many years ago and he did not presently know anyone with such issues. He further argues McNeill did state he could consider the death penalty and that the State had passed white jurors who had issues with anxiety. After a close reading of the record and transcript, we again do not find these arguments persuasive. As with the previous venireman, it is the aggregate of race-neutral factors identified by the State that led to McNeill's challenge and dismissal. Defendant has failed to show disparate treatment in this *Batson* challenge. *See Bell*, 359 N.C. at 14, 603 S.E.2d at 104.

VI. Conclusion

The trial court did not abuse its discretion in denying two of Defendant's three proposed jury instructions. The jury was provided the proposed instructions in substance with the pattern jury instructions the trial court gave. *See Wallace*, 351 N.C. at 525, 528 S.E.2d at 353. Further, the trial court did instruct the jury on Defendant's proposed instruction on lack of mental capacity, fully alerting the jury to their ability to consider Defendant's asserted mental illness as part of the required intent for first-degree murder. Finally, Defendant failed to show any reversible error, where he was convicted of first-degree murder under both the theory of premeditation and deliberation and under the felony murder rule. *See Farmer*, 333 N.C. at 194, 424 S.E.2d at 133.

After reviewing all the "relevant circumstances," the trial court did not err in concluding Defendant had failed to make a *prima facie* showing in his first *Batson* challenge. *See White*, 349 N.C. at 548, 508 S.E.2d at 262. It is well established that a disproportionate number of State's peremptory challenges to dismiss prospective jurors of a particular race is not dispositive of discrimination, but is one factor for the Court to consider. *Barden*, 356 N.C. at 344, 572 S.E.2d at 127 ("We emphasize that a numerical analysis of the type employed here is not necessarily dispositive. However, such an analysis can be useful in helping us and the trial court determine whether a *prima facie* case of discrimination has been established."); *Smith*, 351 N.C. at 263, 524 S.E.2d at 37; *Wiggins*, 159 N.C. App. at 265, 584 S.E.2d at 313.

An analysis of the peremptory challenges in this case goes against Defendant's argument. While the State, at the time of the last *Batson* challenge, had exercised over seventy percent of its peremptory challenges for black jurors, the State peremptorily challenged eight black prospective jurors and passed eight other black prospective jurors to Defendant. One prospective black juror passed by the State was struck by the trial court for cause. Defendant ultimately determined only two black jurors were seated on the panel at the time of the third challenge, as he struck five black potential jurors the State had passed to be seated.

Regarding the other two *Batson* challenges, the State presented valid, race-neutral reasons for challenging the two jurors dismissed. Defendant failed to show any purposeful discrimination. *Fair*, 354 N.C. at 140, 557 S.E.2d at 509. After weighing all the factors considered by the trial court, Defendant has also failed to show the trial court's rulings were clearly erroneous. *Golphin*, 352 N.C. at 427, 533 S.E.2d at 211.

Defendant received a fair trial, free from prejudicial errors. Defendant's arguments are overruled. We find no error in the jury's verdicts or the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges DIETZ and BERGER concur.

STATE OF NORTH CAROLINA
v.
NEIL WAYNE HOYLE

No. COA17-1324

Filed 17 July 2018

1. Indecent Exposure—felony—in the presence of a minor—sufficiency of evidence

The State introduced sufficient evidence in a felony indecent exposure prosecution to survive defendant's motion to dismiss and allow the jury to determine whether defendant's exposure of his genitalia while inside his vehicle could have been viewed by a minor 20 feet away from the vehicle.

2. Indecent Exposure—jury instruction—meaning of presence—new trial

The trial court erred by refusing to include defendant's requested special instruction to the jury regarding the meaning of "presence" in a trial for felony indecent exposure. The failure to instruct the jury that exposure in the presence of another person means that the person could have seen the exposure had they looked prejudiced defendant and constituted reversible error.

Judge MURPHY dissenting.

Appeal by defendant from judgment entered 1 June 2017 by Judge Jeffrey P. Hunt in Catawba County Superior Court. Heard in the Court of Appeals 15 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Tiffany Y. Lucas, for the State.

Anne Bleyman for defendant.

ARROWOOD, Judge.

Neil Wayne Hoyle ("defendant") appeals from judgment entered upon his conviction for felony indecent exposure. For the following reasons, defendant is entitled to a new trial.

I. Background

On 6 June 2016, a Catawba County Grand Jury indicted defendant on one count of felony indecent exposure and one count of misdemeanor indecent exposure based on allegations that defendant exposed himself to a mother and her four-year-old son (the "child") on 16 March 2016. Defendant's case was tried in Catawba County Superior Court before the Honorable Jeffrey P. Hunt beginning on 30 May 2017.

The evidence at trial tended to show that just after the mother and her son arrived home on 16 March 2016, as the mother was unloading groceries and the child was playing in the front yard, a man later identified as defendant pulled up in front of the house with the passenger side of his vehicle facing the house. The road was slightly elevated from the front yard. Defendant first asked for directions. When the mother said she could not help him, defendant offered to work on the house and offered his business card. The mother declined several times, but defendant was persistent that she take his card. The mother approached defendant's vehicle with several grocery bags in her hand to take the card, believing defendant would then leave and she could finish unloading her groceries. The child was swinging on a nearby tree in the front yard, but did not approach defendant's vehicle. As the mother reached into defendant's passenger window and took the card from defendant, she saw that defendant had his hand on his exposed penis. The mother jerked back, dropped her bags, and fell into the small ditch alongside the road. The mother could hear defendant laugh and drive away as she gathered herself, grabbed her son, and ran into the house.

Once inside, the mother called the police. After several minutes, the mother went outside to gather the things she dropped and noticed that defendant's card was on the ground. When the police arrived, the mother told them what happened and gave them defendant's card. The police were able to identify a suspect based on the information on the card and the mother positively identified defendant in a photograph shown to her by the police. Defendant was in his mid-40s.

The mother testified that defendant never verbally acknowledged the child, but did look over at him. The mother also testified that she did not think the child saw what defendant was doing. Based on the mother's description of the events and analysis of the scene, the investigating officer testified that the child was approximately 20 feet away from the location where defendant pulled up in front of the house. The tree the child was playing on was approximately 14 feet away from the location where defendant pulled up in front of the house.

Defendant turned himself in to police on 18 March 2016. At that time, defendant was questioned and arrested. Defendant acknowledged that he pulled up to the house and interacted with the mother. Defendant, however, denied exposing himself.

On 1 June 2017, the jury returned verdicts finding defendant guilty of felony indecent exposure and misdemeanor indecent exposure. The trial court entered judgment on felony indecent exposure sentencing defendant to a term of 10 to 21 months imprisonment and imposing sex offender registration and satellite-based monitoring requirements on defendant upon his release. The trial court arrested judgment on misdemeanor indecent exposure. Defendant gave notice of appeal in open court.

II. Discussion

On appeal, defendant challenges the trial court's denial of his motions to dismiss and his request for a special jury instruction for felony indecent exposure.

1. Motion to Dismiss

[1] At the close of the State's evidence and at the close of all the evidence, defendant moved to dismiss the charges,[1] specifically arguing the State did not present sufficient evidence to support the felony indecent exposure charge. Defendant now challenges the trial court's denial of his motions.

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451,

1. Defendant referred to his motion as a motion for a directed verdict. The trial court, however, properly considered it as a motion to dismiss for insufficiency of the evidence.

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). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980).

This Court has explained that, as defined in N.C. Gen. Stat. § 14-190.9(a1), "[t]he elements of felony indecent exposure are that an adult willfully expose the adult's private parts (1) in a public place, (2) in the presence of a person less than sixteen years old, and (3) for the purpose of arousing or gratifying sexual desire." *State v. Waddell*, 239 N.C. App. 202, 203, 767 S.E.2d 921, 922 (2015) (internal quotation marks omitted). Defendant now contends, as he did below, that there was insufficient evidence that the alleged exposure was "in the presence of" the child to support the felony indecent exposure charge. Therefore, defendant contends the trial court erred in denying his motions to dismiss. Defendant does not challenge the sufficiency of the evidence related to the other elements of felony indecent exposure, or the evidence of misdemeanor indecent exposure.

This Court has made clear that it is not necessary that a defendant expose himself "to" a child; all that is required under N.C. Gen. Stat. § 14-190.9(a1) is that a defendant expose himself "in the presence of" a child. *Id.* at 205, 767 S.E.2d at 924.

In *State v. Fly*, 348 N.C. 556, 501 S.E.2d 656 (1998), our Supreme Court discussed the meaning of "in the presence of" for purposes of indecent exposure. In that case, a woman rounded a turn on the stairs up to her condominium and looked up to see the defendant bent over at the waist, with his short pants pulled down to his ankles, and wearing nothing else besides a backwards baseball cap. *Id.* at 557, 501 S.E.2d at 657. The Court first addressed whether the defendant exposed his private parts even though the woman only described seeing the defendant's " 'buttocks, the crack of his buttocks.' " *Id.* at 557, 559, 501 S.E.2d at 657, 658. Holding the jury could find the defendant did expose his private

parts, the Court explained that " ' "[i]t is not essential to the crime of indecent exposure that someone shall have seen the exposure provided it was intentionally made in a public place and *persons were present who could have seen if they had looked.*" ' " *Id.* at 561, 501 S.E.2d at 659 (quoting *State v. King*, 268 N.C. 711, 712, 151 S.E.2d 566, 567 (1966) (quoting 33 Am. Jur. *Lewdness, Indecency and Obscenity* § 7, at 19 (1941))) (emphasis added). The Court further explained that

> [l]ikewise, the current statute does not require that private parts be exposed to a member of the opposite sex before the crime is committed, but rather that they be exposed "*in the presence of*" a member of the opposite sex. The statute does not go to what the victim saw but to what defendant exposed in her presence without her consent.

Id. (internal citation omitted) (emphasis in original). Thus, in *Fly*, "the fact that [the woman] did not crane her neck or otherwise change her position in an attempt to see more of defendant's anatomy than he had already thrust before her face [did] not defeat the charge of indecent exposure." *Id.*

In *State v. Fusco*, 136 N.C. App. 268, 523 S.E.2d 741 (1999), the defendant was convicted of indecent exposure based on evidence showing that a woman and her mother looked out a window and saw the defendant lying on a creek embankment adjacent to their backyard masturbating with his robe open. The defendant appealed, arguing the charge for indecent exposure in the presence of the mother should have been dismissed because the mother never testified and testimony elicited on her behalf was hearsay. *Id.* at 269, 523 S.E.2d at 742. This Court held "the mere fact that [the mother] did not testify does not justify dismissal of the charge for indecent exposure in her presence[,]" *id.* at 270, 523 S.E.2d at 742, noting that "[the mother's] testimony was not even needed to substantiate [the] charge[,]" because

> [i]ndecent exposure involves exposing one's self "in the presence of" a person of the opposite sex. The victim need not actually see what is being exposed. Accordingly, the State was not required to produce evidence as to what [the mother] actually saw; it only needed to show that defendant was exposing himself and that [the mother] *was present during this exposure and could have seen had she looked.*

Id. (emphasis added).

Based on *Fly* and *Fusco*, defendant contends that "while North Carolina authority does not require that a complaining witness change their position or be within a certain distance in order to see a defendant's exposed private parts, . . . [i]n order to be a victim of indecent exposure it remains necessary that the complaining witness could have seen the private part if they had looked without much effort." Defendant contends there was insufficient evidence in this case that the child could have seen the alleged exposure to support the presence element. In fact, defendant contends the evidence shows that the child could not have seen the alleged exposure without effort. Defendant asserts that in order to see the alleged exposure, the child would have had to move away from the tree he was playing on, go up to the road, move his mother out of the way, and lean into the passenger window.

The State agrees with defendant that the exposure need only have been "in the presence of" the child. *See Waddell*, 239 N.C. App. at 205, 767 S.E.2d at 924. The State, however, takes issue with defendant's reliance on *Fly* and *Fusco* for the meaning of "in the presence of" in the context of an indecent exposure case. The State instead emphasizes that "presence" should be given its plain meaning and looks to Black's Law Dictionary and a probation violation case, *see State v. White*, 129 N.C. App. 52, 496 S.E.2d 842 (1998), to support its argument that "presence" should be interpreted by proximity. Thus, the State argues defendant's alleged exposure was "in the presence of" the child where the child was within sight or call, within the immediate vicinity, playing on a nearby tree.

Upon review of the arguments and the cases, we agree with defendant that *Fly* and *Fusco* are controlling and provide the relevant law regarding presence in indecent exposure cases in North Carolina. Under *Fly* and *Fusco*, in order for an exposure to be "in the presence of" a child, the child must be present during the exposure and have been able to see the exposure had the child looked. Ultimately, however, we disagree with defendant's argument that the trial court erred in denying his motions to dismiss the felony indecent exposure charge. The evidence and circumstances in this case, when viewed in the light most favorable to the State, were sufficient to withstand defendant's motion to dismiss and allow the jury to decide whether any exposure by defendant was in the presence of the child.

Nevertheless, in order for the jury to decide the issue, they must be issued adequate instructions on the law in North Carolina.

2. Jury Instructions

[2] On appeal, defendant also takes exception to the trial court's denial of his request for the inclusion of a special jury instruction on the meaning of presence in the instructions for felony indecent exposure.

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29, *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010).

In reviewing the trial court's jury instructions, this Court must consider the instructions in their entirety. *See State v. Wright*, 302 N.C. 122, 127, 273 S.E.2d 699 703 (1981). "Where an instruction is requested by a party, and where that instruction is supported by the evidence, it is error for the trial court not to instruct in substantial conformity to the requested instruction." *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988). "However, an error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a) (2007)).

In this case, the defense requested an addition to the pattern instruction for felony indecent exposure to define presence as set forth in *Fly* and *Fusco*. Specifically, defendant requested that at the end of the third element in the pattern instruction for felony indecent exposure, "that the exposure was in the presence of at least one other person[,]" *see* N.C.P.I.–Crim. 238.17A, the trial court additionally instruct that "[t]he person need not actually see what is being exposed . . . *but that the person could have seen had they looked.*" After considering the defendant's requested special instruction overnight, the trial court denied the request. The trial court instructed the jury on felony indecent exposure pursuant to the pattern instructions, including additional language that it is not necessary that the person see the exposure, but excluding the language requested by defendant "that the person could have seen had they looked."

As discussed above, defendant's requested instruction on presence was a correct statement of the law under *Fly* and *Fusco*. Furthermore, it

is clear that the substance of the requested instruction was not included in the instructions issued for felony indecent exposure. Thus, it was error for the trial court not to give the requested instruction. Lastly, it is likely that without the additional instruction defining presence pursuant to *Fly* and *Fusco*, the jury considered only the child's proximity to the alleged exposure in determining whether the exposure was "in the presence of" the child because, absent the requested instruction, there was no reason for the jury to consider whether the child could have seen the alleged exposure had he looked. Thus, defendant was prejudiced by the omission of the requested instruction. For these reasons, the trial court's failure to give the requested instruction constitutes reversible error warranting a new trial.

III. Conclusion

The trial court in this case did not err in denying defendant's motion to dismiss the felony indecent exposure charge because sufficient evidence was presented to allow the jury to decide whether the alleged exposure was "in the presence of" the child. However, a new trial is required because the trial court failed to give adequate instructions upon defendant's request for a special instruction explaining the meaning of presence in the context of indecent exposure under North Carolina law.

NEW TRIAL.

Judge Calabria concurs.

Judge Murphy dissents by separate opinion.

MURPHY, Judge, dissenting.

I agree that the Majority's holding is a logical extension of the "could have seen had they looked" language employed by our Court and the Supreme Court in *Fusco* and *Fly*, respectively. Further, requiring that a victim of indecent exposure be able to see such exposure "had they looked" in order to establish the "in the presence of" element of indecent exposure would typically be an appropriate application of the rule of lenity. However, I dissent because the General Assembly specifically intended for our courts to construe the words of the indecent exposure statute as expansively as our constitutions permit. Specifically, when the General Assembly enacted the base indecent exposure statute, N.C. Gen. Stat. § 14-190.9, it expressly and unequivocally stated its intent that:

> Every word, clause, sentence, paragraph, section, or other part of this act shall be interpreted in such manner as to be as expansive as the Constitution of the United States and the Constitution of North Carolina permit.

1971 S.L. 591 § 2. This broad interpretation mandate excludes the rule of lenity from our normal canons of statutory construction.

Fly and *Fusco* applied this broad approach based on the facts presented in those cases. *See State v. Fly*, 348 N.C. 556, 560, 501 S.E.2d 656, 659 (1998) (stating that "the majority of the Court of Appeals simply misread the legislative history and the specifically expressed intent of the legislature which repealed the former statute and adopted N.C.G.S. § 14-190.9"). In neither *Fly* nor *Fusco* did the defendant argue, as Defendant does here, that the State failed to establish the "in the presence of" element of indecent exposure.

Here, however, the Majority's opinion takes a narrow view of the presence element of indecent exposure, and the "could have seen had they looked" standard adopted by the Majority today is not an element of N.C. Gen. Stat. § 14-190.9. The Majority's interpretation disregards the General Assembly's intent that this statute be interpreted in as expansive of a manner as the North Carolina and United States constitutions permit. The trial court was not required to deviate from the pattern jury instruction regarding the "in the presence of" element, and the trial court's decision to omit Defendant's proffered addition was not an abuse of discretion. See N.C.P.I. Crim. 238.17A. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
MICHAEL SHANE WINCHESTER

No. COA17-1099

Filed 17 July 2018

1. Search and Seizure—defendant's person and vehicle—probable cause

There was probable cause to issue a warrant to search defendant's person and his vehicle for evidence of drug dealing where a confidential informant's statements were corroborated by a months-long investigation, drug dealing evidence from multiple trash pulls was not stale, and the allegations sufficiently linked defendant and a Range Rover to the residence and to known drug evidence.

2. Search and Seizure—warrant—seizure of person—two miles from house

The seizure of defendant was reasonable where officers obtained a warrant to search defendant, his Range Rover, and his residence; they waited to execute the warrant until defendant drove away from the house because there were others in the house; and defendant was stopped and searched two miles away in the parking lot of an auto parts store. The warrant was issued to search both the residence and defendant's person; the justification for seizing him at the auto parts store was not limited to the warrant to search the house.

3. Search and Seizure—search of residence—pursuant to warrant—no knock

The trial court properly denied defendant's motion to suppress evidence of drug dealing seized pursuant to a warrant where officers waited until defendant left the house because others were present in the house, announced their presence, waited a reasonable time without hearing a response, and broke down the front door with a ram.

4. Constitutional Law—Miranda warnings—questioning before warnings—prejudice analysis

There was no prejudicial error in defendant being questioned while he was in custody but before he was advised of his *Miranda* rights. Defendant's responses were not inculpatory and there was overwhelming evidence linking defendant to a house about which officers asked questions pertaining to safety.

Appeal by defendant from judgments entered 3 August 2017 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 11 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Marie H. Evitt and Special Deputy Attorney General Derrick C. Mertz, for the State.

Law Office of Barry C. Snyder, by Barry C. Snyder and Gabriel Snyder, for defendant.

ELMORE, Judge.

Defendant Michael Shane Winchester appeals from judgments entered after he pled guilty to two counts of attempted heroin trafficking, one count of possession with intent to sell and deliver heroin, and one count of keeping or maintaining a dwelling to keep and sell heroin. He argues the trial court erred by denying his motions to suppress evidence obtained pursuant to the executions of a warrant to search his person, vehicle, and residence for drug dealing evidence, and by denying his motion to suppress certain statements he made in response to police questioning while he was in custody and before he was read his *Miranda* rights. Because probable cause supported the warrant, the searches and seizure were constitutionally reasonable and, even if defendant's responses should have been suppressed, any error in the trial court's ruling was harmless beyond a reasonable doubt. Accordingly, we affirm the trial court's order.

I. Background

The trial court's unchallenged findings reveal the following facts. On 23 August 2016, after a three-months long police investigation prompted by a tip from a confidential informant that defendant was dealing heroin, Detective Ryan C. Cole of the Guilford County Sheriff's Office obtained a warrant to search defendant's residence at 4103 Falconridge Road in Greensboro for drug dealing evidence. The search warrant also identified a 2013 white-over-red Range Rover bearing the North Carolina registration number DFD-7872 as one of three vehicles to be searched, and authorized searches of defendant and Chasity Desiree Jeffries.

During the early morning that next day, Detective Cole held a tactical briefing with a police taskforce organized to assist in executing the warrant. Detective Cole discussed prior charges issued against defendant for possessing firearms, convictions obtained against defendant

related to drug activity, and defendant's history of keeping large dogs. The officers also discussed the possibility that others, including Jeffries and possibly children, might be at the Falconridge residence. Due to these safety concerns, the officers decided to wait to execute the warrant to search the Falconridge residence until after defendant left the premises.

Around 9:45 a.m., about two hours after surveilling officers had been stationed outside the Falconridge residence, they observed defendant leave the residence, enter the identified Range Rover, and drive away. Detective Cole instructed assisting officers to stop the vehicle to execute the warrant to search defendant and the Range Rover. The officers tailed Range Rover in their patrol cars for about two miles until it pulled into an Advance Auto Parts parking lot and parked. The officers pulled into the parking lot, informed defendant he was under investigation, and detained him in handcuffs.

After Detective Cole arrived at the Advance Auto parking lot, he read defendant the search warrant, and the officers executed the warrant by searching defendant and the Range Rover. The search of defendant's person yielded no incriminating drug evidence. Although a police canine positively alerted for narcotics at the Range Rover's driver's side door, the police search upon executing the warrant ultimately yielded no drug evidence.

While defendant was still being held in investigative detention at Advance Auto and before he was read his *Miranda* rights, Detective Cole informed defendant about the warrant to search the Falconridge residence and asked him whether there were any other people including children or aggressive dogs at the residence, or whether there were any weapons being stored there. In response to Detective Cole's questioning, defendant replied that he had never been to the Falconridge residence and denied having any knowledge of or involvement with that residence.

Detective Cole then radioed authorization to the officers staking out the Falconridge address to execute the search warrant on the residence. Those officers announced "Sheriff's Office, Search Warrant" three times and, after hearing no response, broke down the front door using a ramming device. The entering officers discovered Jeffries inside and detained her incident to the search. Soon after the officers entered the premises, defendant was returned to the Falconridge residence while the officers completed their search. That search revealed a large quantity of heroin stored in the kitchen, as well as several items related to packaging and distributing illegal drugs.

On 7 November 2016, a grand jury indicted defendant for maintaining a dwelling to keep and sell heroin, trafficking heroin by possessing twenty-eight grams or more of heroin, and possession with intent to sell or deliver heroin. On 10 March 2017, defendant moved to suppress all evidence seized from the searches of his person and the Range Rover at Advance Auto, and from the search of the Falconridge residence, as well as all statements he made in response to police questioning before he was read his *Miranda* rights.

After a 9 May 2017 suppression hearing, the trial court entered an order that in relevant part denied defendant's motion to suppress the evidence seized pursuant to the execution of the warrant, as well as his responses to Detective Cole's questioning about the Falconridge residence while he was in custody at Advance Auto.[1] The trial court concluded in relevant part the search warrant was supported by probable cause; defendant's seizure was reasonable; the execution of the warrant on the Falconridge residence neither violated our General Statutes nor defendant's constitutional rights; and defendant's responses to Detective Cole's questioning at Advance Auto were admissible, despite not having been advised of his *Miranda* rights, because the questioning fell under the "public safety" exception to the *Miranda* requirement. *See New York v. Quarles*, 467 U.S. 649, 104 S. Ct. 2626 (1984).

On 3 August 2017, defendant entered a plea agreement in which he pled guilty to two counts of attempted heroin trafficking by manufacturing twenty-eight grams or more of heroin and by possessing twenty-eight grams or more of heroin, possession with intent to sell and deliver heroin, and maintaining a dwelling to keep and sell heroin, while reserving his right to appeal the trial court's suppression rulings. The trial court sentenced defendant to two consecutive terms of sixty to eight-four months in prison. Defendant appeals.

II. Analysis

On appeal, defendant contends the trial court erred by denying his suppression motions on the following grounds: (1) the searches of his person and vehicle were constitutionally unreasonable because the warrant lacked probable cause; (2) the seizure of his person was constitutionally unreasonable because he was detained too far away from the residence to constitute a lawful detention incident to the execution

1. The trial court granted defendant's motion to suppress certain other statements he made while in custody and after he was transported from Advance Auto, but those rulings are not at issue on appeal.

of a search warrant on the premises, *see Bailey v. United State*s, 568 U.S. 186, 133 S. Ct. 1031 (2013); (3) the search of the residence was unreasonable because the officers violated N.C. Gen. Stat. § 15A-251's knock-and-announce requirement; and (4) his responses to Detective Cole's questioning at Advance Auto about the Falconridge address were obtained in violation of his *Miranda* rights.

A. Review Standard

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). But where, as here, a defendant fails to challenge the evidentiary support of any finding, our review is further "limited to whether the trial court's findings of fact support its conclusions of law." *State v. Cheek*, 351 N.C. 48, 63, 520 S.E.2d 545, 554 (1999) (citing *State v. Watkins*, 337 N.C. 437, 438, 446 S.E.2d 67, 68 (1994)). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

B. Searches of Defendant and his Vehicle

[1] Defendant first asserts the searches of his person and vehicle were unreasonable because the warrant lacked probable cause. He concedes Detective Cole's "search warrant application may [have] support[ed] probable cause for a search of the [Falconridge residence] . . . based upon the trash pulls" but argues it failed to provide probable cause to search him or his vehicle. According to defendant, the allegations of the warrant application supporting those searches were founded upon unreliable statements from a confidential informant, and the drug dealing evidence recovered from the multiple trash pulls at the Falconridge residence was " 'stale' and lacked any connection to [him]." We disagree.

A search warrant affidavit must contain sufficient information to establish probable cause "to believe that the proposed search for evidence probably will reveal the presence upon the described premises of the items sought and that those items will aid in the apprehension or conviction of the offender." *State v. Arrington*, 311 N.C. 633, 636, 319 S.E.2d 254, 256 (1984) (citing *State v. Riddick*, 291 N.C. 399, 406, 230 S.E.2d 506, 511 (1976)). "A magistrate must 'make a practical, commonsense decision,' based on the totality of the circumstances, whether there is a 'fair probability' that contraband will be found in the place to be searched." *State v. McKinney*, 368 N.C. 161, 164, 775 S.E.2d 821, 824

(2015) (quoting *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983)). "We review *de novo* a trial court's conclusion that a magistrate had probable cause to issue a search warrant." *State v. Worley*, ___ N.C. App. ___, ___, 803 S.E.2d 412, 416 (2017) (citing *State v. Allman*, 369 N.C. 292, 296–97, 794 S.E.2d 301, 305 (2016)).

Here, the trial court issued the following unchallenged findings:

> 2. . . . [D]uring the months of April and May 2016, Detective . . . Cole . . . learned that the defendant may be selling heroin and other dangerous drugs from a residence located on Falcon Ridge Court in Greensboro, North Carolina;
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> 3. . . . [A] confidential informant known to Detective Cole advised that the defendant was using a Red and White Land Rover Range Rover to transport heroin and other dangerous drugs to and from the subject premises, and further selling dangerous drugs from the vehicle. The confidential informant was able to provide an accurate description of the [Range Rover], including providing an accurate license tag number;
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> . . . .
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> 5. . . . [B]ased upon the information provided by the confidential informant, Detective Cole began a criminal investigation of the defendant, the [Range Rover] and ultimately the [Falconridge residence];
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> 6. . . . [A]s part of Detective Cole's investigation, [he] applied for and received authorization to put an electronic GPS tracking device on the [Range Rover];
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> 7. . . . Detective Cole solicited the assistance of other deputies with the Sheriff's Office and officers with assisting agencies to conduct visual surveillance of the defendant and the defendant's activities, including locations the defendant frequented while driving the [Range Rover];
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> 8. . . . [B]ased upon the electronic and visual surveillance of the defendant and the [Range Rover], Detective Cole learned that the defendant appeared to reside at the [Falconridge] residence;
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> 9. . . . [A]s a result of the electronic and visual surveillance, Detective Cole learned that the defendant frequented locations known for the sale of illegal drugs, including heroin,

> including a residence . . . well known to Detective Cole to be a location where dangerous drugs were sold;
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> 10. . . . [O]n August 14, 2016 the defendant was stopped, at the direction of Detective Cole, while operating the [Range Rover]. At that stop the defendant's vehicle was displaying a fictitious or altered license tag, and the defendant was operating the [Range Rover] at a time when his driving privileges had been suspended or revoked. The defendant was arrested for these offenses on that date;
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> 11. . . . Detective Cole, with assistance of other law enforcement officers working on the criminal investigation of the defendant, performed several "trash pulls" at the [Falconridge] residence;
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> 12. . . . [T]he aforementioned "trash pulls" at the [Falconridge] residence yielded contents including paraphernalia that tested positive for the presence of heroin and cocaine, as well as utility bills and other paper material that demonstrated that the defendant resided at the [Falconridge] residence;
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> 13. . . . [T]he most recent "trash pull" that yielded material testing positive for dangerous drugs had occurred within one week of the subject searches[.]

These binding findings support the trial court's conclusion that the magistrate had probable cause to issue the warrant to search defendant and the Range Rover for drug dealing evidence. The confidential informant's statements were corroborated by the months-long police investigation, the drug dealing evidence recovered from the multiple trash pulls was not stale, and the allegations sufficiently linked defendant and the Range Rover to the Falconridge residence and the known drug evidence.

In his warrant affidavit, Detective Cole alleged that police surveilling defendant observed him driving the identified Range Rover multiple times; visual and electronic surveillance of the Range Rover revealed it frequented places known to be involved in drug dealing activity and would "travel to locations, stay a short amount of time, and then leave the locations," which Detective Cole opined, in his experience, was "behavior . . . indicative of narcotics distribution"; and police observed the Range Rover parked in the Falconridge residence driveway. Additionally, police at least twice observed defendant leaving the Falconridge residence, that residence was listed as defendant's most recent address

in a DMV database, utilities to the Falconridge residence were held in defendant's name, the report generated after a 911 complaint regarding unleashed animals at the Falconridge residence indicated defendant was "the owner of two or three pit bulls which were running loose," and trash pulls on three occasions revealed drug dealing evidence and letters addressed to defendant and other documents listing his name.

Under the totality of the circumstances, Detective Cole's warrant affidavit sufficiently linked defendant and the Range Rover to the drug dealing evidence recovered from the trash pulls at the Falconridge residence. Additionally, based on the affidavit reciting multiple trash pulls at the Falconridge residence revealing drug dealing evidence, the last occurring one week prior to the warrant application, this evidence was not stale under the circumstances. *See State v. McCoy*, 100 N.C. App. 574, 577, 397 S.E.2d 355, 358 (1990) ("[W]here the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. The continuity of the offense may be the most important factor in determining whether the probable cause is valid or stale." (citations omitted)). Because Detective Cole's warrant affidavit supplied the magistrate probable cause to issue a warrant to search defendant and the Range Rover for drug evidence, the trial court properly denied defendant's motion to suppress the evidence obtained pursuant to the execution of that warrant based upon its validity.

C. Seizure of Defendant

[2] Defendant next asserts his seizure at Advance Auto was unreasonable under *Bailey v. United States*, 568 U.S. 186, 133 S. Ct. 1031 (2013), because it occurred two miles away from the Falconridge residence. Although *Bailey* instructs that police detentions of occupants incident to the execution of a search warrant on a premises is spatially contained to the "immediate vicinity of a premises to be searched," *id.* at 201, S. Ct. at 1043, defendant's reliance on *Bailey* is misguided.

In *Bailey*, the defendant-occupants were "stopped and detained at some distance from the premises to be searched" and because the search warrant applied only to the premises, "the only justification for the detention was to ensure the safety and efficacy of the [premises] search." *Id.* at 189–90, 133 S. Ct. at 1035. Since the Court concluded the reasonableness of an occupant's detention incident to the execution of a search warrant "must be limited to the immediate vicinity of the premises covered by a search warrant," *id.* at 199, 133 S. Ct. at 1041, it held the lawful warrant issued to search the premises did not justify seizing

the former occupants about one mile away from the premises to be searched. *Id.* at 202, 133 S. Ct. at 1043. The *Bailey* Court therefore remanded the case with instructions for the lower court to determine whether the officers had an independent justification for seizing the occupants. *Id.*; *see also id.* at 202, 133 S. Ct. at 1042 ("If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause.").

Here, contrarily, the warrant was issued to search both the Falconridge address and defendant's person for drug dealing evidence. Further, the warrant affidavit, supported by the months-long police investigation, provided an independent justification for detaining defendant. Because the officers here had independent probable cause to arrest defendant in connection with the known drug dealing evidence recovered from the trash pulls at the Falconridge residence or, at a minimum, reasonable suspicion to believe defendant had been involved in dealing drugs sufficient to justify briefly detaining and questioning him about that activity, the justification for seizing him at Advance Auto was not limited to the issuance of the warrant to search the Falconridge residence. Therefore, the trial court properly denied defendant's motion to suppress on the basis that his seizure was unreasonable.

D. Search of the Residence

[3] Defendant next asserts the trial court erred by denying his motion to suppress because the search of the Falconridge residence was unreasonable. He argues "[t]he officers deliberately waited until Defendant vacated the premises before breaking open the door without knocking and announcing their presence," thereby substantially violating N.C. Gen. Stat. § 15A-249's knock-and-announce requirement. *See* N.C. Gen. Stat. § 15A-974(a)(2) (2017) (requiring the suppression of evidence if "obtained as a result of a *substantial* violation of the provisions of . . . Chapter [15A]" (emphasis added)). We disagree.

N.C. Gen. Stat. § 15A-249 (2017) provides in pertinent part that an

> officer executing a search warrant must, before entering the premises, give appropriate notice of his identity and purpose to the person to be searched, or the person in apparent control of the premises to be searched. If it is unclear whether anyone is present at the premises to be

> searched, he must give the notice in a manner likely to be heard by anyone who is present.

N.C. Gen. Stat. § 15A-251 (2017) authorizes an officer to

> break and enter any premises . . . when necessary to the execution of the warrant if:
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> (1) The officer has previously announced his identity and purpose as required by G.S. 15A-249 and reasonably believes either that admittance is being denied or unreasonably delayed or that the premises or vehicle is unoccupied; or
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> (2) The officer has probable cause to believe that the giving of notice would endanger the life or safety of any person.

Here, the trial court issued the following unchallenged findings as to the officers' execution of the search warrant on the Falconridge residence:

> 41. . . . [P]rior to executing the Search Warrant upon the residence, Detective Stacy Garrell loudly announced three (3) times that officers would be entering the residence for purposes [of] execution of the search warrant by yelling "Sheriff's Office, Search Warrant" prior to making entry into the [Falconridge] residence;
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> 42. . . . [A]fter waiting a reasonable time and hearing no response from any occupant that may be in the [Falconridge] residence, Detective Jeff Murphy made forced entry into the residence by use of a ramming device[.]

These binding findings establish the officers announced their presence concordant with section 15A-249's knock-and-announce requirement and "after waiting a reasonable time and hearing no response" were authorized under section 15A-251 to break and enter into the residence. Defendant has failed to demonstrate the officers' execution of the warrant violated the challenged provision of Chapter 15A—much less amounted to a "substantial" violation necessary to justify suppressing evidence under section 15A-974(a)(2). Therefore, the trial court properly denied defendant's motion to suppress on this basis.

E. Responses to Police Questioning

[4] Defendant next asserts the trial court erred by denying his motion to suppress his responses to Detective Cole's questioning at Advance Auto because they were made while he was in custody and before he was advised of his *Miranda* rights. The State first responds that Detective Cole's questioning was permissible, and thus defendant's responses were admissible, under the "public safety" exception the *Miranda* requirement. *See Quarles*, 467 U.S. at 655–56, 104 S. Ct. at 2631 (recognizing a "narrow exception to the *Miranda* rule" when police questioning is limited solely to obtaining information necessary to secure public safety). The State next argues that, even if the questioning exceeded *Quarles*' narrow public safety exception and therefore defendant's responses should have been suppressed, defendant cannot establish prejudicial error. We agree any alleged error in the trial court's ruling was harmless beyond a reasonable doubt.

Here, the trial court issued the following unchallenged findings:

> 32. . . . [W]hile the defendant was still in investigative detention [at Advance Auto], including his being handcuffed and seated in the back seat of Deputy Phillips' patrol vehicle, Detective Cole asked the defendant several questions relative to the residence that was a subject of the Search Warrant;
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> 33. . . . [N]either Detective Cole or any other law enforcement officer informed the defendant of his rights pursuant to *Miranda v. Arizona* before questioning the defendant;
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> 34. . . . [T]he purpose for Detective Cole's asking the defendant about the residence was to ascertain whether other subjects may be within the [Falconridge] residence, including children, and whether there may be firearms, aggressive dogs or other circumstances that may pose a danger to officers or other persons, consistent with the defendant's history;
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> 35. . . . Detective Cole did not ask questions of the defendant for investigative purposes or for the purpose of eliciting inculpatory statements from the defendant;
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> 36. . . . [I]n response to Detective Cole's questions, the defendant stated he had never been in the [Falconridge] residence, did not know anything about the [Falconridge] residence and disavowed any control over the residence.

> Detective Cole confronted the defendant about officers having observed the defendant leaving the [Falconridge] residence, which the defendant likewise denied[.]

Although defendant has not identified on appeal any particular incriminating statement he made in response to Detective Cole's questioning about the potential safety concerns of executing the warrant to search the Falconridge residence, defendant's responses merely denied his knowledge of or involvement with that residence. In light of the non-inculpatory nature of defendant's responses, and the State's overwhelming evidence linking defendant to the Falconridge residence, even if Detective Cole's questioning exceeded *Quarles*'s narrow public safety exception to the *Miranda* requirement, we conclude any error in the trial court's ruling was harmless beyond a reasonable doubt. Accordingly, we overrule this argument.

III. Conclusion

Because the warrant issued to search defendant and the Range Rover was supported by probable cause, the trial court properly denied defendant's motion to suppress based on the validity of the warrant. Because the warrant and months-long police investigation justified defendant's detention independent from his status as an occupant of a premises subject to a search warrant, the trial court properly denied defendant's motion to suppress on the basis that his seizure was unreasonable. Because the trial court's findings established that the officers' execution of the search warrant on the Falconridge residence complied with section 15A-249's knock-and-announce requirement, the trial court properly determined there was no "substantial" Chapter 15A violation that would require the suppression of evidence under section 15A-974(a)(2). Finally, even if Detective Cole's questioning fell outside *Quarles*' narrow public safety exception to the *Miranda* requirement, we conclude any alleged error in the trial court's ruling defendant's responses were admissible was harmless beyond a reasonable doubt in light of the non-incriminating nature of those statements and the overwhelming evidence linking defendant to the Falconridge residence. Accordingly, we affirm the trial court's suppression order.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

WARREN STIPPICH, EMPLOYEE, PLAINTIFF
v.
REESE'S TRANSIT, INC., EMPLOYER, RIVERPORT INSURANCE COMPANY, CARRIER (BERKLEY ASSIGNED RISK SERVICES, THIRD-PARTY ADMINISTRATOR), AND RONALD EVANS, INDIVIDUALLY, DEFENDANTS

No. COA17-997

Filed 17 July 2018

1. Workers' Compensation—multiple accidents—primary injury in first accident—compensability

An insurer's argument that plaintiff sustained a material aggravation of neck and back conditions from the second, rather than the first, of two work-related automobile accidents was rejected where sufficient evidence supported the Industrial Commission's findings and conclusions that plaintiff's conditions stemmed from the first accident, particularly since plaintiff was still being treated for injuries related to the first accident when the second occurred.

2. Workers' Compensation—multiple accidents—ongoing disability from first accident—evidentiary support

The Industrial Commission erred in finding and concluding that plaintiff established total disability from work-related automobile accidents where insufficient medical or other competent evidence was introduced to show plaintiff had been totally unable to work in any capacity since the accidents.

3. Workers' Compensation—medical costs—liability—apportionment between employer and insurer

The Industrial Commission properly apportioned liability solely to the employer's insurer for plaintiff's medical treatment for injuries he sustained from two work-related automobile accidents. Although the employer's workers' compensation insurance coverage lapsed between the two accidents, the Commission determined that plaintiff's primary injuries occurred in the first accident and that the second accident resulted in a mere "flare-up" of those injuries.

Appeal by defendant from opinion and award entered 24 May 2017 by the North Carolina Industrial Commission. Heard in the Court of Appeals 4 April 2018.

O'Malley Tunstall, PLLC, by Joseph P. Tunstall, III, for plaintiff-appellee.

Jordan Law Offices, P.A., by James F. Jordan and Sarah C. Blount, for defendant-appellees Reese's Transit, Inc. and Ronald Evans.

Brewer Defense Group, by Joy H. Brewer and Kenneth E. Menzel, for defendant-appellant Riverport Insurance Company.

ELMORE, Judge.

Defendant Riverport Insurance Company ("Riverport") appeals from an opinion and award of the North Carolina Industrial Commission ("the Commission"), which concluded that Riverport is responsible for payment of all benefits due employee Warren Stippich ("plaintiff") for the injuries he sustained in a 6 October 2014 work-related automobile accident. On appeal, Riverport contends the Commission erred in finding and concluding (I) that plaintiff's current neck and lower back conditions are related to the 2014 accident and (II) that plaintiff established ongoing disability as a result of the 2014 accident. In the alternative, Riverport argues (III) that liability for plaintiff's medical treatment should be split equally between Riverport and plaintiff's employer, defendant-appellee Reese's Transit, Inc. ("Reese's"). For the reasons stated herein, we affirm in part and reverse in part.

Background

On 6 October 2014, plaintiff was injured in an automobile accident arising out of his employment with Reese's, which was insured by Riverport. On 15 January 2015, plaintiff was involved in a second automobile accident arising out of his employment with Reese's. However, at the time of the 2015 accident, Reese's had allowed its workers' compensation insurance coverage to lapse. Riverport thus denied a claim for plaintiff's 2015 accident on the grounds that Reese's lacked insurance coverage on that date, and it denied a claim for plaintiff's 2014 accident on the grounds that plaintiff's injuries were related only to the 2015 accident.

Plaintiff filed two Form 33 Requests for Hearing based on Riverport's denial of the two claims. Both claims were heard before Deputy Commissioner Adrian Phillips ("DC Phillips") on 17 November 2015, and evidence presented at the hearing tended to show the following.

Plaintiff was fifty-nine years old at the time of the 2014 accident and had various pre-existing conditions involving his shoulders, knees, left upper extremity, and back. Plaintiff testified to having a low level of chronic back pain since as early as 1989, but he had not received any

treatment for back pain in the six months preceding the 2014 accident, and he had no neck pain prior to October 2014. In August 2014, plaintiff began working as a driver for Reese's, where his employment consisted of transporting children to and from school.

On 6 October 2014, plaintiff was involved in a work-related accident when his vehicle was "T-boned" by another vehicle. Property damage was estimated at $10,000.00 to $12,000.00, and plaintiff's vehicle had to be towed from the scene. Plaintiff was treated at Johnston Medical Center the same day and reported pain in his neck, shoulders, right knee, and right hip.

On 1 November 2014, plaintiff returned to Johnston Medical Center complaining of pain in his neck, shoulders, lower back, and lower right extremity. Plaintiff reported that the pain had become more severe since the day of the accident, so much so that plaintiff could no longer work through the pain or sleep at night. No diagnoses were made at that time as to plaintiff's lower back, but he was diagnosed with neck pain and right knee pain. The very next day, plaintiff presented at the WakeMed Emergency Room and reported pain in his neck, shoulders, and lower back. Upon examination, plaintiff was diagnosed with back pain, right foot pain, and gout.

Plaintiff did not receive any further medical treatment from on or about 3 November 2014 through 7 January 2015. During that time, plaintiff drove for Reese's on a limited basis due to his debilitating pain levels as well as the children's winter break from school.

On 8 January 2015, plaintiff presented at NextCare Urgent Care and reported having persistent neck pain since the 2014 accident. Plaintiff was diagnosed with cervicalgia and back pain, referred to an orthopaedist, and restricted from work for three days. Upon returning to work on 11 January 2015, plaintiff notified Reese's that he did not feel he could work through his pain any longer and thought he may become a danger to himself or the children if he continued to drive in his condition. Plaintiff agreed to temporarily continue his employment with Reese's until the company could locate a replacement driver.

On 15 January 2015—four days after his return to work and notice of intent to cease driving—plaintiff was involved in a second work-related accident. Plaintiff was sitting in his parked Chevrolet Suburban when a Lexus sedan "slid on ice and side-swiped the driver's side rear corner of plaintiff's bumper." The accident was low-impact in nature and resulted in minimal damage to the two vehicles, including a dent in the

Suburban's rear bumper, scratched paint, and a broken tail light, all of which cost approximately $1,500.00 to repair. Plaintiff did not seek treatment for any injuries on the day of the second accident, which he described as a "fender-bender."

On 16 January 2015, plaintiff presented to Paul Becton, PA-C, with Raleigh Orthopaedic Clinic ("ROC") pursuant to a previously-scheduled appointment to address his ongoing pain from the 2014 accident. At that appointment, Mr. Becton diagnosed plaintiff with neck and back pain and prescribed various medications; he also restricted plaintiff from work for three weeks, to be followed by a three-week period of "work as tolerated." However, plaintiff did not return to work.

On 16 February 2015, plaintiff presented to Dr. Mark R. Mikles, an orthopaedic surgeon with ROC, who diagnosed plaintiff with cervical and lumbar spondylosis as well as acute-on-chronic neck and lower back pain. As to further treatment options, Dr. Mikles recommended plaintiff undergo a course of conservative treatment such as medication and physical therapy. A medical note from the February 2015 appointment indicates that Dr. Mikles restricted plaintiff from work "at this point" and instructed plaintiff to follow up with Dr. Mikles after he received the recommended conservative treatment. However, plaintiff never received that treatment, and he did not follow up with Dr. Mikles for approximately ten months. While Reese's continued paying plaintiff's salary from mid-January 2015 through May 2015, plaintiff did not return to work nor seek other employment at any time after the 2015 accident.

In the meantime, plaintiff presented on 28 April 2015 to Dr. David Herzig, a neurosurgeon, and on 21 September 2015 to Dr. Hsiupei Chen, a pain management specialist. According to Dr. Herzig, plaintiff "basically declined" his offer for conservative treatment—which would have consisted of physical therapy, pain management, and medications—and seemed "infatuated" with having surgery. Dr. Chen likewise testified that plaintiff did not follow through with her recommendations for treatment, which would have included a lumbar discogram of his back as well as a steroid injection for his neck. Neither Drs. Herzig nor Chen addressed the issue of work restrictions for plaintiff.

At the November 2015 hearing before DC Phillips, plaintiff testified that he was not injured by, and that his pain had never increased as a result of, the 2015 accident. According to plaintiff, prior to the 2015 accident, a lot of his pain from the 2014 accident had "shaken out," and "all [the 2015 accident] did was wake everything that had kind of . . . calmed down."

On 7 December 2015, plaintiff returned to Dr. Herzig complaining of chronic lower back and neck pain, and he called Dr. Herzig two days later in an attempt to schedule surgery. Dr. Herzig ultimately discharged plaintiff from his practice due to plaintiff's insistence on having surgery despite Dr. Herzig's repeated recommendations against the same. On 14 December 2015, plaintiff followed up with Dr. Mikles for the first time since February and reported declining the conservative treatment offered by Drs. Herzig and Chen. Like Dr. Herzig, Dr. Mikles advised plaintiff at his final appointment on 28 December 2015 that surgical intervention was not warranted, and he did not address the issue of work restrictions for plaintiff.

On 26 July 2016, DC Phillips entered an opinion and award concluding that plaintiff sustained a compensable aggravation of his neck and lower back conditions as a result of the 2015 accident, and that Reese's was liable to plaintiff for temporary total disability benefits as well as medical treatment. As to the issue of ongoing disability, DC Phillips concluded that plaintiff had failed to establish disability beyond 28 December 2015. Plaintiff appealed to the Full Commission.

On 24 May 2017, the Full Commission reversed DC Phillips' opinion and award, concluding: (1) plaintiff's pre-existing neck and lower back conditions were aggravated by the 2014 accident; (2) the 2015 accident resulted in, at most, a temporary flare-up of the conditions aggravated by the 2014 accident, and did not result in any new injury; (3) plaintiff established ongoing disability beginning 15 January 2015; and (4) Riverport is solely liable for all benefits due plaintiff as a result of the injuries he sustained in the 2014 accident. Commissioner Linda Cheatham dissented on the issue of ongoing disability, instead concluding that plaintiff failed to establish disability as of 28 December 2015 due to lack of medical or other competent evidence documenting plaintiff's work restrictions, as well as plaintiff's failure to search for work after 28 December 2015. Riverport appeals.

Standard of Review

Our review of an opinion and award of the Commission is "limited to reviewing whether any competent evidence supports the Commission's findings of fact and whether the findings of fact support the Commission's conclusions of law." *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 116, 530 S.E.2d 549, 553 (2000); N.C. Gen. Stat. § 97-86 (2015). "Thus, on appeal, this Court 'does not have the right to weigh the evidence and decide the issue on the basis of its weight. The [C]ourt's duty goes no further than to determine whether the record contains any evidence

tending to support the finding.' " *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) (quoting *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 434, 144 S.E.2d 272, 274 (1965)). If the record does contain such evidence, the Commission's findings are conclusive on appeal, even if there is also evidence that would support contrary findings. *Id.* (citing *Jones v. Myrtle Desk Co.*, 264 N.C. 401, 402, 141 S.E.2d 632, 633 (1965)). However, the plaintiff is entitled to the benefit of every reasonable inference in his favor. *Id.* (citation omitted).

Discussion

On appeal, Riverport asserts the Commission erred in finding and concluding that plaintiff's current neck and lower back conditions are related to the 2014 accident. Riverport contends the evidence shows plaintiff suffered a "material aggravation" of those conditions—rather than a "temporary flare-up" as found by the Commission—as a result of the 2015 accident, "placing Reese's Transit solely on the risk for plaintiff's medical treatment." Riverport also argues the Commission erred by finding and concluding that plaintiff established ongoing disability beyond 28 December 2015. In the alternative, Riverport contends that liability for plaintiff's medical treatment should be split equally between Riverport and Reese's.

I. The Commission did not err in finding and concluding that plaintiff's current conditions are attributable to the 2014 accident.

[1] Riverport first argues the evidence of record demonstrates plaintiff sustained a material aggravation of his neck and back conditions as a result of the 2015 accident rather than the 2014 accident. Riverport contends plaintiff's own testimony shows that his pain as a result of the 2014 accident had subsided and returned to its "baseline pre-injury levels" prior to the 2015 accident, which then "aggravated" and "resurrected" plaintiff's pain. Riverport also asserts that the medical evidence shows plaintiff's pain never lessened or subsided after the 2015 accident, whereas plaintiff had been able to return to work after the 2014 accident. Thus, according to Riverport, the Commission erred in finding that plaintiff's current conditions are attributable to the 2014 accident.

"Our courts have consistently held that workers injured in compensable accidents are entitled to be compensated for all disability caused by and resulting from the compensable injury." *Heatherly v. Montgomery Components, Inc.*, 71 N.C. App. 377, 379, 323 S.E.2d 29, 30 (1984) (citations omitted). "The law in this state is that the aggravation of an injury . . . is compensable '[w]hen the primary injury is shown to have arisen out of and in the course of employment, [and]

every natural consequence that flows from the injury arises out of the employment, unless it is the result of an independent intervening cause attributable to claimant's own intentional conduct.' " *Id.* at 379-80, 323 S.E.2d at 30 (quoting *Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 73, 308 S.E.2d 485, 488 (1983)). In other words, " '[w]hen a first cause produces a second cause that produces a result, the first cause is a cause of that result.' " *Id.* at 380, 323 S.E.2d at 30 (quoting *Petty v. Transport, Inc.*, 276 N.C. 417, 426, 173 S.E.2d 321, 328 (1970)).

As to plaintiff's testimony, Riverport specifically notes that in Finding of Fact 22, the Commission cites to plaintiff's testimony "that the increased pain after [the 2015 accident] subsided, such that he returned to the pain levels he developed following the [2014 accident]" in support of Finding of Fact 36. Riverport asserts that this testimony does not exist anywhere in the record, and that the pain plaintiff described as having "subsided" was the pain he experienced after the 2014 accident, but before the 2015 accident. Riverport further asserts that, contrary to Finding of Fact 22, the evidence shows plaintiff's pain never lessened or subsided after the 2015 accident. In regard to the medical evidence, Riverport emphasizes the Commission found that three physicians all opined that plaintiff's pre-existing neck and back conditions were aggravated by both the 2014 and 2015 accidents. Riverport argues that because the Commission explicitly found that the 2015 accident aggravated plaintiff's conditions, it was error to hold Riverport solely liable for plaintiff's benefits.

Because the totality of the evidence supports the Commission's findings and conclusions as to a material aggravation of plaintiff's primary injuries, we disagree.

Here, plaintiff's testimony and the opinions of his treating physicians demonstrate that after the 2014 accident, plaintiff suffered from severe and constant pain in his neck and back, decreased mobility, difficulty sleeping, joint pain, muscle spasms and tingling, and tenderness in his neck, lower back, and right hip, and that all of these conditions "would still be continuing today with or without" the 2015 accident. Moreover, plaintiff had notified Reese's *prior to* the 2015 accident that he could not continue his employment due to his physical conditions. Thus, Riverport's arguments as to the evidence of plaintiff's pain levels following the 2014 and 2015 accidents are not persuasive.

Additionally, plaintiff was still in the course of his treatment for the 2014 accident when the 2015 accident occurred. The 2015 accident was low-impact in nature and resulted in minimal damage to the two vehicles involved. Plaintiff did not seek treatment for any injuries on the day

of the 2015 accident, which he described as a "fender-bender." Plaintiff's physicians also testified that in their opinion, the 2015 accident would not have caused plaintiff the extensive pain he was in at that time and going forward. Finally, although Riverport correctly contends that the aggravation of a primary injury is compensable, such compensability relates back to the primary injury, for which Riverport is solely liable. *See Heatherly*, 71 N.C. App. at 379, 323 S.E.2d at 30.

Because the Commission's findings and conclusions that plaintiff's current neck and back conditions are related to the 2014 accident are supported by at least some competent evidence in the record, we reject Riverport's argument and affirm this portion of the opinion and award.

II. The Commission erred by finding and concluding that plaintiff established ongoing disability as a result of the 2014 accident.

[2] Riverport next asserts the Commission erred in finding and concluding that plaintiff established ongoing disability as a result of the 6 October 2014 accident. Riverport contends (1) plaintiff is not disabled as a result of that accident, and (2) plaintiff is unable to establish disability beyond 28 December 2015. Because the record lacks medical or other competent evidence to support the finding that plaintiff has been totally unable to work since December 2015, we agree.

Disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2015). In *Hilliard v. Apex Cabinet Co.*, our Supreme Court held that

> in order to support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was *caused by* plaintiff's injury.

305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982) (emphasis added).

Under the three-pronged *Hilliard* test, the burden is on the employee to first show he is incapable of earning the same wages he had earned before the injury. *Id.*

> The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically

> or mentally, as a consequence of the work[-]related injury, incapable of work in any employment, (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, (3) the production of evidence that he is capable of some work but that it would be futile because of pre[-]existing conditions, i.e., age, inexperience, lack of education, to seek other employment, or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury.

Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 765-66, 425 S.E.2d 454, 457 (1993) (citations omitted).

Here, the Commission concluded plaintiff had established disability pursuant to the *Hilliard* test and the first method set forth in *Russell*—that is, through the production of medical evidence that he is physically or mentally, as a consequence of the work-related injury, incapable of work in any employment. As to plaintiff's proving disability pursuant to *Hilliard* and *Russell*, the Commission found:

> 22. . . . . Prior to the [2014 accident], plaintiff [testified that he] could work through his pain; however, after that collision, he could no longer sleep, bend over, and felt unable to continue working due to increased pain levels.
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> 23. Plaintiff also testified that his personal health insurance paid for his medical treatment in January and February 2015, but that coverage eventually ceased after he stopped working. While receiving medical treatment using his personal health insurance policy, plaintiff paid co-pays out-of-pocket, but he did not have enough personal funds to pay the co-pays required to attend physical therapy. . . . . Plaintiff testified that he had already received medical bills he could not pay and did not want to incur further debt by obtaining additional treatment he could not personally afford. The Commission finds plaintiff's testimony in this regard credible, and further finds plaintiff's reasons for not seeking additional medical treatment reasonable.
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> 33. Dr. Herzig deferred to Dr. Mikles as to plaintiff's capacity for work. Although Dr. Mikles was not directly asked

about plaintiff's capacity for work during his deposition on February 29, 2016, Dr. Mikles testified that he wrote plaintiff out of work following an evaluation on February 16, 2015 and, when plaintiff returned for re-evaluation on December 7 and December 28, 2015, plaintiff demonstrated no significant change in his condition. Dr. Mikles testified that plaintiff's physical examinations were unchanged from prior evaluations, and he continued to recommend the conservative treatment measures previously given at the February 16, 2015 appointment.

34. At the hearing before [DC Phillips], plaintiff testified that his neck pain prevents him from sleeping, working in his yard, and performing the work he used to do. Plaintiff also testified that he is unable to work through his pain and is in need of further medical treatment. The Commission finds plaintiff's testimony as to his pain levels and its effect on his activity levels and work capacity credible.

. . . .

37. The Commission further finds, based upon a preponderance of the evidence in view of the entire record, that plaintiff has been totally disabled from work in any capacity since his involvement in the [2015 accident]. Mr. Becton excused plaintiff from work as of January 16, 2015, and Dr. Mikles maintained this out-of-work status during follow-up on February 16, 2015. Dr. Mikles noted, "[plaintiff] was given a work note stating he is out of work at this point and will follow up once he has had the above treatments approved for further evaluation or workup if necessary." . . . . At the time of plaintiff's follow-ups with Dr. Mikles on December 14 and 28, 2015, plaintiff had not received any of the conservative pain management treatments that Dr. Mikles previously recommended, and his physical examination and conditions remained unchanged. Therefore, even though Dr. Mikles did not provide plaintiff with a new note excusing him from work at either the December 14 or 28, 2015 appointments, the Commission finds that plaintiff remained totally disabled from work in any capacity due to his pain levels and pending receipt of the conservative treatment measures recommended by Dr. Mikles.

> 38. . . . . [Plaintiff's] providers have recommended conservative pain management as the next course of care. Accordingly, the Commission finds that additional treatment for plaintiff's cervical spine and low back conditions is reasonably necessary to effect a cure, provide relief, and lessen his period of disability.

The Commission went on to conclude

> 6. . . . that plaintiff has presented medical evidence sufficient to establish total disability since his involvement in the [2015 accident], pursuant to the first prong of *Russell*. Plaintiff received out-of-work notes from his medical providers on January 16, 2015 and February 16, 2015. The latter note, provided by Dr. Mikles, excused plaintiff from work until he received the conservative pain management treatment measures that Dr. Mikles recommended. Plaintiff had not received those treatment measures at the time of his follow-ups with Dr. Mikles on December 14 and 28, 2015, and his physical examination and conditions remained unchanged. Therefore, even though Dr. Mikles did not provide plaintiff with a new note excusing him from work at either the December 14 or 28, 2015 appointments, the Commission concludes, based upon the cumulative medical evidence entailed in Dr. Mikles' medical records and deposition testimony, that plaintiff remains totally disabled from work in any capacity due to his pain levels and pending receipt of the conservative treatment measures that Dr. Mikles has recommended. . . . . The Commission further concludes that the medical evidence, along with plaintiff's credible testimony as to his pain level, precludes him from work in any capacity at this time.

Based on these findings and conclusions regarding plaintiff's disability, it is apparent that the majority of the Commission interpreted Dr. Mikles' 16 February 2015 medical note as restricting plaintiff from *all work* until he received the recommended conservative treatment. However, the evidence of record does not support such an interpretation. Dr. Mikles' medical note did not indicate that plaintiff should remain out of work until he received the recommended conservative treatment; rather, the note instructed plaintiff to follow up with Dr. Mikles' office once he received the recommended treatment. Moreover, Dr. Mikles did

not testify that it was his intention for plaintiff to remain completely out of work until he received the recommended treatment.

In addition to Dr. Mikles, plaintiff presented to Drs. Herzig and Chen later in 2015. Dr. Herzig testified that plaintiff declined his offer for conservative treatment and seemed "infatuated" with having surgery. Dr. Chen likewise testified that plaintiff did not follow through with her recommendations for treatment. Neither Dr. Herzig nor Dr. Chen wrote out-of-work notes for plaintiff at any time, nor did either doctor recommend any specific work restrictions for plaintiff.

Plaintiff did not follow up with Dr. Mikles until December 2015—approximately ten months after his previous appointment. During this visit, plaintiff informed Dr. Mikles that he had declined conservative treatment offered by Drs. Herzig and Chen. Dr. Mikles, like Dr. Herzig, advised plaintiff that surgical intervention was not warranted. At his final appointment on 28 December 2015, Dr. Mikles recommended that plaintiff follow up with a pain management clinic or Dr. Herzig, but he did not address the issue of work restrictions for plaintiff.

In view of the entire record, as of 28 December 2015, none of plaintiff's treating physicians had ever instructed plaintiff to remain out of work indefinitely "pending receipt of conservative treatment measures." Moreover, any lack of conservative treatment at that point did not preclude plaintiff from at least searching for work, but there is no evidence in the record that plaintiff searched for work—or that a search would have been futile due to pre-existing conditions—following his 28 December 2015 appointment with Dr. Mikles. Absent such a showing, plaintiff has failed to establish total disability pursuant to *Hilliard* and *Russell*.

Because the record is wholly devoid of medical or other competent evidence to support the finding that plaintiff has been totally unable to work since 28 December 2015, and because plaintiff has failed to meet his burden of showing he is incapable of earning wages, we hold that the Commission erred in concluding plaintiff established ongoing disability and in extending plaintiff's benefits beyond that date.

III. Riverport is solely liable for plaintiff's medical treatment as a result of the 2014 accident.

[3] Riverport argues in the alternative that "[b]ecause there is no specific testimony on the percentage of plaintiff's neck and back conditions caused by the October 2014 accident versus the January 2015 accident, apportionment is not appropriate and liability should be split equally"

between Riverport and Reese's, "resulting in joint and several liability for plaintiff's medical treatment." Riverport relies on this Court's decision in *Newcomb v. Greensboro Pipe Co.*, 196 N.C. App. 675, 677 S.E.2d 167 (2009), to support its argument.

In *Newcomb*, the plaintiff suffered a work-related back injury arising out of his employment with the defendant-appellant; he was diagnosed with a disc herniation and underwent a microdiscectomy. *Id.* at 676, 677 S.E.2d at 167. The plaintiff subsequently began working for a new employer, but he continued to receive treatment for his prior back injury. *Id.*

Three years later, the plaintiff sustained a second work-related injury when he slipped and fell while in the course of his new employment. *Id.* The plaintiff complained of increased pain, underwent another microdiscectomy, and was assigned work restrictions of no prolonged sitting or standing, no unsupported or repetitive bending, and no lifting over 10 pounds, which were nearly identical to the restrictions he had been assigned after the first accident. *Id.* at 677, 677 S.E.2d at 168.

The plaintiff's treating physician in *Newcomb* testified that the second accident had aggravated the plaintiff's underlying back condition and precipitated the need for repeat surgery, but he could not apportion a percentage of the plaintiff's condition between the two accidents. *Id.* As a result, the Commission determined that the plaintiff was unable to work due to his vocational background as well as the restrictions he had been assigned, and it concluded that the two employers were jointly and severally liable for payment of the plaintiff's benefits. *Id.* at 678, 677 S.E.2d 168-69. We affirmed. *Id.* at 682, 677 S.E.2d 171.

The facts of the instant case are readily distinguishable from those in *Newcomb*, where the second accident undoubtedly resulted in new injury, pain, and need for medical treatment. Here, the evidence shows that plaintiff's second accident was a "fender-bender" that did not result in any new injury, did not cause any new pain that had not already been caused by the first accident, and did not require new medical treatment. Thus, because the evidence supports the Commission's finding and conclusion that the 2015 accident resulted in a mere "flare-up" of the conditions caused by the 2014 accident, we hold that the Commission did not err in declining to split liability for plaintiff's medical treatment between Riverport and Reese's.

Conclusion

Because there is competent evidence to support the Commission's finding and conclusion that plaintiff's current neck and back conditions

are attributable to the 2014 compensable injury by automobile accident, we affirm this portion of the Commission's opinion and award. However, the Commission's findings are insufficient to support its conclusion that plaintiff established disability after 28 December 2015. Accordingly, we reverse that portion of the Commission's opinion and award concluding plaintiff established ongoing disability and extending plaintiff's workers' compensation benefits beyond 28 December 2015. Lastly, we affirm the Commission's conclusion that Riverport is solely liable for plaintiff's medical treatment as a result of the 2014 accident.

AFFIRMED IN PART; REVERSED IN PART.

Judges TYSON and ZACHARY concur.

UNIFUND CCR, LLC, PLAINTIFF
v.
ISABELLE FRANCOIS, DEFENDANT

No. COA18-111

Filed 17 July 2018

1. Civil Procedure—default—affirmative defenses—statute of limitations—raised sua sponte by trial court

The trial court erred by denying plaintiff debt collector's motion for default judgment and dismissing its complaint sua sponte based on the court's conclusion that the claims were barred by the statute of limitations. A trial court has no authority to raise the statute of limitations, which must be timely raised by the defendant. Further, a trial court has no authority to examine the merits of an absent litigant's potential defenses at the default judgment stage.

2. Creditors and Debtors—collection—barred by statute of limitations—unfair and deceptive trade practice—enforcement by trial court

The trial court erred by denying plaintiff debt collector's motion for default judgment and dismissing its complaint sua sponte based on the court's conclusion that the action violated N.C.G.S. § 58-70-115, a statute that made it an unfair and deceptive trade practice for a collection agency to collect on a debt that it knows, or reasonably should know, is barred by the statute of limitations. The legislature's chosen mechanism for enforcing this statute was a civil claim by

either a debtor or the Attorney General—not review and rejection of claims by trial courts.

Appeal by plaintiff from order entered 13 July 2017 by Judge Becky T. Tin in Mecklenburg County District Court. Heard in the Court of Appeals 17 May 2018.

Sessoms & Rogers, P.A., by Andrew E. Hoke, for plaintiff-appellant.

No appellee brief filed.

DIETZ, Judge.

Plaintiff Unifund CCR, LLC brought a debt collection action against Defendant Isabelle Francois and obtained an entry of default after Francois failed to appear and respond to Unifund's complaint.

At the default judgment hearing—where Francois again failed to appear—the trial court, on its own initiative, denied Unifund's motion for default judgment and dismissed the complaint, concluding that the complaint was barred by the statute of limitations and violated a statutory provision prohibiting debt collectors from pursuing claims they know are barred by the statute of limitations.

We reverse and remand for entry of judgment in Unifund's favor. As explained below, the trial court had no authority to raise a statute of limitations defense on behalf of a defaulting litigant who did not appear. Likewise, the court had no authority to dismiss the complaint based on a perceived violation of a statute that does not authorize courts to act on their own initiative, but instead creates a separate civil enforcement mechanism for the debtor and the Attorney General.

Facts and Procedural History

In 2011, Defendant Isabelle Francois opened a credit card account with Citibank. Francois began making purchases on the account in March 2013 and exceeded the account's credit limit in May 2013. Francois stopped making payments in May 2013. Citibank then closed the account and sent Francois a final billing statement showing a balance of $4,618.08 with a payment due date of 20 November 2013.

After six consecutive months of nonpayment, Citibank charged off the account. Plaintiff Unifund CCR, LLC ultimately acquired the past due account.

On 14 November 2016, Unifund filed a complaint against Francois for the past due amount owed on the account. With its complaint, Unifund filed an affidavit from its custodian of records along with the billing records for the account, and documentation showing Unifund's acquisition of the account. The complaint stated that it was filed within the statute of limitations. Unifund served Francois with the summons but Francois did not appear in the action or file a responsive pleading.

On 31 May 2017, Unifund moved for entry of default and for default judgment. The Mecklenburg County Clerk of Superior Court entered default against Francois the same day.

The trial court heard the motion for default judgment on 10 July 2017. Francois did not appear at the hearing. Unifund presented testimony from a Citibank custodian of records and its own custodian of records. Unifund also submitted the account statements and documents showing the chain of ownership of the account.

Three days later, the trial court filed a lengthy order denying Unifund's motion for default judgment and dismissing the complaint with prejudice. The court found that the action was "barred by the statute of limitations" and that it violated N.C. Gen. Stat. § 58-70-115, a statute that makes it an unfair and deceptive trade practice for a collection agency to "attempt[] to collect on a debt when the collection agency knows, or reasonably should know, that such collection is barred by the applicable statute of limitations." Unifund timely appealed.

Analysis

Unifund argues that the trial court erred by denying its motion for default judgment and dismissing its complaint *sua sponte* based on legal defenses not raised by Francois, who never appeared in the proceeding. As explained below, we agree that the trial court erred.

[1] We begin by addressing the trial court's decision to deny the motion for default judgment, and to dismiss the complaint, because Unifund's claims are "barred by the statute of limitations." Rule 8 of the Rules of Civil Procedure requires that a defendant "set forth affirmatively" a statute of limitations defense in a responsive pleading. N.C. R. Civ. P. 8(c). Our appellate courts repeatedly have emphasized that "the statute of limitations is a technical defense, and must be timely pleaded or it is deemed waived." *Gragg v. W. M. Harris & Son*, 54 N.C. App. 607, 609, 284 S.E.2d 183, 185 (1981). Thus, trial courts have no authority to raise the statute of limitations defense on their own initiative; the defendant must assert this affirmative defense or it is waived.

Moreover, "[w]hen default is entered due to a defendant's failure to answer, the substantive allegations contained in plaintiff's complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted." *Luke v. Omega Consulting Grp.*, 194 N.C. App. 745, 751, 670 S.E.2d 604, 609 (2009). Thus, even setting aside a trial court's inability to raise a statute of limitations defense *sua sponte*, the court lacks the authority to examine the merits of an absent litigant's potential defenses at the default judgment stage at all. Accordingly, the trial court erred by raising and addressing *sua sponte* a purported statute of limitations issue at the default judgment hearing.

[2] We next examine the trial court's reliance on N.C. Gen. Stat. § 58-70-115, a statute that makes it an unfair and deceptive trade practice for a collection agency to "attempt[] to collect on a debt when the collection agency knows, or reasonably should know, that such collection is barred by the applicable statute of limitations." The trial court denied the motion for default judgment and dismissed the complaint based on its conclusion that Unifund violated this statutory provision.

As with the statute of limitations, the trial court had no authority to deny the default judgment and dismiss the complaint on this ground. The General Assembly selected a particular enforcement mechanism for this provision—it authorized the debtor and the Attorney General to bring civil claims against violators to recover actual and statutory damages. *See* N.C. Gen. Stat. § 58-70-130. The legislature *could have* authorized trial courts to independently review debt collection claims and reject those brought in violation of N.C. Gen. Stat. § 58-70-115. Instead, it chose a different means of enforcement. Neither the trial court nor this Court can second-guess this policy decision by the General Assembly. *Davis v. Craven Cty. ABC Bd.*, __ N.C. App. __, __ S.E.2d. __, 2018 WL 1801134, at *2 (2018). Accordingly, the trial court erred by denying the motion for default judgment and dismissing the complaint based on N.C. Gen. Stat. § 58-70-115.

Conclusion

We reverse the trial court's order and remand for entry of an appropriate judgment in favor of Plaintiff Unifund CCR, LLC.

REVERSED AND REMANDED.

Judges TYSON and BERGER concur.

JOSEPH VINCOLI, PETITIONER
v.
N.C. DEPARTMENT OF PUBLIC SAFETY, RESPONDENT

No. COA17-618

Filed 17 July 2018

1. Public Officers and Employees—exempt designation—contested case hearing—dismissal not appealed—law of the case

A state employee challenging his designation as exempt from the protections of the N.C. Human Resources Act after his termination from employment lost his right to challenge the administrative order incorrectly concluding that he was not entitled to a contested case hearing pursuant to N.C.G.S. § 126-5(h), because he did not appeal that order to the Court of Appeals. Since that order was binding as the law of the case, petitioner's second petition raising the same issues was properly dismissed.

2. Public Officers and Employees—whistleblower claim—prior voluntary dismissal—switching forums

A state employee's claim under the Whistleblower Act was properly dismissed by the Office of Administrative Hearings (OAH) where petitioner previously filed the claim in superior court, took a voluntary dismissal, and then raised the claim in a petition filed in OAH rather than refiling in superior court. A whisteblower claim may be brought in one forum or the other, but not both.

Appeal by petitioner from final decision dismissal orders entered on or about 30 March 2017 by Administrative Law Judge J. Randolph Ward in the Office of Administrative Hearings. Heard in the Court of Appeals 15 November 2017.

Crawford & Crawford, PLLC, Robert O. Crawford III, for petitioner-appellant.

Attorney General Joshua H. Stein, by Assistant Attorney General Tamika L. Henderson, for the State.

STROUD, Judge.

Petitioner appeals a final order dismissing his petition for a contested case hearing under North Carolina General Statute § 126-5(h). Because

petitioner failed to appeal from the 10 April 2014 Office of Administrative Hearings order which dismissed his first petition, we affirm the dismissal of this claim. We also affirm the dismissal of petitioner's whistleblower claim because his prior dismissal of the same claim under North Carolina General Statute § 1A-1, Rule 41(a) was in Superior Court, so he cannot refile his claim before the Office of Administrative Hearings.

I. Background

The underlying facts of this case are relatively simple but the procedural background is extraordinarily complex. Much of this background is stated in *Vincoli v. State*, ___ N.C. App. ___, ___, 792 S.E.2d 813 (2016) ("*Vincoli I*"). For purposes of this appeal some of the procedural background regarding Vincoli's first petition for a contested case hearing as recited in *Vincoli I* is useful:

> In 2010, Vincoli was hired by the North Carolina Department of Public Safety ("DPS") into a position subject to the NCHRA and subsequently attained the status of a career State employee. A career State employee is afforded certain protections provided by the NCHRA, such as the right not to be disciplined except for just cause. However, the NCHRA also grants the Governor the authority to designate positions within departments of state government, including DPS, as policymaking or managerial exempt from the provisions of the NCHRA.
>
> Until 2013, a career State employee whose non-exempt position was subsequently designated as exempt was entitled by N.C. Gen. Stat. § 126–34.1(c) to a contested case hearing before OAH to challenge the propriety of the designation. . . .
>
> . . . .
>
> On 21 August 2013, the Governor signed into law House Bill 834, which substantially revised the NCHRA. A career state employee's ability to challenge an exempt designation pursuant to the previous process changed with the passage of An Act Enhancing the Effectiveness and Efficiency of State Government by Modernizing the State's System of Human Resource Management and By Providing Flexibility for Executive Branch Reorganization and Restructuring. The Act, *inter alia*, amended the Employee Grievance section of the NCHRA by repealing N.C. Gen. Stat. § 126–34.1 and replacing it with N.C. Gen.

Stat. § 126–34.02, which omitted an employee's action to challenge an exempt designation as grounds for a contested case hearing and, in effect, eliminated a career state employee's opportunity to a contested case hearing before OAH on this issue.

On 1 October 2013, Vincoli, who was employed by DPS as a Special Assistant to the Secretary for Inmate Services and who had attained career status, was notified that the Governor had declared his position as managerial exempt. Approximately two months later, on 6 December 2013, Vincoli received a letter terminating him from employment on the stated grounds that a change in agency staff is appropriate at this time.

. . . Vincoli filed an internal grievance with DPS challenging the designation of his position as exempt. In response, Vincoli received a letter from DPS refusing to entertain his grievance on the basis that he was not eligible for the internal appeal process as a managerial exempt employee. Subsequently, Vincoli filed a grievance in the North Carolina Office of State Human Resources ("OSHR"), which refused to entertain Vincoli's grievance, concluding that: In this particular case and on these particular facts, OSHR believes that there is no personal or subject matter jurisdiction for any claim by Vincoli for a just cause claim against DPS in either the agency grievance process or OAH. As a result, neither DPS nor OSHR issued a final agency decision on the matter.

On 16 January 2014, Vincoli filed a petition for a contested case hearing with OAH, challenging his exemption and subsequent termination without just cause. Specifically, Vincoli asserted that

> his designation as managerial exempt was in fact used to disguise a disciplinary dismissal without just cause that would fall within the scope of the State Personnel Act's protections against dismissal without just cause. DPS' action was a sham, pretext exemption designation and constituted a de facto dismissal.

In addition, Vincoli asserted that he was entitled to a contested case hearing based on N.C. Gen. Stat. § 126–5(h), which provides: In case of dispute as to whether an

employee is subject to the provisions of this Chapter, the State Personnel Act, the dispute shall be resolved as provided in Article 3 of Chapter 150B. In response, DPS filed a motion to dismiss, asserting that since Vincoli's position was designated as exempt, he was not entitled to challenge DPS' decision to terminate him. Additionally, DPS asserted that OAH lacked jurisdiction to determine whether the classification of Vincoli's position as managerial exempt was proper, on the basis that this issue was not included in N.C. Gen. Stat. § 126–34.02, and any issue for which an appeal to OAH has not been specifically authorized cannot be grounds for a contested case hearing. . . .

. . . .

Vincoli asserted that he had

> properly invoked the subject matter jurisdiction of the OAH in two separate and specific manners. He has alleged dismissal without just cause under 126–35(a), and *has likewise alleged a dispute about whether he is subject to the State Personnel Act under N.C.G.S. 126–5(h).*

After a hearing, OAH entered an order on 10 April 2014 granting DPS' motion to dismiss for lack of subject matter jurisdiction. In its order, OAH made the following conclusions of law:

> 1. Effective August 21, 2013, the law changed controlling the matters over which the OAH has original jurisdiction, and the General Assembly repealed the right to appeal an exempt designation. This statutory change removes the rights of a state employee to challenge an exempt designation; therefore, the merits of this contested case will not be addressed.
>
> 2. As a managerial exempt employee, Vincoli is not subject to the provisions of Chapter 126. *Therefore, G.S. 126–5(h) does not grant Vincoli the right to appeal his exempt designation or ultimate dismissal under G.S. 126–5(h) and Chapter 150B.*
>
> 3. Only those grievance listed in G.S. 126–34.02 may be heard as contested cases in the OAH and only after review by the OSHR. Vincoli's exempt

> designation is no longer among the grievances listed; therefore, the OAH has no subject matter jurisdiction, which is the predicate authority for a contested case to proceed. The lack of subject matter jurisdiction requires that Vincoli's contested case be dismissed.
>
> Vincoli had thirty days to appeal OAH's decision to the Court of Appeals of North Carolina. *Vincoli did not timely appeal this order to our Court.*

Id. at ___, 792 S.E.2d t 814–16 (emphasis added.) (citation, quotation marks, ellipses, brackets, and footnote omitted).

Rather than appeal the 10 April 2014 order, on 29 August 2014, petitioner filed a complaint for a declaratory judgment challenging the statutory basis for the denial of his hearings as unconstitutional. *Id.* at ___ 792 S.E.2d at 816. On 9 June 2015, the trial court granted summary judgment in petitioner's favor "permanently enjoin[ing] the State from enforcing N.C. Gen. Stat. § 126–34.02 against Vincoli and ordered that Vincoli be provided with a contested case hearing before OAH[.]" *Id.* at ___, 792 S.E.2d at 817. The State appealed the 9 June 2015 order to this Court and raised three issues, but this Court only addressed one issue, deeming it dispositive, and reversed the trial court's summary judgment order. *Id.* at ___, 792 S.E.2d at 817-19. In *Vincoli I*, we held as follows:

> Because we hold that Vincoli is entitled to a contested case hearing before OAH pursuant to N.C. Gen. Stat. § 126–5(h), we need not address his claims based upon his right to due process under Article I, Section 19 of the North Carolina Constitution. We reverse the trial court's order denying the State's motion for summary judgment and granting Vincoli's motion for summary judgment.

Id. at ___, 792 S.E.2d at 819 (citation omitted).

While *Vincoli I* was pending before this Court, on 14 January 2016, petitioner filed a second petition with OAH for a contested case hearing. *Vincoli I* was filed on 1 November 2016, and on 18 January 2017, petitioner filed a prehearing statement to proceed with a contested case hearing under the second petition, relying on *Vincoli I* as the basis for the hearing. On or about 3 February 2017, respondent moved for summary judgment arguing petitioner failed to appeal OAH's final decision and order of 10 April 2014 which "expressly found that 126-5(h) did not allow OAH to exercise jurisdiction over Petitioner's claim and dismissed

Petitioner's claim." On or about 16 February 2017, petitioner responded to respondent's motion for summary judgment arguing his contested case was not barred "because the Court of Appeals held that Petitioner has a statutory right to a hearing before OAH and it would be unfair and unjust to deny that right." On or about 30 March 2017, the Administrative Law Judge ("ALJ") issued a final decision dismissing petitioner's second petition, noting that Court of Appeals opinion in *Vincoli I* "falls far short of the order or directive to OAH to reopen the issues addressed in the 2014 Final Decision that Petitioner would like to read into it" and "[n]o law authorizing OAH to provide a hearing under these circumstances has been identified." Petitioner appeals.

II. Standard of Review

> The standard of review for a motion for summary judgment requires that all pleadings, affidavits, answers to interrogatories and other materials offered be viewed in the light most favorable to the party against whom summary judgment is sought. Summary judgment is properly granted where there is no genuine issue of material fact to be decided and the movant is entitled to a judgment as a matter of law.

Harrington v. Perry, 103 N.C. App. 376, 378, 406 S.E.2d 1, 2 (1991) (citation omitted). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). The factual basis for petitioner's claim is not the issue in this appeal, and we treat all of petitioner's factual allegations as true for purposes of summary judgment. *See generally id.* The appeal presents only the question of law of petitioner's legal right to pursue his second petition.

III. Contested Case Hearing under N.C. Gen. Stat. § 126-5(h)

[1] In petitioner's brief on appeal, he focuses on arguments about why *res judicata* does not apply to bar his second petition. Respondent focuses primarily on its argument that even if *res judicata* does not bar petition's second petition, its defense of sovereign immunity does. Neither argument addresses the real issue, which is much simpler. The simple issue is whether petitioner lost his right to challenge the OAH's ruling in the 10 April 2014 order that he was not entitled to a contested case hearing under North Carolina General Statute §126-5(h) by failing to appeal that order. We realize that the order on appeal discusses *res judicata*, but the ALJ came to the correct conclusion, even if some of the rationale in the order is not entirely correct: "A correct decision of a lower court will not be disturbed because a wrong or

insufficient or superfluous reason is assigned." *State v. Hester*, ___ N.C. App. ___, ___, 803 S.E.2d 8, 15–16 (2017) (citation, quotation marks, and brackets omitted).

Vincoli I held that petitioner had a *right* to a "contested case hearing before OAH pursuant to N.C. Gen. Stat. § 126–5(h)" and declined to address whether North Carolina General Statute § 126-34.02 is unconstitutional because it violated Vincoli's " due process rights under Article I, Section 19 of the North Carolina Constitution[.]" ___ N.C. App.at ___, 792 S.E.2d at 816-19. For this reason, *Vincoli I* reversed the trial court's declaratory judgment which had

> declared that the enactment of N.C. Gen. Stat. § 126–34.02, a provision of the North Carolina Human Resources Act ("NCHRA") . . . unconstitutional as applied to Vincoli because it did not provide him the right to a contested case hearing before the Office of Administrative Hearings ("OAH") to challenge the designation of his position as exempt from the NCHRA

and "permanently enjoined the State from enforcing the statute against Vincoli and ordered that the State provide Vincoli with an OAH hearing to review the designation of his position as exempt." ___ N.C. App. at ___, 792 S.E.2d at 814 (footnote and quotation marks omitted).

Petitioner did not appeal the OAH order of 10 April 2014 in his first petition, Case 14OSP00389, which determined he was not entitled to a contested case hearing under North Carolina General Statute § 126-5(h).[1] The proper avenue to challenge the 10 April 2014 order was an appeal to this Court:

> An aggrieved party in a contested case under this section shall be entitled to judicial review of a final decision by appeal to the Court of Appeals as provided in G.S. 7A-29(a). The procedure for the appeal shall be as provided by the rules of appellate procedure. The appeal shall be taken within 30 days of receipt of the written notice of final decision. A notice of appeal shall be filed

1. Vincoli alleged in the declaratory judgment action that he had exhausted his administrative remedies because the OAH "lacks the authority to declare a North Carolina statute unconstitutional" so his claim could not be raised in an administrative forum. In other words, he accepted the OAH's ruling that he had no statutory right to a hearing under North Carolina General Statute § 126-5(h). But this Court in *Vincoli I* held that it need not address the constitutional argument because Vincoli did have a right to review under N. C. Gen. Stat. § 126-5(h). *Vincoli I* ___ N.C. App. at ___, 792 S.E.2d at 814.

> with the Office of Administrative Hearings and served on all parties to the contested case hearing.

N.C. Gen. Stat. § 126-34.02(a) (2013).

Since the 10 April 2014 OAH order was not appealed, it was the final adjudication of the petition; it specifically held that petitioner was not entitled to a hearing under North Carolina General Statute §126-5(h). Although the 10 April 2014 ruling was legally incorrect according to *Vincoli I* -- the declaratory judgment action challenging the constitutionality of Vincoli's right to a contested case hearing -- it still stands. *See Vincoli I*, ___ N.C. App. ___, 792 S.E.2d 813. Vincoli failed to appeal the 10 April 2014 order on his first petition and he cannot get a "second bite at the apple" by bringing a new petition based on the same claims, particularly as the time for filing a contested case hearing based upon his termination had passed. *See* N.C. Gen. Stat. § 126-34.02(a). The only way Vincoli could attempt to challenge the 10 April 2014 order again would be to link his second petition to his first petition, which he attempted to do.

Vincoli's second petition is entitled "Petition for Contested Case Hearing and Motion in the Cause[.]" (Original in all caps.) Petitioner sought to rely upon the Superior Court's declaratory judgment order, which was attached to the petition, to give him a right to bring a new petition based on the same facts. Petitioner also alleged that the petition was a "Motion in the Cause in case 14 OSP 389 for a reconsideration[.]" The second petition recites the same factual and legal basis for Vincoli's claims as the first petition, and he alleges that he sought the declaratory judgment "[a]fter attempting to exhaust his administrative remedies" from his first petition. Petitioner claimed that the declaratory judgment order -- later reversed by *Vincoli I* -- gave him a right to a hearing, despite his failure to appeal the 10 April 2014 OAH order.

Petitioner also relies upon this Court's opinion in *Vincoli I*, specifically noting the last sentence of that opinion: "Nothing in this opinion shall be construed to prejudice any right Vincoli may have to seek a contested case hearing under N.C. Gen. Stat. § 126–5(h)." *Id.* at ___, 792 S.E.2d at 819. But we do not construe this Court's opinion in *Vincoli I* to create a right to a hearing that does not otherwise exist due to petitioner's failure to appeal. To the extent that petitioner sought "reconsideration" of the first petition by his "motion in the cause," any such "reconsideration" is barred by the law of the case doctrine which "provides that when a party fails to appeal from a tribunal's decision that is not interlocutory, the decision below becomes the law of the case and cannot be challenged in subsequent proceedings in the same case."

Boje v. D.W.I.T., L.L.C., 195 N.C. App. 118, 122, 670 S.E.2d 910, 912 (2009). In conclusion, petitioner has lost his right to challenge the 10 April 2014 order's determination he is not entitled to a contested case hearing under North Carolina General Statute § 126-5(h). Although petitioner *was* entitled to such a hearing, he failed to appeal the dismissal of his first petition and is bound by the 10 April 2014 order.

V. Whistleblower Act

[2] OAH also dismissed respondent's claim under the Whistleblower Act. One of the bases of OAH's dismissal of the whistleblower claim was petitioner's prior voluntary dismissal of the same claim under N.C. Gen. Stat. §1A-1, Rule 41(a). Petitioner's brief focuses on the factual merits of his claim but does not contest OAH's finding he filed his whistleblower claim in Superior Court, voluntarily dismissed the claim, and never refiled in Superior Court. *See* N.C. Gen. Stat. § 1A-1, Rule 41(a) (2017). Petitioner contends that by filing his second petition in OAH he revived the Superior Court claim, but this Court has previously held otherwise: "[A] state employee may choose to pursue a Whistleblower claim in either forum, [administrative or superior court,] but not both." *Swain v. Elfland*, 145 N.C. App. 383, 389, 550 S.E.2d 530, 535 (2001). Petitioner has not directed us to any law which indicates an individual may file in one forum, dismiss, and then revive the claim in another. Therefore, we affirm the dismissal of petitioner's whistleblower claim under Rule 41(a).

V. Conclusion

Because petitioner failed to appeal the 10 April 2014 order he is bound by the determination he is not entitled to a contested case hearing, and we affirm the final order on appeal. Because petitioner attempted to switch forums for his whistleblower claim, he lost his right to bring that claim again and we affirm the final order dismissing this claim.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 17 JULY 2018)

COSMOS GRANITE & MARBLE v. CAROLINA CABINETS & GRANITE INC. No. 18-30	Wake (16CV12480)	Dismissed
FLOOD v. CREWS No. 17-740	Wake (15CVS7473)	Affirmed
IN RE A.R. No. 18-27	Forsyth (15JT255)	Affirmed
IN RE B.H.S. No. 18-102	Yadkin (17JA35) (17JA36)	Affirmed
IN RE E.B. No. 17-1384	Mecklenburg (15JA177-178)	Affirmed
IN RE FORECLOSURE OF BLACKWELL No. 17-806	Mecklenburg (16SP1112)	Dismissed
IN RE G.N.R.-U. No. 18-49	Guilford (14JT320-321)	Affirmed
IN RE J.P. No. 17-1375	Duplin (16JT44)	Vacated and Remanded
IN RE S.A.A. No. 17-1211	Randolph (15JT115) (15JT116)	Affirmed
IN RE S.P.R.-G. No. 17-1434	Onslow (17JT75)	Vacated and Remanded
JOHNSON v. EAST CAROLINA UNIV. No. 17-1159	Office of Admin. Hearings (16OSP08333)	Affirmed
MATHIS v. MATHIS No. 17-1071	Harnett (14CVD487)	Affirmed
McKENZIE v. McKENZIE No. 17-854	Rowan (11CVD2698)	Dismissed
STATE v. AUSTIN No. 17-920	Mecklenburg (15CRS234786)	Vacated and Remanded.

STATE v. CHISHOLM No. 17-797	Mecklenburg (16CRS21555-56) (16CRS21558) (16CRS21560-61) (16CRS21564-66)	No Error
STATE v. COLESON No. 17-1304	Wake (16CRS213853)	No Error
STATE v. COLINDRES No. 17-1229	Mecklenburg (17CRS201050)	No Error
STATE v. DAVIS No. 17-1083	Brunswick (13CRS3290) (13CRS3292)	No Error
STATE v. DELEGGE No. 17-1002	Haywood (16CRS846-848)	Affirmed
STATE v. FOGLEMAN No. 17-1358	Alamance (16CRS3028) (16CRS55237)	No Error
STATE v. FORD No. 17-1407	Greene (16CRS130) (16CRS50024)	Affirmed
STATE v. FREEMAN No. 17-1066	Wake (14CRS211495)	No Prejudicial Error
STATE v. HOWELL No. 18-140	Wayne (14CRS52193) (15CRS51808)	Affirmed
STATE v. IVEY No. 17-1266	Durham (16CRS56836) (16CRS56837)	NO PREJUDICIAL ERROR.
STATE v. KIRBY No. 17-1076	Wayne (16CRS52707)	NO PREJUDICIAL ERROR.
STATE v. LAIL No. 18-125	Iredell (17CRS50357) (17CRS50611)	Affirmed
STATE v. MALLOY No. 17-1102	New Hanover (15CRS53695-97)	Dismissed
STATE v. MORROW No. 17-1269	Cleveland (16CRS51432-33) (16CRS971)	No Error

STATE v. REED No. 17-1180	Alamance (15CRS54245)	No Error
STATE v. SOUTHERLAND No. 17-1349	Mecklenburg (15CRS224178-79) (15CRS224189)	NO PREJUDICIAL ERROR.
STATE v. WADE No. 17-1111	Cabarrus (13CRS53341)	No Error
UNIFUND CCR, LLC v. TOMLINSON No. 18-112	Mecklenburg (17CVD1475)	Reversed and Remanded
VR SYS., INC. v. N.C. STATE BD. OF ELECTIONS & ETHICS ENFORCEMENT No. 18-149	Wake (17CVS13394)	Dismissed
YANCEY CTY. v. JONES No. 17-1214	Yancey (16CVD315)	Affirmed

AVR DAVIS RALEIGH, LLC, PLAINTIFF
v.
TRIANGLE CONSTRUCTION COMPANY, INC., DEFENDANT

No. COA17-958

Filed 7 August 2018

1. Appeal and Error—interlocutory appeal—arbitration—substantial right

The denial of a demand for arbitration, while interlocutory, affects a substantial right and is immediately appealable.

2. Arbitration and Mediation—agreement to arbitrate—amount of dispute

The trial court erred by agreeing with plaintiff's interpretation of an arbitration clause where there was a $500,000 threshold but the parties disagreed on handling multiple claims. When faced with doubts concerning the scope of arbitrable issues, the trial court should have deferred to North Carolina's strong policy favoring arbitration.

Judge MURPHY concurring.

Appeal by defendant from order entered 22 February 2017 by Judge W. David Lee in Wake County Superior Court. Heard in the Court of Appeals 5 March 2018.

Wyche, P.A., by William M. Wilson, III, for plaintiff-appellee.

Smith Moore Leatherwood LLP, by Matthew Nis Leerberg, Bradley M. Risinger, and Robert A. deHoll, for defendant-appellant.

CALABRIA, Judge.

Triangle Construction Company, Inc. ("defendant") appeals from an order denying its motion to dismiss and to compel arbitration. After careful review, we reverse the trial court's order and remand for entry of an order compelling arbitration.

I. Factual and Procedural Background

In 2013, AVR Davis Raleigh, LLC ("plaintiff") hired defendant to construct a multi-building apartment complex on land owned by plaintiff in Raleigh, North Carolina. On 31 October 2013, the parties entered into a

contract for defendant to construct three buildings containing 243 apartments, at a guaranteed maximum price of $22,506,113.27. Defendant agreed to achieve substantial completion of the project within 420 days of commencement, with the timeline subject to adjustment as provided by the contract.

On 8 June 2016, plaintiff filed a complaint against defendant in Wake County Superior Court, alleging, *inter alia*, that defendant had failed to adhere to the contractual timeline and failed to pay subcontractors, resulting in substantial damages to plaintiff. Plaintiff asserted claims for breach of contract and breach of agreement to defend and indemnify, and sought $2,708,254.96 in damages. Defendant subsequently filed an answer asserting multiple affirmative defenses and counterclaims for breach of contract, foreclosure of a mechanic's lien, quantum meruit, unjust enrichment, and unfair and deceptive trade practices. Defendant alleged, *inter alia*, that plaintiff had failed to approve and pay for 112 changes to the scope of work under the contract, which caused project delays and approximately $2 million in total damages to defendant. In addition to its damages for the 112 change orders, defendant also sought $159,381.00 for unpaid payment applications and $1,125,306.00 for unpaid retainage.

On 27 July 2016, defendant filed notice of removal to the United States District Court for the Eastern District of North Carolina. The following day, defendant filed a motion to dismiss plaintiff's complaint and to compel arbitration. Defendant asserted that all of the parties' claims must be arbitrated, pursuant to a clause in the contract providing for the following method of binding dispute resolution:

> Arbitration of claims under $500,000 with litigation of claims over $500,000. In the event there are several claims under $500,000, but the aggregate of all claims exceeds $500,000, all the claims shall be arbitrated.

Due to a lack of diversity jurisdiction, on 1 September 2016, the United States District Court entered an order remanding the case to Wake County Superior Court. On 19 October 2016, defendant filed a motion in Wake County Superior Court, as above, seeking to dismiss plaintiff's complaint and to compel arbitration.

Following a hearing, on 22 February 2017, the trial court entered an order denying defendant's motion to dismiss and to compel arbitration. The trial court found that, "in its quest to meet the jurisdictional threshold necessary to compel arbitration," defendant had split its demand for damages for breach of contract by characterizing the 112 change

orders as 112 separate claims. However, the trial court determined that separating "each item or segment of labor and/or materials that may have exceeded the original scope of the work into multiple evidentiary components . . . would require the court to construe the contract in an awkward, contrived and unreasonable manner." The trial court further found that the parties' dispute resolution provision "simply did not address the particular facts and circumstances" of the instant case:

> The hybrid language can be construed to only address three possibilities: (1) Claims under $500,000.00 (arbitration); (2) claims over $500,000.00 (litigation); and (3) several claims under $500,000.00 but which in the aggregate exceed $500,000.00 (arbitration). It is reasonable to conclude that the language used does not address the circumstances of the present case where there are **both** (1) claims which, indisputably, exceed $500,000.00, *and* (2) several claims which, arguably at best, are under $500,000.00 but which in the aggregate exceed $500,000.00.

The trial court therefore denied defendant's motion to dismiss and to compel arbitration, concluding that "the parties have not selected a method of binding dispute resolution other than litigation so that the claims must, both as a matter of law and in accordance with the written agreement be resolved in a court of competent jurisdiction."

Defendant appeals.

II. Motion to Compel Arbitration

On appeal, defendant contends that the trial court erred in denying its motion to dismiss and to compel arbitration. We agree.

A. Interlocutory Appeal

[1] As an initial matter, we note that although the trial court's order is interlocutory, "the denial of a demand for arbitration is an order that affects a substantial right which might be lost if appeal is delayed, and thus is immediately appealable." *Raspet v. Buck*, 147 N.C. App. 133, 135, 554 S.E.2d 676, 677 (2001) (citation and quotation marks omitted); *see also* N.C. Gen. Stat. § 1-567.67(a)(1) (2017) (providing that an appeal may be taken from "[a]n order denying an application to compel arbitration"). Accordingly, defendant's appeal is properly before this Court.

B. Discussion

[2] "North Carolina has a strong public policy favoring the settlement of disputes by arbitration. Our strong public policy requires that the courts

resolve any doubts concerning the scope of arbitrable issues in favor of arbitration." *Johnston Cty. v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). "This is true whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Id.* (citations and quotation marks omitted).

"[B]efore a dispute can be ordered resolved through arbitration, there must be a valid agreement to arbitrate." *Raspet*, 147 N.C. App. at 135, 554 S.E.2d at 678. Whether a dispute is subject to arbitration is a question of contract interpretation to be answered by the trial court. *Id.* at 136, 554 S.E.2d at 678. "[A] trial court's conclusion as to whether a particular dispute is subject to arbitration is a conclusion of law," which we review *de novo* on appeal. *Id.* To determine whether a dispute is subject to arbitration, the trial court must engage in a two-pronged analysis to ascertain "(1) whether the parties had a valid agreement to arbitrate, and also (2) whether the specific dispute falls within the substantive scope of that agreement." *Id.* (citation and quotation marks omitted). It is the second step of the trial court's inquiry "where the presumption in favor of arbitration exists." *Sloan Fin. Grp., Inc. v. Beckett*, 159 N.C. App. 470, 479, 583 S.E.2d 325, 331 (2003).

In the instant case, the first of these questions is answered by the plain language of the binding dispute resolution provision in the parties' modified form contract. Section 13.2 states:

> § 13.2 BINDING DISPUTE RESOLUTION
>
> For any Claim subject to, but not resolved by mediation pursuant to Section 15.3 of AIA Document A201 – 2007, the method of binding dispute resolution shall be as follows:
>
> *(Check the appropriate box: If the Owner and Contractor do not select a method of binding dispute resolution below, or do not subsequently agree in writing to a binding dispute resolution method other than litigation, Claims will be resolved by litigation in a court of competent jurisdiction:)*
>
> [ ] Arbitration pursuant to Section 15.4 of AIA Document A201 – 2007
>
> [ ] Litigation in a court of competent jurisdiction
>
> [X] Other *(Specify)*

> Arbitration of claims under $500,000 with litigation of claims over $500,000. In the event there are several claims under $500,000, but the aggregate of all claims exceeds $500,000, all the claims shall be arbitrated.

The first sentence of the binding dispute resolution provision clearly demonstrates that the parties agreed to arbitrate "claims under $500,000." Admittedly, the second sentence is far less clear. Nevertheless, since the parties had a valid agreement to arbitrate, the dispositive issue is whether the instant "dispute falls within the substantive scope of that agreement." *Raspet*, 147 N.C. App. at 136, 554 S.E.2d at 678 (citation and quotation marks omitted). Indeed, "the problem at hand is the construction of the contract language itself . . . ." *Johnston Cty.*, 331 N.C. at 91, 414 S.E.2d at 32.

Unsurprisingly, the parties disagree over the proper interpretation of the binding dispute resolution provision. At the hearing on defendant's motion to dismiss and to compel arbitration, plaintiff argued that there is a $500,000 "threshold . . . [o]ver that we're litigating; under that, we're arbitrating." According to plaintiff, the provision requires "litigation of all claims when at least one claim exceeds $500,000 and provides for arbitration when no single claim exceeds $500,000 (regardless of the total)." By contrast, defendant interprets the provision to mean that whenever there are several claims that are worth less than $500,000 individually, but more than $500,000 in the aggregate, then all of the claims must be *arbitrated*.

The trial court agreed with plaintiff's interpretation, and accordingly denied defendant's motion. This decision was in error.

In its order, the trial court recognized the "ambiguities" created by the "inartfully drafted dispute resolution language[.]" We agree that there are several reasonable interpretations of the provision, including those favored by both parties. However, faced with such "doubts concerning the scope of arbitrable issues," the trial court should have deferred to North Carolina's strong policy favoring arbitration. *Id.* Instead, the court erroneously concluded "that the parties have not selected a method of binding dispute resolution other than litigation" and denied defendant's motion to dismiss and to compel arbitration. Accordingly, we reverse the trial court's order and remand for entry of an order compelling arbitration. *See, e.g.*, *Ellison v. Alexander*, 207 N.C. App. 401, 415, 700 S.E.2d 102, 112 (2010).

REVERSED AND REMANDED.

Chief Judge McGEE concurs.

Judge MURPHY concurs in a separate opinion.

MURPHY, Judge, concurring.

While I concur in the Majority's opinion based on the current status of our caselaw, I write separately to emphasize the importance of the right to a jury trial in civil proceedings under the North Carolina Constitution. "[A] frequent Recurrence to fundamental Principles is absolutely necessary to preserve the Blessings of Liberty." N.C. Const. of 1776, Declaration of Rights, § 21. A recurrence of our fundamental principles is needed here.

Each iteration of our Constitution has explicitly guaranteed the right to a jury trial for civil cases respecting property:

> "That in all controversies at Law respecting Property, the ancient Mode of Trial by Jury is one of the best Securities of the Rights of the People, and ought to remain sacred and inviolable." N.C. Const. of 1776, Declaration of Rights, § 14.
>
> "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable." N.C. Const. of 1868, art. I, § 19.
>
> "In all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and shall remain sacred and inviolable." N.C. Const. of 1971, art. I, § 25.

The 1868 Constitution merged actions at law and in equity, such that this right to a jury trial now applies to all civil claims, provided that the case respects property. N.C. Const. of 1868, art. IV, § 1. *See also Kiser v. Kiser*, 325 N.C. 502, 506-07, 385 S.E.2d 487, 489 (1989) ("[T]his section created no additional substantive rights to trial by jury in all civil cases, but rather assured that the jury trial rights substantively guaranteed by article I, section 19 (now article I, section 25) would apply equally to questions of fact arising in cases brought in equity as well as cases brought at law.").

Since the adoption of our first Constitution in 1776, our courts have repeatedly pronounced the importance of the right to a jury trial.

"[W]e have a principle of our organic law, by which it is declared that the trial by jury is an institution which has been, and must be, cherished by every free people, as the best security for their lives and property, and ought to remain 'sacred and inviolable.' " *State v. Allen*, 48 N.C. 257, 262 (1855). Our Constitution thus guarantees this right to all those in North Carolina, albeit only under certain circumstances. "The right to trial by jury under article I has long been interpreted by this Court to be found only where the prerogative existed by statute or at common law at the time the Constitution of 1868 was adopted." *Kiser*, 325 N.C. at 507, 385 S.E.2d at 490. We have enforced this condition because the changes made by the 1971 Constitution did not alter the substantive rights guaranteed in the 1868 Constitution. There was a "clear intent on the part of the framers of the new document merely to update, modernize and revise editorially the 1868 Constitution." *N.C. State Bar v. DuMont*, 304 N.C. 627, 636, 286 S.E.2d 89, 95 (1982). This lack of substantive change to the jury trial provision does not show that "the framers of the 1970 Constitution intended that instrument to enlarge upon the rights granted by the 1868 Constitution . . . . [S]uch an intent shows that the 1970 framers intended to preserve intact all rights under the 1868 Constitution." *Id.* The provision's deep roots in our state's history and the unwavering intent of the People to protect this right demonstrate that "section 25 of our Declaration of Rights is one of the 'great ordinances of the Constitution.' " *Kiser*, 325 N.C. at 509, 385 S.E.2d at 491 (quoting *Springer v. Philippine Islands*, 277 U.S. 189, 209, 48 S. Ct. 480, 485 (1928) (Holmes, J., dissenting)).

Therefore, while I recognize that our appellate courts and General Assembly have expressed a strong policy in favor of arbitration, the policy of the People of this state as expressed in our Constitution is for jury trials:

> The right to a jury trial is a substantial right of great significance. "It is a general rule, since the right of trial by jury is highly favored, that waivers of the right are always strictly construed and are not to be lightly inferred or extended by implication, whether with respect to a civil or criminal case . . . . Thus, in the absence of an express agreement or consent, a waiver of the right to a jury trial will not be presumed or inferred. Indeed, every reasonable presumption should be made against its waiver."

Mathias v. Brumsey, 27 N.C. App. 558, 560, 219 S.E.2d 646, 647 (1975) (quoting *In re Gilliland*, 248 N.C. 517, 522, 103 S.E.2d 807, 811 (1958)). The People have valued the sacred right to a jury trial since the adoption

of our first state Constitution in 1776 and prioritized it over variations in civil proceedings:

> Our [C]onstitution declares that in all controversies at law respecting property the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable . . . . [A]ny innovation amounting in the least degree to a departure from the ancient mode may cause a departure in other instances, and in the end endanger or pervert this excellent institution from its usual course.

Whitehurt v. Davis, 3 N.C. 113, 113 (1800). Indeed, the constitutional right to a trial by jury was the basis of one of the first challenges to the validity of a North Carolina statute. *See Bayard v. Singleton*, 1 N.C. 5, 5 (1787) (invalidating a statute that required cases be dismissed when a defendant could prove that he bought the property at issue from a commissioner of forfeited estates).

In light of the historical significance of this right to a jury trial, I stress that, although "North Carolina has a strong public policy favoring the settlement of disputes by arbitration[,]" we cannot abandon our constitutional rights in favor of procedural efficiency and convenience. *Johnston County v. R. N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992).

As the Majority observes, "there are several reasonable interpretations of the provision [at issue]," and a consideration of the People's policy as expressed in our Constitution should dictate that the provision be interpreted in favor of a jury trial. Therefore, I call upon our Supreme Court to make a recurrence to our fundamental principles and reconsider whether the People of this state have a policy of interpreting ambiguities in favor of the right to a jury trial over arbitration.

BERENS v. BERENS

[260 N.C. App. 467 (2018)]

MICHAEL M. BERENS, PLAINTIFF
v.
MELISSA C. BERENS, DEFENDANT

No. COA17-1189

Filed 7 August 2018

1. Divorce—equitable distribution—marital property—529 Savings Plans

The Court of Appeals, considering the issue for the first time, affirmed the trial court's equitable distribution order classifying funds in a 529 Savings Plan, which a married couple created during their marriage for their children's education expenses, as marital property pursuant to N.C.G.S. § 50-20(b)(1). The parents retained ownership and control over the 529 funds and were under no obligation to spend the money on educational expenses.

2. Divorce—equitable distribution—unequal division of property—statutory factors—sufficiency of findings

Where the trial court made an unequal division of property based on the factors in N.C.G.S. § 50-20(c), one of its findings on the statutory factors—regarding the income, property, and liabilities of each party—was insufficient to support its judgment. The trial court declined to make any findings on this factor "as there [was] no evidence to support this distributional factor" even though the wife presented evidence that she currently had no income, while her husband earned more than $300,000 per year.

Appeal by defendant from judgment entered 13 April 2017 by Judge Matt J. Osman in Mecklenburg County District Court. Heard in the Court of Appeals 17 May 2018.

James, McElroy & Diehl, P.A., by Gena Graham Morris and Caroline T. Mitchell, for plaintiff-appellee.

Wyrick Robbins Yates & Ponton LLP, by Michelle D. Connell, for defendant-appellant.

DIETZ, Judge.

The central issue in this appeal is how trial courts in equitable distribution proceedings should classify money in a 529 Savings Plan created

and funded during the marriage. These investment programs permit parents to set aside money for their children's college expenses under tax-favorable conditions.

Defendant Melissa Berens argues that contributions to a 529 Savings Plan are gifts to the parties' children and thus are not marital property. Alternatively, Ms. Berens asks this Court as a policy matter to "carve 529 plans out of the marital estate" through a court-created rule that treats this property differently from other marital assets.

As explained below, we reject Ms. Berens's arguments. The beneficiaries of 529 Savings Plans do not have any ownership or control of the funds; the plan participants can choose not to spend the money on their child's education and (after paying a penalty) spend the money on something else entirely. Thus, contributions to 529 Savings Plans cannot be gifts under property law. Moreover, this Court lacks the authority to create a "carve out" for 529 Savings Plans in the definition of marital property. Equitable distribution is a creature of statute and that change must come, if at all, from the General Assembly. In the meantime, trial courts can and should consider the intended purpose of these marital funds when determining an appropriate equitable distribution.

Ms. Berens also challenges the sufficiency of the trial court's findings of fact. As explained below, one of the court's findings is insufficient under our case law and we therefore vacate and remand the court's order in part. On remand, the trial court, in its discretion, may enter a new order based on the existing record or may conduct any further proceedings that the court deems necessary.

Facts and Procedural History

After more than twenty years of marriage, Michael Berens and Melissa Berens separated in July 2012 and divorced in December 2014. Both parties hold engineering degrees. Mr. Berens is employed and earns more than $300,000 per year. Ms. Berens is a stay-at-home mom.

The parties have six children and, during the marriage, created 529 Savings Plans for several of the children. They funded those 529 Savings Plans with money Mr. Berens earned during the marriage. The parties designated Ms. Berens as the plan participant and owner of the 529 Savings Plan accounts.

In June 2013, Mr. Berens filed a complaint for equitable distribution. After a hearing in mid-November 2016, the trial court entered an equitable distribution order in April 2017. The court determined that an unequal division of the property was equitable and distributed

approximately 57% of the marital estate to Ms. Berens, including the marital home and the 529 Savings Plans. Ms. Berens timely appealed.

Analysis

I. Classification of 529 Savings Plans

[1] The primary issue in this appeal is, somewhat surprisingly, a question of first impression: in an equitable distribution proceeding, how should courts classify funds held in a 529 Savings Plan that a married couple created during the marriage for their child's educational expenses?

A 529 Savings Plan gets its name from Section 529 of the Internal Revenue Code, which permits states to establish "qualified tuition programs." 26 U.S.C. § 529. As relevant here, our State's 529 Savings Plan program permits parents to save money under tax-favorable conditions to later be used for their children's higher education expenses. *See* North Carolina's National College Savings Program, *Program Description* (Jan. 23, 2017), 5, 24.

The issue in this appeal is whether funds that the parties contributed to several 529 Savings Plans during the marriage are marital property. In an equitable distribution proceeding, the trial court must classify the parties' property into one of three categories—marital, divisible, or separate—and then distribute the parties' marital and divisible property. N.C. Gen. Stat. § 50-20. The statute defines marital property as "all real and personal property acquired by either spouse or both spouses during the course of the marriage and before the date of the separation of the parties, and presently owned, except property determined to be separate property or divisible property." *Id.* § 50-20(b)(1). Property that was acquired but then given away to some third party during the marriage—including a gift to the married couple's minor children—is not subject to equitable distribution. *See Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 274 (1990).

Ms. Berens contends that the money contributed to the parties' 529 Savings Plans were gifts to the children listed as the plan beneficiaries. Thus, she argues, "the accounts fall outside the marital estate and the trial court did not have subject-matter jurisdiction to distribute them." We disagree.

"In order to constitute a valid gift, there must be present two essential elements: 1) donative intent; and 2) actual or constructive delivery." *Courts v. Annie Penn Mem'l Hosp., Inc.*, 111 N.C. App. 134, 138, 431 S.E.2d 864, 866 (1993). "These two elements act in concert, as the present intention to make a gift must be accompanied by the delivery, which

delivery must divest the donor of all right, title, and control over the property given." *Id.*

Applying this settled property law principle, the parties' contributions to their 529 Savings Plans were not gifts. In their briefs, both parties discuss various tax implications of 529 Savings Plan contributions at length. But the treatment of these plans for tax purposes does not control the determination of ownership under the equitable distribution statute. Instead, we look to whether the parties delivered an ownership interest in those funds to their children, thereby divesting themselves of that interest. *Id.*

They did not. As Ms. Berens conceded at oral argument, her children have no ownership rights in the money in the 529 Savings Plans. Our State's 529 Savings Plan criteria state that the plan participants "retain[] ownership of and control over the Account" and their children, as the account beneficiaries, have "no control over any of the Account assets." *Program Description*, at 12. Moreover, parents are under no obligation to spend the money in a 529 Savings Plan on the educational expenses of the children listed as the plan beneficiaries. For example, a family with four 529 Savings Plans, one for each of their four children, could later choose to use all the money for a single child with particularly high college expenses. Or those same parents could withdraw all the money, pay a tax penalty, and buy a vacation home. Whether these are wise decisions, or ones that parents likely would make, is irrelevant—parents *could* do so if they wanted, and this is proof that 529 Savings Plan contributions are not gifts to the plan beneficiaries. *See Courts*, 111 N.C. App. at 138, 431 S.E.2d at 866.[1] Thus, absent some additional actions by the parents to restrict the use of the 529 Savings Plan funds, those funds are solely the property of the parents.

Because the parties owned the funds in the 529 Savings Plans, the trial court properly treated those funds as marital property. Indeed, the trial court had no choice—the parties concede that the 529 Savings Plan accounts consist of money acquired by the parties during the marriage and, as explained above, the parties, not their children, own

1. Ms. Berens also argues that "529 plans are constructive trusts held for the benefit of the children" and thus are not marital property. But the cases on which she relies are inapposite; they involve situations in which the children hold title to property and the court wrests title from them by imposition of a constructive trust in order to accomplish an equitable distribution of marital property. *See*, *e.g.*, *Sharp v. Sharp*, 133 N.C. App. 125, 128, 514 S.E.2d 312, 314, *rev'd on other grounds*, 351 N.C. 37, 519 S.E.2d 523 (1999). Here, by contrast, the parents, not the children, hold title to the property.

the money in those accounts. Thus, the equitable distribution statute required the trial court to classify those funds as marital property. N.C. Gen. Stat. § 50-20(b)(1).

Ms. Berens also argues, compellingly, that classifying a 529 Savings Plan as marital property could have negative policy consequences—most obviously, the risk that the spouse who receives the 529 Savings Plans through equitable distribution might be forced to use those funds for purposes other than the children's educational expenses. She contends that "[i]f it is in the public interest to promote education, then 529 accounts must be removed and protected from the unrelated, fragile contract of marriage."

But the courts are the wrong forum to make this policy argument. Equitable distribution is a creature of statutory law that acts as an alternative to the common law claims and rights that otherwise would govern the parties' ownership of their property following a divorce. *Lamb v. Lamb*, 92 N.C. App. 680, 685, 375 S.E.2d 685, 688 (1989). As a result, this Court has no authority to do as Ms. Berens requests and "carve 529 plans out of the marital estate for the benefit of the children prior to distribution of property and debts." It is for the General Assembly, not this Court, to define by statute what property is classified as marital and subject to equitable distribution under this statutory scheme.

In any event, the courts are far from powerless to address these policy concerns. After classifying the parties' property according to law, trial courts have broad discretion to distribute marital property in an equitable manner. *Petty v. Petty*, 199 N.C. App. 192, 197, 680 S.E.2d 894, 897–98 (2009). Trial courts can, and should, use this discretion to minimize the risk that one spouse is forced to use marital assets in a 529 Savings Plan for purposes other than the intended beneficiary's educational expenses.[2] But in classifying property, courts must adhere to the requirements of the equitable distribution statute. The trial court properly did so in this case when it classified the parties' 529 Savings Plans as marital property.

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2. Ms. Berens also argues that classifying a 529 Savings Plan as marital property could be unjust when third parties such as grandparents contributed to the plan as well. Those third-party contributions, which would be gifts under property law, might impose separate obligations on the use of the plan funds by the parent. But Ms. Berens concedes that all of the funds in the 529 Savings Plans in this case came from the parties' marital assets and, thus, we need not address that question here.

II. Trial Court's Findings of Fact

[2] Ms. Berens also argues that the trial court's findings of facts are insufficient to support the court's judgment. As explained below, we agree that one of the trial court's findings is infirm and we remand for the court to address this issue.

The equitable distribution statute permits trial courts to order an unequal division of the parties' marital property, provided that the court considers the relevant statutory factors. *Peltzer v. Peltzer*, 222 N.C. App. 784, 788, 732 S.E.2d 357, 360 (2012). Those factors are enumerated in N.C. Gen. Stat. § 50-20(c).

When the court orders an unequal division based on these statutory factors, "the trial court must make findings as to each factor for which evidence was presented." *Rosario v. Rosario*, 139 N.C. App. 258, 261, 533 S.E.2d 274, 276 (2000). Most disputes over the Section 50-20(c) factors concern how specific the court must be in those findings. *Id.* (collecting cases).

This case presents a different issue. In its order, the court addressed each of the twelve statutory factors individually. For the first factor—the income, property, and liabilities of each party—the court stated that it "declines to make any findings of fact as there is no evidence to support this distributional factor":

> 139. (1) The income, property, and liabilities of each party at the time the division of the property is to become effective.
>
> a. The Court has considered this factor and declines to make any findings of fact as there is no evidence to support this distributional factor.

Ms. Berens argues that this finding is plainly wrong because she presented evidence that she currently had no income and Mr. Berens earned more than $300,000 per year. Ms. Berens contends that, regardless of whether this evidence was sufficient to compel an unequal (in this case, a more unequal) division, it was certainly relevant and thus the trial court erred by finding that there was "no evidence to support this distributional factor."

In his appellee brief, Mr. Berens responds that "[w]hile there may have been evidence presented at trial that *could* have supported this factor being a distributional factor, as the trial court did not find that evidence persuasive, the trial court was not required to list all evidence considered."

Mr. Berens's response is a strawman. The flaw in the court's findings is not the failure to list all potentially relevant evidence—which is not required—but instead the court's statement that there was *no* evidence to support this factor when, in fact, there was.

To be sure, by stating that there was "no evidence to support this distributional factor" the trial court might have meant that it considered the parties' evidence but afforded little or no weight to it. *Peltzer*, 222 N.C. App. at 788, 732 S.E.2d at 360. But that is not what the court's finding states. We therefore vacate in part and remand the court's order for new findings on this statutory factor. Ms. Berens also argues that the court failed to make sufficient findings concerning several other statutory factors, but our review of the court's order and the record satisfies us that the court's findings on those factors are sufficient and we affirm those findings. *Rosario*, 139 N.C. App. at 262, 533 S.E.2d at 276.

Conclusion

We affirm the trial court's classification of the parties' property but vacate and remand the court's order to address an insufficient finding of fact. On remand, the trial court, in its discretion, may enter a new order based on the existing record or may conduct any further proceedings that the court deems necessary.

AFFIRMED IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and BERGER concur.

DAWN S. BLAIR, PLAINTIFF
v.
EVERETTE LACY BLAIR, DEFENDANT

No. COA17-585

Filed 7 August 2018

1. Appeal and Error—petition for writ of certiorari—additional issues—record incomplete

In an appeal from an equitable distribution order, the Court of Appeals denied a husband's petition for writ of certiorari seeking to raise additional issues apart from those presented in his wife's appeal where the record did not include the necessary documents to allow adequate review. Further, the husband did not object to the introduction of an expert's report, meaning his arguments would be limited to the weight of the evidence, not admissibility.

2. Divorce—equitable distribution—partnership percentages—evidentiary support

In an equitable distribution action, the trial court's findings of fact and conclusions of law that a husband's percentage of a partnership with his father was fifty percent were based on sufficient evidence, despite tax returns that said otherwise; it is within the trial court's purview to determine which evidence it finds more credible.

3. Divorce—equitable distribution—business valuation—unchallenged findings

In an equitable distribution action, a wife's challenges to the trial court's valuation of her husband's business at the date of their separation were overruled where the trial court's unchallenged findings of fact were supported by the evidence.

4. Divorce—equitable distribution—business valuation—appreciation—active versus passive

Although any increase in value of separate property during a marriage is presumed to be marital property, the trial court in an equitable distribution action did not err in designating half the appreciation in value of a husband's partnership during the marriage as passive, and thus the husband's separate property, based on evidence that adequately rebutted that presumption. Sufficient evidence was presented to support the trial court's reasoned calculation that part of the appreciation in value was attributed to efforts by the husband's father and to changes in market conditions.

5. Divorce—equitable distribution—post-separation business distributions—tax return characterization binding

In an equitable distribution action, the trial court erred in classifying all of the post-separation business distributions as a husband's self-employment income, and therefore separate property, after the court determined that half the husband's share of the business was marital property. The evidence did not make clear whether the payments represented income to the husband, a return on capital (which would be classified as divisible property), or were of another nature. Any reclassification on remand must take into account the characterization of the distributions on the business's partnership tax returns, which are binding on the parties.

Appeal by plaintiff from order and judgment entered 4 November 2016 by Judge Sherri W. Elliott in District Court, Caldwell County. Heard in the Court of Appeals 29 November 2017.

Wesley E. Starnes, for plaintiff-appellant.

Wilson, Lackey & Rohr, P.C., by David S. Lackey, for defendant-appellee.

STROUD, Judge.

Plaintiff appeals order and judgment regarding equitable distribution. We affirm the trial court's classification and valuation of the defendant's interest in a partnership with his father, but reverse the classification of the post-separation distributions from the partnership to defendant and remand for entry of a new order which classifies these post-separation distributions as divisible property and orders a new distribution.

I. Background

Plaintiff Dawn Blair ("Wife") and Defendant Everette Blair ("Husband") were married on 28 February 1994 and separated on 31 August 2011. On 6 October 2011, Wife filed a complaint with claims against Husband for post-separation support, alimony, equitable distribution, and attorney fees.[1] On 16 November 2011, Husband filed an answer and counterclaim for equitable distribution. Wife and Husband

1. Wife's claim for alimony was dismissed and is not a subject of this appeal.

both alleged they were entitled to a greater than one-half distribution of marital property based upon statutory factors under North Carolina General Statute § 50-20(c).

Trial of equitable distribution was held on 16 October, 10 December, and 12 December of 2014; and the 24th and 25th of August 2015. The issues on appeal all are related to the classification, valuation, and distribution of Blair Iron and Metal ("the Business"), a partnership between Husband and Joe Blair, his father. The equitable distribution judgment was entered on 4 November 2016, and Wife filed notice of appeal.

II. Petition for Certiorari

[1] Husband filed a petition for certiorari, requesting to assert issues on appeal also arising out of the classification and valuation of the Business. Husband avers that he failed to file notice of his cross-appeal under N.C. R. App. P. 3(c)(3) due to excusable neglect, as his counsel did not realize a notice of appeal was required for the issues he wished to present on appeal, which were listed in the record on appeal as his proposed issues. Husband states in his petition that the issues he wished to present were (1) whether evidence from Ms. Fonvielle regarding date of marriage value of the Business should have been excluded because it was not disclosed in discovery; (2) whether Ms. Fonvielle's valuation of the Business should have been excluded for various reasons; and (3) whether the trial court erred by excluding Husband's proposed expert witness, Mr. Prestwood, regarding valuation of the Business.[2] Husband states in his petition that there are "no attachments to this Petition because everything required for this Court to consider[," as to whether to issue Writ appears in the Record.

From our review of the transcript and record, the record does not include everything required for us to consider Husband's proposed issues. All three of these issues are based primarily upon Ms. Fonvielle's valuation and the information upon which she based her evaluation. But Ms. Fonvielle was appointed as the expert to do the business valuation by a consent order which is not in our record. The trial court ruled that Mr. Prestwood could not testify based upon that consent order:

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2. Husband listed seven proposed issues in the Record on Appeal. The three issues addressed in his petition for certiorari encompass most of the issues in the Record on Appeal, although not worded exactly the same. The remaining proposed issues generally relate to determination of the marital interest in the Business, and we have addressed these issues based upon Wife's appeal.

> THE COURT: In looking at the consent order of September the 5th, 2012, um, and remembering the discussions that surrounded the appointment of an expert to value Blair Iron & Metal, specifically that consent order does say that the parties requested the Court to appoint an expert, and it was the Court's appointment of the expert upon the request, joint request, of the plaintiff and defendant, um, and so I am going to disallow the testimony of Mr. Prestwood as the Court had the expert appointed to value this business. Mr. Lackey, I understand you weren't involved then, but Mr. Blair as represented by counsel, um, and that's the Court's ruling.
>
> MR. BEACH: Thank you, Your Honor.

Without the consent order appointing Ms. Fonvielle, we would be unable to review this ruling by the trial court. We would also be unable to determine the exact scope and terms of Ms. Fonvielle's valuation set out in that order, so we would be unable to review Husband's other proposed issues. We also note that Husband did not object to the introduction of Ms. Fonvielle's report as evidence at trial and that his arguments attacking her valuation go to weight and credibility of the evidence, not admissibility. We therefore deny Husband's petition for certiorari to address his proposed issues.

III. Equitable Distribution

Wife raises seven issues on appeal and challenges many findings of fact, although some findings of fact Wife challenges are mixed with conclusions of law. To make matters more confusing, Wife's brief addresses only four issues in detail, and for the remaining issues she simply notes that the issue is "the same issue" as addressed in the argument for another issue but "because of the complex and mixed nature of the issues, it is submitted again here to make clear the nature of the challenges." So according to Wife's brief, issues I, II and VI are really "the same issue[;]" III, IV, and V are "the same issue[;]" and VII stands alone. We will attempt to sort out these "complex and mixed" issues in some rational manner but would encourage appellants to organize issues in a more orderly fashion. For example, if three issues are "the same issue," then they should be presented together as one issue. Furthermore, although Wife's brief mentions many findings of fact in the issues and the headings of the arguments contend that some findings are not supported by the evidence, the substance of her brief does not challenge the findings of fact as unsupported by the evidence. Wife's actual issues arise from the trial court's conclusions of law -- which at times are

labeled as findings of fact -- and thus we address the substance of Wife's arguments which is the trial court's legal conclusions.

A. Standard of Review

Standards of review guide the Court's consideration of all appeals, so they are also useful in determining an orderly manner for presentation of issues. Unfortunately, Wife's brief states several standards of review for each argument, since the issues in each are mixed. If the findings of fact upon which the challenged conclusions of law are not supported by the evidence, the conclusions themselves must fail. *See generally Peltzer v. Peltzer*, 222 N.C. App. 784, 786, 732 S.E.2d 357, 359 (2012). If the findings are supported by the evidence, then we review de novo the trial court's conclusions of law based on those findings. *See generally id*; *Westmoreland v. High Point Healthcare Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Restated,

> [t]he standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment. 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.
>
> The trial court's findings need only be supported by substantial evidence to be binding on appeal. We have defined substantial evidence as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.

Peltzer, 222 N.C. App. at 786, 732 S.E.2d at 359 (citations, quotation marks, and brackets omitted). Also,

> [t]he labels "findings of fact" and "conclusions of law" employed by the trial court in a written order do not determine the nature of our review. If the trial court labels as a finding of fact what is in substance a conclusion of law, we review that "finding" de novo.

Westmoreland, 218 N.C. App. at 79, 721 S.E.2d at 716 (citations omitted).

Furthermore, classification of property is a conclusion of law which we review *de novo*:

> Because the classification of property in an equitable distribution proceeding requires the application of legal

> principles, this determination is most appropriately considered a conclusion of law. The conclusion that property is either marital, separate or non-marital, must be supported by written findings of fact. Appropriate findings of fact include, but are not limited to, (1) the date the property was acquired, (2) who acquired the property, (3) the date of the marriage, (4) the date of separation, and (5) how the property was acquired (i.e., by gift, bequest, or purchase).

Hunt v. Hunt, 112 N.C. App. 722, 729, 436 S.E.2d 856, 861 (1993) (citations omitted); *see generally Westmoreland*, 218 N.C. App. at 79, 721 S.E.2d at 716.

Finally, we review the distribution of the marital property for clear abuse of discretion:

> As to the actual distribution ordered by the trial court, when reviewing an equitable distribution order, the standard of review is limited to a determination of whether there was a clear abuse of discretion. A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason.
>
> The trial court's unchallenged findings of fact are presumed to be supported by competent evidence.

Peltzer, 222 N.C. App. at 787, 732 S.E.2d at 359-60 (citations, quotation marks, and brackets omitted).

Again, because Wife's actual issues are objections to the trial court's conclusions of law, and those conclusions are mixed in with the findings of fact in the order, we assume that Wife listed the findings as part of her issues on appeal because she had difficulty separating the findings from the conclusions. We have had the same problem. We will simply start at the beginning of the order and address Wife's challenges to the conclusions of law as they appear in the order.

B. Partnership Percentages

[2] Evidence relevant to the issues on appeal was presented at the three days of hearing in 2014 and two days in 2015. Almost all of the substantive evidence regarding the Business was presented in 2014. The Business was originally known as Blair Auto and Machine and was a sole proprietorship of Joe Blair. At its inception, the Business did primarily car repair and repair of specialized machinery parts. The trial

court's findings about the formation and existence of the partnership between Husband and his father are not challenged on appeal, although the percentage interest of Husband is an issue.[3] Some findings regarding the formation of the business are uncontested:

> 12. In December 1993 the Defendant, Plaintiff, Joe Blair and May Blair had several discussions concerning the Defendant quitting his job and going into business with Joe Blair.
>
> 13. The parties were quite informal regarding the formation of a partnership. The idea was discussed at two meetings where all four were present. In addition, the Plaintiff and Defendant had some discussions over a One to two month period. Also, the Defendant and his father had several discussions regarding forming a partnership.
>
> . . . .
>
> 15. The Defendant was the primary manager and also the day to day operations manager of the partnership he had formed with his father.
>
> 16. The purpose of the partnership was to maintain the business Joe Blair operated and further develop a recyclable material business as a wholesaler.
>
> 18.[4] The Defendant quit his employment at Burns Wood Products as of February 11, 1994. . . .
>
> 19. No paper writing was ever drawn concerning the operation and interests of the partnership. The Defendant did not "buy into" the partnership; he just began working and managing the partnership's business. All capital, machinery, equipment, buildings, vehicles etc. were Mr. Joe Blair's at the formation of the partnership.
>
> 20. Defendant's partnership interest was gift to him alone from his father, and it was made before the parties' date of marriage.

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3. The trial court found that Wife was not a partner in the Business, and she does not contest that finding on appeal, although the transcript shows that it was a "theory" she advocated at trial.

4. Trial court skipped finding number 17.

21. No partnership documents were filed with the Secretary of State nor any other government entity except for tax records and some records regarding the purchase of equipment. A special account was opened at First Union not in the name of the partnership but titled "Joe and Everette Blair Special Account."

22. Tax records for 1994 indicate the partnership was formed on January 1, 1994.

23. The partnership between Joe Blair, Defendant's father, and Everette Blair, Defendant, was formed on January, 1, 1994.

24. The tax records indicate the partnership's profits and liabilities were allocated at 70% to the Defendant and 30% to Joe Blair. These percentages of profit and liabilities were maintained from 1994 through and including tax year 2000.

25. In tax year 2001, the company name of Blair Auto and Machine was changed to Blair Iron and Metal. The tax records from 2001 through 2013 represent the company name as Blair Iron and Metal.

26. In tax year 2001, the records show the partnership's profits and liabilities changed for Everette Blair from 70% to 60%. The tax records show the change of the partnership's profits and liabilities for Joe Blair changed from 30% to 40%. See Plaintiff's Exhibit #10.

27. From tax year 2002 until tax year 2013, the partners listed for Blair Iron and Metal were Joe Blair and Everette Blair. The percentage of profits and liabilities remained consistent for each tax year as Everette Blair having a 60% and Joe Blair having a 40%. See Plaintiff's Exhibits #17 - #28.

Plaintiff challenges these "findings of fact" regarding the partnership percentages:

33. Even though many of the partnership tax returns show that the Defendant received 60% of the profits, the partnership was between the Defendant and his father, Joe Blair, with 50% ownership by the Defendant and a 50% ownership interest by Joe Blair. Mr. Joe Blair routinely

> allowed the Defendant to take more than 50% of the profits because the Defendant had a young family, including a step-daughter by the Plaintiff, to support. The generosity of the Defendant's father and mother for that matter is further demonstrated by the fact that the parties' real estate was a gift to them from the Defendant's parents.[5]
>
> . . . .
>
> 61. The Court finds the partnership interest of the Defendant on the date of separation was 50%.

Wife also challenges Findings 64 and 65, regarding Husband's 50% partnership interest and the basic math which results from applying a 50% interest to the values determined.

Findings of fact 26 and 27, which are not challenged, also addressed the income tax returns and the partner's percentages of interest on the returns. The tax returns of the partnership were admitted as evidence, and as the finding states, the tax returns showed Husband's partnership interest as sixty percent. Despite repeatedly filing tax returns "under penalty of perjury" which set forth a sixty percent interest for Husband, Husband testified that the business was actually a fifty-fifty partnership:

> Q. Mr. Blair, do you -- did you and your father have an agreement as to your percentage ownership of the partnership? Were you fifty/fifty, forty/sixty, seventy/thirty? Was there an agreement about that?
>
> A. Yes.
>
> Q. What was the agreement?
>
> A. We were equal partners, fifty/fifty.
>
> Q. Can you explain to us why, as the tax returns will show over the years, you almost always took something more than fifty percent of the distributions of the partnership's profits?
>
> A. Yes. The whole, or main purpose, of our joining as a partnership was to help to provide for me a means of living and income to support a family, which I was beginning and already had children. Uh, in the early years,

5. Finding 33 is supported by the evidence, and Wife does not contend otherwise, but rather challenges the conclusion of law regarding the percentages of ownership.

> especially, there was not enough income, profit, to barely support one person, let alone two. And it was always the intent, uh, of--of us both that that was the primary purpose of the business was to provide a living for me, as well as he, uh, as it would provide. The, uh, the amounts through the years have always swayed in my favor, as far as the draws or pays or whatever you want to call them, uh, because I always took the larger percentage. I had a family to raise and needed more income. Uh, the -- as far as the tax returns and those percentages are shown, those were just what the tax people told us we needed to do, because I was taking the majority (inaudible), you know, I don't know if we just kind of followed along with what we were told we should do.

Although the tax returns are substantial evidence of the partnership percentages, they are not dispositive in this context. The evidence is conflicting, but the credibility and weight of the evidence, which includes the tax returns and testimony, are evaluated by the trial court. *See In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) ("[W]hen a trial judge sits as both judge and juror, as he or she does in a non-jury proceeding, it is that judge's duty to weigh and consider all competent evidence, and pass upon the credibility of the witnesses, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." (citation and quotation marks omitted)).

In *Davis v. Davis*, this Court addressed the sufficiency of the evidence in an action seeking the dissolution of an alleged partnership. 58 N.C. App. 25, 26, 293 S.E.2d 268, 269 (1982). The defendant denied the existence of a partnership based upon there being no written partnership agreement and his contention that the parties "never had a meeting of the minds on a verbal partnership agreement." *Id.* at 27, 293 S.E.2d at 269 (quotation marks omitted). This Court noted the evidence regarding the formation of a partnership, including the partnership tax returns filed by the parties:

> Plaintiff's evidence clearly shows that the parties discussed his coming into the business which led to their subsequent engagement together in business transactions. Plaintiff understood their oral agreement to provide that he would own 30% of the business, but William stated that the terms of their agreement were that initially he would get thirty percent of the net profits of the business after all expenses. In addition, there is evidence that

> William considered plaintiff as management because he could not trust an employee. The evidence that plaintiff received a share of the profits of the business therefore is *prima facie* evidence that he is a partner because there is no other evidence that the share of the profits paid to plaintiff was considered employee's wages.
>
> Further, the filing of a partnership tax return is significant evidence of the existence of a partnership. Under the State and Federal income tax laws, a business partnership return may only be filed on behalf of an enterprise entered to carry on a business. There is evidence in the present case that William prepared the tax return for the business indicating himself and plaintiff as co-owners. This constitutes a significant admission by William against his interest in denying the existence of a partnership.
>
> Although William testified that he and plaintiff never agreed on the terms of a partnership, the evidence of the acts and declarations of the parties was sufficient for the jury to infer that a partnership existed in which William and plaintiff were the owners in 70% and 30% shares. Thus, the trial judge did not err in denying defendants' motions for directed verdict and for judgment notwithstanding the verdict.

Id. at 30–31, 293 S.E.2d at 271–72 (citations, quotation marks, and brackets omitted).

Although *Davis* was a business dispute decided by a jury, it is instructive here because this Court noted the evidence of the income tax returns was "a significant admission by [the defendant] against interest" in denying the formation of a partnership, and arguably, by extension, the returns would also be significant evidence of the partners' percentages of interest. *Id.* at 31, 293 S.E.2d at 272. But the tax returns were not dispositive, because the jury had the option to accept either the income tax returns as supporting the existence of a partnership or the defendant's testimony there was no partnership, despite the tax returns. *See id.* at 31-32, 293 S.E.2d at 272. In *Davis*, the jury ultimately found the tax returns and the plaintiff more credible and decided there was a partnership in which plaintiff was a 30% partner. *See id.* at 31, 293 S.E.2d at 272.

Here, the trial court found Husband's testimony that his interest in the partnership was only 50% to be credible and rejected the evidence of the tax returns based upon Husband's testimony that the tax returns

"just kind of followed along with what we were told we should do" by "the tax people[.]" "In an equitable distribution case, the trial court is the fact-finder. Fact-finders have a right to believe all, none, or some of a witness' testimony." *Zurosky v. Shaffer*, 236 N.C. App. 219, 240, 763 S.E.2d 755, 768 (2014) (citations omitted). Wife's argument on the trial court's determination that Husband's partnership interest was 50% is overruled.

C. Valuation of the Business

[3] Wife also challenges several findings of fact regarding the trial court's valuation of the business as of the date of separation. We first summarize the relevant findings which are not challenged on appeal. The trial court found the value of the business as of the date of marriage was $10,000, based upon the estimate of the expert witness on valuation; there was no other evidence of value as of the date on marriage presented, since Husband's valuation was simply "more than" $10,000, and Wife had only "a 'guess[.]' " The trial court noted that the parties entered into a consent order on 5 September 2012 appointing Betsy H. Fonvielle, CPA,[6] as an expert witness to conduct an appraisal of the Business.[7] The trial court also noted Ms. Fonvielle's qualifications, accreditation, and experience as an expert witness in business evaluation. Several findings, not challenged on appeal, addressed the valuation process and methodology:

> 43. Ms. Fonvielle used several factors in her valuation of the partnership on the date of marriage as follows:
>
> a. The tax records indicate the property initially placed in the partnership was one 14" shear listed as depreciable property placed in service as having a value of $1,200. Also listed was a Chevy truck placed in service having a value of $19,000 and used 80% as business purposes. Finally, listed was a 1991 Buick placed in service having a value of $10,000 and used for business purposes 68%. The business depreciative value was $7400 for the 1983 Chevy truck and $6800 for the 1991 Buick.

---

6. The CPA's name is spelled in different ways throughout in our record. The transcript notes it as "Fonville" while the trial court spells it "Fonvielle." Ms. Fonvielle's own letterhead is spelled as the trial court spelled it. We will use the trial court's spelling in our opinion but some of our quotes will use the "Fonville" spelling because that is how her name was spelled in that document.

7. The consent order is not in our record, so the only information we have regarding the terms of Ms. Fonvielle's evaluation is from her report, some emails and letters, and her trial testimony.

The partnership listed no other assets. See Plaintiff's Exhibit #7.

b. The taxable income for Blair Auto and Machine for tax year 1994 was $20,434.00. The partnership sales were $46,747.00. Inventory was listed as zero as of January 1, 1994. See Plaintiff's Exhibit #7.

c. A special account was set up at First Union Bank in the name of Joe Blair and Everette Blair and showed a balance of $867.94 as of February, 1994. The statement indicates the previous balance was zero.

d. The business did use some tools which had been accumulated previously by Joe Blair such as turning lathes, drill presses, grinders, hand tools, milling machine, and a cable crane. Some of these machines and tools are still used in the business.

. . . .

46. Over the first three to six years of the partnership, the company increased its focus toward collecting scrap metal for recycling instead of equipment and car repair. It developed facilities to include a small office building, drive-on scales, grading a large area of its 2.5 acres for storage and sorting metals.

47. The business purchased metal for recycling from the public from 1994 until the parties' separation.

48. The business also placed containers at various plants, including local metal and fabricating businesses, to recycle metal from their scrap. Sometimes the business contracted to purchase the scrap from these plants and sometimes the plants do not charge in an effort to simply get rid of their scrap.

49. The Defendant's business operations from the formation of the partnership until the date of separation were six days per week, having six working employees and the business being opened to the public for sales, all of which was intended to increase business profitability. The Defendant reinvested heavily in equipment as displayed on Exhibit G in Plaintiff's Exhibit #1 referenced hereto and incorporated hereby by reference.

50. The costs of equipment is listed Exhibit G reflects as value of $613,541.00. The Court recognizes this is not an estimate of the fair market value of the equipment on that day; however, it does reflect the heavy reinvestment undertaken by the partners up until date of separation.

51. Upon entering into an engagement agreement with the parties, Ms. Fonvielle gathered financial data from the partnership tax returns including a list of assets requested of documents reflecting liabilities of the partnership, and bank statements of the partnership. She undertook a site visit to the company, interviewed the Defendant regarding the history of the operations and profitability of the company, and she interviewed the Plaintiff regarding the history of the operations and profitability of the company.

52. Mrs. Fonvielle found some of the financial information incomplete. The balance sheets of the company did not balance. While requested, neither the Defendant nor the Plaintiff provided any documentation of the amount of inventory on the date of separation. However, both parties did provide estimates based upon their recollection during interviews and Court testimony. Mrs. Fonvielle did consider these amounts and compared the amounts to industry wide data in determining her estimate of value.

53. At the request of the Defendant, Ms. Fonvielle again valued the company as of· December 31, 2013. At that time she examined further tax records, journals of income and expenses, and bank statements of the company. She interviewed the Plaintiff and the Defendant regarding business operations and profitability since her first evaluation. Ms. Fonvielle did a similar comparison of the economic forecast, industry data, and regional competition as in her first analysis.

54. Ms. Fonvielle used three different accounting valuation methods in determining the value of the partnership for both points in time.

55. She used the Net Asset Approach, the Capitalized Earnings Approach, and the Direct Market Data Approach.

> An Asset valuation of the partnership was not performed. See Plaintiff's Exhibit #1.
>
> 56. Ms. Fonvielle further discounted the business due to the partnership being a family owned business and its lack of liquidity by 10%.
>
> 57. Ms. Fonvielle did not discount or considered how accrued, but unpaid rent to Mr. and Mrs. Joe Blair by the partnership impacted the value of Blair by the partnership impacted the value of Blair Iron and Metal on either the date of separation value or December 13, 2013 valuation date.

But Wife does challenge finding 58:

> 58. Ms. Fonvielle appraised the value of Blair Iron and Metal on the date of separation as Five Hundred Forty Thousand Dollars ($540,000.00) with Defendant's 50% interest in Blair Iron and Metal as being $270,000.00. Ms. Fonvielle's appraisal was based on consideration of the three approaches to determining value: the net asset approach, the capitalized earnings approach, and the direct market data approach.

Finding 58 first simply recites Ms. Fonvielle's valuation as of the date of separation as $540,000; it is not a finding of fact but only a recitation of evidence. The trial court did not *find* the same value as Ms. Fonvielle but instead found a different value in Finding 60, which Wife did not challenge: "Giving full weight to 2009 earnings and applying the result to the mathematical calculations shown in Ms. Fonvielle's report, the Court finds that the fair market value of Defendant's interest in Blair Iron and Metal as of the date of separation was $232,183.00." The remainder of Finding 58 also notes the valuation methods Ms. Fonvielle used; the evidence shows that she did use these methods, although the trial court explained in unchallenged Finding 59 why it did not agree with Ms. Fonvielle's value in Finding 58:

> 59. Ms. Fonvielle's appraised values are overstated because in her capitalized earnings approach to value, Ms. Fonvielle completely disregarded Blair Iron and Metal's unusually low earnings in 2009 while giving full weight to its unusually high earnings in 2008. The Court finds that if Blair Iron & Metal's unusually high earnings in 2008 are given full weight, then its unusually low earnings

> in 2009 must also be given full weight in determining fair market value.

The trial court went on to make these unchallenged findings:

> 62. The value of the partnership of Blair Iron and Metal on the date of separation was Four Hundred Sixty-four Thousand Three Hundred Sixty-seven Dollars ($464,367.00).
>
> 63. The value of Defendant's 50% interest in Blair Iron and Metal on the date of separation was Two Hundred Thirty-two Thousand One Hundred Eighty-three Dollars ($232,183.00).

Wife also challenges other findings of fact regarding valuation, but those findings again address the trial court's determination, which we have already addressed, that Husband had a 50% interest in the Business. This argument is overruled.

D. Classification of Appreciation during Marriage

[4] Wife contends the increase in the value of the Business during the marriage was active and thus marital, so the trial court erred in characterizing one-half of the increase in value since the date of marriage as passive appreciation, and thus Husband's separate property. Wife challenges Finding 66: "The increase in value during the marriage of Defendant's 50% interest in Blair Iron and Metal is composed of active appreciation and passive appreciation." Wife next notes several findings of fact but does not argue they are unsupported by the evidence. Instead, Wife challenges the conclusions of law mixed into these "findings" as not supported by the findings or the law; these findings are:

> 67. The Court finds that not all of the increase in Defendant's interest in Blair Iron and Metal was attributable to active appreciation due to Defendant's efforts. Defendant's father worked in the business along with Defendant. He contributed machinery and equipment to the business. The business operated on property owned by Defendant's parents without having to pay any rent. Defendant's father made some of the equipment used in the business. Furthermore, he used his expertise as a mechanic to repair and maintain the equipment and machinery used in the business, saving the business from having to pay a third party for such repairs and maintenance and/or purchase new machinery and equipment.

The active efforts of a third party, Defendant's father, contributed to the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage.

68. Market conditions also contributed to the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage. In early 1995 Blair Iron and Metal was receiving approximately $3.50 per CW for the scrap metals it sold. In late 2008 and early 2009, it was receiving approximately $6.25 per CW. In 2011, the year of the parties' separation, it was receiving $16.00 and $17.00 per CW for scrap metals. During the marriage the price Blair Iron and Metal received for the scrap metal it sold increased more than 450%. This is purely market-driven appreciation in the price of Blair Iron and Metal's product that has nothing to do with Defendant's efforts.

69. At least one-half (1/2) of the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage was attributable to factors other than active appreciation due to Defendant's efforts.

70. Fifty percent (50%) of the increase in value of Blair Iron and Metal from the date of marriage, February 28, 1994, to the date of separation, August 31, 2011, was due to the active appreciation in the business by the martial efforts of the Plaintiff and Defendant, and Fifty percent (50%) of the increase in value of Blair Iron and Metal from the date of marriage, February 28, 1994, to the date of separation, August 31, 2011, was due to passive appreciation through efforts of Joe Blair and market conditions.

71. The marital interest in Defendant's interest in Blair Iron and Metal as of the date of separation was 1/2 ($227,183.00) = $113,592.00.

Husband initially acquired his interest in the Business from his father as a gift just prior to the marriage, and the trial court valued the Business at $10,000 at that time.[8] During the marriage, Husband worked in the Business and it appreciated in value. Wife contends that Husband failed to rebut the presumption that the increase in the value of the Business

8. Husband acquired his interest in the business on 1 January 1994, although he did not quit his other job and work with the business full-time until 11 February 1994. The parties were married on 28 February 1994.

during the marriage was marital property and challenges the trial court's allocation of appreciation during the marriage as half passive because it wrongfully relied upon "the efforts of [Husband's] father" and "market conditions[.]" (Quotation marks omitted).

Wife correctly notes that based upon the findings that the Business increased in value during the marriage, there is a presumption that the appreciation is active and therefore marital, and the burden of proof was on Husband to rebut that presumption and show that the increase was passive:

> When marital efforts actively increase the value of separate property, the increase in value is marital property and is subject to distribution. To demonstrate active appreciation of separate property, there must be a showing of the (1) value of asset at time of acquisition, (2) value of asset at date of separation, (3) difference between the two. *Any increase is presumptively marital property unless it is shown to be the result of passive appreciation.*
>
> > In light of the remedial nature of the statute and the policies on which it is based, we interpret its provision concerning the classification of the increase in value of separate property as referring only to passive appreciation of separate property, such as that due to inflation, and not to active appreciation resulting from the contributions, monetary or otherwise by one or both of the spouses.
>
> In order for the court to value active appreciation of separate property and distribute the increase as marital property, the party seeking distribution of the property must offer credible evidence showing the amount and nature of the increase.

Conway v. Conway, 131 N.C. App. 609, 615–16, 508 S.E.2d 812, 817–18 (1998) (emphasis added) (citations and quotation marks omitted).

Wife argues that Husband's father's work in the Business should not be considered as passive appreciation since he is a partner, but appreciation from contributions by a business partner of a spouse can be considered as passive appreciation. *See generally Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). In *Lawing*, the defendant-husband owed 48% of the shares in a corporation, "Lawings, Inc. ('LINC')," while the plaintiff-wife owned 6%, and husband's brother owned the

remaining shares. 81 N.C. App. at 161, 344 S.E.2d at 103. Some of the husband's shares were inherited from his father and were his separate property. *See id.* at 174, 344 S.E.2d at 110. LINC increased in value substantially during the marriage. *See id.* The plaintiff-wife argued on appeal the trial court erred by treating all of the appreciation in the husband's separate shares of LINC as his separate property, and this Court agreed:

> This Court has recently addressed questions of this type in applying G.S. 50–20(b)(2), under which inherited property is separate property and increases in value of separate property are also separate property. In each case we have held that increases in value remained separate property only to the extent that the increases were passive, as opposed to active appreciation resulting from the contributions of the parties during the marriage. *McLeod v. McLeod*, *supra*; *Phillips v. Phillips*, *supra*; *Wade v. Wade*, *supra*. . . . . [W]e hold that the *Wade-Phillips-McLeod* rule applies here.

Id. at 174-75, 344 S.E.2d at 110. Here the trial court used the approach in *Lawing* to value the appreciation during the marriage. *See id.* But Wife contends that the evidence was not sufficient to support the trial court's determination that half of the appreciation was active and half was passive, so the presumption the increase was marital should apply.

However, *Lawing* specifically approved consideration of the efforts of a third party who is active in the business as a factor in the passive appreciation in value during the marriage:

> Plaintiff urges that we apply *McLeod* and *Phillips* to the entire appreciation in value. She relies on her evidence that she and defendant ran the corporation, defendant's statements that Plato did not have a real share in business decisions, and defendant's dominance in handling business finances. She contends that this total control by the parties means the entire appreciation should have been designated marital property. Plato testified however that he had an equal share in running the business, and defendant's later statements agree with Plato. *On this record the court could properly find that some part of the appreciation in value was due to the efforts of Plato Lawing.* For the purposes of evaluating the contributions to the marital economy for equitable distribution, we see

no difference between "passive" increases in separate property (interest, inflation) and "active" increases brought about by the labor of third parties for whom neither spouse has responsibility. The court therefore correctly rejected plaintiff's contention that she was entitled to marital treatment of the entire increase in value of the inherited stock.

Nevertheless it would be contrary to the spirit of the Equitable Distribution Act and our decisions in *McLeod* and *Phillips* to hold that simply because a third party worked with plaintiff and defendant in a closely-held corporation, all increase in value automatically is exempted from treatment as marital property. Although the owner of separate shares was treated as the sole owner in *Phillips*, the presence of some minimal (2%) third party involvement did not preclude treatment of corporate appreciation during the marriage as marital property. Other states have generally recognized "active" appreciation of fractional interests in corporations as marital property, even though the underlying shareholder interest was separate property.

Here the entire appreciation in value of the inherited shares was clearly identified for the trial court. The portion of the appreciation attributable to the active efforts of the parties was property "acquired" during the marriage. It therefore was presumably marital in nature. *The only evidence regarding the appreciation was that sketchy evidence discussed above: that evidence did not rebut the presumption of marital property, but only plaintiff's claim to the entire appreciation.*

We therefore hold that the court erred in ruling that the entire appreciation in value of these separate shares was separate property. *We remand for a determination of the proportion of the appreciation that may properly be classified as marital property. The court should make findings as to the value of the shares at the time of the inheritance and as of the date of valuation. It then should determine what proportion of that increase was due to funds, talent or labor that were contributed by the marital community, as opposed to passive increases due to interest and rising land value of land owned at inheritance, and the efforts of Plato.* We recognize that

> we cannot require mathematical precision in making this determination. Nevertheless, the trial court must make a reasoned valuation, identifying to the extent possible the factors it considered.

Id. at 175-76, 344 S.E.2d at 111–12 (citations and headings omitted).

Here, the trial court followed exactly the process directed by *Lawing*. *See generally id.* The trial court's findings show it made a "reasoned valuation" of the contribution of Husband's father to the appreciation in the Business. *Id.* at 176, 344 S.E.2d at 112. The law "cannot require mathematical precision in making" the allocation of passive and active appreciation during the marriage, but it is sufficient for the trial court to "make a reasoned valuation, identifying to the extent possible the factors it considered." *Id.* Specifically, the trial court noted that Joe started the business, which was operated on Joe's land. Joe had a "reputation in the community of being able to 'fix' or 'make' anything relating to machines, machinery, automobiles, engines, and/or motors." In addition, the trial court found

> Defendant's father worked in the business along with Defendant. He contributed machinery and equipment to the business. The business operated on property owned by Defendant's parents without having to pay any rent. Defendant's father made some of the equipment used in the business. Furthermore, he used his expertise as a mechanic to repair and maintain the equipment and machinery used in the business, saving the business from having to pay a third party for such repairs and maintenance and/or purchase new machinery and equipment.

The trial court did not err in concluding that "[t]he active efforts of a third party, Defendant's father, contributed to the increase in the value of Defendant's interest in Blair Iron and Metal during the marriage."

Wife also argues the trial court erred in considering changes in market conditions as a cause of the passive appreciation. Wife claims that although market conditions can be a proper consideration, "defendant merely offered that the rate of compensation for certain scrap materials had changed. The impact of these changes on the value of the business was never explained." (Citation omitted). Wife then notes that other factors could also contribute to appreciation, such as Husband's decision to switch the focus of the Business to scrap metal and the types of scrap metal he obtained.

We have reviewed the trial testimony regarding the Business, the change to a scrap metal business from auto repair, changes in the prices and markets for scrap metal, and the expert valuation of the Business, and Husband offered sufficient evidence for the trial court to consider market conditions. Again, the law does not "require mathematical precision" in determining exactly how much the changes in market conditions contributed to the increase in value of the Business. *Id.* The trial court was well within its discretion to consider the evidence of changes in market conditions as contributing to the passive appreciation in the business during the marriage.

E. Post-Separation Distributions to Husband

[5] Wife's remaining issues challenge the trial court's findings of fact and conclusions of law regarding post-separation distributions from the Business to Husband.[9] In finding 77, the trial court found distributions from the Business to each partner for these years:

Year:	Husband's distributions:	Joe's distributions
2009	82,100	
2010	87,950	
2011	111,226	174,220
2012	65,300	31,700
2013	39,900	81,000

Wife challenges these findings:

> 76. As of the date of separation, Joe Blair was 72 years of age and in declining health. He can no longer handle the physical labor portion of the business. He has had bypass surgery and spinal degeneration, among other health problems. Many times he uses a wheelchair. He still works and does as much as he can to help with his former job duties. As a result, the equipment necessary to the company's operations declined. Competition in the scrap metal business increased, with some of Blair Iron and Metal's competitors being bought by conglomerates. Blair Iron and Metal could no longer compete on

9. These issues are separated into Issues I, II and VI in Wife's brief.

> price to purchase scrap metal from the public, and came to rely solely on its industrial and commercial customers as sources of scrap metal. It lost some of those customers as well. Blair Iron and Metal's location on a rural road, as opposed to its main competitors being located on U.S. Highway 321, a major highway, also contributed to its inability to compete in purchasing scrap metal from the public. In addition, after the date of separation the market price of scrap metal declined from $16.00 and $17.00 per CW to $13.50 per CW.
>
> . . . .
>
> 78. The post separation withdrawals were compensation for Defendant's active management efforts of Blair Iron and Metal and other daily management services and are the Defendant's separate property, not divisible property.

Wife argues that "[a]t best, the funds distributed after the date of separation would only partially represent salary for [Husband]; a portion would be a return on investment." Because one-half of Husband's share of the Business is marital property, the same percentage of distributions after the date of separation representing the partnership's return on investment would be divisible property. *See* N.C. Gen. Stat. § 50-20(b)(4)(c) (2015) (defining divisible property as "[p]assive income from marital property received after the date of separation, including, but not limited to, interest and dividends.").

Wife notes that Ms. Fonvielle presented evidence regarding the nature of the post-separation distributions to Husband:

> Q. All right. Well, let's go through it then. How would you characterize it, Ms. Fonville, as far as their distributions –– . . . . compared to the revenue of the company?
>
> . . . .
>
> A. Um, well, the – the distributions are substantial, uh, but, you know, the business is making money. It's more than, uh, a salary that they would be paid for the work they did, but then they've invested in the company, so some of it's, um paying them for their efforts and some of it[']s return on their investment in the company.
>
> . . . .

THE COURT: Could you repeat that? You said some of the – you – when looking at the distributions on page 15, that some of the distribution portion, you're saying you're – they – you're looking at that significant, yes, but they were paying it some as salary, some as a – as a return on their investment? Is that how you characterized the distributions? Is that what you were ----

THE WITNESS: I-I – well, as a partnership, they're not allowed to pay themselves a wage, so.

THE COURT: Correct.

THE WITNESS: So nothing shows up on the return, but obviously ----

THE COURT: Correct.

THE WITNESS: ---- they would want to receive compensation.

THE COURT: Okay.

THE WITNESS: So the total distribution, some of that would account for, um ----

THE COURT: A so-called salary.

THE WITNESS: ---- a so-called salary.

THE COURT: Okay.

THE WITNESS: And then the rest would be return on investment.

Husband's *only* response to Wife's argument regarding post-separation distributions is that she waived this issue by not raising it before the trial court because it was not listed in the pretrial order. Husband argues "[t]he only issue of post-separation partnership income that she claimed as divisible property was rental income from the parties' rental property. (R p 106)[.]" Husband contends that Wife cannot raise this issue on appeal because she "stipulated in the pre-trial order that there were no issues to be determined by the Court other than those listed, thereby effectively stipulating that there was no issue for the trial court to determine with regard to post-separation distributions."

We first note that the pre-trial order makes little mention of the Business or any related issues. And even if we assume for purposes of Husband's argument that Wife could have waived this issue by failing

to list it in a pretrial order, Husband's reliance upon the pretrial order here is inexplicable. This trial started with no pretrial order and *all* of the substantive evidence regarding the Business was presented before the pretrial order was entered. The first three days of the trial were in 2014 and evidence regarding the Business was presented on these dates. On the third day of the trial, 9 December 2014, the trial court realized that there was no pretrial order in the file and admonished the parties for the lack of a pretrial order:

> THE COURT: And the other thing, I-I need to verify. There is no pretrial order in this file.
>
> MR. JENNINGS: That is correct ----
>
> THE COURT: So ----
>
> MR. JENNINGS: ---- and I discussed that with you before we, um, before we started the ----
>
> THE COURT: And I understand about the business, but there's not anything with any of the other assets, but there is no reason that there's not a pretrial order in this file.
>
> MR. JENNINGS: And ----
>
> THE COURT: That needs to get done, because I'm not hearing anything on any blender pop pan car or any other item on any affidavit without a pretrial order.
>
> MR. JENNINGS: Okay.
>
> THE COURT: Okay?
>
> MR. JENNINGS: Yes, ma'am.
>
> THE COURT: I understand the business, because both of them listed it as unknown. I've got that. But I should still have a pretrial order with regards to all other assets and any other debts that they contend, and that needs to get done ----
>
> MR. JENNINGS: We did ----
>
> THE COURT: ---- because it's been ordered to be done moons ago.
>
> MR. JENNINGS: Excuse me. I understand.

THE COURT: I must have missed it, because otherwise I would probably already dismissed the case for non-compliance with the Court's orders, but I'm in it now and I hadn't done it. But, **I want a pretrial order** ----

MR. JENNINGS: Yes, ma'am.

THE COURT: **---- with every other item other than this business that's in contention**.

MR. JENNINGS: If I'm not mistaken, we did that before we started classification as far as put together a pretrial order ----

THE COURT: Okay.

MR. JENNINGS: ---- and had it available for Mr. Lackey. Um, he doesn't have it and Mr. Lackey and I, um, I don't know if you remember this, but I do because I know that I thought it was a real important point and I stuck it up there in the brain, uh, but, for whatever reason, I think we were ready, but you were saying that we were ready to go on this classification issue ----

THE COURT: Yes.

MR. JENNINGS: ---- (inaudible) let's get going

(inaudible).

THE COURT: Well, that was because that - I mean ----

MR. JENNINGS: And I understand.

THE COURT: ---- it needed to be done.

MR. JENNINGS: I hear you and I'll have - what I'm saying is that work's been done on my part.

THE COURT: Okay.

MR. JENNINGS: And I'll get with Mr. Lackey and we'll shore up what we need to.

(Emphasis added). The pretrial order was actually entered on 24 August 2015, prior to beginning the two days of the trial in 2015. During these two days, evidence regarding personal property was presented—not the substantive evidence about the Business or post-separation distributions

from the Business. The pretrial order was in compliance with the trial court's instructions above: it addressed "every other item other than this business that's in contention." Husband cannot rely upon waiver where the pretrial order was entered *after* presentation of all of the evidence on the Business, including distributions from the Business to the partners, and where the trial court directed that the pretrial order was to address only the items in contention *other* than the Business.

Thus turning back to Wife's argument, she contends the trial court erred by classifying all of the post-separation distributions as Husband's separate property because these payments are at least in part return on investment. Wife may be correct. In *Montague v. Montague*, the husband and wife formed a limited liability company to own and operate a commercial building. 238 N.C. App. 61, 64, 767 S.E.2d 71, 74 (2014). The trial court treated two post-separation distributions to the Husband as his separate property, characterizing them as "management fees" for his active management of the commercial building; this Court reversed and remanded:

> Wife contends that the trial court erred in treating two post-separation distributions made to Husband by the LLC as his separate property by characterizing these distributions as "management fees" he earned for managing the Montague Center after the parties separated. Specifically, the trial court treated as Husband's separate property a $5,010.00 distribution made to him in 2009 and a $26,200.00 distribution made to him in 2010. The key finding in the judgment with regard to these distributions states as follows:
>
> > 48. [Husband] actively manages the commercial property (negotiates all leases, collects rent payments, arranges for any "fit-up" required for a tenant, handles maintenance calls, does the landscaping, touch-up painting) and has done so since prior to the parties' separation. Plaintiff pays himself a management fee for this work in the form of a distribution.
>
> We agree with Wife that our holding in *Hill v. Hill*, ___ N.C. App. ___, 748 S.E.2d 352 (2013), compels us to conclude that the trial court should have classified these distributions as divisible property rather than treating them as Husband's separate property. As divisible property,

they must be distributed by the trial court. Accordingly, we reverse the trial court's classification of these distributions and remand the matter, directing the trial court to reclassify these distributions as divisible property and to make a distribution of this property.

In *Hill*, the parties set up a Subchapter S corporation as a vehicle for the wife's speech pathology practice. The corporate tax returns showed that the wife took money from her practice in two ways: (1) in the form of a low salary; and (2) in the form of shareholder distributions. Evidence was presented that she took shareholder distributions for the purpose of avoiding federal taxes for Social Security and Medicare. The trial court re-characterized the post-separation shareholder distributions to the wife as salary that she earned and, therefore, classified them as her separate property. On appeal, however, our Court reversed, stating that the parties are bound by their established methods of operating the corporation. Our Court essentially determined that since the parties elected to treat a portion of the money paid to the wife as shareholder distributions, rather than treating it as salary expenses of the corporation, these funds were part of the retained earnings of the corporation. Our Court then held that since the retained earnings of a Subchapter S corporation, upon distribution to shareholders, are marital property, the wife was bound by the treatment of these shareholder distributions to her as divisible property.

In the present case, the LLC is taxed as a partnership. The two distributions to Husband at issue here are treated on the LLC's 2009 and 2010 federal tax returns as withdrawals of partnership capital, and not as expenses of the partnership for property management services. Therefore, these distributions were part of the capital of the LLC and, therefore, belonged to the LLC. Had the distributions been treated as "management fees" on the federal tax returns, they would have been LLC expenses, which would have reduced the LLC's net income for 2009 and 2010 by $31,210.00, which potentially would have reduced Wife's personal tax liability.

We note that Husband may have, in fact, earned these distributions as management fees; however, we are compelled by *Hill* to conclude that Husband, being the majority

> owner and a manager of the LLC, is "bound" by the manner in which these post-separation distributions to him were characterized on the LLC tax returns. Accordingly, we strike the trial court's finding that Husband was paid for his efforts in managing the LLC, reverse the portion of the judgment treating the post-separation distributions from the LLC to Husband as his separate property, and remand the matter to the trial court to classify them as divisible property and to distribute this property.

Montague, 238 N.C. App. at 64–66, 767 S.E.2d at 74–75 (citations, quotation marks, and brackets omitted).

Here, this Business is a partnership, and is required to file Form 1065, the U.S. Return of Partnership Income. Form 1065 is filed annually with the Internal Revenue Service for informational purposes only, in that any profits or losses are "passed through" to the general partners for taxation. A Schedule K-1 for each partner is filed with the 1065 to report the partners' shares of any income, losses, deductions, credits, and other relevant information. The partners use the information provided on the Schedule K-1 to prepare their individual income tax returns.

In the present case, the Business partnership returns for years 2009-2013, with accompanying Schedule K-1s, were introduced into evidence as Plaintiff's Exhibits 24-28. Partnership distributions to Husband and his father were characterized on the returns as follows:

		Self-Employment Earnings K-1, Line 1 or 14(A)		Capital Distributions K-1, Line 19	
Exhibit	Year	Husband	Joe	Husband	Joe
#24	2009	29,328.00	19,552.00	0	0
#25	2010	93,939.00	62,626.00	0	0
#26	2011	209,180.00	139,453.00	0	0
#27	2012	40,012.00	26,675.00	0	0
#28	2013	47,204.00	31,469.00	0	0

In addition, the returns reflect that no withdrawals or distributions were made from either Husband's or Joe's capital accounts.

The trial court found the Business made distributions to the Business partners that varied substantially from the figures reflected

on the Business partnership returns for these years. These figures were taken from Exhibit #5, the Blair Iron and Metal Valuation as of December 31, 2013, prepared by Ms. Fonvielle.[10] It is unclear from the Valuation whether the distributions are income to Husband and Joe, return of capital, or of another nature. However, the trial court found that the distributions were income, and thus Husband's separate property.

In accord with *Hill* and *Montague*, the parties are bound by the characterization of the distributions on the income tax returns. *See Montague*, 238 N.C. App. at 64-66, 767 S.E.2d at 74-75. While it is clear that a considerable portion of the post-separation distributions to Husband was self-employment income on which Husband was liable for income and self-employment taxes, the remaining distributions may or may not be a return of capital. Post-separation self-employment income would properly be classified as Husband's separate property, and a post-separation return of capital to Husband would be properly classified as divisible property which should be distributed by the court. Accordingly, we vacate the trial court's classification of the post-separation distributions to Husband as his separate property and remand for entry of an order classifying the distributions in accord with the nature of the distributions, with due regard for the classification of the distributions on the Business's partnership returns, and distributing them properly.

IV. Conclusion

We affirm the trial court's classification and valuation of the Husband's interest in a partnership with his father, but reverse the classification and distribution of the post-separation distributions from the partnership to Husband. We remand for entry of additional findings concerning the nature of the post-separation distributions to Husband and the proper classification, valuation, and, if appropriate, distribution of this property. In addition, the trial court may revise the overall distribution of the marital and divisible property as needed to equalize the distribution in response to any changes in classification and valuation.[11]

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10. As mentioned above, we do not have the consent order setting out the scope of Ms. Fonvielle's evaluation; we are assuming based upon the testimony that the main purpose of Ms. Fonvielle's evaluation was to value the Business and not necessarily to assist the trial court in the classification of the post-separation distributions to the partners.

11. The distribution of marital and divisible property on remand shall remain equal, since the trial court found in the order on appeal that "[n]either party contended in the pretrial order that other than an equal division of marital and divisible property is equitable, nor did either party produce evidence at trial to overcome the presumption that an equal division of marital and divisible property is equitable" and concluded that an equal distribution of marital and divisible property is equitable. Appellant has challenged this finding or conclusion on appeal.

On remand, the trial court may in its sole discretion hold a hearing and receive additional evidence as needed to address the issues on remand.

AFFIRMED in part; REVERSED in part; REMANDED.

Judges ZACHARY and ARROWOOD concur.

BARBARA BURGESS AS ADMINISTRATRIX OF THE ESTATE OF STEPHANIQUE BELL, PLAINTIFF
v.
RASHEKA RENEE SMITH, THOMAS CHEEK MARSHALL, CHICNYLYNN SOLUTIONS, INC., AND ANTHONY JOHNSON, DEFENDANTS

No. COA17-1352

Filed 7 August 2018

Jurisdiction—subject matter—challenged after default judgment—equitable doctrines—inapplicable

Where the trial court entered a default judgment against defendant in a wrongful death action and defendant subsequently challenged the trial court's subject matter jurisdiction by asserting that the matter was one of workers' compensation and jurisdiction lay exclusively with the N.C. Industrial Commission, the trial court erred by failing to resolve the jurisdiction issue and instead concluding that the doctrines of equitable estoppel and laches barred defendants from challenging its subject matter jurisdiction. The order denying defendant's postjudgment motions was vacated and remanded with instructions for the trial court to hold an evidentiary hearing to issue proper findings and conclusions determining its subject matter jurisdiction.

Appeal by defendant from order entered 9 June 2017 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 18 April 2018.

James W. Kirkpatrick, III, P.A., by James W. Kirkpatrick, III, for plaintiff-appellee.

The Turner Law Firm, by Richard W. Turner, Jr., for defendant-appellant Thomas Cheek Marshall.

ELMORE, Judge.

Plaintiff Barbara Burgess, as administratrix of the estate of her deceased daughter, Stephanique D. Bell, brought this wrongful death action in superior court asserting various negligence claims against defendants Rasheka Renee Smith; Thomas Cheek Marshall; Chicnyln[1] Solutions, Inc.; and Anthony Johnson.[2] Bell was killed in a single-vehicle car accident while riding as a passenger in a vehicle owned by Marshall that Smith was driving during the course and scope of her employment as a salesperson traveling from Tennessee to North Carolina to sell Chicnlyn Solutions cleaning products door-to-door for Marshall and Johnson. After defendants Smith and Marshall were served with the complaint and summons but failed to answer or appear, the superior court entered a $2,151,218.29 default judgment against them jointly and severally.

Five months later, Marshall filed his first responsive pleading, asserting for the first time that Bell was his employee and had been killed during the course and scope of her employment while traveling as part of a sales team with Smith. Relying on the exclusivity provision of our Workers' Compensation Act, *see* N.C. Gen. Stat. § 97-10.1, Marshall moved to stay proceedings to enforce the prior judgments, to set aside the entries of default and default judgment, and to dismiss Burgess's claims for want of subject-matter jurisdiction, on the grounds that jurisdiction lies exclusively within the North Carolina Industrial Commission ("NCIC"). After a hearing, the superior court denied Marshall's postjudgment motions and affirmed its default judgment. Rather than issue findings and conclusions determining its jurisdiction, however, the superior court concluded that the doctrines of equitable estoppel and laches barred Marshall from challenging its subject-matter jurisdiction on the basis that Bell was his employee. Marshall appeals, arguing the superior court erred in several respects.

Because subject-matter jurisdiction may be challenged at any time, Marshall was permitted to challenge the superior court's jurisdiction over the subject matter of Burgess's claims against him even for the first time months after the default judgment was entered. Additionally, because subject-matter jurisdiction is a legal matter independent of

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1. Although the complaint names "Chicnlyn Solutions, Inc." elsewhere in the record the business is named "Chicnlynn" or "Chicnylynn" Solutions. We use "Chicnlyn" throughout this opinion.

2. Marshall is the only defendant in this appeal.

parties' conduct, the doctrines of equitable estoppel or laches provided no basis for the superior court to refuse to resolve the jurisdictional challenge. We therefore vacate the superior court's order denying Marshall's postjudgment motions, and remand with instructions for the superior court to hold a hearing in order to issue proper findings and conclusions determining its jurisdiction.

If after the hearing on remand, the superior court determines it had jurisdiction, it may properly deny Marshall's postjudgment motions and its prior judgments against him may be sustained. If the superior court determines jurisdiction lies exclusively with the NCIC, it must set aside its prior judgments against Marshall as void and dismiss Burgess's claims against Marshall for want of subject-matter jurisdiction. In such an event, Burgess may refile her claim against Marshall in the NCIC. We note that while ordinarily an employer may raise the two-year filing requirement imposed by N.C. Gen. Stat. § 97-24 as an affirmative defense to an employee's untimely filed workers' compensation claim, based upon the allegations of employer fault causing the delay in this case, if Marshall attempts to raise this defense, Burgess may properly reassert the affirmative defense of equitable estoppel, as she successfully pled in the superior court. If the superior court determines jurisdiction properly lies in the South Carolina Industrial Commission ("SCIC"), Burgess may file her claim in the SCIC, and we encourage that commission to deem as waived any potential filing defense Marshall may raise.

I. Background

According to Burgess's complaint, on 2 June 2013, Bell was riding as a passenger in Marshall's 1999 Ford SUV, which Smith was driving eastbound on I-40 during the course and scope of her employment with Marshall, Johnson, and Chicnlyn Solutions. Around 8:00 a.m., the vehicle hydroplaned, ran off the road, struck a metal guardrail, and rolled over several times in Haywood County. Tragically, Bell was ejected from the vehicle, sustained fatal injuries in the crash, and died at the scene.

On 7 May 2015, Bell's mother, Burgess, in her capacity as administratrix of Bell's estate, filed a wrongful death action in the superior court asserting various negligence claims against Smith, Marshall, Johnson, and Chicnlyn Solutions. Burgess was unable to serve Johnson or Chicnlyn Solutions with the complaint and summons but secured service on Smith and Marshall. After Smith and Marshall failed to answer or appear, the superior court clerk entered default against Marshall and Smith on 30 July 2015 and 14 July 2016, respectively. On 21 July 2016, after Marshall and Smith again failed to appear, the superior court

judge entered a $2,151,218.29 default judgment against them jointly and severally.

About five months later, on 16 December 2016, Marshall filed his first responsive pleadings and an affidavit. In a filing styled "notice of motion and motion to stay, to dismiss, and for relief from judgment/order," Marshall moved to stay proceedings to enforce all prior judgments, N.C. Gen. Stat. § 1A-1, Rule 62(b) (2015); to dismiss Burgess's claims for lack of subject-matter jurisdiction, *id.* § 1A-1, Rule 12(h)(3) (2015); and to set aside the default and default judgment entered against him, *id.* § 1A-1, Rules 55(d), 60(b)(1), -(3), -(4), -(6) (2015). In a filing styled "motion, answer, and defenses," Marshall relied on the exclusivity provision of our Workers' Compensation Act, *id.* § 97-10.1 (2015), to move to dismiss Burgess's claims against him for lack of subject-matter jurisdiction, *id.* § 1A-1, Rule 12(b)(1), -(b)(6), -(h)(3) (2015).

In the attached affidavit, Marshall averred, for the first time, that Bell was his employee and her death arose out of the course and scope of her employment as a salesperson traveling from Tennessee to North Carolina on a sales team with Smith for the purpose of selling cleaning products door-to-door in Charlotte. According to Marshall's affidavit, "in June 2013 [he] was operating a business utilizing salespersons to sell cleaning products door to door," as well as "[a] sales crew [that] consisted of sales managers, secretaries, and salespersons." Marshall "provide[d] transportation and lodging for the sales crew" and "all product for the salespersons to sell." Marshall further alleged that "[s]alespersons were typically recruited by print advertising," "Bell[ ] responded to a print advertising," he "provided sales training to . . . Bell . . . in early 2013," and "[o]n the date of the accident, . . . Bell was part of a sales crew which worked in Tennessee and was traveling to Charlotte[.] . . ." Thus, Marshall argued, Burgess "improperly brought this matter in Superior Court" because the NCIC "is vested with exclusive jurisdiction to determine the rights and benefits between employers and employees for personal injury or death."

In response, on 8 May 2017, Burgess moved for the superior court to deny Marshall's postjudgment motions, in relevant part pleading the affirmative defenses of equitable estoppel and laches. Burgess attached to her motion, *inter alia*, an affidavit from her attorney, James W. Gilchrist, Jr., in which Gilchrist averred that Marshall on 14 August 2013 "informed [him] that 'the kids' were not employees at the time of the accident" but, rather, "were all independent contractors associated with Anthony Johnson and Chicnylynn Solutions[.] . . ." Thus, Burgess argued, Marshall's three-and-a-half year delay after the date of the car accident

in claiming that Bell was his employee and thus the proper forum for her action was in the NCIC, should be barred by laches since that delay precluded Burgess "from making a claim with the [NCIC] based on N.C. Gen. Stat. § 97-58, which requires that any claim being made with the [NCIC] to be made within two years of the incident giving rise to the claim." Further, Burgess argued, Marshall should be equitably estopped from defensively asserting Bell was his employee to support his motion to dismiss her claims for lack of subject-matter jurisdiction, since Burgess relied upon Marshall's prior contrary statement to her attorney in "fil[ing] suit in Haywood County Superior Court instead of a workers' compensation claim with the [NCIC] or [SCIC]" and permitting Marshall to "rais[e] the defense . . . at this time would preclude her Estate from any recovery under the Rules of the [NCIC] . . . ."

After a hearing, the superior court entered an order on 9 June 2017 denying Marshall's postjudgment motions and affirming its default judgment. In relevant part, the superior court concluded (1) Marshall was equitably estopped from defensively raising the exclusivity provision of our Workers' Compensation Act as a jurisdictional bar to Burgess's claims against him based on his prior contrary extrajudicial statement that Bell was not his employee but an independent contractor, and (2) laches from the delay barred Marshall from now challenging its subject-matter jurisdiction on the basis that Bell was his employee and her death arose during the course and scope of her employment. Marshall appeals.

II. Analysis

On appeal, Marshall argues the superior court erred by not declaring (1) Bell was his employee and her death arose during the course and scope of her employment, and thus (2) it lacked subject-matter jurisdiction over Burgess's claims based upon the exclusivity provision of the Workers' Compensation Act. Marshall also argues the superior court erred by concluding (3) Burgess was entitled to the defense of equitable estoppel because Burgess failed to exercise reasonable care and circumspection in discovering Bell's employment status, and (4) his Rule 12 defenses grounded in his challenge to the superior court's subject-matter jurisdiction were barred by laches because, based on Burgess's own delay in filing her action in superior court days before the expiration of the two-year statute of limitation period applicable to wrongful death claims, no causal link existed between his delayed answer and defenses, and Burgess's loss of her potential workers' compensation claim pursuant to N.C. Gen. Stat. § 97-24's two-year filing requirement. Finally, Marshall argues, (5) the superior court erred by denying

his postjudgment motions for relief and to dismiss Burgess's claims because it lacked subject-matter jurisdiction.

However, because we resolve this appeal on the ground that the superior court erred in failing to resolve Marshall's challenge to its subject-matter jurisdiction, we address the merits of Marshall's arguments only to the extent they implicate our analysis of this threshold jurisdictional issue.

A. Review Standard

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed *de novo* on appeal." *Hillard v. Hillard*, 223 N.C. App. 20, 22, 733 S.E.2d 176, 179 (2012) (quoting *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010)).

B. Subject-Matter Jurisdiction

Superior courts "ha[ve] jurisdiction in all actions for personal injuries caused by negligence, except where its jurisdiction is divested by statute." *Morse v. Curtis*, 276 N.C. 371, 375, 172 S.E.2d 495, 498 (1970) (citing N.C. Const. art. IV, § 2; other citations omitted). "By statute the Superior Court is divested of original jurisdiction of all actions which come within the provisions of the Work[er]'s Compensation Act." *Id.* (citations omitted); *see also* N.C. Gen. Stat. § 97-10.1 ("If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee, his dependents, next of kin, or personal representative shall exclude all other rights and remedies . . . as against the employer at common law or otherwise on account of such injury or death.").

Subject-matter "[j]urisdiction rests upon the law and the law alone. It is never dependent upon the conduct of the parties." *In re T.R.P.*, 360 N.C. 588, 595, 636 S.E.2d 787, 793 (2006) (quoting *Feldman v. Feldman*, 236 N.C. 731, 734, 73 S.E.2d 865, 867 (1953)). Thus, a challenge to subject-matter jurisdiction, *see* N.C. Gen. Stat. § 1A-1, Rule 12(b)(1), -(h)(3), may be raised at any time, even months after entry of a default judgment, *see In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793 ("[L]itigants . . . may challenge 'jurisdiction over the subject matter . . . at any stage of the proceedings, even after judgment.' " (quoting *Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E.2d 876, 880 (1961)); *see also Miller v. Roberts*, 212 N.C. 126, 129, 193 S.E. 286, 288 (1937) ("There can be no waiver of [subject-matter] jurisdiction, and objection may be made at any time." (citations omitted)). Additionally, a party by his or her conduct can neither be equitably estopped nor barred by laches from challenging subject-matter

jurisdiction, nor can these equitable doctrines vest jurisdiction. *See In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793 ("Subject[-]matter jurisdiction 'cannot be conferred upon a court by . . . waiver or estoppel[.] . . .' " (quoting *In re Sauls*, 270 N.C. 180, 187, 154 S.E.2d 327, 333 (1967))).

Where a party challenges the superior court's subject-matter jurisdiction pursuant to the exclusivity provision of our Workers' Compensation Act, "the proper procedure" for the superior court is to "ma[k]e findings of fact and conclusions of law resolving the issue." *Lemmerman v. A.T. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86 (1986) (citing *Burgess v. Gibbs*, 262 N.C. 462, 465, 137 S.E.2d 806, 808 (1964)); *see also Morse*, 276 N.C. at 377, 172 S.E.2d at 499 (noting the superior court "follow[ed] the proper *procedure* in determining the [defendant-employer's] pleas in bar [that the plaintiff-employee's superior court action for personal injury was barred by the exclusivity provision of our Workers' Compensation Act] by hearing evidence offered by the parties, finding facts[and] reaching conclusions of law, . . . to determine its jurisdiction").

Where the superior court enters an order omitting findings and conclusions necessary to resolve a legitimate subject-matter jurisdiction challenge, the proper procedure for the reviewing court is to vacate that order and remand with instructions for the superior court to hold a hearing in order to issue proper findings and conclusions resolving the jurisdictional matter. *See Burns v. Riddle*, 265 N.C. 705, 706–07, 144 S.E.2d 847, 849 (1965) (vacating superior court's order summarily affirming the NCIC's jurisdictional findings and remanding to the superior court with instructions to hold a hearing in order to issue its own "independent findings as to the determinative jurisdictional facts").

Here, after Marshall filed his postjudgment motions to stay proceedings to enforce the judgments entered against him, for relief from those prior judgments, and to dismiss Burgess's claims for want of subject-matter jurisdiction, based upon the exclusivity provision of our Workers' Compensation Act, the superior court held a hearing and entered an order denying the motions and affirming its prior default judgment. In its order, the superior court entered the following factual findings:

> 1. . . . [Bell] died in an automobile accident on June 2, 2013, in Haywood County, . . . when she was a passenger in a vehicle owned by . . . Marshall;
>
> 2. . . . Burgess, the natural mother of . . . Bell, filed a wrongful death action as the Administrator of the Estate

of . . . Bell in the Haywood County Superior Court on May 7, 2015;

3. . . . Marshall was properly served with the Summons and Complaint on May 15, 2015;

4. . . . [W]hen . . . Marshall failed to respond or otherwise move, [Burgess] filed a Motion and Affidavit to Enter Default on July 30, 2015, and default was entered against [Marshall];

5. . . . [A] Motion for Default Judgment was filed on May 20, 2016 and default was entered against . . . [Marshall] on July 18, 2016, with notice of said motion and of the hearing date for said motion being provided to . . . Marshall on May 26, 2016;

6. . . . Marshall failed to file any response to either [Burgess's] Complaint or to her motion for default judgment until he filed an Answer, Motion to Stay, Motion for Dismissal, and Motion for Relief from Judgment on . . . December 14, 2016;

7. . . . [I]t was not until December 14, 2016, that . . . Marshall chose to proffer a defense of lack of subject matter jurisdiction, based on his claim that [Bell] . . . was his employee[.] . . ;

8. . . . [T]he claim of a defense of lack of subject[-]matter jurisdiction was not made until approximately three-and-a-half years after . . . [Bell's] death . . . when, in . . . Marshall's Motion to Stay, to Dismiss and for Relief from Judgment, he asserted that the [NCIC] had exclusive jurisdiction between employers and employees, and indicated for the first time since the accident that he was . . . [Bell's] employer . . . [;]

9. Prior to the filing of . . . Marshall's Motion to Stay, to Dismiss and for Relief from Judgment, during the course of [Burgess's] investigation into this matter, . . . Marshall had consistently alleged, in his conversations with [Bell's] stepfather, Daniel Holmes, and with [Burgess's] Attorney, James W. Gilchrist, Jr., . . . that [Bell] was not [his] employee . . . at the time of the accident but . . . was an independent contractor associated with Defendants Johnson and Chicnylynn Solutions. Further, the Court

> finds that . . . Marshall gave false and misleading information to [Burgess's] representatives as to this very serious matter[;]
>
> 10. Despite [Marshall]'s assertion in his Motion to Stay, to Dismiss and for Relief from Judgment that [Bell] was in an employee-employer relationship on the date of the accident, [Marshall] admitted that he had no Workers' Compensation insurance in place on that date[; and]
>
> 11. . . . [A]ny workers' compensation claim that [Bell] may have had is barred by the two year statute of limitation under N.C. Gen. Stat. § 97-58.

Based on these findings, the superior court concluded in relevant part:

> 2. . . . Marshall is equitably estopped from asserting that this Court does not have subject[-]matter jurisdiction of this action on the grounds that [Bell] was an employee of his so that the proper forum was the [NCIC];
>
> 3. . . . [T]he affirmative defense of laches applies to completely bar . . . Marshall from asserting that [Bell] was his employee and that this court did not have subject matter jurisdiction over this action[.]

As reflected, although Marshall lodged a legitimate challenge to the superior court's jurisdiction over the subject matter of Burgess's claims against him, the superior court failed to follow the proper procedure by issuing findings and conclusions determining its jurisdiction. Because subject-matter jurisdiction may be challenged even months after a default judgment is entered, *In re T.R.P.*, 360 N.C. at 595, 636 S.E.2d at 793, and because a court has the judicial duty to determine its jurisdiction, the superior court erred in refusing to resolve the matter. Additionally, because "[j]urisdiction rests upon the law . . . alone[and] is never dependent upon the conduct of the parties," *id.* (quoting *Feldman*, 236 N.C. at 734, 73 S.E.2d at 867), the doctrines of equitable estoppel and laches are irrelevant to issues of subject-matter jurisdiction, and the superior court improperly relied thereupon in refusing to resolve Marshall's jurisdictional challenge.

As a secondary matter, we note the superior court's reasoning in applying those equitable doctrines appears to have been made under a misapprehension of the law—that is, the superior court's determination that "any workers' compensation claim that Decedent may have had is barred by the two year statute of limitation under N.C. Gen. Stat.

§ 97-[24].”[3] Section 97-24’s two-year filing requirement is not a statute of limitation but merely a condition precedent to compensation under the Workers’ Compensation Act. *See Gore v. Myrtle/Mueller*, 362 N.C. 27, 38, 653 S.E.2d 400, 408 (2007) (“[W]e underscore that the two[-]year limitation in N.C.G.S. § 97-24 has repeatedly been held to be a condition precedent to the right to compensation and not a statute of limitations.” (citation omitted)). Thus, while ordinarily an employer may defensively assert that an employee’s failure to file a claim in the NCIC within two years after the accident procedurally bars that claim, where, as here, employer fault caused the delay, equitable estoppel may apply to waive the employer’s defense, rendering section 97-24’s two-year filing requirement no bar to the untimely filed workers’ compensation claim. *Id.* (“[A] condition precedent, unlike subject[-]matter jurisdiction, may be waived by the beneficiary party by virtue of its conduct. Therefore, by their actions, defendant[-employers] could waive the two[-]year condition precedent laid out in N.C.G.S. § 97-24.” (internal citations omitted)); *see also id.* at 36, 653 S.E.2d at 406 (“[E]stoppel may be invoked to prevent the employer from asserting the time limitation in N.C.G.S. § 97-24 as an affirmative defense. . . . [E]mployer fault, regardless of whether it is intentional, will excuse the untimely filing of a workers’ compensation claim.” (citations omitted)).

Because the superior court failed to follow the proper procedure in issuing findings and conclusions resolving whether it or the NCIC had jurisdiction over the subject matter of Burgess’s claims against Marshall, we vacate its order denying Marshall’s postjudgment motions and remand the case with instructions for the superior court to hold an evidentiary hearing in order to issue proper findings and conclusions determining its jurisdiction, *see Burns*, 265 N.C. at 707, 144 S.E.2d at 849, including resolving Bell’s employment status, *see McCown v. Hines*, 353 N.C. 683, 686, 549 S.E.2d 175, 177 (2001) (“[T]he existence of an employer-employee relationship at the time of the injury constitutes a jurisdictional fact.” (citing *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988))); *see also Lemmerman*, 318 N.C. at 579, 350 S.E.2d at 85 (“[T]he question of whether plaintiff . . . was defendant’s employee as defined by the Act is clearly jurisdictional.”), and any

3. Although Burgess in her motion and the superior court in its order cited to section 97-58, that statute governs the time limit for filing a claim for occupational disease. *See* N.C. Gen. Stat. § 97-58 (2015). Nonetheless, the more applicable statute here governing the time limit for filing a claim alleging a work-related injury by accident imposes the same two-year filing requirement. *See* N.C. Gen. Stat. § 97-24 (2015) (“The right to compensation under this Article shall be forever barred unless (i) a claim . . . is filed with the Commission . . . within two years after the accident . . . .”).

other jurisdictional facts relevant to whether Burgess's superior court claims against Marshall were barred by our Workers' Compensation Act. *See*, *e.g.*, N.C. Gen. Stat. § 97-10.1; *id.* § 97-13(b) (2015) (excluding from the Act an employer "that has regularly in service less than three employees in the same business within this State[.] . . ."); *Young v. Mayland Mica Co.*, 212 N.C. 243, 244, 193 S.E. 285, 285 (1937) ("[T]he number of employees regularly in service in the business of the defendant in this state. . . . is a jurisdictional fact which the superior court has the duty and power to find." (citation omitted)); *see also Bowden v. Young*, 239 N.C. App. 287, 290, 768 S.E.2d 622, 625 (2015) ("[I]ntentional torts generally fall outside the scope of the Workers' Compensation Act." (citing *Woodson v. Rowland*, 329 N.C. 330, 340–41, 407 S.E.2d 222, 228 (1991)). We further note that the record is unclear whether, if the superior court lacked subject-matter jurisdiction, the proper forum for Burgess's claim against Marshall would be in the NCIC or the SCIC.

After the hearing on remand, if the superior court determines it had jurisdiction, it may properly deny Marshall's postjudgment motions and its default judgment may be sustained. However, if the superior court determines jurisdiction lies with the NCIC or SCIC, its prior judgments against Marshall must be vacated and Burgess's claims must be dismissed for want of subject-matter jurisdiction. If Burgess is required to file her claim against Marshall in the NCIC, although N.C. Gen. Stat. § 97-24's two-year filing period will have expired, if needed, based upon the record before us, Burgess may properly raise the affirmative defense that Marshall's conduct in causing the delay equitably estops him from relying on that filing requirement as a procedural bar. If Burgess is required to file her claim in the SCIC, we encourage that commission also to consider any potential filing-period defense Marshall may raise under S.C. Code. § 42-15-40 (2015) (requiring an employee to file a claim in the SCIC within two years after the accident) similarly waived by Marshall's conduct in this case. *See*, *e.g.*, *Lovell v. C. A. Timbes*, *Inc.*, 263 S.C. 384, 388, 210 S.E.2d 610, 612 (1974) ("Section 72-303[, now recodified at section 42-15-40,] is a statute of limitation and . . . compliance with its provisions may be waived by the employer or its insurance carrier or they may become estopped by their conduct from asserting the statute as a defense.").

III. Conclusion

Because Marshall was permitted to challenge the superior court's subject-matter jurisdiction even for the first time months after the default judgment was entered against him, and because a party's conduct is wholly irrelevant to subject-matter jurisdiction, the superior

court erred by refusing to resolve the matter on the basis that Marshall was barred by equitable estoppel and laches from challenging its subject-matter jurisdiction. As the superior court failed to follow the proper procedure in issuing findings and conclusions to determine its jurisdiction, and the record lacks the necessary information to meaningfully consider Marshall's jurisdictional challenge, we vacate the superior court's order denying Marshall's postjudgment motions. We remand the case with instructions for the superior court to hold an evidentiary hearing in order for it to issue proper findings and conclusions relevant to determine its subject-matter jurisdiction.

After the remand hearing, if the superior court determines it had jurisdiction, it may properly deny Marshall's postjudgment motions and its default judgment may be sustained. If the superior court determines elsewise, it must vacate its prior judgments entered against Marshall and dismiss Burgess's claims against him for want of jurisdiction. If Burgess must file her claim against Marshall in the NCIC, under the circumstances of this case, we instruct that commission not to apply section 97-24 two-year filing requirement as a procedural bar to Burgess's claim. If Burgess must refile her claim in the SCIC, we encourage that commission to deem any potential filing defense Marshall may raise as waived.

VACATED AND REMANDED.

Judges TYSON and ZACHARY concur.

DEPARTMENT OF TRANSPORTATION, PLAINTIFF
v.
JAY BUTMATAJI, LLC; BYRD, BYRD, ERVIN, MCMAHON & DENTON, P.A., TRUSTEE; MUKTI, INC., BB&T COLLATERAL SERVICE CORPORATION, TRUSTEE, AND BRANCH BANKING AND TRUST COMPANY, DEFENDANTS

No. COA17-689

Filed 7 August 2018

Eminent Domain—temporary construction easement—motion in limine—damages—interference during construction

In a condemnation action to determine the value of a temporary construction easement taken as part of a highway-widening project, the trial court did not abuse its discretion in limiting the scope of expert testimony by the hotel owner's appraiser by excluding testimony about lost business profits. Evidence of noncompensable losses is not admissible, and damages for temporary takings include the rental value of the land actually occupied by the condemnor, but not interference with the business income for the entire property. Further, portions of the appraiser's opinion were based on assumptions that did not reflect actual construction conditions.

Appeal by defendant Jay Butmataji LLC from judgment entered 10 October 2016 by Judge W. Robert Bell in Superior Court, Burke County. Heard in the Court of Appeals 11 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Kevin G. Mahoney, for the State.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Andrew J. Howell, for defendant-appellant Jay Butmataji LLC.

STROUD, Judge.

Defendant appeals the trial court's judgment awarding him $150,000 as just compensation for the taking of his property by the Department of Transportation. Because the trial court did not abuse its discretion in excluding portions of defendant's appraiser's testimony and appraisal report which valued the taking of a temporary construction easement assuming conditions during construction which did not exist, we affirm.

I. Background

On 10 May 2011, plaintiff Department of Transportation ("DOT") instituted this action against defendant landowner Jay Butmataji LLC, trustees, and Branch Banking and Trust Company.[1] DOT had condemned and appropriated a portion of defendant's property in Burke County upon which it operated a motel. DOT took 0.184 acres of defendant's 3.573 acres of property. DOT described the taking as a temporary construction easement ("TCE") to widen a highway.[2] Defendant Butmataji answered DOT's complaint and requested a jury trial to determine just compensation for the taking.

Before the trial, DOT made a motion in limine requesting the trial court

> to instruct all parties, their counsel, and witnesses not to mention state, or intimate any of the matters listed below by statement, question, or argument in the presence of the jury or the jury panel without first approaching the Court of the hearing of the jury and securing a ruling regarding the same[.]

In its motion, DOT listed several matters subject to the motion in limine. Before trial began, on 9 August 2016, the trial court considered the motion in limine and the parties addressed at length their contentions about the appropriate evidence for the jury to consider.

Defendant owned and operated a motel on the property and contended ingress and egress to his business was limited by the TCE during the construction of the road. The State argued that the appraisal prepared by Mr. Damon Bidencope, defendant's expert witness, included valuation of loss of income to the motel and elements of damages not supported by the actual conditions of the property during construction. The State argued, "[C]ases are very clear, that you are not allowed loss of rent. It's only the rent of that particular piece of the easement, not loss of rent from your business, even though this is a motel, Your Honor. You're just not allowed. It's very, very clear." Defendant's attorney countered,

> [W]e're entitled to present evidence through Mr. Bidencope and through our witnesses of the effect that this temporary

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1. Only defendant Jay Butmataji LLC appeals so it is the singular "defendant" we refer to in this case.

2. DOT also took an easement in perpetuity for drainage, which is not at issue in this case.

> construction easement had on the remainder of the property, because that's what the law says we can do.
>
> . . . .
>
> So we contend we're wholly entitled to put on that evidence and that Mr. Bidencope's appraisal addresses that in a[n] accurate manner. Now, if they want to take Mr. Bidenquote -- cope on voir dire and address it at that time, that's fine, Your Honor. But we wholly don't think you should exclude it at this time in any limited phase.

Mr. Bidencope then testified at length on voir dire.

The trial court granted the State's motion in limine in part and excluded the portion of Mr. Bidencope's appraisal entitled "Building Rent Lost During TCE[,]" approximately two to three pages of the 91 page appraisal.[3] The trial court later clarified its ruling for defendant as follows: "He can testify as to the [a]ffect of the TCE on the remainder of the property, but not as to the taking of the entryway." The only question before the jury was the amount of just compensation defendant should receive. The jury determined damages of $150,000.00, and the trial court entered judgment accordingly. Defendant appeals.

II. Exclusion of Testimony

Defendant's only argument on appeal is that "the trial court erred in granting plaintiff DOT's motion in limine to exclude defendant landowner's expert appraiser Damon Bidencope's testimony concerning the effects of the temporary construction easement on the remainder of the defendant landowner's property." (Original in all caps.) "The standard of review for a trial court's ruling on a motion in limine is abuse of discretion." *Kearney v. Bolling*, 242 N.C. App. 67, 78, 774 S.E.2d 841, 849 (2015), *disc. review denied*, ___ N.C. ___, 783 S.E.2d 497 (2016). "A trial court abuses its discretion where its ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *City of Charlotte v. Combs*, 216 N.C. App. 258, 262, 719 S.E.2d 59, 63 (2011) (citation and quotation marks omitted).

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3. Defendant's counsel noted that removing this portion of the appraisal would also have an effect on other portions of the appraisal, since "information about the TCE coming across the access and having an effect on the remainder of the property is not only found on pages 85 through 86; it effects an analysis of the other portions of his report and the other damages that he's gone through in his report." The trial court required Mr. Bidencope to revise his appraisal to remove the excluded portions. Defendant presented a full proffer of evidence of Mr. Bidencope on voir dire and reserved his objection to the modifications to the appraisal report.

Defendant's argument focuses on *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993) and Rule 702 of the Rules of Evidence regarding an expert witness's qualification to testify; defendant argues "the trial court's ruling was, in effect, a determination that Mr. Bidencope's testimony on the TCE's effect on the remainder of the property was not admissible expert testimony." But defendant misconstrues the trial court's ruling. Mr. Bidencope was not excluded as an expert witness, and he actually testified at length to the jury about the portions of the appraisal not at issue here. Defendant's argument stresses Mr. Bidencope's qualifications and his methodology, but there was really no question as to his qualifications and no question that he used recognized methodologies in valuing the property generally. Defendant's argument assumes that once a witness has been properly qualified as an expert, he may testify to anything within his expertise, but that is simply not the case. Neither experts nor lay witnesses may testify unfettered by the rules of evidence and law applicable to the subject of their testimony. Furthermore, in condemnation cases, the trial court must also consider whether the appraiser's opinion is based upon the correct factual basis and whether the appraisal is based upon any element of damages not considered as a proper consideration for that type of case. *See Department of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6, 637 S.E.2d 885, 890 (2006) ("An opinion concerning property's fair market value must not rely in material degree on factors that cannot legally be considered.").

From reviewing the transcript of the voir dire, arguments, and colloquy with the trial court, it appears the trial court's concern focused on two aspects of the appraisal. First, Mr. Bidencope valued the "Building Rent Lost During TCE" on the assumption that the actual physical access to the motel was cut off or may be cut off at any time during the 5.1 year period of the construction project. Second, Mr. Bidencope used the loss of income from rental of rooms during the TCE as a portion of his opinion of damages.

Defendant's argument conflates the measure of damages for the permanent partial taking -- the portion of the property which was taken -- with the damages for the temporary construction easement -- damages arising from the actual construction period. For the permanent partial taking, just compensation is based upon the fair market value of the property just before the taking as compared to the value immediately after the taking, assuming the project has been completed as designed. *See Barnes v. Highway Commission*, 250 N.C. 378, 387, 109 S.E.2d 219, 227 (1959) ("When the property is appropriated by the State

Highway Commission for highway purposes, the measure of damages is the difference between the fair market value of the entire tract of land immediately before the taking and the fair market value of what is left immediately after the taking."). In other words, damages are based upon a legal fiction that the project as planned has been completed immediately after the condemnor acquires the property. *See generally id*. The highest and best use and fair market value of the property in its condition immediately before the taking is compared to the highest and best use and fair market value of the remainder immediately after the taking as if the project were complete. *See generally Barnes*, 250 N.C. 378, 109 S.E.2d 219. This measure of damages skips over the construction period, if any, and any temporary interference with use of the remaining property during construction. The interference with the property during construction is compensable, but the method of valuation is a bit different. *See generally Combs*, 216 N.C. App. at 261-62, 719 S.E.2d at 62-63.

The *only* valuation issue in this case is for the temporary construction easement, so the law regarding valuation for a permanent partial taking does not apply. Damages for the temporary construction easement are based upon the same general principles of valuation as for the permanent taking, but the legal fiction of immediate completion of the project does not apply; this measure of damages considers interference with the property's use *during* the construction, but not the impact of the project as completed on the remaining property's value as a whole. *See generally id*. This Court summarized the law regarding the measure of damages for a temporary taking of a construction easement in *Combs*:

> A temporary taking, which denies a landowner all use of his or her property for a finite period, is no different in kind from a permanent taking, and requires just compensation for the use of the land during the period of the taking.
>
> Generally, the measure of damages for a temporary taking is the rental value *of the land actually occupied* by the condemnor. *Leigh v. Garysburg Mfg. Co.*, 132 N.C. 167, 170, 43 S.E. 632, 633 (1903); *accord Kimball Laundry Co. v. United States*, 338 U.S. 1, 7, 93 L. Ed. 1765, 1773 (1949) (concluding that the proper measure of compensation for temporary taking is the rental that probably could have been obtained); *United States v. Banisadr Bldg. Joint Venture*, 65 F.3d 374, 378 (4th Cir. 1995) (explaining that when the Government takes property only for a period of years, it essentially takes a leasehold in the

> property, and thus, the value of the taking is what rental the marketplace would have yielded for the property taken; *State v. Sun Oil Co.*, 160 N.J. Super. 513, 527, 390 A.2d 661, 668 (1978) (holding that where a temporary construction easement is taken, the *rental value of the property taken is the normal measure of damages and is awarded for the period taken*)[.]
>
> Where, as here, the temporary taking is in the form of a temporary construction easement, our Supreme Court has held that, in addition to paying the fair rental value of the easement area for the time used by the condemnor, the condemnor is liable for *additional elements of damages flowing from the use of the temporary construction easement*, which may include: (1) the cost of removal of the landowner's improvements from the construction easement that are paid by landowner; (2) the cost of constructing an alternate entrance to the property; (3) the changes made in the area resulting from the use of the easement that affect the value of the area in the easement or the value of the remaining property of the landowner; (4) the removal of trees, crops, or improvements from the area in the easement by the condemnor; and (5) the length of time the easement was used by the condemnor. *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 107, 310 S.E.2d 338, 346 (1984); *see also* 26 Am. Jur.2d *Eminent Domain* § 283 (Where land has been appropriated for a temporary use, the measure of compensation *is the fair productive value of the property during the time in which it is held*. More specifically, the rental value during the period of the taking, together with any damage sustained by the property, may be awarded as full compensation.

Id. at 261-62, 719 S.E.2d at 62-63 (emphasis added) (citations, quotation marks, ellipses, and brackets omitted).

The trial court excluded evidence of loss of motel income during the construction period. Defendant contends the jury should have been allowed to consider "the interference with motel occupancy identified by Mr. Bidencope in his original appraisal report includ[ing] interference with access but also interference with ingress and egress, interference with parking, interference with walk-in revenue, and construction noise." Defendant cites to *Colonial Pipeline Co. v. Weaver*, 310 N.C. 93, 104, 310 S.E.2d 338, 344 (1984), to argue that

loss of income is an "additional element[] of damage[,]" but the law simply does not support *that* type of damage. *See Dep't of Transp. v. M.M. Fowler, Inc.*, 361 N.C. 1, 6–10, 637 S.E.2d 885, 890-93 (2006).

In a section entitled, "ADMISSIBILITY OF LOST BUSINESS PROFITS EVIDENCE[,]" our Supreme Court explained that in a partial taking such as this, a landowner's loss of business income is not admissible evidence. *Id.* Although the Court was addressing valuation of the remainder of the land after a partial permanent taking, these same principles regarding loss of business profits would apply to valuation of a temporary construction easement:

> During a proceeding to determine just compensation in a partial taking, the trial court should admit any relevant evidence that will assist the jury in calculating the fair market value of property and the diminution in value caused by condemnation. Admission of evidence that does not help the jury calculate the fair market value of the land or diminution in its value may confuse the minds of the jury, and should be excluded. *In particular, specific evidence of a landowner's noncompensable losses following condemnation is inadmissible.*
>
> *Injury to a business, including lost profits, is one such noncompensable loss. It is important to note that revenue derived directly from the condemned property itself, such as rental income, is distinct from profits of a business located on the property.* This case is concerned with lost business profits. When evidence of income is used to valuate property, care must be taken to distinguish between income from the property and income from the business conducted on the property. . . .
>
> The longstanding rule in North Carolina is that evidence of lost business profits is inadmissible in condemnation actions, as this Court articulated in *Pemberton v. City of Greensboro*, 208 N.C. 466, 470–72, 181 S.E. 258, 260–61 (1935). . . .
>
> . . . .
>
> Just compensation is not the value to the owner for his particular purposes. Awarding damages for lost profits would provide excess compensation for a successful business owner while a less prosperous one or an individual landowner without a business would receive less money for the same taking. Indeed, if business revenues

were considered in determining land values, an owner whose business is losing money could receive less than the land is worth. Limiting damages to the fair market value of the land prevents unequal treatment based upon the use of the real estate at the time of condemnation. Further, paying business owners for lost business profits in a partial taking results in inequitable treatment of the business owner whose entire property is taken, in which case lost profits clearly are not considered.

Evidence of lost business profits is impermissible because recovery of the same is not allowed. Additionally, the speculative nature of profits makes them improper bases for condemnation awards as they

> depend on too many contingencies to be accepted as evidence of the usable value of the property upon which the business is carried on. Profits depend upon the times, the amount of capital invested, the social, religious and financial position in the community of the one carrying it on, and many other elements which might be suggested. What one man might do at a profit, another might only do at a loss. Further, even if the owner has made profits from the business in the past it does not necessarily follow that these profits will continue in the future.

Recognizing that profits can rarely be traced to a single factor, business executives rely on complex models to determine profitability. Further, the uncertain character of lost business profits evidence could burden taxpayers with inflated jury awards bearing little relationship to the condemned land's fair market value.

Moreover, our well-established North Carolina rule prohibiting lost business profits evidence comports with the federal rule.

. . . .

In summary, the prevailing rule excluding lost business profits evidence in condemnation actions is firmly rooted in our jurisprudence. As a case that comprehensively discussed and applied this enduring rule, Pemberton provides the framework upon which we base our decision today.

Id. (emphasis added) (citations, quotation marks, and footnotes omitted).

Turning back to Mr. Bidencope's excluded testimony and evidence, a motel's business is renting rooms, so its business income is derived from rent, but the proper measure of damages is the rental value of the property actually taken—not the interference with the business income for the entire property. *See Combs*, 216 N.C. App. at 261, 719 S.E.2d at 62 ("[T]he measure of damages for a temporary taking is the rental value of the land actually occupied by the condemnor.") The distinction between damages for the property taken and business income for the entire property may be more obvious in a situation where access was entirely blocked for a period of time and the motel could not operate at all; the landowner would be entitled to the rental value of the land for its use as a motel, *but not* the business income that particular motel may have generated if it had been in operation. *See generally id.* at 261-62, 719 S.E.2d at 62-63. Here, the "land actually occupied" for the TCE was 0.184 acres of defendant's 3.573 acres, so the rental value of the 0.184 acres would be a proper element of the damages.[4] *Id.*

Furthermore, based upon the transcript, Mr. Bidencope assumed that access to the motel was entirely blocked at least part of the time during construction, but the evidence showed that access was never blocked; he also stressed that DOT *could* have blocked the access at any time, so access was uncertain. It is true that DOT *could* have blocked the access, but it did not. Although the access was less convenient due to the construction project, it was open. To this extent, Mr. Bidencope's valuation was not based upon the actual conditions on the property.[5]

Also, Mr. Bidencope's appraisal seemed to consider the effect of the construction on the fair market value of the property as if it were being valued for sale *during* the construction. One portion of the appraisal stated:

> The motel's ability to function is affected due to the uncertainty and possible disturbance of ingress and egress during this period. A potential buyer or tenant operator

4. Mr. Bidencope's appraisal and testimony addressed the rental value of the "TCE Area Loss" as well and that portion of the evidence is not at issue on appeal.

5. Mr. Bidencope also assumed that the change in slope of the driveway made it "uncertain" that "large trucks and emergency vehicles" such as fire trucks could enter the property. Mr. Bidencope's appraisal stated that "[a] motel property cannot operate without the ability of emergency vehicles being able to access the property." But again, there was no evidence that emergency vehicles could not enter the property.

> looking to buy or rent the property on the effective date of the condemnation would consider this factor. . . . .
>
> . . . .
>
> . . . . The uncertainly of use adds risk and adversely impacts the operation of the remainder of the property, which impact[s] the real property market value that a knowledgeable and willing buyer would pay.

But the consideration of what a willing buyer would pay for the entire property *during the construction* is not part of the measure of damages for a temporary construction easement.[6] *See generally id.*

In summary, Mr. Bidencope's opinions regarding the motel's loss of income, the assumption of access being totally blocked to the motel, and the amount a willing buyer might pay for the property during construction were either not supported by the actual evidence or not proper considerations for the jury to calculate damages. The trial court did not abuse its discretion by granting the State's motion in limine on these issues. This argument is overruled.

III. Conclusion

We affirm.

AFFIRMED.

Judges DILLON and INMAN concur.

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6. Valuation during construction is also not part of the valuation of a permanent partial taking, since that valuation is based upon the legal fiction that the project has been completed immediately after the taking. *See generally Barnes v. Highway Commission.*, 250 N.C. at 387, 109 S.E.2d at 227.

EDDINGTON v. LAMB

[260 N.C. App. 526 (2018)]

ZACHARY A. EDDINGTON, PLAINTIFF
v.
KRYSTAL B. LAMB, DEFENDANT

No. COA17-947

Filed 7 August 2018

1. Child Custody and Support—custody—modification—standard

The trial court applied the proper child custody modification standard where the father argued that a temporary order had converted to a permanent order by the operation of time. The relevant time period ends when a party requests that the matter be set for hearing, not when the hearing is held. Here, only nine months elapsed between the entry of the temporary order and the request to set the matter for a hearing, and the matter had not lain dormant.

2. Child Custody and Support—physical custody—sufficiency of findings

The trial court did not abuse its discretion by awarding primary physical custody of a child to the mother and secondary physical custody to the father where the unchallenged findings were adequate for meaningful appellate review and were sufficient to support the trial court's determination. Those findings compared the parents' home environments, mental and behavioral fitness, work schedules as they related to their abilities to care for the child, and past decision-making with respect to the child's care.

3. Child Custody and Support—decision-making authority—health care—education

The portion of a child custody award granting the mother the final decision-making authority for the child's health care and education was vacated and remanded where the findings were not sufficient to support such a broad abrogation of the father's final decision-making authority.

Appeal by plaintiff from order entered 23 February 2017 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 16 May 2018.

Collins Family Law Group, by Rebecca K. Watts, for plaintiff-appellant.

Stepp Law Group, PLLC, by Donna B. Stepp and Jordan M. Griffin, for defendant-appellee.

ELMORE, Judge.

Zachary A. Eddington ("Father") appeals a permanent custody order awarding Krystal B. Lamb ("Mother") primary physical custody and awarding him secondary physical custody of their only minor child, A.B.E. ("Ayden").[1] The order also awarded both parties joint legal custody but split decision-making authority by granting Mother final decision-making authority as to Ayden's healthcare and education, and granting Father final decision-making authority as to Ayden's sports.

Father asserts the trial court erred by (1) applying the wrong legal standard applicable to modifying a temporary custody order, as the prior temporary custody order had converted into a permanent custody order by operation of time, (2) awarding physical custody, as its findings were insufficient to support an award granting Mother primary physical custody of Ayden, and (3) awarding legal custody, as its findings were insufficient to support an award that deviated from pure joint legal custody between the parties.

Because the temporary custody order did not convert into a permanent one, we hold that the trial court applied the proper custody modification standard. Additionally, because the trial court's findings were sufficient to support its decision as to what physical custody award would serve Ayden's best interests, and Father failed to demonstrate the trial court abused its discretion in awarding Mother primary physical custody and Father secondary physical custody of Ayden, we affirm the physical custody award. However, because the trial court's findings were insufficient to support its award of joint legal custody with these particular splits in decision-making authority, we vacate the legal custody award and remand for further proceedings on this issue.

I. Background

On 12 May 2008, Father and Mother became parents to their only child together, Ayden. All three lived as a family unit from Ayden's birth until September 2011, when the parties separated. Although the parties lived apart after ending their relationship, their homes were located about one mile apart on the same road, and they split custody of Ayden on a nearly equal basis.

1. A pseudonym is used to protect the minor's identity.

On 12 November 2013, Father filed a complaint for custody of Ayden. On 27 December 2013, Mother filed an answer and counterclaimed for custody, child support, and attorneys' fees. On 25 June 2014, the parties entered into a consent order for temporary custody, which awarded Mother primary physical custody of Ayden and Father secondary physical custody, and awarded the parties joint legal custody. The order provided its custodial awards were "non-prejudicial and temporary in nature pending a full hearing on the merits."

On 2 April 2015, Father filed a request to set a hearing on permanent custody. The parties appeared before the court on 13 July 2015 for a status conference on permanent custody and on 17 August 2015 for court-ordered mediation, which was unsuccessful. On 7 October 2015, Mother filed a request to set a hearing on permanent custody, child support, and attorneys' fees. The hearing was calendared for 3 February 2016. But on 13 January 2016, Father moved to continue the hearing, with Mother's consent, on the basis that Father "need[ed] additional time to prepare," since "[Mother]'s discovery responses [were] due after the trial date" and her "responses [were] critical to the preparation of [his] case." On 2 February 2016, the trial court entered an order granting the requested continuance. At a 23 February 2016 case review hearing, the trial court rescheduled the hearing on permanent custody, child support, and attorneys' fees for 29 August 2016.

The parties continued to share custody pursuant to the terms of the temporary custody consent order until the permanent custody hearing began in August 2016. After a three-day hearing, the trial court entered a permanent custody order on 23 February 2017. In its order, the trial court awarded (1) Mother primary physical custody of Ayden and Father secondary custody in the form of visitation, and (2) joint legal custody but split decision-making authority, granting Mother final decision-making authority as to Ayden's healthcare and education, and granting Father final decision-making authority as to Ayden's sports. Father appeals.

II. Analysis

On appeal, Father asserts the trial court erred by (1) applying the incorrect custody modification standard, since by the time of the permanent custody hearing, the temporary order had become permanent by operation of time; (2) awarding Mother primary physical custody of Ayden, and Father secondary custody in the form of visitation, because its findings were insufficient to support its physical custody award; and (3) awarding joint legal custody but splitting decision-making authority, since its findings were insufficient to support deviating from pure joint legal custody.

A. Custody Modification Standard

[1] Father first asserts the trial court applied the wrong custody modification standard. He concedes the 2014 consent order was a temporary custody order when entered but argues it converted into a permanent order by the time of the permanent custody hearing. Thus, Father argues, the trial court improperly applied the legal standard applicable to modifying a temporary custody order, when it should have applied the standard applicable to modifying a permanent custody order. We disagree.

We review *de novo* whether a temporary custody order has converted into a permanent custody order by operation of time. *See Woodring v. Woodring*, 227 N.C. App. 638, 642, 745 S.E.2d 13, 17 (2013) (citing *Romulus v. Romulus*, 216 N.C. App. 28, 32, 715 S.E.2d 889, 892 (2011)). A temporary custody order may "become permanent by operation of time[,]" *id.* at 643, 745 S.E.2d at 18 (citations omitted), when "neither party sets the matter for a hearing within a reasonable time," *id.* (quoting *Senner v. Senner*, 161 N.C. App. 78, 81, 587 S.E.2d 675, 677 (2003)). "Whether a request for the calendaring of the matter is done within a reasonable period of time must be addressed on a case-by-case basis." *Id.* (quoting *LaValley v. LaValley*, 151 N.C. App. 290, 293 n.6, 564 S.E.2d 913, 915 n.6 (2002)).

The relevant time period starts when a temporary order is entered and ends when a party requests the matter be set for hearing, not when the hearing is held. *See LaValley*, 151 N.C. App. at 293–94 n.5, 564 S.E.2d at 915 n.5 ("We are careful to use the words 'set for hearing' rather than 'heard' because we are aware of the crowded court calendars in many of the counties of this [s]tate."). While we have held that a twenty-three month delay between the entry of a temporary custody order and a party's request to calendar the matter for a permanent custody hearing is unreasonable, thereby converting a temporary custody order into a permanent one, *id.* at 291–93, 564 S.E.2d at 914–15, the reasonableness of the delay depends in part on whether the case lie dormant before the request to set the matter for hearing was made, *see Senner*, 161 N.C. App. at 81, 587 S.E.2d at 677 (holding a twenty-month delay was not unreasonable when, during that period, the parties had unsuccessfully attempted to negotiate a new custody arrangement); *see also Woodring*, 227 N.C. App. at 644, 745 S.E.2d at 19 (holding twelve months was not unreasonable when, *inter alia*, "the parties were before the court [for custody-related matters] at least three times in the interim period between the entry of the temporary order and the scheduled permanent custody hearing").

Here, only nine months elapsed between entry of the 25 June 2014 temporary custody consent order and Father's 2 April 2015 request to set the matter for a permanent custody hearing. Further, after the temporary custody order was entered, the case did not lie dormant; the parties appeared before the court, another request to set the case for hearing was filed, litigation continued between the parties including discovery requests and answers, a motion to continue was filed and granted, and case review sessions were held. The parents appeared before the court on 13 July 2015 for a permanent custody status conference and, after the case was set for mandatory mediation, the parents appeared before the court on 17 August 2015 to mediate. On 7 October 2015, less than two months after court-ordered mediation was unsuccessful, Mother filed another request to set a hearing on permanent custody, child support, and attorneys' fees. Although that hearing was scheduled for 3 February 2016, on 13 January 2016, Father moved to continue the hearing, with Mother's consent, on the ground that Mother's discovery responses were due after the scheduled hearing date and were necessary to prepare his case. On 2 February 2016, the trial court entered an order granting the motion to continue. On 23 February 2016, during a case review session where both parties' counsel appeared, the trial court rescheduled the hearing for 29 August 2016.

Because Father's request to set the matter for hearing occurred only nine months after entry of the temporary custody order, Mother's request occurred less than two months after court-ordered mediation was unsuccessful, and litigation continued after the temporary order was entered, we conclude under the circumstances of this case that the temporary order did not become permanent by operation of time. Therefore, we hold the trial court applied the proper custody modification standard and overrule this argument.

B. Physical Custody

[2] Father next asserts the trial court's factual findings were insufficient to award Mother primary physical custody of Ayden and, further, that its order should be vacated because its findings are inadequate for meaningful appellate review of whether the trial court abused its discretion in determining what physical custody award would serve Ayden's best interests. We disagree.

As Father does not challenge the evidentiary sufficiency of any factual finding, our review is limited to a *de novo* assessment of whether the trial court's findings support its legal conclusions. *Carpenter v. Carpenter*, 225 N.C. App. 269, 270, 737 S.E.2d 783, 785 (2013) (citing

Hall v. Hall, 188 N.C. App. 527, 530, 655 S.E.2d 901, 904 (2008)). However, "[w]e review a trial court's [legal conclusion] as to the best interest of the child for an abuse of discretion." *In re C.P.*, ___ N.C. App. ___, ___, 801 S.E.2d 647, 651 (2017) (citing *In re J.H.*, 244 N.C. App. 255, 269, 780 S.E.2d 228, 238 (2015)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason. . . . [or] upon a showing that [its ruling] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (internal citation omitted).

Where, as here, "the trial court finds that both parties are fit and proper to have custody, but determines that it is in the best interest of the child for one parent to have primary physical custody[ ] . . . such determination will be upheld if it is supported by competent evidence." *Hall*, 188 N.C. App. at 530, 655 S.E.2d at 904 (citing *Sain v. Sain*, 134 N.C. App. 460, 464, 517 S.E.2d 921, 925 (1999)). "However, when the court fails to find facts so that this Court can determine that the order is adequately supported by competent evidence and the welfare of the child subserved, then the order entered thereon must be vacated and the case remanded for detailed findings of fact." *Crosby v. Crosby*, 272 N.C. 235, 238, 158 S.E.2d 77, 80 (1967) (citation omitted); *see also Carpenter*, 225 N.C. App. at 278–79, 737 S.E.2d at 790 (reversing custody order and remanding for further findings where findings were too meager to support the award).

In resolving a custody dispute between parents, a trial court is "entrusted with the delicate and difficult task of choosing an environment which will, in his judgment, best encourage full development of the child's physical, mental, emotional, moral and spiritual faculties[,]" *Phelps v. Phelps*, 337 N.C. 344, 355, 446 S.E.2d 17, 23 (1994) (quoting *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982)), and must "determine by way of comparisons between the two [parents], upon consideration of all relevant factors, which of the two is best fitted to give the child the home-life, care, and supervision that will be most conducive to [the child's] well-being." *Griffith v. Griffith*, 240 N.C. 271, 275, 81 S.E.2d 918, 921 (1954). "Trial courts are permitted to consider an array of factors in order to determine what is in the best interest of the child[,]" *Phelps*, 337 N.C. at 352, 466 S.E.2d at 22, and findings supporting this conclusion "may concern physical, mental, or financial fitness or any other factors brought out by the evidence and relevant to the issue of the welfare of the child." *Hall*, 188 N.C. App. at 532, 655 S.E.2d at 905 (quoting *Steele v. Steele*, 36 N.C. App. 601, 604, 244 S.E.2d 466, 468 (1978)).

Here, the trial court issued the following unchallenged, and thus binding, factual findings supporting its best-interests conclusion:

> 10. The Plaintiff/Father resides at 3515 Old Camden Road, Monroe, NC in a 1600 square foot home with his new wife, Holland, and with the minor child herein.
>
> 11. Plaintiff/Father's wife, Holland, gets along well with Ayden, and it is in Ayden's best interest to be allowed to continue his relationship with his step-mother.
>
> 12. Plaintiff/Father's home is large enough to accommodate the needs of those who live there, and Plaintiff/Father bought the home in March of 2016, to be in the Unionville School District.
>
> 13. Defendant/Mother resides with her mother, Valerie Lamb, and Ayden at 3716 Old Camden Road, Monroe, NC almost next door to Plaintiff/Father in a two story house on 13 acres. The residence is large enough to accommodate all who live there.
>
> 14. Plaintiff/Father has served as a t-ball and hockey coach for Ayden.
>
> 15. As of date of trial, Plaintiff/Father was out of work collecting worker's compensation due to a shoulder injury. Once he returns to work as a welder, his hours are 6:30 a.m. to 3:00 p.m. in Lancaster, SC, about a 37 minute drive from his home.
>
> 16. Defendant/Mother is employed full time as a PRN health care technician at CMC-Union and has been so employed continuously there since 2011. In that she works PRN, Defendant/Mother has the ability of making out her own schedule, which aids in her care of Ayden.
>
> 17. There has been a break down and lapse in the parties' ability to communicate about Ayden's needs and best interests that runs contrary to his best interests.
>
> 18. There have been in February of 2011 instances of DV between Plaintiff/Father and Defendant/Mother in front of Ayden that were contrary to his best interests that resulted in police being summoned and Defendant/Mother being arrested. The charges against Defendant/Mother were later dismissed with the concurrence of the Plaintiff/Father.

19. Ayden has been prescribed medication for ADHD by his physician. Plaintiff/Father disagrees with the appropriateness of that medication being administered to Ayden and does not see to it that Ayden gets his medicine as prescribed, which is contrary to Ayden's best interests to have his medicine administered to him only intermittently.

20. Plaintiff/Father sent Defendant/Mother a text in September of 2013, prior to filing his Compliant for custody, telling Defendant/Mother that he never wanted to see his son again and nevertheless posting comments on social media that described himself as "a father from a distance" to Ayden. This resulted in Plaintiff/Father not seeing his son Ayden for approximately 85 days. Such behavior was grossly contrary to Ayden's best interests.

21. Plaintiff/Father had legitimate concerns that Defendant/Mother is or has been in the past involved romantically or otherwise with Steven Dayton, a convicted felon and known drug addict as well as Tumani Washington, neither of whom this Court finds to be suitable persons to be around Ayden. Said involvement with Mr. Dayton has been as recent as Summer 2015 according to various Facebook posts, and is contrary to Ayden's best interest. Defendant/Mother admits in retrospect that associating with Mr. Dayton was a lapse in judgment on her part.

22. Plaintiff/Father was less than credible when he testified that "a doctor" had told him that melatonin caused his son's nosebleeds.

23. Ayden currently attends after school at Unionville Elementary where he is in the 3rd grade.

24. Defendant/Mother emailed Plaintiff/Father about stopping conversations with him because of him reportedly halting or being slow in his payment of child support to her. Ending conversation between his two parents because of lack of child support is contrary to best interest of Ayden.

25. Plaintiff/Father enrolled Ayden in after school unilaterally and without conferring with Defendant/Mother first, nor did Plaintiff/Father list Defendant/Mother as a contact

person for Ayden at after school. This was all contrary to best interest. Because of her PRN schedule, Defendant/Mother is able to care for Ayden instead of placing him in after school on her days with him.

26. Defendant/Mother has been diagnosed as being bi-polar and is currently taking Topamax, Wellbutrin, Adderall, and Almapin for same.

27. Defendant/Mother's mother, Valerie Lamb, appears to the Court to be a stabilizing and positive influence in her daughter's life and that of Ayden.

28. Despite Plaintiff/Father and Defendant/Mother living so close to one another, this is not a case where a 50/50 split would serve Ayden's best interests, because the parties do not communicate with each other in a civil manner and because there is such friction between Plaintiff/Father and Defendant/Mother on deciding what is in Ayden's best interests. Ayden needs consistency and routine in his parental approach to his schooling and health care needs, in particular Ayden taking his ADHD medicine daily.

. . . .

32. Plaintiff/Father has an average gross monthly income of $3,842.00 from his regular employment, and $2,130.00 from his temporary worker's compensation.

33. Defendant/Mother has an average gross monthly income of $2,075.00.

We conclude these unchallenged findings are adequate for meaningful appellate review and were sufficient to support the trial court's determination of what physical custody award would serve Ayden's best interests. The findings compared the parents' home environments, mental and behavioral fitness, work schedules as it relates to their abilities to care for Ayden, and past decision-making with respect to Ayden's care. Accordingly, we deny Father's request to vacate the order based on insufficient findings bearing on Ayden's welfare. Further, these findings demonstrate that the trial court's best-interests conclusion—that primary physical custody with Mother and secondary custody with Father served Ayden's best interests—was not manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision.

For example, the trial court found that Father works from "6:30 a.m. to 3:00 p.m. in Lancaster, SC, about a 37 minute drive from his home" and enrolled Ayden in after school, while Mother is able to set her own work schedule, "which aids in her care of Ayden" and can "care for Ayden instead of placing him in after school on her days with him"; that Father's unilateral decision to enroll Ayden in after school and not list Mother as a contact person for Ayden was "all contrary to best interest," since Mother "is able to care for Ayden instead of placing him in after school on her days with him"; that Father texted Mother "that he never wanted to see his son again," resulting in Father "not seeing his son Ayden for approximately 85 days," which was "behavior . . . grossly contrary to Ayden's best interests"; that "Ayden has been prescribed medication for ADHD by his physician," but Father "disagrees with the appropriateness of that medication . . . and does not see to it that Ayden gets his medicine as prescribed, which is contrary to Ayden's best interests to have his medicine administered to him only intermittently"; and that "Ayden needs consistency and routine in his parental approach to his schooling and health care needs, in particular Ayden taking his ADHD medicine daily." Accordingly, we hold the trial court did not abuse its discretion in awarding primary physical custody of Ayden to Mother and secondary physical custody to Father. Therefore, we affirm its physical custody award.

C. Legal Custody

[3] Father next asserts the trial court's findings were insufficient to support its deviation from pure joint legal custody by granting Mother final decision-making authority as to Ayden's health care and education. We agree, vacate the part of the award allocating decision-making authority, and remand for further findings on the issue of joint legal custody.

" '[L]egal custody' . . . refer[s] generally to the right and responsibility to make decisions with important and long-term implications for a child's best interest and welfare." *Diehl v. Diehl*, 177 N.C. App. 642, 646, 630 S.E.2d 25, 27 (2006) (citations omitted). "Our trial courts have wide latitude in distributing decision-making authority between the parties based on the specifics of a case." *Peters v. Pennington*, 210 N.C. App. 1, 17, 707 S.E.2d 724, 736 (2011) (citing *Diehl*, 177 N.C. App. at 647, 630 S.E.2d at 28). While we review a trial court's deviation from pure joint legal custody for abuse of discretion, "a trial court's findings of fact must support the court's exercise of this discretion." *Id.*; *see also Diehl*, 177 N.C. App. at 647–48, 630 S.E.2d 28–29 (reversing joint legal custody award where the findings were insufficient to support the particular allocation of decision-making authority between the parents and remanding

for further findings on the issue of joint legal custody); *Hall*, 188 N.C. App. at 535–36, 655 S.E.2d at 906–07 (same). Our review thus centers on "whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Hall*, 188 N.C. App. at 535, 655 S.E.2d at 906.

In *Diehl*, we held the trial court's findings were insufficient to support its deviation from pure joint legal custody by granting the mother "primary decision making authority," which, in the case of a dispute between the parents, effectively "stripped [the father] of all decision-making authority . . . ." 177 N.C. App. at 646, 630 S.E.2d at 28. Because "only the court's findings regarding the parties' difficulty communicating and [the mother's] occasional troubles obtaining [the father's] consent could be construed to indicate anything other than traditional joint legal custody would be appropriate," *id.* at 648, 630 S.E.2d at 29, we reversed the trial court's ruling awarding primary decision-making authority to the mother and remanded for further proceedings on the issue of joint legal custody, *id.*

Similarly, in *Hall*, we held the trial court's findings were insufficient to support its deviation from pure joint legal custody by granting a parent "decision-making authority regarding all issues affecting the minor children except for issues regarding sports and extracurricular activities." 181 N.C. App. at 533–34, 655 S.E.2d at 906 (brackets omitted). We clarified *Diehl*'s holding as follows: "[T]he trial court may only deviate from 'pure' legal custody after making specific findings of fact" and, therefore, interpreted *Diehl* as requiring a reviewing court to "determine whether, based on the findings of fact below, the trial court made specific findings of fact to warrant a division of joint legal authority." *Id.* at 535, 655 S.E.2d at 906. Because the trial court in *Hall* "made no findings that a split in the decision-making was warranted[,]" *id.*, we reversed the trial court's ruling regarding its split of decision-making authority and remanded for further proceedings on the issue of joint legal custody, *id.* at 535, 655 S.E.2d at 907. We instructed:

> On remand, the trial court may allocate decision-making authority between the parties again; however, were the court to do so, it must set out *specific findings* as to why deviation from "pure" joint legal custody is *necessary*. Those findings must detail why a deviation from "pure" joint legal custody is in the *best interest of the children*. As an example, past disagreements between the parties regarding matters affecting the children, such as where they would attend school or church, would be sufficient,

> but mere findings that the parties have a tumultuous relationship would not.

Id. at 535–36, 655 S.E.2d at 907 (internal footnote omitted).

Contrarily, in *MacLagan v. Klein*, 123 N.C. App. 557, 473 S.E.2d 778 (1996), *abrogated on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998), we held the trial court's findings were sufficient to support its deviation from pure joint legal custody by granting a parent sole religious training decision-making authority. *Id.* at 567–69, 473 S.E.2d at 786–87. There, the trial court found:

> [T]he parties had agreed to rear the minor child in the Jewish faith; the child has had a positive sense of identity as a Jew since she was three years old and has had substantial involvement with the Judea Reform Congregation Synagogue in Durham; and since her introduction into activities at the Edenton United Methodist Church, the child has experienced stress and anxiety as a result of her exposure to two conflicting religions which have had a detrimental effect on her emotional well-being.

Id. at 569, 473 S.E.2d at 787. We reasoned these "findings . . . demonstrate[d] affirmatively a causal connection between the conflicting religious beliefs and a detrimental effect on the child's general welfare" and thus "support[ed] . . . granting [the father] charge of [the minor's] religious training and practice . . . ." *Id.* Accordingly, we affirmed the trial court's allocation of decision-making authority. *Id.*

Here, the trial court awarded both parents permanent joint legal custody and ordered they "shall confer on all issues of major importance regarding [Ayden's] well-being[.]" However, the trial court's award further ordered that, "in the event of disagreement, . . . Mother shall have final decision making authority regarding health care and education." Similar to the terms of the legal custody award in *Diehl*, the terms of the award here, if the parties disputed any matter relating to Ayden's health care or education, essentially abrogated Father's decision-making authority. Our review is whether the trial court's findings supported its discretionary decision to order such a deviation from pure joint legal custody.

As to the split in health care decision-making authority, the trial court issued the following relevant facts:

> 19. Ayden has been prescribed medication for ADHD by his physician. Plaintiff/Father disagrees with the

> appropriateness of that medication being administered to Ayden and does not see to it that Ayden gets his medicine as prescribed, which is contrary to Ayden's best interests to have his medicine administered to him only intermittently.
>
> . . . .
>
> 22. Plaintiff/Father was less than credible when he testified that "a doctor" had told him that melatonin caused his son's nosebleeds.
>
> . . . .
>
> 28. . . . [T]his is not a case where a 50/50 split would serve Ayden's best interests, because . . . there is such friction between Plaintiff/Father and Defendant/Mother on deciding what is in Ayden's best interests. Ayden needs consistency and routine in his parental approach to his . . . health care needs, in particular Ayden taking his ADHD medicine daily.

While these findings may support the trial court's exercise of discretion in deviating from pure joint legal custody by granting Mother final decision-making authority if the parties dispute matters concerning Ayden's ADHD treatment, we conclude the findings are insufficient to support such a broad abrogation from Father of final decision-making authority as to all issues related to Ayden's health care. While the parties disputed the appropriateness of Ayden's ADHD medication, and the trial court found its inconsistent administration would be contrary to Ayden's best interests, no other findings indicate any other health care dispute rendering it necessary for Ayden's best interests to deviate from a pure joint legal custody award by abrogating Father from final decision-making authority as to all matters relating to Ayden's health care. Accordingly, we vacate that part of the legal custody award granting Mother final health care decision-making authority and remand for further proceedings regarding this issue as it relates to joint legal custody.

As to the split in education decision-making authority, the trial court issued the following relevant facts:

> 25. Plaintiff/Father enrolled Ayden in after school unilaterally and without conferring with Defendant/Mother first, nor did Plaintiff/Father list Defendant/Mother as a contact person for Ayden at after school. This was all contrary to best interest. Because of her PRN schedule, Defendant/

> Mother is able to care for Ayden instead of placing him in after school on her days with him.
>
> . . . .
>
> 28. . . . [T]his is not a case where a 50/50 split would serve Ayden's best interests, because . . . there is such friction between Plaintiff/Father and Defendant/Mother on decision what is in Ayden's best interests. Ayden needs consistency and routine in his parental approach to his schooling . . . [.]

While these findings may support the trial court's exercise of discretion in deviating from pure joint legal custody by granting Mother final decision-making authority if the parties dispute matters concerning Ayden's enrollment in after school, we conclude the findings are insufficient to support such a broad abrogation from Father of final decision-making authority as to all matters relating to Ayden's education. Whether to enroll a child in an after-school program is not a dispute about any substantive educational matter, such as, for example, which school Ayden should attend. These findings neither affirmatively demonstrate any causal link between a dispute about an academic or schooling matter and any negative effect on Ayden, nor demonstrate how such a deviation from pure joint legal custody was necessary to serve Ayden's best interests. Accordingly, we vacate that part of the legal custody award granting Mother final education decision-making authority and remand for further proceedings regarding this issue as it relates to joint legal custody.

Because we conclude the trial court's findings were insufficient to support its exercise of discretion in deviating from a pure joint legal custody award by allocating decision-making authority between the parents in this manner, we vacate the trial court's rulings allocating decision-making authority and remand for further proceedings on the issue of joint legal custody. "On remand, the trial court may identify specific areas in which [either parent] is granted decision-making authority upon finding appropriate facts to justify the allocation." *Diehl*, 177 N.C. App. at 648, 630 S.E.2d at 29.

III. Conclusion

Because the temporary custody order did not become permanent by operation of time, we hold that the trial court applied the proper custody modification standard applicable to temporary custody orders. The trial court's factual findings supporting its physical custody award were

sufficient to enable meaningful appellate review and to support the trial court's conclusion as to what award would serve Ayden's best-interests. Because we discern no abuse of discretion in the trial court's decision to award Mother primary physical custody and Father secondary physical custody of Ayden, we affirm its physical custody award. However, because we conclude the trial court's factual findings were insufficient to support its exercise of discretion in splitting decision-making authority in this manner, we vacate its rulings granting Mother final health care and education decision-making authority and remand for further proceedings on the issue of joint legal custody.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges HUNTER, JR. and ZACHARY concur.

IN THE MATTER OF A.P.

No. COA16-1010-2

Filed 7 August 2018

Native Americans—Indian Child Welfare Act—neglected child—notice

The case of a juvenile who was adjudicated as neglected and dependent was remanded to the trial court for notice to be sent to the appropriate tribes in compliance with the federal Indian Child Welfare Act (ICWA). A form indicating the mother's American Indian heritage was sufficient to put the trial court on notice that the matter may concern an Indian child and trigger the notice requirements of the ICWA.

Appeal by respondent from order entered 29 June 2016 by Judge Ty Hands in Mecklenburg County District Court. This case was originally heard before this Court on 3 April 2017. *In re A.P.*, __ N.C. App. __, 800 S.E.2d 77 (2017). Upon remand from the Supreme Court of North Carolina, *In re A.P.*, __ N.C.__, 812 S.E.2d 840 (2018).

Mecklenburg County Department of Social Services, Youth and Family Services, by Associate Attorney Christopher C. Peace, for petitioner-appellee.

Anné C. Wright for respondent-appellant.

Guardian ad Litem Appellate Counsel Matthew D. Wunsche for guardian ad litem.

TYSON, Judge.

The Supreme Court of North Carolina remanded this case for this Court's review of the remaining issues raised by Respondent-mother's appeal. *In re A.P.*, __ N.C.__, 812 S.E.2d 840 (2018). Respondent appeals from an order adjudicating her minor daughter, A.P., to be a neglected and dependent juvenile. The Supreme Court of North Carolina held the Mecklenburg County Youth and Family Services ("YFS") had standing to file the juvenile petition. We remand for the trial court to determine and ensure that the federal Indian Child Welfare Act ("ICWA") notification requirements are met. 25 U.S.C. § 1912(a) (2012); 25 C.F.R. § 23.107(b)(2) (2018).

I. Background

A.P. was born in August 2015, while Respondent was living at the Church of God Children's Home (the "Home"), located in Cabarrus County. Shortly after A.P.'s birth, Respondent began to display irrational behaviors. Respondent was subsequently involuntarily committed for mental health treatment in Mecklenburg County. Respondent agreed to a safety plan with the Cabarrus County Department of Social Services ("CCDSS") to allow A.P. to live at the Rowan County home of an employee ("Ms. B.") of the Home, while Respondent was undergoing in-patient mental health treatment.

Later, Respondent identified her grandfather's home in Mecklenburg County as a place where she could live with A.P. upon her release from in-patient mental health treatment. CCDSS asked YFS to investigate the grandfather's home for appropriateness for A.P. YFS found her grandfather's home to be appropriate, and Respondent moved into the home with A.P. Respondent entered into an agreement with CCDSS that she would cooperate with YFS in developing and following an in-home family services plan, and CCDSS transferred the social services case to YFS.

On 25 November 2015, Respondent's sister discovered Respondent and A.P. were living away from the grandfather's home in a dilapidated house in Mecklenburg County. Respondent's sister took A.P. to Ms. B., and YFS subsequently approved the placement of A.P. with Ms. B. in Rowan County. YFS determined Respondent needed substance abuse

treatment and other services. Respondent initially engaged in services that were performed in Mecklenburg County.

At an 18 December 2015 meeting with YFS, Respondent agreed that A.P. would continue to stay with Ms. B., while she lived with a family friend in South Carolina. Respondent returned to Mecklenburg County in January 2016. She was subsequently jailed on unidentified criminal charges. From 18 to 20 February 2016, Respondent was again an inpatient at Davidson Mental Health Hospital in Mecklenburg County.

On 22 March 2016, Respondent informed YFS that she was now residing in Cabarrus County. On 23 March 2016, Ms. B., A.P.'s caretaker, informed YFS that she could no longer care for A.P. On 29 March 2016, YFS retrieved the child from Ms. B. and obtained a nonsecure custody order from a Mecklenburg County magistrate. On 30 March 2017, YFS filed the nonsecure custody order and a juvenile petition alleging A.P. was a neglected and dependent juvenile.

After an adjudication and disposition hearing, the trial court concluded A.P. was a neglected and dependent juvenile. The court continued custody of A.P. with YFS, with placement in YFS's discretion. The court ordered Respondent to have supervised visitation with A.P., for Respondent to enter into an out-of-home family services agreement with YFS and, to comply with the terms of the agreement. Respondent filed timely notice of appeal.

In the earlier review of *In re A.P.*, __ N.C. App. __, 800 S.E.2d 77, this Court unanimously held YFS lacked standing to file the juvenile petition and vacated the trial court's order. *In re A.P.* at __, 800 S.E. 2d at 82. The Supreme Court determined that "the legislature did not intend to limit the class of parties who may invoke the court's subject matter jurisdiction in juvenile adjudication actions to only directors of county departments of social services in the county where the juvenile at issue resides or is found[,]" and remanded to this Court. *In re A.P.*, __ N.C .at __, 812 S.E.2d at 844.

II. Indian Child Welfare Act

Respondent-mother argues the adjudication hearing should have been continued for further investigation into the applicability of ICWA to this petition. We agree.

The ICWA was enacted by Congress in 1978 to establish the "minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes" in order to "protect the best interests of Indian children and to promote

the stability and security of Indian tribes and families." 25 U.S.C. § 1902 (2012). In relevant part ICWA states:

> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

25 U.S.C. § 1912(a).

An "Indian child" is defined as "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 U.S.C. § 1903(4) (2012). ICWA's notice requirement is mandatory and triggered when the proceeding is a "child custody proceeding," and the child involved is determined to be an "Indian child" of a federally recognized tribe. *In re A.D.L.*, 169 N.C. App. 701, 708, 612 S.E.2d 639, 644 (2005).

At the time the nonsecure custody order was obtained and at A.P.'s adjudication as neglected, this Court had stated "[t]he burden [was] on the party invoking [ICWA] to show that its provisions are applicable to the case at issue, through documentation or perhaps testimony from a tribe representative." *In re C.P.*, 181 N.C. App. 698, 701-02, 641 S.E.2d 13, 16 (2007) (citing *In re Williams*, 149 N.C. App. 951, 957, 563 S.E.2d 202, 205 (2002)).

Under current federal regulations effective 12 December 2016, the burden rests upon the state courts to confirm that active efforts have been made to prevent the breakup of Indian families and those active efforts must be documented in detail in the record. *In re L.W.S.*, __ N.C. App. __, __, 804 S.E.2d 816, 819, nn. 3-4 (2017); 25 C.F.R. § 23.107(a), (b)(1)-(2) (2018).

Whether the evidence presented at the adjudication hearing should have caused the trial court to have reason to know an "Indian child" may

be involved and trigger the notice requirement is the issue before us. The federal regulations implementing ICWA and promulgated in 2016, clearly the states court has reason to know an "Indian child" is involved if: "Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child." 25 C.F.R. § 23.107(c)(2) (2018).

The ICWA proscribes that once the court has reason to know the child could be an "Indian child," but does not have conclusive evidence, the court should confirm and "work with all of the Tribes . . . to verify whether the child is in fact a member." 25 C.F.R. § 23.107(b)(1). Federal law provides: "No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary[.]" 25 U.S.C. § 1912(a). Further, a court must "[t]reat the child as an Indian child, unless and until it is determined on the record that the child does not meet the definition of an "Indian child." 25 C.F.R. § 23.107(b)(2).

Other jurisdictions have recognized that "Indian child" status of the juvenile can only be decided by the tribe itself; therefore, only a suggestion that the child may be of Indian heritage is enough to invoke the notice requirements of the ICWA. *In re Antoinette S.*, 104 Cal. App. 4th 1401, 1408, 129 Cal. Rptr. 2d 15, 21 (2002). Additionally, ICWA provides that even after the completion of custody proceedings, if the provisions of ICWA were violated, "any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action." 25 U.S.C. §1914 (2012).

In *In re A.R.*, the Respondent-father claimed that he had "a family connection to a registered Native American group" which consequently qualified his children for the protections under ICWA. *In re A.R.*, 227 N.C. App. 518, 523, 742 S.E.2d 629, 633 (2013). No further evidence on the Indian heritage of the juveniles was presented and the trial court continued the proceedings without ordering any ICWA notification. *Id.* The court then issued an adjudication and disposition order concluding the children were neglected and abused. *Id.* at 519, 742 S.E.2d at 631.

On appeal, this Court recognized that "it appears that the trial court had at least some reason to suspect that an Indian child may be involved" *Id.* at 524, 742 S.E.2d at 634. Further, this Court held that "[t]hough from the record before us we believe it unlikely that [the juveniles] are subject to the ICWA, we prefer to err on the side of caution by remanding

for the trial court to . . . ensure that the ICWA notification requirements, if any, are addressed . . . since failure to comply could later invalidate the court's actions." *Id.*

In the case of *In re C.P.*, the respondent-mother made the bare assertion that she and her children could possibly be eligible for membership with a band of Potawatomi Indians. *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16. The trial court required the ICWA notice to be sent. *Id.* When the time required under ICWA had passed without response from the tribe, the trial court allowed two continuances before determining ICWA did not apply and resumed the proceedings. *Id.* at 703, 641 S.E.2d at 16-17.

On appeal, the respondent asserted error in the trial court's refusal to continue the proceedings until the tribe responded. *Id.* at 701, 641 S.E.2d at 15-16. This Court held the trial court had complied with ICWA where the length of time of the continuance following the notification letter exceeded ICWA requirements and the respondent had offered no additional evidence to sustain her burden of showing the ICWA further applied. *Id.* at 703, 641 S.E.2d at 17.

Our Court has required social service agencies to send notice to the claimed tribes rather than risk the trial court's orders being voided in the future, when claims of Indian heritage arise, even where it may be unlikely the juvenile is an Indian child. *See In re A.R.*, 227 N.C. App. at 524, 742 S.E.2d at 634; *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16.

On 5 April 2016, the seven-day nonsecure custody hearing was held before the trial court. The court's order contains a finding of fact that ICWA was inapplicable. However, evidence concerning A.P., and admitted at the adjudication hearing by YFS, included a 2015 CCDSS form indicating A.P. and her mother have "American Indian Heritage" within the "Cherokee" and "Bear foot" tribes.

After the CCDSS form was provided to Respondent's counsel at trial, counsel brought to the trial court's attention that Respondent and A.P. were of a federally-recognized Indian tribe and YFS did not provide that tribe any notice. The trial court indicated it had specifically made inquiry at the seven-day hearing of whether ICWA applied and determined the Act did not. There is no transcript in the record from the nonsecure custody hearing. The trial court's order notes Respondent-mother arrived late for the hearing and no one from CCDSS was listed as being present. Nothing in the record shows either CCDSS or YFS complied with the notice provisions of ICWA.

The record indicating Respondent-mother's potential "Cherokee" and "Bear foot" Indian heritage was sufficient to put the trial court on notice and provided "reason to know that an 'Indian child' is involved." 25 U.S.C. § 1912(a). *See In re A.R.*, 227 N.C. App. at 524, 742 S.E.2d at 634; *In re C.P.*, 181 N.C. App. at 702, 641 S.E.2d at 16.

Once this record was brought to the court's attention, the trial court must direct YFS to send a conforming notification letter to the tribe(s). "[T]he question of the district court's jurisdiction under the ICWA cannot be resolved based on the evidence of record, we must remand the cause for a determination of subject matter jurisdiction." *In re E.G.M.*, 230 N.C. App. 196, 204, 750 S.E.2d 857, 862 (2013) (citation omitted).

We remand to the trial court to issue an order requiring notice to be sent by YFS as required by 25 U.S.C. § 1912(a), and which complies with the standards outlined in 25 C.F.R. § 23.111 (2018). If no response to this notification is received, the Respondent-mother must meet her burden to produce evidence to sustain ICWA's application in this case. *See In re C.P.*, 181 N.C. App. at 701-02, 641 S.E.2d at 16 (citation omitted). If a response or other evidence is received confirming A.P. qualifies as an "Indian child," the trial court shall comply with the corresponding provisions in ICWA and with the wishes of that tribe.

"In the event that the trial court concludes on remand that it lacks subject matter jurisdiction . . . , then it will be required to dismiss the petition . . . ." *In re M.G.*, 187 N.C. App. 536, 548 n. 5, 653 S.E.2d 585, 588 n. 5 (2007), *rev'd on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009).

III. Conclusion

This case is remanded to the district court for further proceedings. The trial court shall insure the ICWA's notice and other mandatory requirements are met. YFS is to notify "by registered mail with return receipt requested" to Respondent-mother and child's potential tribe(s). No further "proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary; *Provided*, that the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding." 25 U.S.C. § 1912(a). Respondent-mother's remaining challenges are preserved pending the outcome on remand. *It is so ordered.*

REMANDED.

Judges BRYANT and DAVIS concur.

IN RE I.K.

[260 N.C. App. 547 (2018)]

IN THE MATTER OF I.K., K.M.

No. COA18-94

Filed 7 August 2018

1. Guardian and Ward—guardianship—findings—parents unfit—parents acted inconsistently with status as parents—waiver

The trial court erred by awarding guardianship of two children to their grandmother without first finding that the parents were unfit to parent or had acted inconsistently with their constitutionally protected status as parents. Although the Department of Social Services argued that the parents waived appellate review of this issue by failing to raise it at the hearing, no waiver occurred because the trial court did not permit arguments.

2. Child Abuse, Dependency, and Neglect—reunification efforts—cessation—sufficiency of findings

The trial court's findings were insufficient to support its conclusion that efforts to reunite two children with their parents should cease, where the trial court's order did not demonstrate what evidence convinced the court that the parents had made minimal progress toward reunification and the evidence was a mixed bag.

Appeal by respondent-parents from order entered 7 November 2017 by Judge Joseph Moody Buckner in Orange County District Court. Heard in the Court of Appeals 21 June 2018.

Holcomb & Stephenson, LLP, by Deana K. Fleming, for petitioner-appellee Orange County Department of Social Services.

Batch, Poore & Williams, PC, by Sydney Batch, for respondent-appellant mother.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for respondent-appellant father.

Alston & Bird LLP, by Matthew P. McGuire, for guardian ad litem.

MURPHY, Judge.

Respondent mother ("Patty")[1] and respondent father ("Isaac") appeal from an order ceasing reunification efforts and awarding guardianship of the minor children I.K. ("Iliana") and K.M. ("Kevin") to the maternal grandmother. Because the trial court's findings do not address Respondents' fitness, whether they acted inconsistent with their constitutionally protected status, or why reunification efforts should cease, we vacate the trial court's 7 November 2017 order and remand for further proceedings.

BACKGROUND

Kevin was born to Patty in May 2008. Kevin's father is not a party to this appeal. Iliana was born to Respondents in December 2012. On 10 November 2014, the Rockingham County Department of Social Services received a report that Respondents lived in a "hoarder home" that was unsafe, Respondents sold their food stamps, Kevin was small for his age, there was fighting in the home, and Respondents were smoking marijuana and snorting Percocet. The Rockingham County Department of Social Services investigated this report, but no services were recommended at the time.

In 2015, the Orange County Department of Social Services ("DSS") received two reports alleging that Patty had snorted pills while Kevin was in the home, and that Patty and her brother were involved in a domestic dispute that resulted in the brother shaking and hitting Kevin. At that point, Respondents were provided in-home services to address concerns of substance use, mental health, and domestic violence. On 8 January 2016, Patty was sentenced to 45 days in jail for shoplifting and violating her probation. Patty received another 45 day sentence in April 2016 after a drug test conducted by her probation officer tested positive for cocaine. At that time, Respondents placed Iliana with the maternal grandmother. For the previous five years, Kevin had been residing with his maternal grandmother. On 5 August 2016, Patty informed a DSS social worker that Respondents were being evicted from their home and were homeless.

Due to concerns regarding Respondents' unstable housing, substance abuse, and lack of engagement in substance abuse treatment services, DSS filed juvenile petitions on 10 August 2016 alleging that Kevin and Iliana were neglected and dependent juveniles. DSS obtained nonsecure custody that same day. Following a 15 September 2016 hearing, the trial

1. Pseudonyms are used throughout this opinion to protect the identity of juveniles and for the ease of reading. See N.C. R. App. P. 3.1(b).

court entered an order on 13 October 2016 adjudicating the juveniles dependent, keeping temporary legal and physical custody with the maternal grandmother. The order required Respondents to submit to random drug screens, seek substance abuse treatment services, and follow any treatment recommendations. After a permanency planning hearing on 2 March 2017, the trial court entered an order on 27 March 2017 establishing a primary permanent plan of guardianship with the maternal grandmother and a secondary plan of reunification with Respondents. Following a 5 October 2017 permanency planning hearing, the trial court entered a 7 November 2017 order ceasing reunification efforts and awarding guardianship of the children to the maternal grandmother. Respondents timely appealed the 7 November 2017 order.

ANALYSIS

A. Guardianship

[1] Respondents first contend that the trial court erred in awarding guardianship of the children to the maternal grandmother without first finding that Respondents were unfit to parent or had acted inconsistently with their constitutionally protected status as parents. We agree.

"A natural parent's constitutionally protected paramount interest in the companionship, custody, care, and control of his or her child is a counterpart of the parental responsibilities the parent has assumed and is based on a presumption that he or she will act in the best interest of the child." *Price v. Howard*, 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997) (citations omitted). "[A] natural parent may lose his constitutionally protected right to the control of his children in one of two ways: (1) by a finding of unfitness of the natural parent, or (2) where the natural parent's conduct is inconsistent with his or her constitutionally protected status." *In re D.M.*, 211 N.C. App. 382, 385, 712 S.E.2d 355, 357 (2011) (alteration in original) (quoting *David N. v. Jason N.*, 359 N.C. 303, 307, 608 S.E.2d 751, 753 (2005)). "[T]o apply the best interest of the child test in a custody dispute between a parent and a nonparent, a trial court must find that the natural parent is unfit or that his or her conduct is inconsistent with a parent's constitutionally protected status." *In re B.G.*, 197 N.C. App. 570, 574, 677 S.E.2d 549, 552 (2009) (citations omitted).

DSS and the children's guardian *ad litem* ("GAL") do not refute Respondents' contention that the trial court failed to make the required finding, but instead argue that Respondents waived appellate review of this argument by not raising the issue at the hearing. DSS and the GAL cite this Court's previous pronouncement that "a parent's right to findings regarding her constitutionally protected status is waived if the

parent does not raise the issue before the trial court." *In re R.P.*, ___ N.C. App. ___, ___, 798 S.E.2d 428, 430-31 (2017). However, in *R.P.* we also held that there is no waiver where the party "was not afforded the opportunity to raise an objection at the permanency planning review hearing." *Id.* at ___, 798 S.E.2d at 431. In that case, the trial court indicated at a permanency planning review hearing that it would determine guardianship at the next hearing. *Id.* at ___, 798 S.E.2d at 431. Then, at the next hearing, the trial court did not allow any evidence to be presented concerning guardianship, stating that guardianship had been determined at the prior hearing. *Id.* at ___, 798 S.E.2d at 431.

In the present case, the trial court did not permit arguments. At the conclusion of the hearing, Patty's counsel asked:

> "Judge, can we be heard?"

To which the trial court responded:

> I've heard from you. I know what you want done. Appreciate it.

Thus, the trial court prevented the Respondents from making arguments concerning Respondents' constitutionally protected status as parents, and Respondents cannot be said to have waived their contention on appeal. As to the merits of Respondents' contention, the trial court did not make a finding that Respondents were unfit or had acted inconsistent with their constitutionally protected status. Absent such a finding, the trial court erred in applying the best interest of the child test to determine that guardianship with the maternal grandmother was in the children's best interests. As a result, we vacate that portion of the trial court's order awarding guardianship and remand.

B. Reunification

[2] Respondents next contend that the trial court erred in ceasing reunification efforts. We conclude that the trial court's findings are insufficient to support its conclusion that reunifications efforts should cease.

"Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation omitted). "The trial court's conclusions of law are reviewable *de novo* on appeal." *In re T.R.M.*, 208 N.C. App. 160, 162, 702 S.E.2d 108, 110 (2010) (citation omitted).

"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) (2017). "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." N.C.G.S. § 7B-906.2(b). However, the trial court failed to make findings pursuant to N.C.G.S. § 7B-901(c) or to find that reunification efforts clearly would be unsuccessful or inconsistent with the juvenile's health or safety. To cease reunification in this way:

> [T]he court shall make written findings as to each of the following, which shall demonstrate lack of success:
>
> (1) Whether the parent is making adequate progress within a reasonable period of time under the plan.
>
> (2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.
>
> (3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.
>
> (4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C.G.S. § 7B-906.2(d).

Here, the trial court made the following findings of fact relevant to its decision to cease reunification efforts:

> 7. It is not possible for the juveniles to be returned home in the immediate future or within the next six (6) months and in support thereof, the court specifically finds:
>
> a) Respondent parents have been involved with [DSS] since October 2015 due to concerns about substance use, domestic violence, and unstable housing.
>
> b) Respondent parents have made minimal progress on their case plan objectives, which led to a petition being filed in August 2016.
>
> c) Respondent parents' compliance improved after the court date in March 2017, however they each have missed one drug screen since the last hearing.

d) [DSS] has concerns that [Patty] may be abusing prescription medication. [Patty] has attended substance abuse groups at Freedom House.

e) Respondent parents had a domestic altercation in October 2016. [Patty] attended the first component of domestic violence counseling classes at the Compass Center in Chapel Hill, began the second component in June, 2017 and continues to attend.

f) The parents' minimal progress, including the lack of full engagement with services and refusal to comply with all drug screens as set forth above, is not adequate to continue to pursue reunification as a primary or secondary plan.

g) While respondent parents have demonstrated some cooperation with their case plan and remained involved in their case, their insufficient progress for reunification demonstrates that they are acting inconsistently with the juveniles' health and safety.

. . . .

18. Further reunification efforts would be inconsistent with the juveniles' health and safety.

Respondents appear to challenge finding 7(b), but neither explains how the finding lacks evidentiary support. At various points in their briefs, both cite to examples in the record of their compliance with their case plans, but these mostly occurred after the juvenile petitions were filed. Read in context, finding 7(b) notes Respondents' lack of progress on their case plans *prior to* the juvenile petitions being filed. Respondents do not contest that they made minimal progress on their case plans prior to August 2016.

Isaac challenges the statement in finding 7(c) that Respondents "each have missed one drug screen since the last hearing." We agree that this finding is unsupported by the evidence. The last hearing in this case was on 15 June 2017, and the evidence at the 5 October 2017 hearing showed that Respondents had last missed a drug screen on 5 June 2017. We therefore disregard this portion of finding 7(c) in our analysis.

Patty next appears to challenge finding 7(d), essentially arguing that DSS's concerns regarding her abuse of prescription medication were unfounded. However, Patty does not contest that DSS *had* such

concerns, which is what the finding actually states. Patty fails to demonstrate that finding 7(d) is unsupported by the evidence.

Respondents broadly challenge the statements in findings 7(f) and (g) that they made "minimal progress" and "insufficient progress for reunification." While we find evidence in the record that could support such findings, we also find evidence which tends to show that Respondents were making reasonable progress on their case plans; the trial court's findings are not sufficiently specific to allow this Court to determine what evidence the trial court relied on in reaching this ultimate finding. The trial court found that Respondents' compliance with their case plans had improved since March 2017, and did not make any findings as to Respondents' conduct since that time that could demonstrate that Respondents were making minimal or insufficient progress. The only specific finding made by the trial court that could support its ultimate finding of minimal progress relates to one incidence of domestic violence between Respondents occurring in October 2016, which, in light of the finding relating Respondents' improved compliance since March 2017, is not sufficient alone to show that Respondents had made insufficient progress by the 5 October 2017 hearing. Thus, the order itself does not make findings sufficient to demonstrate what the trial court looked to in determining that Respondents had made minimal progress toward reunification.

The order did incorporate by reference the DSS and GAL court reports submitted for the 5 October 2017 hearing. The statements in those reports regarding Respondents' compliance with their case plans and progress toward reunification, however, are decidedly mixed. The DSS report noted that Patty's case plan asked her to "engage in substance abuse treatment services, including residential treatment if possible, and to submit to random drug screens as necessary," to "participate in mental health treatment," and to "participate in domestic violence education." Evidence suggesting that reunification would be inconsistent with the children's health and safety included that Patty twice appeared to be under the influence of drugs during family events in June and July 2017, complied with eighteen of twenty-eight random drug screens, tested positive for hydrocodone in January 2017, last refused a drug screen on 5 June 2017, and sought to obtain her father's pain medication in September 2017.

In contrast to this evidence, Patty had been regularly attending weekly substance abuse group meetings and individual therapy sessions since February 2017, signed up for and completed parenting classes

without being asked to do so, and had regularly attended domestic violence classes since April 2017. Furthermore, Patty's January 2017 drug screen was the only one in which she tested positive, and she produced a prescription for the hydrocodone.

The DSS report notes that Isaac's case plan asked him to address issues of substance abuse. Evidence suggesting that reunification would be inconsistent with the children's health and safety included that Isaac appeared to be under the influence of drugs during a family event in July 2017, complied with sixteen of twenty-seven random drug screens; tested positive for oxycodone in January 2017, last refused a drug screen on 5 June 2017, and was unwilling to participate in domestic violence classes until it was court ordered in May 2017.

In contrast to this evidence, Isaac regularly met with an individual counselor addressing substance abuse once a month, began attending domestic violence classes in June 2017, and signed up for and completed parenting classes without being asked to do so. Isaac's January 2017 drug screen was the only one in which he tested positive.

As to both parents, the reports noted that their living situation was appropriate, and "[a]ttendance at visits with [the] children has been excellent." Thus, the evidence contained in the DSS and GAL reports, while indicating concern with the parents extensive history of substance abuse and sustainability of Respondents recent improvements, fails to support a finding or conclusion that reunification efforts should cease, and the trial court's own findings provide little indication as to what clear and convincing evidence it found persuasive in concluding that reunification would be inconsistent with the children's health and safety.

The trial court held a permanency planning hearing on 15 June 2017 and determined that reunification efforts should continue. Since that time, while there was one occasion where Respondents were suspected of being under the influence of drugs, Respondents neither failed nor refused a drug screening. There had been no reported incidents of domestic violence, and both were attending classes to address their issues. At the 5 October 2017 permanency planning hearing, this evidence requires the trial court to adjudicate and have made additional evidentiary findings demonstrating why reunification efforts should cease at that point. "Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and 'test the correctness of [the trial court's] judgment.' " *In re L.L.O.*, ___ N.C. App. ___, ___, 799 S.E.2d 59, 66 (2017) (alteration in original) (quoting *In re M.K.*, 241 N.C. App. 467, 471, 773 S.E.2d 535, 538 (2015)). As a result,

we must vacate the permanency planning order and remand to the trial court.[2]

CONCLUSION

We conclude that the trial court failed to make the required finding that Respondents were unfit or had acted inconsistent with their constitutionally protected status as parents. Absent such a finding, the trial court erred in applying the best interest of the child test to determine that guardianship with the maternal grandmother was in the children's best interests. As a result, we must vacate that portion of the trial court's order awarding guardianship and remand for further findings.

In addition, we conclude that the trial court's findings are not sufficient to support its conclusion that reunifications efforts should cease. We vacate and remand for the trial court to make additional evidentiary findings. In the event the trial court on remand again determines that reunification efforts should cease, the court is directed to make additional findings in support of that determination. On remand, "[w]e leave to the discretion of the trial court whether to hear additional evidence." *In re F.G.J.*, *M.G.J.*, 200 N.C. App. 681, 695, 684 S.E.2d 745, 755 (2009).

VACATED AND REMANDED.

Judges DIETZ and TYSON concur.

2. Patty additionally argues, "The trial court lacked competent evidence to conclude that [Patty's] visitation with the minor children required supervision." However, Patty cites to no authority in support of this contention and therefore has abandoned the issue on appeal. N.C. R. App. P. 28(b)(6).

CLIFFORD PRESS, AS AUTHORIZED REPRESENTATIVE OF THE FRACTIONAL OWNERS OF THAT CERTAIN AIRCRAFT BEARING TAIL NUMBER N132SL; AIRCRAFT VENTURES, LLC; ROBERT BURT; LYNN C. BURT; CORPORATE HEALTH PLANS OF AMERICA, INC.; GREENSPRING ASSOCIATES, LLC III; HEELBUSTER, LLC; INTERNATIONAL REAL ESTATE HOLDING COMPANY, LLC; M&T ENTERPRISE GROUP, LLC; MESQUITE AIR COMPANY, LLC; SAMOLOT, LLC; SUN FINANCIAL, LLC; TRIO TRAVEL, LLC; TUDOR COURT FARM, LLC; AND WALSH WILLETT AVIATION, LLC, PLAINTIFFS

v.

AGC AVIATION, LLC; ALTERNATIVE VENTURES, LLC; BEECHWOOD ASSOCIATES, LP; CATHERINE T. CALLENDER; DOUGLAS AND MAUREEN COHN; DMGAAIR LLC; FINS & FEATHERS, LLC; FRANKLIN RESEARCH GROUP, INC.; DAVID HAYES, JV PLANE PARTNERS LLC; MRS AIR LLC; N724DB LLC; NICK'S PLANE LLC; VERNON AND SHERIAN PLASKETT, AS TRUSTEES OF THE PLASKETT FAMILY TRUST; DAVID SCHULMAN; MICHAEL C. SLOCUM; TRAVIS PARTNERS, LLC; TRIAD FINANCIAL SERVICES, INC.; AND GREG WENDT, DEFENDANTS

No. COA17-9

Filed 7 August 2018

1. Contracts—language of contract—plain and unambiguous—no extrinsic evidence

In a dispute between fractional owners of airplanes concerning the ownership of certain airplane engines, the language in the agreements between the parties and the now-bankrupt aircraft fractional ownership company were plain and unambiguous, so plaintiff airplane owners were entitled to summary judgment on their claim for declaratory judgment, granting ownership to plaintiffs of the engines that were originally installed on defendant owners' airplane and later removed and installed on plaintiff owners' airplane.

2. Conversion—taking airplane engines—implementation of ownership program

In a dispute between fractional owners of airplanes concerning the ownership of certain airplane engines, the trial court did not err by dismissing defendant airplane owners' counterclaims for conversion, trespass to chattels, and unjust enrichment. The ownership program documents executed by the participant-owners authorized the now-bankrupt ownership company to swap parts between airplanes to maximize the efficiency of the program. Defendants made no showing that the removal of the engines from their airplane and installation on plaintiffs' airplane resulted from anything other than the implementation of the ownership program.

PRESS v. AGC AVIATION, LLC

[260 N.C. App. 556 (2018)]

Appeal by defendants from order entered 21 September 2016 by Judge Richard S. Gottlieb in Superior Court, Guilford County. Heard in the Court of Appeals 8 August 2017.

McGuireWoods LLP, by Brian Kahn, Terrence M. McKelvey, Robert A. Muckenfuss, and Joshua D. Whitlock, for plaintiffs-appellees.

Aero Law Center, by Jonathan A. Ewing, pro hac vice, and Smith, James, Rowlett & Cohen, by Seth R. Cohen, for defendants-appellants.

STROUD, Judge.

This case started when the music stopped, in an aviatic version of the game of musical chairs -- or musical engines -- Avantair was playing with its airplanes. The music stopped when Avantair was forced into bankruptcy, and at that moment, defendants' airplane had no engines, while plaintiffs' airplane had two engines that were originally on defendants' airplane. Plaintiffs filed this declaratory judgment action to resolve the parties' dispute over who gets to keep the engines. Because the controlling contracts allowed Avantair to play musical chairs, plaintiffs get to keep the engines, so we affirm the trial court's order granting summary judgment in plaintiffs' favor and denying defendants' request for summary judgment.

Background

Plaintiff Clifford Press is an authorized representative for the 14 other plaintiffs; the 15 plaintiffs are the fractional owners of a certain Piaggio Avanti P-180 aircraft ("Plaintiffs' Airplane").[1] The plaintiffs acquired their interests in Plaintiffs' Airplane by purchasing a fractional interest from Avantair, Inc. ("Avantair"), as part of its "Fractional Aircraft Ownership Program" ("the Avantair Program"). The plaintiffs were all parties to Ownership Agreements for their aircraft, although the individual plaintiffs each purchased their fractional interests in Plaintiffs' Airplane on different dates. Under the Avantair Program, each plaintiff was the owner of an undivided interest in Plaintiffs' Airplane, and

1. This aircraft was specifically identified in plaintiffs' Ownership Agreements "a Piaggio Avanti P-180, bearing tail number N132SL, together with engines, components, accessories, parts, equipment and documentation installed thereon or attached thereto or otherwise pertaining thereto." For ease of reading, we will simply call it "Plaintiffs' Airplane."

the plaintiffs were registered with the Federal Aviation Administration ("FAA") as the owners.

Defendants are the fractional owners of another airplane, a Piaggo P-180 aircraft bearing the tail number N106SL ("Defendants' Airplane"). Defendants each purchased fractional interests in Defendants' Airplane from Avantair in the same manner and under the same terms as plaintiffs did for Plaintiffs' Airplane.

Plaintiffs and defendants participated in the Avantair Program. The parties all signed and "executed in substantially the same form and substance" an Aircraft Interest Purchase Agreement ("Purchase Agreement") and a Management & Dry Lease Exchange Agreement (the "MDLA") with Avantair. Under the MDLA, Avantair was engaged as the "Manager" of the Avantair Program. Avantair leased both Plaintiffs' and Defendants' Airplanes (as well as other airplanes owned by other owners) from their respective owners and was obligated to "provide or procure certain administrative and aviation support services with respect to each Program Aircraft, including, without limitation, scheduling, maintenance, insurance, record keeping, flight crew training and scheduling, and fuel for or with respect to any Program Aircraft."

In *In re Avantair, Inc.*, 638 F. App'x 970, 2016 U.S. App. LEXIS 1758 (11th Cir. 2016) (unpublished) (*per curiam*), the Eleventh Circuit explained what happened next:

> When Avantair began experiencing financial troubles, the quality of its maintenance operations took a nose dive. To keep as many planes as possible flying, Avantair cannibalized parts from other planes in the fleet, effectively grounding the donor planes. In addition, Avantair failed to keep adequate safety records of the part transfers. When the Federal Aviation Administration caught wind of Avantair's activities, it grounded Avantair's fleet, forcing the company to cease operations and eventually enter bankruptcy.

Id. at 971, 2016 U.S. App. LEXIS 1758 at *3.

On 25 July 2013, creditors forced Avantair into involuntary Chapter 7 bankruptcy, which was still pending in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division when this declaratory judgment action was filed.[2] During the bankruptcy proceedings,

2. On 3 November 2014, the bankruptcy court granted plaintiffs relief from automatic stay and allowed them to proceed with this action.

the parties learned that Avantair had removed the engines originally installed on Defendants' Airplane and installed those engines on Plaintiffs' Airplane, leaving Defendants' Airplane with no engines as of the bankruptcy.[3] A dispute developed between plaintiffs and defendants regarding the ownership of the engines. Defendants claimed that they never consented to the removal of the engines from Defendants' Airplane and that plaintiffs had no ownership interest in the engines, so plaintiffs should return the engines to defendants.

The specific engines installed as original equipment as of 2003 on Defendants' Airplane bore serial numbers PCE-RK0088 on Engine A and PCE-RK0087 on Engine B[4]. In addition, maintenance records for Defendants' Airplane showed both Engines A and B were removed in 2007 to be overhauled because they had used up almost all of the flying hours allowed by FAA regulations. In November 2007, the refurbished Engine A was installed on one Avantair Program aircraft and refurbished Engine B was installed on another; the engines were not on either Plaintiffs' Airplane or Defendants' Airplane. The engines were again removed and refurbished in 2011, and both Engines A and B were installed on Plaintiffs' Airplane in February 2012.

On 4 November 2014, plaintiffs filed a complaint seeking a "declaratory judgment pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, . . . granting them possession of, control over, and marketable title to [Plaintiffs' Airplane][.]" In the alternative, plaintiffs sought "a declaration, pursuant to the Court's equitable power to quiet title to personal property, granting them possession of, control over, and marketable title to [Plaintiffs' Airplane]." Defendants filed an amended counterclaim on 20 May 2016 for conversion, trespass to chattel, and unjust enrichment, to which plaintiffs filed an answer on 31 May 2016.

On or about 24 June 2016, plaintiffs moved for summary judgment, arguing the court should enter a declaratory judgment that plaintiffs "are entitled to possession and control of, and marketable title to [Plaintiffs' Airplane], including all engines presently affixed to the aircraft[,]" and should dismiss defendants' counterclaims. Plaintiffs asserted there was no genuine issue of material fact and that they are entitled to judgment as a matter of law both on their affirmative claim and on defendants' counterclaims.

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3 Defendants' Airplane's original engines had been removed in 2007 to be overhauled, so those specific engines were not installed on Defendants' Airplane as of the dates on which some of the defendants purchased their fractional interests.

4 We will refer to the engines as Engine A and Engine B for ease of reading.

Defendants also moved for summary judgment on 24 June 2016 with an incorporated memorandum. Defendants alleged there were no genuine issues of material fact and requested that the court deny the relief sought by plaintiffs and enter summary judgment for defendants on their claims for conversion, trespass to chattel, and unjust enrichment, and that the court require plaintiffs to return the engines to defendants. Defendants argued that they were the owners of Engines A and B and that they had not transferred ownership rights to plaintiffs. A series of responses and replies ensued.

The trial court held a hearing on 2 September 2016 on the parties' cross-motions for summary judgment. Following the hearing, the trial court entered its Order on Cross-Motions for Summary Judgment on 21 September 2016. In the order, the court concluded:

> 1. The parties agree, and there is no issue of fact, that the operative documents between parties and Avantair, Inc. are identical in substance.
>
> 2. The language and terms of the Management & Dry Lease Exchange Agreement and the Aircraft Interest Purchase Agreement (collectively, the "Agreements") is plain and unambiguous. The effect to be given unambiguous language in a contract is a question of law for the Court. . . .
>
> 3. Based on the plain and unambiguous language of the Agreements, Plaintiff is entitled to Summary Judgment on its claim for declaratory judgment and Plaintiff is entitled to summary judgment as against Defendants' counter-claims.
>
> 4. Having concluded that the language of the Agreements is unambiguous, the Court need not consider extrinsic evidence of the parties' intent offered by each party; however, even if the Court were to conclude the Agreements were ambiguous and therefore consider competent extrinsic evidence of the parties' intent beyond the language of the Agreements, the Court concludes that the undisputed facts from such extrinsic evidence before the Court establishes that there is no genuine issue of material fact, and Plaintiffs would be entitled to Summary Judgment as a matter of law as to its claim for declaratory judgment and as against Defendants' counter-claims.

(Citations omitted).

The trial court granted plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment, dismissed defendants' counterclaims with prejudice, and concluded that defendants "have no claim to the engines currently attached to [Plaintiffs' Airplane] and Plaintiffs are entitled to possession and control of, and marketable title to, [Plaintiffs' Airplane], including all engines presently affixed to the aircraft." Defendants timely appealed to this Court.

Discussion

On appeal, defendants contend that the trial court erred in granting plaintiffs' motion for summary judgment and denying defendants' summary judgment motion. For the reasons that follow, we disagree.

I. Standard of Review

Defendants have appealed from the trial court's order granting summary judgment for plaintiffs, so we review the trial court's determination *de novo*:

> The standard of review for an order of summary judgment is firmly established in this state. We review a trial court's order granting or denying summary judgment de novo. Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law. All facts asserted by the adverse party are taken as true, and their inferences must be viewed in the light most favorable to that party.

Variety Wholesalers, Inc. v. Salem Logistics Traffic Servs., LLC, 365 N.C. 520, 523, 723 S.E.2d 744, 747 (2012) (citations and quotation marks omitted).

The issues here arise from interpretation of the various agreements entered into by the parties with Avantair. All of the documents regarding the Avantair Program designate Florida law as the governing law for interpretation of the documents. For example, the MDLA includes this provision: "Governing Law and Venue. The Program Documents shall be interpreted and governed by the laws of the State of Florida, without regard to its conflict of laws principles." Even though the parties have not mentioned Florida law, under N.C. Gen. Stat. § 8-4 (2017) we must take judicial notice of Florida law and use Florida law to resolve any substantive issues:

> [T]he contracts expressly provided that "this contract shall be construed according to the laws of the Commonwealth of Virginia." We, therefore, hold that the substantive issues in the present case are to be resolved under the law of Virginia, of which we are required to take judicial notice by G.S. 8-4. North Carolina law, however, governs the procedural matters.

Tanglewood Land Co. v. Wood, 40 N.C. App. 133, 137, 252 S.E.2d 546, 550 (1979) (citation omitted). *See also Arnold v. Charles Enterprises*, 264 N.C. 92, 96, 141 S.E.2d 14, 17 (1965) ("Throughout, neither party has made any reference to the law of New York or that of Virginia, yet we are required to take judicial notice of foreign law. G.S. § 8-4."). Florida's rules of contract interpretation are essentially the same as North Carolina's, but since the controlling Avantair Program documents are entered under and to be interpreted under Florida law, we will use Florida law.

Just as in North Carolina, under Florida law, we consider questions of contract interpretation *de novo*. *SCG Harbourwood, LLC v. Hanyan*, 93 So. 3d 1197, 1200 (Fla. Dist. Ct. App. 2012) ("We may consider de novo whether contract terms are unambiguous.").

> Contract interpretation begins with a review of the plain language of the agreement because the contract language is the best evidence of the parties' intent at the time of the execution of the contract. In construing the language of a contract, courts are to be mindful that "the goal is to arrive at a reasonable interpretation of the text of the entire agreement to accomplish its stated meaning and purpose."
>
> When the terms of a contract are ambiguous, parol evidence is admissible to explain, clarify or elucidate the ambiguous terms. However, a trial court should not admit parol evidence until it first determines that the terms of a contract are ambiguous. If parol evidence is properly admitted and the parties submit contradictory evidence regarding their intent, then the trial court's factual findings regarding the parties' intent are reviewed for competent, substantial evidence.

Taylor v. Taylor, 1 So. 3d 348, 350-51 (Fla. Dist. Ct. App. 2009) (citations and quotation marks omitted).

> It is never the role of a trial court to rewrite a contract to make it more reasonable for one of the parties

> or to relieve a party from what turns out to be a bad bargain. A fundamental tenet of contract law is that parties are free to contract, even when one side negotiates a harsh bargain.

Barakat v. Broward Cnty. Hous. Auth., 771 So. 2d 1193, 1195 (Fla. Dis. Ct. App. 2000) (citations omitted).

II. Language of the Subject Agreements: Plain and Unambiguous

[1] Defendants first argue that the language in the subject agreements was "not unambiguous," so the trial court erred in granting summary judgment because extrinsic evidence must be used to show the intent of the parties and this presents a jury question.

> An interpretation of a contract which gives a reasonable, lawful and effective meaning to all of the terms is preferred to an interpretation which leaves a part unreasonable, unlawful or of no effect. Furthermore, a contract's language is ambiguous only if it is susceptible to more than one reasonable interpretation. A true ambiguity does not exist in a contract merely because the contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible.

Nabbie v. Orlando Outlet Owner, LLC, 237 So. 3d 463, 466-67, 2018 Fla. App. LEXIS 2023, at *5-6 (Fla. Dis. Ct. App. 2018) (citations, quotation marks, and brackets omitted).

Extrinsic evidence may be considered only if the contract terms are ambiguous.

> Florida courts have consistently declined to allow the introduction of extrinsic evidence to construe such an ambiguity because to do so would allow a trial court to rewrite a contract with respect to a matter the parties clearly contemplated when they drew their agreement. The end result would be to give a trial court free reign to modify a contract by supplying information the contracting parties did not choose to include.
>
> Indeed, the Supreme Court put it more bluntly in *Hamilton Constr. Co. v. Bd. of Pub. Instruction of Dade Cty.*, 65 So.2d 729, 731 (Fla. 1953): The parties selected the language of the contract. Finding it to be clear and

> unambiguous, we have no right -- nor did the lower court -- to give it a meaning other than that expressed in it. To hold otherwise would be to do violence to the most fundamental principle of contracts.

Clayton v. Poggendorf, __ So. 3d __, __, 2018 WL 992316, at *4-5 (Fla. Dist. Ct. App. Feb. 21, 2018) (No. 4D17-488) (citation and quotation marks omitted).

Defendants argue that the subject agreements are not "plain and unambiguous" because the agreements "do not clearly and unambiguously state that ownership of the subject engines is transferred upon affixation to another owners' aircraft." (All caps in original). Defendants argue that

> The plain reading of paragraph 7 allows the Manager (of the now defunct Avantair) to "upgrade, alter, or modify" to comply with FAA regulations, and provide for consistency among the Program aircraft. "At the owner's expense," at the very least, implies that the Manager would need to purchase "new" parts to replace the ones that needed to be replaced, or repair what needed to be repaired and the owner would be responsible for the cost of doing so, which would logically be . . . for the benefit of the owner. It does not provide Avantair with an authorization to "cannibalize" parts from one aircraft, and install them onto another aircraft and then call it theirs.

We first note that defendants do not argue that the agreements are ambiguous, but instead that they are "not plain and unambiguous." In addition, "[a] true ambiguity does not exist in a contract merely because the contract can possibly be interpreted in more than one manner. Indeed, fanciful, inconsistent, and absurd interpretations of plain language are always possible." *Id.* at 467, 2018 Fla. App. LEXIS 2023 at *6 (citation, quotation marks, and brackets omitted). Defendant's double negative argument -- "not unambiguous" -- could be read as an argument that the agreements *are* ambiguous, so we will address it on that basis. But their argument is only that the agreements do not "state" that engines can be removed from one Avantair Program aircraft and installed on another. That is not so much an ambiguity but a lack of specificity -- or omission of a term that could have been included, but was not. Defendants focus on the phrase "at the Owner's expense" and interpret it to mean that new parts must always be purchased to replace old parts, including engines. But we may "not read a single term or group

of words in isolation." *Am. K–9 Detection Servs., Inc. v. Cicero*, 100 So. 3d 236, 238 (Fla. Dis. Ct. App. 2012). Defendants' interpretation of "at the Owner's expense" is not convincing, particularly since airplane maintenance involves much more than purchasing new parts. And under the MDLA, owners must pay for all maintenance, upgrades, alterations, or modifications. Defendants' argument also ignores the other provisions of the MDLA and the requirements of the FAA specifically referenced by the subject agreements. We must consider the agreements as a whole.

As noted above, the parties in the Avantair Program were subject to a variety of agreements -- Ownership Agreements, Purchase Agreements, and the MDLA. The Ownership Agreements "set forth [the Owners] understanding and agreement as to Interests and the ownership of the Aircraft." The purpose of the Ownership Agreements was to "set forth the agreement of the Owners regarding the management of the Aircraft[.]" The parties were also subject to the MDLA, which sets forth the terms for use of the Avantair Program aircraft and includes a section entitled "Covenants, Representations and Warranties of Manager;" Avantair was the Manager. The MDLA includes several relevant provisions regarding maintenance of the Avantair Program aircraft:

> 2. Maintenance. Manager shall (i) maintain the airworthiness certification of the Aircraft in good standing, (ii) arrange for the inspection, maintenance, repair and overhaul of the Aircraft in accordance with maintenance programs and standards established by the manufacturer of the Aircraft and approved by the FAA, (iii) keep the Aircraft in good operating condition, and (iv) maintain the cosmetic appearance of the Aircraft in a similar condition, except for ordinary wear and tear, as when delivered to the Owner. Manager agrees to maintain the enrollment of the specified engines in an FAA approved engine program.
>
> . . . .
>
> 7. Aircraft Modifications. Manager may, in its sole discretion, at Owner's expense, upgrade, alter or modify the Aircraft to (i) comply with Manager's interpretations of FAR; (ii) be consistent with industry standards, (iii) comply with, or otherwise permit the Aircraft to be operated under FAR Part 135, (iv) maintain the marketability of the Aircraft, or (v) provide for consistency in equipment, accessories or parts with respect to the Aircraft and any other program Aircraft.

. . . .

> 9. Compliance of Program with FARs. Manager shall be responsible for ensuring that the Program conforms to all applicable requirements of the FAR.

Under these provisions, Avantair had to maintain all Avantair Program aircraft in accord with the Federal Aviation Regulations (FAR) and specifically, to operate the aircraft in compliance with FAR Part 135. FAR Part 135 is 14 CFR Part 135, entitled "OPERATING REQUIREMENTS: COMMUTER AND ON DEMAND OPERATIONS AND RULES GOVERNING PERSONS ON BOARD SUCH AIRCRAFT." Defendants do not dispute that the FAR require routine engine maintenance and after a certain number of flying hours, engines must be entirely overhauled. Although the Avantair Program documents do not have a definition of "maintenance," they require compliance with the FAR ("Manager shall be responsible for ensuring that the Program conforms to all applicable requirements of the FAR."). FAR Part 1 includes a definition of "maintenance:" "Maintenance means inspection, overhaul, repair, preservation, and the replacement of parts, but excludes preventive maintenance."[5] 14 CFR 1.1 - General definitions. Refurbishing an engine is "maintenance" under this definition.

On defendants' argument that the agreements require, or at least that the parties actually intended, that specific engines must remain on Defendants' Airplane, we note that the MDLA and Purchase Agreements for each airplane specifically identified the aircrafts only by the make, model, and tail number. The Ownership Agreements identified each aircraft by make, model, and tail number "together with engines, components, accessories, parts, equipment and documentation installed thereon or attached thereto or otherwise pertaining thereto (collectively, "the Aircraft")." None of the agreements mention any specific serial numbers or other identifying information for any engine or other component of Plaintiffs' and Defendants' Airplanes.

Defendants presented affidavits, including one from the Chief Operation Officer of Avantair which states his understanding of the Avantair Program documents. They argue that "the program documents did not allow for the transfer of ownership of any aircraft component parts." But because the documents are unambiguous, the trial court

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5. "Preventive maintenance means simple or minor preservation operations and the replacement of small standard parts not involving complex assembly operations." 14 CFR 1.1.

correctly did not consider extrinsic evidence of how various people interpreted the Avantair Program documents.

Defendants additionally argue that Section VI, Paragraph 7 of the MDLA regarding "Modifications" was not clear or unambiguous and that it did not include the right to swap engines, as done in the Avantair Program. Paragraph 7 allowed Avantair "in its sole discretion, [to] upgrade, alter or modify the Aircraft to (i) comply with Manager's interpretations of FAR; (ii) be consistent with industry standards, (iii) comply with or otherwise permit the Aircraft to be operated under FAR Part 135." We must read this provision of the MDLA in conjunction with other provisions of the agreement which required Avantair to "(i) maintain the airworthiness certification of the Aircraft in good standing, (ii) arrange for the inspection, maintenance, repair and overhaul of the Aircraft in accordance with maintenance programs and standards established by the manufacturer of the Aircraft and approved by the FAA." Defendants do not dispute that the engines must be removed from an airplane when they have depleted their allowed flying hours and the engines must be overhauled. When engines are removed for maintenance, Avantair could either leave an airplane with no engines or install other engines on the airplane so it could continue to be used. And the MDLA contemplated that the Avantair Program aircraft would be properly maintained and available for use; that was the purpose of the Avantair Program.

In addition, nothing in the MDLA or other Avantair Program documents requires that a particular engine must stay on a particular aircraft. The engines could have been identified by serial number in the Ownership Agreements, Purchase Agreements, or MDLA, but they were not. The dispute here arose only because at the moment of Avantair's bankruptcy, Defendants' Airplane had no engines. Defendants purchased their fractional interests at different times, between the years of 2004 and 2013, so different engines -- or even no engines -- were installed on Defendants' Airplane when some defendants actually acquired their interests in that aircraft. If the parts actually installed on Defendants' Airplane at the moment of purchase were required to stay the same, the defendants who acquired a fractional interest in Defendants' Airplane when it had no engines at all would, by this logic, not be entitled to re-installation of Engines A and B; they would be entitled only to an airplane with no engines.

Both parties cite *In re Avantair, Inc.*, an unpublished decision of the Eleventh Circuit Court of Appeals involving the same fractional-owner Avantair Program, where the Eleventh Circuit affirmed an order of the Bankruptcy Court that "concluded that the program documents

unambiguously designed a fractional-ownership program, with each shareholder necessarily owning a share of a specific plane." *In re Avantair, Inc.*, 638 Fed. Appx. at 972, 2016 U.S. App. LEXIS 1758 at *5 (emphasis added). In *In re Avantair, Inc.*, the proposed plan required that each Avantair Program aircraft be sold and the proceeds distributed to each plane's fractional owners. *Id.* at 971-72, 2016 U.S. App. LEXIS 1758 at *2-4. As in this case, some of the aircraft were operational and in good repair at the time of the bankruptcy, while others were missing parts and of greatly reduced value. *Id.*, 2016 U.S. App. LEXIS 1758 at *3-4. Some of the owners whose planes were missing parts at the time of the bankruptcy contended that all of the owners had an interest in all of the Avantair Program aircraft, so all of the planes should be sold and the total proceeds from all of the planes be distributed to all of the owners in accord with their fractional interests. *Id.* This manner of distribution would increase the value distributed to the owners whose planes lacked parts at the time of bankruptcy. *Id.* at 972, 2016 U.S. App. LEXIS 1758 at *4. The bankruptcy court rejected this argument, finding that the Avantair Program documents executed by the participant-owners -- exactly the same documents as in this case -- "authorized Avantair to swap parts between planes to maximize the efficiency of the program." *Id.*, 2016 U.S. App. LEXIS 1758 at *5. The Eleventh Circuit affirmed and found no error with the Bankruptcy Court's conclusion that "[t]o the extent that Avantair failed to replace parts or maintain the donor planes, . . . the owners of such planes have a claim against Avantair (or the estate) for breaching its obligations to replace parts or maintain the donor planes but . . . the authorized swapping of parts did not and could not commingle the participants' ownership interests." *Id.*

An unpublished opinion from the Eleventh Circuit has no precedential effect even in the Eleventh Circuit, nor is it binding authority over this Court. *See* Eleventh Circuit Rule 36-2, Unpublished Opinions ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority."); *Enoch v. Inman*, 164 N.C. App. 415, 420, 596 S.E.2d 361, 365 (2004)) ("[T]he North Carolina Supreme Court has . . . held that North Carolina appellate courts are not bound, as to matters of federal law, by decisions of federal courts other than the United States Supreme Court."). But *In re Avantair, Inc.* is helpful to our analysis. Defendants contend that it differs from this case because it involved the limited issue of how to distribute aircraft sale proceeds through bankruptcy, rather than the ownership of aircraft parts. Although the ultimate issue was not identical, as defendants claim in their brief on appeal, the Eleventh Circuit ultimately concluded that the subject Avantair Program documents "unambiguously designed a

fractional-ownership program, with each shareholder necessarily owning a share of a specific plane." *In re Avantair, Inc.*, 638 Fed. Appx. at 972, 2016 U.S. App. LEXIS 1758, at *5. And defendants further concede "the Bankruptcy Court found that, under certain circumstances, the program documents authorized Avantair to swap parts between planes to maximize the efficiency of the program[.]" The Eleventh Circuit's analysis of the Avantair Program documents is in accord with ours. The trial court correctly determined that the language and terms in the MDLA and Purchase Agreements "is plain and unambiguous" and that based on the subject agreements, plaintiffs are "entitled to Summary Judgment on [their] claim for declaratory judgment[.]"

Defendants next contend that the trial court should not have granted plaintiffs' summary judgment motion and denied defendants' motion, and argue that the court "also erred in determining that even if the language of the contract was ambiguous, the extrinsic evidence established there was no genuine issue of fact, and that Plaintiffs were entitled to judgment as a matter of law." As we have concluded that the trial court correctly determined that the contract was plain and unambiguous, we need not address this argument.

We hold that the trial court properly granted summary judgment for Plaintiffs based on the plain and unambiguous terms of the Avantair Program documents.

III. Counterclaims

[2] Defendants argue that the trial court erred in dismissing their counterclaims for conversion, trespass to chattels, and unjust enrichment. Although all these claims have slightly different elements, all require some form of unlawful or unauthorized taking of Engines A and B. Defendants argue that

> Avantair removed the original [Defendants' Airplane] engines without authorization, and affixed them to [plaintiffs'] aircraft as the company began to become insolvent, presumably in order to save costs. The transfer of possession was not subject to a sale or any form of consideration through Avantair's program documents. Those engines are the original component parts to the [Defendants' Airplane] aircraft belonging to [defendants].

Defendants also argue that "[a]s is the case with tires on an automobile, the original [Defendants' Airplane] engines did not become part of [Plaintiffs' Airplane] by virtue of their affixation thereto. In fact, aircraft

engines can be quickly removed and swapped, in order to avoid delay and prolonged grounding. They too are easily identifiable and serialized, and can be removed without damaging the donee aircraft." Their argument focuses on "ownership" of the engines as opposed to the ownership of the plane as a whole and contends that plaintiffs have done something wrongful or unjust by keeping the engines that had been on Defendants' Airplane.

According to defendants' argument, defendants own every part of Defendants' Airplane as it existed when it was originally acquired from the manufacturer by Avantair -- engines, tires, seats, cup holders, and everything else -- and each and every part that was on that plane must be returned to them because they own it. As the Eleventh Circuit noted in *Avantair*, defendants "invite[ ] us to resolve this variation on the Paradox of Theseus's Ship by answering a resounding 'yes' to [the question 'is your airplane now my airplane after my airplane's parts have been installed on yours?']"[6] *In re Avantair, Inc.*, 638 F. App'x at 971, 2016 U.S. App. LEXIS 1758 at *2. The Eleventh Circuit "decline[d the] invitation to drift into this philosophical turbulence," and so do we. *Id.* Whatever the answer to the Paradox of Theseus's Ship, the Avantair Program documents controlled the maintenance of the Avantair Program aircraft, so defendants have not shown that plaintiffs did anything unlawful, unauthorized, in bad faith, or inequitable by having the engines that had been on Defendants' Airplane at the moment Avantair was forced into bankruptcy. Avantair was performing its job as Manager -- perhaps poorly, since it led to bankruptcy -- in compliance with the Avantair Program documents by removing the engines from Defendants' Airplane for maintenance and by later installing them on Plaintiffs' Airplane. When bankruptcy was filed, the music stopped in Avantair's game of musical chairs -- or musical engines -- and defendants ended up without a chair. Defendants have not shown that plaintiffs acted in any way not authorized by the Avantair Program documents, so their counterclaims for conversion, trespass to chattels, and unjust enrichment must fail. The trial court did not err by denying defendants' motion for summary judgment and dismissing their counterclaims.

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6. The Paradox of Theseus's Ship was first described by Greek historian Plutarch: "The ship wherein Theseus and the youth of Athens returned from Crete had 30 oars, and was preserved by the Athenians down even to the time of Demetrius Phalereus, for they took away the old planks as they decayed, putting in new and stronger timber in their places, in so much that this ship became a standing example among the philosophers, for the logical question of things that grow; one side holding that the ship remained the same, and the other contending that it was not the same." Plutarch, Theseus, as translated by John Dryden.

Conclusion

We affirm the trial court's order granting summary judgment for plaintiffs and denying defendants' request for summary judgment.

AFFIRMED.

Judges BRYANT and CALABRIA concur.

STATE OF NORTH CAROLINA
v.
SAMUEL CALLEROS ALVAREZ

No. COA17-945

Filed 7 August 2018

Drugs—felony maintaining a vehicle—keeping or selling drugs—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the felony charge of maintaining a truck for the purpose of keeping or selling cocaine based on the totality of the circumstances, which included defendant's exclusive use of and control over the truck, that defendant constructed and knew about the false-bottomed compartment in the back of the truck in which law enforcement discovered one kilogram of cocaine, and that this was not an isolated incident.

Chief Judge McGEE dissenting.

Appeal by defendant from judgment entered 13 January 2017 by Judge Richard Kent Harrell in Lenoir County Superior Court. Heard in the Court of Appeals 5 March 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Anne Goco Kirby, for the State.

Anne Bleyman, for defendant-appellant.

CALABRIA, Judge.

Samuel Calleros Alvarez ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felony maintaining a vehicle for keeping or selling controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7) (2017). After careful review, we conclude that defendant received a fair trial, free from error.

I. Factual and Procedural Background

In January 2015, the Lenoir County Sheriff's Office ("LCSO") planned a controlled "buy-bust" after a confidential source informed Detective Sergeant Jovani Villagra that Miguel Goicochea-Medina was trying to sell a kilogram of cocaine. The informant placed a recorded phone call to Goicochea-Medina, who agreed to sell the informant one kilogram of cocaine for $41,500.00. The parties agreed to meet in the parking lot of a Walmart in Kinston, North Carolina, on 23 January 2015 to conduct the transaction.

On 23 January 2015, Sergeant Villagra and the confidential informant drove separately to the Walmart parking lot and waited for Goicochea-Medina to arrive. At approximately 4:00 p.m., Goicochea-Medina and defendant arrived together in a white Nissan pickup truck. Although Goicochea-Medina was driving, the vehicle was registered to defendant's wife, and defendant used the truck in his work as a carpenter. Upon their arrival, both men exited the truck. After Sergeant Villagra repeatedly requested to see "the product," Goicochea-Medina deferred to defendant, who informed him that "it was in the back of the pickup truck in a compartment." Sergeant Villagra continued to press the men to produce the cocaine. He told the men that he had the $41,500.00 and showed them a cooler full of cash. Defendant responded that they needed "to go to the house" in order to unload the truck and access the cocaine, because he did not want to do it in the Walmart parking lot. Sergeant Villagra instructed the men to follow him, and then exited the parking lot in his vehicle. Goicochea-Medina followed Sergeant Villagra in the pickup truck, and defendant opted to ride with the confidential informant.

While the men were en route to "the house," LCSO officers stopped the pickup truck and placed defendant and Goicochea-Medina under arrest. When a canine unit alerted to the presence of drugs, officers searched the bed of the truck. The truck contained a large quantity of tools and was outfitted with wooden flooring, drawers, compartments, and paneling. Underneath the tools, the officers discovered a small, covered compartment in the far left corner of the floor, near the cab. After uncovering the compartment's false bottom, the officers discovered one kilogram of cocaine wrapped in plastic and oil.

Defendant was subsequently indicted for trafficking in cocaine by possession of 400 grams or more; trafficking in cocaine by delivery; trafficking in cocaine by transportation; conspiracy to traffic by possessing, transporting, selling, or delivering more than 400 grams of cocaine; and felony maintaining a vehicle for keeping or selling controlled substances. On 9 January 2017, a jury trial commenced in Lenoir County Superior Court. Defendant moved to dismiss all charges at the close of the State's evidence, and he renewed the motion following his own presentation of evidence. The trial court denied defendant's motions to dismiss, but ruled that trafficking in cocaine by delivery would be submitted to the jury as an attempt charge. On 13 January 2017, the jury found defendant guilty of all charges except attempted trafficking in cocaine by delivery. The trial court sentenced defendant to 175 to 222 months in the custody of the North Carolina Division of Adult Correction and ordered him to pay a $250,000.00 fine.

Defendant appeals.

II. Motion to Dismiss

Defendant's sole argument on appeal is that the trial court erred by denying his motion to dismiss the charge of felony maintaining a vehicle for keeping or selling controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7). Specifically, defendant contends that the State presented insufficient evidence that he kept or maintained his pickup truck "over a duration of time" for the purpose of keeping or selling cocaine. We disagree.

A. Standard of Review

In reviewing a criminal 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).

"The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both." *Fritsch*, 351 N.C. at 379, 526 S.E.2d at 455.

> 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.

Id. (citation and quotation marks omitted). We review the trial court's denial of a criminal defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

B. Discussion

N.C. Gen. Stat. § 90-108(a)(7) makes it unlawful for any person

> [t]o knowingly keep or maintain any store, shop, warehouse, dwelling house, building, vehicle, boat, aircraft, or any place whatever, which is resorted to by persons using controlled substances in violation of [the North Carolina Controlled Substances Act] for the purposes of using such substances, or which is used for the keeping or selling of the same in violation of [the North Carolina Controlled Substances Act].

By its plain language, N.C. Gen. Stat. § 90-108(a)(7) provides "two theories under which the State may prosecute a defendant . . . ." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). In the instant case, the State prosecuted defendant under the second theory, which requires proof "that the defendant did (1) knowingly (2) keep or maintain (3) a vehicle (4) which is used for the keeping or selling (5) of controlled substances." *Id.*

N.C. Gen. Stat. § 90-108(a)(7) "does not prohibit the mere temporary possession of [a controlled substance] within a vehicle." *Id.* at 32-33, 442 S.E.2d at 30. The word "keep" "denotes not just possession, but possession that occurs over a duration of time." *Id.* at 32, 442 S.E.2d at 30; *see also id.* at 32, 442 S.E.2d at 29-30 (noting various definitions of the word "keep," including: "to have or retain in one's power or possession"; "not to lose or part with"; "to preserve or retain"; and "to maintain continuously and methodically" (alterations and citation omitted)).

"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. In making this determination, courts consider a variety of factors, including occupancy of the property; possession over a duration of time; the presence of large amounts of cash or drug paraphernalia; and the defendant's admission to selling controlled substances. *State v. Frazier*, 142 N.C. App. 361, 365, 366, 542 S.E.2d 682, 686 (2001). No factor is dispositive. *Id.* However, "[t]he focus of the inquiry is on the *use*, not the contents, of the vehicle." *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30. "Although the contents of a vehicle are clearly relevant in determining its use, its contents are not dispositive when . . . they do not establish that the use of the vehicle was a prohibited one." *Id.*

On appeal, defendant contends that the State presented insufficient evidence that he kept or maintained his truck "over a duration of time" for the purpose of keeping or selling cocaine. We disagree.

It is true that much of our case law interpreting N.C. Gen. Stat. § 90-108(a)(7) has turned on similar arguments. *E.g.*, *id.* at 32-33, 442 S.E.2d at 30; *State v. Dunston*, __ N.C. App. __, __, 806 S.E.2d 697, 699 (2017) (rejecting the defendant's argument 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"), *aff'd per curiam*, __ N.C. __, 813 S.E.2d 218 (2018). Nevertheless, "[t]he totality of the circumstances controls, and whether there is sufficient evidence of the 'keeping or maintaining' element depends on several factors, *none of which is dispositive*." *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (emphasis added), *disc. review denied*, 364 N.C. 619, 705 S.E.2d 360 (2010).

In the instant case, the totality of the circumstances supports a reasonable inference that defendant knowingly kept or maintained the truck for the purpose of keeping or selling cocaine. Although the vehicle was registered in his wife's name, defendant described it as "[his] truck." Defendant admitted that it was his work vehicle, that no other party used it, and that he built the wooden drawers and compartments located in the back of the cab. In conducting a lawful search of the vehicle, LCSO officers discovered a false-bottomed compartment on the truck bed floor, hidden underneath "a bunch of tools." Except for a small hole in the center of the plywood, the compartment's concealed lid "looked just like a regular bottom." Underneath the false bottom, officers discovered a four- to six-inch "void" containing one kilogram of cocaine.

The cocaine was wrapped in plastic and oil to evade detection by canine units.

Defendant does not challenge the sufficiency of the evidence supporting his various trafficking convictions arising from this incident. Moreover, substantial evidence supports that defendant knowingly participated in the transaction in the Walmart parking lot immediately prior to his arrest, and that this was not an isolated incident. After Sergeant Villagra asked to see "the product," Goicochea-Medina deferred to defendant, who indicated that the cocaine was in a compartment in the back of the truck. Sergeant Villagra showed the men a cooler full of cash and told them that "next time [he] want[ed] a cheaper price" than $41,500.00. However, defendant refused to produce the cocaine in the Walmart parking lot. At trial, the State presented an audio recording of the transaction in which defendant repeatedly insisted that they "go to the house" to unload the truck. The confidential informant testified that, on the way to "the house," defendant questioned him about his prior experiences with Sergeant Villagra and indicated that they could continue selling drugs together "if everything worked out well[.]"

Taken in the light most favorable to the State, the evidence showed, generally, that defendant exercised regular and continuous control over the truck; that he constructed and knew about the false-bottomed compartment in which one kilogram of cocaine—an amount consistent with trafficking, not personal use— was discovered on 23 January 2015; that he was aware that cocaine was hidden in his truck and willingly participated in the transaction in the Walmart parking lot; and that he held himself out as responsible for the ongoing distribution of drugs like those discovered in the truck. *Cf. Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30 ("The evidence, including defendant's actions, the contents of his car, and the contents of his home, are entirely consistent with drug use, or with the sale of drugs generally, but they do not implicate the car with the sale of drugs.").

This evidence is sufficient for a reasonable juror to infer, from the totality of the circumstances, that defendant knowingly kept or maintained the pickup truck for the purpose of keeping or selling cocaine. Therefore, the trial court did not err by denying defendant's motion to dismiss the charge of felony maintaining a vehicle for keeping or selling controlled substances pursuant to N.C. Gen. Stat. § 90-108(a)(7).

NO ERROR.

Judge MURPHY concurs.

Chief Judge McGEE dissents by separate opinion.

McGEE, Chief Judge, dissenting.

I respectfully dissent and would reverse the trial court's denial of Defendant's motion to dismiss and vacate Defendant's conviction pursuant to N.C. Gen. Stat. § 90-108(a)(7) (2017).

N.C.G.S. § 90-108(a)(7) states that it is unlawful to "knowingly keep or maintain any . . . vehicle . . . for the keeping or selling of [controlled substances.]" Under this provision, the State must prove "that the defendant did (1) knowingly (2) keep or maintain (3) a vehicle (4) which is used for the keeping or selling ([5]) of controlled substances." *State v. Mitchell*, 336 N.C. 22, 31, 442 S.E.2d 24, 29 (1994). Our Supreme Court held in *Mitchell* that:

> The word "keep" is variously defined as follows: "[to] have or retain in one's power or possession; not to lose or part with; to preserve or retain . . . . To maintain continuously and methodically . . . . To maintain continuously and without stoppage or variation . . . [; t]o take care of and to preserve . . . ." "Keep" therefore denotes not just possession, but possession that occurs *over a duration of time*. By its plain meaning, therefore, this statute does not prohibit the mere temporary possession of marijuana within a vehicle. . . . That an individual within a vehicle possesses marijuana on one occasion *cannot* establish that the vehicle is "used for keeping" marijuana[.]

Id. at 32-33, 442 S.E.2d at 29-30 (internal citation omitted) (emphasis added).

In *State v. Dunston*, ___ N.C. App. ___, 806 S.E.2d 697 (2017), *aff'd per curiam*, ___ N.C. ___, 813 S.E.2d 218 (2018), this Court rejected the defendant's argument 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." *Dunston*, ___N.C. App. at ___, 806 S.E.2d at 699. Instead, this Court held that "[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." *Id.* (citing *Mitchell*, 336 N.C. at 34, 442 S.E.2d at 30).

Under the totality of the circumstances in this case, there was insufficient evidence that Defendant kept or maintained his vehicle over a

duration of time to keep or sell controlled substances. This Court has looked at a variety of factors to determine whether a defendant was keeping or maintaining their vehicle for the purpose of keeping or selling a controlled substance. *See State v. Rogers*, ___ N.C. App. ___, 796 S.E.2d 91 (2017) (amount of time the defendant was in control of the vehicle, ownership of the vehicle); *Dunston*, ___ N.C. App. ___, 806 S.E.2d 697 (location of vehicle, quantity of controlled substances, drug paraphernalia consistent with the sale of controlled substances, amount of money in the car); *State v. Rousseau*, ___ N.C. App. ___, 793 S.E.2d 292 (2016) (unpublished) *aff'd per curiam*, 370 N.C. 268, 805 S.E.2d 678 (2017) (location of the drugs within the vehicle, presence of drug remnants within the vehicle). No single factor is dispositive of the issue. *State v. Hudson*, 206 N.C. App. 482, 492, 696 S.E.2d 577, 584 (2010).

In the case before us, the evidence at trial showed Defendant knew the location of the cocaine within the truck, the cocaine was hidden within a compartment in the bed of Defendant's work truck, and the cocaine was wrapped in plastic and coated in oil. While this evidence was sufficient to show Defendant engaged in this sale of drugs, there was insufficient evidence presented that Defendant was keeping or maintaining the vehicle for that purpose "over a duration of time" as required by *Mitchell*. *Mitchell*, 336 N.C. at 32, 442 S.E.2d at 30. *See State v. Rogers*, ___ N.C. App. ___, 796 S.E.2d 91 (2017) (reversing the denial of a motion to dismiss where the defendant maintained possession of vehicle for one-and-a-half hours prior to arrest and there was no evidence showing that the defendant had used the vehicle to keep or sell controlled substances on prior occasions). In the present case, Defendant was not in control of the vehicle at the time of the attempted drug sale. The kilogram of cocaine was in a single package, rather than a size typical of individual sales. There was no testimony that Defendant's vehicle contained any other items associated with the sale of drugs, nor contained a significant amount of money.

The majority states that Defendant "held himself out as responsible for the ongoing distribution of drugs[.]" However, the only evidence presented supporting that assertion was testimony from the confidential informant stating Defendant said during the drug sale that "if everything worked out well we could keep working together." While this statement might support that Defendant had the intent to possibly keep or maintain the vehicle for the purpose of selling drugs in the future, Defendant's statement was conditional and does not support that he was doing so at the time of his arrest. The evidence presented does no more than raise "suspicion or conjecture" that Defendant was "keeping or maintaining"

the vehicle for the purpose of keeping or selling drugs. *State v. Alston*, 310 N.C. 399, 404, 213 S.E.2d 470, 473 (1984) ("If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the perpetrator, the motion to dismiss should be allowed."). Because the State failed to meet its burden, Defendant's motion to dismiss should have been granted.

STATE OF NORTH CAROLINA
v.
MARLON LOUIS BARTLETT

No. COA17-1178

Filed 7 August 2018

1. Search and Seizure—consensual search—coercive environment—race

Defendant's consent to a pat-down search following a traffic stop, which revealed heroin, was voluntary where defendant gave the officer permission to search. Although defendant contended that he consented only in acquiescence to a coercive environment in which his race was a factor, there was no showing in this case that defendant's consent was involuntary other than studies indicating that any police request to search will be seen by people of color as an unequivocal demand to search to be disobeyed only at significant risk. The totality of the circumstances showed that defendant consented freely and voluntarily and not just to avoid retribution.

2. Search and Seizure—scope of consent—pat down—genitalia

A pat-down of defendant's groin, which revealed heroin, was constitutionally tolerable pursuant to his consent to a search of his person following a traffic stop. A reasonable person in defendant's circumstances would have understood the consent to include the sort of limited outer pat-down performed in this case.

3. Search and Seizure—seizure—detention continued after pat-down—plain feel doctrine

An officer at a traffic stop had a reasonable suspicion to detain defendant further under the totality of the circumstances after a pat-down revealed "obvious contraband" concealed inside defendant's clothes.

4. Constitutional Law—Miranda warning—traffic stop—pat-down —question concerning object in clothes

Evidence seized at a traffic stop after a pat-down and a question about the contents of defendant's underwear but before defendant was given a *Miranda* warning did not need to be suppressed where there was no evidence to suggest that defendant had been coerced when he gave his consent to the search.

Appeal by defendant from order entered 14 March 2014 by Judge Susan E. Bray in Guilford County Superior Court. Heard in the Court of Appeals 2 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General David L. Gore, III, for the State.

Warren D. Hynson for defendant-appellant.

ZACHARY, Judge.

Defendant Marlon Louis Bartlett appeals from the trial court's order denying his Motion to Suppress. For the reasons contained herein, we affirm.

Background

Defendant was indicted for two counts of trafficking heroin following a search of his person during a traffic stop. Defendant moved to suppress the heroin on the grounds that it was obtained as the result of an unlawful search, which the trial court denied. The facts pertaining to the search are largely undisputed:

On 30 May 2013, Officer McPhatter, a tactical narcotics officer with the Greensboro Police Department, was patrolling the High Point Road area in an unmarked vehicle. Officer McPhatter noticed a Lincoln sedan weaving in and out of heavy traffic at a high rate of speed, nearly causing multiple collisions. The Lincoln then pulled into a Sonic Drive-In parking lot next to an unoccupied Honda.

Officer McPhatter continued surveilling the Lincoln. Defendant, who was riding in the back passenger seat, exited the Lincoln and approached the Honda. Defendant placed his hand inside the passenger window of the Honda, though Officer McPhatter could not discern whether Defendant took anything from the car. The driver of the Honda appeared and spoke with Defendant for a few seconds. Defendant then

returned to the Lincoln, and he and the other occupants drove away. No one in the Lincoln had ordered any food. Based on his roughly eighteen months of working as a tactical narcotics officer and having observed over 200 drug deals, Officer McPhatter concluded that Defendant had just participated in a drug transaction.

While other officers in the unit watched, the Lincoln next proceeded to a Shell gas station. Officer Randazzo radioed that the Lincoln continued to be driven in a careless and reckless manner, at an estimated fifteen miles per hour over the speed limit. After leaving the Shell gas station, Officer McPhatter stopped the Lincoln for reckless driving and speeding. Officers Randazzo, Farrish, Hinkle, and Hairston also participated in the stop. All five officers were in full uniform as they approached the Lincoln.

Officer McPhatter approached the passenger's side of the vehicle while Officer Hairston and Officer Farrish approached the driver's side. As he neared the vehicle, Officer McPhatter noticed Defendant reach toward the floorboard. Because he did not know whether Defendant had a weapon or was attempting to conceal contraband underneath the seat, Officer McPhatter asked Defendant to show his hands. Defendant raised his hands, which were daubed with a light pink substance that Defendant stated was fabric softener. Officer McPhatter ordered Defendant out of the vehicle and asked Defendant "if he was attempting to conceal something inside the vehicle or on his person." Defendant told Officer McPhatter "that was not the case and that he did not have anything illegal on his person." Officer McPhatter testified that "At that time I asked [Defendant] for consent to search his person, which he granted me by stating, Go ahead." However, Defendant testified that he never gave Officer McPhatter permission to conduct a search.

Officer McPhatter testified that when he proceeded to pat Defendant down, "I noticed a large—a normal—larger than normal bulge near the groin area that's not consistent with like male parts." Officer McPhatter detained Defendant in handcuffs at that point because "It was obvious to me in that he had some kind of contraband on his person." Officer McPhatter "asked [Defendant] if he had anything inside his underwear," and Defendant said that he did. Officer McPhatter then asked Defendant "if he'd retrieve—retrieve the item for me and he told me that he would do so." Officer McPhatter removed the handcuffs from Defendant, and Defendant reached into his pants and produced a single plastic bag containing heroin. Defendant was placed under arrest. Officer McPhatter testified that "maybe five minutes" had passed from the time he pulled

the Lincoln over to the time Defendant pulled the bag of heroin out of his underwear.

After hearing Defendant's Motion to Suppress, the trial court adopted Officer McPhatter's version of events and found that Defendant had consented to the search. The trial court denied Defendant's Motion to Suppress, reasoning:

> Officer McPhatter had reasonable suspicion to stop the Lincoln for the traffic offenses observed. He had reason to ask Defendant to show his hands (for officer safety) after he observed Defendant reach toward [the] floorboard. He had reason to inquire about whether Defendant was trying to conceal anything or had anything illegal (based on movement in car and what he observed at Sonic with Honda). Defendant gave him permission to search. Even if he hadn't, officer was justified in patting Defendant down (frisk for weapons). And once he observed the bulge in Defendant's groin, he was justified in asking him about it and searching further.

Defendant thereafter pleaded guilty to two counts of trafficking heroin, while reserving his right to appeal the suppression ruling. The trial court sentenced Defendant to 90 to 120 months' imprisonment. Defendant appeals, challenging the trial court's order denying his Motion to Suppress.

Standard of Review

In considering the trial court's denial of a defendant's motion to suppress, our review is limited to determining whether "the trial court's findings of fact are supported by competent evidence and whether those findings support its conclusions of law." *State v. King*, 206 N.C. App. 585, 587, 696 S.E.2d 913, 914 (2010) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)).

Discussion

Defendant contends that "the trial court erroneously concluded Officer McPhatter was justified in frisking [Defendant] for weapons when there was no evidence he was armed and dangerous." Defendant also argues that his consent did not render the search permissible (1) because it was not voluntary, and (2) because even if it was voluntary, Officer McPhatter's pat-down of Defendant's groin area exceeded the scope of his consent. Lastly, Defendant argues that "the trial court's conclusion that Officer McPhatter was justified in asking [Defendant] about

suspected contraband and searching him further was not supported by the findings of fact or evidence."

I.

[1] We first address Defendant's argument that his consent cannot properly serve as a justification for the search in the instant case. Defendant maintains that he consented only in acquiescence "to the coercive environment fostered by the police[,]" and that the trial court erred when it denied his Motion to Suppress the evidence obtained therefrom. However, we cannot agree.

The Fourth Amendment to the United States Constitution guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "[A] governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement[.]" *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620. One such exception to the warrant requirement exists "when the search is based on the consent of the detainee." *State v. Jones*, 96 N.C. App. 389, 397, 386 S.E.2d 217, 222 (1989) (citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 36 L. Ed. 2d 854, 858 (1973) and *State v. Belk*, 268 N.C. 320, 322, 150 S.E.2d 481, 483 (1966)).

To be valid, however, a defendant's consent must have been voluntary. *State v. Little*, 270 N.C. 234, 239, 154 S.E.2d 61, 65 (1967). That is, the State must demonstrate that the consent was "not the result of duress or coercion, express or implied." *Bustamonte*, 412 U.S. at 248, 36 L. Ed. 2d at 875. It is well settled that "[t]o be voluntary the consent must be unequivocal and specific, and freely and intelligently given[,]" rather than having been "given merely to avoid resistance." *Little*, 270 N.C. at 239, 154 S.E.2d at 65 (citations and quotation marks omitted).

" 'The question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, expressed or implied, is a question of fact to be determined from the totality of the circumstances.' " *State v. Brown*, 306 N.C. 151, 170, 293 S.E.2d 569, 582, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) (quoting *Bustamonte*, 412 U.S. at 227, 36 L. Ed. 2d at 862-63). The State is not required to demonstrate that a defendant knew that he had a right to refuse the search in order to establish that his consent was voluntary under the totality of the circumstances. *Bustamonte*, 412 U.S. at 249, 36 L. Ed. 2d at 875. However, "the subject's knowledge of a right to refuse is a factor to be taken into account[.]" *Id.* For instance, our Supreme Court has explained that

whether the defendant "was a young and inexperienced person" may be of relevance. *Little*, 270 N.C. at 240, 154 S.E.2d at 65. Otherwise, "the conditions under which the consent to search was given[,]" *United States v. Lattimore*, 87 F.3d 647, 650 (4th Cir. 1996) (citations omitted), are reviewed in order to determine whether there is "evidence of any inherently coercive tactics—either from the nature of the police questioning or the environment in which it took place." *Bustamonte*, 412 U.S. at 247, 36 L. Ed. 2d at 874.

In the instant case, Defendant contends that his race is highly relevant to the determination of whether he voluntarily consented to the search, in that "there is strong evidence that people of color will view a 'request' to search by the police as an inherently coercive command." In support of his argument, Defendant cites various studies which tend to indicate that for people of color in general, "any police request for consent to search will be viewed as an unequivocal demand to search that is disobeyed or challenged only at significant risk of bodily harm." Marcy Strauss, *Reconstructing Consent*, 92 J. Crim. L. & Criminology 211, 243 (2002). Accordingly, Defendant urges that his race "gives pause as to whether the consent" in the instant case was "genuinely voluntary."

Defendant is correct that his race may be a relevant factor in considering whether his consent was voluntary under the totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 558, 64 L. Ed. 2d 497, 512 (1980) (citation omitted). However, beyond the studies to which he refers, the record is devoid of any indication that *Defendant's* individual consent in this particular case was involuntary. *See id.* ("While these [race] factors were not irrelevant, neither were they decisive[.]") (citation omitted). To the contrary, the overall circumstances presented at the suppression hearing tended to show that Defendant consented "freely and intelligently[,]" and not "merely to avoid resistance." *Little*, 270 N.C. at 239, 154 S.E.2d at 65 (citations and quotation marks omitted).

While multiple officers were present on the scene, Officer McPhatter was the only officer who interacted with Defendant. *See State v. Cobb*, ___ N.C. App. ___, ___, 789 S.E.2d 532, 539 (2016) ("Although there were four officers present at defendant's residence, only two . . . were speaking with defendant when he initially gave consent to search his room."); *see also State v. McDaniels*, 103 N.C. App. 175, 184, 405 S.E.2d 358, 364 (1991) (citing *State v. Fincher*, 309 N.C. 1, 25, 305 S.E.2d 685, 700 (1983) (Exum, J., dissenting)) ("Defendant makes much of the fact that there were a number of officers at the scene; however, our Supreme Court has refused to hold that police coercion exists as a matter of law even when ten or more officers are present . . . before the suspect consents to

a search."). When Officer McPhatter approached the Lincoln, he asked Defendant whether he "had anything illegal on [him]." Defendant said that he did not. Upon competent evidence, the trial court found that Officer McPhatter then asked if he could conduct a search of Defendant's person, to which Defendant responded, "go ahead." Defendant testified that he and Officer McPhatter had "no other conversation." At no point did Defendant testify that he was unaware of his ability to refuse Officer McPhatter's request, or that he feared retribution had he elected to do so. Moreover, the record contains no indication that Officer McPhatter "made threats, used harsh language, or raised [his] voice[] at any time during the encounter." *Cobb*, ___ N.C. App. at ___, 789 S.E.2d at 539. There was also no evidence "that any of the officers ever made physical contact with [D]efendant" before asking for his consent to search. *Id.* Each of the officers' firearms remained holstered throughout the encounter. *See McDaniels*, 103 N.C. App. at 184, 405 S.E.2d at 364. Based on these circumstances, we cannot conclude that Defendant's consent was involuntary, and we affirm the trial court's conclusion that Defendant's permission justified Officer McPhatter's search.

II.

[2] Defendant next argues that "the scope of [his] consent to a search of his person did not include a frisk of his private parts, and lacking probable cause or exigent circumstances to justify such a search, [Officer] McPhatter's pat-down of [Defendant's] groin area was constitutionally intolerable." However, because we conclude that Defendant's consent encompassed the sort of limited frisk that was performed in the instant case, neither probable cause nor exigency was required to justify the search.

Voluntary consent to a search does not permit an officer to embark upon an unfettered search free from boundary or limitation. *See State v. Stone*, 362 N.C. 50, 54, 653 S.E.2d 414, 417 (2007) (citing *Florida v. Jimeno*, 500 U.S. 248, 251, 114 L. Ed. 2d 297, 302 (1991)). Rather, "[a] suspect's consent can impose limits on the scope of a search in the same way as do the specifications of a warrant." *Id.* at 54, 653 S.E.2d at 417-18 (quoting *United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir. 1985)). And "[e]ven when an individual gives a general consent without express limitations, the scope of a permissible search has limits." *Id.* at 54, 653 S.E.2d at 418 (citing *United States v. Blake*, 888 F.2d 795, 800-01 (11th Cir. 1989)). In such a case, the limit on the search is that of reasonableness—that is, "what the reasonable person would expect." *Id.* (citing *Blake*, 888 F.2d at 800-01). Our Supreme Court has clearly stipulated that " '[t]he standard for measuring the scope

of a suspect's consent . . . is that of "objective" reasonableness—what would the typical reasonable person have understood by the exchange between the officer and the suspect?' " *Id.* at 53, 653 S.E.2d at 417 (quoting *Jimeno*, 500 U.S. at 250-51, 114 L. Ed. 2d at 302).

Accordingly, to determine whether Defendant's general consent to a search of his person encompassed a pat-down of the area of his genitalia, "we consider whether a reasonable person would have understood his consent to include such an examination." *Id.* at 54, 653 S.E.2d at 417 (citing *Jimeno*, 500 U.S. at 251, 114 L. Ed. 2d at 302).

Defendant cites *State v. Stone* for the proposition that a "reasonable individual would not understand [the individual's] consent to a search of his or her body to include an officer touching his or her genitalia." In *Stone*, "the officer pulled [the] [d]efendant's sweatpants away from his body and trained his flashlight on [the] [d]efendant's groin area[,]" at which point the defendant immediately objected, "Whoa." *Id.* at 55, 653 S.E.2d at 418. Our Supreme Court concluded that "a reasonable person in defendant's circumstances would not have understood that his general consent to search included allowing the law enforcement officer to pull his pants and underwear away from his body and shine a flashlight on his genitals." *Id.* at 56, 653 S.E.2d at 418-19 (citation omitted). In so concluding, the Supreme Court focused on the fact that the officers did not shield the defendant's exposure from public view, and noted that the defendant's immediate objection was relevant to the overall analysis of whether the officer's conduct had exceeded the bounds of ordinary societal expectations. *Id.* at 55-56, 653 S.E.2d at 418-19. The Court also examined several federal cases that "disapproved" of "search[es] involving direct frontal touching of a suspect's genitals[.]" *Id.* at 56, 653 S.E.2d at 418 (citing *Blake*, 888 F.2d at 800-01, and *United States v. Rodney*, 956 F.2d 295, 298 (D.C. Cir. 1992)) (quotation marks omitted).

In the instant case by contrast, we believe that Officer McPhatter's pat-down over Defendant's groin area was within the bounds of what a reasonable person would have expected the search to include. Officer McPhatter limited his pat-down to the outer layer of Defendant's clothing. He did not reach into Defendant's pants in order to search his undergarments or directly touch his groin area. *Cf. Stone*, 362 N.C. at 54-55, 653 S.E.2d at 418 (quoting *Blake*, 888 F.2d at 797, 800-01) (" '[I]t cannot be said that a reasonable individual would understand that a search of one's person would . . . entail' " the officer "reach[ing] into [the defendant's] groin region where he did a 'frontal touching[.]' "). Officer McPhatter also did not expose Defendant to either himself or the public. *See State v. Smith*, 118 N.C. App. 106, 118, 454 S.E.2d 680, 687

(Walker, J., concurring and dissenting), *rev'd*, 342 N.C. 407, 464 S.E.2d 45 (1995). Nor does the record reveal—through either video or testimonial evidence—that the pat-down of Defendant's groin area was otherwise conducted in an unreasonably offensive manner. Moreover, Officer McPhatter asked for Defendant's consent to search after inquiring into whether "he was attempting to conceal something . . . on his person[,]" thus reasonably alerting Defendant to the fact that the search would likely include areas in which such items might immediately be hidden.

Based on these circumstances, we conclude that a reasonable person in Defendant's position would have understood his consent to include the sort of limited outer pat-down that was performed in the instant case. Accordingly, the trial court did not err when it denied Defendant's Motion to Suppress on the grounds that Defendant gave his "permission to search."

Because we conclude that Defendant's Motion to Suppress was properly denied in light of Defendant's valid consent, we need not address Defendant's argument that the trial court erred when it concluded that Officer McPhatter was also "justified in frisking [Defendant] for weapons when there was no evidence he was armed and dangerous."

III.

[3] Notwithstanding his consent, Defendant argues that Officer "McPhatter's continued detention of [Defendant] after searching his groin area to 'find out' what contraband may have been in [Defendant's] pants was not justified by the plain feel doctrine." This argument is unpersuasive.

Officer McPhatter's pat-down of Defendant was lawful by virtue of Defendant's consent. At that point, Officer McPhatter felt a bulge that he judged was "not consistent with . . . male parts[,]" and "was obvious[ly]" contraband. When coupled with the totality of the circumstances already observed by Officer McPhatter, this discovery amounted to reasonable suspicion justifying Officer McPhatter's further detention of Defendant in order to question him about the contents of his pockets. *See New Jersey v. T.L.O.*, 469 U.S. 325, 347, 83 L. Ed. 2d 720, 738 (1985); *State v. Johnson*, 246 N.C. App. 677, 693, 783 S.E.2d 753, 765 (2016).

[4] Lastly, Defendant argues that

> By handcuffing [Defendant] and not allowing him to leave, McPhatter restrained [Defendant's] liberty to the degree associated with formal arrest. Thus, before questioning [Defendant] further, McPhatter was required to inform

> [Defendant] of his *Miranda* rights. McPhatter did not do so. [Defendant's] statement admitting that he had something in his underwear, in response to McPhatter's custodial questioning, was the product of coercion, obtained in violation of *Miranda*, and the evidence obtained from this constitutional violation should have been suppressed. The trial court erred in denying [Defendant's] motion to suppress.

"The *Miranda* warnings are a prophylactic standard used to safeguard the privilege against self-incrimination. The exclusionary rule in such a case is applied differently than it is applied in a case in which a person's constitutional rights are violated such as by an illegal search and seizure." *State v. May*, 334 N.C. 609, 612, 434 S.E.2d 180, 182 (1993). "If the record shows there was no actual coercion but only a violation of the *Miranda* warning requirement," physical evidence seized as a result of the otherwise uncoerced statement need not be suppressed. *Id.*

In the instant case, and for the same reasoning explained in Section I, *supra*, the record contains no evidence which would otherwise suggest that Defendant had been coerced when he admitted to Officer McPhatter that he had something in his underwear and handed over the narcotics. Thus, a *Miranda* violation would not require suppression of the narcotics ultimately retrieved.

Accordingly, we find no error in the trial court's denial of Defendant's Motion to Suppress.

Conclusion

For the reasoning contained herein, the trial court's order denying Defendant's Motion to Suppress is

AFFIRMED.

Judges ELMORE and TYSON concur.

STATE v. BASKINS

[260 N.C. App. 589 (2018)]

STATE OF NORTH CAROLINA
v.
GREGORY CHARLES BASKINS, DEFENDANT

No. COA17-1327

Filed 7 August 2018

1. Judges—overruling another judge—prohibition against—inapplicable to motions for appropriate relief

The trial court in a drug trafficking case erred by denying defendant's motion for appropriate relief (MAR) on the grounds that it would impermissibly require him to overrule another superior court judge's order denying defendant's motion to suppress. The rule that one superior court judge may not overrule another is generally inapplicable to MARs, and the trial court here should have considered the merits of defendant's MAR.

2. Constitutional Law—effective assistance of counsel—appellate—omission of argument

The trial court in a drug trafficking case erred by denying defendant's motion for appropriate relief (MAR) alleging ineffective assistance of appellate counsel. In defendant's appeal from the trial court's denial of his motion to suppress, his attorney's performance was deficient in failing to challenge the trial court's findings regarding police detectives' knowledge of his vehicle's inspection status, as evidenced by the attorney's subsequent affidavit stating that the omission was not a strategic one and that she knew she could not use a reply brief to make new arguments on appeal. The attorney's error was prejudicial because the inspection violation was not supported by competent evidence and thus could not support the traffic stop's validity; further, the other two bases of the traffic stop could not pass constitutional muster.

Appeal by defendant from order entered 29 August 2017 by Judge Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

N.C. Prisoner Legal Services, Inc., by Laura E. A. Altman and Reid Cater, for defendant-appellant.

ZACHARY, Judge.

Defendant Gregory Charles Baskins appeals from the trial court's order denying his Motion for Appropriate Relief. We reverse.

Background

Defendant was charged with conspiracy to traffic in heroin, trafficking by possession of 28 grams or more of heroin, and trafficking by transportation of 28 grams or more of heroin. Defendant filed a Motion to Suppress the evidence on the grounds that the initial seizure that resulted in the inculpatory search was unlawful. The trial court denied Defendant's Motion to Suppress, which this Court affirmed in *State v. Baskins*, No. COA15-1137, 2016 N.C. App. LEXIS 465 ("*Baskins I*"). Defendant thereafter filed a Motion for Appropriate Relief arguing that he received ineffective assistance of appellate counsel in *Baskins I*. The trial court denied Defendant's Motion for Appropriate Relief. Defendant appeals.

I. The Seizure

The evidence presented at the hearing on Defendant's Motion to Suppress tended to show that, on 6 October 2014, Defendant and his traveling companion Tomekia Bone arrived in Greensboro from New York at 6:30 a.m. on the China Bus. At the time of Defendant's arrival, Detective M.R. McPhatter of the Greensboro Police Department was conducting surveillance of the China Bus stop as part of an interdiction team. Detective McPhatter was surveilling the China Bus stop because he "was aware the China Bus was a known method for individuals to transport narcotics because, among other reasons, there was little screening of passengers or their baggage."

Detective McPhatter observed Defendant and Ms. Bone exit the China Bus carrying small bags. According to Detective McPhatter, he "was aware that individuals who transport narcotics often travel on short, up and back trips to New York and, therefore, travel with only small bags."

While Detective McPhatter watched, Defendant and Ms. Bone went inside the Shell station where Detective McPhatter was parked in an unmarked vehicle. Defendant exited the Shell station after a few minutes and looked toward Detective McPhatter's vehicle. "Defendant then gestured at the vehicle as if to [wave] it off and walked back to the door of the Shell station." Detective McPhatter was not sure whether Defendant was trying to determine whether the unmarked vehicle was his ride, or

whether Defendant was trying to determine if a police officer was inside the car. Detective McPhatter radioed the other officers on the interdiction team concerning the occurrence. Shortly thereafter, a Buick pulled into the Shell station and picked up Defendant and Ms. Bone.

Detective McPhatter testified that he ran the Buick's registration on the laptop in his vehicle and learned that the Buick had an expired registration and an inspection violation. However, Detective McPhatter feared that his identity may have been compromised, so he relayed that information to the other detectives and asked them to follow the Buick.

Detective M.P. O'Hal began following the Buick. Detective O'Hal also ran the Buick's tag information and testified that he learned the Buick had an expired registration and an inspection violation. Detective O'Hal testified that at that point he made the decision to stop the Buick. Detective O'Hal approached the vehicle and began conversing with the driver. During that time, Detective O'Hal noticed that Defendant and Ms. Bone appeared very anxious and were sweating heavily.

Detective O'Hal asked the driver for his permission to search the vehicle. The driver consented and the detectives discovered heroin.

II. Motion to Suppress

At the hearing on Defendant's Motion to Suppress, the focus was on the validity of the initial stop of the Buick. At issue was the fact that when the State introduced the DMV information upon which the detectives relied when making the decision to stop the Buick, the DMV information revealed that the Buick's registration was still valid. While technically expired, the DMV printout indicated that the registration was still valid through 15 October 2014:

> PLT STATUS: EXPIRED
>
> ISSUE DT: 09262013 VALID THROUGH 10152014

Indeed, the driver was operating the Buick during the fifteen-day grace period within which the vehicle could be lawfully operated pursuant to N.C. Gen. Stat. § 20-66.1. Detective O'Hal testified that he knew there was a fifteen-day grace period following expiration of a vehicle's registration during which the expired registration remained valid. However, Detective O'Hal explained that he stopped reading the DMV printout when he read that the registration was expired, and therefore he did not learn that it was still valid.

Further, while Detective O'Hal testified that he had also stopped the Buick for an inspection violation, the DMV printout contained no information concerning the status of the Buick's inspection.

Nevertheless, in its order denying Defendant's Motion to Suppress, the trial court found that the detectives "ran the license tag information for the Red Buick . . . and . . . determined that the car had an expired registration and an inspection violation[,]" and that "[t]he stop was initiated because of the expired registration and the inspection violation." The trial court then denied Defendant's Motion to Suppress based upon the following pertinent conclusions of law:

> 1. The . . . registration on the Buick had expired at the time of the stop. North Carolina General Statutes gives officers the authority to issue a citation where probabl[e] cause exists to believe there has been a violation of Chapt. 20 of the General Statutes. N.C.G.S. § 15A-302. Where probable cause exists that a Chapt. 20 violation exists, an officer may stop the vehicle to issue a violation or a warning.
>
> 2. The officers had probabl[e] cause to stop the Buick based on the information received from the DMV search that the vehicle's registration had expired and that an inspection violation had occurred. If the officers were mistaken as to whether or not a Chapt. 20 violation existed at the time of the stop, such was a reasonable mistake of law that did not render the stop invalid. *Heien v. North Carolina*, ___ U.S. ___, 135 S. Ct. 530 (2014).
>
> 3. Considering the totality of the circumstances, Det. O'Hal had reasonable suspicion that criminal activity related to narcotics was afoot when he stopped the Buick, based on the information received from Det. Mc[Ph]atter and his own experience with the circumstances[.]"

Defendant thereafter entered an *Alford* plea[1] to all charges but preserved his right to appeal the denial of his Motion to Suppress.

III. *Baskins I*

While the trial court concluded that the initial seizure of the Buick was justified based on (1) the Buick's inspection violation, (2) the

1. Named after *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970), a defendant is said to have entered an *Alford* plea when the defendant pleads guilty without an admission of guilt

Buick's expired registration, and (3) Detective O'Hal's "reasonable suspicion that criminal activity related to narcotics was afoot[,]" Defendant's counsel on appeal in *Baskins I* challenged only the latter two justifications. Appellate counsel did not challenge any of the trial court's findings of fact. In particular, appellate counsel did not challenge the trial court's findings of fact that the detectives learned of the inspection violation when they ran the Buick's tag information. Thus, despite Defendant's arguments challenging the lack of reasonable suspicion and the reasonableness of the mistake concerning the Buick's registration status, this Court concluded that, "[b]ecause Defendant did not challenge the trial court's findings of fact, we must disagree." *Baskins I*, 2016 N.C. App. LEXIS 465, at *7. We explained:

> As the State correctly points out, Defendant "does not challenge the trial court's findings as to the inspection violation." In fact, Defendant does not specifically challenge any of the trial court's findings of fact, and Defendant does not address the alleged inspection violation in his brief to this Court. In response to the State's brief, Defendant filed a reply brief in which he argues that there was no evidence presented at the suppression hearing indicating that Detective O'Hal could have known the inspection was expired. Though Defendant's argument in his reply brief might have merit, Defendant cannot use a reply brief to introduce new arguments on appeal. *State v. Dinan*, 233 N.C. App. 694, 698, 757 S.E.2d 481, 485, *disc. review denied*, 367 N.C. 522, 762 S.E.2d 203 (2014) (citation omitted) ("[A] reply brief is not an avenue to correct the deficiencies contained in the original brief. *See* N.C.R. App. P. 28(b)(6)[.]"). Further, even in his reply brief, Defendant failed to challenge the following findings of fact:
>
> > 5. Det. McPhatter ran the registration for the . . . Buick on the laptop in his vehicle and learned that the Buick had an expired registration and an inspection violation. He communicated this information to other, assisting detectives and, because he was concerned that his identity had been compromised, he asked other detectives to follow the . . . Buick so he could stay back a distance.
> >
> > . . .

> 8. Det. O'Hal also ran the license tag information for the . . . Buick relayed by Det. McPhatter and also determined that the [Buick] had an expired registration and an inspection violation.
>
> . . .
>
> 10. The stop was initiated because of the expired registration and the inspection violation.
>
> Because Defendant does not challenge these findings of fact, they are binding on appeal. *White*, 232 N.C. App. at 301, 753 S.E.2d at 701.
>
> Driving a vehicle without the required up-to-date inspection is an infraction in North Carolina. N.C. Gen. Sat. § 20-183.8(a)(1) (2015). "A law enforcement officer who has probable cause to believe a person has committed an infraction may detain the person for a reasonable period in order to issue and serve him a citation." N.C. Gen. Stat. § 15A-1113(b) (2015). Based upon the trial court's unchallenged findings of fact, Detective O'Hal determined that the Buick was being operated with an expired inspection, and Detective O'Hal initiated the stop of the Buick, in part, on that basis. These findings of fact are sufficient to support the trial court's conclusion that Detective O'Hal "had [probable] cause to stop the Buick based on the information received from the DMV search that an inspection violation had occurred." This argument is without merit.

Baskins I, 2016 N.C. App. LEXIS 465, at *7-10 (alterations omitted) (footnote omitted). Accordingly, without having to address Defendant's subsequent arguments, this Court affirmed "the denial of Defendant's motion to suppress based solely upon the trial court's [unchallenged] determination that an inspection violation justified the initial stop of the Buick." *Id.* at *10.

IV. Motion for Appropriate Relief

According to Defendant, "[t]here was no evidence to support the finding of fact that the officer was aware of an inspection violation at the time of the stop." Defendant therefore filed a Motion for Appropriate Relief with the trial court on 5 June 2017 in which he alleged that he "received ineffective assistance of counsel" in *Baskins I* "when appellate counsel failed to challenge the trial court's findings of fact in its

order denying his Motion to Suppress." In support of this contention, Defendant noted that appellate counsel *did* challenge the findings of fact concerning the inspection violation in her reply brief "upon reading the State's response brief, which relied on the inspection violation as the basis for the stop." Defendant also attached as an exhibit the affidavit of appellate counsel in which she averred that

> I did not make a strategic decision not to challenge the findings of fact related to the DMV printout in the appellate brief. I did not raise this issue because I did not notice it when I reviewed the record. If I had noticed this issue before filing the brief, I would have raised it at the appropriate time.

Defendant argued that had his appellate counsel "properly challenged the trial court's findings of fact," this Court "would have reversed the trial court's denial of the motion [to suppress] and vacated [Defendant's] convictions because the officer did not have a reasonable suspicion for the traffic stop." Accordingly, based on the facts already in the record, Defendant asked the trial court to adjudicate his Motion for Appropriate Relief for ineffective assistance of counsel "on the merits of the pleadings" and attachments, or in the alternative, to "order the State to file a response and schedule a hearing for the purpose of taking evidence and hearing the arguments of counsel[.]"

The trial court concluded by order entered 29 August 2017 that Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of counsel could "be resolved without an evidentiary hearing" and that it "present[ed] only legal issues[.]" The trial court determined that Defendant's Motion for Appropriate Relief ultimately asked the trial court to "reverse the order denying the Defendant's Motion to Suppress . . . and vacate Defendant's convictions." To that point, the trial court cited "the well established rule in North Carolina . . . that one Superior Court judge . . . may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *N.C. Nat'l Bank v. Va. Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983) (alteration omitted) (citation omitted). The trial court regarded Defendant's Motion for Appropriate Relief as "asking th[e] Court . . . to overrule another Superior Court judge," and therefore concluded that Defendant's Motion for Appropriate Relief for ineffective assistance of appellate counsel was "meritless and should be denied."

Defendant filed a Petition for Writ of Certiorari asking this Court to review the trial court's order denying his Motion for Appropriate Relief.

This Court allowed Defendant's Petition for Writ of Certiorari by order entered 9 October 2017.

Discussion

Defendant argues (1) that the trial court erred in denying his Motion for Appropriate Relief based on the incorrect conclusion that it did not have the authority to do otherwise, and (2) that the trial court erred in denying his Motion for Appropriate Relief because Defendant made a proper showing of ineffective assistance of appellate counsel. We agree.

I. Ineffective Assistance of Appellate Counsel

The right to counsel guaranteed by Article I, Section 23 of the North Carolina Constitution and the Sixth Amendment to the United States Constitution "includes the right to the effective assistance of counsel." *State v. Braswell*, 312 N.C. 553, 561, 324 S.E.2d 241, 247 (1985) (citing *McMann v. Richardson*, 397 U.S. 759, 771, 25 L. Ed. 2d 763, 773 (1970)). The Fourteenth Amendment further requires that defendants be afforded effective assistance of *appellate* counsel. *Evitts v. Lucey*, 469 U.S. 387, 396, 83 L. Ed. 2d 821, 830 (1985); *Smith v. Robbins*, 528 U.S. 259, 279, 145 L. Ed. 2d 756, 776 (2000).

The burden is on the defendant to demonstrate that he received ineffective assistance of counsel "so . . . as to require reversal of [the defendant's] conviction[.]" *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). In order to satisfy that burden, the defendant must establish both of the elements of a claim for ineffective assistance of counsel:

> 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. (emphasis omitted); *accord Braswell*, 312 N.C. at 562, 324 S.E.2d at 248 (adopting the test laid out in *Strickland*). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. The same standard applies to claims of ineffective assistance of appellate counsel.

State v. Simpson, 176 N.C. App. 719, 722, 627 S.E.2d 271, 275, *disc. review denied*, 360 N.C. 653, 637 S.E.2d 191 (2006) (citing *Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780).

II. Superior Court Judge's Authority on a Motion for Appropriate Relief

[1] In his Motion for Appropriate Relief, Defendant argued that his

> appellate counsel fell below an objective standard of professional reasonableness by failing to challenge the trial court's findings of fact in its order denying the motion to suppress, which resulted from her failure to identify the issue in her review of the record. [Defendant] was prejudiced by this error. There was no competent evidence that the officers had reasonable suspicion to believe that a traffic law was being broken at the time of the stop. If appellate counsel had raised this issue by challenging the findings of fact in [Defendant's] case the Court of Appeals would have reversed the order denying the Motion to Suppress and vacated [Defendant's] convictions.

Nevertheless, the trial court denied Defendant's Motion for Appropriate Relief on the grounds that the ineffective assistance of counsel analysis would require the trial court to overrule the earlier superior court judge's order denying Defendant's Motion to Suppress. The trial court concluded that because it did not have the authority to do so, Defendant's Motion for Appropriate Relief must be denied.

The rule that "one superior court judge may not reconsider an order entered by another superior court judge," *State v. Woolridge*, 357 N.C. 544, 545, 592 S.E.2d 191, 191 (2003), is premised upon the fact that "[t]he power of one judge of the superior court is equal to and coordinate with that of another[.]" *Michigan Nat'l Bank v. Hanner*, 268 N.C. 668, 670, 151 S.E.2d 579, 580 (1966). "[I]t is well established in our jurisprudence that . . . ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action." *Woolridge*, 357 N.C. at 549, 592 S.E.2d at 194 (citation and quotation marks omitted). However, this rule is generally inapplicable where a judge is tasked with deciding the merits of a defendant's motion for appropriate relief.

Pursuant to N.C. Gen. Stat. § 15A-1415(a) and (b), a defendant may file a motion for appropriate relief at any time after the verdict on the grounds that "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina."

N.C. Gen. Stat. § 15A-1415(b)(3) (2017). Because effective assistance of appellate counsel is guaranteed by the Due Process Clause of the Constitution, *Evitts*, 469 U.S. at 396, 83 L. Ed. 2d at 830, a defendant may "allege[] ineffective assistance of . . . appellate counsel as a ground for the illegality of his conviction" under N.C. Gen. Stat. § 15A-1415(b)(3). N.C. Gen. Stat. § 15A-1415(e) (2017). N.C. Gen. Stat. § 15A-1413 specifically provides that such motions are to be heard and determined by any superior court judge "empowered to act in criminal matters[.]" N.C. Gen. Stat. § 15A-1413(a) (2017). Our Supreme Court has likewise made clear that it is the duty of the trial judge—when faced with a motion for appropriate relief based on a claim of ineffective assistance of appellate counsel—to "fully address" whether the "defendant's appellate counsel's performance was deficient," and if so, "whether counsel's performance prejudiced [the] defendant." *State v. Todd*, 369 N.C. 707, 712, 799 S.E.2d 834, 838 (2017). Such a situation presents the superior court judge with the task of determining a new issue that has yet to be decided. *Cf. Va. Carolina Builders*, 307 N.C. at 567, 299 S.E.2d at 631.

As explained in subsection *ii* below, while the prejudice prong of an ineffective assistance of appellate counsel claim may implicate prior orders at the trial level, such implications are ancillary to the underlying claim of ineffective assistance of counsel. Indeed, N.C. Gen. Stat. § 15A-1415 explicitly authorizes such collateral action by a superior court judge. *E.g.*, N.C. Gen. Stat. § 15A-1415 (official commentary) ("The Motion for appropriate relief . . . is a device which may be used for any additional matters which relate to the original case[,]" such as "the question of whether or not . . . probation has been unlawfully revoked."). Not only are superior court judges statutorily authorized to do so, but superior court judges routinely perform such collateral reviews upon a defendant's motion for appropriate relief, with the sanction of our appellate courts. This is the case even though such a review may implicate an earlier superior court judge's actions or determinations. *See*, *e.g.*, *Vester v. Stephenson*, 465 F. Supp. 868, 870 (E.D.N.C. 1978) (allowing the petitioner to proceed with his claims, including ineffective assistance of counsel, noting that, among other things, "collateral attacks [are] proper under Section 1415"); *State v. Spruiell*, ___ N.C. App. ___, ___, 798 S.E.2d 802, 806 (2017) ("In the MAR order, the trial court concluded that, under the factual circumstances of [the] [d]efendant's case, it was improper for the trial court to instruct the jury on felony murder."); *State v. Wilkerson*, 232 N.C. App. 482, 491, 753 S.E.2d 829, 836 (2014) ("[T]he trial court clearly had jurisdiction to reach the merits of [the] [d]efendant's challenge to Judge Gore's original judgments pursuant to N.C. Gen. Stat. § 15A-1415(b)(4) and (b)(8)."); *Edmondson v. State*,

33 N.C. App. 746, 749, 236 S.E.2d 397, 399 (1977), *overruled on other grounds*, *State v. Dickens*, 299 N.C. 76, 84, 261 S.E.2d 183, 188 (1980) (answering in the negative the question of "whether an adjudication by a trial judge that a plea of guilty is voluntarily made bars a criminal defendant from collaterally attacking that plea in a post conviction hearing").

Accordingly, the superior court judge in the instant case acted under a misapprehension of the law when he denied Defendant's Motion for Appropriate Relief on the grounds that it would impermissibly require him to "overrule another Superior Court judge[.]"

III. Merits of Defendant's Motion for Appropriate Relief

[2] The State argues that "[e]ven assuming the trial court erred in its rationale, it did not err by ultimately denying Defendant's MAR" because "Defendant failed to show ineffective assistance of appellate counsel." On the other hand, Defendant argues that he made a proper showing of ineffective assistance of appellate counsel, and that the trial court was required to grant his Motion for Appropriate Relief. Thus, Defendant maintains that the "MAR court's order must be reversed[,]" and that "[t]his Court should vacate [his] convictions since he was denied effective assistance of appellate counsel." We agree with Defendant.

In the instant case, Defendant properly asserted his claim of ineffective assistance of appellate counsel through a motion for appropriate relief in the trial court. *See 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) ("In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal."). The order denying Defendant's Motion for Appropriate Relief is devoid of findings relating to any deficiency in appellate counsel's performance, possibly as a result of the trial court's conclusion that it could not overrule the prior judge. Nevertheless, it is appropriate for an appellate court to reach the merits of a claim of ineffective assistance of appellate counsel on direct review "when the cold record reveals that no further investigation is required, *i.e.*, claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citing *State v. Blakeney*, 352 N.C. 287, 308-09, 531 S.E.2d 799, 815-16 (2000) and *State v. House*, 340 N.C. 187, 196-97, 456 S.E.2d 292, 297 (1995)).

Here, we agree with the trial court that Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of counsel "may be resolved without an evidentiary hearing." For the reasons

explained below, we are able to "discern from the record before us whether" appellate counsel's performance was deficient in *Baskins I* and whether Defendant was prejudiced thereby. *State v. Edgar*, 242 N.C. App. 624, 632, 777 S.E.2d 766, 771 (2015). We therefore proceed to the parties' arguments on the merits of Defendant's ineffective assistance of counsel claim.[2]

i. *Deficient Performance*

In order to establish the first prong of an ineffective assistance of counsel claim, the defendant must show "that his counsel's conduct fell below an objective standard of reasonableness." *Braswell*, 312 N.C. at 561-62, 324 S.E.2d at 248 (citing *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693). In the appellate context, a claim of ineffective assistance of counsel requires a showing that the appellate representation did not fall "within the range of competence demanded of attorneys in [appellate] cases." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693 (citation and quotation marks omitted).

Generally, "the decision not to press [a] claim on appeal [is not] an error of such magnitude that it render[s] counsel's performance constitutionally deficient under the test of *Strickland*," *Smith v. Murray*, 477 U.S. 527, 535, 91 L. Ed. 2d 434, 445 (1986) (citation omitted), as there is a presumption that "the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 695 (citation and quotation marks omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Id.* at 690, 80 L. Ed. 2d at 695. Nevertheless, a defendant may be able to overcome this presumption of sound trial strategy and successfully establish "that his counsel was objectively unreasonable in failing to find arguable issues[.]" *Robbins*, 528 U.S. at 285, 145 L. Ed. 2d at 780 (internal citation omitted); *see Strickland*, 466 U.S. at 690-91, 80 L. Ed. 2d at 695 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."). "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688, 80 L. Ed. 2d at 694.

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2. We also note the particular appropriateness of an appellate court ruling on the merits of an ineffective assistance of appellate counsel claim, as that inquiry now necessitates an analysis of whether there is a reasonable probability that the defendant ultimately " 'would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue.' " *Spruiell*, ___ N.C. App. at ___, 798 S.E.2d at 805 (quoting *United States v. Rangel*, 781 F.3d 736, 745 (4th Cir. 2015)).

Here, Defendant argues that his appellate counsel's performance in *Baskins I* was deficient in failing to challenge the trial court's findings of fact regarding the detectives' knowledge of the Buick's inspection status at the time of the initial stop. The State argues that "[s]ince the trial court's findings *were* supported by competent evidence, appellate counsel did not render deficient performance by failing to challenge the findings." (emphasis added).

Contrary to the State's position, the record before this Court reveals that appellate counsel's failure to challenge the trial court's findings of fact regarding the inspection violation was not a reasonable strategic decision based on the argument's lack of merit. *Todd*, 369 N.C. at 712, 799 S.E.2d at 838. As the trial court denied Defendant's Motion to Suppress on the basis that the initial stop of the Buick was justified on three independent grounds, appellate counsel was tasked with reviewing the sufficiency—both legal and evidentiary—for each of those grounds. *See Murray*, 477 U.S. at 536, 91 L. Ed. 2d at 445. However, appellate counsel apparently realized that she had failed to do so upon reading the State's brief, wherein the State noted the inspection violation as an additional justification for the stop. Appellate counsel thereafter submitted a reply brief in which she, for the first time, challenged the evidentiary support for the trial court's findings of fact concerning the inspection violation. That appellate counsel subsequently raised the argument in her reply brief demonstrates that the initial omission was an oversight rather than a reasoned judgment. Moreover, while not controlling, appellate counsel's subjective explanation is relevant to the determination of whether her performance was objectively deficient. On record before us is an affidavit submitted by appellate counsel in *Baskins I*, which directly contradicts the State's position that appellate counsel made a strategic decision not to challenge the trial court's findings of fact. The affidavit provides that "[a]fter reviewing the State's response to my brief, which relied on the inspection status as the basis for the stop, I realized that I had missed this issue in my initial review of the record." The affidavit further provides that "I knew from my training and experience as an appellate attorney that a reply brief cannot be used to make new arguments on appeal."

Accordingly, the record sufficiently demonstrates that appellate counsel did not make a "reasonable professional judgment[]" when she neglected to challenge the trial court's findings of fact concerning the inspection status. *Strickland*, 466 U.S. at 691, 80 L. Ed. 2d at 695. Defendant has thus satisfied the first prong of his ineffective assistance of counsel claim.

ii. *Prejudice*

Nonetheless, as our Supreme Court has explained, "[t]he fact that counsel made an error, or even an unreasonable error, does not warrant reversal of a conviction unless there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *Braswell*, 312 N.C. at 563, 324 S.E.2d at 248 (citation omitted). In other words, a defendant must not only demonstrate that his counsel's performance was deficient, but also that he was prejudiced thereby. *Strickland*, 466 U.S. at 692, 80 L. Ed. 2d at 696. " 'To show prejudice in the context of appellate representation, a [defendant] must establish a reasonable probability he would have prevailed on his appeal but for his counsel's unreasonable failure to raise an issue.' " *Spruiell*, ___ N.C. App. at ___, 798 S.E.2d at 805 (quoting *Rangel*, 781 F.3d at 745 (internal quotation marks omitted)). "[F]or purposes of establishing prejudice, a 'reasonable probability' . . . simply means 'a probability sufficient to undermine confidence in the outcome' of the appeal." *State v. Collington*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, 2018 N.C. App. LEXIS 397, at *29 (quoting *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698).

In the instant case, Defendant argues that he has set out a proper showing of prejudice because "[i]f appellate counsel had argued that the findings of fact were not supported by competent evidence, [this Court] would have reversed the denial of the Motion to Suppress and vacated his convictions." On the other hand, the State argues that even "[h]ad appellate counsel challenged the findings regarding the [vehicle's] inspection status" in *Baskins I*, "this Court would have been bound to reject the argument because Detective O'Hal's testimony supported the findings." Moreover, the State argues that Defendant was not prejudiced by appellate counsel's failure to challenge the trial court's findings of fact because the trial court's ultimate "conclusion—upholding the traffic stop—was legally correct."

We address each of the trial court's three justifications for the stop of the Buick in turn as they become relevant to the prejudice analysis.

1. Inspection Violation

When reviewing a trial court's order granting or denying a motion to suppress, this Court "is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, . . . 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). Findings of fact will be binding on an appellate court so long as they are supported by competent evidence. *Id.*

In the present case, had appellate counsel in *Baskins I* challenged the trial court's relevant findings of fact, there is a reasonable probability that this Court would have concluded that the trial court's finding that "[t]he stop was initiated because of . . . the inspection violation" was not supported by competent evidence and thus could not support the trial court's conclusion of the stop's validity.

The State's Exhibit 1 was a printout of the DMV request for the Buick, which the detective testified was "the same information that [was] available to [him] when [he] ran the plate" on the Buick. However, the DMV printout contained no information concerning the Buick's inspection status, and the detectives did not claim any other source for their alleged knowledge of the Buick's inspection violation. In light of the actual DMV information that was presented, the detectives could not have known that the Buick's inspection was expired at the time Detective O'Hal decided to stop the Buick. Moreover, even if the trial court had noted the discrepancy between the detectives' testimony and the DMV information presented, the trial court concluded as a matter of law that "[t]he officers had probabl[e] cause to stop the [vehicle] based on the information received *from the DMV search* . . . that an inspection violation had occurred." (emphasis added). Because the DMV information presented at the hearing contained no information concerning an inspection violation, we agree with Defendant that there exists a reasonable probability that this Court would have found the findings regarding the inspection to be unsupported by competent evidence had appellate counsel challenged them in *Baskins I*. *See*, *e.g.*, *State v. Fisher*, 141 N.C. App. 448, 454, 539 S.E.2d 677, 682 (2000) ("We recognize that contradictions and inconsistencies rarely render a court's factual findings erroneous. However, the testimony presented at the suppression hearing . . . contained material inconsistencies in the State's own evidence, not simply contradictions between the State's evidence and defendant's evidence.").

Given the reasonable probability that the inspection status would not have been found to support the validity of the stop in *Baskins I*, this Court would have next proceeded to an examination of Defendant's arguments pertaining to the two additional grounds upon which the trial court based its denial of Defendant's Motion to Supress. *See Dixon v. Dixon*, 67 N.C. App. 73, 77, 312 S.E.2d 669, 672 (1984).

2. Reasonable Mistake of Fact

On appeal from the trial court's denial of Defendant's Motion to Suppress in *Baskins I*, appellate counsel argued that "the trial court erred

in ruling that police lawfully stopped the car in which [Defendant] was riding because a mistaken belief of fact that a traffic violation occurred is objectively unreasonable and cannot justify a warrantless seizure." We conclude that there is a reasonable probability this Court would have agreed with this argument had it been addressed in *Baskins I*.

"[T]o conduct an investigatory warrantless stop and detention of an individual, a police officer must have reasonable suspicion, grounded in articulable and objective facts, that the individual is engaged in criminal activity." *State v. Hudgins*, 195 N.C. App. 430, 433, 672 S.E.2d 717, 719 (2009) (citation omitted). "[T]he reasonable suspicion standard requires that the stop be based on specific and articulable facts . . . as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *State v. Barnard*, 362 N.C. 244, 247, 658 S.E.2d 643, 645 (2008) (alteration omitted) (citation and quotation marks omitted). Indeed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.' " *Riley v. California*, ___ U.S. ___, ___, 189 L. Ed. 2d 430, 439 (2014) (citation omitted). Nevertheless, "[t]o be reasonable is not to be perfect[.]" *Heien v. North Carolina*, ___ U.S. ___, ___, 190 L. Ed. 2d 475, 482 (2014). The Fourth Amendment therefore "allows for some mistakes on the part of government officials, giving them 'fair leeway for enforcing the law in the community's protection.' " *Id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176, 93 L. Ed. 1879, 1891 (1949)). That some leeway is provided, however, does not afford law enforcement officials the unfettered liberty to be inaccurate. "The Fourth Amendment tolerates only *reasonable* mistakes, and those mistakes—whether of fact or law—must be *objectively* reasonable." *Id.* at ___, 190 L. Ed. 2d at 486.

Here, the detectives contended that they also stopped the Buick for having an expired registration even though the registration was, in fact, still valid. Nevertheless, the trial court concluded that even "[i]f the officers were mistaken as to whether or not a Chapt. 20 violation existed at the time of the stop, such was a reasonable mistake of law that did not render the stop invalid" under the Fourth Amendment. Our duty in the instant case is simply to determine whether there is a reasonable probability that this Court would have disagreed with this conclusion of law had it been addressed in *Baskins I*.

Initially, we note that the case at bar does not involve a mistake of law. The detective testified that he was aware that the North Carolina statute provides a fifteen-day grace period following the date of a vehicle's registration expiration during which the vehicle may be lawfully operated, and that "to the best of [his] knowledge," "it was in fact lawful for [Defendant's] vehicle to be operated" on the date of the stop. N.C.

Gen. Stat. § 20-66(g) (2017). The detective's belief that the Buick was being operated without a valid registration was thus a mistake of fact rather than of law.

In addition, not only did the detective testify that he knew there was a fifteen-day grace period following expiration of a vehicle's registration, but the DMV information upon which the detective relied at the time of the stop explicitly provided that the Buick's registration was "VALID THRU: 10152014." Nevertheless, the detective testified that his oversight regarding the vehicle's lawful status was due to the fact that "We're not going to scroll down to check a date being valid or not valid." That the detectives stopped the Buick for a registration violation despite having intentionally neglected to read the very sentence in which the relevant expiration date appeared renders questionable the reasonableness of any resultant mistake that ensued. *See State v. Styles*, 362 N.C. 412, 414, 665 S.E.2d 438, 439 (2008) ("This Court requires that the stop be based on specific and articulable facts . . . as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training.") (alterations omitted) (citation and quotation marks omitted). This is also not a case in which the factual assessment regarding the Buick's registration status was required to be made "on the fly." *Heien*, ___ U.S. at ___, 190 L. Ed. 2d at 486. Rather, the detective accessed the DMV information while he was following the Buick as it was obeying the speed limit, at 7:00 a.m., in an area with "not a lot of vehicles on the road," and with the active assistance of at least four additional officers.

Thus, in the present case the detectives had an admittedly accurate understanding of the law, which was coupled with information that was readily available to them indicating that the Buick's registration was still valid. Under these circumstances, we conclude that there is a reasonable probability that this Court would have determined that the facts do not constitute the sort of objectively reasonable mistake of fact tolerable under the Fourth Amendment, and therefore these facts could not serve as a justification for the stop.

3. Reasonable Suspicion

Finally, had appellate counsel challenged the trial court's findings of fact in *Baskins I*, this Court would have been required to address Defendant's argument that "the trial court erred in concluding that reasonable suspicion existed to stop the car in which [Defendant] was a passenger . . . to conduct a narcotics investigation when police lacked individualized reasonable suspicion and acted on the same hunch they applied to everyone who arrived in Greensboro on the China Bus." We

conclude that there is a reasonable probability that this Court would have found this argument meritorious in *Baskins I*.

As explained *supra*, "[a]n investigatory stop must be justified by 'a reasonable suspicion, based on objective facts, that the individual is involved in criminal activity.' " *State v. Watkins*, 337 N.C. 437, 441, 446 S.E.2d 67, 70 (1994) (quoting *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357, 362 (1979)). Whether an officer had a reasonable suspicion to stop a vehicle for investigatory purposes must be considered in light of the totality of the circumstances. *Id.* (citation omitted). "The stop must be based on specific and articulable facts, as well as the rational inferences from those facts, as viewed through the eyes of a reasonable, cautious officer, guided by his experience and training." *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 21-22, 20 L. Ed. 2d 889, 906 (1968), and *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779 (1979)). The justification must be objective rather than subjective. *Id.* at 442, 446 S.E.2d at 70 (citing *United States v. Sokolow*, 490 U.S. 1, 7, 104 L. Ed. 2d 1, 10 (1989)). The officer "must be able to articulate something more than an inchoate and unparticularized suspicion or 'hunch.' " *Sokolow*, 490 U.S. at 7, 104 L. Ed. 2d at 10 (citation and quotation marks omitted).

Here, we note that the trial court's findings of fact in its denial of Defendant's Motion to Suppress provided only that "[t]he stop was initiated because of the expired registration and the inspection violation." Moreover, the conclusion that the detectives "had reasonable suspicion that criminal activity related to narcotics was afoot" was based solely on the facts (1) that the detectives observed Defendant and Ms. Bone exit the China Bus carrying small bags at the "same bus stop that a lot of heroin is being transported from New York to the Greensboro area[;]" and (2) that while waiting for his ride at the adjacent gas station, Defendant briefly looked toward Detective McPhatter's unmarked vehicle and "shooed [his vehicle] off[,]" at which point Defendant's ride—the Buick—pulled into the parking lot.

The facts of this case bear a marked likeness to those presented in the United States Supreme Court case *Reid v. Georgia*, in which

> [t]he appellate court's conclusion . . . that the DEA agent reasonably suspected the petitioner of wrongdoing rested on the fact that the petitioner appeared to the agent to fit the so-called "drug courier profile," a somewhat informal compilation of characteristics believed to be typical of persons unlawfully carrying narcotics. Specifically, the court thought it relevant that (1) the petitioner had arrived from

> Fort Lauderdale, which the agent testified is a principal place of origin of cocaine sold elsewhere in the country, (2) the petitioner arrived early in the morning, when law enforcement activity is diminished, (3) he and his companion appeared to the agent to be trying to conceal the fact that they were traveling together, and (4) they apparently had no luggage other than their shoulder bags.

448 U.S. 438, 440-41, 65 L. Ed. 2d 890, 894 (1980). From these facts, the Supreme Court concluded

> that the agent could not, as a matter of law, have reasonably suspected the petitioner of criminal activity on the basis of these observed circumstances. Of the evidence relied on, only the fact that the petitioner preceded another person and occasionally looked backward at him as they proceeded through the concourse relates to their particular conduct. The other circumstances describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure.

Id. at 441, 65 L. Ed. 2d at 894.

In the instant case, the detectives' inference of criminal activity from Defendant waving off Detective McPhatter's unmarked vehicle at the gas station "was more an inchoate and unparticularized suspicion or 'hunch,' than a fair inference in the light of [their] experience[.]" *Id.* And, even when viewed through the officers' experience that "persons that get on this bus line could possibly be trafficking in narcotics[,]" the fact that an individual—entirely unknown to officers—is seen carrying "just some small, little luggage bags" while returning on the China Bus from a weekend trip to New York is far "too slender a reed to support the seizure in this case." *Id.*

Accordingly, had appellate counsel challenged the findings of fact in *Baskins I*, we conclude that there is a reasonable probability that this Court would have determined that the trial court also erred in denying Defendant's Motion to Suppress on the grounds that the detective "had reasonable suspicion that criminal activity related to narcotics was afoot when he stopped the Buick."

***

Despite the trial court's reluctance to reach the merits of Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of appellate counsel, we are able to conclude from the cold record developed on appeal that the trial court erred in denying Defendant's Motion for Appropriate Relief. Had appellate counsel challenged the trial court's findings of fact regarding the Buick's inspection status in its order denying Defendant's Motion to Suppress, there is a reasonable probability that this Court would have concluded that those findings of fact were not supported by competent evidence. This Court would have then proceeded to the two arguments that Defendant did raise in *Baskins I*. Given the merit of those two arguments, we conclude that there is a reasonable probability that had appellate counsel challenged the trial court's findings of fact concerning the inspection violation, Defendant would have been successful in his appeal in *Baskins I*. Accordingly, the trial court erred when it denied Defendant's Motion for Appropriate Relief on the grounds of ineffective assistance of appellate counsel.

Conclusion

For the reasons explained herein, the trial court's order denying Defendant's Motion for Appropriate Relief is reversed and this matter is remanded for entry of an order granting Defendant's Motion for Appropriate Relief and vacating his convictions.

REVERSED AND REMANDED FOR NEW TRIAL.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
DUVAL LAMONT BOWMAN, DEFENDANT

No. COA17-657

Filed 7 August 2018

1. Constitutional Law—Confrontation Clause—cross-examination of witness—pending unrelated charges

In a prosecution for first-degree murder and related crimes, the trial court erred in limiting defendant's cross-examination of the State's principal witness regarding possible bias where the witness had pending drug charges in another county and defendant produced evidence of an email exchange between prosecutors which he argued established a possible reduction of those charges in exchange for her testimony against him.

2. Constitutional Law—Confrontation Clause—error in limiting cross-examination—prejudice

The trial court's constitutional error in prohibiting a defendant in a first-degree murder trial from cross-examining a witness about possible bias arising from her pending drug charges was prejudicial and required a new trial. The error was not harmless where the witness was the State's principal eyewitness and the State's other evidence against defendant was tenuous, making her testimony essential.

Judge DILLON dissenting.

Appeal by Defendant from Judgment and Commitment entered 27 July 2016 by Judge Richard S. Gottlieb in Forsyth County Superior Court. Heard in the Court of Appeals 25 January 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Joseph L. Hyde, for the State.

Richard Croutharmel for Defendant-Appellant.

INMAN, Judge.

Duval Lamont Bowman ("Defendant") appeals from a final judgment and commitment following a jury verdict finding him guilty of first-degree murder, attempted armed robbery, and possession of a

firearm by a felon. Defendant argues that the trial court erred by: (1) failing to exclude statements he made during a police interrogation in which he was denied his constitutional right to an attorney; (2) violating Defendant's constitutional right to cross-examine the State's principal witness; (3) allowing the State to impeach its own witness with a subsequent witness; and (4) allowing a detective to testify as an expert without properly qualifying the detective as such. During the pendency of his appeal, Defendant filed a motion for appropriate relief with this Court arguing that his constitutional right to due process was violated because the State permitted its principal witness to falsely testify regarding whether she would benefit in exchange for her testimony against Defendant.

After careful consideration, we hold that the trial court committed a constitutional error in restricting Defendant's cross-examination of the State's principal witness and that the State has failed to show that the error was harmless beyond a reasonable doubt; therefore, we vacate the trial court's judgment and remand for a new trial. Defendant's motion for appropriate relief is dismissed as moot.

Factual and Procedural History

The State's evidence at trial tended to show the following:

In the early morning of 23 February 2014, Defendant borrowed a friend's vehicle and went to the home of Lakenda Malachi and her fiancé Anthony Johnson. Defendant, Malachi, and Johnson were all associates in the drug business.

When Defendant arrived at Malachi's house, he confronted Johnson about money Johnson allegedly owed Defendant. Malachi testified that she witnessed Defendant pointing two guns at Johnson, at which point Defendant said: "Y'all did me dirty." As Malachi ran to the next room she heard shots being fired. Defendant then demanded that Malachi give up the money. She locked herself in the other room. Defendant kicked the door open and Malachi told him that she would find the money.

As Malachi began looking for the money, Defendant started hitting her with the guns and told her that he was going to kill Johnson. Malachi ran outside and hid in the bushes. She reached a neighbor's door and was able to make two phone calls: the first was to a male friend named "Royal Highness Salley," and the second was to another male friend named Kasim Washington. After Malachi made her phone calls, the neighbor called 9-1-1.

Approximately ten minutes later, police arrived at the neighbor's house to find Malachi crying and mumbling. Police found Johnson in Malachi's house lying face down in the living room without a pulse. EMS pronounced Johnson dead at the scene. He had been shot twice in the back and once in the left leg and died as a result of the wounds to his back.

Defendant was apprehended in New York by United States Marshals and returned to North Carolina. On 28 March 2014, Detectives interviewed Defendant. Defendant denied any involvement in Johnson's death. Defendant was indicted on 4 May 2015 for murder and on 4 January 2016 for possession of a firearm by a felon. On 6 June 2016, a superseding indictment was filed for first-degree murder along with an indictment for attempted robbery with a dangerous weapon.

Defendant's case went to trial in July 2016. The State presented no physical evidence linking Defendant to the shooting but argued that Malachi's eyewitness testimony established his guilt. On 27 July 2016, the jury found Defendant guilty on all charges and the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant appealed in open court.

Analysis

[1] We address only one of Defendant's arguments on appeal, which we hold entitles him to a new trial. Defendant contends that the trial court erred by limiting the scope of his cross-examination of Malachi, preventing him from adequately questioning her regarding pending drug charges in Guilford County for which she could receive a favorable plea offer contingent on her testimony against Defendant. After careful review of the record and applicable law, we agree.

"Under the Confrontation Clause of the Sixth Amendment to the United States Constitution, an accused is guaranteed the right to be confronted with his adverse witnesses." *State v. Ward*, 354 N.C. 231, 260, 555 S.E.2d 251, 269 (2001) (citing *State v. McNeil*, 350 N.C. 657, 677, 518 S.E.2d 486, 498 (1999)). "This right, however, is not without limits, and the trial court 'retain[s] broad discretion to preclude cross-examination that is repetitive or that is intended to merely harass, annoy or humiliate a witness.' " *Id.* at 260, 555 S.E.2d at 270 (quoting *State v. Mason*, 315 N.C. 724, 730, 340 S.E.2d 430, 434 (1986)).

It is well established that pending criminal charges or any criminal convictions for which a witness is currently on probation are generally permissible topics for cross-examination because "the jury is entitled to

consider, in evaluating a witness's credibility, the fact [that] the State has a 'weapon to control the witness.' " *State v. Ferguson*, 140 N.C. App. 699, 705, 538 S.E.2d 217, 222 (2000) (quoting *State v. Prevatte*, 346 N.C. 162, 164, 484 S.E.2d 377, 378 (1997)).

In *Prevatte*, the North Carolina Supreme Court held that the trial court committed a constitutional error by not allowing the defendant to ask certain questions during cross-examination of the State's principal witness. 346 N.C. at 163, 484 S.E.2d at 378. There, the jury found the defendant guilty of, among other things, first-degree murder. *Id.* at 164, 484 S.E.2d at 378. At the time of his testimony, the State's principal witness, an eyewitness to the shooting, "was under indictment in another county on nine charges of forgery and uttering forged checks." *Id.* at 163, 484 S.E.2d at 378. The Court noted that the other county in which the charges against the witness were pending "was under the same district attorney." *Id.* at 163, 484 S.E.2d at 378. Relying on the United States Supreme Court's decision in *Davis v. Alaska*, 415 U.S. 308, 39 L.Ed.2d 347 (1974), the North Carolina Supreme Court granted the defendant a new trial based on the trial court's failure to allow the defendant to question the State's primary witness about "whether [the witness] had been promised or expected anything in regard to the charges in exchange for his testimony in [the] case." *Id.* at 163, 484 S.E.2d at 378.

Similar limitations to cross-examination have been held not to be error when the pending charges were in a separate prosecutorial district from the district the witness was testifying in, and the defendant failed to present evidence of communication between the two prosecutorial districts. In *State v. Murrell*, 362 N.C. 375, 404, 665 S.E.2d 61, 80 (2008), the North Carolina Supreme Court distinguished *Prevatte* because the State's witness in *Murrell* was facing charges "in a different jurisdiction, and [the] defendant provide[d] no supporting documentation of any discussion between the two district attorneys' offices to demonstrate that [the witness's] testimony was biased in this respect." *Id.* at 404, 665 S.E.2d at 80. It follows that when considering whether a trial court has erred in limiting cross-examination about pending charges against a State's witness, the State's ability to use the pending charges to leverage the witness' testimony is essential.

Here, Defendant's trial counsel argued that an email exchange between prosecutors established a possible reduction of drug trafficking charges against Malachi in Guilford County in exchange for Malachi's testimony against Defendant in Forsyth County. Following a *voir dire* exchange, the trial court ruled that it would allow defense counsel limited cross-examination of Malachi regarding her pending charges.

However, before the jury, the trial court limited defense counsel's questioning as follows:

> DEFENSE COUNSEL: Isn't it true on that date, you were charged by the High Point Police Department with one count of trafficking in methamphetamine, one count conspiracy to traffic in methamphetamine, one count of trafficking in marijuana and one count of conspiracy to traffic in marijuana?
>
> MALACHI: And what day—what date did you say?
>
> DEFENSE COUNSEL: January 21st of 2015.
>
> MALACHI: Yes, sir.
>
> DEFENSE COUNSEL: And those charges are still pending, are they not?
>
> MALACHI: Yes, sir.
>
> . . .
>
> DEFENSE COUNSEL: And this is in Guilford County?
>
> MALACHI: Yes, sir.
>
> . . .
>
> DEFENSE COUNSEL: What, if anything, have you been offered from the State at this point regarding those pending charges?
>
> MALACHI: I don't know nothing about that.
>
> DEFENSE COUNSEL: So nothing has been finalized in Guilford County?
>
> PROSECUTOR: Objection.
>
> THE COURT: Sustained.
>
> . . .
>
> DEFENSE COUNSEL: What, if anything, do you hope to gain out of testifying here for the State with regard to those five pending charges?
>
> MALACHI: Justice for Anthony Johnson.
>
> DEFENSE COUNSEL: So you don't think you're going to get anything out of it for the charges you got?

PROSECUTOR: Objection.

THE COURT: Sustained.

DEFENSE COUNSEL: Are you aware of any other considerations you might have for those pending charges right now?

PROSECUTOR: Objection.

THE COURT: Sustained.

The sustained objections limited the testimony beyond that which the trial court ruled it would allow in *voir dire* and precluded Defendant's counsel from establishing a possible bias in Malachi's testimony against Defendant. The State argues that the trial court properly sustained the objections because defense counsel's questions sought to undermine Malachi's credibility based simply on the fact that she was charged with drug crimes. This argument is unpersuasive, particularly in light of the fact that Defendant, who also testified, admitted to having engaged in drug dealing. Because Defendant presented evidence of communication between the districts, the trial court's limitation of Malachi's cross-examination was in error.

[2] We must next determine whether the trial court's error requires a new trial. To avoid disturbing a jury verdict in a trial involving constitutional error, the State must prove that the error was harmless beyond a reasonable doubt. N.C. Gen. Stat. § 15A-1443 (2017). In the context of a trial court unconstitutionally limiting a criminal defendant's right to cross-examine a witness about pending charges against the witness, the North Carolina Supreme Court has explained that such error may be harmless when the witness is "not a principal witness for the State but [is] a corroborating witness[,]" and has been impeached through other means. *State v. Hoffman*, 349 N.C. 167, 180, 505 S.E.2d 80, 88 (1998).

Similar to *Prevatte* and unlike in *Hoffman*, the witness Defendant sought to cross-examine here was the State's *principal* eyewitness. There were no other witnesses to the shooting of Johnson, and the other evidence provided by the State was tenuous, thereby making Malachi's testimony essential. The State argues that defense counsel's cross-examination was extensive, covering her timeline of events, the assault by Defendant, her phone calls from the neighbor's phone, and her inconsistent statements to medical providers, prosecutors, and police. However, the violation of the confrontation clause arises from Defendant's inability to question the witness specifically about the bias created by the pending charges—which the *Prevatte* court classified

as a "weapon to control the witness"—not from a generalized limited cross-examination. *Prevatte*, 346 N.C. at 164, 484 S.E.2d at 378. By not allowing defense counsel to inquire about Malachi's knowledge of plea negotiations or pending charges, Defendant was prevented from establishing a possible bias arising from the pending charges. The State has, therefore, failed to distinguish this case from *Prevatte* or demonstrate, as in *Hoffman*, that the error was harmless beyond a reasonable doubt. Accordingly, regardless of the extensiveness of the remaining permitted cross-examination of Malachi, the State here has failed to meet its burden of proving that the error was harmless.

Because Malachi was the State's principal and only eyewitness, there was evidence of communication between the two counties regarding Malachi's cooperation, and there was no physical evidence linking Defendant to the shooting, we conclude that the trial court erred in limiting defense counsel's cross-examination and that this error was not harmless beyond a reasonable doubt.

Conclusion

In light of the foregoing, we hold that the trial court erred by limiting defense counsel's cross-examination of Malachi and grant Defendant a new trial. We do not consider Defendant's other assignments of error, as the questions they pose may not recur at a new trial.

NEW TRIAL.

Judge STROUD concurs.

Judge DILLON dissents in separate opinion.

DILLON, Judge, dissenting.

I agree with the majority that the trial court should have allowed the State's sole principal eye-witness, on cross-examination, to answer whether she *thought* or *hoped* she would receive some leniency for the charges pending against *her* in return for her testimony against Defendant. A defendant is entitled for the jury to know that the State's principal witness might be biased, based on the possibility that the witness may be shown leniency by the prosecution regarding charges pending against the witness in exchange for the witness's testimony against the defendant.

I conclude, though, that *in the present case* any error by the trial court was harmless beyond a reasonable doubt. Though the trial court did not allow the witness to answer questions about her hope of receiving leniency, the trial court otherwise gave Defendant's counsel ample opportunity during cross-examination to get his point across to the jury. Specifically, Defendant's counsel was allowed to elicit testimony from the witness about the specifics of her pending drug charges. Also, the trial court allowed the witness to state that she did not "*know* anything about" whether the State would offer her leniency in exchange for her testimony. (Emphasis added.) The trial court simply did not allow the witness to state whether she "hoped" or "thought" she would receive leniency. Further, the witness testified that all she hoped to gain from testifying was "justice" for her boyfriend, who was the victim.

I have reviewed the Defendant's other arguments and do not believe that he has shown reversible error. Accordingly, my vote is that Defendant received a fair trial, free from reversible error.

STATE OF NORTH CAROLINA
v.
BRITTON DARRELL BUCHANAN

No. COA17-746

Filed 7 August 2018

1. Appeal and Error—preservation of issues—jury instructions—no objection

Defendant failed to preserve for appellate review an argument that the trial court deviated from the pattern jury instruction for the offense of assault by pointing a gun because he did not object to the jury instructions at trial and did not specifically allege plain error on appeal.

2. Assault—self-defense—evidence not exculpatory

In a prosecution for various assault charges pertaining to the use of a weapon in a physical altercation in a parking lot, defendant's motion to dismiss was properly denied where the evidence did not tend only to exculpate defendant. Defendant's own testimony, testimony from several witnesses, and video footage demonstrated defendant acting as the aggressor rather than in self-defense.

3. Sentencing—restitution—medical expenses—sufficiency of evidence

The trial court erred in ordering defendant to pay restitution for a victim's medical expenses incurred as a result of being assaulted, where the amount was not supported by sufficient testimony or documentary evidence.

Appeal by defendant from judgments entered 31 August 2016 by Judge Gale M. Adams in Lee County Superior Court. Heard in the Court of Appeals 4 April 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General LaShawn S. Piquant, for the State.

Rudolf Widenhouse, by M. Gordon Widenhouse, Jr., for defendant.

ELMORE, Judge.

Defendant Britton Darrell Buchanan appeals from judgments entered upon jury verdicts finding him guilty of assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, and assault by pointing a gun. On appeal, defendant contends the trial court erred by omitting the essential element of "without legal justification" from its final mandate to the jury on the charge of assault by pointing a gun, by denying his motion to dismiss all the charges against him due to insufficient evidence to rebut his claim of self-defense, and by ordering restitution in an amount not supported by the evidence adduced at trial or sentencing. For the reasons stated herein, we dismiss in part, find no error in part, and vacate in part and remand.

Background

This appeal arises out of a physical altercation that took place in a Walmart parking lot on 20 March 2014.

Robert Noeth was picking up his aunt's prescription that afternoon when he encountered defendant inside the store. At the time, Robert's father James was living with defendant's ex-girlfriend, and Robert and defendant had a recent history of "trouble on the phone with text messages." While Robert was standing in the pharmacy line, defendant approached him from behind, poked him in the back, and stated, "you still running your mouth. I got something for you." Defendant then went outside to wait for Robert in the parking lot, while Robert used the pharmacist's phone to call his father.

Security cameras recorded what happened next, and several eyewitnesses testified at trial. Robert's aunt, Rhonda Yates, had been waiting in the parking lot while Robert went inside the store to pick up her prescription. Yates was sitting on Robert's truck tailgate with defendant—who had parked his vehicle next to Robert's—when James Noeth, Skylar Windham, and Andy Hicks arrived in a black SUV. Additionally, Fallon Hargenrader and her husband Jason had just finished shopping and were sitting in their car nearby, and Debbie Tulloch was walking through the parking lot toward defendant.

Robert was still inside the store when James, Windham, and Hicks arrived. James stopped the SUV directly in front of Yates and defendant, who immediately retrieved a gun from his vehicle. As the three men exited the SUV, defendant approached Windham first and pointed the gun directly in Windham's face, poking him in the eye. Defendant then moved on to James, who he pistol-whipped in the face before being intercepted by Hicks, who in turn hit defendant with a baseball bat.

A scuffle for the gun ensued after Hicks hit defendant with the bat. As the fighting slowed, defendant returned the gun to his vehicle and retrieved an axe handle instead. Defendant proceeded to knock James unconscious with the axe handle before swinging it repeatedly at Hicks and Robert, who by that time had come outside. Hicks and Windham eventually tackled defendant to the ground, and Robert kicked defendant to prevent him from getting up again. Defendant's jaw was broken in seven places and five of his teeth were knocked out during the altercation, which lasted approximately ten minutes. James was airlifted to UNC Hospital and remained there for three to four days.

As a result of the events described above, defendant was indicted on two counts of assault with a deadly weapon inflicting serious injury against James and Hicks and one count of assault by pointing a gun against Windham. Defendant was tried jointly with Hicks, who was indicted on one count of assault with a deadly weapon inflicting serious injury against defendant.

Eleven witnesses—including defendant and Hicks—testified at trial, and video footage captured by the security cameras was played for the jury during Windham's testimony, which was consistent with the video. The video showed defendant sitting on Robert's tailgate in the parking lot; retrieving the gun from his vehicle prior to the three men exiting the SUV; approaching Windham and pointing the gun in his face; approaching James and pistol-whipping him in the face; being struck by Hicks with the bat; getting an axe handle from his vehicle as

the fighting slowed; and hitting James in the head with the axe handle before turning it on Hicks and Robert.

On cross-examination by Hicks's attorney, defendant admitted to retrieving the loaded gun from his vehicle before James, Windham, or Hicks even opened the doors of the SUV. Defendant explained that he could see "the white in [the men's] eyes" and knew he was in trouble; he further claimed to have feared for his life.

At the close of the State's evidence, defendant made a motion to dismiss the charges against him on the grounds that the State "did not present substantial evidence that he did not act in self-defense." The trial court denied defendant's motion to dismiss, which was properly renewed and again denied at the close of all the evidence.

At defendant's request, the trial court instructed the jury using the pattern jury instructions for the offense of assault by pointing a gun as well as for the legal justification of self-defense. The trial court began its charge by instructing the jury that the State was required to prove two things beyond a reasonable doubt: first, that defendant "pointed a gun at Skylar Windham," and second, that defendant "acted intentionally and without justification or excuse." The trial court continued:

> If you find from the evidence beyond a reasonable doubt that on or about the alleged date, the defendant intentionally pointed a gun at Skylar Windham, nothing else appearing, it would be your duty to return a verdict of guilty. If you do not so find or you have a reasonable doubt as to one or both of these things, it would be your duty to return a verdict of not guilty.
>
> Even if you are satisfied beyond a reasonable doubt that the defendant committed an assault by pointing a gun, you may return a verdict of guilty only if the State has also satisfied you beyond a reasonable doubt that the defendant did not act in self-defense. Therefore, if the defendant did not reasonably believe that the defendant's action was necessary or appeared to be necessary to protect the defendant from bodily injury or offensive physical contact, or the defendant used excessive force, or the defendant was the aggressor, the defendant's actions would not be excused or justified in defense of the defendant. If you do not so find or you have a reasonable doubt that the State has proved any of these things, then the defendant's

> actions would be justified by self-defense and it would be your duty to return a verdict of not guilty.

Defendant did not object to any portion of the jury charge or omission therefrom prior to the jury retiring for deliberations.

While the jury was unable to reach a verdict as to Hicks, it found defendant guilty of assault with a deadly weapon inflicting serious injury against James, assault with a deadly weapon against Hicks, and assault by pointing a gun against Windham. The trial court sentenced defendant to 22 months' incarceration, suspended on the condition that he serve 36 months' supervised probation and spend 30 days in jail, pay the requisite jail fees, and not threaten or assault the complaining parties.

As to restitution, James testified at the sentencing hearing that he had outstanding medical bills in the amount of $10,260.00 as a result of defendant's conduct. A bill from UNC Hospital dated 7 April 2014 was presented as a five-page fax dated 24 August 2016, which James testified to requesting in preparation for trial. Defendant did not object to the bill being admitted into evidence, but he did argue that the amount still outstanding was not up-to-date; it was also unclear what, if any, portion of the bill had been covered by insurance. The trial court thus held the issue of restitution open to determine if a more recent bill could be obtained. In the meantime, defendant entered written notice of appeal.

On 5 December 2016, the trial court reconvened for a follow-up hearing to address the sole remaining issue of restitution. James was present at that hearing as well, but he did not testify. The State informed the trial court that "as late as October 28, [they] were receiving the same faxed materials regarding UNC Hospital in terms of the $10,000.00. [They] also had, on behalf of the doctors, [an outstanding bill] in the amount of $1,947.80." The State explained that it had later determined the $10,000.00 amount had been "written off" by both UNC Hospital and its collection agency; thus, the only remaining bill was from UNC doctors in the amount of $1,962.80, including interest. The State further explained that the doctors' bill had been turned over to a separate collection agency and had not been written off. However, no testimony or documentation was presented as to the doctors' bill.

In addition to the conditions set forth in its initial sentencing judgment, the trial court ordered at the follow-up hearing that defendant pay restitution in the amount of $1,962.80. Defendant gave oral notice of appeal from that ruling.

Discussion

On appeal, defendant argues the trial court erred by (I) omitting the phrase "without legal justification" from its final mandate to the jury for the offense of assault by pointing a gun; (II) denying defendant's motion to dismiss, where defendant contends the State's evidence showed he acted in self-defense following a violent assault; and (III) ordering restitution in the amount of $1,962.80.

I. Jury Instructions

[1] Defendant first contends the trial court erred by omitting the essential element of "without legal justification" from the mandate portion of the pattern jury instructions for assault by pointing a gun. He argues further that the trial court should not have included the phrase "nothing else appearing" in the mandate. Defendant asserts that "[b]ecause the jury may have acted on the incorrect part of the instructions, [he] must receive a new trial on this charge."

"A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]" N.C. R. App. P. 10(a)(2); *see also State v. Schiro*, 219 N.C. App. 105, 115, 723 S.E.2d 134, 141 (2012).

> 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).

Defendant here failed to object to the jury instructions at trial. In his brief, defendant ignores this failure, asserting simply that "[w]here a defendant requests and the trial court agrees to give a pattern jury instruction, any error in the actual instruction is reviewed *de novo*." Defendant does not contend on appeal that the alleged error in the jury instructions amounts to plain error.

Because defendant failed to properly preserve this issue for appellate review by lodging an objection at trial, and because defendant has failed to specifically and distinctly allege plain error, we dismiss this portion of defendant's appeal. *See State v. Goss*, 361 N.C. 610, 622, 651

S.E.2d 867, 875 (2007) (holding that defendant had waived an alleged constitutional error by failing to object at trial or to assign plain error on appeal).

II. Motion to Dismiss

[2] Defendant next contends the trial court erred in denying his motion to dismiss the charges against him due to insufficiency of the evidence. Defendant asserts that "the State's own, credible evidence showed he acted in self-defense after he was violently assaulted." Defendant relies primarily on *State v. Johnson*, 261 N.C. 727, 136 S.E.2d 84 (1964), to support his argument that because the State's evidence tended only to exculpate defendant, his motion to dismiss should have been granted.

We review the trial court's ruling on a motion to dismiss *de novo*. *See State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). When reviewing a challenge to the denial of a defendant's motion to dismiss a charge on the basis of insufficiency of the evidence, the relevant inquiry is "whether the State presented 'substantial evidence' in support of each element of the charged offense." *State v. Chapman*, 359 N.C. 328, 374, 611 S.E.2d 794, 827 (2005). "In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence." *State v. Abshire*, 363 N.C. 322, 328, 677 S.E.2d 444, 449 (2009) (citations and internal quotation marks omitted). Further, a " 'substantial evidence' inquiry examines the sufficiency of the evidence presented but not its weight." *State v. McNeil*, 359 N.C. 800, 804, 617 S.E.2d 271, 274 (2005) (citations omitted). Thus, "if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Id.* (citations, internal quotations marks, and brackets omitted).

In *State v. Johnson*, the defendant was convicted of manslaughter for stabbing a man after he broke open the door of her home and attempted to grab her. 261 N.C. at 729, 136 S.E.2d at 86. At trial, the defendant had testified that the man had physically assaulted her earlier on the day of the stabbing as well as three or four months prior, had been told to leave the defendant's home and to stay away, and had been drinking. *Id.* Witnesses corroborated the defendant's testimony, and the State presented no contradictory evidence. Nevertheless, the trial court denied the defendant's motion to dismiss. *Id.*

In reversing the defendant's conviction, our Supreme Court in *Johnson* held that "[w]hen the State introduces in evidence exculpatory

statements of the defendant which are not contradicted or shown to be false by any other facts or circumstances in evidence, the State is bound by these statements." *Id.* at 730, 136 S.E.2d at 86. Furthermore, "[w]hen the State's evidence and that of the defendant is to the same effect and tends only to exculpate the defendant, motion for nonsuit should be allowed." *Id.* Thus, because the evidence in *Johnson* tended only to show that the defendant "had the right to stand her ground, protect her person, [and] prevent the invasion of her home," the trial court erred in denying the defendant's motion to dismiss. *Id.*

The instant case is readily distinguishable from *Johnson* in that the evidence here did not tend only to exculpate defendant. Rather, defendant's own testimony—regardless of the fact that he claimed to have feared for his life—demonstrated that he was waiting for Robert in the parking lot and retrieved a loaded gun from his vehicle before James, Windham, or Hicks even opened the doors of the SUV. Moreover, multiple witnesses testified and video footage tended to show that defendant acted as the aggressor. Thus, because there was substantial evidence to contradict defendant's claim of self-defense, the trial court did not err in denying defendant's motion to dismiss.

III. Amount of Restitution

[3] In his final argument on appeal, defendant contends there was insufficient evidence to support the trial court's restitution award in the amount of $1,962.80 to compensate James Noeth for medical expenses. Defendant asserts that the State offered no evidence at all—through testimony or documentary submission—to support the unsworn statements of the prosecutor indicating that a collection agency was still seeking payment from James.

Even absent an objection, awards of restitution are reviewed *de novo*. *State v. McNeil*, 209 N.C. App. 654, 667, 707 S.E.2d 674, 684 (2011). The restitution award does not have to be supported by specific findings of fact or conclusions of law, and the quantum of evidence needed to support the award is not high. *State v. Davis*, 167 N.C. App. 770, 776, 607 S.E.2d 5, 10 (2005). Rather, when there is some evidence that the amount awarded is appropriate, it will not be overruled on appeal. *Id.*

Although the quantum of evidence needed to support a restitution award is not high, the amount awarded nevertheless "must be supported by evidence adduced at trial or at sentencing." *State v. Moore*, 365 N.C. 283, 285, 715 S.E.2d 847, 849 (2011) (citation and quotation marks omitted). "[A] restitution worksheet, unsupported by testimony or documentation, is insufficient to support an order of restitution." *Id.* (citation

omitted). Unsworn statements of a prosecutor are also insufficient. *McNeil*, 209 N.C. App. at 668, 707 S.E.2d at 684. When no evidence supports the award, the award of restitution will be vacated, and the typical remedy is to remand the restitution portion of the sentence for a new sentencing hearing. *Id.* (remanding when there was evidence of physical damage to victim's property but no evidence as to appropriate amount of restitution); *see also State v. Hunt*, ___ N.C. App. ___, ___, 792 S.E.2d 552, 563 (2016).

Here, the transcripts from both the initial sentencing hearing and the follow-up hearing indicate that the trial court's restitution award was not supported by the evidence.

While James testified at the sentencing hearing and was present at the follow-up hearing, his testimony concerned only the UNC Hospital bill in the approximate amount of $10,000.00. Based on his testimony, James knew very little about the status of the bill or his insurance coverage. The only documentation submitted to the trial court at either hearing consisted of the faxed and outdated bill from UNC Hospital, which the State later determined had been "written off." No testimony or documentation was submitted to support an award based on the UNC doctors' bill.

Because there was no evidence adduced at trial or sentencing to support the trial court's restitution award of $1,962.80, we vacate the award and remand the restitution portion of defendant's sentence for a new sentencing hearing.

Conclusion

As defendant neither objected to the jury instructions at trial nor alleges plain error in his brief, he has waived appellate review of this issue. Additionally, because there was substantial evidence to contradict defendant's claim of self-defense, the trial court did not err in denying his motion to dismiss. Lastly, because the State's evidence failed to support the trial court's restitution award of $1,962.80, we vacate the award and remand the restitution portion of that judgment for a new sentencing hearing.

DISMISSED IN PART; NO ERROR IN PART; VACATED IN PART AND REMANDED.

Judges TYSON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ERIC FERRER, DEFENDANT

No. COA17-655

Filed 7 August 2018

Fraud—insurance fraud—fatal variance between evidence and indictment

The trial court erred in denying defendant's motion to dismiss his conviction for insurance fraud because the State failed to present evidence that defendant made a fraudulent representation to the insurance company named in the indictment. Although there was evidence that defendant made a fraudulent representation to the insurer which covered the business that leased the building where the illegal fire was set, defendant was only charged with defrauding the insurer that covered the building.

Appeal by defendant from judgment entered on or about 12 September 2016 by Judge W. Osmond Smith, III in Superior Court, Person County. Heard in the Court of Appeals 21 March 2018.

Attorney General Joshua H. Stein, III, by Assistant Attorney General Tracy Nayer, for the State.

Patterson Harkavy LLP, by Narendra K. Ghosh, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting him of insurance fraud. Because the State presented no evidence defendant made fraudulent representations in support of an insurance claim to The Hartford Insurance Company as alleged by the indictment, the trial court should have allowed defendant's motion to dismiss this charge. We therefore vacate his conviction for insurance fraud.

I. Background

Sunday, 16 December 2012, was not a happy day at the Happy Days Diner; it was set on fire that day. Happy Days Diner was operated by defendant and Ms. Iris Diaz in a building leased by Fawzi Bekhet. Ms. Diaz was approximately $16,000 in arrears on rent owed to Mr. Bekhet

and was scheduled to go to court the next day on Mr. Bekhet's claim for summary ejectment. After the fire, Ms. Diaz filed an insurance claim with The Hartford Insurance Company ("Hartford"). The building itself was insured by Nationwide Insurance ("Nationwide"), and Mr. Bekhet filed a claim for fire damage with Nationwide. Defendant gave a recorded statement to Nationwide representative Ms. Bonnie Locklear regarding Mr. Bekhet's claim.

Defendant was indicted for burning a commercial structure and for insurance fraud based upon the insurance claim made upon the insurance with Hartford. After a jury trial, defendant was found guilty of both charges. Defendant timely gave oral notice of appeal.

II. Insurance Fraud

Defendant does not challenge his judgment for his conviction of burning a commercial structure but only contends the trial court should have allowed his motion to dismiss the charge of insurance fraud because the State presented no evidence defendant "[m]ade a [f]raudulent [s]tatement to Hartford Insurance[.]"[1]

To defendant's argument there was no evidence he made any fraudulent statement to Hartford, we say, "exactamundo." The trial court should have granted his motion to dismiss.

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The 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 that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

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1. Defendant's second argument on appeal is that if his motion to dismiss the charge of insurance fraud was not properly preserved then his attorney provided ineffective assistance of counsel and this Court should still review his first argument under Rule 2 of the North Carolina Rules of Appellate Procedure. We and the State agree that defendant's counsel adequately preserved the motion to dismiss on his charge of insurance fraud, so we need not address defendant's second argument.

> The elements for insurance fraud include that the accused presented a statement in support of a claim for payment under an insurance policy, that the statement contained false or misleading information concerning a fact or matter material to the claim, that the accused knew that the statement contained false or misleading information, and that the accused acted with the intent to defraud.

State v. Payne, 149 N.C. App. 421, 426–27, 561 S.E.2d 507, 511 (2002); *see* N.C. Gen. Stat. § 58-2-161 (2011).

The indictment for insurance fraud alleged that defendant presented "a written and oral statement as part of a claim for payment pursuant to an insurance policy" with "intent to defraud an insurer, The Hartford Insurance Company." (Original in all caps.)

> It has long been the law of this state that a defendant must be convicted, if convicted at all, of the particular offense charged in the warrant or bill of indictment. It is also settled that a fatal variance between the indictment and proof is properly raised by a motion for judgment as of nonsuit or a motion to dismiss, since there is not sufficient evidence to support the charge laid in the indictment.

State v. Faircloth, 297 N.C. 100, 107, 253 S.E.2d 890, 894 (1979) (citations omitted).

As noted above, defendant gave a statement to Nationwide regarding Mr. Bekhet's claim, not to Hartford, the insurer for Ms. Diaz's claim. No statement from defendant, written or oral, to Hartford was in evidence. The State directs us to Exhibit 13, the audio recording of an interview of defendant by Ms. Locklear of Nationwide. The State directs us to portions of the interview where: defendant acknowledges the fire was determined to be arson; defendant states he had spoken with a special investigator from Hartford; defendant denies being involved with setting the fire; Ms. Locklear says she is "going to go over . . . just some financial information cause we usually cover it. I'm sure the guy probably at Hartford did too . . ." to which defendant responds, "Yeah[;]" and Ms. Locklear asks, "What are you guys claiming with Hartford that you lost?" to which defendant responds, "I think right now it's just the food . . . ." The State then argues that based on these noted portions of the interview it could be

> reasonably deduced or inferred that the Hartford Insurance Company's special investigator asked defendant whether he was responsible for setting fire to the Happy Days Diner, and that defendant made the same false and misleading statement to the Hartford Insurance Company investigator that he made to Ms. Locklear when he denied being involved with setting fire to the Happy Days Diner in response to Ms. Locklear's direct questions regarding the same.

In other words, the State asks that we read the comment, "I'm sure the guy probably at Hartford did too . . ." and the defendant's response, "Yeah," to mean that defendant made specific fraudulent representations to Hartford. The State simply asks that we infer too much from this vague comment and response. There is no doubt that defendant made fraudulent representations to Nationwide, but defendant was not charged for those representations. Since the Nationwide statement was the State's only evidence, the trial court erred in denying defendant's motion to dismiss.

III. Conclusion

Because there was insufficient evidence of insurance fraud, the trial court should have granted defendant's motion to dismiss; thus, we vacate that judgment.

VACATED.

Judges DAVIS and ARROWOOD concur.

STATE v. GRIFFIN

[260 N.C. App. 629 (2018)]

STATE OF NORTH CAROLINA
v.
THOMAS EARL GRIFFIN, DEFENDANT

No. COA17-386

Filed 7 August 2018

1. Appeal and Error—preservation of issues—constitutional argument—raised in and decided by trial court

The State's argument that defendant waived his right to challenge his enrollment in satellite-based monitoring as violating the Fourth Amendment was rejected by the Court of Appeals, because the trial court specifically addressed defendant's right to be free from unreasonable searches at his bring-back hearing.

2. Satellite-Based Monitoring—Fourth Amendment—reasonableness—evidentiary support—effectiveness to protect public

The State's failure to present evidence that satellite-based monitoring (SBM) was effective in protecting the public from recidivist sex offenders violated the Fourth Amendment's prohibition against unreasonable searches and necessitated the reversal of the trial court's order requiring defendant to enroll in SBM for thirty years.

Judge BRYANT dissenting.

Appeal by Defendant from order entered 1 September 2016 by Judge Benjamin G. Alford in Craven County Superior Court. Heard in the Court of Appeals 19 September 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

INMAN, Judge.

In light of this Court's recent decision in *State v. Grady*, __ N.C. App. __, __ S.E.2d __, COA17-12, 2018 WL 2206344 (15 May 2018) ("*Grady II*"),[1]

1. In the interest of clarity, we refer to this cited decision as *Grady II* and refer to the United State Supreme Court's preceding and related decision as *Grady I*.

absent any evidence that satellite-based monitoring ("SBM") is effective to protect the public from sex offenders, the trial court erred in imposing SBM on a sex offender for thirty years. We therefore reverse the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

On 29 January 2004 in Craven County Superior Court, before the Honorable Benjamin G. Alford, Thomas Earl Griffin ("Defendant") proffered an *Alford* plea, as a part of a negotiated plea agreement, to the charge of first-degree sex offense with a child. As a part of the plea agreement, the court dismissed a charge of taking indecent liberties with a child.

The State's recitation of the facts during the plea hearing stated that Defendant was the live-in boyfriend of the victim's mother. The victim, who was eleven years old at the time of the initial disclosure, stated that Defendant had "been messing with her for the past three years," describing penile and digital penetration, as well as penetration with the use of a foreign object. Defendant made a full confession, admitting all of what the victim reported. The court sentenced Defendant to a prison term of 144 to 182 months[2] and recommended that while incarcerated Defendant participate in the SOAR program (a sex offender treatment program).

Defendant was released from prison eleven years later, in June 2015. On 29 September 2015, the Department of Public Safety informed Defendant that his was a reportable sex offense as defined by N.C. Gen. Stat. § 14-208.6(4) and that he could be required to enroll in an SBM program pursuant to N.C. Gen. Stat. § 14-208.40(a)(2), as determined by a court. Defendant was instructed to appear for a "bring-back" hearing to determine whether he would be required to participate in an SBM program.

The bring-back hearing was conducted on 16 August 2016, in Craven County Superior Court, again before Judge Alford. The State introduced into evidence a "Revised STATIC-99 Coding Form" ("Static-99"), an actuarial report designed to estimate the probability of sex offender recidivism, which placed Defendant in the "moderate-low" category, above the "low" and below the "moderate-high" and "high" risk categories.[3]

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2. First-degree sex offense is a B1 felony punishable by a maximum sentence of life imprisonment without parole for offenders with at least a Level V prior record level. Defendant, whose only prior convictions were for driving without a license and registration and fishing without a license, was a Level I offender. *See* N.C. Gen. Stat. § 15A-1340.17 (2017).

3. Though unchallenged before the trial court, Defendant argues on appeal that his Static-99 was miscalculated and that his risk category should have been "low" risk.

The State also called as a witness Probation and Parole Officer Caitlin Allen, who supervised Defendant and other sex offenders. Based on her review of Defendant's prison records and her own supervision, Officer Allen testified that while in prison, Defendant had not completed the SOAR program and that, since his release from prison, Defendant had not committed any criminal offenses or violated the terms of his probation, including restrictions on his location.

Officer Allen also described the physical dimensions of the SBM tracking device, how it is worn, and its general function. The State presented no evidence regarding how information gathered through SBM of Defendant would be used. The State presented no evidence regarding whether, or to what degree, SBM would be effective in protecting the public from Defendant committing another sex offense.

The prosecutor stated her belief that Defendant could be ordered to participate in an SBM program for a term of years, but not life, and "ask[ed] that [the court] find that this was a – that the Satellite Based Monitoring [was] a reasonable search." The prosecutor noted that the victim was a young child, eighteen years younger than Defendant, and that by virtue of his living arrangement with the victim's mother, Defendant held a position of trust in the victim's household. In response, counsel for Defendant argued that based on his "moderate to low level – level of risk" and his compliance with all terms of his probation, "this level of intrusion" was not warranted. The trial court took the matter under advisement without commenting on the merits of either the State's or Defendant's arguments.

On 1 September 2016, the trial court entered a form order finding that Defendant had been convicted of a reportable offense as defined by N.C. Gen. Stat. § 14-208.6 and involving the physical, mental, or sexual abuse of a minor. The order also found that Defendant was not classified as a sexually violent predator, was not a recidivist, and was not convicted of an aggravated offense. The trial court also entered, on an attached form, the following additional findings and a conclusion of law:

> 1. The defendant failed to participate in and[/]or complete the SOAR program.
>
> 2. The defendant took advantage of the victim's young age and vulnerability: the victim was 11 years old the defendant was 29 years old.
>
> 3. The defendant took advantage of a position of trust; the defendant was the live-in boyfriend of the victim's

> mother. The family had resided together for at least four years and [defendant] had a child with the victim's mother.
>
> 4. Sexual abuse occurred over a three year period of time.
>
> The court has weighed the Fourth Amendment right of the defendant to be free from unreasonable searches and seizures with the publics [sic] right to be protected from sex offenders and the court concludes that the publics [sic] right of protection outweighs the "de minimis" intrusion upon the defendant's Fourth Amendment rights.

Based on these findings and conclusion, the trial court ordered Defendant to register as a sex offender and enroll in SBM for a period of thirty years.

Defendant appeals.

II. ANALYSIS

Defendant does not challenge being ordered to register as a sex offender,[4] but argues that the trial court violated his Fourth Amendment rights by ordering him to submit to continuous SBM for thirty years. After careful review of the record and applicable law, we are compelled to agree.

A. Preservation of Issue

[1] "Our appellate courts will only review constitutional questions raised and passed upon at trial." *State v. Mills*, 232 N.C. App. 460, 466, 754 S.E.2d 674, 678 (2014) (citations omitted).

The State argues that Defendant waived the sole issue he raises on appeal—the constitutionality of the order directing him to enroll in the SBM program— asserting "Defendant made no Fourth Amendment challenge either before or at the SBM determination hearing." We reject this argument because the question of whether Defendant's enrollment in an SBM program constituted a reasonable search was directly raised and passed upon by the trial court.

During the bring-back hearing, the prosecutor "ask[ed] that [the court] find . . . Satellite Based Monitoring [was] a reasonable search." In response, Defendant argued that "this level of intrusion" was not

4. As a sex offender, Defendant is subject to a reporting requirement where by statute he must maintain registration with the sheriff of the county in which he resides. *See* N.C. Gen. Stat. § 14-208.7(a) (2017).

warranted. In its order directing Defendant to enroll in a SBM program, the trial court specifically addressed "the Fourth Amendment right of . . . defendant to be free from unreasonable searches . . . [and] the publics [sic] right to be protected" and concluded that the public's right to be protected outweighed Defendant's privacy right.

We hold that Defendant's appeal presents a constitutional question raised and passed upon by the trial court, *see id.* at 466, 754 S.E.2d at 678, and is now properly before this Court.

B. Standard of Review

> In reviewing [the superior court's order], 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.

State v. Williams, 362 N.C. 628, 632, 669 S.E.2d 290, 294 (2008) (citation and quotation marks omitted). This Court reviews "the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Singleton*, 201 N.C. App. 620, 626, 689 S.E.2d 562, 566 (2010) (citation and quotation marks omitted). "We will therefore review the trial court's order to ensure that the determination that 'defendant requires the highest possible level of supervision and monitoring' 'reflects a correct application of law to the facts found.' " *State v. Kilby*, 198 N.C. App. 363, 367, 679 S.E.2d 430, 432 (2009) (citations and brackets omitted).

Williams, *Singleton*, *Kilby*, and a plethora of other decisions regarding SBM were rendered by this Court and the North Carolina Supreme Court prior to the decision by the United States Supreme Court in *Grady v. North Carolina*, 575 U.S. ___, 191 L. Ed. 2d 462 (2015) (per curiam) ("*Grady I*"), which held that North Carolina's SBM program effects a search subject to protections of the Fourth Amendment of the United States Constitution.

"The standard of review for alleged violations of constitutional rights is de novo." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

C. Fourth Amendment to the United States Constitution

The Fourth Amendment to the United States Constitution sets forth "[t]he right of the people to be secure in their persons, houses, papers,

and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. "The touchstone of the Fourth Amendment is reasonableness." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015).

Grady I did not invalidate all SBM orders, noting that "[t]he Fourth Amendment prohibits only *unreasonable* searches." *Grady I*, 575 U.S. at ___, 191 L. Ed. 2d at 462 (emphasis in original). *Grady I* vacated the SBM order and remanded the case to the trial court to determine whether SBM was reasonable based on 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." *Id.* at ___, 191 L. Ed. 2d at 462.

Following the defendant's appeal from a trial court hearing on remand from *Grady I*, this Court in *Grady II* established new criteria for court orders allowing the government to track the location of sex offenders by SBM. *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 8. Following earlier decisions by this Court, *Grady II* held that the State bears the burden of proving that SBM is reasonable. *Id.* at __, __ S.E.2d at __, slip op. at 8; *see also State v. Blue*, 246 N.C. App. 259, 265, 783 S.E.2d 524, 527 (2016). And, for the first time in any North Carolina appellate court decision regarding SBM, *Grady II* held that absent evidence that SBM is *effective* in serving the State's compelling interest in protecting the public from sex offenders, the State failed to meet its burden to prove that SBM is reasonable as required by the Fourth Amendment. *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 8.

D. Evidence that SBM is Effective to Protect the Public from Sex Offenders

[2] Following the United States Supreme Court's remand order in *Grady I* and a new SBM hearing in the trial court, this Court held in *Grady II* that the trial court violated the Fourth Amendment rights of the defendant in that case, a recidivist sex offender, by ordering lifetime SBM absent any evidence that SBM is effective to protect the public against sex offenses. __ N.C. App. at __, __ S.E.2d at __, slip op. at 8. This Court noted that although the SBM program had been in effect for approximately a decade prior to the hearing on remand from the United States Supreme Court, "the State failed to present any evidence of its efficacy in furtherance of the State's undeniably legitimate interests" and held that in the absence of evidence regarding the efficacy of SBM, "we are compelled to conclude that the State failed to carry its burden" of proving that SBM was reasonable in that case. *Id.* at __, __ S.E.2d at __, slip op. at 8.

In this case, as in *Grady II*, the State presented no evidence regarding the efficacy of the SBM program. The State argues that it was unnecessary to present such evidence in order to establish its interest in protecting the public from sex offenders[5] because "one cannot discount the possibility that an offender's awareness his location is being monitored does in fact deter him from committing additional offenses." The State further relies on decisions from other jurisdictions stating that SBM curtails sex offender recidivism.

Our dissenting colleague, who also dissented in *Grady II*, cites the State's Memorandum in Support of Reasonableness of Satellite Based Monitoring submitted to the trial court, noting "the memo outlines empirical evidence and argument as to the statistical likelihood that a sex offender would be a recidivist." The memorandum, however, cited only other court decisions, not evidence, and it did not attach empirical or statistical reports. This approach has been rejected by the United States Court of Appeals for the Fourth Circuit in a decision regarding the constitutionality of premises restrictions for sex offenders:

> The State tries to overcome its lack of data, social science or scientific research, legislative findings, or other empirical evidence with a renewed appeal to anecdotal case law, as well as to "logic and common sense." But neither anecdote, common sense, nor logic, in a vacuum, is sufficient to carry the State's burden of proof.

Doe v. Cooper, 842 F.2d 833, 846 (4th Cir. 2016) (citations omitted).

Decisions from other jurisdictions relied upon by our dissenting colleague—and by the State—holding that SBM is generally regarded as effective in protecting the public from sex offenders are not persuasive in light of this Court's binding decision in *Grady II* that the State must present some evidence to carry its burden of proving that SBM actually serves that governmental interest.[6]

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5. The State also argues that North Carolina's SBM program should be evaluated as a "special needs" program. But the record reflects that the State failed to present this argument to the trial court. "Since the State failed to advance this constitutional argument below, it is waived." *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 3.

6. Also, in contrast to the trial court's order reviewed in *Grady II*, which relied upon some of those decisions, the trial court's order in the case now before us did not refer to any case authorities, or empirical or statistical reports referenced in case authorities, or otherwise. Nor did the trial court indicate in the SBM hearing that it had reviewed the State's legal memorandum or relied upon any of the authorities cited therein.

Our dissenting colleague asserts that requiring the State to introduce evidence that SBM is effective in every SBM hearing, regardless of evidence regarding other relevant circumstances, exceeds the holding of the United States Supreme Court in *Grady I*. However, we are bound by this Court's decision in *Grady II* and cannot hold otherwise. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Our dissenting colleague also asserts that our decision exceeds the holding in *Grady II* by requiring, as a threshold in every SBM case, evidence to support a finding by the trial court that SBM will serve the government purpose of curbing recidivism. But following the reasoning of this Court in *Grady II*, unless SBM is found to be effective to actually serve the purpose of protecting against recidivism by sex offenders, it is impossible for the State to justify the intrusion of continuously tracking an offender's location for any length of time, much less for thirty years.

As noted by this Court in *Grady II*, and by the United States Supreme Court, the continuous and dynamic location data gathered by SBM is far more intrusive than the static information gathered as a result of sex offender registration. " 'GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations.' " *Grady II*, __ N.C. App. at __, __ S.E.2d at __, slip op. at 6 (*quoting United States v. Jones*, 565 U.S. 400, 415, 181 L.Ed.2d 911, 924 (Sotomayor, J., concurring)). In one aspect, the intrusion of SBM on Defendant in this case is greater than the intrusion imposed in *Grady II*, because unlike an order for lifetime SBM, which is subject to periodic challenge and review, an order imposing SBM for a period of years is not subject to later review by the trial court. *See* N.G. Gen. Stat. § 14-208.43 (removal procedure available only for lifetime SBM participants).

We also are bound by this Court's holding in *Grady II* that when the State has presented no evidence that could possibly support a finding necessary to impose SBM, the appropriate disposition is to reverse the trial court's order rather than to vacate and remand the matter for re-hearing. __ N.C. App. at __, __ S.E.2d at __, slip op. at 8 (emphasizing "the State will have only one opportunity to prove that SBM is a reasonable search of the defendant") (citing *State v. Greene*, __ N.C. App. __, __, 806 S.E.2d 343, 345 (2017)).

E. Defendant's Current Threat of Reoffending

This Court in *Grady II* also held that a trial court cannot impose SBM without "sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to *this particular defendant*."

__ N.C. App. at __, __ S.E.2d at __, slip op. at 6 (emphasis in original). The Court "reiterate[d] the continued need for individualized determinations of reasonableness at *Grady* hearings." *Id.* at __, __ S.E.2d at __, slip op. at 8.

Here, unlike in *Grady II*, the State introduced in evidence Defendant's Static-99 risk factor assessment, which reflected that he was a "moderate-low risk" for reoffending. In addition, the State presented evidence, and the trial court found as a fact, that Defendant had violated a position of trust in committing his offense and had failed to complete or participate in a court ordered SOAR program for sex offenders while incarcerated. The SBM order did not reflect in any finding or conclusion whether the trial court determined that Defendant's betrayal of trust or failure to complete or participate in SOAR increased his likelihood of recidivism.

Pre-*Grady I*, this Court held that a Static-99 moderate-low risk assessment, without additional evidence independent of factors considered in the assessment, was insufficient to support the imposition of SBM on a sex offender. *Kilby*, 198 N.C. App. at 370, 679 S.E.2d at 434; *State v. Thomas*, 225 N.C. App. 631, 634, 741 S.E.2d 384, 387 (2013) (holding that statutory language allowing the trial court to make additional findings is to permit the court to consider factors not part of the Static-99 assessment).

In light of our holding that the State failed to prove that SBM is a reasonable search compliant with the Fourth Amendment because it presented no evidence that the SBM program is effective to serve the State's interest in protecting the public against sex offenders, we do not reach the issue of whether the trial court's order or the State's evidence presented regarding Defendant's individual threat of reoffending meets the minimum constitutional standard required by *Grady I* and *Grady II*.

CONCLUSION

We hold that because the State failed to present any evidence that SBM is effective to protect the public from sex offenders, this Court's decision in *Grady II* compels us to reverse the trial court's order requiring Defendant to enroll in SBM for thirty years.

REVERSED.

Judge DAVIS concurs.

Judge BRYANT dissents in separate opinion.

BRYANT, Judge, dissenting.

By requiring our trial courts to find the efficacy of SBM in curbing sex offender recidivism in order to satisfy Fourth Amendment protections against unreasonable searches in the context of SBM, the majority would impose a standard other than is required by Fourth Amendment jurisprudence. I respectfully dissent.

"The touchstone of the Fourth Amendment is reasonableness." *State v. Grice*, 367 N.C. 753, 756, 767 S.E.2d 312, 315 (2015) (citation omitted). "The reasonableness of a search depends on 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." *State v. Grady*, ___ N.C. App. ___, ___, ___ S.E.2d ___, ___, No. COA17-12, 2018 WL 2206344, slip op. at 2 (N.C. Ct. App. May 15, 2018) (hereinafter "*Grady II*") (quoting *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2 459, 462 (2015) (per curiam)).

In support of its reasoning, the majority relies on this Court's 2018 *Grady II* opinion holding that the State failed to carry its burden of proving that SBM was reasonable. In addition to outlining categories of evidence the State failed to present (e.g., "specific interest in monitoring defendant," "general procedures used to monitor unsupervised offenders," *id.* at ___, ___ S.E.2d at ___, slip op. at 7), the *Grady II* majority also stated, "the State failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interests." *Id.* at ___, ___ S.E.2d at ___, slip op. at 8.

I would note that the majority in *Grady II* drew this conclusion in the context of a discussion of the defendant's diminished expectations of privacy. *See id.* at ___, ___ S.E.2d at ___, slip op. at 4 ("The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate." (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654, 132 L. Ed. 2d 564, 575 (1995)). The Court observed that "it [was] unclear whether the trial court considered the legitimacy of [the] defendant's privacy expectation . . . [and] the extent to which the search intrude[d] upon reasonable expectations of privacy." *Id.* at ___, ___ S.E.2d at ___, slip op. at 5 (citation omitted). In regard to continuous GPS monitoring, the *Grady II* opinion states that "[a]lthough the State has no guidelines for the presentation of evidence at *Grady* hearings, . . . there must be sufficient record evidence to support the trial court's conclusion that SBM is reasonable as applied to [*the*] *particular defendant*." *Id.* at ___, ___ S.E.2d at ___, slip op. at 6. On the record before it, the Court observed that "the State presented no

evidence of [the] defendant's current threat of reoffending and . . . the circumstances of his convictions d[id] not support the conclusion that lifetime SBM [was] objectively reasonable." *Id.*

In the absence of evidence describing the defendant's likelihood of recidivism, the Court turned its focus to whether the State presented "any evidence concerning its specific interests in monitoring [the] defendant." *Id.* at ___, ___ S.E.2d at ___, slip op. at 7. The Court noted that "the State failed to present any evidence of [SBM's] efficacy in furtherance of the State's undeniably legitimate interest," in opposition to the defendant's proffer of "multiple reports . . . rebutting the widely held assumption that sex offenders recidivate at higher rates that other groups." *Id.* at ___, ___ S.E.2d at ___, slip op. 8. While the *Grady II* Court majority concluded "that the State failed to carry its burden," *id.*, the Court did not state or imply that the State's burden of proof to establish that SBM was reasonable included establishing the efficacy of SBM in curbing sex offender recidivism for *every* SBM case; it was simply a consideration amongst the totality of the circumstances.

In the instant case, the majority bases the reasonableness of the SBM search of defendant Griffin solely on its holding that the State presented no evidence of the efficacy or effectiveness of the program.[1] Such reasoning unnecessarily imposes upon trial courts a standard other than that which is required by Fourth Amendment jurisprudence: to determine whether a search is reasonable based on "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." *Id.* at ___, ___ S.E.2d at ___, slip op. 2 (quoting *Grady*, 575 U.S. at ___, 191 L. Ed. 2d at 462). Further, by making that standard a necessary finding, as opposed to the broader standard which considers a defendant's expectation of privacy and the extent to which the search intrudes upon reasonable expectations of privacy, the majority forecloses the ability of the trial court to determine the reasonableness of a search based on the totality of circumstances.

Having disagreed with the majority's opinion that the holding in *Grady II* is based on lack of evidence of the efficacy of the SBM program, I must note that the record in the instant case does contain such evidence. In the record proper is a document entitled "Memorandum In Support of The Reasonableness of [SBM]." The memo outlines empirical

1. "We hold that because the State failed to present any evidence that SBM is effective to protect the public from sex offenders, this Court's decision in *Grady II* compels us to reverse the trial court's order requiring Defendant to enroll in SBM for thirty years."

evidence and argument as to the statistical likelihood that a sex offender would be a recidivist. However, this evidence would likely not meet the majority's standard which seems to require statistical data on the recidivism rates of North Carolina offenders in order to determine the efficacy of the SBM program.

As I noted in my dissent in *Grady II*, while the presentation of evidence regarding the rate of recidivism by sex offenders "may be a valid legislative argument, I do not believe it to be a persuasive argument that defendant's participation in the SBM program, when viewed as a search, was unreasonable." *Id.* at ___, ___ S.E.2d at ___, slip op. 11 n.11.

For the reasons stated above, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
WILLIAM BURNETT LINDSEY, DEFENDANT

No. COA17-676

Filed 7 August 2018

Appeal and Error—preservation of issues—constitutional argument—waiver

Defendant waived a constitutional argument that the imposition of satellite-based monitoring was not reasonable under the Fourth Amendment by failing to raise the issue in the trial court, either explicitly or implicitly.

Appeal by defendant from order entered on or about 10 November 2016 by Judge Charles H. Henry in Superior Court, Craven County. Heard in the Court of Appeals 29 November 2017.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Joseph Finarelli, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Wyatt Orsbon, for defendant-appellant.

STROUD, Judge.

Defendant appeals an order requiring him to enroll in North Carolina's sex offender satellite-based monitoring ("SBM") program. Because defendant raised no objection under the Fourth Amendment at the SBM hearing and the issue was not implicitly addressed or ruled upon by the trial court, it was not preserved for appellate review. In our discretion, we decline to grant review under Rule 2 since the law was well-established at the time of the hearing and the State was not on notice of the need to address *Grady* issues due to defendant's failure to raise any constitutional argument. Since defendant raised no other argument about the SBM order, we affirm.

I. Background

In 2009, defendant pled guilty to taking indecent liberties with a child. *See State v. Lindsey*, ___ N.C. App. ___, 789 S.E.2d 568, at *2 (June 21, 2016) (COA15-1251) (unpublished) ("*Lindsey I*"). Defendant was ordered to enroll in SBM, *id.* at *3, and "[d]efendant appeal[ed] from [the] order of the trial court requiring him to enroll in North Carolina's sex offender satellite-based monitoring ('SBM') program." *Id.* at *1. "Because the trial court failed to make the statutorily-required finding that defendant 'requires the highest possible level of supervision and monitoring[,]' N.C. Gen. Stat. § 15A-208.40B(c) (2015)," this Court remanded for further proceedings. *Id.* at *1-2. In *Lindsey I*, defendant's arguments and this Court's ruling were based only upon the application of the SBM statute itself. *See Lindsey I*, ___ N.C. App. ___, 789 S.E.2d 568. Defendant raised no constitutional arguments in *Lindsey I*, nor did this Court's opinion address any constitutional issues. *See id.* This case was not remanded for what has now become known as a "*Grady* hearing" but only for a new hearing to address the statutory issues. *See id.*

On 30 March 2015, the United States Supreme Court issued its per curiam ruling in *Grady v. North Carolina*, holding that SBM is a search under the Fourth Amendment and therefore is subject to the constitutional requirements of the Fourth Amendment. *See Grady*, 135 S.Ct. 1368, 1371, 191 L. Ed. 2d 459 (2015) (per curiam). In *Grady*, the defendant had argued that SBM "would violate his Fourth Amendment right to be free from unreasonable search and seizures." *Id.*, 135 S.Ct. at 1369, 191 L. E. 2d at 460. Our Court stated,

> The United States Supreme Court held that despite its civil nature, North Carolina's SBM program "effects a Fourth Amendment search." *Grady v. North Carolina*, 575 U.S. ___, ___, 191 L. Ed. 2d 459, 462 (2015) (per curiam). However, since "[t]he Fourth Amendment

> prohibits only unreasonable searches[,]" the Supreme Court remanded the case for North Carolina courts to "examine whether the State's monitoring program is reasonable—when properly viewed as a search . . . . " *Id.* at ___,191 L. Ed. 2d at 463.

State v. Grady, ___ N.C. App. ___, ___ S.E.2d ___, *2-3 (May 15, 2018) (COA17-12).

Defendant's hearing on remand, as directed by *Lindsey I*, was held on 8 November 2016, over a year after the United States Supreme Court's ruling in *Grady*. *See generally Grady*, 135 S.Ct. 1368, 191 L. Ed. 2d 459. At the hearing on remand, defendant raised no constitutional objection to SBM based upon the Fourth Amendment or *Grady*. On or about 10 November 2016, the trial court again ordered defendant to enroll in SBM. Defendant appeals.

II. Petition for Writ of Certiorari

Although defendant timely filed a written notice of appeal after entry of the SBM order, he failed to specifically designate this Court as the court he was appealing to in the notice. Because of the defect in his notice of appeal, defendant filed a petition for certiorari with this Court due to his failure to designate this Court as the court he was appealing to in his notice of appeal. The State has claimed no prejudice on appeal due to defendant's failure to note he was appealing to this Court. In our discretion, we grant defendant's petition for certiorari to ensure his appeal is properly before us. *See generally Luther v. Seawell*, 191 N.C. App. 139, 142, 662 S.E.2d 1, 3 (2008) ("This Court does have the authority pursuant to North Carolina Rule of Appellate Procedure 21(a)(1) to treat the purported appeal as a petition for writ of certiorari and grant it in our discretion." (citations and quotation marks omitted)).

III. Waiver

Defendant raises only one issue on appeal and argues that "[t]he [S]tate failed to meet its burden of proving that imposing SBM on Mr. Lindsey is reasonable under the Fourth Amendment." The State contends that defendant has waived his Fourth Amendment argument by his failure to raise the issue. The State, citing *State v. Stroessenreuther*, ___ N.C. App. ___, ___793 S.E.2d 734 (2016), argues that it has the burden to establish the reasonableness of SBM under the Fourth Amendment *only* if the defendant raises the issue at the hearing. *Stroessenreuther* states "[t]rial courts can (and must) consider a Fourth Amendment challenge to satellite-based monitoring *when a defendant raises it*." *Id.* at ___,

793 S.E.2d at 735 (emphasis added). The State contends that "[i]f this statement in *Stroessenreuther* is to have any meaning or application at all, then unless the defendant argues that SBM enrollment violates his Fourth Amendment rights to be free from unreasonable searches, the trial court need not conduct a reasonableness inquiry." Although "this statement in *Stroessenreuther*" was not the holding, it is a correct statement of the law. *See id.* Constitutional issues must be asserted by the defendant in other contexts, and this rule has equal application in a SBM hearing. *See e.g.*, *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) ("Defendant's argument is based upon his Fifth Amendment right to silence and his Sixth Amendment right to counsel. However, defendant did not raise these constitutional concerns before reaching this Court. The failure to raise a constitutional issue before the trial court bars appellate review. Based upon our long-established law, defendant has waived this issue, and he is barred from raising it on appellate review before this Court." (citations omitted)).

Defendant argues in his reply brief that the Fourth Amendment was implicitly raised, contending,

> "[t]he rule that constitutional questions must be raised first in the trial court is based upon the reasoning that the trial court should, in the first instance, "pass[] on" the issue." *State v. Kirkwood*, 229 N.C. App. 656, 665, 747 S.E.2d 730, 737 (quoting *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 529 (2004)), *appeal dismissed*, 367 N.C. 277, 752 S.E.2d 487 (2013). Consequently, when the record shows that "the trial court addressed and ruled upon" a constitutional issue, the "issue is properly before this Court" for review, despite any possible default by the appellant in preserving the issue. *Id.* at 665–66, 747 S.E.2d at 737; accord *In re Hall*, 238 N.C. App. 322, 329 n.2, 768 S.E.2d 39, 44 n.2 (2014) ("[S]ince the record supports a determination that the trial court reviewed and denied petitioner's *ex post facto* argument [regarding sex offender registration], we will review petitioner's contentions on appeal."); *State v. Woodruff*, No. COA13–812, 2014 WL 218397, at *1 (N.C. Ct. App. Jan. 21, 2014) (unpublished) (reviewing double jeopardy claim, despite defendant's failure to "explicit[ly] mention" issue at trial, when "trial court possibly addressed and ruled upon" issue). Here, as in *Kirkwood*, *Hall*, and *Woodruff*, Mr. Lindsey's *Grady* argument is "properly before this Court" for review because the trial

> court, consistent with the fundamental goal of Rule 10, "addressed and ruled upon" the issue in the first instance. *Kirkwood*, 229 N.C. App. at 665–66, 747 S.E.2d at 737. The state's waiver argument should be rejected.

In addition, defendant has requested we invoke Rule 2 of the Rules of Appellate Procedure to consider his constitutional issue.

This Court addressed a similar situation recently in *State v. Bursell*, ___ N.C. App. ___, ___, 813 S.E.2d 463 (2018). In *Bursell*, on 10 August 2016, the trial court ordered defendant to enroll in lifetime SBM following his guilty plea and sentencing for statutory rape and indecent liberties. ___ N.C. App. at ___, 813 S.E.2d at 464. On appeal, the defendant raised a constitutional argument based upon the Fourth amendment and *Grady*. *Id.* at ___, 813 S.E.2d at 465. The State contended that the constitutional issue was not preserved for review because "although defendant objected at sentencing to the orders of registration and SBM, . . . he neither referenced *Grady* nor "raised any objection that the imposition of SBM effected an unreasonable search in violation of the Fourth Amendment[.]" *Id.* at ___, 813 S.E.2d at 465 (ellipses and brackets omitted).

The *Bursell* Court noted that

> generally, constitutional errors not raised by objection at trial are deemed waived on appeal. However, where a constitutional challenge not clearly and directly presented to the trial court is implicit in a party's argument before the trial court, it is preserved for appellate review.

Id. at ___ 813 S.E.2d at 465 (citations, quotation marks, and brackets omitted). After reviewing the transcript of the SBM hearing, this Court determined that it was

> readily apparent from the context that his objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicates defendant's rights under *Grady* to a Fourth Amendment reasonableness determination before the imposition of SBM.

Id. at ___ 813 S.E.2d at 467.

We have also reviewed the transcript of the SBM hearing in this case, as compared to the portions of the transcript noted in *Bursell*, and even considering this case in accord with *Bursell*, here defendant

simply did not raise any constitutional objection, either explicity or implicitly. In *Bursell*, the SBM hearing was the initial hearing held immediately after sentencing. *Id.* at ___, 813 S.E.2d at 464. Here, the SBM hearing was held based upon this Court's directive in *Lindsey I*, where we remanded because the trial court had not made an explicit determination "that defendant requires the highest possible level of supervision and monitoring" and because "the court did not mark a box in paragraph 4 of the 'Findings' section on the AOC–CR–616 order form to indicate the basis for its decision to place defendant on satellite-based monitoring." *Lindsey I*, ___ N.C. App. ___, 789 S.E.2d 568, *1-7 (quotation marks omitted). And on remand, the State and trial court held a hearing as directed by *Lindsey I* where defendant did not -- even indirectly -- raise any constitutional argument regarding the reasonableness of SBM under the Fourth Amendment or *Grady*.

At the beginning of the hearing, the prosecutor called the matter for a SBM hearing and defendant agreed "this is a call-back hearing[:]"

> MS. HAWKINS: William Lindsey, number 207 on the calendar he is on for a Satellite Base Monitoring hearing.
>
> In Mr. Lindsey's hearing I have my probation officer here. I believe for purposes of time that the defendant will stipulate to the letter and to the service of that letter, and that he did indeed receive that letter; is that correct, Mr. Wilson?
>
> MR. WILSON: Yes, your Honor, this is a call-back hearing.[1]

With no further discussion of the purpose of the hearing, the State presented its evidence. The hearing was very brief and no evidence regarding a Fourth Amendment search analysis was presented. The State called only one witness, a probation officer, not defendant's, and admitted only one exhibit, a Static 99 risk assessment. Consistent with the directive of this Court in *Lindsey I*, the main focus of the hearing was whether defendant should be subject to SBM as "the highest possible level of

1. In *Lindsey I*, this Court noted, "The trial court held a 'bring-back hearing' on 14 July 2015 to determine defendant's eligibility for satellite-based monitoring. . . . When conducting a bring-back hearing under N.C. Gen. Stat. § 14-208.40B(c), the trial court is not bound by the DAC's risk assessment when assessing whether a defendant requires the highest possible level of supervision and monitoring." *Lindsey I*, ___ N.C. App. ___, 789 S.E.2d at 568, *2-4. Although defendant's counsel referred to it as a "call-back" hearing instead of a "bring back" hearing, his meaning is obvious and this hearing before the trial court was actually the "bring back" hearing on remand.

supervision and monitoring, N.C. Gen. Stat. § 15A-208.40B(c)[.]" *Id.* at ___ 789 S.E.2d 568, * 1-2.

After the testimony of the probation officer, the trial court asked to review "the investigative file that the DA may have in their possession in regards to the background, more detailed background of the charges and disposition[,]" and defendant had no objection to the trial court's review of this file. The trial court then adjourned the hearing until two days later to have "the opportunity to look at the investigative file" before making its decision. We are uncertain of the purpose of the trial court's review of the entire investigative file from defendant's 2009 prosecution, since it is well-established that SBM decisions must be based only upon the *elements* of the crime for which the defendant was convicted, whether by plea or trial, and not upon the facts alleged by the State in its prosecution.[2] *See State v. Santos*, 210 N.C. App. 448, 453, 708 S.E.2d 208, 212 (2011) ("[I]n *State v. Davison*, . . . we held that when making a determination pursuant to N.C.G.S. § 14–208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction." (quotation marks omitted); *see also State v. Davison*, 201 N.C. App. 354, 364, 689 S.E.2d 510, 517 (2009) ("The General Assembly's repeated use of the term 'conviction' compels us to conclude that, when making a determination pursuant to N.C.G.S. § 14–208.40A, the trial court is only to consider the elements of the offense of which a defendant was convicted and is not to consider the underlying factual scenario giving rise to the conviction. In the case before us, the trial court erred when making its determinations by considering Defendant's plea colloquy in addition to the mere fact of his conviction.").

But whatever the purpose of the trial court's review of the file, a file from a 2009 prosecution would not contain the information needed for a *Grady* hearing. Yet the trial court used this information, as well as evidence from the hearing, to determine that defendant should be enrolled in SBM. In announcing its ruling, the trial court specifically referred to "the investigative report" at least twice and noted, "As I said the Court has reviewed the investigative report and indicated a series of sexual indiscretions with this minor age child. The defendant was aware of her age, but continued to take -- have sexual activities with her." The trial court's "ADDITIONAL FINDINGS" attached to the order were:

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2. We also note that the State's investigative file -- which was apparently crucial to the trial court's decision -- is not in the record before us, and defendant raises no argument regarding use of this file.

> 1. The defendant, when he became aware that the victim was under age, continued his sexual activity with her.
>
> 2. At the time of conviction, the defendant had 9 prior record points and was record level IV.
>
> 3. It is reasonable for public safety and justified that the defendant be placed on satellite based monitoring for a period of 5 years.
>
> 4. The defendant is be to given credit toward that 5 year period for any previous time that the defendant has been subject to satellite based monitoring.

None of the additional findings address a *Grady* analysis or issues under the Fourth Amendment, but instead only address the trial court's reasons for requiring SBM as "the highest possible level of supervision and monitoring." Thus, the constitutional issues related to *Grady* were neither raised by defendant *nor* ruled upon by the trial court as defendant contends, so this issue has not been preserved for appellate review.

Defendant's request for review under Rule 2 remains to be considered. Again, *Bursell* is helpful to our analysis. In *Bursell*, this Court determined the *Grady* issue had been implicitly addressed in the trial court and was preserved. ___ N.C. App. at ___, 813 S.E.2d at 466. But the Court also noted that "[a]ssuming, *arguendo*, this objection was inadequate to preserve a constitutional *Grady* challenge for appellate review, in our discretion we would invoke Rule 2 to relax Rule 10's issue-preservation requirement and review its merits." *Id.* at 466–67. The primary reason the *Bursell* Court would have invoked rule 2 was that "the State here concedes reversible error." *Id.* at ___ 813 S.E.2d at 467. Here, the State does not concede error.

In *State v. Bishop*, this Court noted that the defendant's *Grady* argument from his SBM hearing was also not preserved:

> Indeed, Bishop concedes that the argument he seeks to raise is procedurally barred because he failed to raise it in the trial court. We recognize that this Court previously has invoked Rule 2 to permit a defendant to raise an unpreserved argument concerning the reasonableness of satellite-based monitoring. But the Court did so in *Modlin* because, at the time of the hearing in that case, neither party had the benefit of this Court's analysis in *Blue* and *Morris*. In *Blue* and *Morris*, this Court outlined the procedure defendants must follow to preserve a Fourth

> Amendment challenge to satellite-based monitoring in the trial court.
>
> This case is different from *Modlin* because Bishop's satellite-based monitoring hearing occurred several months after this Court issued the opinions in *Blue* and *Morris*. Thus, the law governing preservation of this issue was settled at the time Bishop appeared before the trial court. As a result, the underlying reason for invoking Rule 2 in *Modlin* is inapplicable here and we must ask whether Bishop has shown any other basis for invoking Rule 2.
>
> He has not. Bishop's argument for invoking Rule 2 relies entirely on citation to previous cases such as *Modlin*, where the Court invoked Rule 2 because of circumstances unique to those cases. In the absence of any argument specific to the facts of this case, Bishop is no different from countless other defendants whose constitutional arguments were barred on direct appeal because they were not preserved for appellate review.

State v. Bishop, ___ N.C. App. ___, ___, 805 S.E.2d 367, 369–70 (2017) (citations, quotation marks, and brackets omitted), *disc. review denied*, ___ N.C. ___, 811 S.E.2d 159 (2018).

This case differs from other cases in which Rule 2 review has been allowed only in its procedural posture, and that difference does not favor defendant. The law regarding *Grady* was well-established by the time of defendant's bring-back hearing, but he made no constitutional objection. *See generally Grady*, 135 S.Ct. 1368, 191 L. Ed. 2d 459. The State and trial court proceeded with the hearing as directed by this Court in *Lindsey I*. Defendant had the opportunity to raise his constitutional argument, but he did not take it. We decline to exercise our discretion under Rule 2 to consider defendant's constitutional argument. If we allowed review in this case, this would essentially allow defendants to sit silently in the SBM hearing while the State and trial court address the case without knowing what issues defendant may raise on appeal and without giving either the opportunity to address them. Although the State has the burden of proof of reasonableness of SBM under the Fourth Amendment as directed by *Grady*, *see generally Grady*, 135 S.Ct. 1368, 191 L. Ed. 2d 459, the defendant still must raise the constitutional objection so the State will be on notice it must present evidence to meet its burden.

IV. Conclusion

We decline to grant review under Rule 2 to consider defendant's constitutional argument which he waived. As defendant makes no other argument regarding the SBM order, we affirm.

AFFIRMED.

Judges ZACHARY and ARROWOOD concur.

STATE OF NORTH CAROLINA
v.
SYDNEY SHAKUR MERCER, DEFENDANT

No. COA17-1279

Filed 7 August 2018

Criminal Law—jury instructions—requested instruction—justification defense

The trial court erred by denying defendant's request for a jury instruction on justification as a defense to possession of a firearm by a felon where he satisfied each element of the justification defense as set forth in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). In the light most favorable to defendant, the evidence showed that another family approached defendant's family's home seeking a fight; defendant grabbed his cousin's gun only after he heard the other family's guns cocking and witnessed his cousin struggling with his own gun; defendant had tried to calm the situation without violence; and defendant relinquished possession of the gun when he was able to run away from the situation. Furthermore, defendant showed he was prejudiced by this error, as the jury was instructed on self-defense with regard to defendant's assault charges and acquitted him of those charges, and the jury sent the trial court a note asking for clarification as to whether there existed a justification defense for possession of a firearm by a felon.

Appeal by defendant from judgment entered 8 May 2017 by Judge Jesse B. Caldwell, III in Mecklenburg County Superior Court. Heard in the Court of Appeals 16 May 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Cheshire Parker Schneider & Bryan, PLLC, by John Keating Wiles, for defendant-appellant.

ZACHARY, Judge.

Defendant Sydney Shakur Mercer was indicted for possession of a firearm by a felon and for two counts of assault with a deadly weapon with the intent to kill. A jury found defendant not guilty on both charges of assault, but guilty of possession of a firearm by a felon. Defendant appeals from judgment entered upon his conviction. On appeal, defendant argues that the trial court erred in denying his request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. After careful review, we conclude that defendant was entitled to an instruction on justification as a defense.

Background

In April 2016, defendant was indicted for possession of a firearm by a felon and two counts of assault with a deadly weapon with the intent to kill. The charges against defendant were joined for trial and came on to be tried before a jury at the 20 March 2017 criminal session of Mecklenburg County Superior Court, the Honorable Jesse B. Caldwell, III presiding.

The charges against defendant arose from an altercation that took place on 30 March 2016 on Peach Park Lane in Charlotte, during which defendant, a convicted felon, possessed a gun. During the events that gave rise to the charges against defendant, defendant resided on Peach Park Lane, near the home of Dazoveen Mingo. On 29 March 2016, Dazoveen was playing basketball in the neighborhood. Defendant's cousin Wardell was also present, and, at some point, Wardell's phone was stolen. He believed that Dazoveen was the culprit and the two nearly fought. The following day, Dazoveen was "walking . . . to the candy man" when he encountered Wardell and an individual he identified as "J." Wardell repeated his previous accusation that Dazoveen had stolen his phone, and a fight occurred. Defendant's mother broke up the fight.

Dazoveen left and notified his brother, Nacharles Bailey, who informed their mother, Dorether Mingo ("Ms. Mingo"). While Dazoveen and Nacharles waited for her to arrive home, Ms. Mingo called her sister, Lina. Ms. Mingo and her other son, Jaquarius, arrived at their home

within approximately five to ten minutes. The Mingos and additional family members then walked over to defendant's home, where Wardell was visiting, with the intention of fighting. At that point, an altercation occurred. The participants and witnesses provided different versions of the event at trial.

I. The State's Evidence

At trial, the State presented evidence tending to show the following: Dazoveen testified that approximately fifteen people walked to defendant's home in order to fight. The only armed person in the Mingo group was Dazoveen's aunt, Lina, who arrived later. Upon their arrival at defendant's home, a black Cadillac pulled into the driveway and defendant, Wardell, and J got out of the car. "When we [were] getting ready to fight," Dazoveen saw that defendant had a handgun "at his belt buckle." Dazoveen did not say anything to defendant, but told Wardell "to come fight [him]." Dazoveen further testified:

> Q. All right. And what, if anything, did you hear anybody else saying to [defendant]?
>
> A. Well, basically my brother and them was telling him to fight. Basically they was telling everybody to fight.
>
> Q. Okay. Which brother was talking to [defendant]?
>
> A. Both of them.

Meanwhile, defendant's mother was attempting to "calm[] down . . . the situation." Dazoveen testified that after defendant showed a gun, "we [were] still trying to fight, and they [were] backing up, and we [were] coming towards them. And that's when [defendant] had shot [the gun] in the air." After defendant fired one shot in the air, Dazoveen's "aunt came running through the path, and then [Ms. Mingo] snatched the gun from her and shot up in the air." Defendant then "shot back into the air[]" and Ms. Mingo shot into the air again. Following these shots, Dazoveen and his relatives returned to the Mingo home, and Dazoveen's aunt called the police. Dazoveen and Ms. Mingo both gave recorded statements at the police station and watched a surveillance video of the altercation which was taken from a nearby home on the same street.

At trial, Dazoveen watched the video and testified that three people had guns during the altercation: defendant, Ms. Mingo, and Dazoveen's brother, Nacharles. He also testified that Nacharles fired his gun, but he could not tell at whom Nacharles was firing. After viewing a video of the statement he gave to police to refresh his recollection, Dazoveen

testified that he told a detective that defendant's mother had broken up the fight between him, Wardell, and J on 29 March 2016, and that both of Dazoveen's brothers, Jaquarious and Nacharles, fired the same gun during the altercation on 30 March 2016.

Ms. Mingo also testified for the State as follows: On 30 March 2016, she received a phone call from her son, Nacharles, in which he informed her that Dazoveen "had been jumped." Her other son, Jaquarious, was with her at the time, and they drove home, during which time she did not make any phone calls. She found that her mother, her sisters, three of her nephews, three of her nieces, and "[her] whole family, pretty much, [were] at the house when [she] pulled up." After seeing her son Dazoveen's injuries from his fight with Wardell and J, she "immediately went to . . . [defendant's] house through the path, there's a path, and as a result of me going, my oldest two went over there to approach [defendant] and the guy J and the guy Wardell." Ms. Mingo's sons were ready to fight and "[she] was not trying to stop [the fight]." Defendant "was the only one that had the gun out," which he had removed from his pants, and he was pointing the gun while saying, "back up, back up."

Her sons "continued to advance on him even though he had [a] gun out[.]" Defendant's mother was "standing in front of him telling him, Sydney, put the gun up, put the gun up." Ms. Mingo testified that by this point, she was screaming, "If you going to shoot, shoot. If you're not, put the gun up." Defendant fired his first shot "over his mom's head" toward Ms. Mingo and her family. Ms. Mingo ran after that first shot and "snatched" her sister's gun from her hand and fired it in the air. She testified that defendant shot toward her "[m]aybe three" times and that she shot toward him "four times, maybe." Nacharles then took the gun from Ms. Mingo, but he did not shoot it because it was empty.

II. Defendant's Evidence

At the conclusion of the State's evidence, defendant presented evidence which tended to show the following: Defendant's mother, Rashieka Mercer ("Ms. Mercer"), testified at trial that, on 30 March 2016, she "heard a bunch of commotion outside" of her house, went outside, and witnessed Wardell and Dazoveen "engaged in a fight." She "told them to stop it, and at that point [Dazoveen] got up and he left" while "screaming out that he was going to get his brothers and they were going to kill [Wardell]." She further testified that no one else was present or involved in the fight other than Dazoveen and Wardell. Later that same day, Ms. Mercer heard another commotion outside of her house, and when she went outside, she "saw a crowd of people basically

ambushing [her] son[.]" Ms. Mercer ran outside and tried to explain that defendant had nothing to do with the earlier fight. At that point, she observed that Nacharles had a gun, "so [she] got in front of [defendant] trying to shield him[.]" Defendant also had a gun. Ms. Mingo "was telling her son [Nacharles] to shoot [defendant]." Nacharles shot his gun, and Ms. Mercer screamed at the crowd about getting defendant out of there because they were trying to kill him. She also witnessed Ms. Mingo "chasing [defendant] and shooting at him."

Defendant testified in his own defense to the following facts: On 30 March 2016, after arriving home from a job interview, defendant encountered a group of approximately fifteen people trying to fight. He knew Nacharles, Jaquarious, and Dazoveen, but did not know the other people. He testified that "[t]he mother of [his] child" was with him in the car. After defendant asked the crowd what was going on, they told him that jumping their little brother was not right, to which defendant responded, "I [didn't] have [anything] to do with it." However, the group kept approaching defendant, stating that they were "done talking." Defendant observed the handles of three handguns in the possession of Jaquarious, Nacharles, and another person he did not know. At that point, Wardell had also pulled a gun out while "talking to them" and "just basically trying to plead our case." Defendant then heard the sound of people cocking their guns, so he asked Wardell to give him the gun, and because "[Wardell] didn't know what he was doing," defendant took the gun from him. Defendant continued trying to plead his case with the group. Defendant was aware that, as a convicted felon, he was not allowed to possess a firearm, but testified that "Wardell [] is my little cousin. So at that time, my mother being out there, . . . I would rather make sure we [are] alive versus my little cousin making sure, who is struggling with the gun." He then pointed the gun at the Mingos and "[kept] telling them to back up" several times. Defendant pointed the gun at Jaquarious because he "ran up on to the side and right beside [defendant's] mother," and then "shots were being fired" by someone else, but defendant could not tell who was firing them. Defendant "turned around to see who shot at Shoe,"[1] and, after telling his mother to move out of the way, he "dashed to the side of the street," and observed that Nacharles was "still shooting at [him], so [defendant] tried to shoot." However, the gun jammed and he threw it to Wardell so "he [could] fix it because it's his gun, and [defendant] just [ran] home." Defendant testified that he "only fired one shot," toward Nacharles "because he was shooting

1. "Shoe" is not mentioned at any other time throughout the trial transcript.

first." Defendant turned himself in to the police early the next morning around midnight.

During the charge conference, defendant made a timely request in writing that the trial court instruct the jury on a justification defense to the charge of possession of a firearm by a felon, which the trial court denied. Defendant objected to the trial court's failure to instruct the jury on justification. During jury deliberations, the jury sent the trial court a note regarding "Justification Defense For Possession of Firearm," in which the jury asked the trial court for "Clarification on whether or not [defendant] can be justified in possession of a firearm even with the stipulation of convicted felon." The trial court responded by "reread[ing] and recharg[ing] its instruction on reasonable doubt and on possession of a firearm by a felon." Defendant was found not guilty of both charges of assault with a deadly weapon with intent to kill and guilty of the charge of possession of a firearm by a convicted felon.

On appeal, defendant asserts that the trial court erred by refusing his request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon.

Standard of Review

It is axiomatic that "the trial court must give the instructions requested, at least in substance, if they are proper and supported by the evidence. The proffered instruction must . . . contain a correct legal request and be pertinent to the evidence and the issues of the case." *State v. Edwards*, 239 N.C. App. 391, 392, 768 S.E.2d 619, 620 (2015) (citations and quotation marks omitted). "[T]he question of whether a defendant is entitled to an instruction on the defense of duress or necessity presents a question of law, and is reviewed *de novo*." *Id.* at 393, 768 S.E.2d at 621. Accordingly, "where the request for a specific instruction raises a question of law, 'the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.' " *Id.* (quoting *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009)).

We review the evidence in the light most favorable to the defendant. *State v. Monroe*, 233 N.C. App. 563, 567, 756 S.E.2d 376, 379 (2014), *aff'd per curiam*, 367 N.C. 771, 768 S.E.2d 292 (2015) ("[W]e review the evidence in the present case in the light most favorable to [the] [d]efendant, in order to determine whether there is substantial evidence of each element of the defense.").

Discussion

On appeal, defendant argues that the trial court erred by denying his request for an instruction on justification as a defense to the charge of possession of a firearm by a felon. After careful review of the evidence in the light most favorable to defendant, we hold that there was substantial evidence of each element of the justification defense in the present case, and defendant was entitled to have the jury instructed on the defense of justification.

Under North Carolina law, "[i]t 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 [N.C. Gen. Stat. § 14-288.8(c)]." N.C. Gen. Stat. § 14-415.1(a) (2017). "The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333, 794 S.E.2d 460, 463 (2016) (citation omitted); *see also State v. Wood*, 185 N.C. App. 227, 235, 647, S.E.2d 679, 686 (2007).

A justification defense to possession of a firearm by a convicted felon was set forth in *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000). The *Deleveaux* test provides that "a defendant must show four elements to establish justification as a defense" to a charge of possession of a firearm by a felon:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

State v. Craig, 167 N.C. App. 793, 796, 606 S.E.2d 387, 389 (2005) (quoting *Deleveaux*, 205 F.3d at 1297); *see also United States v. Crittendon*, 883 F.2d 326, 330 (4th Cir. 1989).

This Court has not explicitly adopted the *Deleveaux* test; however, we have consistently "assume[d] *arguendo*, without deciding, that the *Deleveaux* rationale applies in North Carolina prosecutions for possession of a firearm by a felon." *Monroe*, 233 N.C. App. at 569, 756 S.E.2d at 380. In *State v. Monroe*, the defendant was engaged in an "on-going

dispute" with another man, Davis. *Id.* The defendant was at the residence of another individual, Gordon, when Davis arrived in Gordon's front yard and threatened to "turn the heat up on" the defendant. *Id.* at 564, 756 S.E.2d at 377. Evidence was also presented that earlier that day, Davis had barged into a residence in which the defendant was present, and that Davis stated he was "going to stay out here until the door come open" when he arrived at Gordon's residence. *Id.* However, "[t]he uncontroverted evidence at trial showed that [the] [d]efendant was *inside* Gordon's house when [the] [d]efendant took possession of a firearm":

> [The] [d]efendant's subsequent contentions are that Davis "had instigated violence against [the] [d]efendant before," and that remaining inside Gordon's residence would have been "no protection" because Davis had previously "barged in" to a residence where [the] [d]efendant was located. However, the evidence does not compel a conclusion that, while inside the residence, [the] [d]efendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury.
>
> . . .
>
> We thus cannot rely on the mere possibilities that (1) Davis may have been about to enter the residence and (2) that Davis then would have threatened death or serious bodily injury to [the] [d]efendant. [The] [d]efendant has failed to show that he was under "unlawful and present, imminent, and impending threat of death or serious bodily injury" at the time he took possession of the firearm.

Id. at 570, 756 S.E.2d at 381 (quoting *Craig*, 167 N.C. App. at 796, 606 S.E.2d at 389) (internal quotation marks omitted).

We further concluded that the "[d]efendant also failed to show that he 'had no reasonable legal alternative to violating the law.' " *Id.* at 571, 756 S.E.2d at 381. "The [d]efendant voluntarily armed himself and then walked to the doorway of the residence. [The] [d]efendant has not shown there was no acceptable legal alternative other than arming himself with a firearm, in violation of N.C. [Gen. Stat.] § 14-415.1, and walking to the doorway of Gordon's house." *Id.* Accordingly, this Court held that the evidence, "even when viewed in the light most favorable to [the] [d]efendant, does not support a conclusion that [the] [d]efendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury." *Id.* at 569, 756 S.E.2d at 380.

This Court has applied the *Deleveaux* test in several other cases as well, although the defendant has never satisfied each of the elements in any of these cases. *See*, *e.g.*, *Edwards*, 239 N.C. App. at 395, 768 S.E.2d at 622 (no evidence of facts in support of any elements of the *Deleveaux* test); *State v. McNeil*, 196 N.C. App. 394, 674 S.E.2d 813 (2009) (possession of firearm while under no present or imminent threat of death or injury); *Craig*, 167 N.C. App. at 797, 606 S.E.2d at 389 (possession of firearm after threat subsided); *State v. Boston*, 165 N.C. App. 214, 598 S.E.2d 163 (2004) (possession of firearm while under no present or imminent threat of death or injury); *State v. Napier*, 149 N.C. App. 462, 560 S.E.2d 867 (2002) (possession of firearm while under no present or imminent threat of death or injury).

The present case is distinguishable from the prior cases in which this Court has applied the *Deleveaux* test. Here, defendant presented evidence that he grabbed the gun only after he heard guns cocking and witnessed his cousin struggling with the gun. In defendant's brief, he addresses each element of the *Deleveaux* test as follows:

> a. [Defendant's] testimony that he only grabbed the gun from Wardell when he heard guns being cocked, and threw it back to Wardell when he was able to run away supported the first element of the defense: That he *only possessed the gun during the time he was under an unlawful and present imminent and impending threat of death or serious bodily injury*;
>
> b. The evidence was uncontroverted that the Mingos came to [defendant's] premises as aggressors, intending to fight, and [defendant's] testimony that when he got out of his car they were already there seeking a fight supported the second element of the defense: That he *did not negligently or recklessly place himself in this situation* where he would be forced to engage in criminal conduct;
>
> c. [Defendant's] testimony that he continually used words, trying to "plead his case," in responding to the aggressors and that he only resorted to grabbing the gun from Wardell when he heard guns being cocked supported the third element of the defense: That he had *no reasonable alternative to violate the law*; and
>
> d. [Defendant's] testimony that he only took possession of the gun when he heard guns being cocked and relinquished possession when he was able to run away

> supported the fourth element of the defense: That there was a *direct causal relationship between the criminal action and the avoidance of the threatened harm*.

We find the facts presented and the application of the evidence to the elements of the *Deleveaux* test convincing.

The State contends that, "even assuming the Court were to apply the *Deleveaux* test, . . . the evidence does not support the third element that . . . defendant had no reasonable legal alternative to violating the law." In advancing this argument, the State asserts that defendant could have left the dangerous scene at his home or called 911, both of which are legal alternatives "to violating the law by taking the gun from his cousin." We disagree. As defendant asserts in his reply brief, "[o]nce guns were cocked, time for the State's two alternative courses of action—calling 911 or running away through the park—had passed."

The determination of whether defendant acted reasonably, in light of the possible legal alternatives, is a question for the jury, after appropriate instruction. *See, e.g.*, *State v. Barrett*, 20 N.C. App. 419, 423, 201 S.E.2d 553, 555-56 (1974) ("The reasonableness of defendant's action and of his belief that force was necessary presents a jury question.") (citation omitted). Accordingly, defendant was entitled to have the jury instructed on justification as a defense to the charge of possession of a firearm by a felon.

Furthermore, we conclude that defendant was prejudiced by this error. Pursuant to N.C. Gen. Stat. § 15A-1443(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 . . . ." N.C. Gen. Stat. § 15A-1443(a) (2017); *see also State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) (finding that the trial court's failure to give defendant's requested instruction was prejudicial under N.C. Gen. Stat. § 15A-1443(a)).

In the present case, it is undisputed that defendant fired one or more shots during the altercation. However, the jury was instructed on self-defense with regard to the assault charges. The jury then acquitted defendant of both charges of assault with a deadly weapon with intent to kill as well as the lesser-included offense of assault with a deadly weapon. In contrast, the jury was not instructed on justification with regard to the charge of possession of a firearm by a felon, and the jury then convicted defendant of that charge. Moreover, during jury deliberations, the jury sent the trial court a note titled "Justification Defense For Possession

of Firearm," in which the jury asked the trial court for "Clarification on whether or not [defendant] can be justified in possession of a firearm even with the stipulation of convicted felon." We conclude that there is a reasonable probability that, had the trial court provided defendant's requested justification instruction to the jury, the jury would have reached a different result. *See* N.C. Gen. Stat. § 15A-1443(a).

Conclusion

For the reasons stated herein, we conclude that the trial court committed prejudicial error by denying defendant's request for a jury instruction on justification as a defense to the charge of possession of a firearm by a felon. Accordingly, we hold that defendant is entitled to a new trial.

NEW TRIAL.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
SHENONDOAH PERRY AND EARL LAMONT POWELL, DEFENDANTS

No. COA17-714

Filed 7 August 2018

1. Constitutional Law—in-court testimony—alibi—post-arrest, pre-Miranda silence

In a prosecution for multiple offenses related to a shooting, the trial court did not err in allowing the State to impeach defendant by questioning him on the stand about his post-arrest, pre-*Miranda* silence because his silence was inconsistent with his later alibi testimony that he could not have committed the crimes because he was not present at the shooting, since it would have been natural for defendant to mention the alibi when he was presented with criminal charges after his arrest.

2. Constitutional Law—in-court testimony—alibi—post-arrest, post-Miranda silence—plain error

Where defendant failed to object to the prosecutor's questions regarding his post-arrest, post-*Miranda* silence regarding an alibi in a prosecution for multiple crimes arising from a shooting incident, the admission, although improper, was reviewed for plain error. No

prejudice was shown in light of the ample evidence establishing defendant's guilt.

3. Sentencing—multiple charges for same conduct—conviction with lesser punishment vacated

Defendant's convictions for assault with a deadly weapon and assault on a child, both stemming from the shooting of a gun toward a minor in the back seat of a car, could not both stand; pursuant to N.C.G.S. § 14-33, the conviction for assault on a child was vacated because N.C.G.S. § 14-32 provided harsher punishment for the same conduct—assault with a deadly weapon.

Appeal by Defendants from judgments entered 15 September 2016 by Judge Cy A. Grant in Hertford County Superior Court. Heard in the Court of Appeals 8 February 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Daniel Snipes Johnson and Assistant Attorney General Jeremy D. Lindsley, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily H. Davis, for Defendant Shenondoah Perry.

Glover & Peterson, P.A., by James R. Glover, for Defendant Earl Lamont Powell.

DILLON, Judge.

Defendants Shenondoah Perry and Earl Lamont Powell appeal from judgments entered upon jury verdicts finding them guilty of numerous offenses in connection with a shooting. For the reasons stated below, we vacate Defendant Perry's conviction for assault on a child and otherwise leave the judgments undisturbed.

I. Background

The evidence at trial tended to show that one night in March 2016, Defendants and two other men opened fire at a car occupied by three individuals. Two of the individuals in the car were struck with bullets and were severely injured. The third individual, a child in the back seat, was not struck by a bullet but was injured by broken glass caused by the gunfire.

Defendants were arrested and tried together. Both were convicted by a jury of multiple charges. Both gave timely notice of appeal.

II. Analysis

On appeal, the parties make various arguments, which we address in turn below.

A. *Miranda* Argument

[1] Defendants' first argument pertains to Defendant Perry's in-court testimony regarding his alibi to support his testimony that he was not present during the shooting. Specifically, Defendants contend that the trial court committed reversible error by permitting the prosecutor to question Defendant Perry on cross-examination regarding his silence to the police after his arrest regarding this alibi. N.C. Const. art. I, § 23 ("In all criminal prosecutions, every person charged with a crime has the right to . . . not be compelled to give self-incriminating evidence[.]").

Here, the prosecutor questioned Defendant Perry during cross-examination regarding both his (1) post-arrest, pre-*Miranda* silence, and (2) post-arrest, post-*Miranda* silence.

The following exchange occurred during the State's cross-examination regarding Defendant Perry's silence after his arrest but before he had been informed of his *Miranda* rights:

> [PROSECUTOR]: Now, When you were being processed at the jail, [the officer] was still with you along with some other officers; is that correct?
>
> [DEFENDANT PERRY]: Yes.
>
> [PROSECUTOR]: When did you tell them that you were with Francesca Cooper on the night that you were charged?
>
> [DEFENSE COUNSEL LEWIS]: Objection.
>
> [THE COURT]: Overruled. Go ahead.
>
> . . .
>
> [PROSECUTOR]: When did you tell [the officer] that you didn't do [participate in the shooting] because you were with your baby's mama on the night it happened?
>
> [DEFENDANT PERRY]: I don't recall that.
>
> [PROSECUTOR]: So you didn't tell him?

> [DEFENDANT PERRY]: I don't recall that.
>
> [PROSECUTOR]: Okay, so you didn't tell him that is my question.
>
> [DEFENDANT PERRY]: No.

And the following exchange occurred during cross-examination regarding Defendant Perry's post-arrest, *post-Miranda* silence:

> [PROSECUTOR]: What if anything did you tell the deputies after you were advised of your rights? And it says having these rights in mind, do you wish to answer any questions without hav[ing] a lawyer present and you said yes. What did you tell these officers?
>
> [DEFENDANT PERRY]: I didn't tell them [any]thing.
>
> [PROSECUTOR]: Okay. You never told them a thing?
>
> [DEFENDANT PERRY]: No.

1. Post-arrest, Pre-*Miranda* Silence

Although a defendant's post-arrest, post-*Miranda* warning silence may not be used by the State for any purpose, *State v. Mendoza*, 206 N.C. App. 391, 395, 698 S.E.2d 170, 174 (2010), a defendant's post-arrest, pre-*Miranda* silence "may be used by the State to impeach a defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial." *Id.* Our Supreme Court has instructed that a defendant's silence about an alibi at the time of arrest can constitute an inconsistent statement, and that this silence can be used to impeach a defendant's alibi offered at trial *if it would have been natural for a defendant to mention the alibi at the time of his encounter with the police. State v. Lane*, 301 N.C. 382, 386, 271 S.E.2d 273, 276 (1980).

In the present case, there was evidence which showed as follows: The offenses were perpetrated no more than 72 hours before Defendant Perry was arrested and informed of the charges against him. Defendant Perry knew the victims named in the warrant: he knew one of the victims because she was his ex-girlfriend, and he knew the other victim from hanging out in the same neighborhood. Despite Defendant Perry's familiarity with these two victims and the location where the shooting occurred, he made no statements that he had an alibi to account for his whereabouts during the commission of the crime. When the officer charged Defendant Perry with three counts of attempted murder and three counts of injury to real or personal

property, Defendant Perry failed to mention his alibi when it would have been natural to deny that he would not have attempted to kill his ex-girlfriend, her current partner, and his ex-girlfriend's son.

Based on this evidence, we conclude that Defendant Perry's silence is *inconsistent* with his later alibi testimony presented for the first time during trial. Therefore, the trial court did not err when it allowed the State to impeach Defendant Perry on cross-examination about his failure to say anything about his alibi when the warrants were read to him and *before* he had received Miranda warnings.

2. Post-arrest, Post-*Miranda* silence

[2] We note that while Defendant Perry's counsel objected to the first set of questions regarding Defendant Perry's post-arrest, *pre-Miranda* silence, counsel did not object to the second set of questions regarding Defendant's post-arrest, *post-Miranda* silence. To preserve a question for appellate review, a party must make a timely objection, stating the specific grounds for the ruling sought if the specific grounds are not apparent. *State v. Eason*, 328 N.C. 409,420, 402 S.E.2d.E2d 809, 814 (1991).

In *State v. Moore*, our Supreme Court held that "[i]n criminal cases, an issue that was not preserved by objection . . . may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error." *State v. Moore*, 366 N.C. 100, 105-06, 726 S.E.2d 168, 173 (2012). When a defendant fails to object to the admission of testimony at trial, we review only for plain error. N.C. R. App. P. 10(a)(4). Accordingly, we must review any error using the plain error standard of review.

"For unpreserved evidentiary error to be plain error, the defendant has the burden to show 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. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (internal marks omitted). The inquiry is whether the defendants have shown on appeal that "the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial . . . [,]" *Moore*, 366 N.C. at 106, 726 S.E.2d at 173, and "absent the error, the jury probably would have returned a different verdict." *State v. Lawrence*, 365 N.C. 506, 519, 723 S.E.2d 326, 335 (2012).

In the present case, the admission of Defendant Perry's silence about an alibi *post-Miranda* warning, although improper, does not amount to plain error for either Defendant. Assuming that the admission of this evidence was error, we cannot say that it is reasonably probable that

there would have been a different outcome had evidence of Defendant Perry's silence not been admitted. "[G]iven the brief, passing nature of the evidence in the context of the entire trial, the evidence is not likely to have 'tilted the scales' in the jury's determination of [Defendants'] guilt or innocence." *Moore*, 366 N.C. at 107, 726 S.E.2d at 174.

Indeed, there was ample evidence establishing Defendants' guilt. For example, one of the victims testified at trial, identifying both Defendants as the two shooters with one hundred percent certainty. Also, this victim testified that he had an altercation earlier in the day with Defendant Powell where Defendant Powell pointed a gun at him. This evidence was sufficient to establish Defendants' guilt such that the improper admission of Defendant Perry's post-*Miranda* silence did not prejudice him in a way that resulted in an unfair trial. Accordingly, Defendants' argument is overruled.[1]

B. Sentencing Error

[3] Defendant Perry was convicted of and sentenced for multiple charges. Two of these convictions were for assault with a deadly weapon under N.C. Gen. Stat. § 14-32 and assault on a child under N.C. Gen. Stat. § 14-33, both for the firing of the gun towards the minor in the back seat of the car.

Defendant Perry argues that his conviction and sentence for the assault on the child must be vacated. The State, however, argues that only the sentence should be vacated, while the conviction should be allowed to stand.

We agree with Defendant Perry. Specifically, Section 14-33 states that a defendant shall be "guilty of" assault on a child "unless" another statute provides harsher punishment for the same conduct. N.C. Gen. Stat. § 14-33 (2015). Here, since Defendant Perry was convicted and sentenced for assault with a deadly weapon under Section 14-32 for his assault on the minor in the back seat and since this conviction carries a harsher punishment than that provided under Section 14-33, Defendant

1. We note Defendant Powell's argument that *he* was prejudiced by the admission of his co-defendant's post-arrest silence. Specifically, Defendant Powell put on evidence at trial that he, too, was somewhere else during the shooting. Defendant Powell contends that the evidence of Defendant Perry's silence not only tended to rebut Defendant Perry's alibi evidence but also his own alibi evidence. We are not persuaded that Defendant Powell suffered prejudice which would warrant a new trial. Indeed, there is no factual link between Defendant Powell's alibi evidence and Defendant Perry's alibi evidence. That is, any destruction of Defendant Perry's alibi evidence by Defendant Perry's silence did not bear on the factual circumstances of Defendant Powell's alibi evidence.

Perry cannot be said to be "guilty of" violating Section 14-33. *See, e.g.*, *State v. Davis*, 364 N.C. 297, 306, 698 S.E.2d 65, 70 (2010) (ordering the "judgments" for the lesser offenses be "vacated"). We, therefore, vacate, Defendant Perry's conviction and sentence for assault on a child, but leave the other convictions and sentences undisturbed.

NO ERROR IN PART, VACATED AND REMANDED IN PART.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
ANTWAUN SIMS

No. COA17-45

Filed 7 August 2018

1. Constitutional Law—cruel and unusual punishment—juvenile—life imprisonment without parole—mitigating factors

The sentence of life imprisonment without parole did not violate the Eighth Amendment rights of defendant, who was seventeen and one-half years old at the time he committed the murder, where the trial court complied with the statutory requirements of N.C.G.S. § 15A-1340.19 *et seq*. by conducting a hearing and considering mitigating factors.

2. Sentencing—juvenile—first-degree murder—life imprisonment without parole

The trial court did not abuse its discretion in weighing the mitigating factors when sentencing a juvenile convicted of murder and concluding that life imprisonment without parole was appropriate. Although defendant challenged many of the trial court's findings regarding mitigating factors, the Court of Appeals rejected his challenges and concluded that the trial court's unchallenged evidentiary findings combined with its ultimate findings regarding mitigating factors demonstrated that the trial court's decision was a reasoned one.

Judge STROUD concurring in the result only.

Appeal by defendant from order entered 21 March 2014 by Judge Jack W. Jenkins in Onslow County Superior Court. Heard in the Court of Appeals 17 October 2017.

Attorney General Joshua H. Stein, by Assistant Attorney General Kimberly N. Callahan, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David W. Andrews, for defendant-appellant.

BRYANT, Judge.

Where the trial court complied with the statutory requirements in determining that life imprisonment without parole was warranted for defendant, we hold the sentence is not in violation of the Eighth Amendment. Where the trial court properly made ultimate findings of fact on each of the *Miller* factors as set forth in section 15A-1340.19B(c), we hold that the trial court did not abuse its discretion in weighing those factors and concluding that life imprisonment without parole was appropriate in defendant's case.

In the instant case, the trial court incorporated the facts as articulated by this Court in *State v. Sims*, 161 N.C. App. 183, 184–189, 588 S.E.2d 55, 57–60 (2003), into its order from which defendant appeals.[1] The facts are as follows:

> [D]efendant [Antwaun Sims, who was seventeen at the time of the offense,] was with Chad Williams . . . and Chris Bell . . . in Newton Grove, North Carolina on 3 January 2000, when Bell said that the group needed to rob someone to get a car so Bell could leave the state to avoid a probation violation hearing. Defendant agreed to assist Bell. Defendant, Bell, and Williams observed Elleze Kennedy (Ms. Kennedy), an eighty-nine-year old woman, leaving the Hardee's restaurant . . . around 7:00 p.m. Ms. Kennedy got into her Cadillac and drove to her home a few blocks away. Defendant, Bell, and Williams ran after Ms. Kennedy's car . . . until they reached [her] home. Bell approached Ms. Kennedy in her driveway with a BB pistol and demanded Ms. Kennedy's keys. Ms. Kennedy began

1. This Court has previously summarized the facts of this case for defendant's direct appeal in *State v. Sims*, 161 N.C. App. 183, 184–189, 588 S.E.2d 55, 57–60 (2003).

yelling and Bell hit her in the face with the pistol, knocking her to the ground. Bell told defendant and Williams to help him find the keys to Ms. Kennedy's Cadillac. After rifling through Ms. Kennedy's pockets, Williams found the keys on the carport and handed them to defendant who agreed to drive.

Bell told defendant and Williams to move Ms. Kennedy to the back seat of the Cadillac. . . . Ms. Kennedy kept asking Bell where he was taking her. Bell responded by telling her to shut up and striking her in the face several times with the pistol. . . .

After driving, . . . defendant, Bell, and Williams put Ms. Kennedy, who was unconscious at the time, in the trunk of the Cadillac. . . .

. . . .

[Later], Williams told defendant and Bell that he was not going to travel in a stolen car to Florida with an abducted woman in the trunk. . . .

. . . .

Williams asked if they could let her go, but Bell replied, "Man, I ain't trying to leave no witnesses. This lady done seen my face. I ain't trying to leave no witnesses." Bell asked defendant for a lighter to burn Bell's blood-covered jacket. Defendant gave Bell his lighter and Bell set the jacket on fire and threw it into the Cadillac. Bell stayed to watch the fire, but defendant and Williams walked . . . to defendant's brother's house to watch television. . . . The next morning Bell told defendant to go back to the car and confirm that Ms. Kennedy was dead, and that if she was not, defendant should finish burning the Cadillac. Defendant returned and told Bell and Williams that Ms. Kennedy was dead and that all of the windows in the Cadillac were smoked. . . .

. . . .

Ms. Kennedy's Cadillac was found by law enforcement the morning after her abduction. Investigators discovered Ms. Kennedy's body in the trunk. They made castings of footprints found in the area of the abandoned Cadillac. The castings were later compared to, and matched, shoes

> taken from defendant. . . . Investigators recovered a red cloth from the backseat floorboard, which was later identified as the one defendant had used to wipe down the backseat of the Cadillac. Tests of the cloth showed traces of defendant's semen and Ms. Kennedy's blood. Police found two hairs in the backseat area of the Cadillac, one of which was later determined to be defendant's and the other Bell's. Police also matched latent fingerprints found on the Cadillac with prints taken from defendant and Bell.
>
> . . . .
>
> Forensic pathologist Dr. Falpy Carl Barr (Dr. Barr) testified that he conducted Ms. Kennedy's autopsy on 5 January 2000. . . . Dr. Barr testified that Ms. Kennedy was struck multiple times with a weapon, leaving marks consistent with a pellet gun . . . . Dr. Barr testified that because of the extent of the soot in her trachea and lungs he believed that she was alive and breathing at the time the fire took place in the vehicle; however, because of Ms. Kennedy's elevated carbon monoxide level, Dr. Barr came to the conclusion that Ms. Kennedy died as a result of carbon monoxide poisoning from a fire in the Cadillac.

Id.

Defendant was arrested and later indicted for first-degree murder, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and burning personal property. On 14 August 2001, defendant was tried capitally in the Criminal Session of Onslow County Superior Court, the Honorable Jay Hockenbury, Judge presiding.[2] Defendant was convicted of first-degree murder, first-degree kidnapping, and burning of personal property. At his sentencing hearing, the jury unanimously recommended that defendant be sentenced to life imprisonment without parole, as opposed to death, and the trial court entered judgment. Defendant appealed to this Court, which found no error in defendant's conviction.

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2. Defendant was tried with Bell and Williams as co-defendants. Williams entered a guilty plea to first-degree murder, first-degree kidnapping, burning personal property, and assault with a deadly weapon inflicting serious injury for his role in Ms. Kennedy's death and testified at trial against defendant and Bell. Williams and defendant were sentenced to life without parole. Bell was sentenced to death upon the jury's recommendation.

On 4 April 2013, defendant filed a motion for appropriate relief requesting a new sentencing hearing in light of the United States Supreme Court's decision in *Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012), which held that mandatory life without parole for juvenile offenders violates the Eighth Amendment's prohibition of cruel and unusual punishment. By order entered 2 July 2013, the trial court granted defendant's motion for appropriate relief and ordered a rehearing pursuant to *Miller* as well as our North Carolina General Assembly's enactment of N.C. Gen. Stat. § 15A-1340.19B, 2012 N.C. Sess. Laws 2012-148, § 1, eff. July 12, 2012 (stating that a defendant who is less than eighteen years of age who is convicted of first-degree murder pursuant to premeditation and deliberation shall have a hearing to determine whether the defendant should be sentenced to life imprisonment without parole or life imprisonment with parole).

On 20 February 2014, the Honorable Jack Jenkins, Special Superior Court Judge, conducted a hearing and ordered that "defendant's sentence is to remain life without parole." Defendant appealed. On 28 September 2016, this Court issued a writ of certiorari for the purpose of reviewing the resentencing order.

On appeal, defendant contends the trial court (I) violated his Eighth Amendment constitutional protection against cruel and unusual punishment by imposing a sentence of life without parole; and (II) erred by imposing a sentence of life without parole because the trial court failed to make findings on the presence or absence of *Miller* factors and the findings it did make do not support the conclusion that the sentence was warranted.

I

[1] Defendant first argues the trial court violated his constitutional protections against cruel and unusual punishment by imposing a sentence of life without parole. We disagree.

"The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009). The prohibition of cruel and unusual punishment under the Eighth Amendment forbids entering sentences "that are grossly disproportionate to the crime." *State v. Thomsen*, 242 N.C. App. 475, 487, 776 S.E.2d 41, 49 (2015), *aff'd*, 369 N.C. 22, 789 S.E.2d 639 (2016) (quoting *Harmelin v. Michigan*, 501 U.S. 957, 959, 115 L. Ed. 2d 836 (1991). The jurisprudence of the Eighth Amendment as it applies to

juveniles recognizes that juvenile offenders are categorically distinguishable from adult offenders because of their "diminished culpability and greater prospects for reform." *Miller*, 567 U.S. at 471, 183 L. Ed. 2d at 418. Nevertheless, courts continue to balance their interests in enforcing suitable punishments for juveniles proportionate to the crime while also maintaining fairness to juvenile offenders.

Miller v. Alabama "drew a line between children whose crimes reflect[ed] transient immaturity and those rare children whose crimes reflect[ed] irreparable corruption." *Montgomery v. Louisiana*, 577 U.S. ___, ____, 193 L. Ed. 2d 599, 620 (2016), (*as revised* Jan. 27, 2016). The United States Supreme Court ruled that imposing a *mandatory* life sentence without the possibility of parole for juvenile offenders violates the Eighth Amendment and "a judge or jury must have the opportunity to consider mitigating circumstances." *Miller*, 567 U.S. at 489, 183 L. Ed. 2d at 430; *also see id.* at 476, 183 L. Ed. 2d at 422 ("Such mandatory penalties, by their nature, preclude a sentencer from taking account of an offender's age and the wealth of characteristics and circumstances attendant to it.")

In response to *Miller* (but prior to the U.S. Supreme Court's decision in *Montgomery* in 2016), our General Assembly enacted N.C. Gen. Stat. §§ 15A-1476 *et seq.*—now codified as 15A-1340.19 *et seq*. Section 15A-1340.19B(a)(1) provides that if a defendant is convicted of first-degree murder solely on the basis of the felony murder rule, his sentence shall be life imprisonment with parole. N.C.G.S. § 15A-1340.19B(a)(1) (2017). If a defendant is not sentenced pursuant to subsection (a)(1), "the court shall conduct a hearing to determine whether the defendant should be sentenced to life imprisonment without parole, as set forth in G.S. 14-17, or a lesser sentence of life imprisonment with parole." N.C.G.S. § 15A-1340.19B(a)(2) (2017). Section 15A-1340.19C requires the sentencing court to consider mitigating factors in determining whether a defendant will be sentenced to life without the possibility of parole or life with the possibility of parole and to include in its order "findings on the absence or presence of any mitigating factors . . . ." N.C.G.S. § 15A-1340.19C(a) (2017). Therefore, the statutory scheme does not allow for mandatory sentences of life without parole for juvenile offenders and, thus, on its face, is not in violation of the Eighth Amendment per *Miller*.[3]

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3. We note our Supreme Court's recent opinion in *State v. James* held that "the relevant statutory language [in N.C.G.S. § 15A-1340.19C(a)] treats life imprisonment without the possibility of parole and life imprisonment with parole as alternative sentencing options [to be made based on analyzing] all of the relevant facts and circumstances in

Nevertheless, defendant contends the evidence establishes that he is not one of the rare juveniles who is "permanent[ly] incorrigib[le]" or "irreparabl[y] corrupt[]" and warrants a life sentence without parole as noted in *Montgomery*. Instead, defendant insists that the evidence indicates that at the time of the murder, his intellectual difficulties, developmental challenges, susceptibility to peer pressure, and potential for rehabilitation support a sentence of life in prison with the possibility of parole. Based on the foregoing reasons, and the analysis which follows, we overrule defendant's Eighth Amendment argument. We review the trial court's balancing of the *Miller* factors in Issue II.

II

[2] Defendant next argues the trial court erred by imposing a sentence of life without parole because the trial court failed to make findings on the presence or absence of *Miller* factors and the findings it did make were either contradicted by the evidence or did not support the conclusion that the sentence was warranted. Specifically, defendant challenges six out of the court's nine findings of fact alleging flawed reasoning, and further argues that the trial court failed to establish which factors were mitigating. We disagree.

When an order entered pursuant to N.C.G.S. § 15A-1340.19A *et seq*. is appealed, this Court reviews "each challenged finding of fact to see if it is supported by competent evidence and, if so, such findings of fact are 'conclusive on appeal.' " *State v. Lovette*, 233 N.C. App. 706, 717, 758 S.E.2d 399, 407 (2014). The trial court's weighing of mitigating factors to determine the appropriate length of the sentence is reviewed for an abuse of discretion. *State v. Antone*, 240 N.C. App. 408, 410, 770 S.E.2d 128, 129 (2015). "It is not the role of an appellate court to substitute its judgment for that of the sentencing judge." *Lovette*, 233 N.C. App. at 721, 758 S.E.2d at 410.

Our General Statutes, section 15A-1340.19B(c) sets forth factors a defendant may submit in consideration for a lesser sentence of life with parole. Those factors include: "1) age at the time of offense, 2) immaturity, 3) ability to appreciate the risks and consequences of the conduct, 4) intellectual capacity, 5) prior record, 6) mental health, 7) familial or peer pressure exerted upon the defendant, 8) likelihood that the defendant

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light of the substantive standard enunciated in *Miller*." *State v. James*, ___ N.C. ___, ___, 813 S.E.2d 195, 204 (2018), *aff'd*, ___ N.C. App. ___, 786 S.E.2d 73 (2016), *disc. review allowed*, 369 N.C. 537, 796 S.E.2d 789 (2017). *But see id.* at ___, 813 S.E.2d at 212 (Beasley, J., dissenting) ("A presumptive sentence of life without parole for juveniles sentenced under this statute contradicts *Miller*.").

would benefit from rehabilitation in confinement, and 9) any other mitigating factor or circumstance." N.C.G.S. § 15A-1340.19B(c). We refer to these as the *Miller* factors.

Here, defendant argues the trial court did not establish which factors were mitigating and imposed a sentence that was not supported by the evidence. The State, on the other hand, asserts the trial court made evidentiary findings on the presence or absence of *Miller* factors, and made explicit (or ultimate findings) on whether it found the factors to be mitigating. The trial court's evidentiary findings of fact (which defendant does not challenge and are therefore binding on appeal, *see In re Schiphof*, 192 N.C. App. 696, 700, 666 S.E.2d 497, 500 (2008)) are, in relevant part, as follows:

> 1. The Court finds as the facts of the murder the facts as stated in *State v. Sims*, 161 N.C. App. 183[, 588 S.E.2d 55] (2003).
>
> 2. The Court finds that the murder in this case was a brutal murder. The Court finds instructive the trial/sentencing jury's finding beyond a reasonable doubt that the murder was "especially heinous, atrocious, or cruel" pursuant to N.C.G.S. 15A-2000(e)(9). According to the trial testimony from Dr. Carl Barr, Ms. Kennedy had blunt force trauma all over her body. . . . Soot had penetrated deep into her lungs, meaning that she was alive when her car was set on fire with her in it, and she therefore died from suffocation from carbon monoxide poisoning.
>
> 3. The Court finds that the defendant has not been a model prisoner while in prison. His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison.
>
> 4. The Court finds that the defendant, although expressing remorse during the hearing, has not demonstrated remorse based on his actions and statements. During a meeting with a prison psychiatrist on January 20, 2009, the defendant complained that he was in prison and should not be. . . .
>
> 5. The Court finds that Dr. Tom Harbin testified that the defendant knew right from wrong. Further, Dr. Harbin testified that the defendant would have known that the

acts constituting the kidnapping [and the] murder were clearly wrong.

6. The Court finds that Dr. Harbin testified that the defendant was a follower, and was easily influenced. Dr. Harbin testified that the defendant may not see himself as responsible for an act if he himself did not actually perform the act even if he helped in the performance of the act. Further, Dr. Harbin testified that the defendant has a harder time paying attention than others and a harder time restraining himself than others. Dr. Harbin testified that the defendant had poor social skills, very poor judgment, would be easily distracted and would be less focused than others. Further, the defendant has a hard time interacting with others and finds it harder to engage others and predict what others might do.

7. The Court finds that while this evidence was presented by the defendant to try to mitigate his actions on the night Ms. Kennedy was murdered, that this evidence also demonstrates that the defendant is dangerous. Dr. Harbin acknowledge [sic] on cross-examination that all of the mental health issues he identified in the defendant, taken as a whole, could make him dangerous.

8. The Court finds that the defendant was an instrumental part of Ms. Kennedy's murder. She died from carbon monoxide poisoning from inhaling carbon monoxide while in the trunk of her car when her car was on fire. According to witness testimony at the trial, the defendant provided the lighter that Chris Bell used to light the jacket on fire that was thrown in Ms. Kennedy's car and eventually caused her death.

9. The Court finds that the evidence at trial clearly demonstrated that the defendant did numerous things to try to hide or destroy the evidence that would point to the defendant's guilt. The most obvious part is his participation in killing Ms. Kennedy, the ultimate piece of evidence against the defendants. Additionally, this defendant was the one who drove the car to its isolated last resting place in an attempt to hide it, even asking his co-defendants if he had hidden it well enough. Further, he personally went back

> to the car the morning after the night it was set on fire to make sure Ms. Kennedy was dead.
>
> 10. The Court finds that the physical evidence demonstrated not only his guilt, but specifically demonstrated the integral role the defendant played in Ms. Kennedy's death. Fingerprints, DNA, and footwear impressions at the scene where Ms. Kennedy was burned alive in her car all matched the defendant. Most notably, Ms. Kennedy died in the trunk of her car, and the palmprint on the trunk of the car, the only print found on the trunk, matched the defendant.

With regard to the trial court's ultimate findings of fact on each of the nine *Miller* factors, defendant challenges all but one (Finding of Fact No. 9) for either failing to establish which factors were mitigating, or as contradicted by the evidence or not supporting the conclusion that a sentence of life without parole was warranted. We address defendant's challenge to each ultimate finding in turn.

A. Finding of Fact No. 1—Age

> 1. Age. The Court finds that the defendant was 17 and ½ at the time of this murder, and therefore his age is less of a mitigating factor that [sic] it would be were he not so close to the age of criminal responsibility. Further, considering *Miller v. Alabama* to be instructive as to this factor, the Court notes that the two defendants in Miller, Jackson and Miller, were 14 at the time that each committed the murder for which he was convicted. Defendant Jackson was convicted solely on a felony murder theory and his initial role in the murder was as a getaway driver, and he was not the one who shot the victim. Defendant Miller had a very troubled childhood which included time in foster care and multiple suicide attempts. Miller killed a drug dealer that apparently provided drugs to Miller's mother and the killing occurred after a physical altercation with the victim. *The Court finds that the defendant's age is not a considerable mitigating factor in this case.*

(emphasis added).

Defendant challenges Finding of Fact No. 1 based on the assertion that "despite his chronological age, [defendant] was actually much younger in other respects on the offense date for this case."

First, it is undisputed that defendant was seventeen-and-a-half years old when he and his two codefendants murdered Ms. Kennedy. Second, there is no indication that the legislature, in enacting N.C.G.S. § 15A-1340.19C(a), intended for the trial court to consider anything other than a defendant's chronological age with regard to this factor. Indeed, the trial court is to consider whether a defendant's age is a mitigating circumstance in light of all the circumstances of the offense and the particular circumstances of the defendant. *See id.* In the instant case, the trial court made a point of drawing a comparison between the ages of the defendants in *Miller*, who were fourteen years old at the time of their crimes, and defendant in this case, who was six months away from reaching the age of majority. In so doing, the trial court properly found that age was not a considerable mitigating factor in this case.

B. Finding of Fact No. 2—Immaturity

> 2. Immaturity. *The Court does not find this factor to be a significant mitigating factor in this case based on all the evidence presented.* The Court notes that any juvenile by definition is going to be immature, but that there was no evidence of any specific immaturity that mitigates the defendant's conduct in this case.

(emphasis added).

Defendant contends this finding is not supported by the evidence because the trial court ignored testimony from Dr. Harbin that defendant and his brother frequently had no adult supervision and raised themselves, defendant was "poorly developed," defendant's stress tolerance and coping skills were immature, and defendant had the psychological maturity of an eight to ten year old.

Contrary to defendant's assertions, the trial court made two evidentiary findings of fact—Nos. 6 and 7—which clearly show that it considered Dr. Harbin's testimony. As stated previously, defendant has not challenged the evidentiary findings of fact and so they are binding on appeal. *See In re Schiphof*, 192 N.C. App. at 700, 666 S.E.2d at 500. Instead of finding that any evidence of immaturity mitigated defendant's actions, the trial court weighed the evidence and found more compelling Dr. Harbin's acknowledgment that certain characteristics—defendant's "poor social skills, very poor judgment," and difficulty "interacting with others and find[ing] it harder to engage others and predict what they might do"—"could make [defendant] dangerous." It is well within the trial court's discretion to "pass upon the credibility of [certain] evidence and to decide what[, or how much,] weight to assign to it."

State v. Villeda, 165 N.C. App. 431, 438, 599 S.E.2d 62, 66 (2004). Accordingly, defendant's argument that Finding of Fact No. 2 is not supported by the evidence is overruled.

C. Finding of Fact No. 3—Ability to appreciate the risks of the conduct

> 3. Ability to appreciate the risks of the conduct. Dr. Harbin, the defendant's psychologist, testified that in spite of the defendant's diagnoses and mental health issues, the defendant would have known that the acts he and his co-defendants committed while they stole Ms. Kennedy's car, kidnapped her, and ultimately murdered her were wrong.

Defendant contends the trial court misapprehended the nature of this finding under section 15A-1340.19B(c)(3) because the question of whether defendant knew an act was wrong is part of the test for the defense of insanity.

In the trial court's unchallenged evidentiary Findings of Fact Nos. 5 and 9, the trial court found that defendant knew right from wrong as evidenced by the fact that defendant did numerous acts to attempt to hide or destroy evidence which would inculpate him in the killing of Ms. Kennedy, including the act of her murder itself, driving the vehicle to its last resting place, asking his codefendants if he hid the vehicle well enough, and personally checking to confirm that Ms. Kennedy was dead. By arguing that Dr. Harbin testified that defendant's intellectual abilities were deficient and that he had poor judgment, defendant essentially requests that this Court reweigh the evidence which the trial court was not required to find compelling. *See State v. Golphin*, 352 N.C. 364, 484, 533 S.E.2d 168, 245 (2000) ("The evidence presented by [the defendant's] mental health expert was not so manifestly credible that . . . [the fact finder] was required to find it convincing."). Accordingly, the trial court did not misapprehend the nature of the factor in section 15A-1340.19B(c)(3) on whether defendant had the ability to appreciate the risks or consequences of his conduct, and this argument is overruled.

D. Finding of Fact No. 4—Intellectual Capacity

> 4. Intellectual Capacity. The Court finds that the defendant's intellectual capacity was below normal. Nevertheless, the Court finds that at the time of Ms. Kennedy's murder, the defendant was able to drive a car, to work at Hardee's, to be sophisticated enough to try to hide evidence in multiple ways at multiple places, and to work

> with his co-defendants to hide evidence and to try to hide Ms. Kennedy's car so it would not be found.

Defendant challenges this finding as "violat[ing] the statutory mandate requiring findings of the absence or presence of mitigating factors." However, the trial court's use of the word "nevertheless" demonstrates that it did not consider this factor to be a mitigating one. In other words, Finding of Fact No. 4 can be read to say that while defendant's intellectual capacity was below normal, it was not a mitigating factor in light of other evidence (defendant's ability to drive a car, work at Hardee's, etc.). As such, this finding does not "violate the statutory mandate," and this argument is overruled.

E. Finding of Fact No. 5—Prior Record

> 5. Prior Record. The defendant's formal criminal record as found on the defendant's prior record level worksheet was for possession of drug paraphernalia. However, the Court notes that because the defendant was 17 ½, he had only been an adult for criminal purposes in North Carolina courts for a short period of time. The Court considers the defendant's Armed Robbery juvenile situation in Florida and the defendant's removal from high school for stealing as probative evidence in this case, specifically because both occurrences occurred when the defendant was with others, and the defendant denied culpability in Ms. Kennedy's murder and the other two incidents. *The Court does not find this to be a compelling mitigating factor for the defendant.*

(emphasis added).

Defendant argues the trial court misapprehended this factor because it considered an armed robbery charge from Florida and defendant's expulsion from high school for stealing. He contends this mitigating factor only encompasses a defendant's formal criminal record, which showed a single conviction for possession of drug paraphernalia.

First, the statute at issue, N.C.G.S. § 15A-1340.19B, does not define the term "prior record." *See id.* § 15A-1340.19B(c). Second, in its unchallenged evidentiary Finding of Fact No. 4, the trial court found, in relevant part, as follows with regard to defendant's prior record:

> [T]he Court reviewed materials and heard evidence that as a juvenile in Florida, the defendant had been charged with armed robbery but denied any culpability in the case. Also,

> this Court heard and reviewed evidence that the defendant was removed from Hobbton High School in September 1998 in large part due to bad behavior. Specifically, the Court notes that the defendant was accused, along with two others, of stealing from the boy's locker room after school as a part of a group, but again denied doing anything wrong. The school specifically found that [defendant's] acts during this theft were not due to his learning disabilities. This Court notes in all three incidents, the Florida armed robbery, the Hobbton high school theft, and the murder of Ms. Kennedy, the defendant was with a group of people, and in the light most favorable to him, was at a minimum a criminally culpable member of the group but was unwilling to admit to any personal wrongdoing.

(footnote omitted). Further, in a footnote to unchallenged evidentiary Finding of Fact No. 4, the trial court stated as follows:

> According to the defendant's evidence, the defendant was charged in juvenile court in Florida and was placed on juvenile probation as a result of this incident. Further, the defendant's version of this incident is that after being placed on probation, the charges were eventually dismissed. This Court does not specifically consider the charge itself or the subsequent punishment itself as evidence against the defendant, but rather finds noteworthy the defendant's complete denial of any wrongdoing while involved in criminal activity as part of a group. The Court notes the similarity to that incident and this incident, in which the defendant, while part of a group, committed acts that a Court deemed worthy of punishment, but for which the defendant denied wrongdoing.

By making clear that it was not "specifically consider[ing] the charge itself," the trial court nevertheless did not misapprehend the nature of this mitigating factor as there is no prohibition, statutory or otherwise, on a trial court taking into consideration school records which indicate a defendant has previously engaged in criminal activity simply because such evidence is not a part of a defendant's "formal criminal record." Indeed, evidence of defendant's conviction for possession of drug paraphernalia, followed by theft, followed by the murder of Ms. Kennedy shows the escalation of defendant's criminal activity, which is an appropriate consideration for the trial court. *See Lovette*, 233 N.C. App. at 722, 758 S.E.2d at 410 (finding no error in the trial court's conclusion

to sentence the defendant to life imprisonment without parole where, *inter alia*, the defendant's "criminal activity had continued to escalate"). Defendant's argument is overruled.

F. Finding of Fact No. 6—Mental Health

> 6. Mental Health. Dr. Harbin testified both at trial and at the February 20, 2014 evidentiary hearing that he diagnosed the defendant with ADHD and a Personality Disorder Not Otherwise Specified. The Court finds that although the defendant did have mental health issues around the time of the murder, *they do not rise to the level to provide much mitigation*. Many people have ADHD, and a non-specified personality disorder is not an unusual diagnosis. Many people function fine in society with these issues.

(emphasis added).

Defendant challenges this finding as failing to provide a clear indication of whether it was mitigating or not, depriving this Court of the ability to effectively review the sentencing order. Contrary to defendant's assertion, the trial court clearly stated in Finding of Fact No. 6 that it found "that although the defendant did have mental health issues around the time of the murder, they do not rise to the level to provide much mitigation." In other words, the trial court did not find defendant's mental health at the time to be a mitigating factor. Defendant's argument is overruled.

G. Finding of Fact No. 7—Familiar or Peer Pressure exerted on the defendant

> 7. Familiar of Peer Pressure exerted on the defendant.
>
> A. The Court finds there was no familial pressure exerted on the defendant to commit this crime. In fact, the opposite is true. Sophia Strickland, [defendant's] mother, testified both at the trial and at the February 20, 2014 evidentiary hearing that she had warned [defendant] repeatedly to stay away from the co-defendant's [sic] in this case. Specifically, Ms. Strickland stated at the evidentiary hearing that if [defendant] continued to hang out with his co-defendants, something bad was going to happen. Further, [defendant's] sister, Tashia Strickland, also told [defendant] that she did not like the co-defendants, that the co-defendants were not

> welcome at her residence, and that [defendant] should not hang out with them. Also, Vicki Krch, [defendant's] Hardee's manager, who tried to help [defendant] when she could, sometimes gave [defendant] a free ride to work, bought [defendant] a coat, and fed [defendant's] younger brother for free, warned [defendant] not to hang out with the co-defendants, one of whom had worked for her and she knew well. The Court finds that the defendant refused to listen to his family members' warnings to stay away from the co-defendants.
>
> B. Peer Pressure. There was no evidence in this case that [defendant] was threatened or coerced to do any of the things he did during the kidnapping, assault, murder, and burning of Ms. Kennedy's car. At trial, co-defendant Chad Williams stated that when Chris Bell first brought up the idea of stealing the car, [defendant] stated "I'm down for whatever." The only evidence that may fit in this category is Dr. Harbin's testimony that the defendant could be easily influenced. Nevertheless, the defendant made a choice to be with his co-defendants during Ms. Kennedy's murder, and actively participated in it. The evidence demonstrated that the defendant was apparently only easily influenced by his friends, but not his family who consistently told him to avoid the co-defendants. This demonstrates that the defendant made choices as to whom he would listen.

(footnote omitted).

Defendant argues that both parts of this finding demonstrate that the trial court misapprehended the "peer pressure" mitigating factor. He contends there is no requirement that a defendant demonstrate actual threats or coercion to prove he was subject to peer pressure and that his refusal to listen to his mother after he started hanging out with his codefendant, Bell, was consistent with the existence of peer pressure.

Reading Finding of Fact No. 7 as a whole, it shows that the trial court found that there was little or no pressure exerted by defendant's codefendants to participate in these crimes. The trial court found that when Bell brought up the idea of stealing a vehicle, defendant stated, "I'm down for whatever." It further found that the only evidence that could possibly relate to defendant's susceptibility to familial or peer

pressure was Dr. Harbin's testimony that defendant could be easily influenced. However, the trial court nevertheless found that defendant made a deliberate choice to be with his codefendants and "actively participated" in the murder, even that he played an "integral role" in the crime. As for defendant's contention that his refusal to listen to his family members' warnings to stay away from his codefendants is evidence that he was subject to peer pressure, that contention is not supported by the trial court's findings. The trial court found, rather, that this was evidence that he was "apparently only easily influenced by his friends, but not his family . . . [which] demonstrates that [he] made choices as to whom he would listen." Defendant's argument is overruled.

H. Finding of Fact No. 8—Likelihood the defendant would benefit from rehabilitation in confinement

> 8. Likelihood the defendant would benefit from rehabilitation in confinement. The defendant's prison records demonstrate that the defendant has been charged and found responsible for well over 20 infractions while in prison. He consistently refused many efforts to obtain substance abuse treatment. While the defendant has in fact obtained his GED which the court finds is an important step towards rehabilitation, the Court notes that the defendant during the first ten years plus of his confinement often refused multiple case managers [sic] pleas to obtain his G.E.D. According to prison records submitted into evidence during the February 20, 2014 evidentiary hearing, the Court notes that during a 2009 meeting with a psychiatrist the defendant noted that he was depressed in part because he was in prison and should not be. The Court finds that throughout the defendant's life he did not adjust well to whatever environment he was in. The Court finds that in recent years, the defendant has seemed to do somewhat better in prison, which includes being moved to medium custody. Most importantly to this Court, the evidence demonstrates that in prison, the defendant is in a rigid, structured environment, which best serves to help him with his mental health issues, and serves to protect the public from the defendant, who on multiple occasions in non-structured environments committed unlawful acts when in the company of others.

(footnote omitted).

Defendant argues that in making Finding of Fact No. 8, the trial court improperly used his improvement while in prison against him. Contrary to defendant's assertion, Finding of Fact No. 8 indicates that defendant has not benefitted a great deal from rehabilitation during his confinement, which is supported by the trial court's unchallenged evidentiary Finding of Fact No. 3: "The Court finds that the defendant has not been a model prisoner . . . . His prison records indicate that he has committed and been found responsible for well over 20 infractions since he has been in prison." While the trial court did note that defendant "seemed to do somewhat better in prison" in recent years, it also noted that defendant's own expert testified that his mental health issues made him dangerous and that he would do best in a rigid, structured environment like prison. Accordingly, the trial court's Finding of Fact No. 8 was supported by the evidence and not used improperly against defendant. This argument is overruled.

While *Miller* states that life without parole would be an uncommon punishment for juvenile offenders, the trial court has apparently determined that defendant is one of those "rare juvenile offenders" for whom it is appropriate. *See Miller*, 567 U.S. at 479, 183 L. Ed. 2d at 424. The trial court's unchallenged evidentiary findings combined with its ultimate findings regarding the *Miller* factors demonstrate that the trial court's determination was the result of a reasoned decision.[4] Therefore, the trial court did not abuse its discretion in weighing the *Miller* factors to determine defendant's sentence.

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4. Following the *Miller* ruling, many courts adopted their own interpretation of *Miller*'s application to current legislation and state practices, as it varies by jurisdictions. More recently, in *Malvo v. Mathena*, 893 F. 3d 265, 274 (4th Cir. 2018), *aff'd*, *Malvo v. Mathena*, 254 F. Supp. 3d 820 (E.D. Va. 2017), the Fourth Circuit's opinion defined *Miller* to prohibit "impos[ing] a discretionary life [] without [] parole sentence on a juvenile homicide offender *without first concluding* that the offender's 'crimes reflect permanent incorrigibility,' as distinct from the 'transient immaturity of youth.' " *Id.* (quoting *Montgomery*, 577 U.S. at ____, 193 L. Ed. 2d at 620) (emphasis added)).

We rely on our precedent–which *Montgomery* reiterates–that sentencing judges *may* consider *Miller* factors but are not *required by law* to issue an ultimate finding or conclusion. *See Lovette*, 233 N.C. App. at 719, 758 S.E.2d at 408 ("The findings of fact must support the trial court's conclusion that defendant should be sentenced to life imprisonment without parole, and a finding of 'irreparable corruption' is not required."); *see also Montgomery*, 577 U.S. at ____, 193 L. Ed. 2d at 621 ("*Miller* [does] not require trial courts to make a finding of fact regarding a child's incorrigibility. . . this Court is careful [not] to limit the scope of any attendant procedural requirement to avoid intruding more than necessary upon the States' sovereign administration of their criminal justice systems."). We reject the contention that the trial court was erroneous because it did not issue a finding regarding permanent incorrigibility.

NO ERROR.

Judge CALABRIA concurs.

Judge STROUD concurs in the result only by separate opinion.

STROUD, Judge, concurring.

I concur in the result only, reluctantly, because prior precedent of this Court requires it.

Our trial courts and this Court have struggled with the proper application of the *Miller* factors in first degree murder convictions of defendants under 18 at the time of the crime. *See generally Miller v. Alabama*, 567 U.S. 460, 183 L. Ed. 2d 407 (2012). The application of the *Miller* factors is a discretionary ruling and has no hard and fast rules, nor should it. *See generally id.* But the United States Supreme Court's ruling in *Montgomery v. Louisiana* establishes that the trial court must be able to find that the defendant is "permanent[ly] incorrigibl[e]" or "irreparab[ly] corrupt[]" before sentencing him to life imprisonment without the possibility of parole. 577 U.S. ___, ___, 193 L. Ed. 2d 599, 611-20 (2016). "Permanent" means forever. "Irreparable" means beyond improvement. In other words, the trial court should be satisfied that in 25 years, in 35 years, in 55 years — when the defendant may be in his seventies or eighties -- he will likely still remain incorrigible or corrupt, just as he was as a teenager, so that even then parole is not appropriate. That is a very high standard, which is why the Supreme Court stated that life imprisonment without the possibility of parole should be "rare[.]" *Id.* at ___, 193 L.E. 2d at 611.

If our courts consistently interpret evidence of each factor as "not mitigating" no matter what the evidence is -- and they are free to do so, as I noted in my concurring opinion in *State v. May*, ___ N.C. App. ___, 804 S.E.2d 584 (2017) -- defense attorneys will have no way of knowing what sort of evidence to present in mitigation. For example, a low IQ can be seen as mitigating, since it lessens the defendant's culpability; it can also be seen as not mitigating, because the defendant may be less able to take advantage of programs in prison which may improve him, such as obtaining a GED. Here, the trial court even noted in finding of fact seven that although defendant presented certain evidence intended as mitigating evidence, it found the evidence to be the opposite. Defense attorneys may damage a defendant's case when trying to help it, since any evidence they use can be turned against them. But the trial court's

opinion addressed each factor as required by North Carolina General Statute § 15A-1340.19B, and though I agree with defendant that the trial court focused more on whether he is "dangerous" than permanently incorrigible or irreparably corrupt, under North Carolina's case law, that is within its discretion.

I therefore concur in result only.

STATE OF NORTH CAROLINA
v.
JEFFERY DANIEL WAYCASTER

No. COA17-1249

Filed 7 August 2018

1. Evidence—hearsay—exceptions—business records—GPS tracking reports

The trial court did not err by admitting hearsay evidence under the business records exception to establish that an ankle monitor found in a ditch was the monitor assigned to defendant as a condition of his probation. A probation officer laid a proper foundation by describing the operation of the monitor, demonstrating his familiarity with the monitoring system, and explaining how the tracking information is transmitted to and stored in a database used by the probation office.

2. Sentencing—habitual felon status—proof of prior convictions—evidentiary requirements—ACIS printout

A printout from the Automated Criminal/Infraction System (ACIS) was admissible to prove a prior felony to establish defendant's habitual felon status and was not barred by the best evidence rule. The ACIS printout was a true copy of the original record, certified by a clerk of court at trial, and met the evidentiary requirements of N.C.G.S. § 14-7.4.

Judge MURPHY concurring in part and dissenting in part.

Appeal by defendant from judgments entered 16 May 2017 by Judge Gary M. Gavenus in McDowell County Superior Court. Heard in the Court of Appeals 5 June 2018.

Attorney General Joshua H. Stein, by Assistant Attorney General Alexander Walton, for the State.

Dylan J.C. Buffum Attorney at Law, PLLC, by Dylan J.C. Buffum for defendant-appellant.

ARROWOOD, Judge.

Jeffery Daniel Waycaster ("defendant") appeals from judgments entered on his convictions of interfering with an electronic monitoring device and attaining the status of a habitual felon.

I. Background

On 26 October 2015, defendant was indicted for interfering with an electronic monitoring device, and for attaining the status of a habitual felon. The matter came on for trial in McDowell County Superior Court before Judge Gary M. Gavenus on 15 May 2017. The State's evidence tended to show that, on 24 September 2015, defendant was subject to supervised probation due to a conviction for felony larceny that was entered 22 July 2014. As a modified condition of his probation, defendant submitted to electronic monitoring.

Probation Officer Matthew Plaster ("Officer Plaster") supervised defendant. Officer Plaster testified that defendant's electronic monitoring equipment was installed prior to 24 September 2015 by BI Total Monitoring, the company contracted to install and monitor the equipment. Officer Plaster described the equipment as follows. BI Total Monitoring's electronic monitoring equipment includes an ankle monitor, a beacon that used a global positioning system ("GPS") to track the monitor, and a charger for each probationer. The ankle monitor and beacon "have serial numbers on them that are specific to" the probationer they monitor. BI Total Monitoring's computer software, BI Total Access, keeps logs of which serial numbers are assigned to each probationer.

When an ankle monitor is not in the beacon's range, it transmits a GPS signal. These signals enable the probation officer to log onto a computer program to see, "within a fairly accurate distance[,]" where a probationer is located. When a probationer removes the ankle monitor, BI Total Monitoring notifies the probation office. Officer Plaster testified that this technology "works really well" and their office has "not had much issue with dead spots and stuff." After the equipment's installation on defendant's person and at his residence, Officer Plaster inspected it to ensure "it was on properly."

On 24 September 2015, the "on call" probation officer, Probation Officer David Ashe ("Officer Ashe"), received an alert from BI Total Monitoring that defendant's ankle monitor's strap had been tampered with. Unable to reach defendant by phone, Officer Ashe used the GPS to locate the monitor miles from defendant's residence, in a ditch approximately 8 feet from a road. He testified that he took the ankle monitor to his office, where he verified it was the one assigned to and installed on defendant.

Defendant did not present any evidence.

On 16 May 2017, the jury found defendant guilty of interfering with an electronic monitoring device.

On 17 May 2017, the habitual felon phase of the trial began. The indictment charged defendant with habitual felon status based on three convictions in McDowell County: a 4 June 2001 conviction for felonious breaking and entering on or about 20 February 2001, a 18 February 2010 conviction for felonious breaking and entering on or about 29 October 2009, and a 22 July 2014 conviction for safecracking on or about 27 June 2013. The State offered true copies of judgments related to the 18 February 2010 and 22 July 2014 convictions as evidence.

As proof of the 4 June 2001 conviction, the State called the Clerk of McDowell County Superior Court, Melissa Adams, as a witness. She identified a printout of a record entered into the Automated Criminal/Infraction System ("ACIS") that showed that, on 4 June 2001, defendant was convicted in McDowell County case 01 CR 1216 of felony breaking and entering for an offense that occurred on 20 February 2001. Defendant objected to the submission of the ACIS printout, arguing it was not the best evidence in this case because it was not a copy of the judgment. The trial court overruled defendant's objection, explaining: "ACIS is a way in which the State can introduce true copies of judgments entered in the system, and it's admissible under the rules of evidence."

The jury found defendant had attained habitual felon status. The trial court sentenced defendant to an active term of incarceration for 38 to 58 months.

Defendant appeals.

II. Discussion

Defendant makes two arguments on appeal. First, he argues the trial court committed plain error by admitting hearsay evidence to establish that the ankle monitor found in the ditch was the monitor assigned to

defendant. Second, he argues the trial court erred when it allowed an ACIS printout into evidence as proof of defendant's 2 June 2001 conviction for felony breaking and entering. We address each argument in turn.

A. Hearsay Evidence

[1] Defendant argues the trial court plainly erred when it allowed Officer Ashe to provide testimony based on GPS tracking evidence and simultaneously prepared reports to establish that the ankle monitor that he found was the same monitor that had been installed on and assigned to defendant. Defendant contends this testimony constituted hearsay that was not admissible under any exception. We disagree.

Officer Ashe testified that the 24 September 2015 alert he received from BI Total Monitoring identified defendant as the probationer to whom the monitor at issue was assigned. Defendant objected to this statement as hearsay, but was overruled. Subsequently, Officer Ashe testified that he verified the monitor was the one assigned to and installed on defendant. Defendant did not object. Therefore, he lost the benefit of his initial objection and failed to preserve this issue for appellate review. *See State v. Maccia*, 311 N.C. 222, 229, 316 S.E.2d 241, 245 (1984) ("[W]hen . . . evidence is admitted over objection, and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost.") (citations omitted). Nonetheless, defendant contends the admission of Officer Ashe's testimony based on GPS tracking evidence and simultaneously prepared reports amounts to plain error.

Under plain error review, an issue that was not preserved "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) (2018). "[P]lain error review . . . is normally limited to instructional and evidentiary error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) (citation omitted). To show plain error, a "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) (citation omitted). Accordingly, the error must have been "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) (citation and internal quotation marks omitted).

Rule 801 of the North Carolina Rules of Evidence defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter

asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (2017). Hearsay is generally not admissible at trial, unless otherwise allowed by statute or the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 802. Rule 803(6) of the North Carolina Rules of Evidence establishes an exception to the general exclusion of hearsay for business records, which the rules define as:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity, and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by affidavit or by document under seal under Rule 902 of the Rules of Evidence made by the custodian or witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. Authentication of evidence by affidavit shall be confined to the records of nonparties, and the proponent of that evidence shall give advance notice to all other parties of intent to offer the evidence with authentication by affidavit. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

N.C. Gen. Stat. § 8C-1, Rule 803(6). Electronically stored business records are admissible if:

> (1) the computerized entries were made in the regular course of business, (2) at or near the time of the transaction involved, and (3) a proper foundation for such evidence is laid by testimony of a witness who is familiar with the computerized records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy.

State v. Jackson, 229 N.C. App. 644, 650, 748 S.E.2d 50, 55 (2013) (quoting *State v. Crawley*, 217 N.C. App. 509, 516, 719 S.E.2d 632, 637 (2011)). These records need not be authenticated by the person who made them. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985) (citations omitted).

Our Court has previously held that hearsay statements based on "GPS tracking evidence and simultaneously prepared reports are admissible under the business records exception to the hearsay rule." *State v. Gardner*, 237 N.C. App. 496, 499, 769 S.E.2d 196, 198 (2014) (citation omitted). However, defendant argues that the testimony at issue does not meet the requirements of the business records exception because the probation officers that testified did not lay a proper foundation "to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy" as required under our caselaw. We disagree.

In both *Gardner* and *Jackson*, we held that the probation officers' testimony was sufficient to lay a proper foundation for statements based on GPS tracking evidence and simultaneously prepared reports. *Id.* at 501, 769 S.E.2d at 199; *Jackson*, 229 N.C. App. at 650-51, 748 S.E.2d at 55-56. Here, as in *Gardner*, one of the probation officers that testified, Officer Plaster, testified concerning the operation of the electronic monitoring device worn by defendant and demonstrated his familiarity with the system through his testimony. Additionally, he testified that the information transmitted through the GPS technology is stored in a software database that the probation office uses to conduct its business. He also testified that the program is an accurate source of information that "works really well." We hold that his testimony established a sufficient foundation of trustworthiness for the tracking evidence to be admissible as a business record. Therefore, the trial court did not err when it permitted Officer Ashe to testify that the tracking data in this case verified that the ankle monitor at issue had been assigned to defendant. Because the trial court did not err, the trial court did not commit plain error.

B. Evidentiary Requirements Under N.C. Gen. Stat. § 14-7.4

[2] Defendant argues the trial court erred when it allowed an ACIS printout to be admitted as proof of a prior conviction to establish defendant's habitual felon status. Specifically, he argues the admission of the printout violated the best evidence rule, which requires secondary evidence offered to prove the contents of a recording be excluded whenever the original recording is available. *See State v. York*, 347 N.C. 79, 91, 489 S.E.2d 380, 387 (1997) (citing N.C. Gen. Stat. § 8C-1, Rules 1002-1004 (2017)).

While this Court has previously concluded, in an unpublished opinion, that criminal history printouts from the ACIS database were admissible evidence to prove a prior felony under N.C. Gen. Stat. § 14-7.4, *see State v. Aultman*, No. COA15-242, 244 N.C. App. 777, 781 S.E.2d 532,

2016 WL 47970 at *6 (N.C. Ct. App. Jan. 5, 2016) (unpublished), it is well settled that "[a]n unpublished opinion establishes no precedent and is not binding authority[.]" *Long v. Harris*, 137 N.C. App. 461, 470, 528 S.E.2d 633, 639 (2000) (citation, internal quotation marks, and brackets omitted). Nonetheless, we agree with the reasoning set out in *Aultman* and hold that printouts from the ACIS database were admissible evidence to prove a prior felony under N.C. Gen. Stat. § 14-7.4, and, thus, were not barred by the best evidence rule, for the reasons that follow.

Under the Habitual Felon Act ("the Act"), "when a defendant has previously been convicted of or pled guilty to three non-overlapping felonies," and commits a new felony under North Carolina law, the "defendant may be indicted by the State in a separate bill of indictment for having attained the status of being an habitual felon." *State v. Wells*, 196 N.C. App. 498, 502, 675 S.E.2d 85, 88 (2009) (citation omitted); N.C. Gen. Stat. § 14-7.1 (2017). "The trial for the substantive felony is held first, and only after defendant is convicted of the substantive felony is the habitual felon indictment revealed to and considered by the jury." *State v. Cheek*, 339 N.C. 725, 729, 453 S.E.2d 862, 864 (1995) (citing N.C. Gen. Stat. § 14-7.5). "Upon a conviction as an habitual felon, the court must sentence the defendant for the underlying felony as a Class C felon." *State v. Penland*, 89 N.C. App. 350, 351, 365 S.E.2d 721, 722 (1988) (citing N.C. Gen. Stat. § 14-7.6) (citation omitted).

The Act sets out the following evidentiary requirements for proving prior felonies:

> In all cases where a person is charged . . . with being an habitual felon, the record or records of prior convictions of felony offenses shall be admissible in evidence, but only for the purpose of proving that said person has been convicted of former felony offenses. A prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction.

N.C. Gen. Stat. § 14-7.4. A "certified copy" under N.C. Gen. Stat. § 14-7.4 is "a copy of a document or record, signed and certified as a true copy by the officer whose custody the original is [entrusted]." *State v. Gant*, 153 N.C. App. 136, 143, 568 S.E.2d 909, 913 (2002) (citing Black's Law Dictionary 228 (6th ed. 1990)) (emphasis and alteration omitted). There is no recognizable distinction between certified copies and true copies. *Id.* "[A]lthough section 14-7.4 contemplates the most appropriate means to prove prior convictions for the purpose of establishing habitual felon status, it does not exclude other methods of proof." *State v. Wall*, 141 N.C. App. 529, 533, 539 S.E.2d 692, 695 (2000) (citation omitted).

Our Supreme Court has explained ACIS is:

> an electronic compilation of all criminal records in North Carolina. While the North Carolina Administrative Office of the Courts (AOC) administers and maintains ACIS, the information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk. Any subsequent modifications to that information are under the exclusive control of the office of the Clerk that initially entered the information, so that personnel in one Clerk's office cannot change records entered into ACIS by personnel in a different Clerk's office. In other words, the information in ACIS both duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court.

LexisNexis Risk Data Mgmt. Inc. v. North Carolina Administrative Office of Courts, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015). In a case not involving the Habitual Felon Act, our court held that a "printed-out email, which contains a screenshot of the AOC record of the conviction, is 'a copy' of a 'record maintained electronically' by the Administrative Office of the Courts, which is sufficient to prove [a] prior conviction under N.C. Gen. Stat. § 15A-1340.14(f)(3)" to determine prior record level for sentencing. *State v. Best*, 202 N.C. App. 753, 757, 690 S.E.2d 58, 61 (2010).

In the instant case, the ACIS printout was sufficient evidentiary proof of defendant's 4 June 2001 conviction under the Habitual Felon Act. ACIS "duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by" clerks of court. *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652. The Clerk of McDowell County Superior Court, the individual tasked with maintaining the physical court records in McDowell County, testified that the printout was a certified true copy of the information in ACIS regarding this judgment. She also explained the information was "the same as the judgment" and affirmed it "is a different way of recording what's on a judgment[.]" The Clerk's certification of the ACIS printout as a true copy of the original information is significant due to her responsibility and control over the physical court records, copies, and ACIS entries, as described in *LexisNexis Risk Data Mgmt. Inc.*

The Best Evidence Rule does not bar the admission of this ACIS printout merely because the original judgment was unaccounted for at trial. The plain reading of N.C. Gen. Stat. § 14-7.4 and our habitual felon jurisprudence makes clear that the statute is permissive and does not exclude methods of proof that are not specifically delineated in the Act. *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695 (citation omitted). Moreover, the Clerk of McDowell County Superior Court certified the information as a true copy. The trial court did not err by permitting the State to offer the ACIS printout as evidence of the 4 June 2001 conviction.

III. Conclusion

For the forgoing reasons we hold the trial court did not commit error.

NO ERROR.

Judge CALABRIA concurs.

Judge MURPHY concurs in part and dissents in part in a separate opinion.

Murphy, Judge, concurring in part and dissenting in part.

I concur with the Majority opinion as to the conviction of interfering with an electronic monitoring device, but must respectfully dissent as to the conviction of habitual felon status. State's Exhibit 4, the Automated Criminal/Infraction System (ACIS) printout used to prove one of Defendant's three convictions, was not admissible because the State did not sufficiently comply with the foundational requirements of the best evidence rule.

Under N.C. Gen. Stat. § 14-7.4, "[a] prior conviction may be proved by stipulation of the parties or by the original or a certified copy of the *court record* of the prior conviction." N.C. Gen. Stat. § 14-7.4 (2017) (emphasis added). While the habitual felon statutory language is "permissive," *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695, "[t]he preferred method for proving a prior conviction includes the introduction of the judgment itself into evidence." *State v. Blakney*, 233 N.C. App. 516, 521, 756 S.E.2d 844, 848 (2014) (alteration omitted) (quoting *State v. Maynard*, 311 N.C. 1, 26, 316 S.E.2d 197, 211 (1984)). Thus, although N.C. Gen. Stat. § 14-7.4 "does not exclude other methods of proof[,]" *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695, I dissent because the Majority extends the "permissive" nature of N.C. Gen. Stat. § 14-7.4 too far and suspends

the applicability of our Supreme Court precedent and the Rules of Evidence to habitual felon proceedings.

I note that a printout from the ACIS is neither a "court" nor "judicial" record of a criminal conviction. Rather, the ACIS "is an electronic compilation of all criminal records in North Carolina." *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652. Thus, an ACIS printout is actually a record of the data stored in the ACIS database at one point in time, not a court record. *See id.* Our Supreme Court has held that "[t]he proceedings of courts of record can be proved by their records only[.]" *Jones v. Jones*, 241 N.C. 291, 293, 85 S.E.2d 156, 158 (1954) ("Public policy and convenience require the rule, and a necessary consequence from it is the absolute and undeniable presumption that the record speaks the truth."). This historic mandate is consistent with the modern statutory language of N.C. Gen. Stat. § 14-7.4, which provides that "[a] prior conviction may be proved by the original or a certified copy of the court record of the prior conviction." Therefore, this precedent has not been superseded by statute and is still applicable in the instant case. Our precedent prefers that the proceedings of Courts, such as a criminal conviction, be proved by "their records." Notwithstanding this critical distinction between a judgment record and an ACIS printout, I agree that an ACIS printout may serve as secondary evidence of a defendant's record of conviction, provided that the requirements of the best evidence rule are satisfied. Here, they were not.

Wall, a case principally relied upon by the Majority, is distinguishable from the instant case. In *Wall*, we determined whether "*a faxed certified copy of a criminal record* is admissible under section 14-7.4 to prove defendant's status as an habitual felon." *Wall*, 141 N.C. App. at 532, 539 S.E.2d at 694 (emphasis added). There, although the State did not submit the original or a certified copy of the court record of the defendant's prior felony conviction, the State still proved his conviction with a "court record." *Id.* at 530, 539 S.E.2d at 693. It was with a faxed version of the certified copy of the judgment and commitment form, not an ACIS printout. *Id. Wall*'s holding, confined to its facts, is fairly simple: a facsimile of a certified copy of a defendant's judgment and commitment form is permitted under N.C. Gen. Stat. § 14-7.4. *Id.* at 533, 539 S.E.2d at 695. This distinction between *Wall* and the instant case further confirms that despite N.C. Gen. Stat. § 14-7.4's permissive nature, the State must either proffer a "court record" or otherwise comply with the best evidence rule.

Further, although bound by *Wall*, I dissent in part to recognize that we provided an incomplete and truncated interpretation of N.C. Gen.

Stat. § 14-7.4 in that case. *Id.* at 531-32, 539 S.E.2d at 694. Specifically, *Wall*'s interpretation of N.C. Gen. Stat. § 14-7.4 omits critical words of the statute, and as a result ignores legislative intent. *Id. Wall* stated that:

> The statute at issue in the instant case, section 14-7.4, clearly indicates that the provision is permissive, not mandatory, in that it provides a prior conviction "may" be proven by stipulation or a certified copy of *a record*.

Id. at 533, 539 S.E.2d at 695 (emphasis added). However, the plain language of N.C. Gen. Stat. § 14-7.4 does not provide that a prior conviction may be proven by any "copy of a record," as the above language from *Wall* suggests. *Id.* Rather, N.C. Gen. Stat. § 14-7.4 expressly states that a copy of "the court record" of the prior conviction may be used:

> A prior conviction may be proved by . . . the original or a certified copy of *the court record* of the prior conviction.

N.C. Gen. Stat. § 14-7.4 (emphasis added). A "certified copy of *the court record*" is not synonymous with a "certified copy of *a record*." *Compare id. with Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695.

State v. Aultman, an unpublished decision of this Court, whose reasoning is adopted by the Majority today, relied on *Wall's* truncated interpretation of N.C. Gen. Stat. § 14-7.4. *See Aultman*, 2016 WL 47970 at *5 (unpublished) (citing *Wall*, 141 N.C. App. at 531-32, 539 S.E.2d at 694). Unlike the Majority and the unpublished opinion in *Aultman*, I would limit the holding of *Wall* to its facts, and would decline to extend its reasoning to permit the introduction of ACIS printouts as secondary evidence of a criminal defendant's judgment record without first complying with the foundational requirements of the best evidence rule. *Wall*, 141 N.C. App. at 533, 539 S.E.2d at 695 (holding that a faxed copy of a certified copy of the actual judgment can be admitted to prove a prior conviction in a habitual felon proceeding).

I note that at trial, Defendant argued that the ACIS printout should have been barred by the best evidence rule. Defendant also advances this argument on appeal. However, in neither *Wall* nor *Aultman* did the defendant make any argument concerning the best evidence rule. *Wall*, 141 N.C. App. 529, 539 S.E.2d 692; *Aultman*, 2016 WL 47970. Thus, neither of these cases should be deemed controlling in our resolution of the present case.

The best evidence rule applies here because the ACIS printout was admitted to prove the contents of a judicial record (i.e. a "writing") that the State indicated was unavailable. In response to Defendant's

objection, the State admitted that they had originally intended to use Defendant's judgment and commitment record to prove his conviction, but were using the ACIS printout (submitted as State's Exhibit 4) because the original could not be found.

> *The State*: I'll tell you Your Honor that when we were gathering these documents, 4A had come from microfilming and they said that they didn't have the original of 4. So 4 is the record of the original judgment.

However, this explanation by the State fails to lay the proper foundation necessary to admit secondary evidence of public records under North Carolina Rule of Evidence 1005. I again emphasize that an ACIS printout is not a court record of the original judgment, but is only secondary evidence thereof. *LexisNexis Risk Data Mgmt. Inc.*, 368 N.C. at 181, 775 S.E.2d at 652. The information contained in the ACIS database is entirely dependent upon the contents of a physical court record, a signed judgment and commitment form. *Id.* ("[T]he information contained in ACIS is entered on a continuing, real-time basis by the individual Clerks of Superior Court, or by an employee in that Clerk's office, from the physical records maintained by that Clerk.").

As Defendant's 4 June 2001 judgment record is a "public record," the admissibility of an ACIS printout as secondary evidence of it is governed by Rule 1005. Thus, to properly admit the ACIS printout, the State was required to establish that a copy of the 4 June 2001 judgment record could not be "obtained by the exercise of reasonable diligence." N.C. Gen. Stat. § 8C-1, Rule 1005 ("If a copy which complies with the foregoing cannot be obtained by the exercise of *reasonable diligence*, then other evidence of the contents may be given." (emphasis added)).

Here, there was an inadequate foundation regarding the State's exercise of "reasonable diligence" to obtain a copy of the 4 June 2001 judgment record. *Id.* The only statement made by the State regarding the unavailability of Defendant's judgment record is simply that "they didn't have the original[.]" As to the degree of diligence required under Rule 1005, reasonable diligence "is not easy to define, as each case depends much on its peculiar circumstances[.]" *Avery v. Stewart*, 134 N.C. 287, 290, 46 S.E. 519, 520 (1904). However, reasonable diligence is not an insurmountable standard, even in this context where the State has the burden to prove a defendant guilty beyond a reasonable doubt:

> What degree of diligence in the search is necessary it is not easy to define, as each case depends much on its peculiar circumstances; and the question whether the loss of

> the instrument is sufficiently proved to admit secondary evidence of its contents is to be determined by the Court and not by the jury. But it seems that in general the party is expected to show that he has in good faith exhausted, in a reasonable degree, all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. . . . [T]he burden of showing the loss of a written instrument is upon the party seeking to introduce secondary evidence. He must establish its loss by proof that he has made diligent but unavailing search for the paper in places where it would be most likely to be found, and the degree of diligence necessary to be shown must depend upon the value and importance of the lost document.

Id. (internal quotation marks and citations omitted).

The prosecutor's statement that "they said that they didn't have the original" is not competent evidence of reasonable diligence under Rule 1005. I recognize that the admissibility of secondary evidence of a public record under Rule 1005 is a preliminary question, and the trial court, in making its determination on the question of admissibility, is not bound by the Rules of Evidence. N.C. Gen. Stat. § 8C-1, Rule 104(a). However, our precedent does not treat the statements of counsel to be "evidence." *State v. Crouch*, 74 N.C. App. 565, 567, 328 S.E.2d 833, 835 (1985) ("Our review of representative cases discloses no circumstances where statements of counsel have been treated as evidence[.]"). In *Crouch*, we recognized that the Rules of Evidence do not apply at probation revocation hearings yet still concluded that the defendant was required to present "competent evidence" of his inability to comply with the terms of his probation to meet his burden. *Id.* at 567, 328 S.E.2d at 835. We held that statements from the defendant's counsel were not competent evidence. *Id.* Similarly, in the instant case, although Rule 104 allowed for a relaxation of the Rules of Evidence in determining the preliminary matter of diligence, the State was still required to present evidence. The prosecutor's statement that "they didn't have the original" is not evidence.

Assuming *arguendo* that the statements of counsel are competent evidence for a Rule 1005 foundation, the statement "they said that they didn't have the original" fails to evince a reasonably diligent search. We are unable to discern who they are, where they looked for Defendant's judgment record, and why they did not have an original or a copy of the record. Thus, we have no way of discerning whether a good faith search

has been made in a place where the judgment record was most likely to be found. Even in our unpublished and nonbinding decision in *Aultman*, the ACIS report was only admitted after the Assistant Clerk of Court for the criminal division of Duplin County testified that the ACIS reports were "the only records that would be left of the district court files."[1] *Aultman*, 2016 WL 47970 at *3. Here there was no such testimony, and although the Clerk of McDowell Superior Court testified at Defendant's habitual felon trial, she only testified as to what an ACIS printout was generally and to the meaning of the abbreviations in the ACIS report fields.

By ignoring the applicability of the best evidence rule, the Majority implicitly endorses a subminimal foundation standard that impedes our ability to conduct effective and efficient appellate review. Moreover, the Majority's opinion is a departure from our precedent because it suggests that the evidence necessary to establish a Rule 1005 "reasonable diligence" foundation can come solely from the statements of counsel who seek to admit evidence of the contents of a public record against the other party. Our precedent dictates that ACIS printouts should be used out of necessity, not choice. *See Wall*, 141 N.C. App. 531, 539 S.E.2d 693 (facsimile of judgment); *State v. Ross*, 207 N.C. App. 379, 400, 700 S.E.2d 412, 426 (2010) ("Although other documents, such as a transcript of plea, could be used to prove a conviction, we agree that, as our Supreme Court stated, the '*preferred method* for proving a prior conviction includes the introduction of the judgment itself into evidence.' " (quoting *Maynard*, 311 N.C. at 26, 316 S.E.2d at 211)). The Rules of Evidence and in turn, the best evidence rule apply during the habitual felon enhancement stage of a trial. As the State failed to present competent evidence necessary to establish a foundation demonstrating that a reasonably diligent search was conducted to locate Defendant's 4 June 2001 judgment record, I must respectfully dissent.

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1. I note that the foundation laid by the Duplin County Clerk in *Aultman* further indicated that the ACIS printout was the only remaining evidence of the defendant's conviction. Specifically, ACIS printouts contain a data field labeled "FILM" and this field denotes whether a particular conviction record has been archived via microfilming. In *Aultman*, the "FILM" field in the ACIS printout indicated that the District Court's judgment record was never microfilmed. In contrast, here the "FILM" field in Defendant's ACIS printout contains a corresponding microfilm number, confirming that his original 4 June 2001 judgment record has been archived via microfilming. As a result, the State needed to do more to lay a foundation of a reasonably diligent search for this record.

STATE OF NORTH CAROLINA
v.
JASEN WILSON, DEFENDANT

No. COA17-1317

Filed 7 August 2018

1. Sexual Offenses—by a person in a parental role—sexual act

The State presented sufficient evidence to convict defendant of sex offenses against his 16-year-old stepdaughter. The testimony of an officer recounting defendant's confession, in which he stated he put his hands "in" his stepdaughter's genital area, would allow a rational juror to conclude that defendant engaged in the sexual act of digital penetration of his stepdaughter in violation of N.C.G.S. § 14-27.7.

2. Sexual Offenses—opinion testimony—female anatomy—plain error review

The trial court did not plainly err in a prosecution for sex offenses by allowing an officer to give his "opinion" concerning the female anatomy and his inference that digital penetration occurred. Absent this testimony, there was sufficient other evidence of penetration.

Appeal by Defendant from judgment entered 20 July 2017 by Judge Richard Kent Harrell in Onslow County Superior Court. Heard in the Court of Appeals 6 June 2018.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Larissa S. Williamson, for the State.

Leslie Rawls for the Defendant.

DILLON, Judge.

Jasen Wilson ("Defendant") appeals from the trial court's judgment entered upon a jury verdict finding him guilty of sex offenses by a person in a parental role. Based on our careful review of the record and of controlling precedent, we conclude that Defendant has failed to demonstrate reversible error.

I. Background

This case arises out of alleged sexual conduct by a stepfather with his then 16-year-old stepdaughter. The evidence at trial tended to show the following:

In 2006, Defendant married and became the stepfather of his new wife's young daughter, Fiona.[1] Fiona had never met her birth father, and Fiona grew up knowing Defendant as her father.

Years later, in September 2015, when Fiona was 16 years old, Fiona reported to her high school resource officer that Defendant had "touched her inappropriately" over the past couple of months. Fiona told an investigator that Defendant had digitally penetrated her vagina. Defendant ultimately admitted to a police officer that he touched Fiona in inappropriate ways, but he maintained that he had never digitally penetrated her.

Defendant was indicted on five counts of sexual activity by a substitute parent. At trial, Fiona recanted what she had previously told the investigator. The officer who had interviewed Defendant, though, testified to what Defendant had confessed to him. The jury found Defendant guilty of two of the five counts of sexual activity by a substitute parent. Defendant timely appealed.

II. Analysis

Defendant's appeal focuses on the current state of the law that the State's burden at trial was to show that Defendant *penetrated* Fiona's genitalia with his fingers, not that he merely touched her genitalia. Specifically, Defendant was convicted of two counts of violating N.C. Gen. Stat. § 14-27.7 (2014).[2]

To prove a violation of Section 14-27.7, the State must prove that (1) the accused had assumed the position of a parent in the home of a minor victim[3] and (2) that he engaged in a "sexual act" with the minor residing in the home. *Id.*

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1. A pseudonym.

2. This statute has been re-codified to N.C. Gen. Stat. § 14-27.31 (2015). Because the events at issue occurred prior to 1 December 2015, we reference the prior citation.

3. Defendant does not challenge on appeal that the State's evidence at trial was sufficient to establish that he had assumed the role of Fiona's parent.

The term "sexual act" as defined by our General Assembly does not cover every manner of sexual contact. That is, not every sexual *contact* rises to the level of a sexual *act*. Indeed, our General Assembly has defined "sexual *contact*" more broadly, in relevant part, as the mere touching of a "sexual organ, anus, breast, groin or buttocks[,]"[4] whereas our General Assembly has defined "sexual *act*" more narrowly, in relevant part, as "the *penetration*, however slight, by an object into the genital" opening. N.C. Gen. Stat. § 14-27.1 (2014) (emphasis added).

Accordingly, based on evidence which shows that Defendant had his hands in Fiona's genital area, the State had the burden to prove that Defendant actually digitally penetrated Fiona to establish that Defendant violated Section 14-27.7. Merely touching her genitals is not enough.[5]

Defendant makes two arguments on appeal, each of which focuses on the trial testimony of the officer who had interviewed Defendant. We address each argument in turn.

A. Denial of Defendant's Motion to Dismiss

[1] Defendant argues that the trial court erred in denying his motion to dismiss, contending that the State failed to offer any competent evidence to show that Defendant penetrated Fiona's genitalia.

Our standard of review is to determine whether the evidence, taken in the light most favorable to the State and giving the State the benefit of

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4. This statute was re-codified to N.C. Gen. Stat. § 14-27-20 in 2015.

5. Any sexual contact by Defendant with Fiona, a minor of whom he had assumed the position of a parent, may seem morally reprehensible. But all the evidence at trial showed that Fiona had reached the age of 16 when her alleged encounters with Defendant occurred. In North Carolina, the "age of consent" is 16. Therefore, assuming that Fiona lawfully consented to these encounters with her stepfather, any act of touching her genital area for his sexual gratification is not a crime under our statutes criminalizing indecent liberties with a child, N.C. Gen. Stat. § 14-202.1 (2015) (stating the victim must be under 16 years of age). Our Supreme Court has recognized that one can be guilty of a crime against nature pursuant to N.C. Gen. Stat. § 14-177 for a sexual encounter with a victim under 18, *see State v. Hunt*, 365 N.C. 432, 440, 722 S.E.2d 484, 490 (2012); however, our Supreme Court has also held that "penetration" is a required element of a crime against nature, *see State v. Whittemore*, 255 N.C. 583, 585, 122 S.E.2d 396, 398 (holding that "not every act of sexual perversion is encompassed within the definition of 'the crime against nature' . . . . The crime . . . is not complete without penetration, however slight . . . ."). Our General Assembly has only criminalized consensual sexual encounters between a stepfather who has assumed the role of a parent and his minor stepdaughter who has reached her sixteenth birthday and is living under his roof where the encounters rise to the level of a "sexual *act*" as defined by our General Assembly. Mere "sexual *contact*," even if done for the stepfather's sexual gratification, is not enough, so long as the sixteen-year old stepdaughter lawfully consents.

all reasonable inferences, could persuade a rational juror that Defendant, in fact, penetrated (and not merely touched) Fiona's genitalia with his finger. *See State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 842-83 (2011). If all reasonable inferences of such evidence merely "raise a suspicion or conjecture" that Defendant penetrated Fiona's genitalia, then it was the trial court's duty to allow Defendant's motion to dismiss. *See State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002).

Here, the only substantive, competent evidence offered by the State at trial in its attempt to show that Defendant penetrated Fiona was through the testimony of the officer who recounted what Defendant confessed to him.[6] This officer testified that Defendant confessed to putting his hands "in [Fiona's] genital area" with her consent, which caused her to become sexually aroused:

> A. [Officer describing that Defendant confessed that he and Fiona] would spoon, watching [TV.] At times, she would put my hands in her genital area, and I would pull my hand back and she would put it back there. And then I realized it's something she wanted to feel, so I would let her experience that. She felt safe with me. She felt comfortable with me. So there were times that she put my hand in her pants.
>
> [Officer then described his] line of questioning [that] went, was she excited about it, was it something she wanted? And that's when [Defendant] talked about her actually being wet and he could feel that, on a couple of occasions, but it was something that she wanted. . . . [He] went on to talk about it occurring more, you know, other times it had occurred.
>
> Q. So he indicated to you that this happened on several occasions, is that correct?
>
> A. Yes, ma'am.
>
> * * * *
>
> Q. Did [Defendant] indicate, even though he called her the aggressor, did he indicate that he participated in the act?

6. Statements of a defendant are admissible as exceptions to hearsay under rule 801(d) of the North Carolina Rules of Evidence. N.C. Gen. Stat. § 8C-801(d) (2015).

> A. Well, yes. He said that, you know, whenever she wanted – what he described as that he did not want her to experience this anywhere else. He – because she felt safe with him, he wanted her to experience it with him. He felt like that it was something that she was exploring. He didn't want to stifle that exploration. He wanted her to be able to feel these things.

We conclude that a rational juror, hearing this description of Defendant being "in" Fiona's genital area, wanting her to experience sexual stimulation by his touch, feeling that she was "wet," and feeling that she was sexually stimulated by his touch, could reasonably infer that Defendant at least penetrated Fiona's labia, notwithstanding that a rational juror could reasonably infer otherwise. *See*, *e.g.*, *State v. Walston*, 367 N.C. 721, 729, 766 S.E.2d 312, 318 (2014) (holding that "[t]he entering of the labia is sufficient to establish [penetration]"). We note Defendant's statement to the officer denying penetrating Fiona, but we are to disregard this and other evidence unfavorable to the State in considering the sufficiency of the State's evidence. *Hill*, 365 N.C. at 275, 715 S.E.2d at 842-83.

We also note that in *State v. Whittemore* our Supreme Court held that testimony that the accused told the alleged victim to pull her pants down and then proceeded to "put his hand on [her] privates" for "two or three minutes," then "put his mouth . . . on [her] privates" for about "one or two minutes," and then "[rubbed] his privates at [her] privates rubbing it up and down" was insufficient to prove that any penetration had occurred. *Whittemore*, 255 N.C. at 586, 122 S.E.2d at 398. By contrast, the facts of the present case raise more than a mere suspicion or conjecture that penetration occurred. Though the evidence does not conclusively establish penetration, we conclude that a juror could reasonably infer that penetration occurred.

B. Plain Error

[2] Defendant argues that the trial court plainly erred by allowing the officer to give his "opinion" that (quoting Defendant's brief) "the secretions a woman emitted during sexual arousal can only be detected by vaginal penetration" and that, based on Defendant's confession, the fact that Defendant could feel that Fiona was "wet" in her genital area means penetration must have occurred:

> Q. And the specific sexual act that you were talking about, how would you characterize that? What sexual act was being committed, according to what he was saying?

> A. At that point, I would think he had his hands in his (sic) pants and he was digitally penetrating her. That would be the sexual act I would be thinking about, or talking about. If he could feel [her being wet], that would lead me to believe he had to do it.

Also, on cross-examination, the officer agreed that "you cannot feel the wetness unless your finger is inside the vagina[.]"

In order to properly preserve an evidentiary error for appellate review, the appealing party must have objected at trial. *State v. Odom*, 307 N.C. 655, 659, 300 S.E.2d 375, 378 (1983). If the appealing party fails to object at the appropriate time, our review is limited to plain error. *Id.* at 660, 300 S.E.2d at 378. Under plain error review, we first "must determine that an error occurred at trial." *State v. Miller*, ___ N.C. ___, ___, 814 S.E.2d 81, 83 (2018). If we determine that the "judicial action questioned amounted to error," *see* N.C. R. App. P. 10(a)(4), then we must determine whether, absent that error, the jury would have probably reached a different result. *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Here, Defendant did not object to the officer's testimony. Therefore, we review for plain error. Assuming that the trial court erred by not striking the testimony, we conclude that such error did not rise to the level of plain error. Absent the officer's "opinion" concerning female anatomy, there was sufficient competent evidence for the jury to conclude that Defendant had penetrated Fiona, as set forth in the previous section of this opinion. Defendant has identified no evidence or argument presented at trial indicating that the jury was led to believe that the officer's knowledge of female anatomy exceeded the knowledge of that of the jurors. Accordingly, we do not believe that it is reasonably probable that the jury was swayed by the officer's "opinion" regarding female anatomy such that it would have reached a different result had his "opinion" not been before the jury.

NO ERROR.

Judges DAVIS and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 AUGUST 2018)

AWARTANI v. MOSES H. CONE MEM'L HOSP. OPERATING CORP. No. 17-1300	Guilford (17CVS3061)	Affirmed
BEASLEY v. BEASLEY No. 18-47	Forsyth (15CVD5916)	Affirmed
BUS. IMPROVEMENT TECHS., INC. v. WORLD FAMOUS, INC. No. 17-1274	Wake (16CVD13635)	Affirmed
BYBEE v. ISLAND HAVEN, INC. No. 17-859	Currituck (15CVS386)	Affirmed in part, reversed in part, and remanded with instructions
CARUTHERS v. HANN No. 17-1381	Mecklenburg (99CVD6562)	Vacated and Remanded
DM TR., LLC v. McCABE & CO. No. 17-1193	Carteret (16CVS841)	Affirmed
GERSING v. REAL VISION, INC. No. 17-1382	Avery (15CVS298)	Affirmed
GRODNER v. GRODNER No. 17-570	Pitt (13CVD398)	Affirmed in part; dismissed in part
GRODNER v. GRODNER No. 17-813	Pitt (13CVD398)	Affirmed in part; dismissed in part
HARDY v. N.C. CENT. UNIV. No. 17-664	Office of Admin. Hearings (16OSP4632)	Affirmed
HENION v. CTY. OF WATAUGA No. 17-1107	Watauga (16CVS204)	Dismissed
IN RE B.V. No. 18-84	Mecklenburg (15JT534) (15JT553) (15JT674)	Affirmed
IN RE C.R.R. No. 18-11	New Hanover (15JT167) (15JT168)	Affirmed

IN RE C.W-J.H. No. 18-187	Guilford (15JT450-51) (15JT453-54)	Affirmed
IN RE COGGINS No. 17-1275	Property Tax Commission (17PTC22) (17PTC23) (17PTC24) (17PTC25) (17PTC26)	Affirmed
IN RE FORECLOSURE OF BYRD No. 17-1150	Guilford (16SP1235)	Affirmed
IN RE FORECLOSURE OF SMITH No. 17-874	Gaston (16CVS3443)	Dismissed
IN RE G.L.H. No. 17-1406	Cabarrus (17JT12)	Affirmed
IN RE I.M.P. No. 18-256	Iredell (14JT130) (14JT131)	AFFIRMED IN PART; VACATED IN PART; AND REMANDED.
IN RE K.S.C. No. 18-196	Gates (17JT1)	Vacated and Remanded
IN RE L.A.G. No. 18-283	Forsyth (15JT288)	Vacated and Remanded
IN RE M.V. No. 18-128	Mecklenburg (15JT660-661)	Affirmed
IN RE T.S.B.-S. No. 17-1343	Johnston (13JT64) (13JT65) (13JT89)	Affirmed
JONES v. WELLS FARGO CO. No. 18-96	Nash (15CVS950)	Affirmed
KOVASALA v. KOVASALA No. 17-1084	Wake (12CVD12875)	Affirmed in part, Vacated and Remanded in Part
LANE v. GRAFTON No. 17-1003	Durham (15CVS3869)	Affirmed

LASSITER v. KEYSTONE FREIGHT CORP. No. 17-881	N.C. Industrial Commission (X27940) (X68504)	Affirmed
NEWTON v. GARIEPY No. 17-1175	Durham (15CVD5703)	Affirmed
PHIFER v. PASQUOTANK CTY. No. 17-1155	Pasquotank (15CVS531)	Reversed and Remanded
STATE v. BARNETTE No. 17-1082	Cabarrus (12CRSS53279) (12IFS707275)	Affirmed
STATE v. BECKER No. 17-1311	Swain (15CRS50416)	No Error
STATE v. BELK No. 17-1331	Mecklenburg (15CRS217713) (15CRS217715) (15CRS217717) (15CRS218746-47)	No Error
STATE v. BLACK No. 17-963	Cumberland (14CRS57611)	Dismissed
STATE v. BROWN No. 17-1062	Bladen (14CRS51698) (14CRS51702) (16CRS999)	No Error
STATE v. CHEEK No. 17-829	Randolph (01CRS56902)	Affirmed
STATE v. FERGUSON No. 17-764	Johnston (15CRS2221-2222)	No Error
STATE v. FOOR No. 17-1316	Durham (16CRS51289)	NO PREJUDICIAL ERROR AT TRIAL; REMANDED FOR NEW RESTITUTION HEARING.
STATE v. GARCIA No. 17-912	Haywood (16CRS50695-96) (16CRS50698-99)	Affirmed
STATE v. HARVEY No. 17-1246	Edgecombe (15CRS52194)	No Error

STATE v. HAYWOOD No. 18-85	Ashe (17CRS50022)	No Error
STATE v. McLEOD No. 17-1029	Vance (14CRS53551)	No Error
STATE v. MELGAREJO No. 17-1030	Alamance (15CRS52242)	No Error
STATE v. MILLER No. 17-1215	Union (12CRS53800)	Reversed
STATE v. MOORE No. 18-75	Johnston (16CRS1495-96)	No Error
STATE v. NARANJO No. 17-742	Wake (11CRS100) (11CRS211149)	Affirmed
STATE v. PLESS No. 17-1270	Iredell (12CRS56462-63) (12CRS56466)	No Error
STATE v. REAVES No. 18-100	Columbus (13CRS50034)	No Error
STATE v. SMITH No. 17-1184	Cleveland (14CRS53429)	NO PREJUDICIAL ERROR.
STATE v. SPRINGLE No. 17-652	Carteret (13CRS54303)	Dismissed
STATE v. THOMAS No. 17-904	Davidson (11CRS5349) (11CRS53949)	Affirmed
STATE v. UPCHURCH No. 17-1372	Wake (15CRS202498) (15CRS202500) (15CRS202504)	Affirmed
STATE v. VICKERS No. 17-1216	Wake (14CRS211534)	Affirmed
STATE v. WILLIAMS No. 17-913	Edgecombe (14CRS53269) (15CRS1140)	No Error in part; Vacated and Remanded in part.

STATE v. YOUNG No. 18-258	Mecklenburg (16CRS14131-32)	No Error
TRACTOR PLACE, INC. v. BOLTON No. 17-878	Wake (16CVD578)	Affirmed

HEADNOTE INDEX

TOPICS COVERED IN THIS INDEX

CHILD CUSTODY AND SUPPORT—Continued

CONSTITUTIONAL LAW—Continued

CRIMINAL LAW

Jury instruction—defenses—defense of habitation—The trial court erred in a prosecution for first-degree murder by denying defendant's request for a jury instruction on defense of habitation where the victim continued to return to defendant's property and threaten him with bodily harm despite numerous requests to leave and multiple orders from law enforcement, and it was not disputed that the victim was within the curtilage of defendant's property. There was prejudice because a person who uses permissible force is immune from civil or criminal liability. **State v. Kuhns, 281.**

Jury instructions—requested instruction—justification defense—The trial court erred by denying defendant's request for a jury instruction on justification as a defense to possession of a firearm by a felon where he satisfied each element of the justification defense as set forth in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000). In the light most favorable to defendant, the evidence showed that another family approached defendant's family's home seeking a fight; defendant grabbed his cousin's gun only after he heard the other family's guns cocking and witnessed his cousin struggling with his own gun; defendant had tried to calm the situation without violence; and defendant relinquished possession of the gun when he was able to run away from the situation. Furthermore, defendant showed he was prejudiced by this error, as the jury was instructed on self-defense with regard to defendant's assault charges and acquitted him of those charges, and the jury sent the trial court a note asking for clarification as to whether there existed a justification defense for possession of a firearm by a felon. **State v. Mercer, 649.**

Jury selection—Batson challenge—disparate treatment—The trial court did not err in a first-degree murder prosecution by denying defendant's Batson challenge to the striking of a particular prospective juror where the combination of the prospective juror's answers and demeanor led to his dismissal. Defendant could not show disparate treatment where the same factors were not present in the jurors the State passed. **State v. Hobbs, 394.**

Jury selection—Batson challenge—prima facie case—mootness—The trial court did not err during jury selection for a first-degree murder prosecution by finding that defendant had not made a prima facie showing that two prospective jurors were excluded based on race where the trial court improperly asked the State to articulate for the record its reasons for challenging certain prospective jurors after finding that defendant had not made a prima facie showing. However, the issue did not become moot where, as here, the trial court merely asked for the State's reasoning underlying its decision to challenge for the record. **State v. Hobbs, 394.**

Jury selection—Batson challenge—race-neutral factors—The trial court did not err in a first-degree murder prosecution by denying a Batson challenge to the striking of a potential juror where the State identified race-neutral factors and defendant did not show disparate treatment. **State v. Hobbs, 394.**

Motion for appropriate relief—dismissed without prejudice—Defendant's motion for appropriate relief based on alleged constitutional violations was dismissed without prejudice to refile in superior court where the materials before the appellate court were not sufficient to make a determination. **State v. Nobles, 289.**

Requested instructions—denied—no abuse of discretion—The trial court did not abuse its discretion in a prosecution for murder and robbery by not giving defendant's requested instructions on defendant's mental and emotional condition and whether he had the capacity to consider the consequences of his actions. Such

WORKERS' COMPENSATION

Disability—conclusions—The Industrial Commission did not err in a workers' compensation case in its conclusions that plaintiff was only entitled to temporary disability. The weight of the evidence was for the Commission to determine, the Commission's methods were not "too mechanical" as argued by plaintiff, and its unchallenged facts supported the conclusion of an offer of suitable employment despite plaintiff's fear of another injury. **Garrett v. Goodyear Tire & Rubber Co., 155.**

Evidence—stipulations—Commission to determine weight—In a workers' compensation case, it was for the Full Industrial Commission to determine the weight to be given to the medical records of two doctors. Although the records were stipulated, nothing would have prohibited sworn opinions from the doctors. **Garrett v. Goodyear Tire & Rubber Co., 155.**

Issue preservation—failure of Full Commission to consider argument—The Industrial Commission erred in a worker's compensation case by not considering plaintiff's argument that defendants were estopped from denying the compensability of her claims. Defendants maintained that the issue of whether they were estopped was not before the Full Commission because plaintiff did not appeal the deputy commissioner's opinion and award. However, there were no findings or conclusions in the deputy commissioner's opinion and award addressing the issue and there was nothing to appeal. Plaintiff was deprived of her right to have her case fully and finally determined. **Garrett v. Goodyear Tire & Rubber Co., 155.**

Low back condition—causation—The Industrial Commission did not err in a workers' compensation case by concluding that plaintiff failed to prove that her low back condition was caused by a workplace accident. The Full Commission's opinion and award included several findings that referred to plaintiff's stipulated medical records and therefore she was unable to show that the Full Commission did not consider those records. **Garrett v. Goodyear Tire & Rubber Co., 155.**

Medical costs—liability—apportionment between employer and insurer—The Industrial Commission properly apportioned liability solely to the employer's insurer for plaintiff's medical treatment for injuries he sustained from two work-related automobile accidents. Although the employer's workers' compensation insurance coverage lapsed between the two accidents, the Commission determined that plaintiff's primary injuries occurred in the first accident and that the second accident resulted in a mere "flare-up" of those injuries. **Stippich v. Reese's Transit, Inc., 430.**

Multiple accidents—ongoing disability from first accident—evidentiary support—The Industrial Commission erred in finding and concluding that plaintiff established total disability from work-related automobile accidents where insufficient medical or other competent evidence was introduced to show plaintiff had been totally unable to work in any capacity since the accidents. **Stippich v. Reese's Transit, Inc., 430.**

Multiple accidents—primary injury in first accident—compensability—An insurer's argument that plaintiff sustained a material aggravation of neck and back conditions from the second, rather than the first, of two work-related automobile accidents was rejected where sufficient evidence supported the Industrial Commission's findings and conclusions that plaintiff's conditions stemmed from the first accident, particularly since plaintiff was still being treated for injuries related to the first accident when the second occurred. **Stippich v. Reese's Transit, Inc., 430.**

WORKERS' COMPENSATION—Continued

Neck injury—compensable injury medical evidence—Medical testimony in a workers' compensation action supported the conclusion that the aggravation of plaintiff's pre-existing neck condition was caused by a workplace accident where the doctor treated plaintiff's neck injury before and after the workplace accident and testified that the accident aggravated the existing neck condition. The temporal sequence of events was not the only factor he considered and the opinion was based on more than mere speculation. **Garrett v. Goodyear Tire & Rubber Co., 155.**

Temporary disability—determination—The Industrial Commission erred in awarding temporary total disability compensation in a workers' compensation action by not making sufficient findings regarding the effect that plaintiff's compensable neck injury had on her ability to earn wages during a particular period. The evidence before the Commission did not show that plaintiff was incapable of working at any employment during the relevant period. **Garrett v. Goodyear Tire & Rubber Co., 155.**