247 N.C. App.—No. 5 Pages 641-899

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 22, 2018

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COURT OF APPEALS

CASES REPORTED

FILED 7 JUNE 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

Cases for argument will be calendared during the following weeks in 2018:

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

Opinions will be filed on the first and third Tuesdays of each month.

FRIDAY INVS., LLC v. BALLY TOTAL FITNESS OF MID-ATL., INC.

[247 N.C. App. 641 (2016)]

FRIDAY INVESTMENTS, LLC, Plaintiff
v.
BALLY TOTAL FITNESS OF THE MID-ATLANTIC, INC. f/k/a Bally Total Fitness of the Southeast, Inc. f/k/a/ Holiday Health Clubs of the Southeast, Inc. as successor- in-interest to Bally Total Fitness Corporation; and BALLY TOTAL FITNESS HOLDINGS CORPORATION, Defendants

No. COA15-680

Filed 7 June 2016

Evidence—privileged communications—tripartite attorney-client relationship—indemnification clause—asset purchase agreement

Where plaintiff lessor brought suit against defendants for payment of back rent and other claims under the lease, the trial court did not abuse its discretion when it compelled defendants to produce correspondence and documents exchanged between defendants and a third-party indemnitor, who had agreed in an asset purchase agreement to defend defendants. Defendants and the third-party indemnitor shared a common business interest as opposed to the common legal interest necessary to support a tripartite attorney-client relationship.

Appeal by Defendants from Order entered 9 April 2015 by Judge Jesse B. Caldwell III in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 2015.

Knox, Brotherton, Knox & Godfrey, by Lisa Godfrey, for Defendants-Appellants.

Horack, Talley, Pharr & Lowndes, P.A., by Keith B. Nichols, for Plaintiff-Appellee.

INMAN, Judge.

This appeal requires us to consider the common interest doctrine, which extends the attorney-client privilege to communications between and among multiple parties sharing a common legal interest. We hold that an indemnification provision in an asset purchase agreement, standing alone, is insufficient to create a common legal interest between a civil litigant indemnitee and a third-party indemnitor.

Bally Total Fitness of the Mid-Atlantic, Inc. ("Mid-Atlantic") and Bally Total Fitness Holding Corporation ("Holding") (collectively "Defendants") appeal the trial court's Order denying their Motion for a Protective Order on Supplementation of Written Discovery and granting Plaintiff Friday Investments, LLC's ("Plaintiff") Motion to Compel production of email and written communication between Defendants and third party Blast Fitness Group ("Blast"). Defendants contend that the trial court failed to recognize that they had entered into a tripartite attorney-client relationship with Blast, so that communications between Defendants and Blast are protected by the attorney-client privilege. After careful review, we affirm.

Facts and Background

In February 2000, the predecessor in interest of Mid-Atlantic entered into a lease agreement with the predecessor in interest of Plaintiff for a 25,000 square foot commercial suite in the Tower Place Festival Shopping Center in Charlotte, North Carolina. The lease was guaranteed by Holding, the parent company of both Mid-Atlantic and the original tenant. In 2012, Mid-Atlantic sold certain of its health clubs, including the Tower Place Club, to Blast. The Asset Purchase Agreement between Mid-Atlantic and Blast (the "Blast Agreement") provided that the sale transferred any "obligations . . . arising . . . under the Real Property Leases" of the clubs sold. The Blast Agreement also included an indemnification clause wherein Blast agreed to "defend, indemnify, and hold [Defendants] . . . harmless of, from[,] and against any [l]osses incurred . . . on account of or relating to . . . any Assumed Liabilities, including those arising from or under the Real Property Leases after closing."

Plaintiff brought suit against Defendants on 9 May 2014 in Mecklenburg County Superior Court for payment of back rent and other charges under the lease. Blast subsequently agreed to defend Defendants as provided for in the Blast Agreement.

Defendants and Plaintiff completed an initial exchange of documents and answers to interrogatories on 24 October 2014. Defendants' Senior Vice President and General Counsel, Earl Acquaviva, was deposed by Plaintiff on 11 February 2015. On 19 February 2015, counsel for Plaintiff sent an email to Defendants' counsel requesting copies of "post-suit correspondence and documents exchanged between [Defendants] and Blast." Defendants refused, and on 3 March 2015, Plaintiff filed a Motion to Compel production of the requested documents. Defendants responded by filing a Motion for a Protective Order on 24 March 2015, claiming that communications between themselves and Blast were subject to attorney-client privilege. On 25 March 2015, the trial court orally

ordered Defendants to produce the documents and a privilege log for *in camera* inspection.

On 27 March 2015, Defendants submitted to the trial court the requested documents and a privilege log. After completing an *in camera* review of the documents, the trial court notified counsel via email on 2 April 2015 that it had denied Defendants' Motion for a Protective Order and granted Plaintiff's Motion to Compel. The trial court entered a written order on 13 April 2015 consistent with the court's email notice but granted a motion by Defendants to stay the decision for review by this Court.

Defendants timely appealed. The Record on Appeal was settled via stipulation, pursuant to Rule 11 of the North Carolina Rules of Appellate Procedure, on 29 May 2015. The Record was amended on Defendants' Motion on 24 July 2015 to include the trial court's 2 April 2015 email message.[1] On 1 September 2015, Defendants filed a "Motion to Submit Documents Under Seal," seeking to transmit the documents reviewed *in camera* to this Court for review.

I. Plaintiff's Motion to Dismiss

Plaintiff argues that a "substantial right" is not at stake because Defendants waived their right to appeal the discovery order by failing to specifically assert their attorney-client privilege during the initial round of discovery, and that Defendants' subsequent Motion for a Protective Order was insufficient to constitute an objection. We disagree.

"An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950). While there is generally "no right of immediate appeal from interlocutory orders and judgments," *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990), immediate appeals are available under N.C. Gen. Stat. §§ 1-277(a) and 7A-27(d)(1) (2015) if the order "deprives the appellant of a substantial right which would be lost absent immediate review." *N.C. Dep't of Transp. v. Page*, 119 N.C. App. 730, 734, 460 S.E.2d 332, 334 (1995).

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1. Defendants initially filed Notice of Appeal from the 2 April 2015 ruling communicated to counsel via email, but they also filed Notice of Appeal from the order entered 13 April 2015. Both notices are contained in the Record on Appeal. The email is not an order because it was not filed with the Clerk of Court. N.C. Gen. Stat. § 1A–1, Rule 58 (2015) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.") Accordingly, this opinion reviews only the 13 April 2015 Order.

Both this Court and the North Carolina Supreme Court have recognized that a trial court's "determination of the applicability of [attorney-client] privilege . . . affects a substantial right and is therefore immediately appealable." *In re Miller*, 357 N.C. 316, 343, 584 S.E.2d 772, 791 (2003); *see also Evans v. U.S. Auto. Ass'n*, 142 N.C. App. 18, 24, 541 S.E.2d 782, 786 (2001) (holding that the appeal of a trial court order denying the assertion of attorney client privilege after an *in camera* review affects "a substantial right which would be lost if not reviewed before the entry of final judgment").

Nevertheless, the availability of such appeals is contingent upon the proper assertion of the claimed privilege. In *K-2 Asia Ventures v. Trota*, this Court held that to assert a statutory privilege for interlocutory review, the appellant must have complied with Rule 34(b) of the North Carolina Rules of Civil Procedure by lodging specific objections to individual discovery requests. 215 N.C. App. 443, 446–47, 717 S.E.2d 1, 4–5 (2011). Blanket objections that broadly assert a privilege without attaching it to a particular request, such as the one made by one set of defendants in *K-2 Asia Ventures*, are not only procedurally deficient but also fail to satisfy the requirement that the assertion of privilege be "not otherwise frivolous or insubstantial." *Id.* at 447, 717 S.E.2d at 4 (internal quotation marks and citations omitted).

Plaintiff attempts to draw a parallel to *K-2 Asia Ventures*, noting that Defendants asserted no particularized claim of attorney-client privilege in their responses to the initial round of discovery. We are unpersuaded. None of the initial discovery requests expressly sought correspondence between Defendants and Blast. The initial discovery request that most plainly encompasses these documents—if the documents are not privileged—is the fourth "Request for Production of Documents," which requests "[a]ll *non-privileged* correspondence or written communication of any kind between [Defendants] and any other person or entity concerning the [Tower Place Club], Lease Agreement, Guaranty, or any other issues described or referenced in the Pleadings in this action."[2] (Emphasis added.) Given the limiting language in the request, it is unreasonable—for the purpose of determining waiver—to require Defendants

2. Plaintiff argues that correspondence between Defendants and Blast also was within the scope of several other specific discovery requests that were not limited to non-privileged information. Request 4, which specifically seeks communications between Defendants and "any other person or entity" most plainly encompasses correspondence between Defendants and non-parties to the litigation, such as Blast. Because we affirm the trial court's ruling that the documents at issue are responsive to Request 4, analysis of the other discovery requests is unnecessary.

to have first acknowledged the existence of correspondence they considered privileged and to have objected to production in response to a request for "non-privileged" information.[3]

The record reflects that when faced with a specific request for their communications with Blast, Defendants promptly asserted the attorney-client privilege. During the 11 February 2015 deposition, counsel for Plaintiff asked the deponent, Mid-Atlantic's General Counsel Earl Acquaviva, to describe "all of the conversations that you have had personally with Blast or any representatives of Blast about this lawsuit." Defendants' counsel immediately objected on the basis of attorney-client privilege and advised the deponent not to answer. Plaintiff's further attempts to probe the issue were all met with similar objections by Defendants' counsel, and the deponent refused to answer such questions.

Based on the foregoing details in the record, we hold that Defendants properly asserted the attorney-client privilege in a manner that is neither frivolous nor insubstantial and that this interlocutory appeal affects a "substantial right" of Defendants. We therefore deny Plaintiff's motion to dismiss.

II. Defendants' Motion to Submit Documents Under Seal

In support of their argument that the trial court failed to recognize a tripartite attorney-client relationship between themselves, Blast, and their counsel, Defendants submitted a "Motion to Submit Documents Under Seal" to this Court to examine the documents reviewed *in camera* by the trial court. We decline to grant this motion because it is improper, untimely, and unfairly prejudicial.

This Court has repeatedly held that "[i]t is the appellant's duty and responsibility to see that the record is in proper form and complete." *State v. Williamson*, 220 N.C. App. 512, 516, 727 S.E.2d 358, 361 (2012)

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3. Our holding should not be construed to encourage litigants to assert particularized objections only when a request clearly seeks privileged information or documents. The best practice for counsel responding to discovery is to give each request the broadest possible interpretation and to assert objections to producing information or documents the litigant believes to be beyond the scope of discovery allowed by the Rules of Civil Procedure. Even when privilege is claimed in good faith, the adage that it is easier to beg forgiveness than to seek permission undermines public confidence in the legal profession and our justice system. Defendants would have saved themselves, Plaintiff, the trial court, and this Court significant resources had they more broadly construed Plaintiff's requests and asserted a particularized objection in the first place.

(quoting *State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 644 (1983)). Defendants failed to "request[] that the trial court review the documents *in camera* and then seal the documents for possible appellate review." *Miller v. Forsyth Mem'l Hospital*, 174 N.C. App. 619, 621, 625 S.E.2d 115, 116 (2005). Defendants could have remedied this failure in the trial court prior to settling the Record on Appeal.

Even after the Record on Appeal has been settled in the trial court, but prior to the filing of the Record on Appeal, a party may move this Court to "order additional portions of a trial court record or transcript sent up and added to the record on appeal." N.C. R. App. P. 9(b)(5)(b) (2015). Once the record has been filed, a party may still move to amend the record at any time prior to the filing of the opposing party's responsive brief. N.C. R. App. P. 9(b)(5)(a) (2015). Here, Defendants failed to ask the trial court to seal the records for appellate review, did not move this Court to order the records be sent from the trial court, and filed its unorthodox motion several days after the submission of Plaintiff's Brief.

To allow these documents to enter the record after briefing would be unfairly prejudicial to Plaintiff because such a significant amendment of the record would likely require both parties to re-brief the case to address legal issues not previously raised. For example, this Court reviews a trial court's *in camera* review of documents placed under seal *de novo*, as opposed to for abuse of discretion. *E.g.*, *State v. Minyard*, 231 N.C. App. 605, 615, 753 S.E.2d 176, 184 (2014); *State v. McCoy*, 228 N.C. App. 488, 492, 745 S.E.2d 367, 370 (2013). Amending the appellate record to include these documents would add issues on appeal, including whether the trial court erred in its *in camera* review and whether the documents, based on this Court's *in camera* review, were subject to attorney-client privilege under the five factor *Murvin* test. *Raymond v. N.C. Police Benevolent Ass'n*, 365 N.C. 94, 100–01, 721 S.E.2d 923, 928 (2011); *State v. Murvin*, 304 N.C. 523, 531, 284 S.E.2d 289, 294 (1981). Accordingly, we deny Defendants' Motion to Submit Documents Under Seal.

Because the question presented by Defendants may be addressed by reference to the nature of the relationship between the parties and the existing Record on Appeal, the Court can reach the merits of this appeal without reviewing the documents submitted to the trial court for *in camera* review.

III. Tripartite Attorney-Client Privilege (Common Interest Doctrine)

Defendants claim that the trial court abused its discretion by "disregard[ing] a tripartite attorney-client relationship" between

Defendants, their attorneys, and Blast and ordering the production of communications between them. We hold that Defendants have failed to show that the trial court's ruling was either "manifestly unsupported by reason" or "arbitrary." *See K-2 Asia Ventures*, 215 N.C. App. at 453, 717 S.E.2d at 8 (citation and quotation marks omitted).

A. Standard of Review

This Court reviews trial court orders relating to discovery issues for abuse of discretion. *Id.* To prevail, an appellant must show that the trial court's ruling was "manifestly unsupported by reason" and "so arbitrary that it could not have been the result of a reasoned decision." *State v. T.D.R.*, 347 N.C. 489, 503, 495 S.E.2d 700, 708 (1998).

B. Analysis

Although attorney-client arrangements between two or more clients have been recognized by North Carolina courts for more than half a century, *Dobias v. White*, 240 N.C. 680, 684–85, 83 S.E.2d 785, 788 (1954), there is a dearth of controlling appellate precedent explaining the precise nature of these arrangements and the extension of privilege invoked in disputes with third parties.[4] Accordingly, our discussion of the issue presented in this case is best addressed by reference to not only the limited controlling authority from our state appellate courts, but also non-binding, persuasive decisions by other courts.

Arrangements between two or more parties to obtain legal counsel for a shared legal purpose are known as "tripartite" attorney-client relationships. *Raymond*, 365 N.C. at 98–99, 721 S.E.2d at 926–27. A tripartite relationship most commonly exists "when an insurance company employs counsel to defend its insured against a claim." *Id.* at 98, 721 S.E.2d at 926.[5] A tripartite relationship may also exist between an

4. Our Supreme Court in *Dobias* did not address a claim of privilege by members of a tripartite relationship adverse to a third party, but rather a claim of privilege by one party seeking to bar an adverse party from discovering documents related to a business transaction in which the parties had employed joint counsel. The Supreme Court held that "as a general rule, where two or more persons employ the same attorney to act for them in some business transaction, their communications to him are not ordinarily privileged *inter sese*." 240 N.C. at 685, 83 S.E.2d at 788.

5. The most often cited controlling authority recognizing a tripartite relationship between insurer, insured, and counsel retained by the insurance company to represent the insured is *Nationwide Mut. Fire Ins. Co. v. Bourlon*, 172 N.C. App. 595, 602–03, 617 S.E.2d 40, 45–46 (2005). However, like *Dobias*, *Nationwide Mut. Fire Ins. Co.* sheds little light on the issue presented here, because that appeal arose from an insurance coverage dispute between the insured and the insurer. *Id.*

individual and a "trade association or lobbying group that represents a special interest if there is specific, ongoing litigation." *Raymond*, 365 N.C. at 99, 721 S.E.2d at 927 (citations omitted).

The linchpin in any analysis of a tripartite attorney-client relationship is the finding of a common legal interest between the attorney, client, and third party. *See Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (tripartite attorney-client relationship existed between attorney, client, and benevolence organization due to the common interest of "protecting and promoting the livelihood" of the client). "[T]he parties must first share a common interest about a legal matter." *United States v. Aramony*, 88 F.3d 1369, 1392 (4th Cir. 1996).

North Carolina courts have yet to formulate a bright line rule or articulate criteria for determining whether a common legal interest exists to extend the attorney-client privilege between multiple parties. Instead, our courts have engaged in specific analysis of the facts in each case involving this issue. *See*, *e.g.*, *Raymond*, 365 N.C. at 100, 721 S.E.2d at 927 (common legal interest based on mission of benevolent organization); *Nationwide Mut. Fire Ins.*, 172 N.C. App. at 602–03, 617 S.E.2d at 45–46 (common legal interest based on contract between insured and insurer).

All fifty states and federal courts have recognized the extension of the attorney-client privilege to certain tripartite relationships under various monikers including, *inter alia*, the "joint defense privilege," the "common interest privilege," the "common interest doctrine," and the "common defense rule." *See*, *e.g.*, *Aramony*, 88 F.3d at 1392; *United States v. Schwimmer*, 892 F.2d 237, 243–46 (2d. Cir. 1989); *United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir. 1979); *Ferko v. NASCAR*, 219 F.R.D. 396, 401–03 (E.D Tex. 2003); Craig S. Lerner, *Conspirators' Privilege and Innocents' Refuge: A New Approach to Joint Defense Agreements*, 77 Notre Dame L. Rev. 1449, 1491 (2002). To extend the attorney-client privilege between or among them, parties must (1) share a common interest; (2) agree to exchange information for the purpose of facilitating legal representation of the parties; and (3) the information must otherwise be confidential. *Schwimmer*, 892 F.2d at 243–244. Although prudent counsel would always put a representation agreement in writing, there is no requirement that the agreement be in writing. *See McPartlin*, 595 F.2d at 1336. Despite being labeled a "privilege" by some courts, the common interest doctrine does not recognize an independent privilege, but is "an exception to the general rule that the attorney-client privilege is waived upon disclosure of privileged information [to] a third party." *Ferko*, 219 F.R.D. at 401. Extension of the

attorney-client privilege to these relationships "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *Schwimmer*, 892 F.2d at 244. The extension of privilege applies in disputes between third parties and one or more members of the tripartite arrangement, but not in disputes *inter sese*. *Nationwide Mut. Fire Ins. Co.*, 172 N.C. App. at 602–03, 617 S.E.2d at 45–46 (2005) (insured who was represented by counsel retained by insurance company in tort litigation by a third party against the insured was entitled, in separate litigation against the insurer, to discover communications between the insurer and counsel related to the defense strategy in underlying litigation); *Dobias*, 240 N.C. 680 at 683, 83 S.E.2d at 788 (seller and purchaser of real estate were each entitled to discover the other's communications about the deal with their common real estate attorney).

While not binding, decisions by several federal courts and the North Carolina Business Court provide some clarity as to what constitutes a common *legal* interest, distinguishing it in particular from a common *business* interest. "For the privilege to apply, the proponent must establish that the parties had some common interest about a *legal* matter." *In re Grand Jury Subpoena Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005) (emphasis added) (citations and quotation marks omitted). In that vein, the North Carolina Business Court has held that the common interest doctrine applies to "communications between separate groups of counsel representing separate clients having similar interests and actually cooperating in the pursuit of those interests." *Morris v. Scenera Research, LLC*, 2011 NCBC 33, 2011 WL 3808544, at *7 (N.C. Bus. Ct. Aug. 26, 2011). The Business Court distinguishes such legal interests from "business interest[s] that may be impacted by litigation involving one of the parties." *SCR-Tech LLC v. Evonik Energy Serv. LLC*, 2013 NCBC 42, 2013 WL 4134602, at *6 (N.C. Bus. Ct. Aug. 13, 2013) ("A party seeking to rely on the common interest doctrine must demonstrate that the specific communications at issue were designed to facilitate a common legal interest; a business or commercial interest will not suffice.") (internal citations and quotation marks omitted); *see also Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 447 (S.D.N.Y. 1995) ("[T]he common interest doctrine does not encompass a joint business strategy which happens to include as one of its elements a concern about litigation.").

In *SCR-Tech*, the parties seeking protection under the common interest doctrine were linked by ownership interests as well as a

cooperation agreement. 2013 WL 4134602, at *1. SCR-Tech, the proponent of the privilege, had been previously owned by Ebinger. *Id.* After selling SCR-Tech, Ebinger had come into legal conflict with defendant Evonik over the same technology, and had executed an agreement to support SCR-Tech in its claims against Evonik. *Id.* The Business Court distinguished between "communications between Ebinger and SCR-Tech to coordinate positions to be taken in the separate lawsuits between them and Defendants, and . . . communications by which Ebinger provided SCR-Tech assistance in the present litigation pursuant to the Cooperation Agreement[,]" finding that the former, but not the latter, was sufficient to "rise to a level of [a] shared legal interest." *Id.* at *7.

In *Nationwide Mut. Fire Ins.*, the agreement between the insurer and the insured provided that the insurer would pay damages up to an amount specified in the policy, would provide a defense "at [the insurer's] expense by counsel of [the insurer's] choice," and could settle the claim at any time and on any terms the insurer deemed appropriate. 172 N.C. App. at 598, 617 S.E.2d at 43. This Court held that the insurer and the insured had a shared legal interest in defending against the underlying claim, relying in part on a North Carolina State Bar Opinion recognizing that an attorney may enter into dual representation of both an insurer and an insured. *Id.* at 602–03, 617 S.E.2d at 45.

Indeed, the primary purpose of an insurance contract is defense and indemnification. By contrast, an indemnification provision in an asset purchase agreement is generally ancillary to the sale of a business, and Defendants have presented no evidence that their agreement with Blast was otherwise. The agreement and resulting arrangement is almost identical in nature to the cooperation agreement in *SCR-Tech*. While Defendants attempt to analogize to the insured-insurer agreements recognized in *Nationwide Mut. Fire Ins.*, the analogy is unpersuasive. The indemnification provision in the asset purchase agreement requires Blast to defend and indemnify Defendants from "[l]osses incurred or sustained . . . on account of or relating to . . . the use of the [a]ssets by [p]urchaser and the operation of the . . . [h]ealth [c]lubs . . . ." This language, and the nature of the asset purchase agreement, are most similar to the purchase agreement which was held to be insufficient in *SCR-Tech* to create a tripartite privileged relationship. *SCR-Tech*, 2013 WL 4134602, at *7. Blast is not a party to this litigation. Nor does Blast have any contractual authority to settle or otherwise affect the outcome of the suit against Defendants, unlike the insurer in *Nationwide Mut. Fire Ins.*, 172 N.C. App. at 598, 617 S.E.2d at 43.

Neither this Court nor the North Carolina Supreme Court has extended the common interest doctrine to relationships formed primarily for purposes other than indemnification or coordination in anticipated litigation. *Cf. Raymond*, 365 N.C. at 99, 721 S.E.2d at 924 (law enforcement officer communicated with counsel provided by professional association, of which he was a member, seeking legal advice regarding a specific employment dispute that resulted in litigation); *Nationwide Mut. Fire Ins.*, 172 N.C. App. at 598, 617 S.E.2d at 43 (insurer provided counsel to represent insured in litigation and maintained the right to settle the case); *SCR-Tech*, 2013 WL 4134602, at *1 (parties each involved in separate lawsuits against defendant). Further, we are aware of no precedent indicating that federal courts within the Fourth Circuit have extended the common interest doctrine to a case "where the sharing was not done by agreement relating to some shared actual or imminent, specific litigation." *United States v. Duke Energy Corp.*, 214 F.R.D. 383, 388 (M.D.N.C. 2003); *see also In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990) (parent company and its subsidiary had agreement to jointly prosecute contract claims against U.S. Army). Decisions from other circuits suggest this limitation as well. *Schwimmer*, 892 F.2d at 243; *see also McPartlin*, 595 F.2d at 1337 ("The privilege protects pooling of information for any defense purpose common to the participating defendants."). Blast's status as a non-party and the absence of evidence that this litigation was material to its asset purchase agreement with Defendants distinguishes this case from decisions relied upon by Defendants for protection through the common interest doctrine.

We hold that Defendants and Blast shared a common business interest as opposed to the common legal interest necessary to support a tripartite attorney-client relationship. Consequently, we hold that the trial court did not abuse its discretion in compelling Defendants to produce the documents.

AFFIRMED.

Judges STEPHENS and HUNTER, JR. concur.

KEVIN GERITY, PETITIONER
v.
NORTH CAROLINA DEPARTMENT OF HEALTH AND HUMAN SERVICES, RESPONDENT

No. COA15-843

Filed 7 June 2016

Employer and Employee—Whistleblower Act—autopsy report

On appeal from the final decision of a Senior Administrative Law Judge concluding that petitioner was not entitled to relief under the Whistleblower Act, the Court of Appeals affirmed the order, concluding that petitioner failed to establish that he reported protected activity. Petitioner, an autopsy technician, failed to follow protocol when he discovered evidence during clean-up after an autopsy, and the medical examiner's decision not to mention the evidence in his report did not make the report fraudulent.

Appeal by petitioner from Final Decision entered 12 March 2015 by Judge Fred Gilbert Morrison, Jr. in the Office of Administrative Hearings. Heard in the Court of Appeals 10 February 2016.

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

Attorney General Roy Cooper, by Assistant Attorney General Joseph E. Elder, for respondent.

ELMORE, Judge.

The issue on appeal is whether Kevin Gerity (petitioner) is entitled to relief under the Whistleblower Act, N.C. Gen. Stat. § 126-84 *et seq.* Senior Administrative Law Judge Fred Gilbert Morrison, Jr. (ALJ) entered a final decision concluding that petitioner is not as he failed to prove any of the three elements of a claim. We conclude that petitioner failed to establish that he reported protected activity, and thus we affirm.

I. Background

In December 2013, the North Carolina Department of Health and Human Services (DHHS) decided to pursue termination of petitioner's employment, and petitioner subsequently submitted a letter of resignation. Petitioner filed the instant action in April 2014 alleging that he was threatened with discharge because he made reports that constituted protected activity under the Whistleblower Act. The events

preceding, as set out in the ALJ's findings of fact, tend to show the following: Petitioner worked as an autopsy technician and autopsy facility manager at the Office of the Chief Medical Examiner (OCME), which is within the Division of Public Health (DPH) and ultimately under DHHS. In 2010, Dr. Deborah Radisch became Chief Medical Examiner and hired Dr. Clay Nichols for the position of Deputy Chief Medical Examiner. Dr. Nichols served as petitioner's supervisor.

In May 2011, petitioner assisted Dr. Nichols in performing an autopsy on Terrell Boykin who presented with a gunshot wound to the head and was one of the apparent victims of a double homicide. An x-ray "was said to indicate what appeared to be the presence of an item in the brain." The x-ray was not produced at the hearing. Neither petitioner nor Dr. Nichols recovered a bullet from the brain or skull cavity during the autopsy. Petitioner asked Dr. Nichols if he should perform a second x-ray, and Dr. Nichols instructed petitioner it was not necessary. Dr. Nichols concluded the autopsy, instructed petitioner to release the body to law enforcement, and returned to his office. Despite Dr. Nichols's instruction, petitioner performed a second x-ray, which did not show the presence of an object in the brain, and then he released the body to law enforcement.

As an autopsy technician, petitioner was responsible for cleaning the autopsy room. Petitioner testified at the hearing that the Boykin autopsy "was the last case on that table for that day[.]" Petitioner stated that after he washed the cutting board and started washing the coagulated blood off the autopsy bench, "an object appeared." He rinsed off the object, picked it up, and determined it was a round, whole bullet. Petitioner put it in an evidence bag and called the photographer, William Holloman, to return to the autopsy room. Petitioner explained to Holloman how he found the object and asked Holloman to photograph it. When Holloman refused, petitioner took a picture of the bagged object with his personal cell phone.

Petitioner did not call Dr. Nichols to return to the autopsy room. Instead, he took the bagged object to Dr. Nichols's office, which was located on a different level in the building. Petitioner did not label the evidence bag or document where he found the object, but he told Dr. Nichols that he found it near the cutting board. Dr. Nichols took the bagged object but did not mention it in his autopsy report.

On 28 July 2011, petitioner met with Dr. Radisch and informed her that the Boykin autopsy report "inaccurately stated the bullet exists and is not recovered." Dr. Radisch testified that she subsequently reviewed

the preliminary autopsy report and the x-ray but did not discuss them with Dr. Nichols and did not follow up with petitioner.

On 9 September 2011, Dr. Nichols sent petitioner an e-mail instructing him not to use his cell phone to "conduct outside business on OCME time." Dr. Nichols also stated, "[Y]our contempt for Dr. Radisch is palpable. This includes a long history of belligerence, snide remarks and on at least one occasion, openly confrontational [sic]." Dr. Nichols listed three training classes for petitioner to attend, and concluded, "I sincerely hope that we can use your years of experience in a constructive manner for a long time to come."

Later that morning, petitioner e-mailed Dr. Radisch, OCME administrator Pat Barnes, and Dr. Lou Turner (Dr. Radisch's supervisor) stating, "I am formally requesting a follow up meeting to the conversation we had on July 28, 2011, in regards to the [Boykin] case I worked with Dr. Nichols." Petitioner continued, "The autopsy report released to the public states 'no bullet was recovered'. This disturbs me because I personally recovered the bullet in this case and personally handed it to Dr. Nichols, yet this is not reflected in the final report." Dr. Radisch forwarded the e-mail to Dr. Nichols but did not take any additional action.

In September 2013, DHHS leadership learned that the State Bureau of Investigation (S.B.I.) was investigating the Boykin autopsy. Investigators interviewed petitioner regarding his role in the autopsy. Around the same time, the local media reported about understaffing and other problems at the OCME. As a result of information discovered during the S.B.I. investigation, the following month DHHS ordered an internal personnel investigation into the Boykin autopsy. According to DHHS's final report submitted to the ALJ, "Petitioner provided detailed information about the OCME's unwritten policies, protocols and practices for evidence collection." Additionally, he "acknowledged that an autopsy technician should call the pathologist back into the room upon finding evidence outside the body."

In November 2013, DHHS terminated Dr. Nichols's employment. In December 2013, DHHS decided to pursue termination of petitioner's employment. On 6 December 2013, Dr. Turner delivered a pre-disciplinary letter to petitioner, which was signed by DPH Acting Division Director Danny Staley and stated, "This letter is to notify you that a pre-disciplinary conference has been scheduled for December 9, 2013, at 11:00 a.m. . . . The purpose of this conference is to ensure that the decision to be made is not based on misinformation and to give you an opportunity to respond."

On 9 December 2013, petitioner, Mr. Staley, Dr. Turner, and DHHS Human Resources Manager Greg Chavez attended the pre-disciplinary conference. Mr. Staley began by stating, "This is your opportunity to give me your side of the story," and no decision has been made. Before addressing the content of the pre-disciplinary letter, petitioner presented a typed resignation letter addressed to Mr. Staley. In the letter, petitioner stated, "Please accept this letter of resignation effective today, December 9, 2013. . . . It is my intention to retire effective January 1, 2014." Mr. Staley accepted petitioner's resignation and sent him a letter that day to confirm. In April 2014, petitioner filed a petition for a contested case hearing alleging a violation of the Whistleblower Act. Petitioner filed a prehearing statement on 30 May 2014 stating the following:

> [Petitioner] was threatened with discharge and was constructively discharged from the Respondent because he made reports that were protected activity under the Whistleblower Act. These reports were on matters of public concern that involved (a) substantial and specific dangers to the public health and safety, specifically mishandling and incompetence of autopsies [sic] of murder victims by superiors or colleagues, (b) gross mismanagement, and (c) gross abuse of authority.

On 7 January 2015, Senior Administrative Law Judge Fred Gilbert Morrison, Jr. heard arguments, and on 12 March 2015, he entered a final decision concluding that petitioner was not entitled to relief. Petitioner appeals.

II. Analysis

"It is well settled that in cases appealed from administrative tribunals, '[q]uestions of law receive *de novo* review,' whereas fact-intensive issues 'such as sufficiency of the evidence to support [an agency's] decision are reviewed under the whole-record test.' " *N.C. Dep't of Env't & Natural Res. v. Carroll*, 358 N.C. 649, 659, 599 S.E.2d 888, 894–95 (2004) (quoting *In re Greens of Pine Glen Ltd. P'ship.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Under a *de novo* review, the reviewing court " 'consider[s] the matter anew[ ] and freely substitutes its own judgment for the agency's.' " *Id.* at 660, 599 S.E.2d at 895 (quoting *Mann Media, Inc. v. Randolph Cnty. Planning Bd.*, 356 N.C. 1, 13–14, 565 S.E.2d 9, 17 (2002)). When applying the whole record test, however, the reviewing court " 'may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*.' " *Id.* (quoting

Watkins v. N.C. State Bd. of Dental Exam'rs, 358 N.C. 190, 199, 593 S.E.2d 764, 769 (2004)). If the "findings are supported by substantial evidence—that amount of evidence that a reasonable mind would accept as adequate to support a decision, the reviewing court must uphold the . . . decision." *N.C. Dep't of Corr. v. McNeely*, 135 N.C. App. 587, 592, 521 S.E.2d 730, 733 (1999) (citing *ACT-UP Triangle v. Comm'n for Health Sci.*, 345 N.C. 699, 707, 483 S.E.2d 388, 393 (1997)).

The Whistleblower Act, codified at N.C. Gen. Stat. § 126-84 *et seq.* (2015), provides,

> (a) It is the policy of this State that State employees shall be encouraged to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting:
>
> (1) A violation of State or federal law, rule or regulation;
>
> (2) Fraud;
>
> (3) Misappropriation of State resources;
>
> (4) Substantial and specific danger to the public health and safety; or
>
> (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority.

N.C. Gen. Stat. § 126-84(a) (2015). Furthermore,

> [n]o head of any State department, agency or institution or other State employee exercising supervisory authority shall discharge, threaten or otherwise discriminate against a State employee regarding the State employee's compensation, terms, conditions, location, or privileges of employment because the State employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, any activity described in G.S. 126-84, unless the State employee knows or has reason to believe that the report is inaccurate.

N.C. Gen. Stat. § 126-85(a) (2015).

In order to succeed on a claim under the Whistleblower Act, a plaintiff has the burden of proving by a preponderance of the evidence the following three elements: "(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff

in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

On appeal, petitioner claims that the ALJ erred in concluding that he did not engage in protected activity for two reasons. First, he argues no evidence supports the ALJ's conclusion that his 9 September 2011 e-mail was a "tit for tat." Petitioner contends that the Boykin autopsy report was inaccurate or fraudulent, without further explanation. Second, petitioner states that the Whistleblower Act applies if his employer retaliated based on a misapprehension that petitioner reported protected activity.

We do not find merit in petitioner's first argument. Although petitioner takes issue with the ALJ's "tit for tat" theory, petitioner fails to present any argument on why the numerous other findings are not supported by substantial evidence or why the conclusions of law are in error. Likewise, petitioner does not present any argument on why his allegations constituted any one of the five protected activities under N.C. Gen. Stat. § 126-84 (2015). In the three-and-a-half pages petitioner devotes to discussing protected activity in his brief, he cites only one case, from California, on public policy. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005) (noting that the appellant "fail[ed] to cite any legal authority or even a legal definition of the term ratification in its brief to this Court").

In its final decision, the ALJ concluded in part,

> 8. After considering all of the evidence, it is found that Petitioner failed to show by a preponderance of the evidence that he found a whole bullet during the Boykin autopsy. Neither party produced the x-ray, the bagged object, or any photographs thereof, and the parties offered conflicting evidence on whether the bagged item consisted of a whole bullet, a bullet jacket, a bullet fragment, or something else. It is concluded that Dr. Radisch's description of the object as a "piece of copper projectile jacket" is more credible than Petitioner's description of a "whole bullet," particularly in light of the autopsy report which clearly describes a "gaping" exit wound.
>
> 9. Even if the object Petitioner said he found was a whole bullet, it is not clear that Dr. Nichols' autopsy report

was fraudulent or even inaccurate. Dr. Nichols prepared a thorough autopsy report that identified Mr. Boykin's cause of death and described in considerable detail the entry and exit wounds made by a bullet. Petitioner claims to have discovered a bullet and contends that the report was fraudulent because Dr. Nichols stated that a "bullet exists and is not recovered." But although Dr. Nichols' statement could be read as an assertion that no one at the OCME found a bullet, it could also be interpreted as a truthful assertion that Dr. Nichols did not personally find and recover a bullet and thus he could not verify or vouch for one's recovery. This interpretation is supported by the fact that the OCME had no rules for how pathologists should respond to items presented to them outside the autopsy room, likely because this situation had never arisen before.

10. After considering all of the evidence, it is concluded that Petitioner's complaints about the Boykin autopsy primarily concerned his dissatisfaction with Dr. Nichols' job performance rather than fraud or a substantial and specific threat to public safety. Petitioner admitted that he did not trust Dr. Nichols and that he called Mr. Holloman to show him that Dr. Nichols' work was "sloppy." Dr. Nichols, in turn, obviously distrusted and was not always satisfied with Petitioner. The timing of Petitioner's complaints about the Boykin autopsy also suggest a kind of "tit for tat," with Petitioner complaining about Dr. Nichols' work in retaliation for Dr. Nichols' warnings about Petitioner's secondary employment and interactions with others.

In sum, the ALJ concluded that "the greater weight of the evidence does not support a conclusion that Petitioner engaged in protected activity when he reported his concerns about the Boykin autopsy to his superiors at the OCME[.]" We agree.

The evidence supports the ALJ's findings that petitioner knew under known protocol and work rules that he should have called Dr. Nichols, the pathologist, to return to the autopsy room so that Dr. Nichols could properly collect and bag any newly discovered evidence. It is evident from the record that petitioner and Dr. Nichols disagreed on what to do with the later-found object. However, Dr. Nichols's decision not to mention the object—presented to him in his office, after the autopsy ended,

in an unmarked evidence bag, with no documented record of where it came from—in his autopsy report does not, as petitioner alleges, make the autopsy report fraudulent. N.C. Gen. Stat. § 126-84 (2015).

Although the ALJ made additional remarks suggesting petitioner was complaining about Dr. Nichols due to Dr. Nichols's 9 September 2011 e-mail, we do not find it necessary to speculate as to petitioner's timing in reporting to Dr. Radisch—i.e., whether it was a "tit for tat." Instead, in analyzing the substance of petitioner's 28 July 2011 oral report and 9 September 2011 written report to Dr. Radisch, we conclude petitioner failed to establish by a preponderance of the evidence that he reported or was about to report protected activity.

We address petitioner's second argument without reaching the merits. At the hearing, petitioner testified that an S.B.I. agent and Dr. Turner asked him if he spoke to the media regarding the Boykin autopsy. Although petitioner denied speaking to the media, he stated, "[I]t seemed to me I was being zeroed in on as far as being a leak."

The ALJ addressed petitioner's allegation by stating that because petitioner did "not contend that he actually prompted the media reports or S.B.I. investigation . . . there is no need to determine whether such behavior would qualify as protected activity under the Whistleblower Act." Later in the final decision, in discussing the third element of a claim and the absence of a retaliatory motive—assuming *arguendo* that petitioner satisfied the first two elements—the ALJ stated, "[E]ven if Petitioner could show that DHHS management sought his dismissal because they mistakenly believed him to be the source of the media and S.B.I. leaks, this would be insufficient to establish a claim under the Whistleblower Act."

As the ALJ pointed out, our courts have not considered whether a "perceived whistleblower" is entitled to protection under the Whistleblower Act. However, this Court need not decide that issue today as it is not necessary to reach a conclusion in this case. For the reasons discussed above, because petitioner's reports to Dr. Radisch did not constitute protected activity under N.C. Gen. Stat. § 126-84 (2015), a perceived report of the same content to a different party (the S.B.I. or the media) would likewise not constitute protected activity.

Because petitioner did not engage in protected activity, we need not address petitioner's arguments on the remaining two elements of a claim under the Whistleblower Act.

III. Conclusion

The ALJ did not err in determining that petitioner was not entitled to relief under the Whistleblower Act.

AFFIRMED.

Judges STROUD and DIETZ concur.

NORMAN GLENN, Plaintiff
v.
EDGAR JOHNSON, Individually and as Chairman of the Board of Trustees; EVERETTE W. JOHNSON, JR., individually and as Chairman of the Board of Deacons; and NEW RED MOUNTAIN MISSIONARY BAPTIST CHURCH, INC., Defendants

No. COA15-523

Filed 7 June 2016

1. Emotional Distress—negligent and intentional—internal church disagreement

Where plaintiff was treasurer of his church and asserted claims against the church and two members of the church's board for claims arising from a disagreement over monetary issues, the trial court did not err by granting defendants' motions for summary judgment on plaintiff's negligent infliction of emotional distress (NIED) and intentional infliction of emotional distress (IIED) claims. On the NIED claim, plaintiff failed to identify defendants' negligent conduct, and on the IIED claim, plaintiff failed to allege or present evidence of defendants' conduct that rose to level of extreme and outrageous.

2. Libel and Slander—internal church disagreement—insufficient evidence

Where plaintiff was treasurer of his church and asserted claims against the church and two members of the church's board for claims arising from a disagreement over monetary issues, the trial court did not err by granting summary judgment in favor of defendants on plaintiff's claims for libel and slander per quod. There was no forecasted evidence that could be construed as libel or slander per quod.

Appeal by plaintiff from orders entered 29 April 2014 by Judge R. Allen Baddour, Jr., and 24 February 2015 by Judge Elaine M. O'Neal

Bushfan in Orange County Superior Court. Heard in the Court of Appeals 22 October 2015.

Law Offices of Hayes Hofler, P.A., by R. Hayes Hofler, III, for plaintiff-appellant.

Teague Campbell Dennis & Gorham, LLP, by Jacob H. Wellman, for defendant-appellees Edgar Johnson and Everette W. Johnson, Jr.

Bailey & Dixon, LLP, by Philip A. Collins and G. Lawrence Reeves, for defendant-appellee New Red Mountain Missionary Baptist Church, Inc.

McCULLOUGH, Judge.

Norman Glenn ("plaintiff") appeals from the trial court's order to dismiss in part and order granting summary judgment in favor of Edgar Johnson ("Edgar"), Everette W. Johnson, Jr. ("Everette"), and New Red Mountain Missionary Baptist Church, Inc. (the "Church") (together "defendants"). Upon review, we affirm.

I. Background

At all times relevant to this appeal, the Church was a nonprofit corporate entity operating as a church in Durham, Edgar was a member of the Church and Chairman of the Board of Trustees, Everette was a member of the Church and Chairman of the Board of Deacons, and plaintiff was a member of the church. Plaintiff also served as the treasurer of the Church and was a member of the Board of Trustees. It was disagreements between defendants and plaintiff while he was treasurer that allegedly resulted in harm to plaintiff and caused plaintiff to initiate this action against defendants.

That contentious relationship is summarized as follows: The Church bylaws require the Board of Trustees to obtain an audit annually. Edgar proposed an audit at the quarterly Church conference in July 2012 and the proposal was approved by the Church body. Yet, over plaintiffs' objection, that vote of approval was later rescinded at the quarterly Church conference in October 2012 after concerns were raised over the cost of an audit. Also over plaintiff's objection, Edgar then moved to have a less costly "compilation" of the Church's financial records completed. After Edgar's motion carried at the October 2012 conference, in November 2012, Edgar requested that plaintiff write a check for a $250 retainer for

the accountant who would perform the compilation. Plaintiff refused to do so. Aware of Edgar's request in November 2012, in early December 2012, the Board of Deacons, chaired by Everette, sent a letter to plaintiff requesting that he write the retainer check. Plaintiff again refused to do so and did not respond. As a result of plaintiff's repeated refusal, the Board of Deacons sent plaintiff another letter in early January 2013 requesting that plaintiff meet with the Board of Deacons to discuss the matter. Plaintiff, however, did not attend the meeting. At the quarterly Church conference in January 2013, the Board of Deacons then read and presented a letter to the Church body asking for plaintiff's resignation from the position of treasurer. Plaintiff, who was surprised by the request, then stood up in front of the Church body, handed over his keys, and renounced further responsibilities as treasurer. Since that time, plaintiff has sought on numerous occasions for the Church to clarify the reasons the Board of Deacons requested his resignation, but defendants never did so to the satisfaction of plaintiff.

Based on these facts, plaintiff asserted the following claims for relief in the complaint against defendants filed on 20 December 2013

(1) Injunctive relief to enjoin the Church from "conducting any financial transactions by the treasurer until such time as it has legally replaced plaintiff as treasurer following the bylaws and established church procedure[]" and to enjoin the individual defendants from "in any way retaliating against plaintiff, or defaming plaintiff[.]"

(2) Libel and/or slander *per se* because "[t]he acts of defendants . . . have been committed with malice and intent to cause plaintiff to suffer humiliation and damage his reputation within the church community. They have been defamatory *per se*, constituting publications by the defendants to third persons which, when considered alone . . . untruthfully charge that plaintiff has committed wrongdoing that amounts to a crime or otherwise has subjected plaintiff to ridicule, contempt, or disgrace in his church community."

(3) Libel and/or slander *per quod* because "defendants' actions have constituted publications by defendants of statements to third parties which, when considered with innuendo, colloquium, and explanatory circumstances, have become defamatory, causing plaintiff

to suffer ridicule, contempt, or disgrace, and further causing special damages . . . ."

(4) Negligent infliction of emotional distress ("NIED") in that "defendants negligently engaged in the . . . wrongful conduct. It was reasonably foreseeable that said conduct would cause the plaintiff severe emotional distress, and the conduct did in fact cause the plaintiff severe emotional distress, necessitating professional treatment being rendered to plaintiff . . . ."

(5) Intentional infliction of emotional distress ("IIED") in that the "conduct of defendants was extreme and outrageous, intended to cause severe emotional distress, or committed with a reckless indifference to the likelihood that such conduct would cause severe emotional distress, and which did cause severe emotional distress to the plaintiff."

Defendant further alleged grounds existed to justify awards of compensatory, special, and punitive damages.

On 24 February 2014, the Church filed a motion to dismiss and answer and Edgar and Everette filed a separate joint motion to dismiss and answer. In response, plaintiff filed an affidavit on 7 April 2014. Plaintiff's affidavit reasserted the factual bases of his claims and included copies of the Church constitution and bylaws, letters to him from the Board of Deacons, and documentation of Church meetings as attachments to support his claims.

Following a 7 April 2014 hearing in Orange County Superior Court on defendants' motions to dismiss, on 29 April 2014, Judge R. Allen Baddour, Jr., filed an order granting defendants' motions to dismiss in part after determining that plaintiff "failed to state claims for . . . (1) [l]ibel and slander per se against all defendants; and (2) [l]ibel and slander per quod against defendants Everette . . . and [the Church], to the extent that such claim(s) are founded upon statements made by . . . Everette . . . ." Thus, the judge dismissed those claims with prejudice and allowed plaintiff's other claims to proceed.

Defendants then filed motions to exclude expert testimony and for summary judgment on the remaining claims on 9 January 2015. In support of the summary judgment motions, defendants submitted numerous depositions with exhibits for the trial court's consideration. Following a 9 February 2015 hearing on defendants' motions for summary judgment,

on 24 February 2015, Judge Elaine M. O'Neal Bushfan filed an order granting summary judgment in favor of defendants. Specifically, the trial court "determined that there are no genuine issues of material fact and that defendants are entitled to judgment as a matter of law as to all of plaintiff's remaining claims for [NIED], [IIED], slander *per quod*, injunctive relief and punitive damages."

Plaintiff filed notice of appeal on 18 March 2015 from the 29 April 2014 order dismissing some of his claims and from the 24 February 2015 summary judgment order.

II. Discussion

On appeal, plaintiff contends the trial court erred in entering summary judgment in favor of defendants on his claims for NIED, IIED, and libel and/or slander *per quod*. We address plaintiff's arguments in order.

As noted above, plaintiff also appealed from the 29 April 2014 order dismissing his libel and slander *per se* claims against all defendants and his libel and slander *per quod* claims against Everette and the Church. Plaintiff, however, has not raised any issues in his brief on appeal concerning the dismissal order and has abandoned any issues concerning the dismissed claims. *See* N.C. R. App. P. 28(b)(6) (2016) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). Plaintiff has also abandoned any issues concerning summary judgment on his claims for injunctive relief and punitive damages by failing to raise arguments on appeal.

Standard of Review

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

> In order to prevail on a motion for summary judgment, a moving party meets its 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 or cannot surmount an affirmative defense which would bar the claim. Once the moving party meets this burden, the burden is then on the opposing party to show that a genuine issue of material fact exists. . . . If

> the opponent fails to forecast such evidence, then the trial court's entry of summary judgment is proper.

Finley Forest Condo. Ass'n v. Perry, 163 N.C. App. 735, 738-39, 594 S.E.2d 227, 230 (2004) (internal quotation marks and citations omitted).

Emotional Distress Claims

[1] Plaintiff first contends the trial court erred by granting defendants' motions for summary judgment as to his NIED and IIED claims. Plaintiff claims he has raised genuine issues of material fact as to the essential elements of both claims.

NIED

We first address plaintiff's argument with respect to his claim for NIED.

> Our cases have established that to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress (often referred to as "mental anguish"), and (3) the conduct did in fact cause the plaintiff severe emotional distress. Although an allegation of ordinary negligence will suffice, a plaintiff must also allege that severe emotional distress was the foreseeable and proximate result of such negligence in order to state a claim; mere temporary fright, disappointment or regret will not suffice. In this context, the term "severe emotional distress" means any emotional or mental disorder, such as, for example, neurosis, psychosis, chronic depression, phobia, or any other type of severe and disabling emotional or mental condition which may be generally recognized and diagnosed by professionals trained to do so.

Johnson v. Ruark Obstetrics and Gynecology Associates, P.A., 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990) (internal citations omitted). Thus, summary judgment in favor of defendants on the NIED claim is proper where the evidence does not establish negligence by defendants or establishes that the alleged negligent conduct was not the foreseeable and proximate cause of plaintiff's severe emotional distress. *Robblee v. Budd Services, Inc.*, 136 N.C. App. 793, 795, 525 S.E.2d 847, 849, *disc. review denied*, 352 N.C. 676, 545 S.E.2d 228 (2000).

Now on appeal, plaintiff asserts he has suffered severe emotional distress that was both a foreseeable result of and proximately caused by defendants' negligent conduct. Plaintiff cites various cases and points to evidence tending to show that there was sufficient evidence of severe emotional distress for the questions of foreseeability and proximate cause to be determined by a jury.

Upon review of the record, it is clear that there was evidence in the record from which the jury could determine plaintiff had suffered severe emotional distress. Furthermore, plaintiff is correct that foreseeability and proximate cause are generally questions for the jury. *See Acosta v. Byrum*, 180 N.C. App. 562, 568, 638 S.E.2d 246, 251 (2006) ("Questions of proximate cause and foreseeability are questions of fact to be decided by the jury."). Plaintiff's arguments on appeal, however, only address the second and third elements of NIED. Plaintiff never clearly identifies in what way defendants' conduct was negligent.

It is clear from the elements listed above that "[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, 859 (2012). In reviewing a trial court's grant of a motion to dismiss a NIED claim, this Court has explained that "[t]he first element of an NIED claim requires allegations that the defendant failed to exercise due care in the performance of some legal duty owed to [the] plaintiff under the circumstances[.]" *Horne v. Cumberland Cnty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 148, 746 S.E.2d 13, 19 (2013) (internal quotation marks and citation omitted). "Generally, where the facts are undisputed, [t]he issue of whether a duty exists is a question of law for the court." *Finley Forest Condo. Ass'n*, 163 N.C. App. at 739, 594 S.E.2d at 230 (internal quotation marks and citation omitted).

In *Horne*, the plaintiff's failure to allege such a legal duty owed by the defendant to the plaintiff was fatal to the plaintiff's NIED claim. *Horne*, 228 N.C. App. at 149, 746 S.E.2d at 19. In addition to failing to allege a legal duty, this Court also explained in *Horne* that "[b]eyond the conclusory assertion that '[the defendant] negligently engaged in the aforementioned conduct against [the] plaintiff,' [the] plaintiff's complaint recounts only *intentional* conduct on the part of [the defendant]." *Id.* (alterations in original omitted) (emphasis in original). As a result, the plaintiff in *Horne* "failed to properly plead an element essential to her NIED claim[]" because "[a]llegations of intentional conduct, . . . even when construed liberally on a motion to dismiss, cannot satisfy the negligence element of an NIED claim." *Id.*

Although defendants did not move to dismiss plaintiff's NIED claim in the present case, *Horne* is instructive in our review of the trial court's grant of defendants' motions for summary judgment.

The evidence in this case is that plaintiff was a member of the Church and served as treasurer and a member of the Board of Trustees. Edgar and Everette were also members of the Church and members of church boards. As in *Horne*, plaintiff does not assert that defendants owed him a legal duty and fails to cite any authority showing that a legal duty exists between church members. The only conceivable duty owed by defendants to plaintiff was to act in accordance with the bylaws of the Church, but it is clear from the record that any conduct by the individual defendants in contravention to the bylaws was intentional, rather than negligent.

In arguing the trial court erred in granting summary judgment for defendants on the NIED claim, plaintiff glosses over the first element of NIED, stating that "[he] satisfie[d] the first two elements by offering evidence showing that it was reasonably foreseeable that such negligence would proximately cause [his] severe emotional distress." Yet, as noted above, plaintiff never identifies defendants' negligent conduct. Even in his NIED claim in the complaint, plaintiff merely incorporates the factual allegations and asserts as follows:

> 28. The defendants negligently engaged in the above wrongful conduct. It was reasonably foreseeable that said conduct would cause the plaintiff severe emotional distress, and the conduct did in fact cause the plaintiff severe emotional distress, necessitating professional treatment being rendered to plaintiff . . . .

We hold these conclusory allegations and the evidence presented are insufficient to avoid summary judgment.

Where defendant failed to allege a duty owed by defendants and there is no evidence of negligent acts by defendants, plaintiff has failed to establish a *prima facie* case of NIED and summary judgment was proper. *See Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 354, 595 S.E.2d 778, 782 (2004) (Summary judgment was proper because an essential element of NIED was unsupported by the evidence where the plaintiff presented no evidence that the defendant owed a duty of care or that there was a breach such a duty.) Thus, we hold the trial court did not err in entering summary judgment in favor of defendants on plaintiff's NIED claim.

IIED

We next address plaintiff's argument regarding to his claim for IIED. "A claim for [IIED] exists when a defendant's conduct exceeds all bounds usually tolerated by decent society and the conduct causes mental distress of a very serious kind." *Watson v. Dixon*, 130 N.C. App. 47, 52, 502 S.E.2d 15, 19 (1998) (internal quotation marks and citations omitted). Broken down into its elements, IIED consists of: "(1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress to another. The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981).

Although plaintiff acknowledges that, "[a]s to the first element, a determination at summary judgment of whether 'alleged acts may be reasonably regarded as extreme and outrageous is initially a question of law[,]' " *Phillips v. Rest. Mgmt. of Carolina, L.P.*, 146 N.C. App. 203, 213, 552 S.E.2d 686, 693 (2001) (quoting *Shreve v. Duke Power Co.*, 85 N.C. App. 253, 257, 354 S.E.2d 357, 359 (1987)), *disc. rev. denied*, 355 N.C. 214, 560 S.E.2d 132 (2002), plaintiff asserts the trial court in this case could not determine, as a matter of law, that defendants' conduct did not rise to the level of "extreme and outrageous" and, therefore, the issue should have been determined by the jury, along with the issues of intent, or reckless indifference, and severe emotional distress. *See also Johnson v. Bollinger*, 86 N.C. App. 1, 6, 356 S.E.2d 378, 381-82 (1987) ("[T]his Court held the initial determination of whether conduct is extreme and outrageous is a question of law for the court: If the court determines that it may reasonably be so regarded, then it is for the jury to decide whether, under the facts of a particular case, defendants' conduct . . . was in fact extreme and outrageous.") (internal quotation marks, citation, and emphasis in original omitted). Consequently, plaintiff concludes summary judgment on his IIED claim was improper. In support of his arguments, defendant relies solely on *Phillips*, in which the plaintiff alleged IIED after consuming food that had been spit on. *Phillips*, 146 N.C. App. at 207, 552 S.E.2d at 689. On appeal of the trial court's grant of summary judgment in favor of the restaurant owner/operator, this Court agreed that the trial court erred in granting summary judgment in favor of the owner/operator. *Id.* at 213, 552 S.E.2d at 693. Recognizing that other states had made similar conduct criminal or determined similar conduct toward prisoners was unconstitutional, this Court "[could not] say, as a matter of law, that a food preparer surreptitiously spitting in food intended for a patron's consumption [did] not rise to the level of

'extreme and outrageous.' " *Id.* We are not convinced that the present case is comparable to *Phillips*.

This Court has explained that

> [c]onduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. The behavior must be more than mere insults, indignities, threats, and plaintiffs must necessarily be expected and required to be hardened to a certain amount of rough language, and to occasional acts that are definitely inconsiderate or unkind.

Smith-Price, 164 N.C. App. at 354, 595 S.E.2d at 782 (internal quotation marks, citations, and alterations in original omitted).

In this case, plaintiff asserts that the same conduct that was alleged to be the basis of his NIED claim is intentional, extreme, and outrageous to support a claim of IIED. Specifically, after incorporating by reference the factual allegations, plaintiff asserted as follows in his complaint:

> 31. The above-described conduct of defendants was extreme and outrageous, intended to cause severe emotional distress, or committed with a reckless indifference to the likelihood that such conduct would cause severe emotional distress, and which did cause severe emotional distress to the plaintiff.

The conduct by defendants alleged to be extreme and outrageous includes the following: requesting that plaintiff, as treasurer of the Church, write a check for a compilation although plaintiff was against conducting a compilation instead of a full audit; requesting through letters that plaintiff write a check and meet with the Board of Deacons to discuss his refusal to write a check; requesting plaintiff's resignation through a letter read and presented to the Church body at the quarterly conference; ignoring, refusing, or laughing at efforts by plaintiff for reconciliation or mediation.

These acts by defendants are simply not comparable to spitting in food and we now hold that, as a matter of law, plaintiff has failed to allege or present evidence that defendants' conduct in this case rose to the level of extreme and outrageous. As a result, the trial court did not err in entering summary judgment in favor of defendant on plaintiff's IIED claim.

Defamation Claims

[2] In the last issue on appeal, plaintiff contends the trial court erred in granting summary judgment as to his claims for libel and slander *per quod*. We disagree.

We begin our analysis of this final issue by noting that it not entirely clear what ruling by the trial court is being challenged. In his brief on appeal, plaintiff asserts that "Judge Bushfan allowed dismissal of all claims, including *per quod* defamation claims[,]" and contends that "Judge Bushfan, ruling on Rule 56 motions, should have denied those motions as to defamation *per quod*, because she had actual evidence before her which went beyond the mere allegations of the complaint and created genuine issues of material fact as to *per quod* defamation among all three defendants." However, Judge Bushfan did not dismiss any claims, but instead granted summary judgment in favor of defendants. Moreover, the only defamation claims addressed in the summary judgment order were plaintiff's libel and slander *per quod* claims against Edgar and the Church, as the other defamation claims were previously dismissed by Judge Baddour. It is the grant of summary judgment on the libel and slander *per quod* claims against Edgar and the Church that we now review on appeal.

Libel and slander are both forms of defamation – libel is written and slander is oral. *Aycock v. Padgett*, 134 N.C. App. 164, 165, 516 S.E.2d 907, 909 (1999). " 'To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed.' " *Daniels v. Metro Magazine Holding Co., L.L.C.*, 179 N.C. App. 533, 538-39, 634 S.E.2d 586, 590 (2006) (quoting *Andrews v. Elliot*, 109 N.C. App. 271, 274, 426 S.E.2d 430, 432 (1993)), *appeal dismissed and disc. rev. denied*, 361 N.C. 692, 654 S.E.2d 251 (2007); *see also Desmond v. News and Observer Pub. Co.*, __ N.C. App. __, __, 772 S.E.2d 128, 135, *appeal dismissed and disc. rev. denied*, __ N.C. __, 776 S.E.2d 195 (2015).

> Where the injurious character of the words do not appear on their face as a matter of general acceptance, but only in consequence of extrinsic, explanatory facts showing their injurious effect, such utterance is actionable only *per quod*. Where the words spoken or written are actionable only *per quod*, the injurious character of the words and some special damage must be pleaded and proved.

Beane v. Weiman Co., 5 N.C. App. 276, 278, 168 S.E.2d 236, 237-38 (1969).

In this case, it is not clear what plaintiff contends to be libelous or slanderous. Plaintiff identifies both the letter from the Board of Deacons requesting his resignation that was read and presented at the Church conference and prior statements by Edgar concerning whether plaintiff had used church funds to purchase a home and an automobile. Plaintiff then asserts that the sudden demand that he resign after he refused to write a check fueled innuendo and speculation that he must have done something wrong. Plaintiff further asserts that any misperception was magnified by the refusal of the Board of Deacons and Board of Trustees to explain their actions and to dispel any misunderstandings about plaintiff's resignation.

Yet, upon review of the record, there is no evidence of any conduct that could be construed as libel or slander *per quod*. First, concerning Edgar's prior questions insinuating plaintiff's misuse of church funds allegedly made in 2009 or early 2010, there is no evidence that the statements were made to anyone other than plaintiff. In fact, plaintiff indicated Edgar's statements were made directly to him. Furthermore, any defamation claim based on those statements in 2009 or early 2010 is now barred by the statute of limitations. *See* N.C. Gen. Stat. § 1-54(3) (2015) (providing a one year statute of limitations for libel and slander). Second, concerning the Board of Deacons' letter requesting plaintiff's resignation, Edgar was not a member of the Board of Deacons and plaintiff has failed to identify any false statement in the letter.

As the individual defendants assert, plaintiff's "primary argument seems to be that the letter, [or defendants in general,] did not do enough to prevent others from speculating that [p]laintiff may have done something wrong." But where there is no evidence of actionable defamation in the record, the trial court did not err in granting summary judgment in favor of defendants on the claims of libel and slander *per quod* against Edgar and the Church.

III. Conclusion

For the reasons discussed above, we hold the trial court did not err in entering summary judgment on plaintiffs' claims for NIED, IIED, or defamation *per quod*.

AFFIRMED.

Judges DIETZ and TYSON concur.

IN RE A.M.

[247 N.C. App. 672 (2016)]

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

No. COA15-1035

Filed 7 June 2016

1. Child Abuse, Dependency, and Neglect—abuse—findings—sufficient

In a case in which a child (the first of two) was adjudicated abused based on serious emotional damage, the findings were sufficient to sustain the adjudication even though they did not track the specific language used in N.C.G.S. § 7B-101(1)(e).

2. Child Abuse, Dependency, and Neglect—abuse—findings—no sufficient

An adjudication that a child (the second of two) was abused was remanded for the trial court to make findings of fact addressing the directives of N.C.G.S. § 7B-101(1)(e) concerning the child's serious emotional damage based on the evidence presented.

3. Child Custody and Support—child in DSS custody—support—findings—not sufficient

The trial court erred by ordering a mother to pay child support where it failed to make the required findings as to a reasonable sum and the mother's ability to pay.

Appeal by Respondent-Mother from orders entered 11 June 2015 by Judge W. Fred Gore in District Court, Brunswick County. Heard in the Court of Appeals 9 May 2016.

Elva L. Jess for Petitioner-Appellee Brunswick County Department of Social Services.

Michael E. Casterline for Respondent-Appellant Mother.

Michael N. Tousey for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Mother ("Mother") appeals from orders adjudicating A.M. and E.R. (together, "the Children") to be abused and neglected and ordering that the Children remain in the custody of the Brunswick

County Department of Social Services ("DSS"). We affirm in part, and remand in part for additional findings of fact.

I. Background

DSS filed juvenile petitions on 12 March 2015 ("the petitions"), alleging that sixteen-year-old A.M. and six-year-old E.R. were abused, neglected, and dependent. The trial court entered nonsecure custody orders that same day and placed the Children in the custody of DSS. The petitions alleged Mother had an extensive history with DSS, which dated back to 2001. Mother has two daughters older than A.M. who left home at age sixteen. Mother relinquished her parental rights to her oldest child, a son. A.M. and her two older sisters were in foster care for approximately two years around the time Mother was pregnant with E.R.

The petitions alleged Mother yelled and screamed at the Children and routinely called them derogatory names, such as "bitch," "slut," "hussy," and "ass." The petitions also alleged Mother tended to single out A.M. for cruel treatment. A.M. allegedly told a social worker she wanted to go into foster care again, but A.M. felt she was rearing E.R. and was worried about leaving her alone with Mother. The petitions further alleged that DSS had offered Mother numerous services, but Mother's inappropriate behavior continued.

The trial court held an adjudication and disposition hearing on 15 April 2015. During the adjudicatory portion of the hearing, the following witnesses testified: Rebecca Blake ("Ms. Blake"), an intensive family preservation specialist who worked with Mother and the Children for approximately five weeks in 2014; Dr. Maria O'Tuel ("Dr. O'Tuel"), a licensed psychologist who conducted a Child/Family Forensic Evaluation with Mother and the Children; a family friend; an older sister of the Children; and Mother. At the conclusion of the hearing, the trial court adjudicated the children as abused, but declined to adjudicate the Children neglected or dependent.

DSS filed a motion on 30 April 2015 asking the trial court to reconsider its ruling. The trial court held a hearing on the motion on 6 May 2015. In an order entered 11 June 2015, the trial court adjudicated the Children abused and neglected. The trial court entered a separate disposition order on the same day, concluding it was in the Children's best interest to remain in DSS custody. Mother appeals.[1]

1. The fathers of the juveniles participated in the trial court proceedings but are not parties to this appeal.

II. Abuse Adjudications

Mother contends on appeal that the findings of fact in the adjudication order do not support the trial court's conclusion that the Children were abused. An abused juvenile is defined, in relevant part, as "[a]ny juvenile less than 18 years of age whose parent, guardian, custodian, or caretaker . . . [c]reates or allows to be created serious emotional damage to the juvenile." N.C. Gen. Stat. § 7B-101(1)(e) (2013). This subsection also provides that "serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward [herself] or others." *Id.* "The role of this Court in reviewing an initial adjudication of [abuse] is 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.M.*, 180 N.C. App. 539, 544, 638 S.E.2d 236, 239 (2006) (quotation marks omitted). Unchallenged findings are binding on appeal. *See In re M.D.*, 200 N.C. App. 35, 43, 682 S.E.2d 780, 785 (2009).

In the present case, Mother does not challenge the findings in the adjudication order, and they are binding on appeal. *See id.* Instead, Mother contends the findings in the adjudication order do not support the trial court's conclusion that the Children were abused. Specifically, Mother argues the findings of fact fail to establish that either of the Children suffered from severe anxiety, depression, withdrawal, or aggressive behavior. She contends, therefore, that the findings fail to establish serious emotional damage.

A. Abuse Adjudication of A.M.

[1] Regarding A.M.'s abuse adjudication, the trial court made the following findings:

> 14. [A.M.] expresses *hopelessness* about [DSS's] involvement. She advised Dr. O'Tuel that [DSS] had been involved on numerous occasions, that . . . [M]other did not like any of [DSS's] personnel and got irritated at all of them.
>
> 15. Dr. O'Tuel believes, and the [c]ourt finds, that [A.M.'s] expressions of *hopelessness* [have] resulted in her *withdrawal* from the situation, *withdrawal being her coping mechanism*.
>
> . . . .

17. . . . [A.M.] expressed to her social worker that "I want you to figure out how I can leave legaly [sic]. I don't care if it is foster care I really just need to be out of here. Im [sic] tired of her always calling me names and threatening me and of this stuff. I should [not] . . . have to sit here and deal with it. But no body [sic] seems to get that." This text demonstrates the *anxiety* under which the child suffers and the efforts on her part to *with*[*draw*] from the situation.

. . . .

24. [A.M.] was upset by the names that . . . [M]other called her. She expressed a sense of *helplessness* that anyone could help her. She does not feel that there are any programs that can be offered that can change . . . [M]other's behavior.

. . . .

26. . . . Dr. O'Tuel opined and this [c]ourt finds that "[t]he safety of the children is paramount as the functioning of the mother is severely compromised and her maltreatment appears intentional with no remorse evident or expressed."

. . . .

31. The toxic environment based upon continued foul and abusive language to which the children have been exposed creates a substantial risk of mental or emotional impairment. [A.M.] has expressed that she is upset by . . . [M]other's constant tirades and believes that leaving the home, even being placed in foster care, would be preferable to remaining in the home. The [statements of A.M.] demonstrate[ ] the level of her *anxiety* and the desire to *with*[*draw*] from the home situation.

(Emphases added). Mother argues these findings of fact are insufficient because they do not reflect an actual mental health diagnosis. Mother also argues that, while the trial court used the terms "withdrawal" and "anxiety[,]" the trial court did not actually find that A.M. suffered emotional damage evidenced by these conditions. We are not persuaded.

The findings of fact quoted above repeatedly state that A.M. was upset by Mother's behavior, that she felt a sense of hopelessness regarding the situation, and that her coping mechanism was withdrawal. Additionally, the trial court found that A.M.'s home life created anxiety for her. While the anxiety found by the trial court was not the product of a formal psychiatric diagnosis, N.C.G.S. § 7B-101(1)(e) imposes no such requirement.

Mother also argues that the withdrawal A.M. suffered was not the withdrawal contemplated by N.C.G.S. § 7B-101(1)(e). Mother contends that A.M.'s withdrawal was not a manifestation of emotional abuse, but rather a desire to get away from Mother. Again, we disagree. While some of the findings of fact do show a desire by A.M. to leave Mother's home, the findings also demonstrate that A.M.'s coping mechanism was withdrawal. This view is supported by the evidence from the hearing. When asked about the impact on A.M. of Mother's yelling, screaming, and cursing, Dr. O'Tuel responded:

> That it definitely has a negative impact on her. It's manifested both — mostly in [A.M.] of her *withdrawing emotionally from others* as well as her difficulty trusting others. She seems to have this sense of . . . learned helplessness and it just sort of means that, you know, no matter [what] I do nothing's going to change.

(Emphasis added). Based on Dr. O'Tuel's testimony, it is apparent that the withdrawal found by the trial court was not only a manifestation of A.M.'s desire to leave Mother's home, but also of the psychological condition contemplated by N.C.G.S. § 7B-101(1)(e).

Although the findings of fact do not track the specific language used in N.C.G.S. § 7B-101(1)(e), we nevertheless find them sufficient to sustain an adjudication of abuse based on serious emotional damage. "The trial court's written findings must address the statute's concerns, but need not quote its exact language." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (concluding that findings of fact in an order ceasing reunification efforts were sufficient where the order embraced the substance of the statutory provision). Here, the findings of fact address the statute's concerns regarding A.M.'s serious emotional damage. We, therefore, affirm the trial court's adjudication of abuse as to A.M.

B. Abuse Adjudication of E.R.

[2] Regarding E.R.'s abuse adjudication, the trial court's only finding of fact that expressly touched solely on the emotional condition of

E.R. stated: "[E.R.] had defiant behaviors and presented with a fear of sleeping in her own bed." Although Dr. O'Tuel opined that E.R.'s defiant behavior was related to inconsistent discipline and lack of structure or guidance from Mother, Dr. O'Tuel also stated Mother "is not attune[d] to [the Children's] emotional needs and indeed contributes to their denying their emotions to cope with the insults she spews daily." Dr. O'Tuel's evaluation showed that E.R.'s fear of sleeping in her own bed was related to (1) E.R.'s concern regarding Mother's health conditions; and (2) a sexual assault she allegedly suffered when she was three years old. However, Dr. O'Tuel also questioned "where was [Mother] during the alleged abuse incident in which someone broke into the house, took [E.R.], left the premises, and sexually abused her."

There were other findings of the trial court demonstrating: (1) that E.R. witnessed Mother's tirades against A.M.; (2) that Mother's foul language was at times directed at E.R.; (3) that A.M. was concerned about E.R.'s emotional well-being should E.R. be left alone with Mother; and (4) that Mother's language was "demeaning, offensive[,] and not nurturing[.]" As to both A.M. and E.R., the trial court did find that "[t]he toxic environment based upon continued foul and abusive language to which the [C]hildren have been exposed creates a substantial risk of mental or emotional impairment." Although these findings were not sufficient to connect Mother's behavior to E.R.'s having "serious emotional damage [as] evidenced by . . . severe anxiety, depression, withdrawal, or aggressive behavior toward [herself] or others," *see* N.C.G.S. § 7B-101(1)(e), there was sufficient evidence presented at trial to support such a determination. Dr. O'Tuel stated that

> [e]motional abuse can involve . . . screaming and cursing at a child, or calling a child names. . . . . Every professional involved in this case, through documentation or interview, has indicated that the [C]hildren are experiencing severe emotional abuse by the [M]other. . . . . This situation is chronic, with acute exacerbations, meaning verbal assaults by . . . [M]other are a part of normal, everyday life for these girls, and . . . [M]other is frequently worse at times.

Dr. O'Tuel's evaluation further noted that "toxic stress . . . occurs with strong, frequent or prolonged adversity, disrupts brain architecture and other organ systems, and increases risk of stress-related disease and cognitive impairment. It is highly likely that . . . [M]other's interaction with her children qualifies as providing the toxic stress discussed here."

We remand for the trial court to make findings of fact that address the directives of N.C.G.S. § 7B-101(1)(e) concerning E.R.'s serious emotional damage based on the evidence presented.

III. Child Support

[3] Mother also challenges a decree in the trial court's disposition order. Specifically, the trial court ordered the Children's parents to "arrange to provide child support for the benefit of their children." Mother argues the trial court erred in ordering her to pay child support because the court failed to make necessary findings of fact in support of this decree and failed to specify an amount of child support. We agree.

Pursuant to N.C. Gen. Stat. § 7B-904(d) (2013), a trial court is authorized to order a parent in a Chapter 7B proceeding to pay child support under the following circumstances:

> At the dispositional hearing or a subsequent hearing, when legal custody of a juvenile is vested in someone other than the juvenile's parent, *if the court finds that the parent is able to do so*, the court may order that the parent pay a reasonable sum that will cover, in whole or in part, the support of the juvenile after the order is entered. If the court requires the payment of child support, the amount of the payments shall be determined as provided in G.S. 50-13.4(c).

(Emphasis added). Under N.C. Gen. Stat. § 50-13.4(c) (2013), which governs orders for child support in Chapter 50 proceedings,

> an order for child support must be based upon the interplay of the trial court's conclusions of law as to (1) the amount of support necessary to meet the reasonable needs of the child and (2) the relative ability of the parties to provide that amount. These conclusions *must themselves be based upon factual findings specific enough* to indicate to the appellate court that the judge below took due regard of the particular estates, earnings, conditions, (and) accustomed standard of living of both the child and the parents. It is a question of fairness and justice to all concerned.

Coble v. Coble, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quotation marks omitted).

In the present case, custody of the Children was vested in DSS; therefore, the trial court was authorized to order Mother to pay child support. *See* N.C.G.S. § 7B-904(d). However, the trial court also was obligated to find that Mother had the ability to pay support and determine a reasonable sum in accordance with N.C.G.S. § 50-13.4(d). *See id.* The trial court made no findings regarding Mother's income, ability to work, or ability to pay. Nor did the trial court make findings regarding the reasonable needs of the Children or an appropriate amount of support. Accordingly, we remand this matter to the trial court for additional findings and for entry of an order consistent therewith. *See In re W.V.*, 204 N.C. App. 290, 296–97, 693 S.E.2d 383, 387–88 (2010) (remanding a child support award for further findings of fact where the trial court failed to make findings of fact regarding the reasonable needs of the child and the relative ability of the parent to pay support).

IV. Conclusion

We affirm the adjudication of abuse as to A.M. and remand for additional findings as to the adjudication of abuse of E.R. Because Mother has not challenged the trial court's conclusion that the Children were neglected, we affirm the trial court's neglect adjudications. We remand the trial court's order for child support for further findings and for entry of an order consistent therewith. Because Mother has not otherwise challenged the trial court's disposition order, we affirm the remainder of it.

AFFIRMED IN PART; REMANDED IN PART.

Judges BRYANT and STROUD concur.

IN RE CORNING INC.

[247 N.C. App. 680 (2016)]

IN THE MATTER OF APPEAL OF Corning Incorporated from the decisions of the Cabarrus County Board of Equalization and Review Concerning the valuations of certain real property for tax years 2012 and 2013.

No. COA15-954

Filed 7 June 2016

1. Taxation—property tax—industrial facility—valuation

The property owner (Corning) in a contested tax valuation met its initial burden of producing competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation and that the assessments substantially exceeded the true value of the property.

2. Taxation—property tax—partially outdated industrial facility—continued use—no market—valuation

The County did not meet its subsequent burden of going forward in a disputed tax valuation case where the property owner (Corning) had met its initial burden of showing that the County had used an erroneous method of valuation. The property had originally been built for the manufacture of fiber optic cable, it was shuttered due to market conditions, production resumed eight years later with Corning as the only major optical fiber producer, and technology had changed in the meantime so that the need for space was reduced and part of the multi-story building design was not needed. The County's position was that the property was being used for the purpose for which it was designed, the manufacture of fiber optic cable, and based its cost analysis on that use rather than its value to a willing buyer, which would involve adoptive reuse and a lower sales price.

3. Taxation—property tax—partially outdated industrial facility—current use unique—no bearing on value

In a case challenging a tax valuation of an industrial property that had only one use, the overwhelming evidence showed that the property could not have been sold as a fiber optics manufacturing facility (the current use), and that use had no bearing on the property's value to a potential buyer.

4. Taxation—outdated industrial facility—valuation—blended sales approach

The Property Tax Commission did not err in a case challenging the tax valuation of an industrial property that had only one use

by adopting a blended cost-sales approach. Although the County maintained that case law required special-purpose facilities to be valued at cost, North Carolina statutes required that property be assessed at its true value, N.C.G.S. § 105-283. While experts could opine that the cost approach was an appropriate method for assessing true value of a specialty property, N.C. case law did not necessarily demand the same.

5. Taxation—property—outdated industrial facility—highest and best use

The highest and best use of property in a challenged tax valuation was future industrial use where there was no market for the current use, the manufacture of fiber optic cable.

Appeal by Cabarrus County from the Final Decision entered 20 March 2015 by the North Carolina Property Tax Commission. Heard in the Court of Appeals 24 February 2016.

Richard M. Koch for Cabarrus County.

Nelson Mullins Riley & Scarborough, LLP, by Charles H. Mercer, Jr. and Reed J. Hollander, and Stavitsky & Associates, LLC, by Bruce J. Stavitsky, for Corning Inc.

ELMORE, Judge.

Cabarrus County appeals from the Final Decision of the North Carolina Property Tax Commission lowering the assessed property values for Tax Years 2012 and 2013 to the values urged by the taxpayer, Corning Inc. The County argues that the Commission's Final Decision is not supported by competent, material, and substantial evidence, and is otherwise affected by errors of law. We affirm.

I. Background

Corning owns and operates a large fiber optic manufacturing facility in Cabarrus County. It was constructed in 1997 when the technology for manufacturing optical fiber required specific design features, such as a four-story layout, interior partitions, and numerous draw towers penetrating multiple floors of the building. Due to market conditions in the fiber optic industry, the facility was shuttered in 2002. Corning resumed production on a limited basis in 2010 as the only major optical fiber company to survive the telecom bust. Around that same time, however, the technology for manufacturing optical fiber changed, eliminating the

need for the multi-story building design and substantially reducing the space required for manufacturing.

The County initially assessed the property at a value of $172,218,270 for each of the Tax Years 2012 and 2013. On appeal to the Cabarrus County Board of Equalization and Review, the County Board lowered the assessed values to $147,609,250 and $152,183,290 for Tax Years 2012 and 2013, respectively. Corning then appealed to the North Carolina Property Tax Commission, arguing that (1) the County used an arbitrary or illegal method of appraisal in reaching its assessed values, (2) the County assigned values to the subject property that substantially exceeded its true value in money, and (3) the County's assessments were significantly greater than those of other locally assessed property.

At the hearing, Corning offered an appraisal report prepared by Fitzhugh L. Stout, who also testified as an expert in industrial real estate appraisal. Mr. Stout explained that he valued the property for alternative industrial use because "there is no demand for either building or buying a fiber optic manufacturing facility." Using a blended cost-sales approach, he assigned values of $26,370,000 and $30,490,000 for Tax Years 2012 and 2013, respectively. Corning also presented the expert testimony of John T. Cashion, an industrial real estate broker. Based on the industrial attributes of the property and the useful area to a likely buyer, Mr. Cashion testified that he would have marketed the property for $15,000,000 or $16,000,000.

In support of its assessments, the County offered the expert testimony of its tax administrator, J. Brent Weisner. Mr. Weisner opined that the property was "special-purpose" property, and he valued it under the cost approach. In addition, the County contracted with Michael P. Berkowitz and Thomas B. Harris, Jr. of T.B. Harris, Jr. & Associates, Inc., to provide a retrospective valuation of the property as of 1 January 2012. Their expert testimony and written appraisal report, which included a $148,890,000 valuation for Tax Year 2012, was also received at the hearing. They did not establish a value for Tax Year 2013.

In its Final Decision, the Commission determined that the County's valuation methods were arbitrary or illegal based, in part, on the following findings of fact:

> 10. When determining the market value for the subject property, an appraiser should rely upon the appraisal approach that will best determine the market value for the subject property.

. . . .

15. When relying on the cost approach, Cabarrus County classified the subject property as a special-purpose or special-use property since Corning was using the property for its intended purpose. As such, Cabarrus County appraised the subject property based on Corning's use of the subject facility, which caused the County to implicitly value the subject property at the subjective worth to Corning and not at the objective value to a willing buyer.

16. When arriving at the assessments for the subject property, the County's application of the 2012 schedules of values, standards, and rules to determine the values assigned to the subject property was flawed when the County's schedules of values, standards, and rules provided no category for the assessment or appraisal of the subject facility as special-purpose property.

17. Cabarrus County used an arbitrary method to value the subject property as [of] January 1, 2012 and January 1, 2013 when it categorized the subject facility as a special-purpose property.

18. Cabarrus County failed to consider acceptable appraisal methodology to determine the loss in value due to economic and functional obsolescence related to the subject property when its method of appraisal considered all costs that added no value to the subject property given that the building is not a modern facility, there is obsolescence associated with the multiple-level floor layouts, and there is building area that is still in shell condition.

19. Cabarrus County's arbitrary cost approaches, and the results thereof, do not constitute the market values for the subject property as of January 1, 2012, and January 1, 2013.

. . . .

22. To arrive at the market value for the subject property as of January 1, 2012 and a market value for the subject property as of January 1, 2013, Mr. Stout determined the highest and best use of the subject property, as if vacant, would be holding the property for future development for an industrial use; and when considering that the subject

> property is improved with an industrial facility, the continuation of this use is concluded to be financially feasible.
>
> . . . .
>
> 26. Mr. Stout determined the market value for the subject property to be $26,370,000 as of January 1, 2012, and the market value for the subject property to be $30,490,000 as of January 1, 2013. Mr. Stout arrived at his market values for the subject property by considering the loss in value due to economic and functional obsolescence including, but not limited to, the subject facility's size, multiple-level floor layouts, and area in shell condition.
>
> 27. Mr. Stout did substantially dispute the County's assessment of $147,609,250 for the subject property as of January 1, 2012, and the County's assessment of $152,183,290 for the subject property as of January 1, 2013.
>
> 28. The discrepancy between the values assigned to the subject property by the County Board and Mr. Stout's market values is due to (a) the County's arbitrary classification of the subject property as a special-purpose property when applying the cost approach to develop its assessments; (b) the County's failure to consider acceptable appraisal methodology to determine the loss in value due to economic and functional obsolescence associated with the subject property that Mr. Stout did consider when applying his analysis to determine the market values for the subject property; and (c) the County's focus on the special use of the subject property by Corning, which caused the County to implicitly value the property at the subjective worth to Corning and not at the objective value to a[ ] willing buyer.

(Footnotes omitted). The Commission then entered the following conclusions of law:

> 1. Corning's evidence from Mr. Stout, taken alone and by itself, tends to show that the County's methods are arbitrary or illegal due to (a) the County's classification of the subject property as a special-purpose property; (b) the County's failure to consider acceptable appraisal methodology to show loss in value due to economic and functional obsolescence associated with the subject

> property; and (c) the County's focus on the specific use of the subject property, which caused the County to implicitly value the subject property at the subjective worth to Corning and not at the objective value to a willing buyer.
>
> 2. Corning thus rebutted the presumption of correctness of the two assessments at issue, and the burden shifted to Cabarrus County to demonstrate that its methods produced the true values for the subject property as of January 1, 2012 and January 1, 2013.
>
> 3. Cabarrus County did not carry its burden when it failed to demonstrate that its appraisal methodology produced true values in view of both sides' evidence and the weight and sufficiency of the evidence, the credibility of the witnesses, and inferences as well as conflicting and circumstantial evidence; and thus its methods are arbitrary or illegal.

The Commission implicitly adopted Mr. Stout's valuation and lowered the assessed values for each of the two tax years to the values urged by Corning. The County appeals.

II. Discussion

Our review is governed by N.C. Gen. Stat. § 105-345.2, which provides in pertinent part as follows:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The Court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 105-345.2(b) (2015).

The proper standard of review "depends upon the particular issues presented on appeal." *Amanini v. N.C. Dep't of Human Res.*, 114 N.C. App. 668, 674, 443 S.E.2d 114, 118 (1994) (citation omitted). Where a petitioner argues that the Commission's decision was affected by an error of law, we apply a *de novo* review. *In re Appeal of Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003). " 'Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319). We apply the "whole record" test to determine whether the Commission's decision is supported by competent, material, and substantial evidence. *Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319. "The 'whole record' test is not a tool of judicial intrusion; instead, it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence." *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979) (citations omitted).

> The "whole record" test does not allow the reviewing court to replace the [Commission's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo*. On the other hand, [it] requires the court, in determining the substantiality of evidence supporting the [Commission's] decision, to take into account whatever in the record fairly detracts from the weight of the [Commission's] evidence. . . . [T]he court may not consider the evidence which in and of itself justifies the [Commission's] result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson v. Wake Cnty. Bd. of Educ., 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977) (citations omitted).

In North Carolina, *ad valorem* tax assessments are conducted under a uniform standard. A county must appraise all real and personal

property "at its true value in money," which is its "market value." N.C. Gen. Stat. § 105-283 (2015). "Market value" is defined by statute as the estimated price

> at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

Id.; *see also In re Appeal of S. Ry. Co.*, 313 N.C. 177, 188, 328 S.E.2d 235, 243 (1985) (holding that appraisals "from the perspective of the present owner to the exclusion of the willing buyer were in clear violation of the statutory 'market value' standard"); *In re Ad Valorem Valuation of Prop. in Forsyth Cnty.*, 282 N.C. 71, 80, 191 S.E.2d 692, 698 (1972) ("To conform to the statutory policy of equality in valuation of all types of properties, the statute requires the assessors to value all properties, real and personal, at the amount for which they, respectively, can be sold in the customary manner in which they are sold.").

"An important factor in determining the property's market value is its highest and best use." *In re Appeal of Belk-Broome Co.*, 119 N.C. App. 470, 473–74, 458 S.E.2d 921, 923 (1995) (citing *Rainbow Springs P'ship v. Cnty. of Macon*, 79 N.C. App. 335, 339 S.E.2d 681 (1986)), *aff'd per curiam*, 342 N.C. 890, 467 S.E.2d 242 (1996). "Highest and best use" has been defined as "the reasonably probable and legal use of vacant land or an improved property, which is physically possible, appropriately supported, financially feasible, and that results in the highest value." Appraisal Inst., *The Appraisal of Real Estate* 297 (11th ed. 1996). It "is not determined through subjective analysis by the property owner, the developer, or the appraiser; rather, highest and best use is shaped by the competitive forces within the market where the property is located." *Id.* at 298.

A. Corning's Burden

[1] We first address the County's argument that Corning failed to produce competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation.

A county's *ad valorem* tax assessment is presumptively correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 562, 215 S.E.2d 752, 761 (1975). To rebut this presumption, the taxpayer must produce "competent, material and substantial evidence" which tends to show that the county used

either (1) an arbitrary *or* (2) illegal method of valuation, *and* (3) "the assessment substantially exceeded the true value in money of the property." *Id.* at 563, 215 S.E.2d at 762; *see also In re Appeal of IBM Credit Corp. (IBM Credit I)*, 186 N.C. App. 223, 226, 650 S.E.2d 828, 830 (2007) (citations omitted) (clarifying that the taxpayer's burden "is one of production and not persuasion"), *aff'd per curiam*, 362 N.C. 228, 657 S.E.2d 355 (2008). If the taxpayer successfully rebuts the initial presumption, the burden shifts back to the county to "demonstrate that its methods produce true values." *In re Appeal of Parkdale Mills*, 225 N.C. App. 713, 717, 741 S.E.2d 416, 420 (2013) (citing *In re Appeal of IBM Credit Corp. (IBM Credit II)*, 201 N.C. App. 343, 345, 689 S.E.2d 487, 489 (2009); *see also S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239 (explaining that the taxing authority has the final "burden of going forward with evidence and of persuasion").

A method of valuation is illegal if it does not result in "true value," as defined under N.C. Gen. Stat. § 105-283. *S. Ry.*, 313 N.C. at 181, 328 S.E.2d at 239 (citations omitted). Our decisions have further held that an illegal appraisal methodology is also arbitrary. *In re Appeal of Blue Ridge Mall LLC*, 214 N.C. App. 263, 269, 713 S.E.2d 779, 784 (2011); *In re Appeal of Lane Co.*, 153 N.C. App. 119, 124, 571 S.E.2d 224, 227 (2002).

In this case, the Commission concluded that "Corning's evidence from Mr. Stout, taken alone and by itself, tends to show that the County's methods are arbitrary or illegal . . . ." Mr. Stout's research revealed that "Corning is the only major company that still produces optical fiber in the United States and North America." The cost of labor has driven the majority of fiber optic manufacturers overseas, and even if Corning's facility was put on the market, those manufacturers "would not come here because [the cost] of labor is just too high." Based in part on the lack of market demand for fiber optics manufacturing facilities, Mr. Stout concluded that the highest and best use of the property, as vacant, would be future industrial use, and as improved, would be continued industrial use. He explained that

> [a]s improved, we realize that, you know, the highest and best use would be continued use as the fiber optic manufacturing plant, but under the market value premise, what we found was there is no demand for either building or buying a fiber optic manufacturing facility. We found no evidence in market in North America that there was a competitor who would be willing to come up and buy this plant for continued fiber optic manufacturing. . . . And there are other fiber optic producers, but no one of this magnitude.

While Mr. Stout appreciated the unique features of the improvements, he did not consider the property to be special-purpose property:

> [A]lthough there—this is a unique property, that the County considers this special purpose, it's really not. This is what we call a limited market property. There are adaptive reuse. They wouldn't level this if they left it. They would—someone would come in and use what we feel is the functional useable area of that, so we feel like the highest and best use as improved would be for continued industrial use.

Although the improvements would have to be retrofitted for a different use, Mr. Stout opined that the property would have value to an alternative industrial user:

> A: There would be a market for it at a certain price, which I believe the price that I put on it could be sold to an alternative user. And through my career, I've done a lot of adaptive reuse, and certainly this isn't a building that would be scrapped. It would be cost prohibitive. So the most likely alternative user, they'll find some industrial user at a price, and my sales reflected a much lower price than this. But there is a market for adaptive reuse, but they wouldn't use those other floors.
>
> Q: Would it be fair to say that these alternative users that you envision for the property would need to adapt it for their own use?
>
> A: Yes.
>
> Q: And would that mean they'd have to spend some money on it to make it useful to them?
>
> A: Most conversion of manufacturing plants, that's what we call limited market properties because all of them have to do that, all manufacturing in the first generation in specialized properties. The second generation will have to do certain gutting and retrofitting to meet their manufacturing processes.
>
> Q: Then, of course, after they do that, it really wouldn't be necessarily useful to another alternative user.
>
> A: Well, the next alternative user would do the same thing. They'll come and gut those things that don't work for

> them and convert it, and we have plenty of evidence of that market.
>
> Q: But once they do that, once they do that adaptation and spend that money, it would have value to them to be able to use it for the purpose for which they intended.
>
> A: Correct.
>
> Q: So do I understand you to be saying basically that this particular property just needs to be valued as a generic manufacturing or warehouse facility for tax purposes; is that correct?
>
> A: Well, under my understanding, the definition, the way I interpret it, it has to sell between a willing buyer and a willing—there has to have been a change. It's not to this specific user. It's not a use value or value of use. Under those premises, that's the way we valued it.

Under the assumption that the highest and best use would be for continued industrial use, Mr. Stout proceeded with his property analysis. He estimated that 536,285 square feet of the 1,208,996 gross square feet of the improvements was "functional rentable or usable area for adaptive reuse or alternative use," which included the lower level of the processing area and half of the second floor. A large portion of the facility was "vacant shell space": As of 1 January 2012, 38 percent of the gross square footage, and 34 percent of the total functional rentable area, was in shell condition. As of 1 January 2013, those estimates had been reduced to 26 percent and 31 percent, respectively, due to some additional up-fit.

Mr. Stout assigned no value to the third and fourth floors of the facility because "industrial users typically don't recognize multistory buildings . . . . And although there are some users that use second-level space, it's rare that you see any that are three and four stories . . . ." The property also had a "number of ancillary buildings that are used specifically for Corning's process which . . . would not have any value to any other user." Three different brokers agreed with Mr. Stout's opinion regarding the value of the multi-story design and ancillary buildings. The first broker "was not familiar with any recent multi-floor industrial sales." He would give "some value" to the second floor, "no value" to the third and fourth floors, and "little to no value" to the ancillary buildings in the rear of the site. The second broker opined that the "upper floors in [the] production warehouse would get no value on [the] resale market," and that the ancillary buildings "have little value." The third broker simply

stated, "Multi-story industrial buildings are functionally obsolete." Mr. Stout viewed the brokers' comments as "reflective of what's going on in the market for industrial properties."

Mr. Stout initially valued the property under all three methods of valuation, but ultimately used a blended cost-sales approach, assigning 75 percent of the weighted average to the cost and 25 percent to the sales comparison. He explained his consideration of these two approaches in his report:

> The cost approach is most reliable for newer properties that have no significant amount of accrued depreciation. The subject is not new construction, and there is a relatively active market for land sales in the area. The subject was specifically built for Corning, Inc. and has a number of building components that are not suitable for alternative industrial users. As a result, the property suffers from a significant amount of functional/external obsolescence. Although significant adjustments for functional/external obsolescence reduce the reliability and credibility of the approach, this approach would be given consideration due to the quality of the improvements.
>
> The sales comparison approach is most reliable in an active market when an adequate quantity and quality of comparable sales data are available. In addition, it is typically the most relevant method for owner-user properties, because it directly considers the prices of alternative properties with similar utility for which potential buyers would be competing. There is a reasonably active market for industrial properties, and this approach most closely reflects buyer behavior. Accordingly, the sales comparison approach is given weight in the value conclusion.

He did not give weight to the income approach, however, because "[a]n owner-user is the most likely purchaser of the appraised property, and the income capitalization approach does not represent the primary analysis undertaken by the typical owner-user."

Using his cost approach, Mr. Stout began with an estimated replacement cost of $75,702,482. He then subtracted $20,766,391 for age-life depreciation and $28,917,261 for functional and external obsolescence. After adding $3,850,000 for the land value, Mr. Stout valued the property at $29,870,000 as of 1 January 2012. He used the same formula to value the property at $35,300,000 as of 1 January 2013, which was slightly

higher due to interim up-fit. Under his sales comparison approach, Mr. Stout identified four transactions involving similar industrial properties in the region during the relevant time period. The sales indicated an average adjusted value of $33.00 per square foot. Recognizing once again the obsolescence associated with the multi-story structure and ancillary buildings, Mr. Stout applied the average rate to only the functional rentable area of 536,285 square feet. He made further adjustments for capital expenditures and arrived at the value of $15,870,000 and $16,040,000 for Tax Years 2012 and 2013, respectively. Finally, after assigning the appropriate weight to each approach, Mr. Stout valued the property at $26,370,000 for Tax Year 2012 and $30,490,000 for Tax Year 2013.

On more than one occasion at the hearing, Mr. Stout testified that he used the "true value" appraisal standard and that his valuation was "consistent with the concept of value-in-exchange." The following testimony shows that while he considered Corning's current use of the property in his analysis, he valued the property from the standpoint of a likely buyer:

> Q: Now, in your appraisal, you didn't really consider the use that it's presently being used for, did you?
>
> A: Well, of course, I did. That was in my replacement cost I did.
>
> Q: And presently it's being used by Corning—
>
> A: That's correct.
>
> Q: —is that correct? And it's being used for the same purpose for which it was constructed—
>
> A: That's correct.
>
> Q: —is that correct? And that is, in fact, the use that would be considered among all the other uses, is it not?
>
> A: Well, considering they're the only major employer or manufacturer of optical fiber, there are no other likely buyers out here for that type of use.
>
> . . . .
>
> Q: Well, wouldn't it be fair to say that the highest and best use of this property as of 2012 or 2013, either one, was the very use that was being made of it at that time? Wouldn't that be the highest and best use?

> A: Well, the purpose of true value is you're looking at that value in exchange, so I'm not looking at a value and use to Corning or a use value, who is that alternative user, were they willing to pay, so it has to be between a willing—and there are no potential buyers in North America we are aware of that are of this magnitude. There are other manufacturers, but none of this size.
>
> Q: Well, then, would it be fair to say that overall, your appraisal is for an alternative industrial user, not for Corning?
>
> A: That's correct.

Based on the foregoing, we conclude that Corning met its initial burden to produce competent, material, and substantial evidence tending to show that the County used an arbitrary or illegal method of valuation and the assessments substantially exceeded the true value of the property. Specifically, Mr. Stout's report and testimony tended to show that the property was not special-purpose property, but rather a "limited-market" property which had value to an alternative industrial user. At the same time, he acknowledged the obsolescence associated with the multi-story design, the improvements in shell condition, and the ancillary buildings. Most importantly, he priced the property based on its value in-exchange, recognizing that Corning's use of the facility was not a dispositive factor because there was no market demand for fiber optic manufacturing facilities.

B. The County's Burden

[2] Next, we must determine whether the County met its subsequent "burden of going forward with the evidence and of persuasion." *S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239. In this final stage of the burden-shifting framework, the critical inquiry is whether the County's valuation approach "is the proper means or methodology" to produce "true value" based on the characteristics of the subject property. *IBM Credit II*, 201 N.C. App. at 349, 689 S.E.2d at 491 (internal quotation marks omitted). The Commission has a duty " 'to hear the evidence of both sides, to determine its weight and sufficiency and the credibility of witnesses, to draw inferences, and to appraise conflicting and circumstantial evidence, all in order to determine whether the [County] met its burden.' " *Id.* (quoting *S. Ry.*, 313 N.C. at 182, 328 S.E.2d at 239). In this part of our discussion, we also address the County's challenges to Findings of Fact Nos. 15, 17–19 and 28 as being contrary to the evidence.

The Commission concluded that the County "did not carry its burden when it failed to demonstrate that its appraisal methodology produced true values." At the hearing, Mr. Weisner explained that when the facility closed in 2002, the County reduced the assessed value from $172 million to $51 million "because at that point in time it was a special purpose building that was no longer being used for its special purpose, so . . . [the] only thing you could do with it is adapt it to some other use." The County "looked at the possibility of having to sell it to a secondary user as opposed to looking at . . . the replacement cost to produce the fiber that it was designed to produce." When the facility resumed production, the County "took off all of the obsolescence that [it] applied earlier when [Corning] was out of business and there was no market for the fiber . . . and that allowed the value to float back up to a higher value." As Mr. Weisner confirmed, "the reason the value increased by almost three times was because Corning started using the facility again to manufacture product."

Relying solely on the cost approach, Mr. Weisner testified that the County did not assign any functional or economic obsolescence to the property in Tax Year 2012 or 2013. When asked how he would know what a willing buyer would pay for the subject property without factoring in obsolescence, Mr. Weisner testified that

> we're calling it a special purpose property, *so we're looking at any obsolescence that may occur due to . . . its ability to produce the product that it was designed to produce.* This is the most modern plant in the world that produces this particular type of fiber, and when you walk through this plant and you look at this plant, it is fully in operation, there's—equipment is covering all the floors, *it's being used exactly as it was designed to be used, so there was no, in our opinion, no functional obsolescence to the building.*

(Emphasis added.) Mr. Weisner also agreed with Commissioner Morgan, however, that obsolescence would be inherent to specialty property. When Commissioner Morgan asked how that obsolescence is measured in the County's system, Mr. Weisner explained he would adjust for functional obsolescence "if the plant stopped producing—if there was no longer any valid use for that building to produce its product that it was designed to produce, then that's the time that we would look at all the secondary uses that it could be put to, and we would—we certainly would increase its functional obsolescence."

In his appraisal report, Mr. Berkowitz referenced the uniform appraisal standard set forth in N.C. Gen. Stat. § 105-283 and offered the statutory definition of "true value." The subsequent paragraph in the appraisal, however, seems to add to that definition the following caveat:

> The most significant factor with respect to the subject is that a substantial portion of the improvements are specific to the operations of the property as a fiber optic manufacturing plant. We consider it unlikely that many of the physical characteristics of the primary building would be constructed for any other use. The "reasonable knowledge" as mentioned in the definition of true value is applicable to the current and historic use of the facility as a fiber optic manufacturing plant.

At the hearing, Mr. Berkowitz offered an explanation of the foregoing paragraph:

> A: That there are some small variances with respect to the definitions, and the one most pertinent with respect to the valuation is the latter half of that definition in saying that both the buyer and seller have a reasonable knowledge of all the uses to which the property is adapted and for which it's capable of being used.
>
> Q: And what does that mean to you?
>
> A: To me, *I think it identifies specifically special use properties in that if they are specifically designed for intended use and are being used as such, then it should be valued as such.*

(Emphasis added.)

Mr. Berkowitz and Mr. Harris determined that the highest and best use of the property would be "its continued use as a fiber optic manufacturing facility, with the limited possibility of expansion as market conditions improved." Their highest and best use analysis suggests that they reached this determination based on Corning's use of the property:

> The market for large manufacturing facilities is limited. However, the information provided by Corning with respect to new fiber optic cable manufacturing facilities indicates that the design of the improvements is somewhat outdated. *Regardless, the property owner continues to use the manufacturing portion of the property for its*

> *intended use. Therefore, the highest and best use of the property as improved is for continued use as a fiber optic manufacturing facility with the possibilities of expansion depending on market conditions.*

(Emphasis added.) At the hearing, Mr. Berkowitz confirmed the focus of the County's highest and best use analysis: "[I]n consideration of how it was used for the special purpose for which it was designed, the highest and best use would be for continued use as a fiber optic manufacturing facility." If not simultaneously, Mr. Berkowitz subsequently concluded that the property was special-purpose property because "it has unique design characteristics that are specific to the intended use that it is being used for."

Nevertheless, the County takes exception to the Commission's finding that "when relying on the cost approach, Cabarrus County classified the subject property as a special-purpose property," insisting that it "considered" the property to be "special-purpose" but did not "classify" the property as such for special treatment under its schedule of values. As Corning correctly notes, however, this argument is semantic rather than substantive. In context, the Commission's finding explains how the County came to rely on the cost approach. Ultimately, the record amply demonstrates that the County determined the property was special-purpose property, which helped form the foundation for its methodology. Mr. Weisner stated, "[W]e feel like it's a special purpose property and the best approach is the cost approach." Mr. Berkowitz testified, "Special purpose properties by definition have unique characteristics for which they're designed for their intended use. The most applicable methodology with respect to valuing those properties is the cost approach." Mr. Harris's appraisal report similarly concludes, "The subject is considered a 'special purpose' property. As such, the cost approach is considered the most reliable indicator of value. For this appraisal, we include a cost approach only."

We also acknowledge that to some extent it may be true, as the County contends, that it used the cost approach due to the lack of comparable sales data. By insisting that the highest and best use was for manufacturing optical fiber, however, the County pigeon-holed the property into a market with no user-owner demand, and thus, no comparable sales. Mr. Weisner testified that "there's not really good comparables to tell you the true value of this property as it's being used as a fiber optics plant. So then that drives us to the cost approach to look at—because it is special purpose." Mr. Berkowitz's testimony also demonstrates how his highest and best use analysis effectively precluded consideration of alternative use:

A: We did consider the sales comparison approach, but we felt that the sales that were in the market, none of them included fiber optic manufacturing facilities, and that any adjustments would be misleading as far as the conclusions from a sales comparison approach.

Q: You just looked at fiber optics?

A: That's correct.

Q: And the reason for that is?

A: Because in using sales that were not this design would be misleading.

Q: Do you consider there to be alternate users for this property?

A: Not under its highest and best use.

Q: Do you consider there to be any way that this property could be positioned in the market to be used by others than a fiber optic manufacturer?

A: It could be.

Q: What would be some of those things that could be done to make it usable for others?

A: Well, usable for others?

Q: For other manufacturers.

A: That would be inconsistent with its highest and best use.

Q: The highest and best use is as fiber optic manufacturing?

A: Yes.

Q: What analysis did you do to determine that this was the most profitable return on this use of this property, maximally productive, the standard, in other words?

A: Yes. It would be the highest and best use because it would return—make the highest return to the investor. If you're using it and adapting it for another use, inherently there would be more economic and functional obsolescence of the building.

> Q: Are you valuing this property, sir, to Corning, Incorporated?
>
> A: I'm valuing it under its highest and best use.

While the County maintains that the highest and best use of the property was for manufacturing optical fiber, each of the County's experts recognized that there was no market for the same. Mr. Harris testified that he researched national markets for fiber optics manufacturing facilities in preparing the appraisal report, and when asked if there was a national market for those facilities, he responded, "No." Mr. Berkowitz reached the same conclusion, though he posited that the property would still be attractive to "an investor." When asked if he conducted any research to determine whether there had been investor acquisitions of similar "large industrial facilities," Mr. Berkowitz admitted, "I didn't." In a similar effort to defend the County's position, Mr. Weisner's testimony also fell short:

> Q: As you sit here today before the Commission, is it the position of the County that the value that a willing buyer would pay for this property as of 1/1/2012 is $147 million and change?
>
> A: Yes. To use it as a fiber optics manufacturing plant, yes.
>
> Q: And is it the position of the County that a willing buyer would pay approximately $152 million for the property as of January 1, 2013?
>
> A: Yes.
>
> Q: Okay. And can you identify for us who that buyer is, hypothetical or real, that would pay that amount of money for this facility?
>
> A: Somebody that wanted to use the facility for the purpose in which it was intended to be used.
>
> Q: And have you identified anybody actually active in the economy that would want to buy this facility for that specific use you just identified?
>
> A: I have not.

Based on the foregoing, we conclude that the Commission's findings are supported by competent, material, and substantial evidence, and the Commission's decision has a rational basis in the evidence. The evidence shows that the County's highest and best use analysis was

based on Corning's use of the property, rather than its value to a willing buyer. The same subjectivity was evident in the County's classification of the property as special-purpose property. Consequently, the County used the cost approach but failed to account for obsolescence which, in the Commission's discretion, should have been deducted in light of Mr. Stout's testimony. Moreover, while the County determined the highest and best use of the property was for manufacturing optical fiber, the testimony from its own experts reveals its failure to use a valuation method that reflects what willing buyers in the market for fiber optics manufacturing facilities would pay for the property. *See Belk-Broome*, 119 N.C. App. at 474, 458 S.E.2d at 923–24 (concluding that where property's highest and best use was "its present use as an anchor department store," the County was "required to use a valuation methodology that reflects what willing buyers in the market for anchor department stores will pay for the subject property").

C. Affected by Other Errors of Law

[3] The County also argues that the Commission's Final Decision was affected by errors of law. Throughout its brief, the County maintains that Corning's valuation, as adopted by the Commission, is contrary to the existing law because it did not appraise the property "based on what is there and how it is being used." Instead, it is "based on a hypothetical, potential generic industrial buyer purchasing a closed and vacant property."

The County insists on valuing the property by its value in-use despite our uniform appraisal standard for valuation at fair market value. N.C. Gen. Stat. § 105-283. Value in-use is relevant to fair market value in that an owner's current use of the property may be indicative of its economic utility, and therefore, its value to a potential buyer. Our statutes actually direct appraisers to consider the adaptability of real property and improvements for commercial, industrial, or other uses. N.C. Gen. Stat. § 105-317(a)(1) & (2) (2015). Inevitably, this also "requires consideration of its declining attractiveness for such use." *Prop. in Forsyth Cnty.*, 282 N.C. at 78, 191 S.E.2d at 697. As the evidence overwhelmingly shows that the property could not have been sold as a fiber optics manufacturing facility, Corning's current use of the property has no bearing on its value to a potential buyer. *See Parkdale Mills*, 225 N.C. App. at 720, 741 S.E.2d at 421–22 (explaining that the Commission's emphasis on the taxpayer's current use of the facility implicitly allowed the County to value the property at its subjective worth to the taxpayer, which "is obviously not the same as adequately determining the objective value of these properties to another willing buyer.")

[4] Next, the County argues that case law requires special-purpose facilities to be valued at cost, and therefore, the Commission erred as a matter of law in adopting Mr. Stout's blended cost-sales approach to arrive at its final value.

In support of its argument, the County cites to the Commission's findings in *In re Appeal of Federal Reserve Bank of Richmond*, 92 PTC 152 (1994), a prior decision which was not appealed to this Court. In that case, the Commission found that "[b]ased upon the specific features of this facility, the highest and best use of the subject property is as a special purpose building," and "[s]pecial purpose buildings are most accurately appraised at a cost of reproduction or replacement." Even assuming that decision has precedential value here, which it does not, the County's attempt to analogize the facts of that case to those *sub judice* is misplaced. Here, the Commission recognized that one of the flaws in the County's cost approach method was its initial designation of the property as special-purpose property. In arguing that the Commission failed to follow case law requiring special-purpose property to be valued at cost, therefore, the County relies on a faulty premise, i.e., that this was specialty property.

No other case offered by the County requires special-purpose property be valued exclusively at cost. The County cites to *In re Appeal of Phillip Morris*, 130 N.C. App. 529, 503 S.E.2d 679 (1998), where the taxpayer argued unsuccessfully that the appraiser's cost approach method was not designed to determine market value of the specialty property based on a hypothetical arms-length transaction. *Id.* at 537, 503 S.E.2d at 684. This Court noted that experts from both parties agreed, "where, as here, evidence of comparable sales is not readily available, the cost approach is the most accepted method of determining true value." *Id.* Contrary to the County's assertion, that statement was not a holding of our Court; it was simply a fact agreed upon by the expert witnesses. Nowhere in *Phillip Morris* does this Court hold that specialty property must be valued exclusively at cost.

The County's reliance on *Belk-Broome* fares no better. While *Belk-Broome* noted instances where the cost approach may be appropriate, e.g., "for specialty property or newly developed property," we further explained that

> when applied to other property, the cost approach receives more criticism than praise. For example, the cost approach's primary use is to establish a ceiling on valuation, rather than actual market value. It seems to be

> used most often when no other method will yield a realistic value. The modern appraisal practice is to use cost approach as a secondary approach "because cost may not effectively reflect market conditions."

Belk-Broome, 119 N.C. App. at 474, 458 S.E.2d at 924 (citations omitted). Again, nowhere in *Belk-Broome* does this Court hold that specialty property must be valued exclusively at cost. Our statutes require that property be assessed at its true value, N.C. Gen. Stat. § 105-283, and while experts may opine that the cost approach is an appropriate method for assessing true value of a specialty property, our case law does not necessarily demand the same. *See Greens of Pine Glen*, 356 N.C. at 648, 576 S.E.2d at 320 ("In light of the innumerable possible situations that may arise, authorities that have the obligation of assigning a value to land sensibly are given discretion to apply the method that most accurately captures the 'true value' of the property in question.").

In addition, the County challenges the Commission's finding that the County's application of its schedule of values, standards, and rules was flawed because it "provided no category for the assessment or appraisal of the subject facility as special-purpose property." According to the County, there is no factual basis for this assertion and no support for it in the law.

Corning challenged the assessments based, *inter alia*, on the County's failure to follow the uniform appraisal methods and its schedule of values. N.C. Gen. Stat. § 105-317 states that "it shall be the duty of the assessor to see that . . . [u]niform schedules of values, standards, and rules to be used in appraising real property at its true value . . . are prepared and are sufficiently detailed to enable those making appraisals to adhere to them in appraising real property." N.C. Gen. Stat. § 105-317(b)(1) (2015). The County's schedule of values, standards, and rules, however, provides no guidance for the appraisal or assessment of special-purpose property. While the subheading in Chapter 9—"valuation of special properties"—seems promising, it describes only how the County values mobile home parks and cemeteries. At the hearing, when asked if there was "anything in the County's schedule of values that's specific to what the County has termed special purpose properties," Mr. Weisner replied, "I don't believe there is." He also testified that due to the superadequacy and obsolescence associated with technology changes, the County "appraise[d] it as a heavy manufacturing building. So instead of trying to develop a schedule of values on this fiber optics building at $420 a square foot, we chose to price them at our base price for an

excellent quality heavy manufacturing facility." Accordingly, we reject the County's argument.

[5] Turning now to the County's final argument, the County challenges Mr. Stout's opinion regarding the highest and best use of the property, which was implicitly adopted by the Commission. According to the County, the Commission's finding as to the highest and best use of the property is "fatally flawed" for three reasons.

First, the County avers that the Commission's finding does not follow the law as enunciated in *Belk-Broome*, where the parties agreed that the highest and best use of the subject property was "its present use as an anchor department store." *Belk-Broome*, 119 N.C. App. at 474, 458 S.E.2d at 923. It is not clear what "enunciated law" the County is referencing. But to the extent the County contends that this factual stipulation should be treated as a rule of law, we disagree. We see no basis in *Belk-Broome* or elsewhere to hold that current use necessarily equates to highest and best use, especially under the facts of this case.

Second, the County argues that if the highest and best use of the facility is a vacant industrial facility, then the up-fit would have no additional value to an alternate industrial user. According to the County, therefore, the discrepancy between Mr. Stout's assigned values for Tax Years 2012 and 2013 is further evidence that the highest and best use of the property is its current use as a fiber optics manufacturing facility. This argument is not based on legal error. Instead, the County is asking this Court to reweigh the evidence of the highest and best use. It is the Commission's duty, however, to resolve conflicts in the evidence and weigh the credibility of the witnesses. *Rainbow Springs*, 79 N.C. App. at 343, 339 S.E.2d at 686. Because "[t]he Commission's judgment 'as between two reasonably conflicting views' is supported by substantial evidence', we will not overturn its decision on this ground. *Id.* (quoting *Thompson*, 292 N.C. at 410, 223 S.E.2d at 541).

Third and finally, the County claims that if the highest and best use of the property is to manufacture optical fiber, then Corning would not sell the property for any other use unless it was under duress. As such, it would not be a "willing seller" as required by N.C. Gen. Stat. § 105-283. The County ignores the fact that the highest and best use, as found by the Commission, is future industrial use. It disregards the evidence which amply demonstrates there is no market for a fiber optic manufacturing facility in North America, much less in North Carolina. And it speculates that Corning would be a "willing seller" if and only if it sold the property in a market with no willing buyer. There is no support for this argument in the law or the facts of this case.

III. Conclusion

Based on the foregoing, we conclude that the Commission's Final Decision is supported by competent, material, and substantial evidence in view of the whole record, and was not affected by errors of law. The Final Decision is affirmed.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

IN THE MATTER OF CHRISTOPHER KORFMANN

No. COA15-1005

Filed 7 June 2016

1. Contempt—required notice—not given

The trial court erred by finding a juror in contempt for using his cell phone, contrary to instructions, where the court did not give the juror the required notice.

2. Contempt—confiscated cell phone—return—request and refusal required for appellate action

The Court of Appeals could not order returned a cell phone confiscated from a juror until the juror applied for his phone's release and was refused.

Appeal by Christopher Korfmann from Order entered 10 June 2015 by Judge Milton F. Fitch, Jr. in Wilson County Superior Court. Heard in the Court of Appeals 9 March 2016.

Womble Carlyle Sandridge & Rice, LLP, by Brent F. Powell and James A. Dean.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly N. Callahan, for the State.

ELMORE, Judge.

Christopher Korfmann (appellant) appeals from the trial court's order finding him in direct criminal contempt for using a cell phone

during jury deliberations and sentencing him to thirty days in prison. After careful consideration, we reverse and vacate the order.

I. Background

On 8 June 2015, appellant was selected to serve as a juror for a civil trial in Wilson County Superior Court. After the trial and during jury deliberations, the trial judge received a note from the jury room. As a result, he recalled the jury to the courtroom and asked the foreperson, who happened to be appellant, "Was a cell phone utilized by one of the jurors in this matter, yes or no?" Appellant responded, "Yes . . . That was myself." After a bench conference with the attorneys, the following colloquy took place:

> THE COURT: Sir, were you using that cell phone during this trial?
>
> THE FOREPERSON: No, sir.
>
> THE COURT: How was the cell phone utilized?
>
> THE FOREPERSON: Yesterday when I left the courthouse.
>
> THE BAILIFF: Stand up, sir.
>
> (Foreperson stood.)
>
> THE FOREPERSON: Yes, sir. Yesterday when I left the courthouse I went to lunch and while I was at lunch I used the note taking program on my cell phone to record my notes because I didn't have a piece of paper to write down.
>
> THE COURT: Your notes, where did the notes come from?
>
> THE FOREPERSON: The notes, the things that I wanted to remember from the trial just so I could think about it and that I wouldn't forget if I had—there was a few questions that I had that I wanted to ask today during deliberation and I wrote down those questions that I wanted to ask so I wouldn't forget.
>
> THE COURT: And who were you going to ask those questions of?
>
> THE FOREPERSON: They were the questions I was planning to ask you, sir.
>
> THE COURT: You were going to ask me the questions?

THE FOREPERSON: Well, no. I was going to ask the Court because they were questions I didn't feel were answered during—

THE COURT: Do you understand what your function is as a juror?

THE FOREPERSON: Yes, sir.

THE COURT: So why would you have these questions to ask me, the Court?

THE FOREPERSON: Well, there were—perhaps I misspoke. They were questions that I had about the case, that I wrote down the questions simply because I didn't have a pen and paper to write down the questions and it was more, it was, aside from questions it was things that I wanted to remember that—

THE COURT: Did you hear my instruction that it is your duty to recall and remember?

THE FOREPERSON: I did, sir, yes.

THE COURT: All right. Have a seat.

(Foreperson sat down.)

THE COURT: Come.

([The attorneys] approached the bench and a discussion was held off the record.)

THE COURT: Madam Court Reporter, for the record, at the beginning of this trial the parties agreed further and stipulated further that the jury verdict could go down to ten; thus I did not pick an alternate.

Because of the developments as I understand the developments to have occurred in this jury room in this matter, that is, an individual utilized a cell phone for the purposes of questions, answers, notes or whatever, and then informed the Court that the purpose of his notes were to pose questions to the Court when the Court has made it crystal clear that the jury is to rely on their recollection, not their notes, not a cell phone, but their recollection. And then come to find that the party who had utilized technology turns out to be the Foreperson which cause [sic] some problems in the jury room; thus how I got the issue.

> I am going to declare a mistrial in this matter. And this matter will have to be tried again.
>
> It is the Court's responsibility to avoid impropriety as well as the appearance of impropriety. The court system through its citizens that this court system belongs to oftentimes gets a black eye from citizens who are not willing to participate in the court system and to follow the rules that are outlined by them.
>
> This Court takes the strong position that technology is not to be utilized by jurors and, in fact, this jury has been warned several times not to use.
>
> In my opinion the utilization by the juror is blatantly disrespecting the Court's order not to use.
>
> Sir, I think that what I am going to do with you is I am going to send you to Wilson County Jail for 30 days for failing to follow the order given to you by this Court.
>
> The ladies and gentlemen of this jury are now excused. You can get a certificate as to where you have been for the last several days. You are excused.
>
> This gentleman is in your custody.

A "Direct Criminal Contempt/Summary Proceedings/Findings and Order" was entered that same day stating the following:

> The court finds beyond a reasonable doubt that during the proceeding the above contemnor willfully behaved in a contemptuous manner, in that the above named contemnor did
>
> DEFENDANT WAS A JUROR IN THE MIDDLE OF DELIBERATIONS AND USED HIS CELL PHONE AFTER BEING INSTRUCTED NOT TO DO SO.
>
> The undersigned gave a clear warning that the contemnor's conduct was improper. In addition, the contemnor was given summary notice of the charges and summary opportunity to respond.
>
> The contemnor's conduct interrupted the proceedings of the court and impaired the respect due its authority.
>
> Therefore, it is adjudged that the above named contemnor is in contempt of court. It is ordered that the contemnor . . .

be imprisoned for a term of 30 days in the custody of the Sheriff.

Appellant was taken to the Wilson County Jail where he stayed for six nights before being released on bail. According to appellant, upon his release all of his personal belongings were returned to him with the exception of his phone. Appellant filed notice of appeal on 15 June 2015 and a Motion for Appropriate Relief (MAR) on 19 June 2015. As of the filing of appellant's brief on 7 October 2015, the trial court had not scheduled a hearing for the MAR.

II. Analysis

[1] "[O]ur standard of review for contempt cases 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. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008) (quoting *State v. Simon*, 185 N.C. App. 247, 250, 648 S.E.2d 853, 855 (2007)).

N.C. Gen. Stat. § 5A-11 provides a list of conduct that constitutes criminal contempt. N.C. Gen. Stat. § 5A-11(a)(1)–(10) (2015). Although the trial court's order does not specify which subsection applies, it appears that the court based its order on section 5A-11(a)(3), which states that criminal contempt is the "[w]illful disobedience of, resistance to, or interference with a court's lawful process, order, directive, or instruction or its execution." N.C. Gen. Stat. § 5A-11(a)(3) (2015).

Direct criminal contempt occurs when the act "(1) [i]s committed within the sight or hearing of a presiding judicial official; and (2) [i]s committed in, or in immediate proximity to, the room where proceedings are being held before the court; and (3) [i]s likely to interrupt or interfere with matters then before the court." N.C. Gen. Stat. § 5A-13(a) (2015). "Any criminal contempt other than direct criminal contempt is indirect criminal contempt and is punishable only after proceedings in accordance with the procedure required by G.S. 5A-15." N.C. Gen. Stat. § 5A-13(b).

On appeal, appellant submits a number of challenges to the trial court's order.[1] Assuming without deciding that appellant engaged in

1. Appellant argues that he did not violate a court process, order, directive, or instruction; the trial court did not instruct him not to take or use notes; the trial court did not instruct him that he could not use his phone during recesses or deliberations; the evidence does not support the finding he actually used his phone during deliberations; the trial court failed to make the requisite finding of willfulness; and he did not engage in direct criminal contempt.

direct criminal contempt, we hold that the trial court failed to follow the requirements of N.C. Gen. Stat. § 5A-14 and the order must be vacated. Thus, we do not reach each of appellant's arguments.

Appellant argues that "the process used to convict him fell short of the requirements of North Carolina law."

N.C. Gen. Stat. § 5A-14 allows a judge to "summarily impose measures in response to direct criminal contempt[.]" N.C. Gen. Stat. § 5A-14(a) (2015). Before imposing measures in response to direct criminal contempt, though, "the judicial official must give the person charged with contempt summary notice of the charges and a summary opportunity to respond and must find facts supporting the summary imposition of measures in response to contempt. The facts must be established beyond a reasonable doubt." N.C. Gen. Stat. § 5A-14(b) (2015). This Court has previously noted that "the requirements of [N.C. Gen. Stat. § 5A-14] are meant to ensure that the individual has an opportunity to present reasons not to impose a sanction." *In re Owens*, 128 N.C. App. 577, 581, 496 S.E.2d 592, 594 (1998). Moreover, "imprisonment may not be imposed for criminal contempt, whether direct or indirect, unless: (1) The act or omission was willfully contemptuous; or (2) The act or omission was preceded by a clear warning by the court that the conduct is improper." N.C. Gen. Stat. § 5A-12(b) (2015).

In *Peaches v. Payne*, this Court concluded that "the trial court failed to follow the procedure mandated by N.C. Gen. Stat. § 5A-14(b)," and as a result we reversed the finding of contempt. 139 N.C. App. 580, 587, 533 S.E.2d 851, 855 (2000). We reasoned, "The transcript reveals that the court advised contemnor that, because he had questioned the rulings of the court and shown disrespect for the court, he was in the bailiff's custody. Court was immediately recessed without contemnor having been given an opportunity to present reasons not to impose a sanction." *Id.* (quotations omitted).

Here, like in *Peaches*, the transcript shows that the trial court did not advise appellant that he was being charged with contempt and appellant was not provided an opportunity to respond to the charge. Instead, the trial court stated, "Sir, I think that what I am going to do with you is I am going to send you to Wilson County Jail for 30 days for failing to follow the order given to you by this Court." The trial court immediately excused the other jurors, told the bailiff that appellant was in his custody, and announced that court was adjourned *sine die*.

The trial court did not give appellant the necessary "summary notice of the charges and a summary opportunity to respond" before imposing

measures under N.C. Gen. Stat. § 5A-14. The State's argument that appellant "was given notice and an opportunity to explain his actions" is not supported by the transcript. Although appellant was able to respond to the trial judge's preliminary questions, appellant was not given an opportunity to respond to the charge. *See* N.C. Gen. Stat. § 5A-14 (2015). Accordingly, because the trial court failed to comply with the statutory requirements of N.C. Gen. Stat. § 5A-14, we reverse and vacate the contempt order.

In *Peaches*, we stated, "Trial judges must have the ability to control their courts. However, because a finding of contempt against a practitioner may have significant repercussions for that lawyer, judges must also be punctilious about following statutory requirements." 139 N.C. App. at 587, 533 S.E.2d at 855. We point out that a finding of contempt against a citizen, attempting to fulfill his civic duty to serve as a juror for the first time, along with a thirty-day jail sentence, may also have significant repercussions.

While the presiding judge is given large discretionary power as to the conduct of a trial, we note that specifically instructing the jury as to certain discretionary decisions may help jurors properly fulfill their role in court. For instance, North Carolina Pattern Jury Instruction 100.70, "Taking of Notes by Jurors," states the following:

> *While the Rules of Civil Procedure have no statutory analogue to G.S. § 15A-1228, which permits jurors in a criminal case to make notes and take them into the jury room (except where the judge on his own motion or the motion of a party rules otherwise in his discretion), note-taking in civil cases has been left, as a matter of practice, to the sound discretion of the trial judge.*
>
> [*If Denied*: In my discretion, members of the jury, you will not be allowed to take notes in this case.]
>
> [*If Allowed*: In my discretion, you will be allowed to take notes in this case.
>
> When you begin your deliberations, you may use your notes to help refresh your memory as to what was said in court. I caution you, however, not to give your notes or the notes of any of the other jurors undue significance in your deliberations. All of the evidence is important. Do not let note-taking distract you. Listen at all times intently to the testimony.

> Any notes taken by you are not to be considered evidence in this case. Your notes are only to assist your memory and are not entitled to any greater weight than the individual recollections of other jurors.]

N.C.P.I.–Civil 100.70 (2004).

While "[o]ur trial court judges must be allowed to maintain order, respect and proper function in their courtrooms[,]" *State v. Randell*, 152 N.C. App. 469, 473, 567 S.E.2d 814, 817 (2002), they must also follow all statutory requirements before imposing a finding of contempt. *See Peaches*, 139 N.C. App. at 587, 533 S.E.2d at 855.

[2] Appellant also claims that, even if he could have been properly held in contempt, confiscation of his phone exceeds the sanctions allowed under North Carolina law. In appellant's affidavit, he states,

> After telling me he was sending me to jail, the Judge dismissed everyone. The bailiff took me to a room behind the courtroom. Eventually, I was handcuffed and shackled around my ankles and waste. All my personal belongings were taken. I was told everything would be taken to the jail, other than my phone. The phone was placed in an envelope and put in a locked box in the room. The bailiff told me the Judge would keep the phone and was still deciding whether to destroy it.

The record is devoid of any attempts by appellant to recover his phone. Until appellant applies for his phone's release and is refused, we cannot order the phone to be returned to appellant. *See* N.C. Gen. Stat. § 15-11.1(a) (2015).

III. Conclusion

Because appellant was not given summary notice of the charge against him and was not given an opportunity to respond to the charge, we reverse and vacate the trial court's order.

REVERSED AND VACATED.

Judges McCULLOUGH and INMAN concur.

IN RE O.D.S.

[247 N.C. App. 711 (2016)]

IN THE MATTER OF O.D.S.

No. COA15-1148

Filed 7 June 2016

Termination of Parental Rights—oral statement of judgment—ground omitted—included in written order

Where the trial court's written order terminated respondent-father's parental rights based on the grounds of neglect and dependency, the Court of Appeals held that the trial court did not err even though it did not orally find the ground of dependency at the conclusion of the adjudication portion of the hearing.

Appeal by Respondent-Father from order entered 11 August 2015 by Judge Beverly Scarlett in District Court, Orange County. Heard in the Court of Appeals 9 May 2016.

Holcomb & Cabe, LLP, by Carol J. Holcomb and Samantha H. Cabe, for Petitioner-Appellee Orange County Department of Social Services.

Richard Croutharmel for Respondent-Appellant Father.

Winston & Strawn LLP, by Amanda L. Groves and Kobi Kennedy Brinson, for Guardian ad Litem.

McGEE, Chief Judge.

Respondent-Father appeals from an order terminating his parental rights as to his minor child O.D.S. We hold the trial court did not err in terminating Respondent-Father's parental rights on the ground of dependency, even though the trial court did not orally find that ground at the conclusion of the adjudication portion of the hearing, and we affirm the trial court's order.

The Orange County Department of Social Services ("DSS") obtained non-secure custody of O.D.S. and filed a petition on 25 February 2014, alleging he was a neglected and dependent juvenile. The trial court held a hearing on 3 April 2014 and entered an order on 8 May 2014, in which it adjudicated O.D.S. to be a neglected juvenile, and continued custody with DSS. By order entered 17 November 2014, the trial court relieved DSS from having to make further reunification efforts with

Respondent-Father and set the permanent plan for O.D.S. as reunification with his mother ("Mother"). Mother, however, failed to meet the goals of her case plan and, by order entered 20 February 2015, the trial court relieved DSS from having to make further reunification efforts with Mother, set the permanent plan for O.D.S. as adoption, and ordered DSS to file motions to terminate Respondent-Father's and Mother's parental rights as to O.D.S.[1]

DSS subsequently filed a motion to terminate Respondent-Father's parental rights, alleging grounds of neglect and dependency. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (6) (2015). The trial court held a hearing on the motion on 16 July 2015, and entered an order on 11 August 2015 terminating Respondent-Father's parental rights as to O.D.S. In that order, the trial court found the existence of both grounds alleged in the motion and concluded that termination of Respondent-Father's parental rights was in O.D.S.'s best interests. However, at the conclusion of the adjudication portion of the termination hearing, the trial court stated it found that DSS had proven neglect as a ground for terminating Respondent-Father's parental rights, but the trial court did not reference the ground of dependency. Respondent-Father filed notice of appeal on 17 August 2015.

Respondent-Father argues the trial court erred in finding that the ground of dependency existed to terminate his parental rights. Respondent-Father contends the trial court erred because, at the conclusion of the adjudication portion of the hearing, the trial court did not orally state it was finding dependency as a ground for termination, but included that ground in the written order entered 11 August 2015. We disagree.

Specifically, Respondent-Father contends that, because the trial court did not state at the conclusion of the adjudication hearing that DSS had proven the ground of dependency pursuant to N.C. Gen. Stat. § 7B-1111(a)(6), it was precluded from finding dependency as a ground to terminate Respondent-Father's parental rights in its written order. We note that Respondent-Father does not make any argument challenging the adjudication of dependency based upon a lack of evidence or insufficient findings of fact. Respondent-Father's argument is entirely predicated on his contention that the trial court was precluded from including a ground in its written order that it did not address when rendering

1. The motion to terminate the parental rights of Mother was heard at a separate hearing, and she is not a party to this appeal.

judgment in open court. Therefore, our review is limited to whether the trial court was precluded from basing termination of Respondent-Father's parental rights on the ground of dependency when it did not state dependency as a ground for termination in open court.

N.C. Gen. Stat. § 7B-1109 requires the trial court to do the following in response to any adjudication hearing deciding whether grounds exist to terminate a person's parental rights:

> The court shall take evidence, find the facts, and *shall adjudicate the existence or nonexistence of any of the circumstances set forth in G.S. 7B-1111 which authorize the termination of parental rights of the respondent.* The adjudicatory order shall be reduced to writing, signed, and entered no later than 30 days following the completion of the termination of parental rights hearing.

N.C. Gen. Stat. § 7B-1109(e) (2015). Thus, the trial court is required to address every ground brought forth in a petition or motion to terminate a parent's rights to his or her child, and make a determination for *every* ground alleged, whether the petitioning party has proved that ground, or failed to prove that ground. More generally, our Supreme Court has held that Rule 52 of the North Carolina Rules of Civil Procedure

> imposes three requirements on the court sitting as finder of fact: it must (1) find the facts on *all* issues joined in the pleadings; (2) *declare the conclusions of law arising from the facts found*; and (3) *enter judgment accordingly*. The court logically must comply with these three requirements in the above order. Thus, under Rule 58 there can be no valid entry of judgment absent necessary findings.

Stachlowski v. Stach, 328 N.C. 276, 285, 401 S.E.2d 638, 644 (1991) (citations omitted) (emphasis added). We note that N.C. Gen. Stat. § 7B-1109 includes no requirement that the trial court render its decisions in open court. *See, e.g.*, *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 208, 215, 580 S.E.2d 732, 737 (2003) (The trial court rendered judgment in open court granting summary judgment in favor of three of four defendants, stating: "I'm going to review the documents as to [the fourth defendant] and rule on that later."[2] The trial court then entered a written order in which it granted summary judgment in favor of all four defendants.).

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2. This citation comes from the hearing transcript in *Draughon*.

In the present case, DSS moved to terminate Respondent-Father's parental rights based upon the grounds of neglect, N.C. Gen. Stat. § 7B-1111(a)(1), and dependency, N.C. Gen. Stat. § 7B-1111(a)(6). These grounds were considered at the 16 July 2015 termination hearing. The trial court was therefore required to address both grounds, and enter findings of fact, conclusions of law, and rulings for each ground. In what appears to have been an oversight, the trial court did not address the ground of dependency when it rendered judgment in open court. Neither Respondent-Father, DSS, nor O.D.S.'s guardian *ad litem* brought this oversight to the attention of the trial court. However, the trial court's written order, entered 11 August 2015, complied with the dictates of N.C. Gen. Stat. § 7B-1109(e) by making adjudicatory determinations for both the grounds for termination that had been brought before it.

Because many of our appellate decisions addressing these issues were based upon rules that have since changed, it is important to note how entry of judgment and notice of appeal from civil judgments have changed in light of revisions to Rule 58 of the North Carolina Rules of Civil Procedure, which became effective 1 October 1994 for "all judgments subject to entry on or after that date." 1994 N.C. Sess. Laws, Ch. 594; *Capital Outdoor Advertising v. City of Raleigh*, 337 N.C. 150, 159, 446 S.E.2d 289, 295 (1994). Prior to the 1994 amendments, judgments and orders could be entered by the clerk simply making a notation of the orally rendered judgment. The trial court would then, after official entry of judgment, "make a written judgment that conform[ed] in general terms with [the] oral judgment pronounced in open court." *Morris v. Bailey*, 86 N.C. App. 378, 389, 358 S.E.2d 120, 126 (1987) (citation omitted). Entry of judgment based upon oral rendition of judgments is no longer allowed in civil matters; currently, judgments and orders are only "entered when [they are] reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2015). The pre-1994 provisions of Rule 58 are discussed in *Morris*:

> Defendant's final argument is that the trial judge erred in signing the judgment. Here, the trial court announced the general terms of its judgment in open court. Defendant gave oral notice of appeal in open court immediately after the court announced its judgment.[3] Five days later, the

3. "Prior to 1 July 1989, notice of appeal in civil actions could be given either in writing or orally in open court. Appellate Rule 3(a), however, was amended on 8 December 1988 to provide that an appeal in a civil action is taken, effective for all judgments entered on or after 1 July 1989, by filing notice of appeal with the clerk of superior court and

court executed a written judgment. Defendant contends the trial judge was not permitted to execute any written judgment that was different in any manner from the announcement of the judgment made in open court.

Defendant's contention hinges on our interpretation of the trial court's actions under Rule 58 of the North Carolina Rules of Civil Procedure, N.C.G.S. Sec. 1A-1, Rule 58:

> Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.
>
> In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.
>
> In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk's notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

Here, the verdict was not for "only a sum certain or cost or that all relief" be denied, but the trial judge awarded attorney fees and relief other than damages. Although the trial judge announced his general holdings at the end of the trial, he did not direct the clerk to make any entry in

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serving copies thereof upon all other parties." *Currin-Dillehay Bldg. Supply v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683 (1990). Rule 3(a) also applies to orders. *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803-04, 486 S.E.2d 735, 737-38 (1997).

> the record. Therefore, under the second paragraph of Rule 58, the judgment was not entered in open court and the written judgment of 9 June 1986 is the judgment for the purposes of the Rules of Civil Procedure under the third paragraph of Rule 58. The written judgment did not determine any issue different from those dealt with in the judgment announced in open court. Therefore, defendant's oral notice of appeal, though given in open court prior to the entry of judgment, was effective to give notice of appeal to the written judgment under N.C.G.S. Sec. 1-279(a).
>
> Even if the judgment had been entered in open court, the subsequent written judgment is not invalid. A trial court has the authority under N.C.G.S. Sec. 1A-1, Rule 58 to make a written judgment that conforms in general terms with an oral judgment pronounced in open court. A trial judge cannot be expected to enter in open court immediately after trial the detailed findings of fact and conclusions of law that are generally required for a final judgment. If the written judgment conforms in general terms with the oral entry, it is a valid judgment. A notice of appeal entered in open court immediately after entry of the oral judgment does not remove the authority of the trial court to enter its written judgment which conforms substantially with the court's oral announcement. Here, the written judgment conforms in general terms with the oral announcement of the judgment in open court and therefore, *even if the judgment had been entered in open court*, the subsequent written judgment is valid.[4]

Morris, 86 N.C. App. at 387-89, 358 S.E.2d at 126-27 (citations omitted) (emphasis added). Though *Morris* states "[i]f the written judgment conforms in general terms with the oral entry, it is a valid judgment[,]" *Id.* at 389, 358 S.E.2d at 127, this statement must be understood in context. The requirement that the written judgment generally conform to the orally rendered judgment is based upon the fact that the orally rendered

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4. *But see Hopkins v. Hopkins*, 268 N.C. 575, 576, 151 S.E.2d 11, 11-12 (1966) ("During a term of court a judgment is said to be within the breast of the court, and it may be changed at any time. It has been the settled rule for some time that any order or decree made was, during the term, *in fieri*, and that the court during the term could *vacate* or modify the same."); *Stokes Co. Soil Conservation Dist. v. Shelton*, 67 N.C. App. 728, 731, 314 S.E.2d 2, 4 (1984) (trial court can "change the judgment during the same term of court").

judgment *had already been entered* and was therefore *already in effect*.[5] The subsequent written judgment was merely providing written factual and legal support for the already *entered* oral judgment. In *Morris*, this Court treated orally rendered judgments that had been entered differently than those that had *not* been entered, stating:

> Although the trial judge announced his general holdings at the end of the trial, he did not direct the clerk to make any entry in the record. Therefore, under the second paragraph of Rule 58, the judgment was not entered in open court and the written judgment of 9 June 1986 is the judgment for the purposes of the Rules of Civil Procedure under the third paragraph of Rule 58. The written judgment did not determine any issue different from those dealt with in the judgment announced in open court. *Therefore*, defendant's oral notice of appeal, *though given in open court prior to the entry of judgment*, *was effective to give notice of appeal* to the written judgment under N.C.G.S. Sec. 1-279(a).

Id. at 388-89, 358 S.E.2d at 126 (citations omitted) (emphasis added). The reason the *Morris* Court emphasized that the written judgment did "not determine any issue different from" the orally rendered judgment was that the substantial accord between the two is what gave effect to the oral notice of appeal, *even though the notice of appeal was given before actual entry of the judgment*.

The implication is that, had the subsequent written judgment differed from the oral judgment, the notice of appeal would not have been effective because, though it was given *after* judgment had been rendered in open court, it was given *before* the judgment was entered. Therefore, it could not serve to give notice of appeal from anything in the later written judgment that differed substantially from the oral rendering of that judgment. The further implication is that the judgment later written and entered controlled, and the trial court was not bound by its earlier rendered judgment. This is so because *if* the trial court was bound by its non-entered orally rendered judgment, notice of appeal from that judgment would *always* be effective – the trial court would simply have to

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5. Once a judgment has been entered, the trial court cannot make substantial changes to that judgment without notice to the parties and an opportunity to be heard. *See* N.C. Gen. Stat. § 1A-1, Rules 59 and 60; *Lee v. Lee*, 167 N.C. App. 250, 254, 605 S.E.2d 222, 224-25 (2004); *Scott v. Scott*, 106 N.C. App. 379, 416 S.E.2d 583 (1992).

insure that its entered written judgments always conformed with their corresponding non-entered orally rendered judgments. If this were the case, remedy for failure of the entered written order to conform to the orally rendered order would be remand to make the written order conform with the orally rendered order; but the validity of the notice of appeal would not be in question. However, the issue in *Morris* was the validity of the notice of appeal, not the validity of the written and entered judgment itself.

Furthermore, this Court has not generally required written entered judgments to adhere to the prior non-entered, orally rendered judgments upon which they were based. " 'The announcement of judgment in open court is the mere rendering of judgment,' and is *subject to chang*e before 'entry of judgment.' 'A judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court.' " *Morris v. Southeastern Orthopedics Sports Med. & Shoulder Ctr.*, 199 N.C. App. 425, 433, 681 S.E.2d 840, 846 (2009) (citations omitted) (emphasis added); *see also Fayetteville Publ'g Co. v. Advanced Internet Techs., Inc.*, 192 N.C. App. 419, 425, 665 S.E.2d 518, 522 (2008) ("The trial judge's comments during the hearing as to its consideration of the entire case file, evidence and law are not controlling; the written court order as entered is controlling."). In fact, this Court has held that the trial court can consider evidence presented *following* the oral rendering of the judgment in order to better inform its subsequent written judgment. *Morris*, 199 N.C. App. at 433, 681 S.E.2d at 846 (the trial court could consider an affidavit filed after rendering of the judgment in open court so long as it was filed before the trial court *entered* judgment); *Fayetteville Publ'g*, 192 N.C. App. at 425-26, 665 S.E.2d at 522 (the fact that there was only a short period of time "between hearing the motion and rendering the order in open court" is not dispositive of whether trial court fully weighed the evidence because the written order wasn't entered until days later); *see also Stachlowski*, 328 N.C. at 282-83, 401 S.E.2d at 642-43 ("The record indicates that on 17 January 1989, the trial court announced in open court that . . . custody would not change from defendant to plaintiff. The court thus *rendered* judgment that day on the custody issue. There is no indication, however, that it made any direction to the clerk to *enter* judgment. On the contrary, the court directed counsel for defendant to "draw the Order." The parties continued to negotiate visitation privileges with the express understanding that counsel would not draw the order until the parties got 'squared away on . . . Christmas.' Though the court *rendered* judgment as to custody on 17 January 1989, these circumstances do not establish an entry of judgment at that time.").

What this Court has continually held, however, is that a notice of appeal from a judgment rendered in open court will not vest jurisdiction in this Court until that judgment is entered – meaning until a written judgment, generally conforming with the judgment rendered, is filed with the appropriate clerk. *Abels*, 126 N.C. App. at 804-05, 486 S.E.2d at 738. The logical continuation of the reasoning of this holding is that jurisdiction will not vest in this Court if notice of appeal is given after oral rendering of the judgment but before entry of the judgment *if* the written judgment entered does not generally comply with the judgment rendered in open court. This is an issue of appellate jurisdiction, not a limitation on what the trial court may include in its written order. Though it does not appear that this Court has directly addressed this issue, it follows that an appellant must file a written notice of appeal from the written and entered judgment, even if that appellant has already filed a written notice of appeal from the orally rendered judgment, *if the written and entered judgment does not generally comply with the earlier rendered judgment*. However, the present case does not include any issues related to our jurisdiction or the validity or timeliness of the notice of appeal. Respondent-Father filed his notice of appeal *following* the *entry* of the order terminating his parental rights, so there was no requirement, for purposes of appellate jurisdiction, that the order entered 11 August 2015 generally conform with the order rendered in open court on 16 July 2015. *See Morris*, 86 N.C. App. at 388-89, 358 S.E.2d at 126.

This is not to say there are no circumstances in which deviation from judgments rendered in open court will constitute error. Respondent-Father relies on this Court's holding in *In re J.C. & J.C.*, ___ N.C. App. ___, 783 S.E.2d 202 (2014), which stated that "if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive." *Id.* at, ___, 783 S.E.2d at 205. In *J.C.*, which was an appeal from an order that changed custody of a child under DSS supervision, the trial court announced at the hearing that it was adopting all of the recommendations from the Department of Social Services, except that the department would continue to supervise visitation with the respondent-mother until it could find a replacement supervisor, and that the visitation would be every other week at DSS's offices. *Id.* at __, 783 S.E.2d at 205. However, the trial court's written order directly contradicted the order rendered from the bench and directed that the respondent-mother's visitation would be supervised by third parties at a visitation center, and at respondent-mother's expense. *Id.* at __, 783 S.E.2d at 205. Because this Court concluded that the differences between the oral

rendering and the written order were substantive, we vacated the written order's visitation provisions, and remanded for entry of an amended order that accurately reflected the trial court's oral disposition. *Id.* at __, 783 S.E.2d at 205.

Respondent-Father, relying on *J.C.*, argues that, because the order entered in the matter before us did not generally comply with the order rendered in open court, we, and the trial court, are bound by the order as rendered in open court on 16 July 2015, which did not address dependency as a ground for terminating his parental rights. In *J.C.*, this Court stated the following:

> "[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A–1, Rule 58 (2013). Thus, "[a]nnouncement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment." *Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 (1997). "If the written judgment conforms generally with the oral judgment, the judgment is valid." *Edwards v. Taylor*, 182 N.C. App. 722, 727, 643 S.E.2d 51, 54 (2007). However, if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive. *See State v. Sellers*, 155 N.C. App. 51, 59, 574 S.E.2d 101, 106–07 (2002).

Id. at __, 783 S.E.2d at 205.

However, *J.C.* appears to be in conflict with certain established precedents. *J.C.* cites to *Edwards*, which in turn cites *Morris*, *supra*. As stated above, this portion of *Morris* is discussing a situation when an order was *entered* orally in open court, then subsequently reduced to writing and filed. *Morris*, 86 N.C. App. at 389, 358 S.E.2d at 127. Judgments and orders in civil cases can no longer be *entered* in open court and, therefore, this portion of *Morris* is no longer relevant. It is true that general conformity between the orally rendered judgment and the written judgment entered is still relevant for determining the validity of notices of appeal filed following oral rendering of the judgment, but before the judgment has been entered, *Id.* at 388-89, 358 S.E.2d at 126, but that is not the situation before us. Further, the holding in *Edwards* that "[i]f the written judgment conforms generally with the oral judgment, the judgment is valid[,]" *Edwards*, 182 N.C. App. at 727, 643 S.E.2d at 54, does not command the converse, i.e. that any written judgment

that does not generally conform with the oral judgment is necessarily *invalid*. Though there may be situations when this is true, we can find no opinion in which it has been held that the written and entered judgment must always generally conform with a prior oral rendition of that judgment in order to be valid. However, as noted above, there are plenary opinions in which our appellate courts have affirmed entered judgments and orders that do not conform to the associated orally rendered judgments and orders.

J.C. cites a criminal case, *Sellers*, for the proposition that "if there is a discrepancy between the written order and the oral rendering of the order in open court as reflected by the transcript, the transcript is considered dispositive." *J.C.*, __ N.C. App. at __, 783 S.E.2d at 205. *J.C.* bases this statement on the following analysis in *Sellers*:

> Defendant asserts the trial court erred in failing to make the requisite finding that the aggravating factors outweighed the mitigating factors before sentencing defendant to an aggravated term for assault with a firearm on Officer Denny. The transcript reveals the trial court stated, "[t]he Court finds that the factors, factors in aggravation outweigh the factors in mitigation, and that an aggravated sentence is justified in the judgments to be entered." The form, however, leaves unchecked this important finding. From the transcript and the aggravated sentence imposed, it is clear that the court intended to have this box checked. Clerical errors are properly addressed with correction upon remand because of the importance that the records " 'speak the truth.' " Accordingly, upon remand the trial court should correct the clerical error when it enters a new judgment.

Sellers, 155 N.C. App. at 59, 574 S.E.2d at 106-07 (citation omitted). This holding in *Sellers* stands for the proposition that, when it is apparent from the transcript that a clerical error has been committed on the written order, remand is appropriate so that the trial court can correct the clerical error. *Sellers* does not stand for the proposition that the trial court is always bound by its pronouncements in open court.

As discussed above, prior opinions of this Court have made clear that, as a general proposition, the written and entered order or judgment controls over an oral rendition of that order or judgment. *See, e.g.*, *Fayetteville Publ'g*, 192 N.C. App. at 425-26, 665 S.E.2d at 522. One panel of this Court cannot overrule a prior panel of this Court, or our Supreme

Court. *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). To the extent that *J.C.* is in conflict with prior holdings of this Court, or our Supreme Court, we are bound by the prior holdings.

Assuming *arguendo J.C.* is not in conflict with prior opinions, we believe it is limited to the facts in that case. In *J.C.*,

> the trial court made two statements [in open court] which constituted [the oral rendering of its] order regarding visitation: "I'm going to adopt the recommendations put for[th] by the Department with the exception that DSS will supervise until they can find a replacement[,]" and "I'm adopting every recommendation [by DSS] with the exception of the visitation will be at Social Services every other week." Nonetheless, in its written order, the trial court directly contradicted the order it rendered from the bench, instead adopting DSS's recommendation by ordering that respondent's visitation would continue to be at a visitation center at respondent's expense.

J.C., __ N.C. App. at __, 783 S.E.2d at 205. In the present case, the trial court did not directly contradict itself. Instead, the trial court was silent on the ground of dependency at the end of the trial, apparently unaware of its omission. Neither Respondent-Father nor any other party alerted the trial court to the omission. No order or judgment had been entered at that time and, therefore, no party was bound by the judgment. The judgment entered, by filing of the written order terminating Respondent-Father's parental rights, included both grounds for termination argued at trial, neglect and dependency. Respondent-Father properly noticed appeal from this entered judgment. On these facts, we hold that the trial court was not bound by its oversight in rendering judgment, and that the written order, subsequently entered, controls.

We further note that were we to find error in the trial court's omission in rendering judgment in open court, the remedy would be to remand for the trial court to make findings of fact and conclusions of law and determine whether DSS proved the ground of dependency. This, of course, the trial court has already done. This Court has decided that, when the trial court has failed to find *any* specific N.C. Gen. Stat. § 7B-1111 ground for terminating a respondent's parental rights, it will not dismiss the action, it will vacate the erroneous judgment and remand to the trial court, to either amend its order to demonstrate that it correctly found a ground for termination pursuant to N.C. Gen. Stat.

§ 7B-1111, or take other appropriate action to insure the matter was properly decided. *See*, *e.g.*, *In re T.M.H.*, 186 N.C. App. 451, 456, 652 S.E.2d 1, 3 (2007) ("We vacate the order and remand the matter to the trial court with instructions . . ., if appropriate, to articulate conclusions of law that include the grounds under N.C.G.S. § 7B–1111(a) which form the basis for termination. The trial court may, in its discretion, receive additional evidence on remand."); *In re D.R.B.*, 182 N.C. App. 733, 738-39, 643 S.E.2d 77, 81 (2007) (this Court vacated a judgment that failed to articulate the specific grounds for termination and remanded for the trial court to make the appropriate findings and conclusions); *see also In re T.B.*, *C.P.*, *& I.P.*, 203 N.C. App. 497, 509, 692 S.E.2d 182, 190 (2010) (In adjudication hearing trial court adjudicated children dependent, but failed to adjudicate whether children were neglected as alleged in petition. This Court remanded for determination of the neglect allegation).

In the present case, the trial court found that DSS had proven the two grounds alleged in its motion to terminate, neglect and dependency. Even assuming *arguendo* it was error for the trial court to fail to announce in open court that it would rule in favor of DSS on the ground of dependency, our remedy would be to remand to the trial court to give it the opportunity to provide findings and conclusions in support of terminating Respondent-Father's parental rights on the ground of dependency, assuming that was the trial court's intention. Because there is already a judgment, written and entered on 11 August 2015, in which the trial court ruled that the ground of dependency had been proven, remand would be an unnecessary delay, and a waste of judicial resources. We hold that the trial court was not precluded from finding dependency as a ground for terminating Respondent-Father's parental rights even though it did not include that ground when it rendered the judgment in open court.

We now address dependency as a basis for the trial court's decision to terminate Respondent-Father's parental rights. The trial court concluded in its 11 August 2015 order:

> Grounds exist to terminate Respondent[s] parental rights under N.C.G.S. § 7[B-]1111(6) in that Respondent [ ] is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101; there is a reasonable probability that such incapability will continue for the foreseeable future; and Respondent lacks an appropriate alternative childcare arrangement.

We find no evidence that the ground of dependency had been dismissed, and note that Respondent-Father's counsel put on evidence in an attempt to rebut the allegation that Respondent-Father lacked an appropriate alternative caregiver. The trial court was thus statutorily required to determine the existence or non-existence of the ground of dependency because it was alleged in the motion to terminate Respondent-Father's parental rights. N.C. Gen. Stat. § 7B-1109(e).

Respondent-Father does not otherwise challenge the trial court's conclusion that termination of his parental rights was appropriate based upon the ground of dependency, and does not challenge the court's conclusion that termination of Respondent-Father's parental rights was in O.D.S.'s best interests. Because Respondent-Father does not argue on appeal that the trial court's findings of fact and conclusions of law do not support its determination that termination of his parental rights was proper based upon N.C. Gen. Stat. § 7B-1111(a)(6), we hold that this ground supports the trial court's decision to terminate Respondent-Father's parental rights. Thus, we need not address Respondent-Father's arguments regarding the ground of neglect, *see In re N.T.U.*, ___ N.C. App. ___, ___, 760 S.E.2d 49, 57 ("In termination of parental rights proceedings, the trial court's 'finding of any one of the . . . enumerated grounds is sufficient to support a termination.' "), *disc. review denied*, ___ N.C. ___, 763 S.E.2d 517 (2014), and we affirm the trial court's order terminating Respondent-Father's parental rights to O.D.S.

AFFIRMED.

Judges BRYANT and STROUD concur.

MYERS v. CLODFELTER

[247 N.C. App. 725 (2016)]

JACK L. MYERS AND ANNA BIANCA COE, PLAINTIFFS
v.
STANLEY CLODFELTER AND WIFE, RUBY Y. CLODFELTER, DEFENDANTS

No. COA15-1307

Filed 7 June 2016

Easements—prescriptive—road through property

Where defendants appealed from the trial court's grant of a perpetual prescriptive easement in favor of plaintiffs, the Court of Appeals held that plaintiffs presented sufficient evidence to show all requirements for a prescriptive easement of a road that plaintiffs and their predecessors had used for access to their own properties through defendants' properties.

Appeal by defendants from order entered 10 August 2015 by Judge Ted S. Royster, Jr. in Davidson County Superior Court. Heard in the Court of Appeals 11 May 2016.

Roberson Haworth & Reese, PLLC, by Christopher C. Finan and Matthew A.L. Anderson, for plaintiff-appellees.

Jon W. Myers for defendant-appellants.

TYSON, Judge.

Stanley and Ruby Clodfelter ("Defendants") appeal from the trial court's grant of a perpetual prescriptive easement in favor of Jack L. Myers and Anna Bianca Coe ("Plaintiffs"). We affirm.

I. Background

Coe Road intersects Highway 64 in Lexington, North Carolina, and is identified by a street sign. The tract where Coe Road intersects with Highway 64 is owned by Plaintiff Myers. Coe Road runs south through two tracts owned by Defendants. The road continues south through two tracts owned by other parties, who are not involved in this dispute. The road then crosses an 18.5 acre tract owned by Plaintiff Myers, and continues to travel south through a 4.1 acre tract owned by Plaintiff Coe.

The 18.5 acre tract owned by Mr. Myers and the 4.1 acre tract owned by Ms. Coe are the properties affected by this easement dispute. Coe Road provides the only means of ingress to and egress from these

properties. A house, garage, and storage building are located on Ms. Coe's property. Ms. Coe lived on the property with her parents when she was a child. Ms. Coe's father lived on the property until 2005. Ms. Coe testified her parents and grandparents maintained Coe Road by "scraping" it, trimming trees, and adding gravel to the road.

A house is also located upon Mr. Myers's property, which he has leased to others in the past. Mr. Myers testified he also performed maintenance of Coe Road by adding gravel and cinderblock, and trimming back trees. Water lines run from Highway 64 along Coe Road to Plaintiffs' properties.

Defendants became upset after Mr. Myers began to consider using his property for a commercial paintball field. In 2005, Defendants dug a large ditch across Coe Road, where the road traverses Defendants' property. Plaintiffs have not been able to access their properties by vehicles since the ditch was constructed.

Plaintiffs filed suit in superior court on 15 January 2013. Plaintiffs alleged they, and their predecessors in title, have openly, notoriously, continually, and adversely used Coe Road to cross Defendants' property for over fifty years. Plaintiffs sought an adjudication, finding they are the holders of a non-exclusive prescriptive easement through Defendants' property along Coe Road, and an order permanently enjoining Defendants from obstructing the road. Both Plaintiffs also sought monetary damages to compensate for the loss of use of their properties.

The case came before the trial court 17 March 2015. The court found Plaintiffs, or their predecessors in title, have used Coe Road to access their properties and provide utilities to their properties for over sixty years. The court further found: Plaintiffs never asked Defendants for permission to use the road; Defendants never gave Plaintiffs permission to use the road; Plaintiffs have used the road by claim of right; and, Plaintiffs have maintained the road.

The trial court concluded Plaintiffs have openly, notoriously, and by claim of right, used Coe Road to access their properties. The court decreed Plaintiffs as the holders of a twelve foot wide perpetual prescriptive easement for ingress, regress and utilities, over and across Defendants' tracts. The court further concluded Defendants wrongfully closed the road, and ordered them to return the road to its pre-existing condition. The court did not award any damages to either Plaintiff. Defendants appeal. Plaintiffs did not cross appeal.

II. Standard of Review

The standard of review on appeal from a judgment entered after a non-jury trial is "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted). The findings of fact "are conclusive on appeal if there is evidence to support those findings." *Id.* (citation omitted). "A trial court's conclusions of law, however, are reviewable *de novo*." *Id.* (citation omitted).

III. Prescriptive Easement

"An easement by prescription, like adverse possession, is not favored in the law[.]" *Godfrey v. Van Harris Realty, Inc.*, 72 N.C. App. 466, 469, 325 S.E.2d 27, 29 (1985) (citation omitted). To establish the existence of a prescriptive easement, the party claiming the easement must prove four elements:

> (1) that the use is adverse, hostile, or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Perry v. Williams, 84 N.C. App. 527, 528-29, 353 S.E.2d 226, 227 (1987) (citation and quotation marks omitted).

Defendants argue Plaintiffs failed to show either a hostile or adverse use of Coe Road, or a use of the road under claim of right, for a continuous and uninterrupted period of at least twenty years.

Ms. Coe was two years old in 1992, when she acquired title to the 4.1 acre tract from her great-grandparents. Ms. Coe's great-grandparents had acquired ownership of the tract in 1953. Since that time, Coe Road provided the only means of access and egress to and regress from the property via Highway 64, and was used by Ms. Coe and her predecessors in interest for that purpose. She had owned the tract around 13 years when Defendants closed the road in 2005.

Ms. Coe lived on the property with her parents while she was a child. While Ms. Coe lived on the property, her parents "scraped" the road, cut back trees, and added gravel to the roadbed. Ms. Coe's parents and grandparents shared the costs of maintaining the road.

Mr. Myers' 18.5 acre property is directly north of Ms. Coe's property. Mr. Myers acquired his tract from Ms. Coe's relatives by general warranty deeds recorded in 2001 and 2002. He had owned the tract three or four years when Defendants closed access to his property. Evidence showed Mr. Myers also performed maintenance work on the road. Neither Plaintiff had owned their property for the previous twenty years.

" 'Tacking' is the legal principle whereby successive adverse users in privity with prior adverse users can tack successive adverse possession of land so as to aggregate the prescriptive period of twenty years." *Dickinson v. Pake*, 284 N.C. 576, 585, 201 S.E.2d 897, 903 (1974) (citation omitted) (internal quotation marks supplied). Plaintiffs must prove they or their predecessors in interest engaged in a continuous and hostile or adverse use of the easement for at least twenty years prior to the time Defendants closed the road. *Id.*; *Perry*, 84 N.C. App. at 528-29, 353 S.E.2d at 227.

"A mere permissive use of a way over another's land, however long it may be continued, can never ripen into an easement by prescription." *Dickinson*, 284 N.C. at 581, 201 S.E.2d at 900. "To establish that a use is 'hostile' rather than permissive, it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." *Id.* at 580-81, 201 S.E.2d at 900. Rather, "[a] 'hostile' use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right." *Id.* at 581, 201 S.E.2d at 900 (citation omitted).

Hostile use is established by the introduction of "some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent." *Id. See also* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 15.18[2] (Patrick K. Hetrick & James B. McLaughlin, Jr. eds., 6th ed. 2011) (" '[H]ostility' can be sufficiently shown by demonstrating a use exercised under such circumstances as to manifest and give notice that the use was made under a claim of right. Permission given after the hostile use has begun does not destroy the hostility.")

Defendants argue, while Plaintiffs may "tack," their period of alleged adverse use of the road with the period of use by their predecessors, they failed to present evidence to show their predecessors' use of the road was adverse. Mr. Myers has known the Coe family for over fifty years, and the Coe family had always used the easement to access his tract and Ms. Coe's tract. He purchased his property from the Coe family.

Defendant Ruby Clodfelter testified she had no problem with the use of the road "as long as the Coes lived there," but opposed Myers' use of the road because of his plan to allow a paintball field on his property. She did not specify which Coe family member she referenced.

It is undisputed that Plaintiffs or their predecessors in interest continuously and uninterruptedly used Coe Road for any and all purposes incident to the use and enjoyment of their properties, and as their only means of access, for a period of at least twenty years. Coe Road is identified by a sign at its intersection with Highway 64. The use of the road was open and notorious and with full knowledge by Defendants.

Our Supreme Court has found the "hostility" requirement to establish a prescriptive easement was satisfied in cases with nearly identical facts. In *Potts v. Burnette*, the Court stated:

> Plaintiffs' evidence, viewed in the most favorable light, shows that the disputed roadway is the only means of access to plaintiffs' land and the cemetery located thereon and has been openly and continuously used by plaintiffs, their predecessors in title and the public for a period of at least fifty years. No permission has ever been asked or given. Plaintiffs, on at least one occasion, smoothed, graded and gravelled the road, and have, on other occasions, attempted to work on it. Although there was no evidence that plaintiffs thought they owned the road, there was abundant evidence that plaintiffs considered their use of the road to be a right and not a privilege. This evidence is sufficient to rebut the presumption of permissive use and to allow, but not compel, a jury to conclude that the road was used under such circumstances as to give defendants notice that the use was adverse, hostile, and under claim of right and that the use was open and notorious and with defendants' full knowledge and acquiescence.

301 N.C. 663, 668, 273 S.E.2d 285, 289 (1981) (emphasis omitted).

Likewise, in *Dickinson*, the plaintiffs and their predecessor maintained the road in passable condition by raking leaves and scattering oyster shells. No evidence was presented that the plaintiffs sought, or the defendants gave, permission for the plaintiffs to use the road. The Court determined the evidence was sufficient to overcome the presumption that the use of the road was permissive. 284 N.C. at 583-84, 201 S.E.2d at 901-02. *See also Perry*, 84 N.C. App. at 529, 353 S.E.2d at 228 (finding testimony that the plaintiff's agent maintained a farm path for

the plaintiff's use, and that the plaintiff never asked for and was never given permission to use the farm path, to be "evidence sufficient to rebut the presumption of permissive use").

The record shows "abundant evidence" that Plaintiffs considered and demonstrated their use of Coe Road to be by right, and not a privilege. *Potts*, 301 N.C. at 668, 273 S.E.2d at 289. Under these precedents, the evidence is sufficient to rebut the presumption that Plaintiffs' and their predecessors' use of Coe Road was permissive. This evidence supports the trial court's conclusion the "hostility" requirement was met for a period of at least twenty years to establish a prescriptive easement.

IV. Conclusion

Plaintiffs presented sufficient evidence to show all requirements for a prescriptive easement. The trial court properly ordered that Plaintiffs possess a non-exclusive perpetual prescriptive easement, known as Coe Road, for access, ingress, egress, regress and utilities, in, over, across and through the properties of Defendants. The judgment of the trial court is affirmed.

AFFIRMED.

Judges CALABRIA and HUNTER, JR. concur.

ROBERT V. POWELL, PLAINTIFF
v.
P2ENTERPRISES, LLC AND ROBERT HENRY POWELL, DEFENDANTS

No. COA15-542

Filed 7 June 2016

Employer and Employee—unpaid wages—employer—economic reality test

There was no genuine issue of fact for trial, and the trial court properly granted defendants' motion for summary judgment in an action for unpaid wages. Although defendant Powell maintained financial control over the restaurant by virtue of his position as the sole Member of P2E (the LLC which owned the restaurant involved in this action), he did not have significant day-to-day, operational control over the restaurant's employees. Plaintiff Robert's (the other member of the LLC) operational control over the restaurant's operations was substantial as well as consistently exercised.

Appeal by plaintiff from order entered 11 June 2014 by Judge Richard W. Stone in Forsyth County Superior Court. Heard in the Court of Appeals 20 October 2015.

The Law Office of Herman L. Stephens, by Herman L. Stephens, for plaintiff.

Morrow Porter Vermitsky Fowler & Taylor, PLLC, by John N. Taylor, Jr. and John C. Vermitsky, for defendants.

CALABRIA, Judge.

Plaintiff Robert V. Powell ("Robert") initiated this action on 13 March 2013 by filing a complaint against P2Enterprises, LLC ("P2E") and his father, Robert Henry Powell ("Powell") (collectively, "defendants"), alleging unpaid wages under the North Carolina Wage and Hour Act ("NCWHA"), N.C. Gen. Stat. §§ 95–25.1, *et seq.* Robert now appeals the trial court's grant of summary judgment in favor of defendants. We affirm.

In 2008, after Robert approached Powell with the idea of owning and operating a restaurant, the parties set up P2E, a manager-managed limited liability company organized under the laws of North Carolina.

They named the company "P2Enterprises" to reflect the two Powells who were involved in the restaurant venture. According to P2E's Articles of Organization and related documents, Robert was its only Manager and Powell was the company's sole Member. On 2 July 2010, the parties executed a document giving P2E's Member and Manager "signing authority in all matters concerning the Corporation." On 4 October 2010, P2E acquired a restaurant located in Winston-Salem, North Carolina, and named it "Bob's Big Gas Subs and Pub" ("the restaurant"). Together, Robert and Powell created the idea and concept for the restaurant, a sub sandwich shop housed in a converted gas station. Both parties' signatures and titles appear on loan documents and the restaurant's lease.

In addition to his role as Manager of P2E, Robert also served as general manager of the restaurant. He was in charge of hiring and training employees; dealing with vendors; managing payroll and other expenses; setting employees' schedules; ordering food, beer, and supplies; and handling other daily operational tasks. Powell was rarely involved in the restaurant's day-to-day operations. He provided free labor when the restaurant was short-staffed, but his main role was serving as the "money man."

Although the restaurant appeared to be operating well, it was chronically short on cash. Whenever there were insufficient funds to pay vendors and restaurant staff, Robert would call Powell to request additional money. Occasionally, Powell responded that he could not contribute funds. When funds were not forthcoming from Powell, Robert decided not to pay himself for that pay period rather than default on other expenses.

By early 2011, Robert and Powell's working relationship started to suffer. In April 2011, Robert told head chef Tim Papenbrock ("Papenbrock") that he planned to buy Powell out. Around the same time, Powell distanced himself from the operation of the restaurant and took another job. Robert retained full control over the restaurant's operations. In 2012, a dispute arose between Robert and Powell regarding Robert's failure to pay the restaurant's expenses, including rent, utilities, and vendor bills. At that time, Powell learned that due to the restaurant's financial struggles, Robert had not paid himself for certain pay periods. Powell agreed to pay Robert $16,917.00 in back wages. However, in December 2012, when Powell sought to reassert some control over the restaurant's management, Robert tried to convince Papenbrock and other employees to leave with him in an attempt to force the restaurant to shut down. He intended to reopen without Powell and rehire the restaurant staff, but none of the employees agreed to Robert's plan. In

January 2013, following a dispute with his father, Robert quit his job as general manager of the restaurant.

On 15 March 2013, Robert filed a complaint against defendants, alleging liability for unpaid wages plus interest, liquidated damages, and attorneys' fees, pursuant to the NCWHA. In response, defendants filed counterclaims and sought damages for breach of contract, conversion, constructive fraud, and breach of fiduciary duty. Defendants also moved for summary judgment on Robert's claims. The motion was heard by the Honorable Richard W. Stone on 5 May 2014 in Forsyth County Superior Court. On 11 June 2014, Judge Stone entered an order granting defendants' motion and dismissing all of Robert's claims with prejudice. Defendant's voluntarily dismissed their counterclaims against Robert without prejudice on 7 October 2014. Robert appeals.

On appeal, Robert argues that several factors establish defendants' liability for his unpaid wages under the NCWHA. Specifically, Robert contends that, inter alia, the appearance of Powell's electronic signature on all paychecks, Powell's establishment of and control over bank accounts that funded the restaurant, P2E's use of Powell's home address as its mailing and registered office address, and Powell's role as P2E's "money man" are dispositive of his claims. We disagree.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008) (quoting *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007)). "In ruling on a motion for summary judgment the evidence is viewed in the light most favorable to the non-moving party." *Hinson v. Hinson*, 80 N.C. App. 561, 563, 343 S.E.2d 266, 268 (1986) (citation omitted). "A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense." *Draughon v. Harnett Cty. Bd. of Educ.*, 158 N.C. App. 705, 708, 582 S.E.2d 343, 345 (2003) (internal quotation marks and citation omitted). Furthermore, if a grant of summary judgment "can be sustained on any grounds, it should be affirmed on appeal." *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989).

The NCWHA and the federal Fair Labor Standards Act ("FLSA") provide for recovery of an employee's unpaid wages from an "employer." N.C. Gen. Stat. § 95–25.22(a); 29 U.S.C. § 216(b). "The NCWHA is

modeled after the FLSA." *Hyman v. Efficiency, Inc.*, 167 N.C. App. 134, 137, 605 S.E.2d 254, 257 (2004) (citing *Laborers' Int'l Union of N. Am. v. Case Farms, Inc.*, 127 N.C. App. 312, 314, 488 S.E.2d 632, 634 (1997)). As such, "[i]n interpreting the NCWHA, North Carolina courts look to the FLSA for guidance." *Garcia v. Frog Island Seafood, Inc.*, 644 F. Supp. 2d 696, 707 (E.D.N.C. 2009); *see also Hyman*, 167 N.C. App. at 142-49, 605 S.E.2d 260-64 (applying federal employment case law to wage withholding and other claims brought pursuant to the NCWHA); *Laborers' Int'l*, 127 N.C. App. at 314, 488 S.E.2d at 634 (noting the NCWHA is modeled after the FLSA and relying on federal case law's interpretation of the term "employee"). Under the FLSA, a plaintiff bears the burden of establishing that he or she is an "employee." *Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007) (citation omitted).

An "employer" is "any person acting directly or indirectly in the interest of an employer in relation to an employee." N.C. Gen. Stat. § 95–25.2(5); 29 U.S.C. § 203(d). Under both state and federal law, the term "person" includes individuals as well as commercial entities such as corporations. N.C. Gen. Stat. § 95–25.2(11); 29 U.S.C. § 203(a). "Accordingly, it is well established that, under certain conditions, individuals may be subjected to liability for unpaid wages[.]" *Garcia*, 644 F.Supp. 2d at 720. Specifically, the NCWHA makes an "employer" liable for unpaid wages, liquidated damages, costs, and reasonable attorneys' fees. N.C. Gen. Stat. § 95–25.22.

"Described as 'expansive' by the [United States] Supreme Court, *see Falk v. Brennan*, 414 U.S. 190, 195 (1973), the term 'employer' is 'to be construed liberally [under the FLSA] because by it Congress intended to protect the country's workers.' " *Garcia*, 644 F. Supp. 2d at 720 (citation omitted). But the term "does have its limits." *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 295 (1985). As a result, whether a person constitutes an "employer" under the FLSA "turns upon the degree of control and direction one has over the daily work of an individual. The right to control, not necessarily the actual existence of control, is important." *Zelaya v. J.M. Macias, Inc.*, 175 F.R.D. 625, 626 (E.D.N.C. 1997) (citations omitted). To decide whether an individual is an "employer" for purposes of NCWHA and FLSA liability, courts apply an "economic reality" test.[1] *Garcia*, 644 F. Supp. 2d at 720. This test examines "the totality

1. We note that the Fourth Circuit applies a different, six-factor "economic realities" test to determine whether an individual is an employee or independent contractor under the FLSA. *See Sigala v. ABR of VA, Inc.*, No. GJH-15-1779, 2016 WL 1643759, at *5 (D. Md. Apr. 21, 2016) (citing *Schultz v. Capital International Security, Inc.*, 466 F.3d 298, 305 (4th Cir. 2006)).

of the circumstances to determine whether the individual has sufficient operational control over the workers in question and the allegedly violative actions to be held liable for unpaid wages or other damages." *Id.* (citation and quotations omitted).

> Factors commonly relied on by courts in determining the extent of an individual's operational control over employees include whether the individual: (1) had the power to hire and fire the employees; (2) supervised and controlled employee work schedules or conditions of employment; (3) determined the rate and method of payment; and (4) maintained employment records.

Id. at 721 (citations omitted); *see also Thompson v. Blessed Home Inc.*, 22 F. Supp. 3d 542, 550 (E.D.N.C. 2014) (citing *Garcia* and applying the "economic reality" test to the plaintiff's FLSA and NCWHA claims). "These factors are not exclusive nor is any one factor dispositive. Rather, the determination of whether a particular individual had sufficient operational control within a business enterprise to be considered an 'employer' for purposes of the FLSA requires a consideration of all of the circumstances and relevant evidence." *Garcia*, 644 F. Supp. 2d at 720 (internal brackets and citations omitted); *see also Steelma*n, 473 F.3d at 128 (noting that "courts have been exhorted to examine 'the circumstances of the whole activity,' rather than 'isolated factors,' or 'technical concepts' ") (internal citations omitted). The gist of federal case law is that since economic reality must be determined based upon all the circumstances, courts should examine any relevant evidence so as to avoid applying the test in a narrow, mechanical fashion. *See Steelman v. Hirsch*, 473 F.3d 124, 128 (4th Cir. 2007) (noting that federal case law makes it "clear that the 'economic reality' standard calls for pragmatic construction" of employment relationships and that any judicial evaluation in this context must examine "the circumstances of the whole activity" instead of "isolated factors") (citations omitted).

Applying the economic reality test to the instant case, it appears that Robert, rather than Powell, fits the definition of an "employer" under the NCWHA. As to the first factor, the power to hire and fire employees, both Robert and Powell appear to have shared that authority. Regarding Robert's employment at the restaurant, the parties disagree as to whether he quit or was fired. Although Robert asserts that he was terminated, employee affidavits that were submitted by defendants suggest that Robert voluntarily left his position following a dispute with Powell over his decision to retain Papenbrock as head chef. Regardless of the characterization, however, this type of departure seems to be

less relevant in the context of NCWHA and FLSA liability. Considering all relevant evidence, including Robert's deposition and the affidavits of several restaurant employees, it appears that Powell held the authority to hire and fire simply by virtue of his executive position in P2E. By contrast, as general manager of the restaurant, Robert directly hired and fired staff, and exercised control over employees' daily responsibilities. Although Powell attended the interview process that took place during the restaurant's start-up phase, and he participated in a decision to hire two additional operational managers who were subordinate to Robert, Robert agreed that it was ultimately his decision to hire both managers. Subsequently, Robert, along with one of the newly hired operational managers, organized a two-day interview process to hire restaurant staff and conducted "ServSafe" training for the new employees.

Regarding the second economic reality test factor, the ability to supervise and control employees' work schedules, Robert acknowledged that he was an operational manager, but denied having "operational authority" or control. However, the facts of this case prove this is a distinction without a difference. When he managed the restaurant, Robert was responsible for setting employee and management schedules (including his own), ordering food and beer, paying vendors, supervising the kitchen and dining areas, and answering customer concerns and complaints. Conversely, Powell was merely the restaurant's "money man." Although he sometimes provided free labor whenever the restaurant was short-staffed, he was off-site more often than not. Furthermore, at his deposition, Robert testified that Powell was "not active in the operation" during the period of time between October 2011 and December 2012.

As to the third factor, during his deposition, Robert agreed that it was "fair" to state that he set the rate and method of payment for employees. Robert initially paid the restaurant staff $9.00 per hour based on his own experience in the hospitality industry and the fact that the restaurant would not be a full-service establishment employing tipped wait staff. According to Robert, a separate company processed payroll, including withholding and other calculations, for all restaurant employees. Robert and one of the operational managers, Brian Zollicoffer ("Zollicoffer"), submitted biweekly reports to the payroll company for processing. Powell did not actively participate in the payroll process. According to Zollicoffer, Powell "had nothing to do with deciding" whether the salaried employees, including Robert, got paid for any particular pay period. When cash flow was tight and Powell could or would not fund the shortfall, Robert decided not to submit information to the payroll company regarding the hours he had worked. As a result, he did not get

paid for those periods. While no one factor of the economic reality test is dispositive, we nonetheless find this third factor to be especially significant in this case, since Robert's primary objective in this action was to recover unpaid wages that he claimed Powell owed him. Although Powell may have had some control over the amount of money in the P2E bank accounts, his only direct involvement in the payroll process was the appearance of his "electronic signature" on all paychecks. When Robert chose not to submit information regarding the hours he worked to the payroll company that would have generated a check for his salary during a particular pay period, he did so at his own discretion and without Powell's prior knowledge or approval. Consequently, given Robert's control over the payroll process and, more importantly, his control over his own salary, it was Robert who failed to pay himself the wages he now seeks to recover from Powell.

Finally, as to the fourth economic reality test factor, Robert agreed at his deposition that he was in charge of maintaining employment records and personnel files. There is no record evidence to suggest that Powell maintained any employment records.

Reviewing the evidence in the light most favorable to Robert, he fails to explain how these factors pertain to the economic realities of this case. Powell and P2E cannot be adjudged an "employer" for purposes of the NCWHA under any analysis based in "economic reality." The record reveals that Robert consulted with Powell prior to significant expenditures, and that he relied on Powell for funding during the restaurant's economic shortfalls. Yet Robert's operational control over the restaurant's operations was substantial as well as consistently exercised. Powell took no responsibility for the direct supervision of the restaurant's employees. Even when the record is viewed in the light most favorable to Robert, it could not lead a rational trier of fact to find for him. As a result, there was no genuine issue of fact for trial and the trial court properly granted defendants' motion for summary judgment.

Pursuant to the NCWHA and the economic reality test, Powell and P2E were not employers for the purposes of Robert's unpaid wages claim. Although Powell maintained financial control over the restaurant by virtue of his position as the sole Member of P2E, he did not have significant day-to-day, operational control over the restaurant's employees. Accordingly, we affirm the trial court's grant of summary judgment in favor of defendants.

AFFIRMED.

Judges BRYANT and ZACHARY concur.

KIMARLO RAGLAND, PETITIONER
v.
NASH-ROCKY MOUNT BOARD OF EDUCATION, RESPONDENT

No. COA15-862

Filed 7 June 2016

1. Appeal and Error—record—administrative record—CD—motion to strike denied

A CD that was part of an administrative record, which was filed by respondent-Board pursuant to N.C.G.S. § 150B-47 for review by the trial court and filed with the Court of Appeals pursuant to N.C. Rule of Appellate Procedure 9(d)(2), was properly a part of the record on appeal, and petitioner's motion to strike the CD video recording was denied.

2. Appeal and Error—record—motion of squash subpoena—no ruling at trial indicated

Petitioner did not preserve for appeal an issue involving respondent's motion to quash a subpoena where the record did not indicate a ruling on the motion.

3. Schools and Education—dismissed teacher—decision on administrative record

Assuming the issue was preserved for appellate review, petitioner could not have prevailed on the question of whether a subpoena should have been suppressed in a case involving a teacher's dismissal. N.C.G.S. § 115C-325.8 explicitly provided that a teacher's appeal of a dismissal shall be decided on the administrative record. Once the administrative record was closed, petitioner had no right to request additional discovery or to subpoena additional witnesses before the superior court.

4. Schools and Education—teacher dismissal—appeal to superior court—pleading—not a civil action

Respondent-Board responded in a timely manner to a petition in an action by a teacher challenging his dismissal where petitioner assumed the status of one who had filed a complaint in the superior court, but what petitioner actually sought in the superior court was an administrative review of respondent-Board's decision. Respondent-Board was not required to respond in accordance with the Rule of Civil Procedure applicable to a party in a civil action.

5. Schools and Education—dismissal of teacher—trial court review—proper

In a case in which a teacher challenged his dismissal, there was nothing in the record on appeal that would suggest the trial court neglected its duty and failed to perform the review required by law.

6. Administrative Law—appeal of agency—trial court sitting as an appellate court——findings not required

Although petitioner argued that the trial court's order was not factual in nature in an action by a teacher challenging his dismissal, a trial court sitting as an appellate court to review an administrative agency decision is not required to make findings of fact, and, if the court does make such findings, they may be disregarded on appellate review.

7. Schools and Education—teacher dismissal—change in attorneys

In an action by a teacher challenging his dismissal, the trial court did not err by allowing "impromptu" counsel for respondent-Board. The record, however, established that counsel filed a Notice of Appearance and properly served petitioner with the notice in advance of the hearing. Petitioner cited to no authority to support his argument that respondent-Board's counsel was not properly before the court, nor did he put forth any basis for his claim of prejudice other than accusations that the change in attorneys was made in order to personally attack petitioner.

8. Schools and Education—teacher dismissal—not arbitrary or capricious

Respondent-Board's decision to terminate a teacher was supported by substantial evidence in the record and was not arbitrary or capricious. Reviewing the entire record, there was substantial evidence to support respondent-Board's decision to terminate petitioner's employment for neglect of duty, inadequate performance, failure to fulfill the duties and responsibilities imposed upon teachers by state law, and failure to comply with reasonable requirements prescribed by the Board, any of which, standing alone, would be sufficient to support respondent-Board's decision.

9. Schools and Education—dismissal of teacher—evidence proper

The evidence relied upon by respondent-Board in considering the dismissal of a teacher constituted the type of probative evidence to which respondent-Board was entitled to give consideration.

10. Schools and Education—dismissal of teacher—specific findings and conclusions—not required

The procedures for a teacher dismissal hearing that governed petitioner's case did not require the Board to make specific findings of fact or conclusions of law. Respondent-Board provided the requisite notice to petitioner pursuant to N.C.G.S. § 115C-325.6, and petitioner's argument that respondent-Board was required to make findings of fact and conclusions of law was overruled.

11. Schools and Education—dismissal of teacher—not unconstitutional

Respondent-Board's decision to dismiss a teacher was not unconstitutional or otherwise made upon improper procedures or affected by error of law. Petitioner made a generalized argument that his constitutional rights were violated and his property taken without due process but did not cite any authority in support of those assertions. The record fully established that petitioner was afforded the process and procedure to which he was entitled pursuant to N.C.G.S. §§ 115C-325.4 through -325.8.

Appeal by petitioner from order entered 15 April 2015 by Judge Alma L. Hinton in Nash County Superior Court. Heard in the Court of Appeals 9 February 2016.

Kimarlo A. Ragland, B.S., M.S., pro se.

Tharrington Smith, L.L.P., by Deborah R. Stagner and Colin A. Shive, for respondent-appellee.

BRYANT, Judge.

Where the trial court's decision following review of a school board's termination of a teacher's employment was supported by substantial evidence and was not arbitrary or capricious, and where the decision was made upon lawful procedures and was not affected by other error of law, we affirm.

On 6 October 2014, respondent, Nash-Rocky Mount Board of Education ("respondent-Board"), hired Kimarlo Ragland, petitioner, as a math teacher at Tar River Academy, respondent-Board's alternative school. On 17 October 2014, less than two weeks after starting work, petitioner had a confrontation with a student ("M"). M had been making threats to another student in the classroom, and petitioner was escorting

M to the in-school suspension office. Once in the hallway, petitioner and M exchanged remarks; M became angry, dropped his books, and told petitioner that petitioner "[was] not going to keep talking to [him] like th[at]." Petitioner retreated to his classroom and locked the door. M hit and kicked the door, attempting to get into the classroom. M eventually broke the glass panels of the door, cutting himself and bleeding profusely. A teacher from the classroom across the hall, Charman Pearson, came over and placed herself between M and the door.

During this time, petitioner remained in the classroom but stripped off his shirt as though preparing for a fight. Students within the classroom were out of their seats and moving around as petitioner paced shirtless near the door. A female student ("S.B."), told petitioner to put his shirt on or he would get fired. Petitioner did not respond to S.B., but he did put his shirt back on. Although there was a phone in the classroom, at no time during the incident did petitioner attempt to notify the school administration or otherwise obtain assistance. The school's administrative office was ultimately notified of the incident by students from another classroom. The injured student, M, was escorted away by the school resource officer.

Later, the school principal John Milliner-Williams, obtained written statements from students. Principal Williams then had the students removed from the classroom and he reviewed the statements. He also spoke to some of the students who were in the classroom and learned that another student, S.B., had made a cell phone video recording of the incident. Principal Williams then talked to petitioner. When asked why he had removed his shirt, petitioner stated that he was preparing for combat and thought that he would have to defend himself. As a result of petitioner's handling of the incident, Principal Williams issued a written letter to petitioner reprimanding him for his bad judgment, failure to follow standard procedures, failure to call for assistance, and "complete lack of concern for the safety of [his] students or the adherence to school and district guidelines."

On the next school day, Monday, 20 October 2014, petitioner approached S.B., stroked her hair and told her that he had been "thinking about [her] the whole weekend, how [she] tried to help [him] save [his] job." At the end of the class period, as S.B. was leaving, petitioner asked her why she had told him to put his shirt back on and asked, "[y]ou didn't want to see my muscles?" In her next class, S.B. shared with Ms. Pearson that she was uncomfortable and did not want to go back to petitioner's class. Ms. Pearson referred S.B. to administration, where she met with Principal Williams. S.B. was visibly shaken and looked as

if she had been crying. In her statement to Principal Williams and later at the hearing before respondent-Board, S.B. said that petitioner's comments and his touching her made her "uncomfortable," and she "felt his [comments were] out of line."

That same day, Principal Williams called petitioner into his office to question him about his conduct. Petitioner admitted that he had touched S.B.'s hair, but did not seem to think he had done anything wrong by stroking her hair and making the statements he had made. The combination of the two incidents that day (Monday) and the previous Friday led Principal Williams to believe it would be impossible for petitioner to be an effective educator at Tar River Academy. Principal Williams informed the superintendent, Dr. Anthony Jackson, of petitioner's actions, and the superintendent met with petitioner on 22 October 2014 in order to allow him an opportunity to respond to the allegations against him. Dr. Jackson testified that he was concerned about the lack of judgment petitioner had shown in such a short time. After the meeting, Dr. Jackson suspended petitioner with pay effective immediately. Dr. Jackson then recommended petitioner's dismissal by written letter dated 25 November 2014.

Petitioner appealed Dr. Jackson's dismissal recommendation to respondent-Board, which conducted a hearing that lasted over three hours on 8 January 2015. Three students, including S.B., along with Ms. Pearson, Principal Williams, and Dr. Jackson, testified at the hearing. Respondent-Board viewed the video recording. Respondent-Board also received documentary evidence from both the superintendent, Dr. Jackson, and petitioner. The documentary evidence included, *inter alia*, copies of petitioner's written reprimand, the dismissal letter, students' handwritten statements regarding the incident, copies of pertinent statutes (N.C.G.S. §§ 115C-325.4, -325.6, -325.7), and applicable pages from the Nash-Rocky Mount Board of Education Policy Manual.

Following the hearing, respondent-Board voted to terminate petitioner based on grounds of inadequate performance, neglect of duty, failure to comply with such reasonable requirements as respondent-Board may prescribe, and failure to fulfill the duties and responsibilities imposed upon teachers by state law. On 12 January 2015, respondent-Board notified petitioner in writing of its decision to dismiss him from his position as a teacher on the grounds listed above. Petitioner filed a "Petition for Judicial Review and Notice of Appeal" and later an Amended Petition in the Superior Court. Petitioner asserted that he was seeking review of respondent-Board's decision pursuant to N.C. Gen. Stat. §§ 150B-45 and 115C-325.8.

Respondent-Board timely filed in the Superior Court the Administrative Record from petitioner's 8 January 2015 dismissal hearing before respondent-Board. Respondent-Board also filed a Response to the Petition for Judicial Review pursuant to N.C. Gen. Stat. § 150B-46.

Meanwhile, petitioner filed a Motion to Enter Default, a Motion for Judgment by Default, a Motion for Summary Judgment, and later a revised Motion for Summary Judgment. Petitioner noticed these three motions for hearing on 13 April 2015, and respondent-Board subsequently filed a Notice of Hearing on the Petition.

On 13 April 2015, the case came on for hearing before the Honorable Alma Hinton, Superior Court Judge presiding. By order entered 15 April 2015, Judge Hinton denied petitioner's three motions, dismissed the Petition for Judicial Review, and affirmed respondent-Board's decision dismissing petitioner from his position as a teacher. Petitioner timely filed Notice of Appeal to this Court.

Petitioner's Motion to Strike the Video Recording

[1] The Record on Appeal was deemed settled by operation of Rule 11(c) of the North Carolina Rules of Appellate Procedure. Included in the Record on Appeal filed with the Clerk of the Court of Appeals was a "CD of video evidence filed pursuant to Rule 9(d)" ("video recording"). Petitioner filed a Motion to Strike the video recording, arguing, *inter alia*, that the trial court did not view or examine the recording, and therefore, it is not properly before this Court. Thereafter, respondent-Board filed a response to petitioner's Motion to Strike.

"Pursuant to the North Carolina Rules of Appellate Procedure, our review is limited to the record on appeal . . . *and any other items filed with the record in accordance with Rule 9(c) and 9(d)*." *N.C. Concrete Finishers, Inc. v. N.C. Farm Bureau Mut. Ins. Co., Inc.*, 202 N.C. App. 334, 337, 688 S.E.2d 534, 536 (2010) (emphasis added) (quoting *Kerr v. Long*, 189 N.C. App. 331, 334, 657 S.E.2d 920, 922 (2008)). Rule 9(d) states in relevant part:

> Any exhibit filed, served, submitted for consideration, admitted, or made the subject of an offer of proof may be made a part of the record on appeal if a party believes that its inclusion is necessary to understand an issue on appeal.
>
> . . .

> (2) Exhibits Not Included in the Printed Record on Appeal. A documentary exhibit that is not included in the printed record on appeal can be made a part of the record on appeal by filing three copies with the clerk of the appellate court.

N.C. R. App. P. 9(d)(2) (2014).

Here, the CD video recording was part of the Administrative Record, which was filed by respondent-Board pursuant to N.C. Gen. Stat. § 150B-47 for review by the trial court and filed with this Court pursuant to Rule 9(d)(2). Petitioner concedes that the CD video recording is part of the administrative record. Because the CD was part of the Administrative Record, which in turn was before and reviewed by the trial court, it is properly a part of the record here. *See Batch v. Town of Chapel Hill*, 326 N.C. 1, 12, 387 S.E.2d 655, 662 (1990) (making "an examination of the administrative record which was correctly before the trial court on review"). Accordingly, petitioner's Motion to Strike the CD video recording is denied.

On appeal, petitioner asserts the following arguments (condensed for purposes of clarity and ease of reading): (I) the trial court erred in committing various errors of law and procedure in hearing and deciding the petition; and (II) respondent-Board's decision to terminate petitioner's employment was not supported by substantial evidence in the record, was arbitrary or capricious, and was made upon unlawful procedures or affected by other error of law.

This case arises from a judicial review of respondent-Board's decision to terminate petitioner's employment as a teacher with the Tar River Academy. A superior court sitting in review of a local school board's decision to dismiss a teacher may reverse the school board's decision if it determines that the decision:

> (1) Is in violation of constitutional provisions.
>
> (2) Is in excess of the statutory authority or jurisdiction of the board.
>
> (3) Was made upon unlawful procedure.
>
> (4) Is affected by other error of law.
>
> (5) Is unsupported by substantial evidence in view of the entire record as submitted.

(6) Is arbitrary or capricious.

N.C. Gen. Stat. § 115C-325.8 (2015).

The language of N.C. Gen. Stat. § 115C-325.8 is nearly identical to the language set forth in N.C. Gen. Stat. § 150B-51(b) of the Administrative Procedure Act ("APA").[1] Prior to the adoption of N.C. Gen. Stat. § 115C-325.8, effective 1 July 2014, the right of appeal to superior court for a dismissed teacher was previously codified in N.C. Gen. Stat. § 115C-325(n).[2] Under N.C. Gen. Stat. § 115C-325(n), North Carolina's appellate courts consistently applied the standards for judicial review set out in N.C.G.S. § 150B-51(b) of the APA to appeals from school

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1. N.C. Gen. Stat. § 150B-51(b) of the APA states as follows:

> (b) The court reviewing a final decision may affirm the decision or remand the case for further proceedings. It may also reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency or administrative law judge;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S 150B-29(a), 150B-30, or 150B-31 in view of theentire record as submitted; or
>
> (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51(b) (2015); *see also Joyner v. Perquimans Cnty. Bd. of Educ.*, 231 N.C. App. 358, 364–65, 752 S.E.2d 517, 521–22 (2013) (holding the trial court was correct in applying the "whole record test" in undertaking its review of the Board of Education's decision and citing N.C. Gen. Stat. § 150B-51(b) for the appropriate standard of review).

2. N.C. Gen. Stat. § 115C-325(n) states as follows:

> (n) **Appeal.** – Any career employee who has been dismissed or demoted under G.S. 115-325(e)(2), or under G.S. 115C-325(j2), or who has been suspended without pay under G.S. 115C-325(a)(4a), or any school administrator whose contract is not renewed in accordance with G.S. 115C-287.1, or any probationary teacher whose contract is not renewed under G.S. 115C-325(m)(2) shall have the right to appeal from the decision of the board to the superior court for the superior court district or set of districts as defined in G.S. 7A-41.1 in which the career employee is employed. This appeal shall be filed within a period of 30 days after notification of the decision of the board. The cost of preparing the transcript shall be determined under G.S. 115C-325(j2)(8) or G.S. 115C-325(j3)(10).

boards to the courts. *See, e.g.*, *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 185 N.C. App. 566, 572, 649 S.E.2d 410, 414 (2007) ("On appeal of a decision of a school board, pursuant to the amended N.C. Gen. Stat. § 115C-325(n), 'a trial court sits as an appellate court and reviews the evidence presented to the school board.' " (citation omitted)); *Joyner v. Perquimans Cnty. Bd. of Educ.*, 231 N.C. App. 358, 363–64, 752 S.E.2d 517, 521 (citing to N.C.G.S. § 150B-51(b) for the standard of review where a probationary teacher whose contract had not been renewed appealed the decision pursuant to N.C.G.S. § 115C-325(n)). Accordingly, the case law developed under the prior statutory framework of N.C.G.S. § 115C-325(n) is instructive, particularly where no appellate court has addressed the standard of review for N.C.G.S. § 115C-325.8 and where N.C.G.S. § 115C-325.8 is practically indistinguishable from the standard of review set forth in N.C.G.S. § 150B-51(b).

In reviewing administrative proceedings like those conducted by school boards, the trial court acts as an appellate court and may not substitute its judgment for that of a school board. *See, e.g.*, *Rector v. N.C. Sheriffs' Educ. & Training Stds. Comm'n*, 103 N.C. App. 527, 532, 406 S.E.2d 613, 617 (1991). Further, "the substantive nature of each assignment of error dictates the standard of review." *N.C. Dep't of Env't and Natural Res. v. Carroll*, 358 N.C. 649, 658, 599 S.E.2d 888, 894 (2004) (citations omitted). "When this court reviews appeals from superior court either affirming or reversing the decision of an administrative agency, our scope of review is twofold, and is limited to determining: (1) whether the superior court applied the appropriate standard of review and, if so, (2) whether the superior court properly applied this standard." *Mayo v. N.C. State Univ.*, 168 N.C. App. 503, 507, 608 S.E.2d 116, 120 (2005) (citing *In re Appeal by McCrary*, 112 N.C. App. 161, 166, 435 S.E.2d 359, 363 (1993)).

De novo review applies to a petitioner's claims regarding the violation of subsections (1) through (4) of N.C.G.S. § 115C-325.8. *See Carroll*, 358 N.C. at 659, 599 S.E.2d at 895 (interpreting similar provisions of N.C.G.S. § 150B-51(b)). "Under the *de novo* standard of review, the trial court considers the matter anew and freely substitutes its own

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> A career employee who has been demoted or dismissed, or a school administrator whose contract is not renewed, who has not requested a hearing before the board of education pursuant to this section shall not be entitled to judicial review of the board's action.

Id. § 115C-325(n) (2015).

judgment" for that of the board. *Id.* at 660, 559 S.E.2d at 895 (citation and quotation marks omitted).

The remaining two grounds for violations under N.C.G.S. § 115C-325.8, claims that respondent-Board's decision was unsupported by substantial evidence (subsection (5)) or was arbitrary or capricious (subsection (6)), are subject to the whole record test. *See Davis v. Macon Cnty. Bd. of Educ.*, 178 N.C. App. 646, 652, 632 S.E.2d 590, 594 (2006). The whole record test requires a reviewing court to consider the entire record to determine whether there is "substantial evidence" to support a school board's final decision. *Joyner*, 231 N.C. App. at 365, 752 S.E.2d at 521–22 "Substantial evidence is that which a reasonable mind would regard as adequately supporting a particular conclusion." *Walker v. N.C. Dep't of Human Res.*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990) (citation omitted). "[T]he reviewing court must examine all competent evidence, including that which contradicts the agency's findings, to determine if the agency decision is possessed of a rational basis in the evidence." *Beauchesne v. Univ. of N.C. at Chapel Hill*, 125 N.C. App. 457, 465, 481 S.E.2d 685, 691 (1997) (citation omitted).

In applying the whole record test, the reviewing trial court "may not substitute its judgment for the agency's as between two conflicting views, even though it could reasonably have reached a different result had it reviewed the matter *de novo*." *Carroll*, 358 N.C. at 660, 599 S.E.2d at 895 (citation omitted). The decisions of local school boards may be reversed as arbitrary or capricious only if they are "patently in bad faith, or whimsical in the sense that they indicate a lack of fair and careful consideration or fail to indicate any course of reasoning and the exercise of judgment." *Alexander v. Cumberland Cnty. Bd. of Educ.*, 171 N.C. App. 649, 660, 615 S.E.2d 408, 416 (2005) (citations and quotation marks omitted).

Additionally, "[i]n all actions brought in any court against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show to the contrary." N.C. Gen. Stat. § 115C-44(b) (2015); *see also Alexander*, 171 N.C. App. at 660, 615 S.E.2d at 416 (citing statutory presumption of correctness in administrative review of school board decisions). The burden is on petitioner to show that the school board acted arbitrarily or capriciously. *Abell v. Nash Cnty. Bd. of Educ.*, 89 N.C. App. 262, 265, 365 S.E.2d 706, 708 (1988) (*Abell II*) (citing Edward L. Winn, *Teacher Nonrenewal in North Carolina*, 14 Wake Forest L. Rev. 739, 762 (1978)). Arbitrary or capricious reasons "are those without any rational

basis in the record . . . ." *Abell v. Nash Cnty. Bd. of Educ.*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984) (*Abell I*).

I

Petitioner first argues that the trial court's decision was made upon unlawful procedures and was affected by error of law. Specifically, petitioner contends that the trial court (1) erred and violated his rights by not "adjudicating" his subpoena; (2) improperly denied petitioner's motions to enter default, judgment by default, and for summary judgment; (3) erred in its review and resulting order because the order was not "factual in nature"; and (4) erred in hearing from respondent-Board's "impromptu" counsel at the 13 April 2015 hearing. On all points, we disagree.

(1) Subpoena

[2] Once petitioner's case was before the trial court for review, petitioner sought to compel (1) the addresses of two students, as petitioner claimed the students assaulted him, and (2) the minutes of the Board's closed session deliberation following petitioner's dismissal. Respondent-Board filed a Motion to Quash Subpoena on the grounds that the subpoena (1) required disclosure of privileged or other protected matter to which no exception or waiver applied and (2) was otherwise unreasonable or oppressive. However, there is nothing in the record before this Court to indicate whether the trial court ruled on respondent-Board's Motion to Quash Subpoena. As petitioner failed to "obtain a ruling upon the . . . motion," he has failed to preserve this issue for appeal. N.C. R. App. P. 10(a)(1) (2014).

[3] Nevertheless, assuming arguendo the issue is preserved for review, petitioner could not prevail. Section 115C-325.8 explicitly provides that a teacher's appeal of a dismissal "shall be decided on the administrative record." N.C.G.S. § 115C-325.8(b). In the instant case, at petitioner's dismissal hearing before respondent-Board, petitioner was permitted to subpoena witnesses, and he did so. He subpoenaed three students to testify—the female student who recorded the video, a male student who observed petitioner's exchange with S.B. where petitioner touched her hair, and another female student who was in the classroom when petitioner removed his shirt. Petitioner questioned those students, and he was also given the opportunity to present documentary evidence. Once the administrative record was closed, petitioner had no right to request additional discovery or to subpoena additional witnesses before the Superior Court. Indeed,

> when a superior court judge sits as an appellate court to review an administrative agency decision the judge is not required to make findings of fact. . . . *If the superior court judge does make findings of fact and conclusions of law, these will not be considered in our appellate review.*

Shepherd v. Consolidated Judicial Retirement Sys., 89 N.C. App. 560, 562, 366 S.E.2d 604, 605–06 (1988) (emphasis added) (internal citations omitted). Thus, even if petitioner had obtained a ruling from the trial court on respondent-Board's Motion to Quash petitioner's subpoena, the ruling would not have been favorable to petitioner as petitioner could not have presented additional evidence to the superior court that had not been presented to respondent-Board. *See id.*; *see also Macon Cnty. Bd. of Educ.*, 178 N.C. App. at 651, 632 S.E.2d at 594 ("On appeal of a decision of a school board, a trial court sits as an appellate court and reviews the evidence *presented to the school board*." (emphasis added) (citation omitted)).

Accordingly, there is no basis for petitioner's assertion that he was entitled to subpoena records or was otherwise entitled to additional discovery on appeal once the matter was before the trial court. The trial court was permitted to review respondent-Board's decision only on the administrative record before it, *see* N.C.G.S. § 115C-325.8(b), and thus, the trial court did not err in concluding that it was "only empowered to consider the record . . . ."

(2) Petitioner's Motions

[4] Petitioner next contends that the trial court erred in determining that his motions—Motion to Enter Default, Motion for Judgment by Default, and Motion for Summary Judgment—were inappropriate as respondent-Board's "answer" failed to set forth affirmative defenses and deny allegations set forth in his Petition, which petitioner considers to be a "complaint." Specifically, petitioner contends that there was "no genuine issue of any material fact" as respondent-Board failed to deny any of petitioner's allegations set forth in his petition. Thus, petitioner argues, as there was "no genuine issue of any material fact," the trial court should have granted default, default judgment, and summary judgment in favor of petitioner. Petitioner's argument is without merit.

Based on his motions before the trial court and his arguments before this Court, petitioner is trying to assume the status of one who has filed a "complaint" in the superior court. However, what petitioner actually sought in the superior court was an *administrative* review of respondent-Board's decision. Both the Petition and the Amended

Petition specifically state that they are brought pursuant to N.C. Gen. Stat. §§ 150B-45 and 115C-325.8. Petitioner did not file a complaint or commence a *civil action* under Rule 3 of the North Carolina Rules of Civil Procedure. *See* N.C. Gen. Stat. § 1A-1, Rule 3 (2015) ("A *civil action* is commenced by filing a complaint with the court." (emphasis added)). Thus, respondent-Board was not required to respond in accordance with the Rule of Civil Procedure applicable to a party in a civil action after service of a summons and a complaint. *See* N.C. Gen. Stat. § 1A-1, Rule 12(a)(1) (2015) ("A defendant shall serve his answer within 30 day after service of the *summons and complaint* against him." (emphasis added)).

Indeed, the Rules of Civil Procedure "shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature *except when a differing procedure is prescribed by statute*." N.C. Gen. Stat. § 1A-1, Rule 1 (2015) (emphasis added). Thus, "when a statute under which an administrative board has acted provides an orderly procedure for an appeal to the superior court for review of the board's action, this procedure is the exclusive means for obtaining such judicial review." *Presnell v. Pell*, 298 N.C. 715, 722, 260 S.E.2d 611, 615 (1979) (citations and quotation marks omitted). Here, N.C. Gen. Stat. § 150B-46 provides that, in response to a petition filed following administrative proceedings, "parties to the proceeding may file a response to the petition within 30 days of service. Parties, including agencies, may state exceptions to the decision or procedure and what relief is sought in the response." *Id.* § 150B-46 (2015).

Respondent-Board responded in a timely manner to the Petition. Respondent-Board was served with a copy of the Amended Petition by certified mail on 24 February 2015 and respondent-Board filed a copy with the trial court on 25 March 2015, within thirty days after receipt of the Petition (twenty-nine days later). Respondent-Board had no duty to respond to petitioner's improper motions. Accordingly, petitioner's arguments are overruled as his motions for default and summary judgment were inappropriate and properly denied by the trial court.

(3) Trial Court's Review and Order

[5] Petitioner also contends that the trial court failed to review the Petition, Administrative Record, and other materials. This contention is without merit. The Order dismissing the Petition and affirming respondent-Board's decision clearly states as follows: "The Court has reviewed the Petition and Amended Petition, the Administrative Record filed by Respondent[-Board] . . . and Respondent[-Board's] Response

. . . and has considered the arguments of Petitioner and counsel for Respondent[-Board], as well as the briefs and legal authorities submitted." There is nothing in the record before this Court that would suggest the trial court neglected its duty and failed to perform the review required by law. *See Moore*, 185 N.C. App. at 573, 649 S.E.2d at 415 (noting that the appellate court's task "is essentially twofold: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.")

[6] Petitioner also argues that the trial court's order was not "factual in nature." However, when a trial court sits as an appellate court to review an administrative agency decision, the court is not required to make findings of fact, and if the court does make such findings, they may be disregarded on appellate review. *See id.*; *Shepherd*, 89 N.C. App. at 562, 366 S.E.2d at 605–06 (1988); *see also Area Mental Health Auth. v. Speed*, 69 N.C. App. 247, 250, 317 S.E.2d 22, 25 (1984) (noting that "it is unnecessary for a trial judge who reviews administrative action . . . to explain the reasons for his decision to affirm such action"). We find nothing in the record to suggest the trial court erred in its review of the administrative record or in its order. Accordingly, petitioner's argument is overruled.

(4) Respondent's Counsel at the 13 April 2015 Hearing

[7] Petitioner also argues that the trial court erred in allowing "impromptu" counsel for respondent-Board and contends that he was prejudiced by the fact that respondent-Board was represented by a different attorney, albeit from the same law firm, at the 13 April 2015 hearing. The record, however, establishes that counsel filed a Notice of Appearance and properly served petitioner with the notice in advance of the hearing. Petitioner cites to no authority to support his argument that respondent-Board's counsel was not properly before the court, nor does he put forth any basis for his claim of prejudice other than accusations that the change in attorneys was made in order to personally attack petitioner. This argument, which is wholly without merit and is not supported by the record, is overruled.

II

[8] In petitioner's next argument, he contends that the trial court's order affirming respondent-Board's decision to terminate petitioner's employment was in error as respondent-Board's decision was not supported by substantial evidence in the record and was arbitrary and capricious; that respondent-Board's decision was based on improper evidence; that respondent-Board was required to make findings of fact; and that

respondent-Board's decision was unconstitutional and otherwise made upon improper procedures or affected by error of law. We disagree.

Petitioner challenges the evidence relied upon to sustain his termination based on "inadequate performance" and "neglect of duty" as insufficient.

> It is well settled that the credibility of witnesses and the probative value of particular testimony are for the administrative body to determine, and it may accept or reject in whole or in part the testimony of any witness. While an administrative body must consider all of the evidence and may not disregard credible undisputed evidence, it is not required to accept particular testimony as true.

State ex rel. Utils. Comm'n v. Duke Power Co., 305 N.C. 1, 21, 287 S.E.2d 786, 798 (1982) (citation omitted). Moreover, "it is the responsibility of the administrative agency," here respondent-Board, "to determine the weight and sufficiency of the evidence and the credibility of witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. *See Watkins v. N.C. State Bd. of Dental Exam'rs*, 358 N.C. 190, 202, 593 S.E.2d 764, 771 (2004) (citation and quotation marks omitted).

During the hearing held on 8 January 2015, respondent-Board heard testimony from a female student S.B. and two other students, Ms. Pearson, Principal Williams, and Superintendent Anthony Jackson. Respondent-Board reviewed the video recording of the 17 October 2015 incident, considered the handwritten statements and other documentary evidence presented by both petitioner and the superintendent, and heard petitioner's statements and arguments. The evidence, which petitioner argues is not substantial and, therefore, cannot support respondent-Board's dismissal of petitioner, is summarized below.

Petitioner does not dispute the essential facts, he only challenges the conclusions to be drawn therefrom. Petitioner has never denied that during a situation with an out-of-control student, he removed his shirt and prepared for a physical confrontation. Instead of calling a school administrator, the school resource officer, or other assistance, petitioner became agitated, stripped to his bare torso, and "prepared for combat." Meanwhile, another teacher, Ms. Pearson, placed herself between the door and the violent student, trying to calm him down, while also entreating petitioner to please call "downstairs" for assistance. Ultimately, another student contacted the main office and summoned help.

Ms. Pearson testified that on 17 October 2015 there was no order in petitioner's classroom during the incident and that it is a teacher's "responsibility to keep order in a classroom at all points in time." Principal Williams testified as follows:

> Based on the statements I had from the students and my conversation with [petitioner], I had determined that he had not acted in the best interests of the students, which is always our primary objective. He didn't call the front office when – when the incident occurred. And I just felt like him preparing for combat instead of mitigating the circumstances, he was actually adding to the situation at that time.

Following the incident with the violent student and petitioner's removal of his shirt in the classroom on 17 October 2014, the following Monday, petitioner approached a female student S.B., stroked her hair, and told her that he had been thinking about her over the weekend. Petitioner also asked S.B., "[y]ou didn't want to see my muscles?" When questioned by Principal Williams, petitioner never denied this conduct but instead claimed he was being "friendly" towards S.B.

S.B. was extremely upset by petitioner's actions towards her, testifying that he had made her uncomfortable. Principal Williams testified that he was concerned that petitioner did not seem to think he had done anything wrong and he further felt that he could not risk petitioner possibly engaging in other inappropriate behavior with students.

Superintendent Jackson also testified regarding the applicable policies that petitioner had failed to follow, including the Board's policy against sexual harassment. The Board also considered the North Carolina State Board of Education policy outlining the Code of Ethics for professional educators.

Reviewing the entire record, there is substantial evidence to support respondent-Board's decision to terminate petitioner's employment as a teacher for neglect of duty, inadequate performance, failure to fulfill the duties and responsibilities imposed upon teachers by state law, and failure to comply with reasonable requirements prescribed by the Board, any of which, standing alone, would be sufficient to support respondent-Board's decision. *See* N.C. Gen. Stat. §§ 115C-325.4(a)(1), (4), (9), (10) (2014), *amended by* 2015 N.C. Sess. Laws 2015-24, § 8.38(a) ("No teacher shall be dismissed . . . except for one or more of the following: (1) Inadequate performance. . . . (4) Neglect of duty. . . . (9) Failure to fulfill the duties and responsibilities imposed upon teachers . . . .

(10) Failure to comply with such reasonable requirements as the board may prescribe.").

Further, there is nothing in the record to suggest that respondent-Board failed to consider and weigh all of the evidence or that respondent-Board's decision was "patently in bad faith, or whimsical." *In re Alexander*, 171 N.C. App. at 660, 615 S.E.2d at 416 (citation omitted). Accordingly, respondent-Board's decision to terminate petitioner was supported by substantial evidence in the record and was not arbitrary or capricious.

[9] Petitioner complains that the evidence relied upon by respondent-Board was "incompetent, unsubstantial, unreliable, and/or inadmissible." In a dismissal hearing before a school board, the board "may give probative effect to evidence that is of a kind commonly relied on by reasonably prudent persons in the conduct of serious affairs." N.C. Gen. Stat. § 115C-325.7(4) (2014). Here, the testimony of students, a teacher, the principal, the superintendent, written student statements, a video recording of petitioner's actions, and school board policies all constitute the type of probative evidence to which respondent-Board was entitled to give consideration. Petitioner's argument on this point is without merit.

[10] Petitioner also challenges what he deems respondent-Board's lack of required findings of fact. However, the procedures for a teacher dismissal hearing that govern petitioner's case do not require the board to make specific findings of fact or conclusions of law. *See* N.C. Gen. Stat. §§ 115C-325.4 through -325.8 (2014). Rather, a teacher "may not be dismissed . . . except upon the superintendent's recommendation based on one or more of the grounds in G.S. 115C-325.4." *Id.* § 115C-325.6(a). Those grounds include, *inter alia*, inadequate performance, neglect of duty, and failure to fulfill the duties and responsibilities imposed upon teachers or administrators. *See id.* §§ 115C-325.4(a)(1)–(9). Prior to a recommendation of dismissal or demotion, written notice to the teacher, setting forth "the grounds upon which [the superintendent] believes such dismissal or demotion is justified," *id.* § 115C-325.6(b), is also required.

Respondent-Board's written notice to petitioner of the basis for his dismissal included the following:

> The board determined that your conduct in your classroom at Tar River Academy on Friday, October 17, and Monday, October 20, required your termination. Your failure to appropriately respond to a student who became agitated in your classroom on Friday, October 17, created an unsafe situation during which the student injured himself.

> Rather than maintaining order in your classroom and contacting the front office for assistance with the student in the hallway, you created additional commotion inside the classroom by removing your shirt.
>
> Despite being provided an opportunity to prove that the Friday incident was an aberration, on the following Monday, you made an inappropriate comment to a female student while touching her hair. Despite testimony at the January 8 hearing about the effect that your conduct had on the student in question and a student who witnessed the interaction, you continued to maintain that you had done nothing wrong.

The above written notice clearly conveys respondent-Board's determination that petitioner's conduct warranted dismissal and the precise facts upon which that determination was based. Accordingly, as respondent-Board provided the requisite notice to petitioner pursuant to N.C.G.S. § 115C-325.6, petitioner's argument that respondent-Board was required to make "findings of fact and conclusions of law" is overruled.

[11] Finally, petitioner makes a generalized argument that his constitutional rights were violated and his property taken without due process. He neglects to cite to any authority in support of these assertions. *See State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." (citations omitted)). Further, because the record fully establishes that petitioner was afforded the process and procedure to which he was entitled pursuant to N.C. Gen. Stat. §§ 115C-325.4 through -325.8, petitioner's argument is overruled, and we find that respondent-Board's decision was not unconstitutional or otherwise made upon improper procedures or affected by error of law.

Thus, as the trial court's order affirming respondent-Board's termination of petitioner was made upon lawful procedures, was not affected by error of law, was supported by substantial evidence, and was not arbitrary or capricious, the order of the trial court is

AFFIRMED.

Judges DILLON and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
CHALMERS GRAY BOHANNON, JR.

No. COA15-389

Filed 7 June 2016

1. Child Abuse, Dependency, and Neglect—felonious—evidence of serious injury—sufficient

The trial court did not err in denying defendant's motion to dismiss a charge of felony child abuse inflicting serious bodily injury due to insufficient evidence. Significant, internal bleeding clearly had the potential to kill the child and that risk was created when the brain injury was inflicted.

2. Criminal Law—prosecutor's closing argument—not grossly improper

The trial court did not err by not intervening ex mero motu to address the prosecutor's allegedly improper closing remarks in a prosecution for felony child abuse inflicting serious bodily injury. In light of the overall factual circumstances, the prosecutor's closing arguments were not so grossly improper as to infect the trial with unfairness and render the conviction fundamentally unfair.

Appeal by defendant from judgment entered 27 March 2014 by Judge Edwin G. Wilson in Forsyth County Superior Court. Heard in the Court of Appeals 6 October 2015.

Attorney General Roy Cooper, by Assistant Attorney General Jennie Wilhelm Hauser, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender, John F. Carella, for defendant.

CALABRIA, Judge.

Chalmers Bohannon ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of felony child abuse inflicting serious bodily injury. For the reasons that follow, we find no error.

I. Background

The State presented evidence that on the evening minor victim A.B.[1] sustained injuries, he was approximately three months old and he lived with his mother, Brittany Fulp ("Fulp"), and his father, defendant, in a small apartment located in Winston-Salem. During the early evening hours of 7 September 2012, Fulp placed A.B. in his crib and he went to sleep. Since A.B. was asleep and defendant was home, Fulp walked to a nearby drugstore. When Fulp returned to the apartment approximately thirty to forty-five minutes later, A.B. was propped up on defendant and Fulp's bed; he was whimpering but was unable to cry. A.B.'s face and chest were bruised, and his eye was swollen. When Fulp asked defendant what happened, he responded that he was not sure. After settling A.B., Fulp laid him down for the night and planned to seek medical assistance if he appeared worse the next day. A.B. slept through the night for the first time in his life. Although Fulp checked on A.B. the following morning, she could not properly assess his condition due to the dim lighting around his crib. Sometime during the evening hours of 8 September 2012, defendant's mother, defendant, and Fulp transported A.B. to the hospital to have his injuries evaluated.

In the pediatric emergency department, A.B. was first assessed by a triage nurse. He was then further examined by Dr. David Klein, an emergency medicine specialist, and Dr. Coker, the chief resident at the hospital. Dr. Klein observed bruising in the following areas: A.B.'s left forehead; the right side of his face going towards the ear; the middle portion of the right side of his face; the upper left chest going toward his shoulder; and the right side of his chest going toward his upper abdomen. When the physicians asked defendant and Fulp what happened to A.B, neither one provided an answer. After remaining in the emergency room for fifteen minutes, defendant left the hospital and went home.

While at the hospital, A.B. underwent a series of diagnostic tests which included a CAT scan and an MRI of his head as well as x-rays of all his bones. Dr. Lauren Golding was the attending pediatric radiologist on duty when A.B. was brought to the hospital on 8 September. She discovered that A.B. had sustained a broken right tibia (i.e., leg fracture). A.B.'s leg injury was thought to be the result of a "buckle fracture," an injury that occurs when a bone "buckles" after being subjected to

1. The minor victim's initials will be used to protect his identity in conformity with N.C. R.App. P. 3.1(b) and 4.

substantial force or pressure. Buckle fractures in infants can result from significant twisting or torqueing of the bone. Follow-up x-ray scans (on 25 September 2012) revealed that A.B. had also sustained a buckle fracture to his left tibia. A.B.'s MRI revealed subarachnoid hemorrhaging consistent with the external bruising on both sides of his brain. Subarachnoid hemorrhages refer to bleeding under the arachnoid, or innermost, layer of the brain. At trial, Dr. Golding testified that bleeding around the brain is a sign of significant trauma and can result in acute illness or death depending on the volume of the bleeding and the increase in intracranial pressure. A.B. was eventually admitted to the hospital for orthopedic surgery, general observation, and physical protection. He was hospitalized for two days.

Since neither Fulp nor defendant could explain what happened to A.B., hospital staff reported suspected child abuse to Forsyth County's Child Protective Services (FCCPS) and local law enforcement. As a result, Winston-Salem Police Officer Aaron Jessup ("Officer Jessup") was dispatched to the hospital, where he found medical staff with A.B. in his room. Officer Jessup then located Fulp in the parking lot where it appeared she was trying to leave. Fulp told Officer Jessup she was not in the room because she was frightened and concerned for defendant. She also reported her version of events from the night of 7 September 2012. After continued questioning, Fulp informed the police officer that defendant was at their apartment. In following up on the information Fulp provided, Officer Jessup went to the family's apartment and interviewed defendant, who stated that he was cooking in the kitchen on the night of 7 September 2012 when A.B. fell off the couch and landed face down on the carpeted floor.

On 10 September 2012, Dr. Meggan Goodpasture, director of the hospital's Child Abuse and Neglect Team, conducted a complete physical exam on A.B. and observed that he had "significant bruising" on his chest, both cheeks, and his face extending from his left ear to his right ear. Upon A.B.'s release to FCCPS, hospital staff recommended that social workers have A.B. examined by a neurosurgeon in two to three weeks.

On 25 February 2013, the State indicted defendant and charged him with three counts of felony child abuse inflicting serious physical injury. Subsequently, the State offered a plea arrangement pursuant to which defendant could "plead as indicted" or face indictments on additional charges. After defendant rejected the plea offer, the State obtained additional indictments charging him with felony child abuse inflicting serious bodily injury and habitual felon status. The case proceeded to trial and, on 27 March 2014, a jury returned verdicts finding defendant guilty

on two counts of felony child abuse inflicting serious physical injury (a Class E felony) for A.B.'s broken tibias and bruising, and one count of felony child abuse inflicting serious bodily injury (a Class C felony) for A.B's brain injury. The trial court sentenced defendant to 127 to 165 months' imprisonment for the Class C felony and 44 to 65 months for each of the Class E felonies. The three sentences were ordered to run consecutively in the North Carolina Department of Public Safety, Division of Adult Correction. Defendant appeals.

II. Analysis

A. Motion to Dismiss

[1] Defendant first asserts that the trial court erred by denying his motion to dismiss because the State presented insufficient evidence of a serious bodily injury as required by N.C. Gen. Stat. § 14-318.4(a3). We disagree.

We review a 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 [c]ourt is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000), *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." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33 (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994), *cert. denied*, 515 U.S. 1135, 132 L. Ed. 2d 818 (1995). Contradictions and discrepancies in the evidence "are for the jury to resolve." *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993).

Felonious child abuse inflicting serious bodily injury is defined by subsection 14-318.4(a3), which provides that

> [a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or

> impairment of any mental or emotional function of the child, is guilty of a Class C[2] felony.

N.C. Gen. Stat. § 14-318.4(a3) (2012). A "serious bodily injury" is a "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization." N.C. Gen. Stat. § 14-318.4(d)(1).

The separate, lesser offense of felonious child abuse inflicting serious physical injury is defined under N.C. Gen. Stat. § 14-318.4(a), which states:

> A parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious physical injury upon or to the child or who intentionally commits an assault upon the child which results in any serious physical injury to the child is guilty of a Class E[3] felony, except as otherwise provided in subsection (a3) of this section.

N.C. Gen. Stat. § 14-318.4(a) (2012). A "serious physical injury" is defined as a "[p]hysical injury that causes great pain and suffering. The term includes serious mental injury." N.C. Gen. Stat. § 14-318.4(d)(2).

In order to prove felonious child abuse inflicting serious bodily injury, the State must prove that: "(1) the defendant was the parent of the child; (2) the child had not reached [sixteen years of age]; and (3) the defendant intentionally and without justification or excuse inflicted serious bodily injury." *State v. Wilson*, 181 N.C. App. 540, 543, 640 S.E.2d 403, 405-06 (2007). "[W]hen an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120-21 (2003).

In the instant case, it is undisputed that defendant is A.B.'s father and that A.B. is less than sixteen years of age. Defendant had exclusive

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2. 2013 N.C. Sess. Law 35, section 1, effective 1 December 2013, upgraded a violation of N.C. Gen. Stat. § 14-318.4(a3) from a Class C felony to a Class B2 felony. Defendant was properly indicted and convicted under the statute as it existed at the time of A.B.'s injuries.

3. 2013 N.C. Sess. Law 35, section 1, effective 1 December 2013, upgraded a violation of N.C. Gen. Stat. § 14-318.4(a) from a Class E felony to a Class D felony.

custody over A.B. at the time that A.B. was injured, and defendant does not challenge that he intentionally caused those injuries. Therefore, the only remaining issue is whether A.B.'s subarachnoid hemorrhaging constitutes a "serious bodily injury" under N.C. Gen. Stat. § 14-318.4(d)(1).

This Court has previously noted that "the definition of 'serious bodily injury' in this statute mirrors the definition of the same in [N.C. Gen. Stat.] § 14-32.4[,]" our assault inflicting serious bodily injury statute. *State v. Lowe*, 154 N.C. App. 607, 615, 572 S.E.2d 850, 856 (2002). In the context of our assault statute, the term "requires proof of more severe injury than the 'serious injury' element of [assault with a deadly weapon with intent to kill or inflicting serious injury]." *Id.* However, neither subdivision 14-318.4(d)(1) nor case law further define the term in the context of felonious child abuse, nor do they explain what constitutes a "substantial risk of death." *See* N.C. Gen. Stat. § 14-318.4(d)(1). Even so, it is clear that subsection 14-318.4(a3) is violated whenever a parent or caretaker inflicts a bodily injury on a minor that "creates" such a risk. *See id.* As a result, the age and particular vulnerability of a minor victim must factor into this analysis.

Defendant argues "the State failed to present evidence that the bleeding [around A.B.'s brain] created 'a substantial risk of death' or caused 'serious permanent disfigurement, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ,' or resulted in 'prolonged hospitalization.' " According to defendant, since A.B. did not actually suffer acute consequences from his subarachnoid hemorrhages, his brain injury never presented a substantial risk of death. In making this argument, defendant portrays A.B.'s hospitalization as one based on "protection," not "treatment," and he notes that A.B. was released only "with a prescription for Tylenol, if needed." Based on this characterization of the evidence, defendant asks us to remand for entry of judgment on the lesser offense of felony child abuse inflicting serious physical injury.

In response, the State contends that this Court's holding in *State v. Wilson*, 181 N.C. App. 540, 640 S.E.2d 403 (2007) should control our analysis in this case. Wilson is distinguishable, however, because the defendant in that case challenged the sufficiency of the evidence proving "that [she] intentionally abused her child[,]" rather than the evidence offered to prove a serious bodily injury. *Id.* at 542, 640 S.E.2d at 405. Furthermore, the *Wilson* defendant was convicted of a single count of felonious child abuse inflicting serious bodily injury for a series of injuries including first and second degree burns caused by scalding water and cigarette butts; "chronic signs of neglect"; and a blood clot

appearing on the right side of the child's brain. *Id.* at 541, 640 S.E.2d at 401. By contrast, in the instant case, defendant was convicted of three counts of felonious child abuse—two inflicting serious physical injury (for the fractured tibia and bruises appearing on A.B.'s face, ear, and chest), and one inflicting serious bodily injury (for the subarachnoid hemorrhages). Consequently, the "serious bodily injury" in *Wilson* was actually a series of injuries that included a subdural hematoma, rather than the brain injury alone.

Although *Wilson* does not control our analysis in this case, we nevertheless hold that there was sufficient evidence to submit to the jury the question of whether A.B. suffered a serious bodily injury. Our examination of the record evidence, considered in the light most favorable to the State, shows that A.B. was a normal, healthy baby who had no prior medical problems. Dr. Klein, the attending physician in the hospital's pediatric emergency department on 8 September 2012, testified about his examination of A.B. He stated that a CAT scan revealed an abnormality in A.B.'s skull, but the radiologist could not determine at that time whether "that was a separation due to a break [in the skull] or a separation due to a slow closing of those bones" forming the area commonly referred to as the "soft spot" on a baby's head. After A.B. was admitted to the hospital, Dr. Golding examined A.B.'s MRI, which revealed multiple areas of hemorrhaging on his brain. Dr. Golding testified that bleeding on the brain could lead to a number of issues, including "developmental delays" or even "acute illness and death" when there is significant volume and increasing intracranial pressure. Similarly, Dr. Goodpasture testified that bleeding around the brain is "certainly a sign of serious trauma" that, in infants, can cause "irritability, seizures, and . . . even . . . life-threatening events[.]" Although the subarachnoid hemorrhaging did not appear to be immediately life-threatening when A.B. was evaluated at the hospital, Dr. Goodpasture stated that it is very difficult to predict the full effect of brain injuries in infants because "an infant's brain at this time is growing and developing a tremendous amount, and . . . injury to their brain at this age could be more traumatic or damaging than to [an adult's]." She further testified that A.B.'s brain injury would require him to be continuously monitored for dangerous side effects down the road. Defendant did not offer any evidence.

When viewed in the light most favorable to the State, the evidence was sufficient to withstand defendant's motion to dismiss. More specifically, based on the facts of this case, we believe the record demonstrates that A.B.'s brain injury created a substantial risk of his death. The evidence suggests that defendant intentionally inflicted serious trauma to the head of A.B., thereby causing subarachnoid hemorrhaging. Indeed,

the force was so strong as to crack A.B.'s skull, or at the very least, cause bleeding in the brain of an infant so young that his "soft spot" had not yet closed. This significant, internal bleeding clearly had the potential to kill A.B. and that risk was created when the brain injury was inflicted. The dangers inherent in such a situation—one where some action or mechanism delivered multiple, vicious blows to a three-month-old baby's skull—could be inferred by the fact finder as a matter of common knowledge. Given the uncontroverted testimony of three expert witnesses who personally treated A.B., we conclude that there was sufficient evidence from which a reasonable jury could find that A.B.'s brain injury constituted a "serious bodily injury" in accordance with N.C. Gen. Stat. § 14-318.4(a3). Thus, the trial court did not err in denying defendant's motion to dismiss due to insufficiency of the evidence.

B. The State's Closing Argument

[2] Defendant next argues that the trial court erred in failing to intervene *ex mero motu* during the State's closing argument. We disagree.

Initially, we note that defendant did not object to the State's closing at trial.

> The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. Under this standard, only an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken. Defendant must show that the prosecutor's comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Jones, 231 N.C. App. 433, 437, 752 S.E.2d 212, 215 (2013) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, 367 N.C. 322, 755 S.E.2d 616 (2014).

It is well established that "[s]tatements made during closing arguments to the jury are to be viewed in the context in which the remarks are made and the overall factual circumstances to which they make reference." *State v. Harris*, __ N.C. App. __, __, 763 S.E.2d 302, 311 (2014) (citation omitted). "As a general proposition, counsel are allowed wide latitude in closing arguments, so that a prosecutor is entitled to argue

all reasonable inferences drawn from the facts contained in the record." *Id.* (citations omitted). "Unless the defendant objects, the trial court is not required to interfere *ex mero motu* unless the arguments stray so far from the bounds of propriety as to impede the defendant's right to a fair trial." *State v. Small*, 328 N.C. 175, 185, 400 S.E.2d 413, 418 (1991) (quotation marks and citations omitted). Nor is the trial court required "to intervene *ex mero motu* where a prosecutor makes comments during closing argument which are substantially correct shorthand summaries of the law, even if slightly slanted toward the State's perspective." *State v. Barden*, 356 N.C. 316, 366, 572 S.E.2d 108, 140 (2002) (citation omitted). Moreover, a prosecutor's misstatement of the law may be cured by the trial court's subsequent correct instructions. *Id.*

Here, defendant challenges the following statement made by the prosecutor during her closing argument:

> And I contend you've heard evidence from Dr. [Klein], Dr. Golding, and Dr. Goodpasture about the concerns about infants having subarachnoid hematoma [sic] or bleeding in the subarachnoid space; that infants are particularly vulnerable when they're this age, and that that kind of bleeding can lead to death, developmental delays, you know, brain disfigurement, a number of things; so much so that they have to monitor infants for a significant period of time to make sure that they develop normally and that they meet their milestones. And so what's required in that is a substantial risk. The State is not required to prove that [A.B.] actually suffered death or disfigurement or whatever. But I would contend to you that if you have a bleed in your brain, which is the organ that controls all your bodily functions, that that bleeding can lead to swelling, which cuts off oxygen, which could lead to death, which could lead to impairment, which could lead to delays, all kinds of significant problems down the road.

Defendant argues that this statement "misrepresented the State's burden of proof and asked the jury to find that [A.B.] suffered a 'serious bodily injury' if it concluded that there was *some possibility* of future impairment or disfigurement." Further, defendant argues that the trial court's failure to intervene and correct the State's misrepresentations deprived defendant of his right to a fair trial.

During closing argument, the prosecutor stated that she must prove "substantial risk" that "could lead" to prolonged or permanent injuries. The jury charge, however, clarified the law and the State's burden of proof:

> The defendant has been charged with Felonious Child Abuse Inflicting Serious Bodily Injury. For you to find the defendant guilty of this offense, the State must prove three things beyond a reasonable doubt: . . . And third, that the defendant intentionally inflicted a serious bodily injury to the child or intentionally assaulted the child which proximately resulted in serious bodily injury to the child.
>
> A serious bodily injury is defined as a bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ or that results in prolonged hospitalization.

Both the State and defendant approved the jury charge before it was delivered. Moreover, following a question from the jury, the judge clarified the definitions of "serious bodily injury" and "serious physical injury" under the statute. This request for clarification manifested the jury's understanding that the State's burden of proof for the charge stemming from A.B.'s head injury was different than those related to his bruises and broken tibias. Given the opportunity to convict defendant of the lesser charge of felonious child abuse inflicting serious physical injury, the jury nevertheless determined that A.B.'s subarachnoid hemorrhaging constituted a "serious bodily injury."

In light of the "overall factual circumstances" of this case, *Harris*, __ N.C. App. at __, 763 S.E.2d at 311, we conclude that the prosecutor's closing arguments were not "so grossly improper" as to "infect[] the trial with unfairness" and "render[] the conviction fundamentally unfair." *Jones*, 231 N.C. App. at 437, 752 S.E.2d at 215. Therefore, the trial court did not err by failing to intervene *ex mero motu* to address the prosecutor's allegedly improper closing remarks.

III. Conclusion

Based on the foregoing analysis, we hold that the trial court did not err in denying defendant's motion to dismiss for insufficient evidence the charge of felonious child abuse inflicting serious bodily injury. Additionally, we hold that the trial court did not err in failing to intervene *ex mero motu* during the prosecutor's closing argument.

NO ERROR.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
SANDRA MESHELL BRICE, DEFENDANT

No. COA15-904

Filed 7 June 2016

Indictment and Information—habitual larceny—prior convictions—listed in single count

Where the sole indictment issued against defendant listed a single count of habitual misdemeanor larceny and alleged defendant's prior convictions thereafter, the Court of Appeals allowed defendant's petition for certiorari and held that the indictment failed to comply with N.C.G.S. § 15A-928 and was insufficient to confer jurisdiction upon the trial court. The conviction was vacated and remanded for entry of judgment and sentence on misdemeanor larceny.

Appeal by defendant from judgment entered 12 February 2015 by Judge Michael D. Duncan in Catawba County Superior Court. Heard in the Court of Appeals 24 February 2016.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Daniel L. Spiegel, for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Nancy Dunn Hardison, for the State.

ELMORE, Judge.

Defendant argues on appeal that the indictment against her was fatally defective because it failed to comply with the requirements set forth in N.C. Gen. Stat. § 15A-928. Defendant's petition for *certiorari* is allowed by this Court so that we may review the judgment entered. In accordance with *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), we hold that the indictment was insufficient to confer jurisdiction upon the trial court. We vacate defendant's conviction for habitual misdemeanor larceny and remand for entry of judgment and sentence for misdemeanor larceny.

I. Background

On 22 July 2013, a Catawba County Grand Jury indicted Sandra Meshell Brice (defendant) on one count of "habitual misdemeanor

larceny" for stealing five packs of steaks valued at $70.00. The indictment alleged:

> that on or about [21 April 2013] and in [Catawba County] the defendant named unlawfully, willfully, and feloniously did steal, take, and carry away FIVE PACKS OF STEAKS, the personal property of FOOD LION, LLC, such property having a value of SEVENTY DOLLARS ($70.00), and the defendant has had the following four prior larceny convictions in which he was represented by counsel or waived counsel:
>
> On or about MAY 8, 1996 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 10, 1996 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Lincoln County, North Carolina; and that
>
> On or about FEBRUARY 19, 1997 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, GS. 14-72, and on or about JULY 29, 1997 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that
>
> On or about JUNE 13, 2003 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about OCTOBER 17, 2003 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina; and that
>
> On or about JULY 7, 2007 the defendant committed the misdemeanor of LARCENY in violation of the law of the State of North Carolina, G.S. 14-72, and on or about SEPTEMBER 24, 2007 the defendant was convicted of the misdemeanor of LARCENY in the District Court of Catawba County, North Carolina.

At the beginning of trial, defendant stipulated to four prior misdemeanor larceny convictions outside the presence of the jury. The trial court informed counsel that it intended to proceed as if the trial was for misdemeanor larceny. The court also informed the jury that defendant had been charged "with the offense larceny."

At the conclusion of trial, the jury found defendant guilty of larceny. The court entered judgment against defendant for habitual misdemeanor larceny, and sentenced defendant to ten to twenty-one months of imprisonment, suspended for twenty-four months of supervised probation, and a seventy-five-day active term as a condition of special probation. Defendant appeals.

II. Discussion

Defendant argues that the trial court lacked jurisdiction to enter a judgment for habitual misdemeanor larceny because the indictment was fatally defective in that it failed to comply with the mandates of N.C. Gen. Stat. § 15A-928. Although defendant failed to challenge the sufficiency of the indictment in the trial court, "where an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341 (citations omitted), *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000), *reh'g denied*, 531 U.S. 1120, 148 L. Ed. 2d 784 (2001). Therefore, we address defendant's argument on the merits.

A valid indictment is required to confer jurisdiction upon the trial court. *State v. Covington*, 258 N.C. 501, 503, 128 S.E.2d 827, 829 (1963); *State v. Morgan*, 226 N.C. 414, 415, 38 S.E.2d 166, 167 (1946). " 'When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority.' " *State v. Petersilie*, 334 N.C. 169, 175, 432 S.E.2d 832, 836 (1993) (quoting *State v. Felmet*, 302 N.C. 173, 176, 273 S.E.2d 708, 711 (1981)). Challenges to the sufficiency of an indictment are reviewed *de novo*. *State v. Pendergraft*, ____ N.C. App. ____, ____, 767 S.E.2d 674, 679 (Dec. 31, 2014) (COA14-39) (citing *State v. Marshall*, 188 N.C. App. 744, 748, 656 S.E.2d 709, 712 (2008)).

In trials in superior court where a defendant's prior convictions are alleged as part of a charged offense, the pleading must comply with the provisions of section 15A-928. N.C. Gen. Stat. § 15A-924(c) (2015). Section 15A-928 provides, in pertinent part, as follows:

> (a) When the fact that the defendant has been previously convicted of an offense raises an offense of lower grade to one of higher grade and thereby becomes an element of the latter, *an indictment or information for the higher offense may not allege the previous conviction*. . . .
>
> (b) An indictment or information for the offense must be accompanied by a special indictment or information, filed

> with the principal pleading, charging that the defendant was previously convicted of a specified offense. *At the prosecutor's option, the special indictment or information may be incorporated in the principal indictment as a separate count.* . . .
>
> . . . .
>
> (d) When a misdemeanor is tried de novo in superior court in which the fact of a previous conviction is an element of the offense affecting punishment, *the State must replace the pleading in the case with superseding statements of charges separately alleging the substantive offense and the fact of any prior conviction, in accordance with the provisions of this section relating to indictments and informations.*

N.C. Gen. Stat. § 15A-928(a), (b) & (d) (2015) (emphasis added).

Turning to the offenses at issue, larceny is punishable as a Class 1 misdemeanor where the value of the property stolen is not more than $1,000.00. N.C. Gen. Stat. § 14-72(a) (2015). If, however, at the time of the offense the defendant had four prior larceny convictions, then the offense is punishable as a Class H felony. N.C. Gen. Stat. § 14-72(a) & (b)(6) (2015). In such a case, the defendant's prior convictions are treated as elements to elevate the principal offense from a misdemeanor to a felony. Therefore, an indictment for habitual misdemeanor larceny is subject to the provisions of N.C. Gen. Stat. § 15A-928.

On its face, the indictment here failed to comply with N.C. Gen. Stat. § 15A-928. The State used the instrument to charge defendant with habitual misdemeanor larceny and to list defendant's prior convictions. Although section 15A-928(b) allows the State to incorporate "the special indictment or information" into the principal indictment, defendant's prior convictions were not alleged in a separate count. Rather, the sole indictment issued in this case lists a single count of "habitual misdemeanor larceny," alleging defendant's prior convictions thereafter.

Nevertheless, the State cites *State v. Jernigan*, 118 N.C. App. 240, 455 S.E.2d 163 (1995), for the proposition that errors under section 15A-928 are not reversible unless the defendant was prejudiced. In *Jernigan*, the trial court failed to arraign defendant in accordance with N.C. Gen. Stat. § 15A-928(c), as it "did not formally arraign defendant upon the charge alleging the previous convictions and did not advise defendant that he could admit the previous convictions, deny them, or

remain silent . . . ." *Id.* at 243, 455 S.E.2d at 165. Before trial, however, defendant stipulated to his previous convictions which were set forth in the indictment. *Id.* at 243–44, 455 S.E.2d at 165–66. We held that the trial court's failure to follow the arraignment procedures under section 15A-928(c) was not reversible error because it was "clear that defendant was fully aware of the charges against him, that he understood his rights and the effect of the stipulation, and that he was in no way prejudiced by the failure of the court to formally arraign him and advise him of his rights." *Id.* at 245, 455 S.E.2d at 167.

While the State's argument under *Jernigan* is persuasive, its proposition fails because a formal arraignment under section 15A-928(c) is not a matter of jurisdictional consequence. In *State v. Williams*, 153 N.C. App. 192, 568 S.E.2d 890 (2002), *disc. review improvidently allowed*, 375 N.C. 45, 577 S.E.2d 618 (2003), we held that where the State failed to charge the defendant with habitual misdemeanor assault in a special indictment or separate count of the principal indictment, in accordance with section 15A-928(b), the trial court was without jurisdiction to sentence defendant for habitual misdemeanor assault. *Id.* at 194–95, 568 S.E.2d at 892. Despite this Court's previous decision in *Jernigan*, no showing of prejudice was required to vacate the judgment in *Williams*. We believe *Williams* controls the disposition *sub judice*.

III. Conclusion

Because the indictment did not comply with the requirements of N.C. Gen. Stat. § 15A-928 regarding indictments and informations, the trial court was without jurisdiction to enter judgment against defendant for habitual misdemeanor larceny. We vacate defendant's conviction and remand for entry of judgment and sentence on misdemeanor larceny. *See Williams*, 153 N.C. App. at 196, 568 S.E.2d at 893 (remanding for entry of judgment on misdemeanor assault on a female).

VACATED AND REMANDED. NEW SENTENCING.

Judges HUNTER, JR. and DAVIS concur.

STATE v. CRANDELL

[247 N.C. App. 771 (2016)]

STATE OF NORTH CAROLINA
v.
TIMOTHY TERRELL CRANDELL

No. COA15-461

Filed 7 June 2016

1. Appeal and Error—notice of appeal—motion to suppress—plea agreement

Defendant gave timely, proper notice of appeal where he gave notice of his intent to appeal the trial court's denial of his motion to suppress in his plea agreement. Moreover, at the conclusion of the plea hearing, defendant gave oral notice of appeal in open court.

2. Search and Seizure—totality of circumstances—area known for drugs and stolen property

The trial court did not err by denying defendant's motion to suppress in a prosecution for offenses including burglary, larceny, and possession of stolen goods. The prosecution arose from a deputy sheriff seeing defendant in a location known for the sale of drugs and stolen property, the deputy stopped defendant's car and found marijuana, the deputy also noticed a ring that matched the description of stolen property, and the police searched defendant's car the next day with consent and found the ring and other items. The totality of the circumstances gave rise to a reasonable, articulable suspicion that defendant was engaged in criminal activity, and the trial court did not err in holding that the deputy had reasonable suspicion to stop defendant's vehicle.

Appeal by defendant from judgments entered on or about 23 September 2014 by Judge Claire V. Hill in Superior Court, Johnston County. Heard in the Court of Appeals on 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Patrick S. Wooten, for the State.

Kimberly P. Hoppin, for defendant-appellant.

STROUD, Judge.

Timothy Terrell Crandell ("defendant") appeals from the trial court's judgments entered upon a plea agreement. Defendant argues that the

trial court erred in denying his motion to suppress, because the police officer who stopped defendant's car lacked reasonable suspicion. Defendant also filed a petition for writ of certiorari. We deny defendant's petition and affirm the trial court's judgments.

I. Background

"Blazing Saddles" is a partially burned, abandoned building in Johnston County. It is not a residence or a business—at least not a business allowed by law—and is "known for one thing and that is selling drugs and dealing in stolen property." Around 3:00 p.m. on 17 September 2013, Deputy Clifton, a member of the Johnston County Sheriff's Aggressive Field Enforcement ("SAFE") team, observed defendant drive into the area adjacent to "Blazing Saddles." He also noticed that a metal cable, which served as a gate, was down, which in his experience indicated that "Blazing Saddles" was "open for business." About two minutes later, Deputy Clifton observed defendant drive away from "Blazing Saddles." Deputy Clifton then stopped defendant's car and found that defendant possessed some marijuana. During the stop, Deputy Clifton also noticed that defendant had a ring which matched the description of a ring which had recently been reported as stolen.

The following day, the police arrived at defendant's house and asked to search defendant's car; defendant consented. The police found the stolen ring in defendant's car. During the search, a detective noticed a tub "with some miscellaneous items" in the yard. The detective returned the following day to arrest defendant and noticed that the tub contained "quite a few tools that . . . [had not] been there the day before." The police discovered that these tools had recently been stolen from defendant's neighbor's shed. The police later discovered that defendant had repeatedly instructed his girlfriend to testify that she had not given the police consent to search his house.

On 16 December 2013, a grand jury indicted defendant for attaining the status of a habitual felon. *See* N.C. Gen. Stat. § 14-7.1 (2011). On 5 May 2014, a grand jury indicted defendant for second-degree burglary, larceny after breaking or entering, felony possession of stolen goods, and common law obstruction of justice. *See* N.C. Gen. Stat. §§ 14-3(b), -51, -71.1., -72(b)(2) (2013). On 5 May 2014, a grand jury indicted defendant for breaking or entering, larceny after breaking or entering, and felony possession of stolen goods. *See* N.C. Gen. Stat. §§ 14-54(a), -71.1., -72(b)(2) (2013). On 21 July 2014, a grand jury indicted defendant for five counts of common law obstruction of justice. *See* N.C. Gen. Stat. § 14-3(b) (2013).

On 2 April 2014, defendant moved to suppress evidence obtained as a result of Deputy Clifton's stop. At a suppression hearing on 4 September 2014, the trial court rendered its order denying defendant's motion to suppress, which was memorialized in a written order entered on 17 October 2014. On or about 22 September 2014, the State and defendant executed a plea agreement in which the State dismissed two counts of possession of stolen goods and one count of common law obstruction of justice and defendant pled guilty to the remaining charges pursuant to *North Carolina v. Alford*, 400 U.S. 25, 27 L. Ed. 2d 162 (1970). In the plea agreement, defendant gave notice of his intent to appeal the trial court's denial of his motion to suppress. On or about 23 September 2014, after a plea hearing, the trial court convicted defendant of one count of second-degree burglary, two counts of larceny after breaking or entering, five counts of common law obstruction of justice, and one count of breaking or entering. The trial court adjudged defendant to be a habitual felon and sentenced him to 117 to 153 months of imprisonment. At the conclusion of the plea hearing, defendant gave oral notice of appeal in open court.

II. Petition for Writ of Certiorari

[1] Defendant filed a petition for writ of certiorari "asking this Court to permit appellate review in the event the Court should conclude that the notice of appeal was defective."

> [I]n order to properly appeal the denial of a motion to suppress after a guilty plea, a defendant must take two steps: (1) he must, prior to finalization of the guilty plea, provide the trial court and the prosecutor with notice of his intent to appeal the motion to suppress order, and (2) he must timely and properly appeal from the final judgment.

State v. Cottrell, 234 N.C. App. 736, 739-40, 760 S.E.2d 274, 277 (2014). In the plea agreement, defendant gave notice of his intent to appeal the trial court's denial of his motion to suppress. At the conclusion of the plea hearing, defendant gave oral notice of appeal in open court. Accordingly, we hold that defendant gave timely, proper notice of appeal. *See id.* We therefore review the merits of defendant's appeal and deny defendant's petition.

III. Motion to Suppress

[2] Defendant's only argument on appeal is that the trial court erred in denying his motion to suppress, because Deputy Clifton lacked

reasonable suspicion to stop defendant's car, in contravention of the Fourth Amendment of the U.S. Constitution and article I, section 20 of the North Carolina Constitution. *See* U.S. Const. amend. IV; N.C. Const. art. I, § 20.

A. Standard of Review

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. However, when . . . the trial court's findings of fact are not challenged on appeal, they are deemed to be supported by competent evidence and are binding on appeal. Conclusions of law are reviewed de novo and are subject to full review. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Biber, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011) (citations and quotation marks omitted).

B. Findings of Fact

Defendant argues that competent evidence does not support the trial court's Findings of Fact 2, 5, and 27 in its order denying his motion to suppress. Defendant challenges the underlined portion of Finding of Fact 2:

> 2. Defendant was charged with Second Degree Burglary, Felony Breaking and or Entering, 2 counts of Felony Larceny after Breaking and/or Entering, 2 counts of Felony Possession of Stolen Goods and Obstruction of Justice. <u>The defendant also attained the status as a Habitual Felon and Habitual Breaking and/or Entering Offender.</u>

(Emphasis added.) Defendant contends that at the time of the suppression hearing, he had not yet attained the status of a habitual felon although he had been *indicted* for attaining the status of a habitual felon. *See* N.C. Gen. Stat. § 14-7.1. It is possible that some words were inadvertently omitted from this sentence, since it appears that in this paragraph the trial court was listing the offenses with which defendant had been charged. But in any event, we need not address this issue as it has no bearing on the issue of whether the trial court erred in denying his motion to suppress.

Defendant next challenges Finding of Fact 5, which states:

> 5. Deputy Clifton and other officers on the Safe Team routinely share information regarding these high crime areas, including the area referred to as "Blazing Saddles[,"] to stay informed of what type of criminal activity is going on throughout high crime areas.

Defendant contends that "[t]here is no evidence to support a finding that this sharing occurred *prior* to [his] arrest." (Emphasis added.) We note that this finding of fact does not state that the sharing occurred prior to defendant's stop, but we agree with defendant that if Deputy Clifton had never heard of "Blazing Saddles" before and had no knowledge either directly or by reputation of its "business," he may have had far less basis for a suspicion of criminal activity. But there is abundant evidence that Deputy Clifton was quite familiar with "Blazing Saddles," both from personal experience and from the sharing of information with other officers, well before he ever saw defendant there. Deputy Clifton gave the following testimony:

> [The Court:] So since the date of this incident, how many times have you been out there?
>
> [Deputy Clifton:] Since the day—about 15 or so—
>
> [The Court:] Okay.
>
> [Deputy Clifton:] —or more charges since then.
>
> [The Court:] Okay.
>
> [Deputy Clifton:] And that's just me personally. [There have] been other officers that have made drug charges, been search warrants executed at this location.
>
> [The Court:] These other officers are part of the S.A.F.E. Team?
>
> [Deputy Clifton]: S.A.F.E. Team and our narcotics division.
>
> [The Court:] So, *generally* when they make arrests out there, do they come back and brief the rest of the S.A.F.E. Team with regard to the activity there?
>
> [Deputy Clifton:] Yes. The information is *constantly* passed back and forth between them and us.

(Emphasis added.) Although Deputy Clifton testified to the sharing of information among SAFE team members after he had mentioned the number of stops he had made since defendant's stop, nothing in his testimony suggests that this sharing of information did not take place *before* defendant's stop. In addition, Deputy Clifton further testified that before defendant's stop, from January 2011 to 17 September 2013, the date of defendant's stop, he had made 23 stops in connection with activity at "Blazing Saddles" which led to drug-related charges. It is clear from his testimony generally and from other uncontested findings of fact that he was quite familiar with "Blazing Saddles" before he observed defendant there. Deputy Clifton testified: "This particular place, *ever since I have been at the sheriff's office*, has been known for one thing and that is selling drugs and dealing in stolen property." (Emphasis added.) We hold that this evidence is competent to support Finding of Fact 5 that Deputy Clifton and other police officers on the SAFE team "routinely share information" about criminal activity at "Blazing Saddles," as well as any implication that this "routine[]" sharing of information had occurred both before and after defendant's stop. *See Biber*, 365 N.C. at 167-68, 712 S.E.2d at 878.

Defendant also challenges Finding of Fact 27, which states:

> 27. Based upon the location, the time of day, the amount of time Defendant was on the premises and his training and experience, Deputy Clifton, through his testimony, articulated specific facts that gave rise to his suspicion that criminal activity was afoot.

Defendant "does not challenge this statement to the extent that the trial court found that Deputy Clifton articulated some facts which gave rise to his suspicion that some criminal activity was afoot." (Emphasis added.) Rather, he argues that these facts were insufficient to constitute reasonable suspicion that defendant, in particular, was engaged in criminal activity. Because defendant's argument is more properly characterized as a challenge to the trial court's conclusion of law that Deputy Clifton had reasonable suspicion to stop defendant's car, we address this argument below.

C. Conclusion of Law

Defendant argues that the findings of fact do not support the trial court's conclusion of law that Deputy Clifton had reasonable suspicion to stop defendant's car.

> The Fourth Amendment protects individuals against unreasonable searches and seizures. The North Carolina

Constitution provides similar protection. A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Such stops have been historically viewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Despite some initial confusion following the United States Supreme Court's decision in *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), courts have continued to hold that a traffic stop is constitutional if the officer has a reasonable articulable suspicion that criminal activity is afoot.

Reasonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence. Only some minimal level of objective justification is required. *This Court has determined that the reasonable suspicion standard requires that the stop 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. Moreover, a court must consider the totality of the circumstances—the whole picture in determining whether a reasonable suspicion exists.*

State v. Barnard, 362 N.C. 244, 246-47, 658 S.E.2d 643, 645 (emphasis added and citations, quotation marks, brackets, and ellipsis omitted), *cert. denied*, 555 U.S. 914, 172 L. Ed. 2d 198 (2008).

The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. *First, the assessment must be based upon all of the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions—inferences and deductions that might well elude an untrained person.*

The process does not deal with hard certainties, but with probabilities. Long before the law of probabilities

> was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers. *Finally, the evidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement.*
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoing. Chief Justice Warren, speaking for the Court in *Terry v. Ohio*, . . . said that, "this demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence.*" [*See Terry*, 392 U.S. at 21 n.18, 20 L. Ed. 2d 906 n.18] (emphasis added).

United States v. Cortez, 449 U.S. 411, 418, 66 L. Ed. 2d 621, 629 (1981) (emphasis added and brackets omitted).

In *Barnard*, around 12:15 a.m. "in a high crime area of downtown Asheville where a number of bars are located[,]" a police officer stopped the defendant's vehicle after the defendant remained stopped at an intersection for approximately 30 seconds after the traffic light had turned green "without any reasonable appearance of explanation for doing so." *Barnard*, 362 N.C. at 244, 247, 658 S.E.2d at 644-45. At a suppression hearing, the officer testified that the defendant's delayed reaction was an indicator of impairment. *Id.* at 247, 658 S.E.2d at 645. Our Supreme Court held that "[b]ecause [the] defendant's thirty-second delay at a green traffic light under these circumstances gave rise to a reasonable, articulable suspicion that [the] defendant may have been driving while impaired, the stop of [the] defendant's vehicle was constitutional[.]" *Id.* at 248, 658 S.E.2d at 645.

Here, the trial court made the following findings of fact in support of its conclusion that Deputy Clifton had reasonable suspicion to stop defendant's car:

> 3. [Deputy Clifton] has been a law enforcement officer since 1999, then moved from patrol to the narcotics division to sergeant of patrol, subsequently deployed by the military and since returning to the sheriff's office has

been a member of the SAFE (Sheriff's Aggressive Field Enforcement) team.

4. The SAFE team is responsible for responding to high crime areas where complaints have been made, and those areas of surveillance, where sometimes checkpoints and traffic stops are set up.

5. Deputy Clifton and other officers on the Safe Team routinely share information regarding these high crime areas, including the area referred to as "Blazing Saddles[,"] to stay informed of what type of criminal activity is going on throughout high crime areas.

6. "Blazing Saddles" consists of a piece of property that includes an abandoned building that is partially burned down, containing no electricity and where people frequent when dealing in drugs and/or stolen property.

7. People often frequent the property at all hours, all the time.

8. From the year 2011 to the date of this hearing Deputy Clifton had made a total of 37 arrests at this location.

9. [Thirty-two] (32) of those arrests at this location were made during the day and the other 5 were made at night.

10. [Twenty-three] (23) of those arrests were made prior to September 17, 2013 at [3:00 p.m.], when the arrest of the Defendant occurred.

11. Deputy Clifton's other vehicle stops originating from this area were made as a result of his observation of motor vehicle violations and ultimately resulted in arrests for possession of narcotics.

12. At the "Blazing Saddles[,"] there is a cable fence connected to the property.

13. Deputy Clifton testified that his experience is that when the gate is down, the property is "open for business[,"] or it is the time period when people are selling or doing drugs on the property.

14. On the date of this incident, the gate was down, indicating to Deputy Clifton that drug or other criminal activity may be occurring.

15. On September 17, 2013, Deputy Clifton was on routine patrol.

16. On September 17, 2013, Deputy Clifton observed Defendant turn into the premises of the "Blazing Saddles[,"] which is known to him and other officers, as a place where drugs are sold and where stolen items are possessed and sold as well.

17. On September 17, 2013, there were at least 5 to 10 people already present at the "Blazing Saddles" location.

18. Based upon Deputy Clifton's training, experience, conversations with drug suspects and arrestees and his own observations, the usual time period for a drug transaction occurs within approximately two minutes.

19. Deputy Clifton had previously observed numerous drug transactions occurring at "Blazing Saddles" frequently for a period of time, lasting no more than five minutes.

20. Deputy Clifton observed the defendant turn into the premises of the "Blazing Saddles" while [Deputy Clifton] proceeded down the road.

21. Deputy Clifton then turned around, looped back, and then observed the Defendant exit the premises of the "Blazing Saddles."

22. Deputy Clifton did not observe Defendant's activities at the "Blazing Saddles" but observed that the Defendant was on the premises of "Blazing Saddles" for approximately two minutes.

23. Deputy Clifton testified that he didn't pull into the premises directly in his marked patrol car, because based upon experiences, perpetrators of drug crimes at "Blazing Saddles" flee when marked patrol cars enter the premises.

24. Deputy Clifton further testified that Defendant's car turned [onto] the property and when [Deputy Clifton] saw the car exiting the property, based on [his] training and experience, the length of time was consistent with drug activity.

> 25. After seeing the defendant enter the "Blazing Saddles" and then leave in a time frame consistent with a drug transaction, [Deputy Clifton] initiated an investigatory stop.

On the date of the stop, based on his experience making 23 arrests in connection with drug activity at "Blazing Saddles" and other police officers' experiences at "Blazing Saddles," Deputy Clifton was aware of a steady pattern that people involved in drug transactions visit "Blazing Saddles" when the gate is down and stay only for approximately two minutes. Defendant followed this exact pattern: he visited "Blazing Saddles" when the gate was down and stayed approximately two minutes. Deputy Clifton's stop was "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." *See id.* at 247, 658 S.E.2d at 645 (citation omitted). Deputy Clifton had observed a "pattern[] of operation of [a] certain kind[] of lawbreaker[]" and "[f]rom these data" had drawn inferences and made deductions "that might well elude an untrained person." *See Cortez*, 449 U.S. at 418, 66 L. Ed. 2d at 629. Accordingly, we hold that the totality of the circumstances gave rise to a reasonable, articulable suspicion that defendant was engaged in criminal activity. *See Barnard*, 362 N.C. at 248, 658 S.E.2d at 645.

Defendant also specifically challenges the trial court's Conclusion of Law 4, which states:

> 4. This case is distinguishable both from [*State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992)] and from [*Brown v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979)] because [Deputy Clifton] had specific knowledge of activity that was going on there because he had previously made arrests at the location for possession of narcotics and had been previously briefed by his colleagues regarding criminal activity being conducted at the location.

We agree with the trial court that *Brown* and *Fleming* are distinguishable.

In *Brown*, a police officer stopped the defendant after he and another police officer observed the defendant and another man "walking in opposite directions away from one another in an alley" in a neighborhood which "has a high incidence of drug traffic." *Brown*, 443 U.S. at 48-49, 61 L. Ed. 2d at 360. The police officer testified that "[a]lthough the two men were a few feet apart when they first were seen, . . . both officers believed the two had been together or were about to meet until the patrol car appeared." *Id.* at 48, 61 L. Ed. 2d at 360. The U.S. Supreme

Court held that the police officer lacked reasonable suspicion to stop the defendant for the following reasons:

> [The police officer] testified at [the defendant's] trial that the situation in the alley "looked suspicious," but he was unable to point to any facts supporting that conclusion. There is no indication in the record that it was unusual for people to be in the alley. The fact that [the defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [the defendant] himself was engaged in criminal conduct. In short, the [defendant's] activity was no different from the activity of other pedestrians in that neighborhood. When pressed, [the police officer] acknowledged that the only reason he stopped [the defendant] was to ascertain his identity.

Id. at 52, 61 L. Ed. 2d at 362-63 (footnote omitted). The U.S. Supreme Court was careful to narrow its holding: "This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *Id.* at 52 n.2, 61 L. Ed. 2d at 362 n.2.

This Court in *Fleming* held that the facts in that case were analogous to the facts in *Brown*:

> [A]t the time [the police officer] first observed defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant at this time nor any contact between defendant and his companion. Next, the officer observed the two men *walk* between two buildings, out of the open area, toward Rugby Street and then begin *walking* down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away from the group of officers. At this time, [the police officer] "stopped" defendant and his companion and immediately proceeded to ask them questions while he simultaneously "patted" them down.

> We find that the facts in this case are analogous to those found in *Brown*. [The police officer] had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar to the area. Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a "high drug area." This would not be reasonable.

Fleming, 106 N.C. App. at 170-71, 415 S.E.2d at 785-86. Defendant argues that he, like the defendant in *Fleming*, made "no overt act" sufficient to create a reasonable suspicion. *See id.* at 170, 415 S.E.2d at 785.

But we distinguish this case from *Brown* and *Fleming*, because Deputy Clifton observed defendant follow a specific pattern that was closely consistent with his knowledge and experience of a certain kind of lawbreaker at this particular location: defendant visited "Blazing Saddles" when the gate was down and stayed only for approximately two minutes. In addition, this was not just a "high drug area"; it was a location with no use or purpose other than criminal activity. *See id.* at 171, 415 S.E.2d at 785-86. "Blazing Saddles" was notorious for "selling drugs and dealing in stolen property." It was an abandoned, partially burned building with no electricity, and there was no apparent legal reason for anyone to go there at all, unlike the neighborhood in *Brown* or the apartment complex in *Fleming*, where people actually lived. *See id.* at 170-71, 415 S.E.2d at 785-86; *Brown*, 443 U.S. at 52, 61 L. Ed. 2d at 362-63. The U.S. Supreme Court in *Brown* was careful to distinguish the facts in that case from factual situations like the one present here: "This situation is to be distinguished from the observations of a trained, experienced police officer who is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." *See Brown*, 443 U.S. at 52 n.2, 61 L. Ed. 2d at 362 n.2. This case is much more comparable to *Barnard*, where our Supreme Court held that the "defendant's thirty-second delay at a green traffic light under [those] circumstances gave rise to a reasonable, articulable suspicion that [the] defendant may have been driving while impaired[.]" 362 N.C. at 248, 658 S.E.2d at 645. Following *Barnard*, we hold that the trial court did not err in holding that Deputy Clifton had reasonable suspicion to stop defendant's vehicle and thus did not err in denying defendant's motion to suppress. *See id.*

IV. Conclusion

For the foregoing reasons, we affirm the trial court's judgments.

AFFIRMED.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
CHRISTOPHER MICHAEL CROOK, DEFENDANT

No. COA15-893

Filed 7 June 2016

1. Confessions and Incriminating Statements—custodial interrogation—no Miranda warning

The trial court erred in a prosecution for possession of drugs, drug paraphernalia, and other offenses, by concluding that defendant was not subject to custodial interrogation when he made a statement about having marijuana and by denying his motion to suppress. The need for answers to questions did not pose a threat to the public safety, outweighing the need for a rule protecting defendant's privilege against self-incrimination.

2. Confessions and Incriminating Statements—erroneous admission of statement—prejudicial

The defendant in a prosecution for drug offenses established that he was prejudiced by the trial court's error in refusing to exclude his custodial statement indicating possession of marijuana. The State did not present "overwhelming evidence," excluding defendant's statement, which linked him to the marijuana and drug paraphernalia, and there was a reasonable possibility that a different result would have been reached at the trial had the error not been committed.

3. Identity Theft—driver's license—personal identifying information

The trial court's peremptory instruction on identity theft (that a driver's license would be personal identifying information) was not erroneous in light of the overwhelming evidence presented.

4. Sentencing—prior record level—probation point

The trial court erred by including a probation point when sentencing defendant as a prior record level II offender. The error was prejudicial because the additional point raised defendant's prior record level from I to II. The trial court did not determine that the State had provided the required notice.

Appeal by defendant from Judgment entered 14 March 2014 by Judge Marvin P. Pope, Jr. in Henderson County Superior Court. Heard in the Court of Appeals 9 March 2016.

Attorney General Roy Cooper, by Assistant Attorney General Sherri Horner Lawrence, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Andrew DeSimone, for defendant.

ELMORE, Judge.

Christopher Michael Crook (defendant) appeals from his two consecutive sentences of thirteen to twenty-five months imprisonment, arguing that the trial court erred in denying his motion to suppress a statement he made prior to receiving *Miranda* warnings, erred in sentencing him as a prior record level II offender, and committed plain error in its jury instructions. We reverse in part, find no error in part, and vacate and remand for resentencing.

I. Background

The State's evidence tended to show the following: On 14 June 2013, Detective Daniel Barale with the Fletcher Police Department was patrolling the hotels and motels of the area. He parked at the Knights Inn Motel and was sitting in his vehicle when he saw a black Jeep pull in and park behind him. Detective Barale entered the license plate number into a program on his computer, which indicated that the license plate had been revoked and belonged to a Crown Victoria.

Detective Barale then searched for the registered owner of the Crown Victoria via the computer program and learned that Nicholas Taylor, who had an active warrant out of Buncombe County, owned the car. Detective Barale testified that around the same time, "two younger white males came out [of the Jeep] and walked right in front of me." The computer program displayed a picture of Taylor with a neck tattoo, which allowed Detective Barale to identify one of the men who walked

in front of his car as Taylor. Detective Barale also testified that one of the men had a large, fixed-blade knife on his belt. The men walked up the stairs on the outside of the motel and entered a motel room.

After Detective Barale confirmed with dispatch that the Buncombe County warrant for Taylor was still active, he called for backup. A few minutes later, Officer Brian Fulmer arrived, and they knocked on the motel room door where Taylor and the other male had entered. Detective Barale knocked "a couple times," and announced, "Fletcher Police," but no one answered. Detective Barale testified that he could see through the blinds and observed Taylor and the other male sitting on the beds as well as a third person coming from the back of the room where the bathroom was located. Around that same time, Detective Barale retrieved a passkey from a maintenance worker to unlock the door, however, the chain on the inside was latched. Defendant opened the door, walked outside, and tried to shut the door behind him. Detective Barale told him "to get out of the way" and that "we had a warrant for arrest for one of the persons inside." Detective Barale testified that defendant "tried to turn around and go back inside. I grabbed him. And we started wrestling. I took him to the ground and handcuffed him." Detective Barale stated that he placed defendant under arrest for resisting his investigation.

Detective Barale testified as follows:

> Q. Once you got handcuffs on him what did you do at that point?
>
> A. I first did a quick pat down of him. First off, I asked him to sit down and I checked on the other officer, because I knew he had two to deal with. Once I did that, I went back to [defendant] and I asked—I patted him down. I found scales in his pocket. I retrieved the scales. And I asked him did he have anything else on him.
>
> . . .
>
> Q. And what was his response?
>
> MR. JOHNSON: Objection.
>
> THE COURT: Overruled.
>
> MR. JOHNSON: I would just like to renew it on—based on the pretrial motion and due process.
>
> THE COURT: Objection noted.
>
> Q. Well, let me ask. What did you ask the defendant again?

A. I asked him if he had anything else on him.

Q. And what was his response?

A. "I have weed in the room."

Q. And what did you do at that point?

A. At that point once we made sure that the other two were not going to be an issue, I helped [defendant] to his feet, and we went into the room. There is a—there was a small table right next to the room and two chairs, and I sat him down right there on those chairs. I then went into the back area of the room where the bathroom is located to make sure there was nobody else and do a quick check and make sure there are no weapons anywhere within reach of [defendant]. When I entered the bathroom, the toilet seat was up, and there was leaves, green leaves, floating in the toilet bowl and a syringe. And there was another syringe—well, appeared to be another syringe at the bottom that sunk.

Q. What did you do once you saw that?

A. At that point I left it where it was. I went back and asked [defendant] to tell me—point to me where the weed was. He went in between the two beds to a nightstand, and there was a small jewelry box.[1] He opened the jewelry box and grabbed a plastic bag, like a Ziploc bag, and there were—that contained marijuana. He then tried to close the jewelry box very quickly. But before he did, I could see that there was more in the jewelry box, including at least one glass pipe that I could see and a small baggy that had—little small clear plastic bag that had some kind of white or light tan powder.[2]

Q. What did you do once he tried to close that box?

A. I sat him back down on the chair and seized the box.

Q. What—once you seized the box what did you do?

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1. On cross-examination, Detective Barale noted that "he was handcuffed behind his back. . . . [He] was backing up to . . . [the] jewelry box . . . so he could use his hands."

2. The powder was later identified as heroin.

A. Looked in the box. And I believe there were actually two glass pipes in the box and two bags of marijuana, some, what we call, blunts which is an empty cigar that are used to smoke marijuana, stuff them with marijuana and smoke them. And I believe there was also one marijuana cigarette that was all ready to be smoked.

Q. What did you do once you found those items in the jewelry box? Let me back you up. Who took you to that jewelry box?

A. [Defendant] did.

Q. And what did you do once you found those items in the jewelry box?

A. I seized the jewelry box.

Q. And what did you do at that point?

A. At that point I believe I asked [defendant] what else in the room was his. I think he pointed to a backpack. And I went back to the bathroom to retrieve the evidence that was in the toilet bowl.

Q. And this was the, I believe you said, green leafy substance and the syringe?

A. Correct.

Q. What did you do once you went in there to retrieve that?

A. I got in there and I was looking for something that I could use to reach in the toilet bowl. Some hotels have those clear trash bag liners, I was looking for one of those I could put my hand in that and try to pick up stuff from the toilet bowl. So I looked up, and there was a towel rack that's facing right above the toilet. And on that I saw a wrapped toilet paper roll, and it was on its side about 45 degrees pointing to the wall. The end of it was wet. The wrapper around the toilet paper was wet. And I looked around and I saw that there was a clear plastic bag pointing—sticking out of it. And I looked at a little bit closer and I also saw it was [sic] light or white tan powder in that plastic bag.

Q. And what did you do once you found that powder?

A. I retrieved it.

Q. What did you do at that point?

A. At that point I came back to [defendant] and I read [defendant] his *Miranda* rights.

Q. And what happened at that point?

A. I asked [defendant], you know, who the powder belonged to, if he knew anything about it. He denied. I asked him if he had bought it or sold it—I believe the way I put it: Did you buy or sell anything to Mr. Dawkins and Mr. Taylor, the other two? And he said no.

Detective Barale also found a wallet on the table where defendant was seated, which defendant admitted was his. The wallet contained two North Carolina driver's licenses: one in the name of Christopher Messer, and another in the name of Kyle Andre. When asked who they belonged to, defendant stated "it was his friends." Detective Barale also testified that defendant stated the Christopher Messer license was his own.

Detective Barale placed defendant, who was handcuffed with his hands behind his back, in Officer Fulmer's patrol vehicle. Detective Barale testified that he saw defendant looking toward him, so he opened the car door and saw a small, folded piece of paper on the floorboard that contained a "very small amount of clear crystal."[3] When Detective Barale asked defendant what it was, defendant "denied knowing anything about it and told me that I had planted it in the vehicle." Officer Fulmer then transported defendant to the Henderson County jail for processing. Detective Barale presented the evidence from that day to a magistrate, who issued an order in the name of Christopher Messer. Additionally, defendant applied for and obtained an appearance bond in the name of Christopher Messer. Days later, on 17 June 2013, Officer Fulmer informed Detective Barale that the person he booked on 14 June 2013 was not Christopher Messer but was actually Christopher Crook.

Defendant's evidence tended to show that when Officer Fulmer asked defendant what his name was, he stated, "Christopher Crook." Officer Fulmer testified that he called the name, "Christopher Crook," into dispatch, and that defendant never told him that his name was Christopher Messer.

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3. The crystal was later identified as methamphetamine.

On 30 September 2013, defendant was indicted for the following charges: possession of methamphetamine, trafficking in heroin, two counts of identity theft, resisting a public officer, possession of a schedule IV controlled substance, possession of up to one half ounce of marijuana, and possession of drug paraphernalia. On 18 February 2014, defendant filed a motion to suppress statements defendant made while in custody and prior to receiving *Miranda* warnings.

The matter came on for trial at the 10 March 2014 Criminal Session of Henderson County Superior Court. After a *voir dire* examination of Detective Barale, the trial court denied defendant's motion to suppress. The jury found defendant not guilty of possession of methamphetamine and not guilty of trafficking in heroin. Defendant pleaded guilty to possession of a schedule IV controlled substance, and the jury found defendant guilty of the remaining charges. On 14 March 2014, the trial court sentenced defendant to a term of thirteen to twenty-five months for one count of identity theft and to a consecutive term of thirteen to twenty-five months for the remaining convictions. Defendant filed a petition for writ of *certiorari* on 22 January 2015, which we allowed.

II. Analysis

A. Motion to Suppress

[1] Defendant argues that the trial court erred in denying his motion to suppress his statement, "I have weed in the room." Defendant states, "To the extent the trial court concluded that [defendant] was not in custody when Detective Barale questioned him, the trial court's conclusion was unsupported by the findings and the evidence." Moreover, the statement was made in response to Detective Barale's direct questioning.

"The standard of review when appealing from a trial court's ruling on a motion to suppress is that 'the trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. The trial court's conclusions of law, however, are fully reviewable.' " *State v. Evans*, 201 N.C. App. 572, 574, 688 S.E.2d 25, 26–27 (2009) (quoting *State v. Green*, 194 N.C. App. 623, 626, 670 S.E.2d 635, 637 (2009)).

Here, the trial court found that the "officer was searching the defendant for his own safety and was not conducting an in-custody interrogation at that time." It concluded that the "officer was reasonable based on the particular circumstances of placing the defendant under arrest to inquire as to whether or not the defendant had any other objects on him. And the response of the defendant was voluntarily made, that the marijuana

or weed, end quote, was the marijuana of the defendant." The trial court concluded that "this question asked by the officer prior to the *Miranda* rights being given to the defendant was not a custodial interrogation."

In *Miranda v. Arizona*, the Supreme Court held, "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706 (1966). The Court explained, "By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* The North Carolina Supreme Court has likewise confirmed that "the rule of *Miranda* applies only where a defendant is subjected to custodial interrogation." *State v. Gaines*, 345 N.C. 647, 661, 483 S.E.2d 396, 404 (1997) (citation omitted).

We have previously stated that "the determination of whether a defendant was in custody is a question of law, [and] it is fully reviewable here." *State v. Fisher*, 158 N.C. App. 133, 145, 580 S.E.2d 405, 415 (2003) (citing *State v. Briggs*, 137 N.C. App. 125, 128, 526 S.E.2d 678, 680 (2000)), *aff'd*, 358 N.C. 215, 593 S.E.2d 583 (2004). In determining if a suspect is in custody, "the definitive inquiry is whether there was a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest." *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405 (citing *Stansbury v. California*, 511 U.S. 318, 128 L. Ed. 2d 293 (1994)).

Here, as found by the trial court, immediately following the scuffle with Detective Barale, defendant was handcuffed behind his back and placed under arrest for resisting a public officer. Accordingly, because defendant was under formal arrest, he was in custody. *Gaines*, 345 N.C. at 662, 483 S.E.2d at 405. The trial court erred inasmuch as it concluded defendant was not in custody.

"[T]he trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). In *Rhode Island v. Innis*, the Supreme Court discussed the meaning of interrogation and concluded that "the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent." 446 U.S. 291, 300–01, 64 L. Ed. 2d 297, 307–08 (1980). In this case, because Detective Barale asked defendant an express question, we need

not determine whether Detective Barale's conduct amounted to the "functional equivalent." *See id.* at 301, 64 L. Ed. 2d at 308 (noting that the functional equivalent includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect"); *Fisher*, 158 N.C. App. at 142, 580 S.E.2d at 413.

Here, after Detective Barale handcuffed defendant, placed him under arrest, and conducted a pat-down which led to the recovery of a digital scale, he expressly asked defendant, "Do you have anything else on you?" Defendant, in custody in front of the doorway to the motel room, stated, "I have weed in the room." Accordingly, because defendant was subjected to express questioning while he was in custody, under *Miranda*, he was entitled to procedural safeguards informing him of, *inter alia*, his right to remain silent. As defendant did not receive *Miranda* warnings, the prosecution was not permitted to use defendant's statement stemming from the custodial interrogation. *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 706. Therefore, the trial court erred in concluding that defendant was not subject to custodial interrogation and in denying defendant's motion to suppress his statement.

We disagree with the State's argument that the public safety exception established in *New York v. Quarles*, 467 U.S. 649, 81 L. Ed. 2d 550 (1984), applies. In that case, a woman approached two officers' patrol vehicle and informed them that she had just been raped, and that the man, whom she described to the officers, had just entered an A&P supermarket located nearby and was carrying a gun. *Id.* at 651–52, 81 L. Ed. 2d at 554. The officers drove to the supermarket, spotted a man who matched the description, and pursued him as he ran toward the rear of the store. *Id.* at 652, 81 L. Ed. 2d at 554. As one of the officers placed the man in custody, he noticed the man was wearing an empty shoulder holster, so he asked him where the gun was. *Id.* In holding that the state court erred in excluding the suspect's response to the question, the Supreme Court recognized "a narrow exception to the *Miranda* rule" when it concluded that "there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence[.]" *Id.* at 658, 655, 81 L. Ed. 2d at 558, 557.

The facts of this case are noticeably distinguishable from those in *Quarles*. Here, "the need for answers to questions" did not pose a threat to the public safety, outweighing the need for a rule protecting defendant's privilege against self-incrimination. *Id.* at 657, 81 L. Ed. 2d at 558. Defendant was not suspected of carrying a gun or other weapon. Rather, he was sitting on the ground in handcuffs and he had already

been "patted down," which produced only a digital scale. Moreover, in *Quarles*, immediately after securing the loaded revolver, the officer advised the suspect of his rights before continuing with "investigatory questions about the ownership[.]" *Id.* at 659, 81 L. Ed. 2d at 559. In contrast, here, the officers conducted a full search of the motel room and posed further investigatory questions to defendant, including asking him to reveal everything he owned in the motel room, before ultimately reading him his rights. Accordingly, we reject the State's argument that the public safety exception should apply in this case. *See State v. Crudup*, 157 N.C. App. 657, 661, 580 S.E.2d 21, 25 (2003) (holding that the "circumstances in this case exceed the narrow scope of the public safety exception [as] [d]efendant was handcuffed[,] . . . surrounded by three officers[,] and [t]here was no risk of imminent danger to the public, the officers, or even to the defendant").

[2] For the following reasons, defendant has established he was prejudiced by the trial court's error in refusing to exclude his statement. "A defendant is prejudiced by errors relating to rights arising other than under the Constitution of the United States when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443 (2015).[4]

In *State v. Phelps*, this Court concluded that the trial court erred in admitting the defendant's statement because the officer failed to advise the defendant of his *Miranda* warnings prior to the custodial interrogation. 156 N.C. App. 119, 123, 575 S.E.2d 818, 821 (2003), *rev'd*, 358 N.C. 142, 592 S.E.2d 687 (2004). Nonetheless, we held that there was "no reasonable possibility that the exclusion of defendant's statement would have resulted in a different verdict." *Id.* at 124, 575 S.E.2d at 822. Judge Hunter, dissenting in part, maintained that "the admission of defendant's statement to [the officer] that he had some crack in his coat pocket was highly inflammatory on the issue of whether defendant knowingly possessed the cocaine" and the State's evidence, excluding the defendant's statement, was "hardly overwhelming." *Id.* at 127, 575 S.E.2d at 824 (Hunter, J., dissenting in part). He wrote, "In fact, the only evidence

4. *See United States v. Patane*, 542 U.S. 630, 636, 159 L. Ed. 2d 667, 674 (2004) (holding that "the *Miranda* rule is a prophylactic employed to protect against violations of the Self-Incrimination Clause"); *Oregon v. Elstad*, 470 U.S. 298, 309, 84 L. Ed. 2d 222, 232 (1985) (discussing the prophylactic *Miranda* procedures); *State v. Goodman*, 165 N.C. App. 865, 868–69, 600 S.E.2d 28, 30–31 (2004). *But see Dickerson v. United States*, 530 U.S. 428, 444, 147 L. Ed. 2d 405, 420 (2000) (holding that "*Miranda* announced a constitutional rule").

against defendant is that cocaine, discovered as a result of a *Miranda* violation, was found inside the coat defendant was wearing. Thus, without the admission of defendant's incriminating statement, there is a reasonable possibility that the jury would have had reasonable doubt as to whether defendant knowingly possessed the cocaine and returned a different verdict." *Id.* at 127–28, 575 S.E.2d at 824. Our Supreme Court reversed for the reasons stated in Judge Hunter's dissenting opinion. 358 N.C. 142, 592 S.E.2d 687 (2004).

Here, like in *Phelps*, the State did not present "overwhelming evidence," excluding defendant's statement, which linked him to the marijuana and corresponding drug paraphernalia found in the same location. Defendant was acquitted of the charges for other drugs to which he did not admit ownership, two other people were in the motel room when officers arrived, and a fourth individual rented the motel room. Accordingly, 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.

B. Jury Instruction

[3] Defendant argues, "The trial court erroneously gave peremptory instructions on both counts of identity theft that 'the driver's license of Christopher Michael Messer would be personal identifying information' when a driver's license does not qualify as 'identifying information' under the identity theft statute." Defendant contends that N.C. Gen. Stat. § 14-113.20(b)(2) states that "identifying information" includes only a driver's license *number*. Defendant claims that because "the instructions lessened the State's burden of proof and the evidence was conflicting, the erroneous jury instructions had a probable impact on the jury's verdicts."

The State contends, "Defendant's argument fails to acknowledge that a North Carolina driver[']s license holder's driver[']s license number appears on an actual North Carolina driver[']s license." Alternatively, the State argues that "a driver[']s license is personal identifying information under N.C.G.S. § 14-113.20(b)(10) as '[a]ny other . . . information that can be used to access a person's financial resources.' "

"A defendant who does not object to jury instructions at trial will be subject to a plain error standard of review on appeal." *State v. Oakman*, 191 N.C. App. 796, 798, 663 S.E.2d 453, 456 (2008) (citing *State v. Goforth*, 170 N.C. App. 584, 587, 614 S.E.2d 313, 315 (2005)); N.C. R. App. P. 10(a)(4) (2009). "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 quotation marks omitted).

Defendant was charged with two counts of identity theft under N.C. Gen. Stat. § 14-113.20, which provides as follows:

> (a) A person who knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences is guilty of a felony punishable as provided in G.S. 14-113.22(a).
>
> (b) The term "identifying information" as used in this Article includes the following:
>
> (1) Social security or employer taxpayer identification numbers.
>
> (2) Drivers license, State identification card, or passport numbers.
>
> . . . .
>
> (10) Any other numbers or information that can be used to access a person's financial resources.

N.C. Gen. Stat. § 14-113.20 (2015).

As to the first count of identity theft, the trial court stated in pertinent part that "the driver's license of Christopher Michael Messer would be personal identifying information." Regarding the second count, the trial court stated that "the driver's license and Social Security number of Christopher Michael Messer would be personal identifying information."

The evidence shows that defendant possessed Christopher Messer's driver's license in his own wallet. After defendant was arrested, Detective Barale entered Christopher Messer's driver's license number into the computer system so that the magistrate could issue arrest warrants in that name, and defendant accepted service of the arrest warrants in Christopher Messer's name. Defendant then used Christopher Messer's name, social security number, and driver's license number on his application for an appearance bond, which was accepted.

In light of the overwhelming evidence presented, the jury instruction did not have a probable impact on the jury's verdict, and defendant cannot establish plain error. Christopher Messer's driver's license included the driver's license number. Moreover, even if failing to include the word "number" after "driver's license" in the instruction was error under N.C. Gen. Stat. § 14-113.20(b)(2), the driver's license constitutes "any other . . . information that can be used to access a person's financial resources" under N.C. Gen. Stat. § 14-113.20(b)(10).

C. Sentencing

[4] Defendant argues that the trial court erred by including the probation, parole, or post-release supervision point and sentencing him as a prior record level II offender because the State did not provide him with notice of intent under N.C. Gen. Stat. § 15A-1340.16(a6). Defendant contends this case is controlled by *State v. Snelling*, 231 N.C. App. 676, 752 S.E.2d 739 (2014).

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citing *State v. Fraley*, 182 N.C. App. 683, 691, 643 S.E.2d 39, 44 (2007)). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* (citing *State v. Morgan*, 164 N.C. App. 298, 304, 595 S.E.2d 804, 809 (2004); N.C. Gen. Stat. § 15A-1446(d)(5), (d)(18)).

Pursuant to N.C. Gen. Stat. § 15A-1340.14(b)(7) (2015), a trial court can assess one prior record level point "[i]f the offense was committed while the offender was on supervised or unsupervised probation, parole, or post-release supervision, or while the offender was serving a sentence of imprisonment[.]" The statute further states, "G.S. 15A-1340.16(a5) specifies the procedure to be used to determine if a point exists under subdivision (7) of this subsection. The State must provide a defendant with written notice of its intent to prove the existence of the prior record point under subdivision (7) of this subsection as required by G.S. 15A-1340.16(a6)." N.C. Gen. Stat. § 15A-1340.14(b).

N.C. Gen. Stat. § 15A-1340.16 (a6) (2015), "Notice of Intent to Use Aggravating Factors or Prior Record Level Points," states,

> The State must provide a defendant with written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7) at least 30 days before

> trial or the entry of a guilty or no contest plea. A defendant may waive the right to receive such notice.

The State contends that "defendant's prior record level worksheet was made available to [him] in discovery on 8 August 2013, more than 30 days prior to the trial. . . . As such, the defendant was provided notice of his prior record level calculation of a prior record level II with two prior record level points[.]" The State also argues that by stipulating that he was a prior record level II offender for sentencing, with one sentencing point not related to a prior conviction, defendant "consented to the calculation and waived any notice requirements[.]" The State's position, however, has already been rejected by this Court in *State v. Williams*, No. COA11-1256, 2012 WL 1317821 (N.C. Ct. App. Apr. 17, 2012).

In *Williams*, the defendant filed a motion alleging that the State had failed to provide sufficient notice of its intent to attempt to establish the existence of a prior record point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7). *Id.* at *2. The trial court agreed, concluding, "[T]he prior record level worksheet that the State had provided to Defendant in discovery did not constitute written notice of the State's intent to prove that Defendant had committed the offense for which he was being sentenced while on probation." *Id.* This Court affirmed, stating, "At most, this prior record worksheet constituted a possible calculation of Defendant's prior record level and did not provide affirmative notice that the State intended to prove the existence of the prior record point authorized by N.C. Gen. Stat. § 15A-1340.14(b)(7) as required by N.C. Gen. Stat. § 15A-1340.16(a6)." *Id.* at *7. We noted that the State "had the ability to comply with the statute using regular forms promulgated for this specific purpose by the Administrative Office of the Courts." *Id.* (quoting *State v. Mackey*, 209 N.C. App. 116, 121, 708 S.E.2d 719, 722 (2011)).

In *State v. Snelling*, we held that the trial court erred in sentencing the defendant as a prior record level III because it failed to comply with N.C. Gen. Stat. § 15A-1340.16(a6). 231 N.C. App. at 682, 752 S.E.2d at 744. Because the trial court did not determine if the statutory requirements of N.C. Gen. Stat. § 15A-1340.16(a6) were met, no evidence showed that the State provided notice of its intent to prove that probation point, and no evidence indicated that defendant waived his right to receive such notice, we found prejudicial error and remanded for resentencing. *Id.* at 682–83, 752 S.E.2d at 744. As defendant points out, the defendant in *Snelling* also stipulated to his prior record level points, including one point for an offense committed while he was on probation. *Id.* at 678, 752 S.E.2d at 742.

Here, like in *Snelling*, the trial court did not determine that the State had provided notice of its intent to prove defendant committed the crimes charged while on probation, parole, or post-release supervision. Additionally, like in *Williams*, assuming that the State had included defendant's prior record level worksheet in discovery, such action does not constitute "written notice of its intent to prove the existence of . . . a prior record level point under G.S. 15A-1340.14(b)(7)." N.C. Gen. Stat. § 15A-1340.16(a6). Moreover, no evidence shows defendant waived such notice.

Acknowledging that *Williams* is not controlling legal authority as it is an unpublished case,[5] we decline the State's invitation to reach a different conclusion here. Moreover, we do not find merit in the State's distinction that unlike in *Williams*, the prior record level calculation here was "typewritten on the prior record level worksheet, rather than handwritten, which indicates permanency." The trial court erred by including the probation point in sentencing defendant as a prior record level II offender. This error was prejudicial because the additional point raised defendant's prior record level from I to II.

III. Conclusion

The trial court erred in denying defendant's motion to suppress his statement, "I have weed in the room." Accordingly, we reverse and remand for a new trial on the possession of marijuana and drug paraphernalia charges. The trial court did not commit plain error in its jury instructions on identity theft. The trial court committed prejudicial error by including the probation point in sentencing defendant as a prior record level II offender. Therefore, we vacate defendant's sentence, and we remand to the trial court for resentencing.

REVERSED IN PART; NO ERROR IN PART; VACATED AND REMANDED.

Judges McCULLOUGH and INMAN concur.

5. *See* N.C. R. App. P. 30(e)(3) ("An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority.").

STATE v. DULIN

[247 N.C. App. 799 (2016)]

STATE OF NORTH CAROLINA
v.
RICHARD DULIN, III, DEFENDANT

No. COA15-547

Filed 7 June 2016

1. Drugs—possession of drug paraphernalia—motion to dismiss—constructive possession—plain view

The trial court did not err by denying defendant's motion to dismiss the charge of possession of drug paraphernalia. Viewing the evidence in the light most favorable to the State, the evidence supported an inference that the police found the drug paraphernalia in plain view in a common living area where defendant, as a resident of the house, exercised nonexclusive control. Further, the State proffered sufficient evidence to establish defendant's constructive possession of the drug paraphernalia seized from the house.

2. Drugs—possession of marijuana with intent to sell or deliver—motion to dismiss—uncovered fishing boat in yard

The trial court erred by denying defendant's motion to dismiss the charge of possession of marijuana with intent to sell or deliver. The State failed to proffer sufficient evidence linking defendant to the marijuana found in an uncovered fishing boat in the yard. The case was remanded for resentencing.

Appeal by defendant from judgments entered on or about 11 September 2014 by Judge A. Moses Massey in Superior Court, Forsyth County. Heard in the Court of Appeals on 21 October 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Karen A. Blum, for the State.

Kimberly P. Hoppin for defendant-appellant.

STROUD, Judge.

Richard Dulin, III ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession with the intent to sell or deliver marijuana and possession of drug paraphernalia. Defendant contends that the trial court erred in denying his motion to dismiss. We find no error in part, vacate in part, and remand.

I. Background

Around noon on 10 January 2012, Officers Shuskey and Honaker began watching a house in Winston-Salem. At 12:01 p.m., the officers observed a man working on a white truck in the carport of the house. Officer Honaker noted that at some point, the white truck left the house, but he did not record whether the man left the house. Between 12:01 p.m. and 1:38 p.m., several people traveled to and from the house, by either car, moped, bicycle, or on foot, each spending only a few minutes at the house. At 1:39 p.m., defendant left the house driving a black truck. During defendant's absence, there was no activity at the house, other than a man who briefly walked in front of it. At 3:02 p.m., defendant returned in the black truck and parked it in front of the house. At 3:09 p.m., a man on a bicycle arrived and approached defendant in front of the house. The two men shook hands "as if they were passing an item back and forth."

A few minutes later, another man walked by the police officers and noticed their presence. He walked over to defendant and pointed out their location to him. Defendant immediately began using his cell phone. Defendant then got in the truck, drove it behind the house, and then returned a minute later, parking it in front of the house again. Defendant began washing the truck while the man who had informed him of the officers' location began raking leaves in the yard.

Officers Shuskey and Honaker, along with other police officers, detained defendant and the other man while they were working in the front yard and began searching for drugs. Defendant admitted to one of the police officers that he had a "blunt" in the black truck. Officer Shuskey searched the black truck that defendant had been driving and washing and found a small bag of marijuana in the console. Another police officer searched one of the house's multiple bedrooms and found marijuana located in a picture frame behind a photograph of defendant. The police officer also found a feminine deodorant bar in the bedroom.

Officer Barker searched a different room of the house which appeared to be a common living area as it had a television, couch, bookcases, and other "general furniture items[.]" There, he found a marijuana grinder, a digital scale with residue on it, $400 in cash tucked between books on a bookshelf, packaging material, plastic bags, and some clear glass jars which had a green leafy residue and smelled of unburnt marijuana. Officer Barker testified that the digital scale was in plain view and that the marijuana grinder was on the bookshelf where he found the cash.

Another police officer searched the kitchen and found an off-white powdery substance splattered in a microwave and on razor blades lying on the kitchen counter. At trial, Amanda Battin, a forensic scientist, testified that there was cocaine residue on one of the razor blades. In their search, the police officers also found a piece of mail addressed to defendant at the house's address, as well as a photograph of defendant and another person.

Sergeant McDonald searched a part of the yard, to the right of the house, where Officers Shuskey and Honaker had observed defendant driving the truck. There, he found an uncovered "flat-bottom style fishing boat" on a trailer that was located in an open, unfenced area roughly seventy feet from the side of the house. He also observed a "freestanding swing" somewhere between the house and the boat. In plain view under the boat's steering console, he found four or five individually packaged bags of marijuana, all contained within a large foil package. At trial, Officer Honaker opined that this marijuana was packaged for sale, and Ms. Battin testified that the total amount of marijuana recovered during the search was more than one half of an ounce. Officers Shuskey and Honaker did not testify that they observed defendant near the boat, nor did they testify that they heard defendant leave the truck when he was out of their view or do anything that would indicate that he may have hidden the marijuana in the boat. The police did not check to whom the boat was registered.

On or about 4 June 2012, a grand jury indicted defendant for possession with intent to sell or deliver marijuana, felony possession of cocaine, and possession of drug paraphernalia. *See* N.C. Gen. Stat. §§ 90-95(a)(1), (3), -113.22 (2011). At trial, defendant moved to dismiss at the close of the State's evidence and at the close of all the evidence, and the trial court denied both motions. On or about 10 September 2014, a jury found defendant guilty of possession with intent to sell or deliver marijuana and possession of drug paraphernalia and not guilty of possession of cocaine. On or about 11 September 2014, the trial court entered consecutive sentences of six to 17 months of imprisonment for the offense of possession with intent to sell or deliver marijuana and 120 days of imprisonment for the offense of possession of drug paraphernalia. The trial court suspended the two sentences and placed defendant on 36 months of supervised probation, which included an active term of 120 days of imprisonment as a condition of special probation. Defendant gave notice of appeal in open court.

II. Motion to Dismiss

[1] Defendant solely contends that the trial court erred in denying his motion to dismiss because insufficient evidence established that he actually or constructively possessed drug paraphernalia or marijuana with intent to sell or deliver.

A. Standard of Review

> Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.
>
> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it 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, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, 193 N.C. App. 521, 524-25, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, brackets, and ellipses omitted). "In deciding whether the trial court's denial of [a] defendant's motion to dismiss violated [the] defendant's due process rights, this Court must determine whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *State v. Penland*, 343 N.C. 634, 648, 472 S.E.2d 734, 741 (1996) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573 (1979)), *cert. denied*, 519 U.S. 1098, 136 L. Ed. 2d 725 (1997).

B. Possession of Drug Paraphernalia

> A person is in "possession" of a controlled substance within the meaning of G.S. 90-95 if they have the power and intent to control it; possession need not be actual. The State is not required to prove that the defendant owned

> the controlled substance . . . or that defendant was the only person with access to it.
>
> . . . Where control of the premises is nonexclusive, however, constructive possession may not be inferred without other incriminating circumstances.

State v. Rich, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citations and quotation marks omitted).

> Incriminating circumstances relevant to constructive possession
>
> > include evidence that defendant: (1) owned other items found in proximity to the contraband; (2) was the only person who could have placed the contraband in the position where it was found; (3) acted nervously in the presence of law enforcement; (4) resided in, had some control of, or regularly visited the premises where the contraband was found; (5) was near contraband in plain view; or (6) possessed a large amount of cash.
>
> Evidence of conduct by the defendant indicating knowledge of the controlled substance or fear of discovery is also sufficient to permit a jury to find constructive possession. Our determination of whether the State presented sufficient evidence of incriminating circumstances 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. Alston, 193 N.C. App. 712, 716, 668 S.E.2d 383, 386-87 (2008) (citations, quotation marks, and emphasis omitted), *aff'd per curiam*, 363 N.C. 367, 677 S.E.2d 455 (2009).

In *Rich*, the defendant argued that insufficient evidence established that she possessed cocaine, which the police had found in the bedroom of a house. *Rich*, 87 N.C. App. at 382, 361 S.E.2d at 323. The State proffered evidence that

> defendant was seen on the premises the evening before [the search], that on the night of her arrest she was cooking dinner at the house when the agents arrived, that women's casual clothes and undergarments were found in the bedroom [where the cocaine was found], and that mail

> addressed to defendant, including an insurance policy listing the house as her residence, was found in the house.

Id. This Court held that this evidence was sufficient to show that the defendant had nonexclusive control of the premises. *Id.* This Court held that the State also proffered evidence of "other incriminating circumstances" by establishing "more than [the] defendant's mere residence in the house." *Id.* at 382-83, 361 S.E.2d at 323. The State's "evidence showed that [the] defendant was present on the premises when the cocaine was found, that women's clothes and undergarments were in the room and in the dresser where the cocaine was found, and that letters with [the] defendant's name on them were also found in the room." *Id.* at 382, 361 S.E.2d at 323.

Here, the State established defendant's nonexclusive control of the house by introducing the following evidence: (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck; (2) the police found a piece of mail addressed to defendant at the house's address; (3) the police found photographs of defendant inside the house; and (4) several people visited the house while defendant was present, but no one visited the house while defendant was absent, other than a man who briefly walked in front of it. *See id.*

Officer Barker found the drug paraphernalia in a room in "the southern part of the house" which appeared to be a common living area as it had a television, couch, bookcases, and other "general furniture items[.]" In describing this room, Officer Barker did not mention a bed or anything akin to bedroom furniture. But later Officer Barker testified that he found the drug paraphernalia in "the southern bedroom[.]" The jury could have reasonably inferred that defendant and any other residents treated this room as a common living area even though it may have been constructed as a bedroom. Officer Barker also testified that the digital scale was in plain view and that the marijuana grinder was on the bookshelf where he found the cash. Viewing the evidence in the light most favorable to the State and giving the State every reasonable inference therefrom, we hold that the evidence supports an inference that the police found the drug paraphernalia in plain view in a common living area where defendant, as a resident of the house, exercised nonexclusive control. *See Robledo*, 193 N.C. App. at 524-25, 668 S.E.2d at 94.

In addition, the following evidence constitutes "other incriminating circumstances" which prove "more than defendant's mere residence in the house": (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck;

(2) the defendant admitted to the police that he had a "blunt" in the black truck, which was parked in front of the house, and the police found marijuana in the black truck's console; (3) the police found marijuana in the house behind a photograph of defendant; and (4) several people visited the house while defendant was there, including a man who shook hands with defendant "as if they were passing an item back and forth." *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323 (holding that evidence which showed that the "defendant was present on the premises when the cocaine was found," along with other evidence, constituted evidence of "other incriminating circumstances"). We find most significant the fact that the police found marijuana in a picture frame behind a photograph of defendant.[1] We conclude that

> [a]lthough the evidence tends to show that defendant shared the house with at least one other individual, *considering the totality of the circumstances*, a reasonable inference may be drawn that defendant had the power to control the use and disposition of the [drug paraphernalia] since it was located in a common area of his residence.

See State v. Baldwin, 161 N.C. App. 382, 392, 588 S.E.2d 497, 505 (2003) (emphasis added); *Alston*, 193 N.C. App. at 716, 668 S.E.2d at 386-87 ("Our determination of whether the State presented sufficient evidence of incriminating circumstances depends on the totality of the circumstances in each case." (citation and quotation marks omitted)).

Defendant argues that the fact that the police found marijuana behind a photograph of himself "suggests as much that someone else residing in the home had a picture of [defendant] as it did that [defendant] would have had a framed picture of himself by his bed." Defendant also points to the fact that a police officer found a feminine deodorant bar in that bedroom. But in reviewing a motion to dismiss, we view the evidence "in the light most favorable to the State" and give the State "every reasonable inference therefrom[.]" *See Robledo*, 193 N.C. App. at 524, 668 S.E.2d at 94 (citation omitted). We hold that the jury could have reasonably inferred from the evidence as a whole that defendant had nonexclusive control of the house. *See id.*

Defendant also argues that while the evidence might have been sufficient to support defendant's control over the black truck and therefore

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1. We note that it appears from the record that defendant was not indicted for simple possession of marijuana, and the State did not proffer evidence of the amount of this marijuana although it almost certainly was not large given its location.

over the marijuana found in the truck's console, there was insufficient evidence "establishing his exclusive control over the home[.]" But in order to establish constructive possession, the State need not prove *exclusive* control; it is sufficient to prove nonexclusive control plus other incriminating circumstances. *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. As discussed above, we hold that the State proffered evidence of defendant's nonexclusive control of the house plus other incriminating circumstances.

Defendant relies on *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987). But *McLaurin* is distinguishable. There, the State proffered evidence that the defendant lived at a house with other individuals, where the police had found drug paraphernalia, but the State presented no additional evidence relating to the defendant. *McLaurin*, 320 N.C. at 146, 357 S.E.2d at 638. Our Supreme Court held that "because [the] defendant's control over the premises in which the [drug] paraphernalia were found was nonexclusive, and because *there was no evidence of other incriminating circumstances linking her to those items*, her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." *Id.* at 147, 357 S.E.2d at 638 (emphasis added).

In contrast, here, the State proffered evidence of "other incriminating circumstances" linking defendant to the drug paraphernalia found in plain view in a common living area of the house: (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck; (2) the defendant admitted to the police that he had a "blunt" in the black truck, which was parked in front of the house, and the police found marijuana in the black truck's console; (3) the police found marijuana in the house behind a photograph of defendant; and (4) several people visited the house while defendant was there, including a man who shook hands with defendant "as if they were passing an item back and forth." *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323. Following *Rich*, we hold that the State proffered sufficient evidence to establish defendant's constructive possession of the drug paraphernalia seized from the house. *See id.* Accordingly, we hold that the trial court did not err in denying defendant's motion to dismiss with respect to the charge of possession of drug paraphernalia.

C. Possession of Marijuana with Intent to Sell or Deliver

[2] Defendant next argues that the trial court erred in denying his motion to dismiss with respect to the charge of possession of marijuana with intent to sell or deliver, because the State failed to proffer

sufficient evidence linking him to the marijuana found in the uncovered fishing boat.

The State produced no evidence linking defendant to the marijuana found in the boat other than the evidence that the boat was present in the yard. Sergeant McDonald testified that the boat was located roughly seventy feet from the side of the house and within the "curtilage" of the house. It is not clear why he used this term, but it is possible that the search warrant for the house also authorized a search of the curtilage so he described the boat as being within the curtilage and thus within the scope of the search warrant.[2] "Curtilage" is a term of art which is normally used in cases raising Fourth Amendment issues from a search and seizure without a warrant in an area near a defendant's residence. In that context, our Supreme Court has noted:

> The curtilage is the area immediately surrounding and associated with the home. In a non-Fourth Amendment case, we have said "the curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings." *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955) (citations omitted). The curtilage does enjoy some measure of Fourth Amendment protection, . . . because it is intimately linked to the home, both physically and psychologically[.] As such, it serves as the buffer between the intimate activities of the home and the prying eyes of the outside world. But, law enforcement is not required to turn a blind eye to contraband or otherwise incriminating materials left out in the open on the curtilage. Neither is law enforcement absolutely prohibited from crossing the curtilage and approaching the home, based on our society's recognition that the knocker on the front door is treated as an invitation or license to attempt an entry, justifying ingress to the home by solicitors, hawkers and peddlers[.]
>
> As a buffer, the curtilage protects privacy interests and prevents unreasonable searches on the curtilage.

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2. The search warrant is not in our record and defendant has not raised any argument regarding the scope of the search conducted under the search warrant, and we express no opinion upon that issue. We discuss the use of the term "curtilage" only because it was used in the evidence and because the State relies upon this term in its argument that the boat was within defendant's area of constructive possession.

State v. Grice, 367 N.C. 753, 759-60, 767 S.E.2d 312, 317-18 (citations, quotation marks, and ellipsis omitted), *cert. denied*, ___ U.S. ___, 192 L. Ed. 2d 882 (2015). "The curtilage is the area to which extends the intimate activity associated with the sanctity of a man's home and the privacies of life, and therefore has been considered part of [the] home itself for Fourth Amendment purposes." *State v. Smith*, ___ N.C. App. ___, ___, 783 S.E.2d 504, 511 (No. COA 15-305) (Mar. 1, 2016) (brackets omitted) (quoting *Oliver v. United States*, 466 U.S. 170, 180, 80 L. Ed. 2d 214, 225 (1984)).

> The protection afforded to curtilage under the privacy interest of [the] Fourth Amendment is determined by looking at four factors: "[(1)] the proximity of the area claimed to be curtilage to the home, [(2)] whether the area is included within an enclosure surrounding the home, [(3)] the nature of the uses to which the area is put, and [(4)] the steps taken by the resident to protect the area from observation by people passing by."

Id. at ___ n.2, ___ S.E.2d at 511 n.2 (quoting *United States v. Dunn*, 480 U.S. 294, 301, 94 L. Ed. 2d 326, 334-35 (1987)).

In *Grice*, police officers who approached the door of the defendant's home for a "knock and talk" noticed some plants growing in containers in an unfenced area about fifteen yards from the residence. 367 N.C. at 754-55, 767 S.E.2d at 314-15. The officers recognized the plants as marijuana, seized them, and later arrested the defendant. *Id.* at 755, 767 S.E.2d at 315. The defendant argued that evidence of the plants should have been suppressed because the officers' warrantless search and seizure of the plants violated the Fourth Amendment, as the plants were within the curtilage of his home and thus were protected. *Id.* at 757-59, 767 S.E.2d at 316-17. Our Supreme Court rejected this argument, concluding "that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects 'the privacies of life' inside the home." *Id.* at 760, 767 S.E.2d at 318 (quoting *Oliver*, 466 U.S. at 180, 80 L. Ed. 2d at 225).

Sergeant McDonald's testimony characterizing the boat as within the "curtilage" of the house does not make it so. His testimony in this regard is more of a legal conclusion than a factual description of the premises, and we note that on appeal, the State makes no argument in support of his conclusion. The facts in evidence cannot support his conclusion that the boat was actually within the curtilage. The evidence showed that the

boat was out in the open, in an unfenced area of the yard about seventy feet from the home. There was no evidence that this area of the yard was in any way "intimately linked to the home," either "physically [or] psychologically[.]" *See id.* at 759, 767 S.E.2d at 317 (quoting *California v. Ciraolo*, 476 U.S. 207, 212-13, 90 L. Ed. 2d 210, 216 (1986)). In fact, the boat was farther from defendant's home than the marijuana plants were from the home of the defendant in *Grice* and was also located in an open, unfenced area. *See id.* at 754-55, 767 S.E.2d at 314-15. In addition, all four *Dunn* factors militate against a conclusion that the boat was within the house's curtilage. *See Dunn*, 480 U.S. at 301, 94 L. Ed. 2d at 334-35. Thus, the boat was not in an area "intimately" associated with the home and could not be connected to defendant simply based upon its location in the yard. *See Grice*, 367 N.C. at 759, 767 S.E.2d at 317 (citation omitted).

Nor was there any evidence to show that defendant had any ownership interest in or possession of the boat, even assuming that it was in his yard. Sergeant McDonald testified that the boat was located in a part of the yard which defendant had driven through when driving the truck behind the house, as observed by Officers Shuskey and Honaker. But Officers Shuskey and Honaker did not testify that they observed defendant near the boat, nor did they testify that they heard defendant leave the truck when he was out of their view or do anything that would indicate that he may have hidden the marijuana in the boat. As best we can tell from the testimony, Officers Shuskey and Honaker observed defendant driving through the right side of the yard, disappearing behind the house, and then driving back to the front, but there is no evidence that defendant stopped at the boat or hid anything in the boat, and the officers testified that he was aware of their presence at that point.[3] In addition, the police did not check to whom the boat was registered, and Sergeant McDonald testified that the boat was uncovered. The house had multiple bedrooms, and Officer Honaker testified that at 12:01 p.m., he had observed another man working on a white truck in the carport of the house, so the boat may have belonged to someone else residing in the home. But there was no evidence regarding the ownership or use of the boat or of any items found within the boat which could have connected it to defendant or anyone else. And even if the boat had been

3. Using a map, Officer Shuskey clarified the two locations from which he and Officer Honaker observed defendant, but we do not have this map in the record on appeal. Nevertheless, we have carefully reviewed their testimony and have given the State the benefit of every reasonable inference based upon their descriptions. *See Robledo*, 193 N.C. App. at 524-25, 668 S.E.2d at 94.

within the curtilage, it still does not automatically follow that defendant had actual or constructive possession of every item within the curtilage, just as the fact that if an item is found in a house where a defendant and other people live does not mean that the defendant automatically had actual or constructive possession of that item.

The "other incriminating circumstances" as noted above are not particularly strong, even for the drug paraphernalia, and are simply too weak to connect defendant to the marijuana found in the boat so far from the house. Those circumstances were, as noted above, that (1) defendant spent hours at the house on the day of the search, either inside it or in the front yard washing the black truck; (2) the defendant admitted to the police that he had a "blunt" in the black truck, which was parked in front of the house, and the police found marijuana in the black truck's console; (3) the police found marijuana in the house behind a photograph of defendant; and (4) several people visited the house while defendant was there, including a man who shook hands with defendant "as if they were passing an item back and forth." *See Rich*, 87 N.C. App. at 382-83, 361 S.E.2d at 323.

These circumstances generally tend to show that defendant did reside in the house, but most significant is the fact that the police found marijuana in a picture frame behind a photograph of defendant. As noted above, defendant argues that it is unlikely that a person would display a photograph of himself and that he would hide his own marijuana behind it, but a jury could certainly infer that defendant himself did this. *See Robledo*, 193 N.C. App. at 524, 668 S.E.2d at 94. That fact thus provides some evidence of other incriminating circumstances linking defendant to the drug paraphernalia found in the house, but it cannot connect defendant to something found in an open boat in the yard so far from the house. We therefore hold that the State failed to present sufficient evidence of defendant's constructive possession of the marijuana found in the boat. *See McLaurin*, 320 N.C. at 147, 357 S.E.2d at 638 ("[B]ecause [the] defendant's control over the premises in which the paraphernalia were found was nonexclusive, and because there was no evidence of other incriminating circumstances *linking* her to those items, her control was insufficiently substantial to support a conclusion of her possession of the seized paraphernalia." (emphasis added)). In other words, the State's evidence was insufficient to convince any rational juror *beyond a reasonable doubt* that defendant constructively possessed the marijuana found in the boat. *See Penland*, 343 N.C. at 648, 472 S.E.2d at 741 (In reviewing a motion to dismiss, we "must determine

whether 'any rational trier of fact could have found the essential elements of the crime *beyond a reasonable doubt*.' " (emphasis added and emphasis omitted) (quoting *Jackson*, 443 U.S. at 319, 61 L. Ed. 2d at 573)); *State v. Marshall*, 94 N.C. App. 20, 29, 33-34, 380 S.E.2d 360, 365-66, 368 (noting that the trial court excluded evidence that the police had found marijuana in a car parked within the curtilage of the defendant's house, which was registered to a woman living at the house with the defendant, "because the State failed to link its possession or control to the defendant"), *appeal dismissed and disc. review denied*, 325 N.C. 275, 384 S.E.2d 526 (1989).

Officer Honaker opined that the marijuana found in the boat was packaged for sale and Ms. Battin testified that the total amount of marijuana recovered was more than one half of an ounce. But excluding the marijuana found in the boat, the State did not proffer sufficient evidence to convince any rational juror beyond a reasonable doubt that defendant had actual or constructive possession of the marijuana or committed all the elements of the offense of possession of marijuana with intent to sell or deliver. *See id.*; *State v. Carr*, 145 N.C. App. 335, 341, 549 S.E.2d 897, 901 (2001) ("The offense of possession with intent to sell or deliver has the following three elements: (1) possession of a substance; (2) the substance must be a controlled substance; (3) there must be intent to sell or distribute the controlled substance."); N.C. Gen. Stat. § 90-95(a)(1). On appeal, the State directs us to no other evidence to support defendant's conviction for possession of marijuana with intent to sell or deliver. Accordingly, we hold that the trial court erred in denying defendant's motion to dismiss with respect to the charge of possession of marijuana with intent to sell or deliver and thus vacate that conviction. *See Robledo*, 193 N.C. App. at 525, 668 S.E.2d at 94.

Although the trial court did not consolidate defendant's convictions in sentencing, we remand the case for resentencing out of an abundance of caution. We note that in sentencing defendant for the possession of drug paraphernalia conviction, the trial court found that a longer period of probation was necessary than that which is specified in N.C. Gen. Stat. § 15A-1343.2(d) (2013), although we cannot discern if the other conviction influenced the trial court's determination. It is also possible that the conviction of possession of marijuana with intent to sell or deliver had no effect upon the sentencing for the conviction of possession of drug paraphernalia, and if so, the trial court need not revise the sentence on remand. Accordingly, we remand the case to the trial court for resentencing in light of this opinion.

III. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to dismiss with respect to the charge of possession of drug paraphernalia but that it did err in denying defendant's motion to dismiss with respect to the charge of possession of marijuana with intent to sell or deliver. Accordingly, we hold that that the trial court committed no error in convicting defendant of possession of drug paraphernalia, vacate defendant's conviction for possession of marijuana with intent to sell or deliver, and remand for resentencing.

NO ERROR IN PART, VACATED IN PART and REMANDED.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
TIMOTHY CHADWICK FLEMING

No. COA16-37

Filed 7 June 2016

1. Evidence—videotape of confession—illustrative purposes

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals rejected his argument that the State failed to lay a proper foundation for admission of the videotape of his confession. The tape was admitted for illustrative purposes, and testimony asserted that the tape fairly and accurately illustrated the events filmed.

2. Evidence—other crimes—voir dire testimony—authentication—surveillance video

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals rejected his argument that the trial court erred by allowing the State to introduce hearsay evidence of other crimes committed by defendant. The trial court was not bound by the Rules of Evidence when it admitted an investigator's testimony during voir dire, and the investigator's testimony adequately authenticated the surveillance video introduced for Rule 404(b) purposes.

3. Conspiracy—common law robbery—lack of agreement

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, the Court of Appeals held that the trial court erred by denying defendant's motion to dismiss the charge of conspiracy to commit common law robbery. There was no evidence of an agreement between defendant and his co-perpetrator to use "means of violence or fear" to take the handbags.

4. Sentencing—trial court's comments

Where defendant appealed from convictions arising from the theft of handbags from a Marshalls store, he failed to show any reversible error resulting from the trial court's comments at sentencing. His sentence was imposed within the presumptive range and was presumed regular and valid.

Appeal by defendant from judgment entered 16 July 2015 by Judge Carla N. Archie in Mecklenburg County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde for the State.

Marilyn G. Ozer for defendant.

TYSON, Judge.

Timothy Chadwick Fleming ("Defendant") appeals from jury convictions of common law robbery, conspiracy to commit common law robbery, misdemeanor larceny, and of having attained habitual felon status. The trial court arrested judgment on the misdemeanor larceny charge. We find no error in part, reverse the judgment in part, and remand for re-sentencing.

I. Factual Background

On 30 April 2013, a theft occurred at a Marshalls store located in Charlotte, North Carolina. The store's video surveillance system recorded the theft and depicted a male, later identified as Defendant, enter Marshalls, walk around the women's handbag area, and leave the store. A second male entered the store five minutes later. The second male, identified as Roger McCain ("McCain"), walked directly to the women's handbag area, picked up several handbags, and attempted to exit the store.

Assistant manager Tracy Wetzel ("Wetzel") was working in the front vestibule of the store arranging shopping carts, when she observed McCain approach the exit with an armload of Michael Kors purses. Wetzel stepped toward McCain and asked him "if [she] could help him." McCain pushed Wetzel out of the way and exited the store.

While Wetzel was not physically injured, McCain pushed her with enough force into the sliding doors to knock them off of their hinges. McCain jumped into a white Toyota Camry, which displayed a handmade cardboard license plate. The Toyota was waiting for McCain at the curb. Defendant was the driver.

Charlotte-Mecklenburg Police Department Detective Barry C. Kipp ("Detective Kipp") used license plate information obtained from the Toyota's cardboard plate and learned the vehicle belonged to Defendant's mother and it was parked at Defendant's address. He identified Defendant as the first man seen in the Marshalls surveillance video. Detective Kipp asked to interview Defendant. Defendant waived his Miranda rights and agreed to speak with Detective Kipp.

During the interview, Defendant admitted to his involvement in the Marshalls theft. Defendant stated he and McCain had planned to steal handbags from Marshalls. Defendant identified himself and McCain as the perpetrators in the surveillance video. Defendant stated he was not aware of an altercation with Wetzel until McCain got into the vehicle after stealing the handbags.

On 6 January 2014, Defendant was indicted for common law robbery, conspiracy to commit common law robbery, felonious larceny, and having attained the status of habitual felon.

The State presented the evidence summarized above and the video of Detective Kipp's interview with Defendant. The trial court also admitted the State's Rule 404(b) evidence of other crimes. The first incident was introduced through Marshalls and T.J. Maxx corporate investigator Jonathan Nix ("Nix"). Nix testified that he was called to investigate a theft, which had occurred on 12 April 2013 at a T.J. Maxx retail store in Mooresville, North Carolina.

Nix testified he was familiar with the camera system used at the Mooresville T.J. Maxx store, the system was functioning correctly at the time of the theft, and he made a copy of the surveillance video showing a theft of handbags similar to the theft at the Charlotte Marshalls. Nix testified the video proffered by the State was the one he had copied

and it had not been edited. This video was admitted into evidence and published to the jury.

The second incident was introduced through Mark Armstrong ("Armstrong"). Armstrong testified he was operating the surveillance camera system at Dillards Department Store in Gastonia, North Carolina on 1 April 2013. From the surveillance camera, he observed a male subject enter the store and steal five or six handbags.

The court instructed the jury to limit their use of this evidence to:

> "show the identity of the person who committed the crimes charged in this case if they were committed, that the defendant had motive for the commission of the crimes charged in this case, that the defendant had the intent which was a necessary element of the crimes charged in this case, that the defendant had the knowledge which is a necessary element of the crimes charged in this case, that there existed in the mind of the defendant a plan, scheme, system or design involving the crimes charged in this case, the absence of mistake and absence of accident."

Defendant did not present any evidence.

The jury convicted Defendant of common law robbery, conspiracy to commit common law robbery, and misdemeanor larceny. He was also convicted of attaining habitual felon status. The trial court arrested judgment on the conviction of misdemeanor larceny.

For common law robbery, Defendant was sentenced to 127 to 165 months imprisonment as an habitual felon. For conspiracy to commit common law robbery, Defendant was sentenced to 89 to 119 months imprisonment as an habitual felon.

II. Issues

Defendant argues the trial court erred by: (1) admitting his videotaped confession into evidence; (2) admitting 404(b) evidence of other crimes or bad acts through hearsay testimony; (3) denying his motion to dismiss; and, (4) sentencing Defendant to two consecutive sentence terms which would run consecutively to any sentence which may be imposed upon Defendant in the future.

III. Admission of Videotape Confession as Illustrative Evidence

[1] Defendant argues the State failed to lay a proper foundation for admission of the videotape of his confession. We disagree.

A. Standard of Review

"In determining whether to admit photographic evidence, the trial court must weigh the probative value of the photographs against the danger of unfair prejudice to defendant." *State v. Blakeney*, 352 N.C. 287, 309, 531 S.E.2d 799, 816 (2000). "This determination lies within the sound discretion of the trial court, and the trial court's ruling should not be overturned on appeal unless the ruling was manifestly unsupported by reason or [was] so arbitrary that it could not have been the result of a reasoned decision." *State v. Goode*, 350 N.C. 247, 258, 512 S.E.2d 414, 421 (quotations omitted).

B. Analysis

"Photographs and video are usually competent to be used by a witness to explain or illustrate anything that it is competent for him to describe in words." *State v. Stewart*, 231 N.C. App. 134, 141, 750 S.E.2d 875, 880 (2013) (citation omitted). *See also State v. Billings*, 104 N.C. App. 362, 371, 409 S.E.2d 707, 712 (1991) (basic principles governing the admissibility of photographs apply also to motion pictures).

Video images may be introduced into evidence for illustrative purposes after a proper foundation is laid. N.C. Gen. Stat. § 8-97 (2015). The proponent for admission of a video lays this foundation with "testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purposes)." *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608-09 (1988), *rev'd on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990), *cert. denied*, 356 N.C. 311, 571 S.E.2d 208 (2002).

Over Defendant's objection, videotape of Detective Kipp's interview with Defendant was allowed into evidence. Defendant's objection only addressed whether the State had laid a proper foundation to admit the evidence, not whether Detective Kipp was competent to testify to the interview. He testified that the videotape was a "fair and accurate depiction of the interview." The videotape was shown to the jury solely to illustrate Detective Kipp's testimony.

Because the videotape was admitted only for illustrative purposes, and testimony asserted the videotape fairly and accurately illustrated the events filmed, this testimony meets the authentication requirements enunciated in Cannon for admission for illustrative purposes. This assignment of error is overruled.

IV. 404(b) Evidence of Other Crimes

[2] Defendant argues the trial court erred by allowing the State to introduce hearsay evidence of other crimes committed by Defendant pursuant to N.C. Gen. Stat. § 8C-1, Rule 404(b).

A. Standard of Review

"Determining the competency of a witness to testify is a matter which rests in the sound discretion of the trial court." *State v. Phillips*, 328 N.C. 1, 17, 399 S.E.2d 293, 301, *cert. denied*, 501 U.S. 1208, 115 L. Ed. 2d 977 (1991). "To test the competency of a witness, the trial judge must assess the capacity of the proposed witness to understand and to relate under oath the facts which will assist the jury in determining the truth with respect to the ultimate facts." *State v. Liles*, 324 N.C. 529, 533, 379 S.E.2d 821, 823 (1989).

"The trial court must make only sufficient inquiry to satisfy itself that the witness is or is not competent to testify. The form and manner of that inquiry rests within the discretion of the trial judge." *In re Will of Leonard*, 82 N.C. App. 646, 649, 347 S.E.2d 478, 480 (1986).

B. Analysis

The challenged testimony was elicited during the *voir dire* of Nix, who investigated a theft of handbags in Union County. The *voir dire* was held to determine the admissibility of surveillance video of the theft. This evidence was introduced pursuant to Rule 404(b) for the purpose of showing motive, intent, preparation, or plan. *See* N.C. Gen. Stat. § 8C–1, Rule 404(b) (2015). "[P]reliminary questions concerning the qualification of a person to be a witness are determined by the trial court, which is not bound by the rules of evidence in making such a determination. In determining whether a person is competent to testify, the court may consider any relevant information which may come to its attention." *In re Faircloth*, 137 N.C. App. 311, 316, 527 S.E.2d 679, 682 (2000) (citation omitted).

The trial court was not acting as the trier of fact, and was not bound by the Rules of Evidence while making a preliminary determination outside the presence of the jury. The testimony of Nix was properly admitted by the trial court during the *voir dire* hearing.

Defendant also argues surveillance video from the Union County T.J. Maxx was inadmissible because it was not based on Nix's personal knowledge. Nix was not present when the theft recorded took place.

"Real evidence is properly received into evidence if it is identified as being the same object involved in the incident and it [is] shown that the object has undergone no material change." *State v. Snead*, __ N.C. __, __, 783 S.E.2d 733, __, 2016 WL 1551403, at *3 (N.C. Apr. 15, 2016) (internal quotation marks and citation omitted). "Recordings such as a tape from an automatic surveillance camera can be authenticated as the accurate product of an automated process under Rule 901(b)(9)." *Id.* (quotation and citation omitted). The State may authenticate the video and lay a proper foundation for its admission with evidence showing that the recording process is reliable and that the video introduced at trial is the same video that was produced by the recording process. *Id.*

During *voir dire*, Nix testified the surveillance video system was functioning properly at the time the video was captured and the video images introduced at trial were unedited and were the same video images created by this system. The surveillance video was adequately authenticated. *See id.* The State laid a proper foundation to support its introduction into evidence. This assignment of error is overruled.

V. Conspiracy to Commit Common Law Robbery

[3] Defendant argues the State presented insufficient evidence tending to show he entered into an agreement to perform every element of common law robbery. We agree.

A. Standard of Review

"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." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation and internal quotation marks omitted). "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). "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).

B. Analysis

"A criminal conspiracy is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way or by unlawful means." *State v. Bindyke*, 288 N.C. 608, 615, 220 S.E.2d 521, 526 (1975) (citations omitted).

Whether or not an agreement exists to support a finding of guilt in a conspiracy case is generally inferred from an analysis of the surrounding facts and circumstances, rather than established by direct proof. *State v. Whiteside*, 204 N.C. 710, 712-13, 169 S.E. 711, 712 (1933). The mere fact that the crime the defendant allegedly conspired with others to commit took place does not, without more, prove the existence of a conspiracy. *State v. Arnold*, 329 N.C. 128, 142, 404 S.E.2d 822, 831 (1991). "If the conspiracy is to be proved by inferences drawn by the evidence, such evidence must point unerringly to the existence of a conspiracy." *State v. Massey*, 76 N.C. App. 660, 662, 334 S.E.2d 71, 72 (1985). "There is a distinction between the offense to be committed and the conspiracy to commit the offense. In the one, the *corpus delicti* is the act itself; in the other, it is the conspiracy to do the act." *Whiteside*, 204 N.C. at 712, 169 S.E. at 712 (citations omitted).

Here, to survive a motion to dismiss, the State was required to prove "an agreement [between Defendant and Roger McCain] *to perform every element of*" common law robbery. *State v. Dubose*, 208 N.C. App. 406, 409, 702 S.E.2d 330, 333 (2010) (*quoting State v. Suggs*, 117 N.C. App. 654, 661, 453 S.E.2d 211, 215 (1995)) (emphasis supplied). Common law robbery is "the felonious, non-consensual taking of money or personal property from the person or presence of another by means of violence or fear." *State v. Smith*, 305 N.C. 691, 700, 292 S.E.2d 264, 270, *cert. denied*, 459 U.S. 1056, 74 L.Ed.2d 622 (1982).

The State attempted to connect Defendant with the "violence or fear" element of the common law robbery through the testimony of Detective Kipp. When asked whether Defendant stated "he was aware of the altercation with the manager at Marshalls" [Ms. Wetzel], during his conversations with police, Detective Kipp testified that Defendant indicated that he was only aware an altercation had occurred once Roger McCain "got back in the vehicle" as they escaped following the robbery.

During cross-examination of Detective Kipp, this exchange occurred regarding the common law robbery charge:

> Q. Now, in your interview and investigation in this case you had no – you received no information at all that

Mr. Fleming was involved at all with the actual assault upon Ms. Wetzel; is that correct?

A. Correct.

Q. He was sitting in the car [sic] far as what you understand the situation?

A. He was driving the car, correct.

Q. He said he didn't see the incident at all, and you don't have any evidence to prove otherwise, do you?

A. No.

Q. Now, when Assistant DA says a plan, you haven't – Mr. Fleming said nothing about any plan, did he?

A. I don't remember.

Q. Okay. And, in fact, there is no evidence at all from Mr. Fleming about any plan to commit any kind of common law robbery, was there – or has he?

A. No. There's no plan for that, no.

Considering this evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference, and resolving any contradictions in its favor, the State presented no evidence of an agreement to support a conspiracy to commit common law robbery between Defendant and McCain.

The only evidence presented at trial tended to show the absence of such an agreement. McCain's use of or "means of violence or fear" to push Wetzel aside to consummate the larceny was unknown to Defendant until after the robbery. None of the other "grab and run" larcenies involving Defendant and McCain showed any other takings occurred "by means of violence or fear." The trial court erred by denying Defendant's motion to dismiss the charge of conspiracy to commit common law robbery.

VI. Sentencing

[4] Defendant argues the trial court erred by sentencing him to two consecutive sentences, which would also run consecutively to any sentence imposed upon Defendant in the future. Defendant contends such sentence violates his constitutional right to be free from cruel and unusual punishment. U.S. Const. Amend. VIII; N.C. Const. Art. I, Sec. 27.

A. Preservation of Error

The State argues Defendant has not preserved this issue for appellate review, as he failed to raise this constitutional issue at trial. *See State v. Garcia*, 358 N.C. 382, 410, 597 S.E.2d 724, 745 (2004) ("[C]onstitutional matters that are not raised and passed upon at trial will not be reviewed for the first time on appeal." (Internal citations and quotation marks omitted)).

"An error at sentencing is not considered an error at trial for the purpose of [Appellate] Rule 10(a) because this rule is directed to matters which occur at trial and upon which the trial court must be given an opportunity to rule in order to preserve the question for appeal." *State v. Curmon*, 171 N.C. App. 697, 703, 615 S.E.2d 417, 422 (2005) (internal citation and quotation marks omitted). Defendant was not required to object at sentencing to preserve the issue on appeal. *State v. Pettigrew*, 204 N.C. App. 248, 258, 693 S.E.2d 698, 704-05 (2010) (citation omitted).

B. Standard of Review

Within the limits of the sentence permitted by law, the character and extent of the punishment to be imposed rests within the sound discretion of the court. We review the sentence for manifest and gross abuse. *State v. Hullender*, 8 N.C. App. 41, 42, 173 S.E.2d 581, 583 (1970), *see also State v. Sudderth*, 184 N.C. 753, 114 S.E. 828 (1922).

C. Analysis

Not every improper remark made by the trial court requires resentencing. "When considering an improper remark in the light of the circumstances under which it was made, the underlying result may manifest mere harmless error." *State v. Pickard*, 143 N.C. App. 485, 490, 547 S.E.2d 102, 106 (2001) (quotation and citation omitted).

The sentence contained in the written judgment is the actual entry of judgment and the sentence imposed. *State v. Crumbley*, 135 N.C. App. 59, 66, 519 S.E.2d 94, 99 (1999). The sentence announced in open court is merely the rendering of judgment and does not control. *State v. Hanner*, 188 N.C. App. 137, 139, 654 S.E.2d 820, 821 (2008). *See also Abels v. Renfro Corp.*, 126 N.C. App. 800, 803, 486 S.E.2d 735, 737 ("Announcement of judgment in open court merely constitutes 'rendering' of judgment, not entry of judgment."), *disc. review denied*, 347 N.C. 263, 493 S.E.2d 450 (1997).

While the transcript shows the trial court made oral comments during sentencing that the sentences imposed would run consecutively to

any sentence Defendant might receive in the future, these comments or conditions are not reflected in Defendant's written and entered judgment. Defendant's sentence was imposed within the presumptive range allowed by statute and is presumed to be regular and valid. *State v. Earls*, 234 N.C. App. 186, 193, 758 S.E.2d 654, 659 (2014). Defendant has not overcome this presumption. This argument is overruled.

VII. Conclusion

The State laid a proper foundation to admit a recording of Defendant's confession to illustrate the witness' testimony. Surveillance recordings of other larcenies Defendant participated in were properly introduced and limited as Rule 404(b) evidence.

The State's evidence was insufficient to support submitting the charge of conspiracy to commit common law robbery to the jury. Defendant's motion to dismiss should have been granted. Defendant's conviction for conspiracy to commit common law robbery is reversed.

Defendant has failed to show any reversible error resulting from the trial court's comments at sentencing. These comments are not reflected in the final written judgment entered.

NO ERROR IN PART, REVERSED IN PART, AND REMANDED.

Judges CALABRIA and HUNTER, JR concur.

STATE OF NORTH CAROLINA
v.
JOEL JUAN NAVARRO, DEFENDANT, AND
CRUM & FORSTER INDEMNITY CO., SURETY

No. COA15-1065

Filed 7 June 2016

1. Jurisdiction—Rule 59 motion—bond forfeiture proceeding

The Court of Appeals had jurisdiction in a bond forfeiture case over surety's appeal from the trial court's 23 January 2015 order. The surety filed a proper Rule 59 motion to toll the thirty-day period for appeal.

2. Evidence—findings of fact—sufficiency of evidence

The trial court erred in a bond forfeiture case by its finding of fact no. 15. Because it was not supported by competent evidence, it could not be used to support the conclusion of law that surety failed to demonstrate extraordinary circumstances. However, this error did not warrant reversal.

3. Penalties, Fines, and Forfeitures—bond forfeiture—motion to remit—findings of fact—numerous tasks completed by surety not required

The trial court did not err by denying surety's motion to remit the bond forfeiture. The trial court was not required to make findings of fact specifying the numerous tasks completed by surety in its effort to surrender defendant.

4. Civil Procedure—Rule 59 motion—extraordinary circumstances—substantial costs

The trial court did not abuse its discretion in a bond forfeiture case by denying surety's Rule 59 motion. The findings were both relevant to and determinative of the ultimate issue regarding extraordinary circumstances. The fact that surety incurred substantial costs to surrender defendant did not warrant relief from judgment. It could not be said that the court's decision to deny surety's motion was manifestly unsupported by reason or was so arbitrary that it could not have been the result of a reasoned decision.

Appeal by surety from orders entered 23 January 2015 and 10 June 2015 by Judge Jim Love, Jr. in Harnett County District Court. Heard in the Court of Appeals 24 February 2016.

W. Robert Denning, III and Mary McCullers Reece for surety-appellant Crum & Forster Indemnity Co.

Rod Malone and Stephen G. Rawson, for respondent-appellee Harnett County Board of Education.

Harnett County District Attorney Vernon K. Stewart for the State.

ELMORE, Judge.

This cases arises from an order of bond forfeiture issued after defendant failed to appear in court. The trial court denied surety's petition to remit and subsequent Rule 59(e) motion on the grounds that surety failed to demonstrate "extraordinary circumstances" which warrant relief from judgment. On appeal, surety principally argues that (1) in its order denying surety's motion to remit, the trial court failed to make sufficient findings of fact determinative of the ultimate issue, and (2) the trial court abused its discretion in denying surety's Rule 59(e) motion. We affirm.

I. Background

Joel Juan Navarro (defendant) was arrested in Harnett County for cocaine trafficking. He was released after posting a $100,000.00 bond written by Jessica Matthews, a bail agent for Crum & Forster Indemnity Co. (surety). Defendant was scheduled to appear in Harnett County District Court on 27 May 2014, but failed to do so. The next day, the court issued an order of forfeiture on the $100,000.00 bond. The forfeiture notice listed 25 October 2014 as the final judgment date.

On 2 October 2014, surety contacted David Marshburn, one of its bail agents, for assistance in finding defendant. Marshburn, along with Agents Berube and Ward, drove from North Carolina to Miami and located defendant's home. After conducting surveillance, the agents entered the house. They observed no sign of defendant but his girlfriend, Miriam Roche, and friend, Maria Romero, were present. Both told the agents that defendant was in Boston and had not been back since he was released from jail. Marshburn told Roche to "call Defendant's Attorney in Harnett County North Carolina and have the order for arrest and failure to appear recalled and make sure Defendant goes to court." He also told Romero to contact him when defendant's case was recalled. The agents then left and returned to North Carolina.

On 16 October 2014, Marshburn learned from defendant's attorney that the district attorney was not willing to recall the order for arrest and failure to appear. Nevertheless, the next day Marshburn traveled back to Miami in hopes that defendant "would come back out of hiding since defendant thinks he does not have a warrant." At defendant's home, Romero told Marshburn that defendant is in Boston and that he was stopped a few days ago at the airport by TSA. Marshburn decided to head to Boston.

Upon his arrival, Marshburn began conducting surveillance at the address listed on the appearance bond. A neighbor told Marshburn that he saw defendant at the address several weeks ago, at which point Marshburn decided to approach the house. A woman answered the door and told Marshburn that defendant had been in Miami with Roche about two weeks ago, but he was not at the house in Boston. She also told Marshburn that if he "wanted to find defendant, he was going to have to follow [Roche]."

Marshburn arrived back in North Carolina on 22 October 2014 before making his way to Miami with Agents Berube and Ward. At defendant's home, the agents again questioned Roche and Romero, who told them that defendant was now in Phoenix staying with a friend. The agents decided to return to North Carolina and verify defendant's travel with TSA.

On 25 October 2014, Marshburn flew to Phoenix and found the apartment complex where defendant was allegedly staying. After a day of surveillance, Marshburn decided to question the maintenance man. He directed Marshburn to defendant's apartment unit, but added that he had "not seen defendant in a while." Hoping for an update on defendant's location, Marshburn texted Romero, who told him that defendant "went across the border into Mexico." Marshburn returned to North Carolina.

On 31 October 2014, Marshburn and Berube flew to Miami after hearing that defendant "might show up" at a Halloween party hosted by Roche. They did not find defendant, but they did install a tracking device on his car before returning to North Carolina. A week later, Marshburn received information from the tracking device showing that defendant's car had moved to an unfamiliar address. Marshburn traveled back to Miami with Agents Berube and Griggs to conduct surveillance and tail cars leaving the house. On 14 November 2014, after no sign of defendant, the agents once again returned to North Carolina.

The trail went cold until 7 December 2014, when Marshburn received a text message containing defendant's new phone number. He

purchased a phone with a Phoenix area code and had Agent Jiminez call defendant to "befriend" him. Six days later, Marshburn and Jiminez flew to Phoenix to set up a meeting with defendant but, according to Marshburn, defendant "gave Agent Jiminez the run around and never would meet." Eventually, defendant disconnected the phone and the agents' subsequent attempts to track it failed. They returned to North Carolina.

On 27 December 2014, Marshburn made his final visit to Miami with Agent Trotter. Marshburn had received another text message containing defendant's location and intercepted defendant as he was heading toward his home in Miami. On 30 December 2014, the agents surrendered defendant into custody in Harnett County on behalf of surety.

Following defendant's surrender, Marshburn submitted a petition seeking full remission of the $100,000.00 bond. The court denied the petition by a written order entered 23 January 2015, which contained the following relevant findings of fact:

> 5. The Harnett County Clerk of Court issued a Bond Forfeiture Notice giving notice of the Defendant's failure to appear to the Defendant, Surety, and Bail Agent on 28 May 2014.
>
> 6. The Bond Forfeiture Notice indicated 25 October 2014 was the Final Judgment Date.
>
> 7. The Surety surrendered the Defendant on 30 December 2014 to the Harnett County Detention Center.
>
> 8. On 6 January 2015, the Surety filed a Petition for Remission with the Harnett County Clerk of Court requesting the Court remit the 100,000.00 dollar bond which was paid by the Surety on 27 October 2015.
>
> . . . .
>
> 10. The Surety and the Bail Agent are engaged in the bail bonding profession.
>
> 11. The Surety and the Bail Agent received proper notice of the pending bond forfeiture and the final judgment date.
>
> 12. The Surety and Bail Agent were aware the Defendant owned property in Massachusetts and Florida prior to posting the Defendant's bond.

> 13. The Surety and Bail Agent were aware the Defendant did not reside in the State of North Carolina.
>
> 14. The Defendant was apprehended by the Surety in the State of Florida where he owned a home.
>
> 15. Prior to posting the Defendant's bond, the surety secured a 100,000.00 dollar lien against the Defendant's home located in Florida.

Based on these findings, the trial court concluded surety and bail agent failed to demonstrate that any extraordinary cause exists to warrant relief from the final judgment of the Court.[1]

On 2 February 2015, surety filed a motion to alter or amend the judgment pursuant to Rule 59. Along with the motion, surety included exhibits and affidavits from Marshburn describing his efforts to apprehend and surrender defendant. After a hearing, the trial court took the matter under advisement and later denied surety's motion by an order entered 10 June 2015. On 23 June 2015, surety appealed both the 10 June 2015 order denying the motion to alter or amend the judgment, and the 23 January 2015 order denying surety's petition to remit.

II. Discussion

A. Jurisdiction

[1] As a threshold matter, the Board argues that this Court lacks jurisdiction over surety's appeal from the trial court's 23 January 2015 order. The Board maintains that surety's motion to alter or amend the judgment was not a proper Rule 59 motion because (1) it failed to state the grounds with particularity, as required by Rule 7, and (2) it attempts only to reargue matters from the original hearing and present evidence that could have been offered but was not. According to the Board, therefore, surety's motion was insufficient to toll the time for appeal of the underlying order.

"[A] bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter." *State ex rel. Moore Cnty. Bd. of Educ. v. Pelletier*, 168 N.C. App. 218, 222, 606 S.E.2d 907, 909 (2005)

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1. Although the trial court included this statement in its findings of fact, we agree with both surety and the Board that it is more properly characterized as a conclusion of law, as it requires "the exercise of judgment, or the application of legal principles . . . ." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and quotation marks omitted).

(citing *State v. Mathis*, 349 N.C. 503, 509 S.E.2d 155 (1998)). Pursuant to Rule 3 of the North Carolina Rules of Appellate Procedure, a party has thirty days to appeal from a judgment or order in a civil action. N.C. R. App. P. 3(c) (2016). " 'The running of the time for filing and serving a notice of appeal in a civil action . . . is tolled . . . by a timely [Rule 59] motion' for a new trial or to alter or amend a judgment." *Smith v. Johnson*, 125 N.C. App. 603, 606, 481 S.E.2d 415, 417 (1997) (quoting N.C. R. App. P. 3(c), (c)(3), (c)(4)).

Rule 59 of the North Carolina Rules of Civil Procedure lists nine grounds upon which a party may move to alter or amend a judgment. N.C. Gen. Stat. § 1A-1, Rule 59(a) & (e) (2015). Such grounds include "[i]nsufficiency of the evidence to justify the verdict or that the verdict is contrary to law," and "[a]ny other reason heretofore recognized as grounds for new trial." N.C. Gen. Stat. § 1A-1, Rule 59(a)(7) & (9). Like any other written motion, a Rule 59 motion is subject to the requirements of Rule 7. N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015); *see, e.g.*, *N.C. Alliance for Transp. Reform, Inc. v. N.C. Dep't of Transp.*, 183 N.C. App. 466, 468–70, 645 S.E.2d 105, 107–08 (2007) (finding a Rule 59 motion procedurally deficient under Rule 7(b)(1)).

Rule 7(b)(1) states, "An application to the court for an order shall be by motion which . . . shall be made in writing, *shall state with particularity the grounds therefor*, and shall set forth the relief or order sought." N.C. Gen. Stat. § 1A-1, Rule 7(b)(1) (2015) (emphasis added). "The mere recitation of the rule number relied upon by the movant is not a statement of the grounds within the meaning of Rule 7(b)(1)." *Smith*, 125 N.C. App. at 606, 481 S.E.2d at 417. Rather, the movant "must supply information revealing the basis of the motion." *Id.* (citing *Sherman v. Myers*, 29 N.C. App. 29, 30, 222 S.E.2d 749, 750 (1976); 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure: Civil* § 2811 (2d ed. 1995)). If necessary, a Rule 59 motion may be supported by accompanying affidavits. *See* N.C. Gen. Stat. § 1A-1, Rule 59(c) (2015) ("When a motion for new trial is based upon affidavits they shall be served with the motion.").

After examining the contents of the challenged motion and attached affidavits, we are convinced that surety's motion satisfied the particularity requirements expressed in Rule 7. In its motion, surety offered the following grounds for relief: "[P]etitioner asserts that there was an insufficiency of the evidence before the Court to justify the verdict or judgment and the conclusions of law as well as other reasons heretofore recognized as grounds to alter or amend judgment." While the foregoing statement tracks the language from Rule 59(a)(7) and (9), surety

elaborates on the basis of its motion: "Movant prays the Court open this judgment previously entered, take additional testimony on the issue of extraordinary cause and upon such evidence to amend the findings of fact and conclusions of law will make [sic] new findings and conclusions and direct the entry of an amended and new judgment."

Surety also attached and incorporated by reference Marshburn's affidavit, which included a brief description of his efforts to surrender defendant and his assertion that "[s]uch efforts constitute extraordinary cause to justify relief from judgment under North Carolina law." Marshburn's second affidavit, attached and incorporated into his first, as well as the exhibits documenting Marshburn's travel, receipts, text messages, and other information, provides a detailed account of his efforts to locate and surrender defendant. The affidavits and exhibits offer evidentiary support for surety's argument that the verdict was based on insufficient evidence—which is not the same as "re-arguing matters from the original hearing." We conclude, therefore, that surety filed a proper Rule 59 motion to toll the thirty-day period for appeal.

B. Challenged Finding of Fact No. 15

[2] Turning now to the merits of the appeal, surety first argues that the trial court's Finding of Fact No. 15 is not supported by competent evidence. Surety does not challenge the court's finding that defendant owned a home in Florida, as stated in Finding of Fact No. 14, but instead argues that the home securing the bond belonged to a person other than defendant.

"In reviewing a trial judge's findings of fact, 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) (quoting *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)); *see also Sisk v. Transylvania Cmty. Hosp., Inc.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (" '[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.' " (quoting *Tillman v. Commercial Credit Loans, Inc.*, 362 N.C. 93, 100–01, 655 S.E.2d 362, 369 (2008))).

After careful review of the record, we have found no evidence that surety secured a $100,000.00 lien against defendant's home in Florida. The record actually shows that the bond was secured by the home of Alexander Garcia, who executed a mortgage deed and contingent

promissory note securing $100,000.00 in future advances to surety in the event of forfeiture. The address of the encumbered property described in the mortgage deed does not match defendant's address listed in Marshburn's affidavit. There is no evidence that defendant owned or had any interest in the encumbered property. Nor can we even determine the nature of Garcia's relationship to defendant. Because Finding of Fact No. 15 is not supported by competent evidence, it may not be used to support the conclusion of law that surety failed to demonstrate "extraordinary circumstances." *See Cavenaugh v. Cavenaugh*, 317 N.C. 652, 658, 347 S.E.2d 19, 23 (1986) ("Since the trial judge's findings of fact are not supported by competent evidence, they cannot be used to support a conclusion of law . . . .").

C. Sufficiency of the Trial Court's Findings of Fact

[3] Next, surety argues that the trial court erred in denying surety's motion to remit the bond forfeiture because it failed to make pertinent findings of fact on contested matters, as required by N.C. Gen. Stat. § 1A-1, Rule 52.

"In all actions tried upon the facts without a jury," Rule 52 of the North Carolina Rules of Civil Procedure requires the trial court to "find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2015). To satisfy Rule 52,

> the trial court must make "a specific statement of the facts on which the rights of the parties are to be determined, and those findings must be sufficiently specific to enable an appellate court to review the decision and test the correctness of the judgment." Rule 52(a)(1) does not require recitation of evidentiary facts, but it does require specific findings on the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Chem. Realty Corp. v. Home Fed. Sav. & Loan Ass'n, 65 N.C. App. 242, 249, 310 S.E.2d 33, 37 (1983) (citations and quotation marks omitted), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L. Ed. 2d 69 (1984); *see also State v. Rakina*, 49 N.C. App. 537, 540–41, 272 S.E.2d 3, 5 (1980) ("Under Rule 52(a), . . . the court need only make brief, definite, pertinent findings and conclusions upon the contested matters."). "Where a trial court's findings of fact ignore questions of fact that must be resolved before judgment can be entered, the

action should be remanded." *State v. Escobar*, 187 N.C. App. 267, 270, 652 S.E.2d 694, 697 (2007) (citing *Chem. Realty Corp.*, 65 N.C. App. at 250, 310 S.E.2d at 37).

There are only two grounds upon which a surety may obtain relief from a final judgment of forfeiture: "The person seeking relief was not given notice as provided in G.S. 15A-544.4"; or "[o]ther extraordinary circumstances exist that the court, in its discretion, determines should entitle that person to relief." N.C. Gen. Stat. § 15A-544.8(b)(1) & (2) (2015). " 'Extraordinary circumstances' in the context of bond forfeiture has been defined as 'going beyond what is usual, regular, common, or customary . . . of, relating to, or having the nature of an occurrence or risk of a kind other than what ordinary experience or prudence would foresee.' " *State v. Gonzalez-Fernandez*, 170 N.C. App. 45, 49, 612 S.E.2d 148, 152 (2005) (quoting *State v. Vikre*, 86 N.C. App. 196, 198, 356 S.E.2d 802, 804 (1987)).

Whether extraordinary circumstances exist "is a heavily fact-based inquiry" and "should be reviewed on a case by case basis." *State v. Coronel*, 145 N.C. App. 237, 244, 550 S.E.2d 561, 566 (2001). Our courts have articulated several factors to determine whether "extraordinary circumstances" exist to remit a judgment of forfeiture. Those relevant to our discussion *sub judice* include (1) "the inconvenience and cost to the State and the courts," (2) "the surety's status, be it private or professional," (3) "the risk assumed by the sureties," and (4) "the diligence of sureties in staying abreast of the defendant's whereabouts prior to the date of appearance." *Id.* at 248, 550 S.E.2d at 569 (citations omitted).

As for the weight of particular factors, we have specifically cautioned that "diligence alone will not constitute 'extraordinary cause,' for due diligence by a surety is expected." *Id.* (citation omitted). Nor "will the amount of expenses incurred by professional sureties due to a forfeiture" be sufficient in and of itself. *Id.* (citation omitted). A surety assumes the risk of expending resources to the extent of its foreseeable efforts. *See Gonzalez-Fernandez*, 170 N.C. App. at 53, 612 S.E.2d at 154 ("A surety's efforts to bring a defendant to North Carolina to appear in court are not extraordinary if it was foreseeable that the surety would have to expend those efforts to produce the defendant in court."); *Vikre*, 86 N.C. App. at 199, 356 S.E.2d at 804 ("It was entirely foreseeable . . . that the sureties would be required to expend considerable efforts and money to locate [the defendant] in the event he failed to appear. The fact that the sureties incurred expenses in connection with the forfeiture does not necessarily constitute extraordinary cause."); *see also Escobar*, 187 N.C. App. at 273, 652 S.E.2d at 699 (concluding that the surety failed

to demonstrate "extraordinary circumstances" where the surety was aware of the defendant's ties to Mexico but failed to stay abreast of his location after he was deported).

Here, surety claims that the trial court's findings failed to address the determinative factors necessary to support its conclusion on "extraordinary circumstances." According to surety, the trial court was required to make specific findings regarding surety's efforts and expenses—an argument similar to the one we addressed in *State v. Escobar*. In *Escobar*, the trial court denied the surety's motion for relief from judgment of forfeiture, concluding that there were no extraordinary circumstances which entitled the surety to relief. *Escobar*, 187 N.C. App. at 269, 273, 652 S.E.2d at 696, 699. In its order, the trial court found that the surety's efforts

> resulted in locating [the defendant] in the penal system of another jurisdiction, but did not result in the apprehension or capture of [the defendant] by authorities in that jurisdiction . . . . [The defendant]'s return to this jurisdiction is by writ based upon the continuing efforts of the District Attorney to prosecute [the defendant] on the original charges in this jurisdiction.

Id. at 271, 652 S.E.2d at 697–98. On appeal, we rejected the surety's argument that Rule 52 required the trial court to enter more specific findings about its efforts to locate the defendant, as " 'Rule 52(a)(1) does not require recitation of evidentiary facts.' " *Id.* at 271, 652 S.E.2d at 698 (quoting *Chem. Realty Corp.*, 65 N.C. App. at 249, 310 S.E.2d at 37). We determined instead that "[t]he trial court fulfilled its obligations under Rule 52(a)(1) because it made a specific finding of fact that [the surety]'s efforts resulted in locating Defendant, but the District Attorney was ultimately responsible for returning Defendant to Union County." *Id.* at 271, 652 S.E.2d at 698.

As in *Escobar*, here the trial court was not required to make "findings of fact specifying the numerous tasks completed" by surety in its effort to surrender defendant. *Escobar*, 187 N.C. App. at 271, 652 S.E.2d at 698. The court's findings demonstrate that it considered factors relevant to an "extraordinary circumstances" analysis. Findings of Fact Nos. 6 and 7 show that surety surrendered defendant nearly two months after the final judgment date, which bears on surety's diligence. Finding of Fact No. 10 addresses surety's professional status in the bail bond profession. Finding of Fact Nos. 12 and 13 show that, before posting the bond, surety had notice of defendant's flight risk and it was foreseeable that

surety would have to travel to other states to surrender defendant. And finally, Finding of Fact No. 14 shows that defendant was apprehended in Florida, where surety knew that defendant owned property. These findings were both relevant to and determinative of the ultimate issue regarding "extraordinary circumstances." To require a specific finding that surety sent six agents on several trips to three different states, for example, would be to require "a recitation of the evidentiary facts." *Chem. Realty Corp.*, 65 N.C. App. at 249, 310 S.E.2d at 37. We conclude, therefore, that the trial court satisfied its obligation under Rule 52.

D. Denial of Surety's Rule 59 Motion

[4] Finally, surety argues that the trial court abused its discretion in denying surety's Rule 59 motion. Similar to its Rule 52 argument, surety maintains that "the circumstances of defendant's surrender were extraordinary" and "the trial court did not consider and did not make any findings of fact regarding surety's efforts and expenses to produce [defendant] for trial . . . ." Pointing to the court's Finding of Fact No. 15, surety further asserts that the court improperly "focused on surety's resources for recoupment of the bond if [defendant] did not appear," a factor which surety claims has "no bearing on the ultimate goal of producing the defendant for trial."

After reviewing the trial court's conclusion without the support of Finding of Fact No. 15, we cannot say that the court's decision to deny surety's motion was "manifestly unsupported by reason" or was "so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). Surety's efforts, while taxing, were not unexpected. Defendant's property ownership in Massachusetts and Florida, coupled with the fact that he did not live in North Carolina, put surety on notice of defendant's flight risk. And as a professional bond agent, surety was especially aware of that risk. Surety's expenses were largely based on its travel to states where it knew defendant owned property and its continued willingness to trust the information from Roche and Romero. The fact that surety incurred substantial costs to surrender defendant does not warrant relief from judgment in this case.

III. Conclusion

Although the trial court's Finding of Fact No. 15 is not supported by competent evidence, this error does not warrant a reversal. *See In re Estate of Mullins*, 182 N.C. App. 667, 670–71, 643 S.E.2d 599, 601 (2007) ("In a non-jury trial, where there are sufficient findings of fact based on competent evidence to support the trial court's conclusions of law,

the judgment will not be disturbed because of other erroneous findings which do not affect the conclusions." (quoting *In re Estate of Pate*, 119 N.C. App. 400, 402–03, 459 S.E.2d 1, 2–3 (1995))). The court's remaining findings were both relevant and determinative of the ultimate issue regarding "extraordinary circumstances," and the court did not abuse its discretion in denying surety's Rule 59 motion.

AFFIRMED.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
JOSE MERLIN HENRIQUEZ PORTILLO

No. COA14-1206

Filed 7 June 2016

1. Confessions and Incriminating Statements—custodial interview—motion to suppress—totality of circumstances—restraint—medication—officers' plans

The trial court did not err in a first-degree murder case by denying defendant's motion to suppress his 17 December statements to investigating officers. The totality of circumstances would not have caused a reasonable person to believe that there was a restriction on defendant's freedom of movement to indicate a formal arrest. Any restraint defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers. The record did not support that defendant's medication had an adverse effect on his ability to think rationally. Finally, an officers' plans, when not made known to a defendant, have no bearing on whether an interview is custodial.

2. Confessions and Incriminating Statements—second confession—no Miranda violations for first confession—no statutory violations

The trial court did not err in a first-degree murder case by refusing to suppress defendant's 23 December statement. Even assuming that the investigating officers were required to advise defendant of his *Miranda* rights on 17 December and failed to do so, such a violation would not require suppression of defendant's 23 December

statement because his 17 December statement was neither coerced nor made under circumstances calculated to undermine his free will. Further, the trial court properly concluded that the inculpatory statements did not result from substantial violations of Chapter 15A's provisions.

3. Confessions and Incriminating Statements—self-serving exculpatory statement—separate and apart from other statements

The trial court did not err in a first-degree murder case by excluding a statement defendant made to a bilingual officer. In order for the State to have opened the door to this testimony, defendant's exculpatory statement had to have been made at the same time as other statements that had been introduced into evidence. Defendant's self-serving exculpatory statement to the officer was made on 19 December 2009, separate and apart from the statements he made on 17 and 23 December.

Appeal by defendant from judgment entered 31 July 2013 by Judge Edgar B. Gregory in Forsyth County Superior Court. Heard in the Court of Appeals 26 August 2015.

Attorney General Roy Cooper, by Assistant Attorney General Teresa M. Postell, for the State.

Michael E. Casterline, for defendant.

CALABRIA, Judge.

Jose Merlin Henriquez Portillo ("defendant") appeals from a judgment entered upon a jury verdict finding him guilty of first degree murder. Defendant contends the trial court committed reversible error by excluding certain evidence he offered at trial, and by failing to suppress two statements he made to police officers in the hospital. We conclude that defendant received a fair trial free from error.

I. Background

On the evening of 16 December 2009, Cirilo Avila ("Avila") drove a grocery truck to the Pepper Ridge apartment complex in Winston-Salem. He planned to sell produce and earn money to purchase Christmas presents for his family. Since the truck had been robbed on previous occasions, Avila was carrying a .380 caliber handgun for his protection. Later in the evening, officers from the Winston-Salem Police

Department ("WSPD") responded to a shooting in Pepper Ridge's parking lot. Responding officers found Avila's lifeless body in the back of his truck, and a .380 handgun with an empty magazine lay in his hand. Avila had been shot four times; two .45 caliber shell casings were found inside the truck and two were found outside of it. A few feet away from the truck, defendant was lying on his back on the pavement. He had been shot in the lower back, was unconscious, and had no radial pulse when EMS arrived. Several feet away from where defendant lay in the parking lot, the police found a .45 handgun with a wooden grip that had been partially shattered. Witnesses at the scene reported that they heard several gunshots from what sounded like multiple guns. Another witness saw someone run away from the scene.

Defendant was transported to the hospital by EMS and underwent immediate emergency surgery for injuries he sustained in his lower right back and his wrist. Defendant was then placed in the intensive care unit ("ICU"). While defendant was being treated, medical personnel turned his clothes, two gloves, a wallet, two .45 automatic pistol magazines, and other personal items over to police officers. Inside the wallet was an identification card with defendant's picture and the name Jose Carranza Massimo.

On 17 December 2009, Detectives Bell and Flynn of the WSPD arrived at the hospital to speak with defendant. Defendant's nurse informed the officers that while defendant was taking pain medication, he was able to answer questions coherently. WSPD Detective Bowen told the attending doctor that defendant was a suspect in a homicide case and asked that his identity be restricted and that he not be allowed to receive visitors. The doctor was also informed that WSPD officers would stand guard over defendant while he remained in the hospital. Officers assigned to guard duty wore standard-issue police uniforms.

Defendant's hospital bed was in a room with about ten other patients that formed a semicircle facing the nurse's station. His bed curtain was open and any officer standing guard was seated about ten feet behind him, out of defendant's sight. In accordance with a WSPD policy designed to protect victims, suspects, and witnesses, the officer on duty could enter and leave without being seen by the patient.

When defendant was being interviewed, he was alert, spoke clearly, and did not appear to be impaired in any way. His answers matched the officers' questions and he appeared to be in "full control of his mental faculties while he was speaking with the officers." Sometime during the interview, to ensure privacy, the detectives closed the curtains around

defendant's bed. However, aside from the monitors and machines that were attached to him, defendant was not physically restrained during the interview.

Detective Bell interviewed defendant in Spanish. At the time of the interview, the officers knew defendant had been shot and had undergone surgery the previous night. They did not know whether defendant was the person who shot Avila or was simply someone who had been injured in the gunfire. However, the officers expressed their belief that defendant had intended to rob the grocery truck and defendant acknowledged this fact. He also provided detailed information in response to open-ended questions, such as the progression of events on the night of the shooting.

Defendant responded to the questions as follows: the robbery was his roommate's idea; his roommate's name was Chundo, who had a red two-door Honda Civic; Chundo was wearing dark clothes and drove both of them to the apartment complex between 7 and 8 p.m.; Chundo gave defendant a black semiautomatic .45 caliber pistol as they walked up to the grocery truck; the worker was inside the truck as they approached the truck, but there were no customers around; defendant pointed the gun at the worker and Chundo demanded money from the victim; defendant did not say anything; the plan was that he and Chundo would divide the proceeds of the robbery evenly; the man in the truck pulled a gun out of his front right pant pocket and shot at defendant; defendant fired two shots; and defendant did not know where Chundo went and did not know if the victim said anything. Defendant provided this information twice: once during a twenty-minute conversation and again during a five to six-minute audio recording. The statement defendant gave the detectives "made complete sense with what [they] knew from the crime scene," and it later proved consistent with information they eventually received. Defendant was not arrested after giving his initial statement, as he was still admitted to the hospital and the WSPD needed to follow up on the information it had obtained.

Later that same day, Detective D.C. Taylor obtained a warrant charging defendant with murder and attempted robbery with a dangerous weapon. On 20 December 2009, defendant was restrained in handcuffs while he was still at the hospital, but there was no further contact between defendant and Detective Bell until defendant was discharged on 23 December 2009.

On 23 December, Detectives Bell and Taylor visited defendant in his hospital room. Defendant appeared alert and coherent. There were officers outside the room and defendant was still in handcuffs. The officers

read defendant his *Miranda* rights orally in Spanish, and also provided a written copy in Spanish. Defendant, who did not appear to be impaired, acknowledged understanding his rights, which he waived both verbally and in writing.

The same day, defendant was interviewed at the WSPD. The interview was videotaped and recorded in Spanish, and lasted under one hour. At the time of the interview, defendant did not seem impaired, and officers had been told that the medication defendant had been given would not affect his cognitive abilities. After defendant was *Mirandized* yet again, he confirmed that he understood his rights and affirmed that he had signed the form. Defendant again told the officers what happened, in detail. Initially, defendant gave them the same false name he had given before, Jose Carranza Massimo, but he eventually acknowledged his real name and admitted that the name on the identification in his wallet was not his own.

When asked if he could remember what happened on the day of the shooting, defendant stated the robbery was Chundo's idea, and that he had only known Chundo for a few weeks. Defendant also maintained that: Chundo gave him a black .45 caliber handgun; defendant had two of Chundo's gun magazines in his pocket; defendant pointed the gun at the driver; the driver was a Mexican male he did not recognize and he did not think Chundo knew him; both defendant and Chundo told the driver to give them money; as defendant stood in front of the man in the truck with Chundo behind defendant, the driver of the truck took a gun out of his right front pant pocket and shot him; defendant was not sure how many times the victim shot at him but he was hit twice, in the hand and the torso; he did not see if Chundo took anything because he fell; and defendant shot once or twice at the man in the truck. The interview concluded at 1:37 p.m. and defendant was taken to the magistrate shortly thereafter.

In August 2010, defendant was indicted on one count of first degree murder and one count of attempted robbery with a dangerous weapon. The State gave notice of its intent to seek the death penalty, and on its own motion, the court ordered that defendant be examined for capacity to proceed to trial. At a November 2012 hearing, the court concluded defendant possessed the capacity to proceed to trial under N.C. Gen. Stat. § 15A–1001(a). Counsel for defendant filed a motion asking the court to deem him mentally incompetent and barred from receiving the death penalty. In addition, defendant moved to suppress his 17 December 2009 statement to Detectives Bell and Flynn, as well as his 23 December 2009 statement to Detectives Bell and Taylor.

During a pretrial evidentiary hearing, the court declared the case as non-capital. The court also entered a detailed written order on the suppression matters, concluding Portillo was not in custody when he gave his 17 December statement and that he made his statement knowingly and voluntarily. In addition, the court concluded Portillo was properly advised of his right to counsel on 23 December, and he voluntarily waived that right. Consequently, the trial court denied defendant's motion to suppress both statements. The court's conclusion as to defendant's 17 December statement was based, in pertinent part, on the following findings of fact:

> 41. The Court finds based on the evidence that the defendant entered Baptist Hospital of his own volition to have gunshot wounds treated. The wounds were not inflicted by any state agency; instead, the wounds were inflicted as a result of the defendant's participation in an attempted armed robbery. The defendant was transported to the hospital by EMS personnel and not by police officers. There were not any overt actions by police officers at the hospital that indicated the defendant was in custody.
>
> 42. The Court finds that the objective circumstances of the interview would not have caused a reasonable person to believe that there was a restriction on his or her freedom of movement to indicate a formal arrest. First, the Court finds that the defendant was not under arrest and was not handcuffed at the time of the interview. The warrant for arrest had not been issued prior to the interview.
>
> 43. Second, the Court finds that the defendant was not restrained in any manner. The layout of the intensive care unit at Baptist Hospital where the defendant was recovering at the time of the interview and the location of the uniformed officer present would not have caused a reasonable person to believe his or her freedom of movement was being restrained. The intensive care unit in the North Tower is an open area in which the patients do not have individual rooms. There were not any locked doors or any evidence that a guard was behind the defendant at the time of the interview. There were no overt actions that indicated the defendant was in custody. Therefore, "the atmosphere and physical surroundings during the questioning manifest a lack of restraint or compulsion." *State v. Thomas*, 22 N.C. App. 206, 211 (1974).

> 44. Third, the Court notes that Detective Bell and Detective Flynn were wearing plain clothes at the time of the interview with the defendant. This fact, as noted in [*State v.*]*Waring*, [364 N.C. 443, 471, 701 S.E.2d 615, 633 (2010)], dictates that a subject is not in custody. Therefore, the totality of the circumstances in the interview supports a finding that the defendant was not in custody.

Defendant was tried in July 2013 in Forsyth County Superior Court. On 31 July 2013, the jury returned verdicts finding defendant guilty of first degree murder and attempted robbery with a dangerous weapon. After the trial court arrested judgment on the attempted robbery charge, defendant was sentenced to life imprisonment on the murder conviction. Defendant appeals.

II. Motion to Suppress

Defendant argues the trial court erred in denying his motion to suppress his 17 December and 23 December 2009 statements he gave to investigating officers. Specifically, defendant contends that he should have been advised of his *Miranda* rights since he was in custody when he made his 17 December statement. In addition, defendant argues his 23 December statement was tainted by the illegality of his 17 December statement and should have been excluded.

A. Defendant's 17 December Statement

[1] Defendant first contends that his 17 December statement was inadmissible at trial because it was elicited during a custodial interrogation and because he was not *Mirandized* prior to making it. For these reasons, defendant argues the trial court committed reversible error by admitting his 17 December statement into evidence. We disagree.

In reviewing a trial court's denial of a motion to suppress, "the trial court's findings of fact 'are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting.' " *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (quoting *State v. Eason*, 336 N.C. 730, 745, 445 S.E.2d 917, 926 (1994)). However, "the trial court's determination of whether an interrogation is conducted while a person is in custody involves reaching a conclusion of law, which is fully reviewable on appeal." *State v. Buchanan*, 353 N.C. 332, 336, 543 S.E.2d 823, 826 (2001) (citing *State v. Greene*, 332 N.C. 565, 577, 422 S.E.2d 730, 737 (1992)). "The trial court's conclusions of law must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *Buchanan*, 353 N.C. at 336, 543 S.E.2d at 826 (internal citation

and quotation omitted). Since "defendant does not challenge the findings of fact on appeal, they are binding, and the only question before this Court is whether those findings support the trial court's conclusions." *State v. Fuller*, 196 N.C. App. 412, 418, 674 S.E.2d 824, 829 (2009) (citation omitted).

The Fifth Amendment to the United States Constitution protects a person from being compelled to be a witness against himself in a criminal case. U.S. Const. amend. V. This privilege against self-incrimination "is made applicable to the states by the Fourteenth Amendment." *State v. Richardson*, 226 N.C. App. 292, 299, 741 S.E.2d 434, 440 (2013). In *Miranda v. Arizona*, the United States Supreme Court decreed that statements obtained from a suspect during a custodial police interrogation are presumed to be compelled in violation of the Fifth Amendment's Self-Incrimination Clause and are thus inadmissible in the State's case-in-chief. 384 U.S. 436, 457-58, 16 L. Ed. 2d 694, 713-14 (1966). Under *Miranda*, "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Id.* at 444, 16 L. Ed. 2d at 706. These safeguards include warning a criminal suspect being questioned that he "has the right to remain silent, that anything he says can be used against him in a court of law, [and] that he has the right to the presence of an attorney," either retained or appointed. *Id.* at 479, 16 L. Ed. 2d at 726.

Police officers, however, "are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because . . . the questioned person is one whom the police suspect." *Buchanan*, 353 N.C. at 337, 543 S.E.2d at 827 (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 50 L. Ed. 2d 714, 719 (1977)). Non-custodial interrogations do not require *Miranda* warnings. *Id.* at 337, 543 S.E.2d at 826. Rather, "*Miranda* warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.' It was *that* sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Id.* at 337, 543 S.E.2d at 827 (citation omitted). Thus, when deciding whether *Miranda* warnings were required, a court must initially determine whether a defendant was "in custody" at the time of questioning. *Id.* at 337, 543 S.E.2d at 826.

To that end, our Supreme Court has held the definitive "inquiry in determining whether [an individual] is 'in custody' for purposes of *Miranda* is, based on the totality of the circumstances, whether there

was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at 339, 543 S.E.2d at 828 (internal quotation marks omitted). This objective inquiry, labeled the "indicia of formal arrest test," is not synonymous with the "free to leave test," which courts use to determine whether a person has been seized for Fourth Amendment purposes. *Id.* at 339, 543 S.E.2d at 828 (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980)). Instead, "the indicia of formal arrest test has been consistently applied to Fifth Amendment custodial inquiries and requires circumstances which go beyond those supporting a finding of temporary seizure and create an objectively reasonable belief that one is actually or ostensibly 'in custody.' " *Id.* (internal quotation marks and citation omitted).

For purposes of *Miranda*, custody analysis must be holistic and contextual in nature: it is based on the totality of circumstances and is necessarily "dependent upon the unique facts surrounding each incriminating statement." *State v. Garcia*, 358 N.C. 382, 399, 597 S.E.2d 724, 738 (2004) (citing *State v. Barden*, 356 N.C. 316, 337, 572 S.E.2d 108, 123 (2002)). "No one factor is determinative." *Id.* at 400, 597 S.E.2d at 738. In addition, "the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned." *Stansbury v. California*, 511 U.S. 318, 323, 128 L. Ed. 2d 293, 298 (1994). As such, the circumstances are examined from the interrogation subject's point of view. *Id.* at 324, 128 L. Ed. 2d at 299 ("[T]he only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation.") (citation omitted). All told, custody analysis turns on "whether a reasonable person in [the suspect's] position would believe that they were under arrest or significantly restrained in their movement." *State v. Allen*, 200 N.C. App. 709, 713, 684 S.E.2d 526, 530 (2009).

This Court has previously addressed whether a defendant is considered to be in custody while being treated at a hospital. *E.g.*, *Allen*, *State v. Fuller*, 166 N.C. App. 548, 603 S.E.2d 569 (2004); *State v. Thomas*, 22 N.C. App. 206, 206 S.E.2d 390 (1974). The fact that a suspect is hospitalized at the time he is questioned by police does not, by itself, make an interview custodial. *State v. Sweatt*, 333 N.C. 407, 417-18, 427 S.E.2d 112, 118 (1993). Instead, all relevant factors must be balanced, including: "(1) whether the defendant was free to go at his pleasure; (2) whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and (3) whether officers intended to arrest the defendant." *Allen*, 200 N.C. App. at 714, 684 S.E.2d at 530 (internal citation omitted).

The *Allen* Court held that the hospitalized defendant was not in custody during an interrogation because any restraint in his movement was due to his medical treatment rather than any coercion or show of force by the police officers. *Id.* at 715, 684 S.E.2d at 531. In *Thomas*, the trial court found that when the officers first addressed the defendant, they did not know what caused the accident that was the subject of the case, nor did they know the extent of defendant's involvement. 22 N.C. App. at 209-10, 206 S.E.2d at 392-93. The officers also had no intention of arresting the defendant, who appeared coherent, articulate, and not under the influence of any narcotic drugs. *Id.* at 210, 206 S.E.2d at 393. Further, the officers' placement in the room did not restrict the defendant's freedom of movement. *Id.* On appeal, this Court held that since the "atmosphere and physical surroundings during the questioning manifest[ed] a lack of restraint or compulsion[,]" a custodial interrogation had not occurred. *Id.* at 211, 206 S.E.2d at 393.

In the instant case, defendant's argument tracks the three factors articulated in *Allen*. Defendant first contends that "neither [his] grave medical condition nor the police presence would have allowed [him] to *freely leave* the ICU at the time Detectives Bell and Flynn arrived to question him." (Emphasis added). However, as noted above, this is not the proper inquiry. The dispositive issue is whether defendant's freedom of movement was restrained to the extent associated with a formal arrest. *State v. Gaines*, 345 N.C. 647, 662, 483 S.E.2d 396, 405 (1997) (citation omitted). Nothing in the record establishes defendant knew that a guard was present when the challenged interview was conducted. Defendant, who was interrogated in an open area of the ICU where other patients, nurses, and doctors were situated, had no legitimate reason to believe he was in police custody. Significantly, the trial court found that none of the officers on guard duty with defendant spoke "with [him] about the case . . . prior to the [17 December] interview" and that Detectives Bell and Flynn wore plain clothes to the hospital. The court also found that "the objective circumstances of the interview would not have caused a reasonable person to believe that there was a restriction on his or her freedom of movement to indicate a formal arrest" because "defendant was not under arrest and was not handcuffed at the time of the interview." Even though the interrogating officers stood around defendant as he lay in a hospital bed, there is no evidence that defendant's movements were restricted by anything other than the injuries he had sustained and the medical equipment that was connected to him. Consequently, "[a]ny restraint in movement defendant may have experienced at the hospital was due to his medical treatment and not the actions of the police officers." *Allen*, 200 N.C. App. at 715, 684 S.E.2d at 531.

Furthermore, while it is true defendant would not have been permitted to leave the hospital on 17 December unless he obtained police clearance, this has no bearing on our custody analysis. Courts have repeatedly emphasized that a determination of custody depends on objective circumstances and not the undisclosed, subjective views of the interrogating officers. *Buchanan*, 353 N.C. at 341, 543 S.E.2d at 829 (internal citation omitted). "Unless they are communicated or otherwise manifested to the person being questioned, an officer's evolving but unarticulated suspicions do not affect the objective circumstances of an interrogation . . . and thus cannot affect the *Miranda* custody inquiry." *Id.* (internal quotation marks and citation omitted).

Second, defendant argues that the interrogation was custodial because he "was undoubtedly under the influence of the previous night's anesthesia and of pain medication" and "the detectives . . . [did not] consult the attending physician as to the actual effect the drugs might be having on his comprehension." Yet nothing in the record indicates that defendant was incapable of understanding the questions he was asked. Although defendant had the ability to administer 1cc of morphine to himself at every ten minutes, he did not use any morphine between 12:45 and 4:55 p.m. on 17 December. When the investigating officers arrived at approximately 2:07 p.m., the ICU nurse specifically told Detective Flynn that the pain medication would not impair defendant's ability to answer questions. The record merely reveals the amount of morphine defendant could receive at one time, it does not establish the medication's effect on him. Indeed, the record suggests that any effect was minimal. Defendant was alert and coherent, and he spoke quietly, clearly, and deliberately. His statement "made complete sense with what [was] kn[own] from the crime scene," and it proved to be consistent with information that emerged later in the investigation. As a result, the record does not support defendant's argument that the medication had an adverse effect on his ability to think rationally, and the issue of impairment was one for the jury.

Third, and finally, defendant argues that he was in custody because "the detectives arrived at the hospital with the intention of arresting him." This contention has no legal force here. Although the officers may have arrived at the hospital with the intention of arresting him, officers' plans, when not made known to a defendant, have no bearing on whether an interview is custodial. *Id.* at 341-42, 543 S.E.2d at 829. Defendant's *Miranda* rights were not triggered simply because he had become the focus of the detectives' suspicions. *See In re D.A.C.*, 225 N.C. App. 547, 553, 741 S.E.2d 378, 382 (2013) (noting that "[a]bsent

indicia of formal arrest, [the facts] that police have identified the person interviewed as a suspect and that the interview was designed to produce incriminating responses from the person are not relevant in assessing whether that person was in custody for *Miranda* purposes"). In any event, the warrant for defendant's arrest was not issued until after the 17 December interview was completed. Defendant fails to identify any evidence suggesting that he was aware of the detectives' knowledge and beliefs regarding the case at the time of questioning. Whatever degree of suspicion the detectives may have conveyed through their questioning, a reasonable person in defendant's position would not have been justified in believing he was the subject of a formal arrest or was restrained in his movement by police action.

Reviewing the totality of the circumstances, we conclude that the evidence supports the trial court's findings, which in turn support its conclusion that defendant was not in custody when his 17 December statement was given. Because defendant was not in custody, *Miranda* warnings were not required, and the trial court did not err in admitting defendant's voluntary statement at trial. Accordingly, we reject defendant's argument.

B. Defendant's 23 December Statement

[2] Defendant next contends that since his 17 December statement was taken in violation of *Miranda* and inadmissible, his 23 December statement was tainted and thus also inadmissible. We disagree.

When a defendant's initial statement is taken in violation of *Miranda*, "a presumption arises which imputes the same prior influence to any subsequent confession, and this presumption must be overcome before the subsequent confession can be received in evidence." *Greene*, 332 N.C. at 578-79, 422 S.E.2d at 738 (citation omitted). The justification for this rule is a concern by courts that a second confession is so influenced by the first involuntary confession as to "deprive the defendant of his free will during subsequent confessions." *Id.* at 579, 422 S.E.2d at 738 (citation omitted).

Defendant cites *State v. Edwards*, 284 N.C. 76, 199 S.E.2d 459 (1973), in support of his argument that his 23 December statement was inadmissible. In *Edwards*, our Supreme Court applied a rule from one of its much earlier cases, *State v. Gibson*, 216 N.C. 535, 5 S.E.2d 717, 718 (1939), and determined that a defendant's later statement was inadmissible when it had been made after an earlier statement that was determined to be involuntary. *Edwards*, 284 N.C. at 80, 199 S.E.2d at 461. The rule announced by the *Gibson* Court was as follows: "It is established by

numerous decisions that where a confession has been obtained under such circumstances or by such methods as to render it involuntary, a presumption arises which imputes the same prior influence to any subsequent confession of the same or similar facts, and this presumption must be overcome before the subsequent confession can be received in evidence." *Gibson*, 216 at 535, 5 S.E.2d at 718. Gibson, however, was decided nearly three decades before *Miranda*.

While it is true that *Miranda*'s protections are such that no actual compulsion need be shown to result in the suppression of a statement obtained in violation of them, where no threats or coercion were used to extract an initial confession, "the reason for the rule giving rise to the presumption that subsequent confessions are tainted by the same influences that rendered the earlier confession[] involuntary does not exist." *Greene*, 332 N.C. at 579, 234 S.E.2d at 738 (quoting *Siler*, 292 N.C. at 552, 234 S.E.2d at 739). "[T]he objective of *Miranda* is to protect against coerced confessions, not to suppress voluntary confessions, which 'are essential to society's compelling interest in finding, convicting, and punishing those who violate the law.' " *Buchanan*, 353 N.C. at 342, 543 S.E.2d at 829 (quoting *Moran v. Burbine*, 475 U.S. 412, 426, 89 L. Ed. 2d 410, 424 (1986). Because no record evidence shows the 17 December statement was coerced, there is no support for defendant's contention that "[t]he [23 December statement] [was] thus tainted by the first." Moreover, the principle recognized in *State v. Morrell* resolves defendant's argument against him: "The Fifth Amendment requires suppression of a confession that is the fruit of an earlier statement obtained in violation of *Miranda* only when the earlier inadmissible statement is 'coerced or given under circumstances calculated to undermine the suspect's ability to exercise his or her free will.' " 108 N.C. App. 465, 474, 424 S.E.2d 147, 153 (1993) (quoting *Oregon v. Elstad*, 470 U.S. 298, 309, 84 L. Ed. 2d 222, 232 (1985)).

In the instant case, we have already determined that defendant's 17 December statement was not given in the context of a custodial interrogation. Thus, his initial statement was not taken in violation of *Miranda*. Further, even assuming that the investigating officers were required to advise defendant of his *Miranda* rights on 17 December and failed to do so, such a violation would not require suppression of defendant's 23 December statement because his 17 December statement was neither coerced nor made under circumstances calculated to undermine his free will. *See id.* at 474, 424 S.E.2d at 153. Accordingly, the trial court did not err in refusing to suppress defendant's 23 December statement.

C. Trial Court's Refusal to Suppress Defendant's 23 December Statement on Grounds of Technical Statutory Violations

Next, defendant argues that his 23 December statement was inadmissible under N.C. Gen. Stat. § 15A-974 and should have been suppressed by the trial court. According to defendant, the arresting police officers in this case committed substantial violations of our Criminal Procedure Act by failing to comply with N.C. Gen. Stat. §§ 15A-501 and 15A-511.

Section 15A-974 provides, in relevant part, as follows:

> a) Upon timely motion, evidence must be suppressed if:
>
> (1) Its exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or
>
> (2) It is obtained as a result of a substantial violation of the provisions of this Chapter. In determining whether a violation is substantial, the court must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful;
>
> d. The extent to which exclusion will tend to deter future violations of this Chapter.

N.C. Gen. Stat. § 15A-974(a) (2013). Section 15A-501 outlines the general duties of police officers upon arrest of a person, which include an officer's duty to "inform the person arrested of the charge against him or the cause for his arrest." N.C. Gen. Stat. § 15A-501(1) (2013). In addition, once a police officer makes an arrest with or without a warrant, the officer "must take the arrested person without unnecessary delay before a magistrate as provided in [section] 15A-501." N.C. Gen. Stat. § 15A-511 (2013). Our Supreme Court has held that "[f]or a violation [of section 15A-511] to be substantial, [a] defendant must show that the delay in some way prejudiced him, for example, by causing a violation of his constitutional rights, . . . or by resulting in a confession that would not have been obtained but for the delay[.]" *State v. Martin*, 315 N.C. 667, 679, 340 S.E.2d 326, 333 (1986) (citations omitted).

Here, defendant was restrained in handcuffs while a patient in the hospital (20 December), but he was not taken before a magistrate until

the day he was released from the hospital (23 December). Defendant was informed of the first degree murder charge against him after giving his 23 December statement. Defendant argues that, because the police obtained a warrant charging him with murder after his 17 December statement, he "had a fundamental right to know that formal criminal proceedings had been initiated against him before he was asked to make [another] statement on 23 December." Defendant also insists he was prejudiced by the delay in taking him before a magistrate. In its written order denying defendant's motion to suppress, the trial court conducted the following analysis after finding that the arresting officers committed "technical violation[s]" of sections 15A-501 and 15A-511:

> The defendant was handcuffed on December 20, 2009 but was not taken before a magistrate until December 23, 2009. However, the Court finds that the defendant was not prejudiced by the technical violation. The defendant was still advised of his *Miranda* rights prior to the December 23, 2009 interview, and the defendant waived his rights. The defendant's waiver was voluntary for the same reasons cited previously.

By his own admission, defendant cited violations of sections 15A-501 and 15A-511 in support of his motion to suppress at the trial level, while on appeal he argues that section 15A-974 "require[d] suppression" of his 23 December statement. Our appellate courts have "long held that where a theory argued on appeal was not raised before the trial court, 'the law does not permit parties to swap horses between courts in order to get a better mount [on appeal].' " *State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)). For this reason, defendant has failed to properly preserve this issue for appellate review. Nevertheless, defendant contends we should review this issue, citing the following language in *State v. Ashe*: "When a trial court acts contrary to a statutory mandate and a defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial." 314 N.C. 28, 39, 331 S.E.2d 652, 659 (1985). This line of reasoning, however, is not persuasive here—defendant claims that police officers violated certain statutes governing arrest, not that the trial court acted contrary to a statutory mandate.

Moreover, even assuming defendant's argument was properly before us, we find that it has no merit. Defendant claims he had a fundamental right to be informed of the pending charges before being questioned by law enforcement because "[w]ithout that knowledge, he could not

knowingly and intelligently make a decision about the exercise of his rights." But no such principle of law exists. "A person does not have to know all the legal consequences of making a confession in order for the confession to be admitted into evidence." *State v. Shytle*, 323 N.C. 684, 690, 374 S.E.2d 573, 576 (1989) (citation omitted). And there is no requirement that an accused "be made aware of all facts which might influence his or her decision" to confess. *Id.* (citation omitted); *Moran*, 475 U.S. at 422-23, 89 L. Ed. 2d at 421-22 ("[W]e have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. . . . Once it is determined that a suspect's decision not to rely on his rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law."). Though additional information may have been useful to defendant or may have influenced his decision to confess, any violation of section 15A-501 was "technical" as opposed to substantial and did not render defendant's 23 December statement involuntary or inadmissible. *See State v. Carter*, 296 N.C. 344, 352-53, 250 S.E.2d 263, 268 (1979) ("We believe that *Miranda* not only lacks an explicit requirement that an individual be informed of the charges about which he is to be questioned prior to waiving his rights but also lacks any implicit requirement that such action be taken by authorities before a valid waiver of rights can be executed by one who is to be interrogated. . . . In the instant case the court specifically found that defendant was fully and accurately advised of his rights prior to answering any questions. . . . We also note that defendant had knowledge of his rights and was aware that the investigation concerned a homicide before he made the incriminating statement. Yet, he willingly continued to answer the questions put to him.").

As for defendant's claim that he was prejudiced by the lapse of time between his arrest and his first appearance before a magistrate, the central issue is whether his confession resulted from the delay. Our Supreme Court has repeatedly held that when a defendant is interrogated before being taken before a magistrate, the confession that resulted was not obtained as a result of a substantial violation of Chapter 15A. *See, e.g.*, *Martin*; *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988), *sentence vacated on other grounds*, 494 U.S. 1021, 108 L. Ed. 2d 601 (1990); *State v. Littlejohn*, 340 N.C. 750, 459 S.E.2d 629 (1995). In *Littlejohn*, the defendant argued that, but for the thirteen-hour delay between his arrest and the time he was taken before a magistrate, he would not have confessed. 340 N.C. at 758, 459 S.E.2d at 633. In rejecting this argument, our

Supreme Court noted that the defendant had been advised of his rights before the interrogation and that he would have received the same notification from a magistrate. *Id.* at 758, 459 S.E.2d at 634. As a result, the defendant failed to establish that he "would have exercised his right to remain silent if he had been warned of this right by a magistrate rather than the officer." *Id.*

Similarly, in the instant case, defendant was advised of his rights before being interviewed on 23 December regarding Avila's murder. Defendant has failed to show that the delay in appearing before a magistrate undermined his free will and rendered his confession involuntary. At first glance, the three-day period between defendant's arrest and his first appearance before a magistrate seems significant. However, since defendant was arrested while recuperating from gunshot wounds and taken before a magistrate on the same day he was released from the hospital, the actual "delay" at issue should be measured in hours not days. When the delay—which was largely due to defendant's medical treatment—is viewed in context, no substantial violation of section 15A-511 occurred. *See id.* at 758, 459 S.E.2d at 633-34; *State v. Chapman*, 343 N.C. 495, 499, 471 S.E.2d 354, 356 (1996) (ten-hour delay between arrest and first appearance before a magistrate, where most of the time was spent questioning the defendant, did not constitute an unnecessary delay because officers had a right to conduct the interrogations). Accordingly, the trial court properly concluded that the inculpatory statements at issue did not result from substantial violations of Chapter 15A's provisions and the court did not err in denying defendant's motion to suppress his 23 December statement.

III. Trial Court's Exclusion of Defendant's Purported Inconsistent Statement Made to Police

[3] In his final argument, defendant contends that the trial court erred by excluding a statement he made to Officer Charles Olivio,[1] a bilingual officer with the WSPD. Once again, we disagree.

Officer Olivio had been posted to guard defendant on the morning of 19 December 2009. At some point, defendant offered an unsolicited statement to Officer Olivio, all in Spanish: "I am . . . getting in trouble for nothing. My friend asked me to go with him. I stood around, and then I got shot. My friend ran. And now I can't feel my leg." At trial, defendant

1. We note that Officer Olivio's last name is also spelled as "Olivo" in the transcript. We use the former spelling of his name because that is how the court reporter transcribed it when he was introduced as witness and stated his title and full name.

called Officer Olivio, who was examined outside the jury's presence. Because the State had placed great emphasis on the consistency between defendant's 17 and 23 December statements, defense counsel argued that defendant's "inconsistent statement" to Officer Olivio was admissible. After the State objected, the trial court ruled that the statement constituted "inadmissible self-serving hearsay of the defendant who has not testified . . . ." Consequently, this evidence was not before the jury.

On appeal, defendant argues that "the State opened the door to the admission of [his] statement to Officer Olivio by the prosecutor's repeated emphasis on the consistency of . . . defendant's two recorded statements."

> When the State offers into evidence a part of a confession the accused may require the whole confession to be admitted. Thus, when the State introduces part of a statement made by a defendant, the defendant is then entitled to have everything brought out that was said by him *at the time the statement was made* to enable him to take whatever advantage the statement introduced may afford him. However, if the State does not introduce statements of a defendant made on a later date, a defendant is not entitled to introduce these later self-serving statements since the State has not opened the door for such testimony.

State v. Weeks, 322 N.C. 152, 167, 367 S.E.2d 895, 904 (1988) (emphasis added) (citations omitted).

Despite defendant's protestations on this issue, we need say little more than this argument has already been rejected by our Supreme Court. *See id.* at 168, 367 S.E.2d at 905 ("The evidence shows that [the defendant's purported exculpatory] statement was not made at the same time as the oral statements that were introduced into evidence. Therefore, in order for [the] defendant to be entitled to introduce this later self-serving statement, the State must have 'opened the door[,]' [which did not happen in this case.]"); *State v. Lovin*, 339 N.C. 695, 709-10, 454 S.E.2d 229, 237 (1995) ("When the State elicited testimony from [the defendant's girlfriend] of a statement made by the defendant earlier in the day, it did not open the door for a statement the defendant later made from the jail to [her]. The statement did not corroborate [the] defendant's testimony because he did not testify. It would have been hearsay testimony and was properly excluded."). *Weeks* and *Lovin* require a defendant's exculpatory statement to have been made at the same time as other statements that have been introduced into evidence. Because defendant's self-serving, exculpatory statement to

Officer Olivio was made on 19 December 2009, separate and apart from the statements he made on 17 and 23 December, the State did not open the door for its admission. Accordingly, the trial court properly excluded it at trial.

IV. Conclusion

We conclude that the evidence supports the findings entered in the trial court's suppression order, and those findings support the court's conclusions that defendant's 17 and 23 December statements were admissible. The trial court also did not err in concluding that technical statutory violations did not warrant the suppression of defendant's 23 December statement. Finally, the trial court properly excluded defendant's exculpatory statement to Officer Olivio.

NO ERROR.

Judges STROUD and INMAN concur.

STATE OF NORTH CAROLINA
v.
ERIC PRESTON SAWYERS

No. COA15-980

Filed 7 June 2016

1. Appeal and Error—writ of certiorari—appeal lost through no fault of own

Because defendant's right to appeal from the 15 October 2014 judgment was lost through no fault of his own, the Court of Appeals exercised its discretion and allowed defendant's petition for writ of certiorari pursuant to Rule 21(a)(1). Trial counsel inadvertently failed to specifically state that the appeal was from both the denial of the suppression motions and also from the judgment entered on October 15, 2014.

2. Search and Seizure—investigatory stop—driving while impaired—motion to suppress evidence—community caretaking exception

The trial court did not err in a driving while impaired case by denying defendant's motion to suppress the evidence. The officer had specific and articulable facts sufficient to support an investigatory

stop of defendant. The public need and interest outweighed defendant's privacy interest in being free from government seizure and defendant's seizure fit within the community caretaking exception.

3. Motor Vehicles—driving while impaired—motion to suppress—breath test

The trial court did not err in a driving while impaired driving case by denying defendant's motion to suppress the breath test results where defendant alleged the seizure of his cell phone prevented him from obtaining a witness in time to observe the test. Police officers complied with the requirements set out in N.C.G.S. § 20-16.2(a)(6) as defendant's first breath test was not administered until more than thirty minutes after defendant was informed of his rights.

Appeal by defendant from order and judgment entered 15 October 2014 by Judge Lucy N. Inman in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Christopher R. McLennan, for the State.

Tarlton Law PLLC, by Raymond C. Tarlton, for defendant-appellant.

McCULLOUGH, Judge.

Eric Preston Sawyers ("defendant") appeals from judgment entered upon his plea of guilty to driving while impaired. Defendant argues that the trial court erred by denying his motion to suppress. For the reasons stated herein, we affirm the order of the trial court.

I. Background

On 12 November 2011, defendant was arrested and issued a citation for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1.

On 29 April 2013, defendant filed a "Motion to Dismiss" charges against him alleging statutory and constitutional violations regarding his right to pre-trial release, his right to obtain additional chemical analysis, and his right to have an opportunity to obtain evidence. On the same date, defendant filed a "Motion to Suppress Evidence Obtained without Reasonable Suspicion to Stop and Seize Defendant" and a "Motion to Suppress EC/IR II Test Results."

Following a hearing held on 27 September 2013, the trial court entered an order on 15 October 2013 denying defendant's motion to dismiss. The trial court made the following pertinent findings of fact:

> 3. That Trooper Keller . . . assisted Sergeant Dorty with the DWI investigation and thereafter arrested the defendant at 2:26am for Driving While Impaired[.]
>
> . . . .
>
> 5. That Trooper Keller then transported the defendant to the Charlotte Mecklenburg detention facility for an EC/IR II test of his breath for alcohol, arriving at approximately 3:05am.
>
> 6. That the defendant was taken to the nurse, fingerprinting, and image capturing until 3:34am.
>
> 7. That Trooper Keller advised the defendant of his rights to a chemical analysis of his breath and the defendant reviewed and acknowledged the rights form regarding chemical analysis at 3:45am, but refused to sign. . . .
>
> 8. That the defendant was allowed to retrieve phone numbers from his phone and make phone calls. He called his mother Christine Sawyers at approximately 4:00am to let her know he was in jail and she needed to come get him, *but there was no mention of observing the EC/IR II testing procedures.*
>
> 9. That Christine Sawyers lives in South Charlotte and arrived within approximately 30 minutes of receiving the defendant's phone call.
>
> 10. That a witness did not appear for the defendant within the requisite 30 minutes, so Trooper Keller requested the defendant submit to a test of his breath for alcohol at 4:19am and 4:22 am. The lower of the two readings was .15 g/210L. . . .

(emphasis added). The trial court concluded:

> 1. That there was no substantial violation of the United States Constitution, the North Carolina Constitution, or any statutory violation.
>
> 2. That the defendant was informed of his right to have a witness present and was allowed a witness, Christine

> Sawyers, at the Mecklenburg County Jail, who was able to communicate and speak to the defendant for 30 minutes and assist in forming his defense.
>
> 3. That there was no evidence that anyone who came to the Mecklenburg County Jail to see or speak with defendant was denied that right.

A hearing on defendant's motions to suppress was held during the 15 October 2014 criminal session of Mecklenburg County Superior Court.

In regards to defendant's "Motion to Suppress Evidence Obtained without Reasonable Suspicion to Stop and Seize Defendant," the State offered the testimony of Sergeant Henry Hill Dorty, Jr. ("Sergeant Dorty") with the North Carolina Highway Patrol. Sergeant Dorty testified that on 12 November 2011 at 2:26 a.m., he was on patrol on Tryon Street in downtown Charlotte. He was sitting stationary in his vehicle at a stoplight. Sergeant Dorty observed defendant walking down the sidewalk and noticed that he had a slight limp. Sergeant Dorty testified that directly behind defendant was what appeared to be a homeless male dragging a female. The female "appeared to either be very intoxicated or drugged." Defendant stopped at a car on the side of the road and opened the back door behind the driver's seat. Defendant and the other male put the female in the backseat of the vehicle. Dorty testified that "I didn't know whether she was being kidnapped, if she was in danger or what the situation was." Thereafter, defendant got into the driver's seat and the other male got into the front passenger seat of the car. Defendant got into traffic two car lengths in front of Sergeant Dorty. Sergeant Dorty testified that he stayed behind defendant and planned to stop defendant's vehicle "[t]o investigate to see if the female in the vehicle was okay, what was going on." After defendant made two turns, Sergeant Dorty activated his blue lights and pulled defendant over.

The trial court denied defendant's motion to suppress for lack of reasonable suspicion by stating as follows:

> THE COURT: . . . I am persuaded, based on the evidence presented and the very eloquent arguments of counsel for both sides, the authorities cited, that Trooper Dorty had a reasonable and articulable suspicion to initiate the stop and that the stop falls within the community caretaker exception to the Fourth Amendment.

In regards to defendant's "Motion to Suppress EC/IR II Test Results,"

Trooper Robert B. Keller ("Trooper Keller") and defendant testified. Trooper Keller with the North Carolina State Highway Patrol testified that he came into contact with defendant during the early hours of 12 November 2011. Trooper Keller was contacted by Sergeant Dorty. Subsequent to arriving on the scene, Trooper Keller formed the opinion that defendant was impaired and arrested defendant for driving while impaired at 2:26 a.m. Defendant was taken to "Mecklenburg County intake downtown" and entered the room containing the Intoximeter ECIR/II machines. Defendant's rights were read to him at 3:45 a.m. and defendant refused to sign the form acknowledging his rights. Defendant called for a witness using the landline provided by the sheriff's department and spoke with his mother at 3:59 a.m. When asked whether Trooper Keller had a disagreement with defendant over defendant's access to his cell phone, Trooper Keller testified that he did not "recall communication a whole lot about the cell phone." Trooper Keller further testified that he could not recall whether he heard defendant asking his mother to come down to the jail or whether he asked his mother to serve as a witness for the breath test. Trooper Keller testified that to his recollection, defendant failed to indicate to him at 3:45 a.m. that he had a witness coming to view the testing procedures and that if defendant had so indicated, Trooper Keller would have waited thirty minutes for the witness to arrive. Defendant provided two samples at 4:19 a.m. and 4:22 a.m. Trooper Keller testified that between 3:45 a.m. and 4:19 a.m., he was not notified that anyone had arrived to view the testing procedures.

Defendant testified that he and Trooper Keller had disagreements regarding signing paperwork and accessing his cell phone so that he could access his attorney's phone number. Defendant recalled Trooper Keller reading him his rights as it pertained to submitting to a test of his breath but testified that he refused to sign the rights form. At 3:59 a.m. defendant made a phone call to his mother. Defendant testified that the purpose of calling his mother was because he "wanted a witness to watch the Breathalyzer test." It would have taken ten to fifteen minutes for his mother to arrive at the jail. Defendant testified that to his knowledge, his mother arrived within thirty minutes of his phone call.

The trial court adopted the findings of fact made in the 15 October 2013 order denying defendant's motion to dismiss. The trial court denied defendant's motion to suppress evidence from defendant's breath test and stated as follows:

> THE COURT: . . . And I do find that the State has met the burden of producing evidence, which hasn't been impeached, that Trooper Keller observed the defendant.

> The standard is not -- as I understand it, there's not any authority that says the standard is that you're not allowed to fill out paperwork or talk on the phone or do anything else during that observation period. So I'm going to find that the State's met its burden on that. And for all those reasons, I'm going to deny the motion to suppress[.]

On 15 October 2014, the trial court entered an order, denying both of defendant's motions to suppress. Thereafter, defendant pled guilty to driving while impaired while reserving his right to appeal the denial of his motions to suppress. On the same date, the trial court entered judgment, sentencing defendant to a DWI Level Five punishment. Defendant was sentenced to 30 days in jail. This sentence was suspended and defendant was placed on supervised probation for a term of 12 months. On 16 October 2014, defendant entered notice of appeal.

II. Standard of Review

Review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial [court]'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 [court]'s ultimate conclusions of law." *State v. Salinas*, 366 N.C. 119, 123, 729 S.E.2d 63, 66 (2012) (citation omitted). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

III. Discussion

Defendant presents two issues on appeal. Defendant argues that the trial court erred by: (A) denying defendant's motion to suppress where the facts demonstrated that Sergeant Dorty did not have the reasonable articulable suspicion needed to justify an investigatory stop and (B) denying defendant's motion to suppress the breath test results where the seizure of defendant's cell phone prevented defendant from obtaining a witness in time to observe the test. Before we reach the merits of defendant's appeal, we first address a preliminary issue.

Notice of Appeal

[1] Defendant has filed a petition for writ of certiorari in which defendant concedes that while he intended to appeal "from all adverse decisions against him," through miscommunication or inadvertent error, his "trial counsel inadvertently failed to specifically state that the appeal was from both the denial of the suppression motions and also from the

Judgment entered on October 15, 2014." Accordingly, defendant requests that our Court issue a writ of certiorari pursuant to the North Carolina Rules of Appellate Procedure Rule 21(a)(1). Rule 21(a)(1) provides that:

> [t]he writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. Rule 21(a)(1) (2016). Our Court has previously ruled that " '[a]ppropriate circumstances' may include when a defendant's right to appeal has been lost because of a failure of his or her trial counsel to give proper notice of appeal." *State v. Gordon*, 228 N.C. App. 335, 337, 745 S.E.2d 361, 363 (2013). Because defendant's right to appeal from the 15 October 2014 judgment was lost as a result of no fault of his own, we exercise our discretion and allow defendant's petition for writ of certiorari pursuant to Rule 21(a)(1).

A. Motion to Suppress for Lack of Reasonable Suspicion

[2] In his first argument on appeal, defendant contends that the trial court erred in denying his motion to suppress where the facts demonstrated that Sergeant Dorty did not have the reasonable articulable suspicion necessary to justify an investigatory stop, thereby violating his rights under the Fourth Amendment to the United States Constitution and Article I, § 20 of the North Carolina Constitution to be free from unreasonable seizures. Defendant also argues that the trial court erred by applying the community caretaking doctrine as an exception to the warrant requirement of the Fourth Amendment. We disagree.

> The Fourth Amendment protects individuals against unreasonable searches and seizures and the North Carolina Constitution provides similar protection. A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief. Traffic stops have been historically reviewed under the investigatory detention framework first articulated in *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968). Under *Terry* and subsequent cases, a traffic stop is permitted if the officer has a reasonable, articulable suspicion

that criminal activity is afoot.

State v. Smith, 192 N.C. App. 690, 693, 666 S.E.2d 191, 193 (2008) (citations omitted). "Reasonable suspicion requires that the stop 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." *State v. Lopez*, 219 N.C. App. 139, 145, 723 S.E.2d 164, 169 (2012) (citation omitted). "All the State is required to show is a minimal level of objective justification, something more than an unparticularized suspicion or hunch. A court must consider the totality of the circumstances in determining whether the officer possessed a reasonable and articulable suspicion to make an investigatory stop." *State v. Brown*, 213 N.C. App. 617, 619, 713 S.E.2d 246, 248 (2011) (citations and quotation marks omitted).

After thoroughly reviewing the record, we hold that Sergeant Dorty had specific and articulable facts sufficient to support an investigatory stop of defendant. Sergeant Dorty testified that in the early morning hours of 12 November 2011 at 2:26 a.m., he was on patrol on Tryon Street in downtown Charlotte. He was sitting stationary in his vehicle at a stoplight when he observed defendant walking down the street with a slight limp. Sergeant Dorty observed that directly behind defendant was another male, who appeared to be homeless, dragging an "either very intoxicated or drugged" female down the street. Defendant and the other male placed the female in defendant's vehicle, defendant and the other male entered the vehicle, and defendant's vehicle left the scene. Sergeant Dorty testified that he was unsure whether the female "was being kidnapped, if she was in danger or what the situation was." Sergeant Dorty did not believe that the other male was with defendant and the female and wanted to investigate "to see if the female in the vehicle was okay, what was going on." Considering the totality of the circumstances, we hold that defendant's investigatory stop was justified by Sergeant Dorty's reasonable suspicion that defendant was involved in criminal activity. Therefore, we hold that the trial court did not err by denying defendant's motion to suppress on this ground.

In addition to holding that there was reasonable articulable suspicion to conduct an investigatory stop of defendant, the trial court also held that the stop fell within the community caretaker exception to the Fourth Amendment. In *State v. Smathers*, 232 N.C. App. 120, 753 S.E.2d 380 (2014), our Court formally recognized the community caretaking doctrine as an exception to the warrant requirement under the Fourth Amendment to the United States Constitution. *Id.* at 122, 753 S.E.2d at

382. In reference to a large majority of state courts recognizing this doctrine as an exception, our Court noted that:

> [t]he overarching public policy behind this widespread adoption is the desire to give police officers the flexibility to help citizens in need or protect the public even if the prerequisite suspicion of criminal activity which would otherwise be necessary for a constitutional intrusion is nonexistent. The doctrine recognizes that, in our communities, law enforcement personnel are expected to engage in activities and interact with citizens in a number of ways beyond the investigation of criminal conduct. Such activities include a general safety and welfare role for police officers in helping citizens who may be in peril or who may otherwise be in need of some form of assistance.

Id. at 125, 753 S.E.2d at 384 (citation omitted). Our Court adopted a three-pronged test in applying the community caretaking exception:

> the State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual. Relevant considerations in assessing the weight of public need against the intrusion of privacy include, but are not limited to: (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Id. at 128-29, 753 S.E.2d at 386 (citations omitted). "[T]his exception should be applied narrowly and carefully to mitigate the risk of abuse." *Id.* at 129, 753 S.E.2d at 386.

We must now apply the three-pronged test to the circumstances in our present case. First, it is undisputed that the traffic stop of defendant was a seizure under the Fourth Amendment of the United States Constitution. Second, given that Sergeant Dorty observed defendant and what appeared to be a homeless male dragging a female who seemed

to "either be very intoxicated or drugged" into defendant's vehicle, there was an objectively reasonable basis under the totality of the circumstances to conclude that the seizure was based on the community caretaking function of ensuring the safety of the female. Sergeant Dorty testified that he was unsure whether the female "was being kidnapped, if she was in danger or what the situation was." Third, the public need or interest in having defendant seized outweighed his privacy interest in being free from the intrusion. Sergeant Dorty observed the female who was either intoxicated or drugged being put in the backseat of defendant's vehicle by defendant and another male who "appeared to be homeless and didn't appear to be with these two people that I saw him with." Defendant and the other male entered the vehicle and began driving away from the scene. Therefore, the degree of public interest in ensuring the safety and well-being of the female was high and the fact that defendant was driving away in a vehicle with the female as a passenger contributed to the exigency of the situation. Furthermore, defendant was operating a vehicle when he was seized rather than enjoying the privacy of his own home, thereby lessening his expectation of privacy. *See Smathers*, 232 N.C. App. at 131, 753 S.E.2d at 387 (stating that "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view") (citation omitted).

Based on the foregoing, we hold that the public need and interest outweighed defendant's privacy interest in being free from government seizure and that defendant's seizure fit within the community caretaking exception as set out in *Smathers*. Accordingly, we hold that the trial court did not err by applying the community caretaking exception and affirm the trial court's order denying defendant's motion to suppress.

B. Motion to Suppress Breath Test Results

[3] In his second argument on appeal, defendant asserts that the trial court erred by denying his motion to suppress the results of his breath test where he was deprived of a reasonable opportunity to arrange to have a witness observe his breath test. Specifically, defendant argues that officers deprived defendant access to his cell phone address book, which in turn impeded his ability to contact a witness in a timely manner.

Defendant directs our attention to North Carolina General Statutes section 20-16.2(a)(6) regarding his right to call a witness to view the administration of a chemical breath test. N.C. Gen. Stat. § 20-16.2(a)(6) provides as follows, in pertinent part:

> Any law enforcement officer who has reasonable grounds to believe that the person charged has committed the implied-consent offense may obtain a chemical analysis of the person.
>
> Before any type of chemical analysis is administered the person charged shall be taken before a chemical analyst authorized to administer a test of a person's breath or a law enforcement officer who is authorized to administer chemical analysis of the breath, who shall inform the person orally and also give the person a notice in writing that:
>
> . . . .
>
> You may call an attorney for advice and select a witness to view the testing procedures remaining after the witness arrives, but the testing may not be delayed for these purposes longer than 30 minutes from the time you are notified of these rights. You must take the test at the end of 30 minutes even if you have not contacted an attorney or your witness has not arrived.

N.C. Gen. Stat. § 20-16.2(a)(6) (2015).

After careful review, we hold that the record evidence supports the trial court's conclusion that police officers complied with the requirements set out in N.C. Gen. Stat. § 20-16.2(a)(6) as defendant's first breath test was not administered until more than thirty minutes after defendant was informed of his rights. Trooper Keller testified that defendant was arrested at 2:26 a.m. on 12 November 2011 for driving while impaired. Defendant was taken to "Mecklenburg County intake downtown" and entered the room containing the Intoximeter ECIR/II machines. Trooper Keller read defendant's rights to him at 3:45 a.m., however, defendant refused to sign the form acknowledging his rights. Trooper Keller testified that between 3:45 a.m. and 3:59 a.m., defendant was not prevented from using the telephone. Defendant called his mother using a landline provided by the sheriff's department at 3:59 a.m. Trooper Keller could not recall whether he heard defendant asking his mother to come down to the jail or whether he asked his mother to serve as a witness for the breath test. Defendant failed to indicate to Trooper Keller at 3:45 a.m. that he had a witness coming to view the testing procedures. Trooper Keller testified that if defendant had indicated to him that he had a witness on the way, Trooper Keller would have waited thirty minutes for the witness to arrive. Defendant provided two breath samples at 4:19 a.m. and 4:22 a.m. Trooper Keller testified that between 3:45 a.m.

and 4:19 a.m., he was not notified that anyone had arrived to view the testing procedures.

Defendant's argument that he was denied access to his cell phone in order to retrieve numbers is without merit. The trial court adopted the findings of fact entered in the 15 October 2013 order denying defendant's motion to dismiss and defendant does not challenge any specific findings on appeal. Finding of fact number 8 indicates that defendant was "allowed to retrieve phone numbers from his phone and make phone calls." This finding is supported by the testimony of Deputy James Ingram, of the Mecklenburg County Sheriff's Office, at the hearing held on 27 September 2013:

> Q. Looking towards the bottom of the page where the notes are listed, we've gone through some of these. It looks like at 3:18 the defendant retrieved numbers from his phone; is that correct?
>
> A. Correct.

Accordingly, we hold that the trial court did not err by denying defendant's motion to suppress the results of his breath test.

IV. Conclusion

Based on the foregoing reasons, we affirm the order of the trial court denying defendant's motions to suppress.

AFFIRMED.

Judges BRYANT and STEPHENS concur.

TD BANK, N.A., PLAINTIFF
v.
RICKY NEAL WILLIAMS, DEFENDANT

No. COA 15-598

Filed 7 June 2016

1. Loans—foreclosure sale—proceeds—value

The trial court did not err in a foreclosure sale case by granting summary judgment in favor of plaintiff bank regarding sale proceeds. There was a lack of evidence to support defendant's claims that the property was worth more than the value obtained at the foreclosure sale. Defendant did not base the value of the property on his personal knowledge and there was no alleged value from defendant at the time of sale.

2. Appeal and Error—dismissal of appeal—proposed amended answer—no order in record allowing amended answer

The trial court did not err by dismissing defendant's proposed amended answer alleging negligence, negligent entrustment, and a Chapter 75 violation. There was no order in the record showing the trial court allowed defendant to amend his answer. If a necessary pleading is not contained in the record on appeal, the proper remedy is to dismiss the appeal.

Appeal by Defendant from an order entered 8 December 2014 by Judge J. Thomas Davis in McDowell County Superior Court. Heard in the Court of Appeals 18 November 2015.

Ward and Smith, P.A., by Lance P. Martin and Norman J. Leonard, for Plaintiff-Appellee.

David R. Payne, P.A., by David R. Payne, for Defendant-Appellant.

HUNTER, JR., Robert N., Judge.

Ricky Williams ("Williams") appeals from the trial court's grant of summary judgment in favor of TD Bank. Williams argues genuine issues of material fact existed relating to the proceeds from a foreclosure sale.

He also contends the trial court erred by dismissing three counterclaims. We affirm in part and dismiss in part.

I. Factual and Procedural History

Williams, individually or as a Trustee, Steak House Inc., and Shuttle Services Inc. (business entities controlled by Williams), borrowed money from the Bank, guaranteed loans and secured the loans to the Bank in the following manner:

1. Williams Note:

On or about 5 March 2004, Williams signed an installment promissory note in the principal amount of $160,000 bearing interest at the rate of five percent (5%) to Carolina First Bank ("the Williams Note"). Repayment was to be made in 60 installments of $1,271.46, with a final payment of the remaining unpaid balance due 5 March 2009. The note reflects this loan was secured by an assignment of leases and rents, an assignment of investment property, and a deed of trust on property at Circle Street. The Assignment of Investment Property assigns Carolina First Bank a securities account held by UVEST Financial Services in the name of Williams to secure the Williams Note. The record does not contain a copy of the assignment of leases and rents or the deed of trust. The loan file for the Williams Note contained a Securities Entitlement Control Agreement dated 8 March 2004 naming Carolina First Bank as the secured party, Williams as the debtor, and UVEST as the securities intermediary. The property subject to the securities agreement included a securities account held by UVEST Financial Services in the name of Williams. Williams claims the Securities Entitlement Control Agreement is a product of forgery.

2. Steak House Note:

On or about 27 March 2007, The Steak House, Inc., a North Carolina corporation, signed an installment promissory note in the principal amount of $850,000 bearing interest at the rate of seven and three-quarters percent (7¾%) to Carolina First Bank ("the Steak House Note"). The note was to be paid back in monthly installments of $7,039.39 with a balloon payment of the remaining balance at the end of five years on 27 March 2012. Simultaneously, Williams executed a guaranty, promising to pay the Steak House Note in the event that Steak House, Inc. failed to pay the note. In addition, Williams, as Trustee of the Ricky Williams Revocable Trust, signed a deed of trust dated 27 March 2007 conveying property at Sterling Street in Morganton to MTNBK, Ltd. in

trust for the benefit of Carolina First Bank to be sold to pay the Steak House Note upon default.

3. Shuttle Truck Note:

On or about 25 June 2007, Shuttle Truck Service, Inc., a North Carolina corporation, signed an installment promissory note in the principal amount of $700,000 bearing interest at seven and three-quarters percent (7¾%) per annum ("the Shuttle Truck Note"). The note was to be repaid in 60 installments of $5,805.54 with a balloon payment on 2 July 2012 of the remaining balance. According to the loan agreement, this loan is secured by the following property: an assignment of leases and rents and a deed of trust on property at US 221 North. The record does not contain a copy of these documents. Additionally, the loan was cross-collateralized with the Steak House Note. The Shuttle Truck Note was personally guaranteed by Williams on the date it was signed.

When the Williams Note matured on 5 March 2009, Williams was unable to pay the balance on the note, and he requested that the bank extend the maturity date. On 5 March 2009, Williams and Carolina First Bank agreed to extend the maturity date of the Williams note for 60 days. On 20 May 2009, the parties again extended the maturity date for an additional 60 days.

When the Williams Note matured again, Williams and Carolina First Bank agreed to enter into a new loan. At the request of Carolina First Bank, UVEST liquidated $10,000 from Williams's brokerage account on 21 August 2009 to pay delinquent property taxes. On 27 August 2009, Carolina First Bank closed on the loan renewal. The Williams Note was refinanced by a new loan evidenced by a new promissory note signed by Williams payable to Carolina First Bank in the principal amount of $148,000 at an interest rate of seven and three-quarters percent (7¾%) per annum. The new loan paid off the 5 March 2004 loan, which had a remaining balance of $137,387.42. In the second Williams Note, there are three recitals as follows:

> 9. LOAN PURPOSE. The purpose of this Loan is RENEW AND ADD ADDITIONAL COLLATERAL TO MATURED LOAN $10M NEW MONEY TO COVER APPRAISAL COST ON THREE COMMERCIAL PROPERTIES.
>
> 10. ADDITIONAL TERMS. THIS LOAN IS CROSS COLLATERALIZED WITH LOAN ---1911 IN THE NAME OF THE STEAK HOUSE, INC IN THE AMOUNT OF $850,000.00, DATED MARCH 27, 2007 SECURED BY REAL ESTATE AND EQUIPMENT.

> 11. SECURITY. The Loan is secured by separate security instruments prepared together with this Note as follows:
>
> Document Name; Parties to Document
>
> Leases And Rents Assignment – 1610 MAIN STREET; J & R'S FOOD, INC.
>
> Leases And Rents Assignment – 2115 S. STERLING STREET; THE RICKY N. WILLIAMS REVOCABLE TRUST
>
> Assignment of Investment Property/Securities – Account Number ---7087; RICKY N. WILLIAMS
>
> Deed of Trust – 2115 S. STERLING STREET; THE RICKY N. WILLIAMS REVOCABLE TRUST
>
> Deed of Trust – 1610 MAIN STREET; J & R'S FOOD, INC.
>
> and by the following, previously executed, security instruments or agreements: ASSIGNMENT OF INVESTMENT PROPERTIES/SECURITIES HELD IN THE NAME OF RICKY N. WILLIAMS ISSUED MARCH 5, 2004 SECURED BY UVEST FINANCIAL SERVICES ACCOUNT # ---7087

On 17 November 2009, Shuttle Truck Service, Inc. and Carolina First Bank entered into an agreement modifying the Shuttle Truck Note. According to the bank, the modification agreement included an agreement that Williams would liquidate the balance of his UVEST brokerage account and apply the remaining balance to the Williams Note. However, the modification contract does not reflect that understanding. UVEST liquidated the remaining balance, $94,058.76 from the account on 30 November 2009.

On 30 September 2010, Carolina First Bank merged into TD Bank, N.A.. The assets including the loans and the secured properties underlying these three notes were transferred to TD Bank as Carolina First Bank's successor in interest.

According to the complaint, The Steak House, Inc. defaulted on its loan. The record does not contain a payment history on the Steak House note, a date of default, or a demand letter requesting payment in full. On 12 October 2010, Williams failed to make a payment on the Williams Note, and was assessed a late fee of $56.10. Williams was assessed four additional late fees and made no additional payments on his personal loan. The record does not contain a demand letter requesting payment in full of the Williams Note. According to the final report of sale, the Trustee foreclosed on the Williams Revocable Trust property by bidding

in the amount of $595,000. The final report states that of this sum $591,850.40 went to pay the obligations owed on the Williams Note and the Steak House Note. TD Bank was the successful bidder at the sale of the property.

On 22 January 2013, TD Bank filed a verified complaint seeking monetary damages from Williams on the basis of his breach of guaranty of the Steak House Note and for his failure to pay the Williams Note. In addition to monetary damages, TD Bank sought attorneys fees of 15% of the amount of the outstanding indebtedness on the basis of N.C. Gen. Stat. § 6-21.2. The record contains no summons so we are unable to discern when service was returned.

On 13 May 2013, Williams responded to the complaint by filing a Rule 12(b)(6) motion to dismiss, an unverified answer containing general denials to some of the allegations in the complaint and defenses to liability under the Deficiency Judgment Act. Subsequently, Williams sought to amend his answer by filing a "Proposed Amended Answer" to add additional defenses and include a counterclaim for negligence, negligent entrustment, and a Chapter 75 violation for unfair and deceptive trade practices. However, there is no order allowing the proposed amendment to the complaint in our record.

On 30 October 2014, TD Bank filed an "amended" motion for summary judgment. With its motion, TD Bank filed four affidavits and the transcript from Williams's deposition together with supporting documents. The affidavits and deposition are described below.

The affidavit of Elizabeth Walker, previously the Vice President and City Executive for TD Bank in Marion, North Carolina, establishes Walker was involved in Carolina First Bank's relationship with Williams and his corporations. Walker stated that she "had many conversations with Williams and his accountant, Frank Biddix, concerning the loans because they were often past due or because the bank often received only partial payments on some of the loans." She described all of the loans as "seriously delinquent." Additionally, the closing on the renewal of the Williams Note was delayed when Carolina First Bank discovered Williams owed delinquent real property taxes. Walker sent UVEST a letter authorizing them to liquidate $10,000 for the purpose of paying Williams's delinquent taxes. Shuttle Truck defaulted on its note in 2009. On 17 November 2009, Williams requested the bank modify the Shuttle Truck Note rather than exercise the Bank's rights of default under that note. Carolina First Bank agreed, allowing Shuttle Truck, Inc. to make interest-only payments for six months in return for Williams agreeing

to liquidate the remaining balance of his brokerage account to reduce the amount owed on the Williams Note. Walker contacted UVEST on 24 November 2009, authorizing them to liquidate the remaining balance of the brokerage account. Until 11 July 2011, Williams continued to make monthly payments on the Williams Note. However, the attached payment history does not contain any records from 10 November 2010 through 8 November 2013.

The second affidavit, the affidavit of Shelley McTaggart, the Vice President of TD Bank, contained the following in support of the bank's motion for summary judgment. After default on the Steak House Note, TD Bank commenced foreclosure proceedings in Burke County. The bank's bid of $595,000 was the only bid for the property. After applying the proceeds of the sale to expenses of the foreclosure proceeding and the Steak House Note, a balance of $238,940.71 remained on the Steak House Note. She also explained the UVEST account securing the Williams Note was maintained by UVEST Financial Services, not Carolina First Bank. She admits a clerical error in some documents in the loan file which list Carolina First Bank as the holder of the account. UVEST has never been a subsidiary or affiliate of Carolina First Bank or TD Bank.

Terri Payne, the Vice President of Client Support Services of LPL Financial ("LPL"), a custodian of records for UVEST Financial Services, executed an affidavit for LPL. LPL is an affiliate of UVEST. In 2004, Williams registered an individual brokerage account with UVEST. The account was opened under the name Carolina First Collateral Account for Benefit of Ricky N. Williams. UVEST held the account as collateral for a loan with Carolina First Bank. The account was opened with the instruction that "it is acceptable to distribute cash and future dividends off this account to the customer. Trading, however, should be limited as to not drop below the value of the account at the time the loan was closed." In January 2006, Williams bought shares in Enterra Energy. Williams initiated the purchase. In January 2007, Williams sold his shares in Enterra as well as shares in Ford Motor Company. The trade confirmation represents the sale was solicited by a UVEST representative. The same month, Williams bought mutual funds in the amount of $130,000. On 21 August 2009, UVEST liquidated securities in the account in the amount of $10,000 and tendered a check in that amount to Carolina First Bank. At the request of Carolina First Bank, UVEST liquidated the remainder of the account on or about 30 November 2009, tendering a check to Carolina First Bank in the amount of $94,058.76. She also noted the value of the brokerage account declined over time between 2004 and 2009 due to the stock market decline.

Finally, TD Bank filed an affidavit of David Wooten, a former Market Executive for the Marion office of Carolina First Bank, in support of its motion for summary judgment. Wooten was involved in the bank's loan to Williams in his individual capacity. Wooten did not forge Williams's name on the loan documents, including the Assignment of Investment Properties, nor does he have reason to believe any other person at Carolina First Bank forged Williams's signature.

TD Bank also filed a deposition of Williams with its motion for summary judgment. In his deposition, Williams explained he was the president and sole shareholder of The Steak House, Inc. He bought a Western Sizzlin' and converted it into The Steak House. Since 2008, the restaurant has generated no revenue and has no employees. Williams is also the president of Shuttle Truck Service, Inc. Shuttle Truck Service is a truck stop that washes trailers and has a snack area. He bought the company from its previous owner.

In his deposition, Williams described his meeting at Carolina First Bank when he executed the Williams Note. He explained he discussed having an investment account as collateral for the loan with a man at the bank. Because of that conversation, he thought UVEST and Carolina First Bank were part of the same company. He did not, however, recognize the Securities Control Agreement dated 5 March 2004. The Agreement, which was part of the Williams Note file, was executed when Williams lived in Michigan. As a result, Williams contends the Agreement was forged, because he did not live at the address listed on the Agreement at that time. He also said "this definitely is not my signature."

In response to TD Bank's motion for summary judgment, Williams filed a verified response and a cross motion for partial summary judgment related to the deficiency claim on 2 November 2015. The response contained the following factual allegations:

> 14. In 2009 as a result of the banking crisis across America the Defendant struggled to make payments to Carolina First Bank but was assured by Beth Walker of Carolina First Bank that the bank would work with him related to his loans. The real estate which secured the Morganton Steak House was valuable and he felt as if in the event of a potential foreclosure that the property would more than cover the value of the loan. The value of the property located at 2115 South [Sterling] Street in June of 2009 was $1,060,000.00.

> 15. The Defendant listed the property for $1,700,000.00 in 2009 and in August of 2011 he entered into a lease/option agreement with respect to the subject property in the amount of $1,500,000.00.

Attached to the response, Williams provided an appraisal of the property for $1,060,000 dated 16 June 2009, a listing agreement with a real estate agent listing the sale price at $1,700,000 dated 16 March 2009, and a lease with purchase option in the amount of $1,500,000 dated 20 June 2011.

On 8 December 2014, the trial court entered an order granting summary judgment in favor of TD Bank. The order decreed TD Bank recover $296,402.27 in relief under the Steak House Note plus interest and reasonable attorneys fees as well as $46,744.80 on the Williams Note plus interest and reasonable attorneys fees. The trial court also dismissed Williams's counterclaims. Williams timely entered a Notice of Appeal.

II. Jurisdiction

As an appeal from a final judgment of a superior court, jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b).

III. Standard of Review

On appeal, an order granting summary judgment is reviewed *de novo*. *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674, 693 (2004). Summary judgment is appropriate only when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

When reviewing the evidence on a motion for summary judgment, we review evidence presented in the light most favorable to the nonmoving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003). Moreover, "if the granting of summary judgment can be sustained on any grounds, it should be affirmed on appeal." *Wells Fargo Bank, N.A. v. Arlington Hills of Mint Hill, LLC*, 226 N.C. App. 174, 176, 742 S.E.2d 201, 203 (2013) (quoting *Shore v. Brown*, 324 N.C. 427, 428, 378 S.E.2d 778, 779 (1989)).

IV. Analysis

A. Summary Judgment

[1] N.C. Gen. Stat. § 45-21.36 makes a statutory defense available to loan obligors in actions brought by a lender to recover the deficiency

following a foreclosure sale of the collateral. *Branch Banking and Trust Co. v. Smith*, __ N.C. App. __, __, 769 S.E.2d 638, 641–642 (2015). A deficiency judgment is an imposition of personal liability on a mortgagor for the unpaid balance of the mortgage debt after proceeds from a foreclosure sale have been applied to the debt, and failed to satisfy the total debt due. *Hyde v. Taylor*, 70 N.C. App. 523, 526, 320 S.E.2d 904, 906 (1984). The statute reads:

> When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part[.]

N.C. Gen. Stat. § 45-21.36 (2015).

A guarantor is entitled to the statutory defense as well, even if the borrower has been dismissed from the action. *Branch Banking and Trust*, __ N.C. App. at __, 769 S.E.2d at 642 (citing *Virginia Trust Co. v. Dunlop*, 214 N.C. 196, 198 S.E. 645 (1938)). By allowing guarantors to exert a defense under the statute in addition to the mortgagor, the statute "establishes an equitable method of calculating the indebtedness." *High Point Bank and Trust Co. v. Highmark Properties, LLC*, 368 N.C. 301, 305, 776 S.E.2d 838, 841 (2015).

In order to calculate the indebtedness, the statute requires the holder of the obligation to show "that the property sold was fairly worth the amount of the debt secured by at the time and place of sale or that the amount bid was substantially less than its true value." N.C. Gen. Stat. § 45-21.36 (2015). The burden of proof lies with the mortgagor or guarantor to provide evidence that at the time of sale either the property

was worth more than the debt or that the mortgagee's bid was substantially less than its true value. *Branch Banking and Trust*, __ N.C. App. at __, 769 S.E.2d at 641. Under N.C. Gen. Stat. § 45-21.36, Williams is entitled to benefit from the statutory defense because he is the mortgagor of the Williams Note and a guarantor of the Steak House Note.

Pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, summary judgment shall be rendered "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 . . . ." N.C. Gen. Stat. § 1A-1, Rule 56 (2015). A verified complaint or motion may be treated as an affidavit if it meets the above criteria. *See Wein II, LLC v. Porter*, 198 N.C. App. 472, 477, 683 S.E.2d 707, 711 (2009). At summary judgment, the non-moving party must set forth specific facts by affidavits, depositions, answers to interrogatories, and other means provided by Rule 56 to show a genuine issue of material fact exists. Any affidavit submitted at summary judgment must "be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." N.C. Gen. Stat. § 1A-1, Rule 56 (2015). Unsworn letters and correspondence are not the type of evidence considered by the court at summary judgment, and should not be considered. *Duke Energy Carolinas, LLC v. Bruton Cable Serv., Inc.*, 233 N.C. App. 468, 473, 756 S.E.2d 863, 866 (2014).

The central issue of this appeal is whether Williams has presented a forecast of evidence sufficient to raise a question of material fact. Under the issue to be decided by the court, a property owner may testify to the value of his or her property. "Unless it affirmatively appears that the owner does not know the market value of his property, it is generally held that he is competent to testify as to its value." *Goodson v. Goodson*, 145 N.C. App. 356, 361, 551 S.E.2d 200, 204 (2001) (quoting *N.C. Highway Comm. v. Helderman*, 285 N.C. 645, 652, 207 S.E.2d 720, 725 (1974)). This stems from the rule that lay persons may testify as to the value of real property "if the witness can show he has knowledge of the property and some basis for his opinion." *See Finney v. Finney*, 225 N.C. App. 13, 16, 736 S.E.2d 639, 642 (2013) (quoting *Whitman v. Forbes*, 55 N.C. App. 706, 711, 286 S.E.2d 889, 892 (1982)).

Here, Williams alleged TD Bank did not extract the full value of the property as a defense in his *unverified* answer filed 13 May 2013. He contends the value of the property was sufficient to pay the mortgage in full. Because the answer is unverified, it does not support a holding that

Williams has forecast evidence that a genuine issue of material fact of value exists.

However Williams's motion for partial summary judgment was verified and contends that the Sterling Street property was fairly worth the amount of debt secured by it at the time and place of sale. At the time of the foreclosure sale, Williams owed $830,800.11 on the Steak House Note and $41,836.50 on the Williams Note, for a total of $872,636.61. The evidence presented by Williams that the property was worth more than the indebtedness is contained within Williams's verified response to the motion for summary judgment. There he alleges the following facts:

> 14. In 2009 as a result of the banking crisis across America the Defendant struggled to make payments to Carolina First Bank but was assured by Beth Walker of Carolina First Bank that the bank would work with him related to his loans. The real estate which secured the Morganton Steak House was valuable and he felt as if in the event of a potential foreclosure that the property would more than cover the value of the loan. The value of the property located at 2115 South [Sterling] Street in June of 2009 was $1,060,000.00.
>
> 15. The Defendant listed the property for $1,700,000.00 in 2009 and in August of 2011 he entered into a lease/option agreement with respect to the subject property in the amount of $1,500,000.00.

Attached to Fact 14, Williams provided one page of an appraisal by a commercial appraising company, Miller & Associates, stating that on 10 June 2009 the Sterling Street Property was worth $1,060,000.00. With Fact 15, Williams provided a listing agreement, listing the sale price of the property at $1,700,000.00 dated 16 March 2009 and a lease with purchase option in the amount of $1,500,000.00 dated 29 June 2011. The attachments were not accompanied by supporting data or affidavits from the appraiser or the real estate professionals stating that on the date of the foreclosure the property was valued at these amounts. Furthermore, Williams himself does not aver that he has an opinion of the value of the property at the time of the foreclosure or that he relied on these documents in reaching this conclusion. Finding no other verified evidence in the record supporting Williams's property value claim, we hold Williams fails to forecast evidence sufficient to create a question of material fact. Because Williams did not base the value of the property on his personal knowledge and because we have no alleged value from Williams at the time of sale, there is a lack of evidence to

support Williams's claims that the property was worth more than the value obtained at the foreclosure sale. We therefore affirm the trial court's grant of summary judgment.

B. Dismissed Claims

[2] Williams filed a Proposed Amended Answer alleging negligence, negligent entrustment, and a Chapter 75 violation. Williams argues the trial court erred by dismissing these three claims. Because we find no order in the record showing the trial court allowed Williams to amend his answer, we cannot consider a "proposed" amended answer. If a necessary pleading is not contained in the record on appeal, the proper remedy is to dismiss the appeal. *Washington County v. Norfolk Southern Land Co.*, 222 N.C. 637, 638, 24 S.E.2d 338, 339–340 (1943).

V. Conclusion

For the foregoing reasons, we affirm in part and dismiss in part.

AFFIRMED IN PART AND DISMISSED IN PART.

Judges STEPHENS and INMAN concur.

DAWN WEIDEMAN, Plaintiff
v.
ERIN ATALIE SHELTON, Defendant
v.
ANNETTE WISE, Intervenor

No. COA15-772

Filed 7 June 2016

1. Child Custody and Support—child custody—protected parental status—former domestic partner of maternal grandmother—temporary custody order—clear and convincing evidence standard

The trial court did not err in a child custody case by concluding that intervenor, former domestic partner of plaintiff maternal grandmother, failed to establish by clear and convincing evidence that defendant mother acted inconsistently with her constitutionally protected parental status. The findings did not demonstrate that defendant intended for the 2012 custody order to be permanent.

Intervenor failed to carry her burden of proving by clear and convincing evidence that defendant failed to shoulder the responsibilities attendant to rearing the minor child.

2. Child Custody and Support—child custody—notice—necessary party—no putative father contested notice

The trial court did not err by upholding the 1 March 2012 custody order. Assuming *arguendo* that the custody order was initially entered in error because intervenor Wise was not given proper notice of the initial custody hearing and was not joined as a necessary party, this error was resolved when the trial court allowed Wise to intervene and participate in the custody proceedings. Further, the record contained no evidence that any putative father contested notice of the initial custody hearing or of the subsequent custody proceedings, and thus, that issue was dismissed.

3. Child Visitation—failure to address—former domestic partner of maternal grandmother—protected parental status

The trial court did not err in a child custody case by failing to address visitation. The trial court concluded that intervenor, former domestic partner of plaintiff maternal grandmother, failed to establish that defendant mother acted inconsistently with her constitutionally protected parental status.

Appeal by intervenor from order entered 3 November 2014 by Judge Ward D. Scott in Buncombe County District Court. Heard in the Court of Appeals 2 December 2015.

Bidwell & Walters, PA, by Paul Louis Bidwell and Law Offices of Douglas A. Ruley, PLLC, by Douglas A. Ruley, for intervenor-appellant.

No brief for defendant-appellee.

No brief for plaintiff-appellee.

CALABRIA, Judge.

Annette Wise ("Wise"), intervenor, appeals from an amended custody order that recognized intervenor as a party, but dismissed intervenor's motions for custody and visitation without prejudice. The trial court concluded that the initial custody order awarding Dawn Weideman ("Weideman"), plaintiff, the biological maternal grandmother, custody of

Chris[1] remained in full force and effect. Erin Atalie Shelton ("Shelton"), defendant, is Weideman's biological daughter and Chris's biological mother. We affirm.

I. Background

Weideman and Wise were domestic partners beginning in 1991 when Shelton was approximately two years old. Wise, Weideman, and Shelton resided together in Wise's house as a family unit. When Shelton was around ages thirteen or fourteen, she exhibited outbursts of anger and frustration, or symptoms of a mental health disorder, and was treated with various medications. Around the age of fourteen, Shelton began drinking alcohol and using drugs. At age seventeen, Shelton became pregnant while still using alcohol and drugs, was uncertain as to the father's identity, and dropped out of high school.

In December 2006, Shelton gave birth to Chris. Wise and Weideman were excited to assist Shelton in her role as a new mother. For the first few weeks, Shelton actively cared for Chris by feeding and nurturing him, and Wise and Weideman assisted with routine care of Chris. A few weeks later, Shelton began to suffer from the emotional swings of her untreated mental health disorder and exhibited symptoms suggestive of postpartum depression. Subsequently, Shelton told Weideman that she needed help caring for Chris because she was depressed and struggling. Following this discussion, Weideman and Wise, rather than Shelton, spent more time caring for Chris.

In August 2007, without Shelton's knowledge, Wise and Weideman approached an attorney and requested a document allowing them to care for Chris. Subsequently, Wise, Weideman, and Shelton executed an appointment of guardianship ("2007 guardianship appointment") that purported to grant Weideman and Wise legal guardianship of Chris. Shelton requested an addendum to the 2007 guardianship appointment that stated "the parties agree that the appointment is temporary."

After executing this document, Wise and Weideman continued caring for Chris just as they had done prior to signing the document. Shelton continued to live with Weideman and Wise on an ongoing basis and later lived with them with her boyfriend on a part-time basis until Wise demanded that Shelton leave the residence and not return. When Shelton returned, she drove her vehicle into the gate, and Wise called law enforcement. Subsequently, although Shelton spent some time in

1. A pseudonym is used to protect the minor's identity.

a rehabilitation center, her mental health issues continued for the next few years. Specifically, she exhibited erratic behaviors consistent with bipolar disorder, which remained untreated except through self-medication with prescription narcotics, drugs, and alcohol. Shelton continued to live part-time with Weideman and Wise, but sometime in 2009, Wise again banned Shelton from the residence.

In late 2009, although Wise and Weideman separated and Weideman relocated from Wise's home, Wise and Weideman continued to care for Chris, and Chris split time between the two residences. Following the separation, Shelton spent time at Weideman's new residence and continued to stay with Wise on a part-time basis, until Wise made Shelton relocate from her house in January 2010. Wise banned Shelton from returning to her house, even when Chris was staying there. Wise also attempted to prohibit Shelton from seeing Chris when he stayed at Weideman's residence. Wise told Shelton that she was not entitled to care for Chris and that she intended to supervise any contact between Shelton and Chris. However, Shelton was able to exercise visitation with Chris through Weideman. In May 2010, Shelton gave birth to another child, Charlie,[2] whose rights are not at issue in this appeal. Around August 2010, Shelton relapsed and was admitted into another rehabilitation center.

By the fall of 2011, Shelton's life improved. She secured her own housing and regularly attended therapy classes. She also discovered a medication regime that worked, and, except for one minor relapse in 2011 when she smoked marijuana, she remained sober. Following Weideman and Wise's separation, Chris began splitting time between the two, and Shelton exercised visitation with Chris through Weideman. During this time, Shelton attempted to assert parental control over Chris and act in the role of his parent.

In 2012, Shelton and Weideman agreed that Weideman should have custody of Chris. Subsequently, Weideman filed a complaint for custody of Chris, Shelton consented, and the trial court entered an initial child custody consent order on 1 March 2012 ("2012 custody order") granting Weideman custody of Chris. In June 2012, Weideman exercised her exclusive custody of Chris by prohibiting contact between Wise and Chris.

On 31 August 2012, Wise filed motions to intervene and to set aside the custody order, as well as a motion for custody and visitation and for breach of the 2007 guardianship appointment. Wise alleged, *inter alia*,

2. A pseudonym is used to protect the minor's identity.

that Shelton had abdicated her protected parental status. Weideman filed a response and a motion to dismiss. After a hearing, the trial court denied Weideman's motion to dismiss, determined Wise's pleadings were sufficient to allege an action for abrogation of Shelton's protected parental status, and granted Wise's motion to intervene.

After additional motion hearings, the trial court entered an order on 15 August 2014 ("initial 2014 custody order") that was amended on 3 November 2014 ("amended 2014 custody order") to add, *inter alia*, findings that Shelton did not intend to abdicate complete responsibility for Chris or that the care Weideman or Wise provided for Chris was intended to be permanent. To the contrary, the court found that Shelton intended the care to be temporary. The trial court also amended its conclusions of law, stating that "[Wise] has a relationship with [Chris] in the nature of a parent-child relationship[]" and had standing to intervene. However, the trial court repeated its conclusion that Wise failed to meet her burden of proving by clear, cogent, and convincing evidence that Shelton had abdicated her constitutionally protected parental rights. In addition, although the trial court again dismissed Wise's motions for custody and visitation, it omitted the words "with prejudice" from the amended 2014 custody order. However, the decretal portion of the amended 2014 custody order similarly upheld the custodial arrangement outlined in the 2012 custody order, and similarly concluded that the 2012 custody order remained in full force and effect. Wise appeals the amended 2014 custody order.

II. Analysis

Wise's arguments on appeal can be consolidated into two issues: whether the trial court erred by (1) concluding Wise failed to establish by clear and convincing evidence that Shelton acted inconsistently with her constitutionally protected parental status; and (2) dismissing Wise's motions for custody of and visitation with Chris.

As an initial matter, we note that "in custody cases, the trial court sees the parties in person and listens to all the witnesses." *Adams v. Tessener*, 354 N.C. 57, 63, 550 S.E.2d 499, 503 (2001) (citation omitted). With this perspective, the trial court is able "to observe the demeanor of the witnesses and determine their credibility, the weight to be given their testimony and the reasonable inferences to be drawn therefrom." *Yurek v. Shaffer*, 198 N.C. App. 67, 80, 678 S.E.2d 738, 747 (2009) (citation omitted). This opportunity of observation "allows the trial court to detect tenors, tones and flavors that are lost in the bare printed record

read months later by appellate judges." *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citations and quotation marks omitted).

A. Conduct Inconsistent with Protected Parental Status

[1] Wise contends the trial court erred by concluding that Shelton did not act inconsistently with her constitutionally protected parental status. We disagree.

> Parents have a fundamental right to make decisions concerning the care, custody, and control of their children. As long as a parent maintains his or her paramount interest, a custody dispute with a nonparent regarding those children may not be determined by the application of the 'best interest of the child' standard. However, the paramount status of parents may be lost . . . where the natural parent's conduct is inconsistent with his or her constitutionally protected status.

Rodriguez v. Rodriguez, 211 N.C. App. 267, 276-77, 710 S.E.2d 235, 242 (2011) (internal citations and some quotation marks omitted).

Our review of "[w]hether . . . conduct constitutes conduct inconsistent with the parents' protected status" is *de novo*. *Id.* at 276, 710 S.E.2d at 242 (citation omitted) (alteration in original). Under this review, we "consider[] the matter anew and freely substitute[] [our] own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citations and quotation marks omitted). Our analysis is a "fact-sensitive inquiry," *Boseman v. Jarrell*, 364 N.C. 537, 550, 704 S.E.2d 494, 503 (2010), and this determination "must be viewed on a case-by-case basis." *Owenby v. Young*, 357 N.C. 142, 147, 579 S.E.2d 264, 268 (2003) (citation omitted). We are bound by the unchallenged findings of a trial court. *See, e.g.*, *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011) ("Unchallenged findings of fact are binding on appeal.") (citation omitted). A trial court must determine by "clear and convincing evidence" that a parent's conduct is inconsistent with his or her protected status. *Adams*, 354 N.C. at 63, 550 S.E.2d at 503 (citation omitted). Therefore, Wise's burden on appeal is to establish by clear and convincing evidence that Shelton acted inconsistently with her protected parental status.

1. Custody Order

Wise first contends that Shelton's consent to the 2012 custody order, which led to the trial court granting primary custody of Chris to

Weideman, was clear and convincing evidence that Shelton acted inconsistently with her protected parental status. We disagree.

"[I]f a parent cedes paramount decision-making authority, then, so long as he or she creates no expectation that the arrangement is for only a temporary period, that parent has acted inconsistently with his or her paramount parental status." *Boseman*, 364 N.C. at 552, 704 S.E.2d at 504 (citation omitted). In the instant case, Shelton, as Chris's mother, made temporary arrangements for Chris's care first when she executed the 2007 guardianship appointment, which stated explicitly that the appointment was temporary, and next when she consented to the 2012 custody order.

At the custody hearings, Shelton testified that she never told Wise that the 2007 guardianship appointment would be permanent or that Wise would be Chris's parent, and that she never intended to mislead Weideman or Wise into thinking that they would parent Chris until he was an adult. Shelton testified that for a few months in 2007, she was not receiving treatment for her feelings of anxiety and depression, nor was she receiving prescription medications for other mental health issues. This struggle prompted her to seek help from Wise and Weideman to care for Chris, which triggered Wise and Weideman to discuss having an attorney draft the 2007 guardianship appointment. Shelton further testified that after the 2007 guardianship appointment was executed, she remained involved in Chris's life. When Shelton was doing well, she would be involved in Chris's life, holding him and playing with him and trying to help with caring for him. But when Shelton was not doing well, she would try to avoid Chris, so as to prevent Chris from seeing her under the influence of narcotics or exhibiting symptoms of her mental health issues. Weideman testified that Shelton agreed to sign the 2007 guardianship appointment "only if it were temporary because one day she hoped to be able to raise [Chris]." Indeed, Wise concedes that the 2007 guardianship appointment provided explicitly that "the parties agree that the appointment is temporary."

Regarding the 2012 custody order, Wise contends that Shelton failed to indicate that she intended the custodial arrangement to be temporary. However, Wise is mistaken. The transcript of the custody hearings indicate that Shelton and Weideman intended a temporary arrangement. Shelton testified that she did not understand that the 2012 custody order would strip her of her right to parent Chris. Rather, Shelton understood that Weideman, unlike Wise, was willing to allow Shelton to undertake more of a parenting role for Chris at a time when she would be able to do so. Indeed, Weideman testified that "[Shelton] knew that [by] giving

me legal custody [of Chris], [Shelton] would still be able to be a part of his life and hopefully some day be his parent[.]"

Shelton's decision to consent to the 2012 custody order was based, in part, on her understanding that legally placing Chris in Weideman's care would allow Shelton to continue to be an active participant in Chris's life and provide her the opportunity to assert her role as Chris's parent to a progressively greater degree. The trial court made the following unchallenged findings of fact, which are binding on appeal:

> 54. . . . This decision [to execute the 2012 custody order] was based in part upon the desire of [Shelton] to be actively involved in [Chris's] life . . . , and that by legally placing [Chris] in the care of [Weideman,] [Shelton] would continue to have the opportunity to be an active participant in [Chris's] life[.]
>
> . . . .
>
> 58. . . . [Shelton's] election to grant [Weideman] custody of [Chris] pursuant to the Order of 1 March 2012 was . . . not inconsistent with her parental role for the following reasons:
>
> a. Prior to this time, while [Chris] was in the care of [Wise], [Shelton] was unable to assert her rights as a parent and was unable to have any real interaction with [Chris];
>
> b. [Weideman] had not interfered with [Shelton]'s ability to see [Chris] and represented a safe place for [Chris] to live on an ongoing basis while [Shelton] attempted to place herself in the position where she was able to assert her rights as a parent;
>
> c. [U]nder [Weideman]'s care, [Chris] was able to maintain a relationship with [Shelton,] and [Shelton] was able to provide care for [Chris];
>
> d. [Weideman] has always allowed [Shelton] access to and the ability to care for [Chris] in the best interest of [Chris;]
>
> e. [W]hen [Chris] was placed with [Weideman] on a primary basis, [Shelton] had access to and was able to provide care for [Chris], as well as providing a relationship for [Chris] with his sibling, including teaching

> [Chris] sign language in order to be able to communicate with his younger sibling.

The trial court's findings illustrate that Shelton's execution of the 2012 custody order was not conduct inconsistent with her protected parental status. Rather than demonstrate that Shelton intended the 2012 custody order to further relinquish her parental authority, the findings illustrate that Shelton intended for the 2012 custody order to enable her to assert her right to parent Chris and to assume her role as Chris's mother to a progressively greater degree. The findings demonstrate that Wise purposefully impeded Shelton from exercising her right to parent Chris, and that executing the 2012 custody order that granted Weideman sole custody of Chris was one of the very limited ways by which Shelton would be able to assert her role as Chris's parent. Therefore, the findings demonstrate not that Shelton intended for the 2012 custody order to grant Weideman permanent custody of Chris, but that she intended for the 2012 custody order to provide her with the opportunity to assume her role as Chris' mother in the future.

Wise has failed to establish by clear and convincing evidence that Shelton's execution of the 2007 guardianship appointment or the 2012 custody order conduct inconsistent with her protected parent status. Therefore, we overrule Wise's challenge.

2. Responsibilities Attendant to Rearing Chris

Wise next contends that the trial court erred by concluding Shelton did not act inconsistently with her protected status, because Wise presented clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to rearing a child. We disagree.

Although Wise cites to *Price v. Howard* for the proposition that "the parent may no longer enjoy a paramount status if . . . she fails to shoulder the responsibilities that are attendant to rearing a child," 346 N.C. 68, 79, 484 S.E.2d 528, 534 (1997), she has failed to apply that case or any other authority to the facts of this case. *Moss Creek Homeowners Ass'n, Inc. v. Bissette*, 202 N.C. App. 222, 231, 689 S.E.2d 180, 186 (2010) ("[T]he [party] appl[ied] no facts from the record to the case law cited. Accordingly, this argument is deemed abandoned. N.C. R. App. P. 28(b)(6) (2009)."). In support of her argument, Wise cited only to an unpublished opinion from this Court, but failed to apply facts from the record to the case cited. Moreover, she failed to include a copy of this opinion at the end of her brief. Rule 30 of the North Carolina Rules of Appellate Procedure provides:

> (3) An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored, except for the purpose of establishing claim preclusion, issue preclusion, or the law of the case. If a party believes, nevertheless, that an unpublished opinion has precedential value to a material issue in the case and that there is no published opinion that would serve as well, the party may cite the unpublished opinion if that party serves a copy thereof on all other parties in the case and on the court to which the citation is offered. This service may be accomplished by including the copy of the unpublished opinion in an addendum to a brief or memorandum.

N.C.R. App. P. 30(3)(e)(3).

Nonetheless, we conclude that Wise has failed to carry her burden of proving by clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to rearing Chris. Wise contends that the 2007 guardianship appointment, Wise and Weideman co-parenting Chris for five-and-one-half years, and Shelton using drugs and disappearing for days, are clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to raising Chris. We disagree.

The trial court made the following unchallenged findings:

> 31. Based upon a reading of [the 2007 guardianship appointment] and all the competent evidence in this matter, the Court does not find that the intent of [Shelton] was to abdicate complete responsibility for her child, or that any intent to allow [Weideman] or [Wise] to provide care for her child was intended to be permanent. Rather, and to the contrary, the Court finds that this assignment by [Shelton] was intended by [Shelton] to be temporary in nature.
>
> . . . .
>
> 38. That [Shelton's] admittance into Copestone in 2005, relapse in 2007, and Neil Dobbins in 2010[, rehabilitation centers,] are all indicative of the struggles [Shelton] faced at the intersection of untreated mental health issues and self-medicating that turns into addiction. That given

[Shelton's] long journey towards seeking professional help, and then subsequent journey of discovering a medication regiment that worked to treat these issues, and later behavioral therapies and remedies to assist [Shelton] realize that she has choices where before all of these treatments [Shelton] testified she would only feel trapped by her illness and react in anger, that given all of these journeys coupled with the fact that [Shelton] is a high school drop-out with very limited economical means, that temporary guardianship and custody must give a birth mother the time and space to learn how to take care of herself so that she can be a fully present mother for her son. The Court notes that [Shelton] has made and is making progress in this journey and that [Shelton's] progress can be tracked with her involvement and increased parenting role in [Chris's] life as described by [Weideman], [Shelton], and [Shelton's] biological grandmother[.]

39. [Wise] testified that [Shelton] did not take care of [Chris] and would often be upset with [Chris] if [he] cried or made noise at night. [Wise] further testified that she and [Weideman] would ask [Shelton] to leave the residence if it was upsetting [Chris]. The Court notes that on these occasions [Shelton] would leave the residence. The Court cannot find that the request to have [Shelton] leave the residence, or compliance by [Shelton] with this request, is an act contrary to the parental responsibility and rights of [Shelton] when the evidence supports that this was an appropriate decision.

40. While [Wise] testified that [Shelton] never took parenting responsibilities, the Court does not find this to be credible; when considering the competent testimony of [Weideman], [Shelton,] and [Wise], the Court finds that [Shelton] did assume certain parenting responsibilities for [Chris], [but] did also rely upon both [Weideman] and [Wise] to care for [Chris].

. . . .

42. That [Shelton] never expressed any desire or intention for [Weideman] and [Wise] to provide for the sole and exclusive care for [Chris]; in fact, the Court finds [to] the contrary, that the guardianship papers and other statements

made were raised initially by [Wise], and that [Shelton], in fact, objected to the supposition that [Weideman] and [Wise] would be awarded the care for [Chris].

. . . .

47. That [Wise] attempted to keep Shelton away from [Chris] when [he] was staying at [Wise's] respective residence; that the intent of [Wise] to prevent [Shelton] from staying at her residence when [Chris] was living in that home, and to even prevent [Shelton] from seeing [Chris] when [he] was at [Weideman's] residence. To which [Weideman] testified that she simply would not tell [Wise] when [Shelton] was present at her home with [Chris].

48. That the intentional acts of [Wise] to prevent [Shelton] from being in the presence of [Chris] was not the intent or desire of [Shelton], and that [Shelton] lacked the ability, self-esteem, and resources to undertake any real act or actions to establish her role as a parent in [Chris's] life. . . . Accordingly, the Court finds that [Wise] cannot simultaneously attempt to prevent [Shelton] from having a relationship with her child, and then hold this against [Shelton.]

. . . .

50. The Court further finds, based upon the testimony of [Wise] that [Wise] never agreed, and would not have agreed, to let [Shelton] take [Chris] or have a parental role over [Chris]. [Wise] further testified that she wanted [Chris] to view his own biological mother, [Shelton], as a big sister, and went further stating, "I believe [Chris] is mine. . . or at least half mine." The Court believes [Wise's] response when asked if between 2006 to 2012, at no time would [Wise] have allowed [Shelton] to take on a parenting role, to which [Wise] responded, "Correct."

These unchallenged findings demonstrate that Shelton was suffering from untreated mental health issues for the majority of Chris's life, but that she made qualitative progress toward resolving these issues that previously hindered her from asserting her role as Chris's parent. We agree with the trial court that Wise cannot simultaneously intentionally prevent Shelton from having a relationship with Chris, and then argue that Shelton has failed to shoulder her burden to care for Chris. The evidence indicates that Shelton recognized that she needed to relinquish

some of her parental authority to Weideman and Wise while she sought treatment for her mental health issues and her problems of addiction, until she was able to care for Chris. Wise has failed to establish by clear and convincing evidence that Shelton failed to shoulder the responsibilities attendant to raising Chris, such that she has abdicated her protected parent status. Therefore, we overrule Wise's challenge.

B. Validity of Custody Order

[2] Wise contends the trial court erred by upholding the 1 March 2012 custody order, because it was entered in violation of N.C. Gen. Stat. §§ 50A–205(a) and 50A–209. Specifically, Wise contends the custody order was invalid and unenforceable, because the initial custody complaint failed to disclose Wise's custodial and parental relationship to Chris, Wise was not joined in the initial custody complaint as a necessary party under Rule 19 of the North Carolina Rules of Civil Procedure, and the initial complaint failed to disclose any potential putative fathers. We disagree.

"N.C. Gen. Stat. § 50A–205 provides that notice and an opportunity to be heard must be provided to all interested parties before a child custody determination can be made." *Mitchell v. Mitchell* (*now Norwich*), 199 N.C. App. 392, 398, 681 S.E.2d 520, 525 (2009) (citation omitted). This includes "any person having physical custody of the child." N.C. Gen. Stat. § 50A-205(a) (2015). In this case, Wise had physical custody of Chris. Therefore, she had a right to notice of the initial custody hearing. Although Wise was not given notice of the initial custody hearing, the trial court granted her motion to intervene in the matter, and Wise was subsequently joined as a party to the custody proceedings. After multiple days of hearings, in which Wise participated, the trial court determined that, even though Wise had a relationship with Chris, the custodial arrangement of the initial custody order was appropriate. In addition, the trial court dismissed Wise's motions for custody and visitation without prejudice.

Assuming, *arguendo*, that the custody order was initially entered in error because Wise was not given proper notice of the initial custody hearing, this error was resolved when the trial court allowed Wise to intervene and participate in the custody proceedings. Although Wise appealed the amended custody order, not the initial custody order, the amended custody order not only references the initial custody order, but also incorporates the trial court's conclusion of law that the custodial arrangement outlined in the initial custody order awarding Weideman custody of Chris was a proper initial custody determination.

This same rationale, that any error arising from Weideman and Shelton's failure to give Wise notice of the initial custody proceeding was resolved after Wise was joined as a party to the custody proceedings, also applies to Wise's challenge that initially she was not joined as a necessary party. Therefore, we overrule these challenges.

As to Wise's challenge that Weideman's "fraudulent exclusion of the likely biological fathers[] render[ed] the [consent order] invalid and unenforceable," we note that, once again, Wise has failed to apply any authority to the facts of this case. *See* N.C.R. App. P. 28(b)(6). Nonetheless, we note that the trial court found the following unchallenged facts:

> 8. . . . The father of [Chris], as of the date of the hearing, was not known; there was no service on the father or putative father at the time of the filing of the Complaint, nor was evidence presented by any person or party to this action during this trial that paternity had been established concerning [Chris].
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> . . . .
>
> 33. That [Chris's] father had yet to make an appearance or be present in the life of the child, in any way, shape or form [from Chris's birth until execution of the 2007 guardianship appointment].

We recognize that the record does contain an affidavit from Greg Clinkscales ("Clinkscales"), the father of Shelton's other minor child, Charlie, which was attached to Wise's Rule 59 and 60 motions after the trial court entered its custody order on 15 August 2014. The affidavit states in pertinent part:

> 3. [Shelton] and I have one child together, that I am certain of, [Charlie], born May 31, 2010. I have had physical custody of [Charlie] since two (2) months after he was born.
>
> 4. [Shelton] told me that [Chris] is my child and that there was no doubt about it; she told me this prior to May 2013.

However, the record contains no evidence that Clinkscales or any other putative father contested notice of the initial custody hearing or of the subsequent custody proceedings. Clinkscales was not joined as a party to this appeal pursuant to N.C.R. App. P. 5(a). Therefore, this issue is not properly before us, and we dismiss this challenge.

C. Trial Court's Failure to Address Visitation

[3] Wise's next argument pertains to the trial court's failure to address visitation. Specifically, Wise contends: "The trial court's Order noted that visitation was an issue, but, failed to enter any findings or conclusions that addressed visitation, and the Order specifically failed to address whether visitation with Wise is in the child's best interests." However, "[a]s we have concluded that defendant did not act inconsistently with her status as a parent, and the trial court did not make a finding that defendant was unfit, there was no basis for the trial court to grant visitation to [Wise]." *Rodriguez*, 211 N.C. App. at 279, 710 S.E.2d at 244 (citation omitted). The trial court did not err by dismissing Wise's motion for visitation of Chris. We overrule this challenge.

Because the trial court concluded that Wise failed to establish that Shelton acted inconsistently with her constitutionally protected parental status, we do not address Wise's additional challenges on appeal.

III. Conclusion

Since the trial court did not err by concluding Wise failed to establish by clear and convincing evidence that Shelton had acted inconsistently with her constitutionally protected parental status, the trial court also did not err in dismissing Wise's motions for custody and visitation. Accordingly, we affirm the trial court's order.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

DAVID WRAY, PLAINTIFF
v.
CITY OF GREENSBORO, DEFENDANT

No. COA15-912

Filed 7 June 2016

Immunity—governmental immunity—police officer's contractual claim—litigation expenses

The trial court erred by granting defendant City's Rule 12(b) motion to dismiss plaintiff former police chief's complaint seeking $220,593.71 for the amount he paid defending lawsuits filed against him arising from his employment. The City was not shielded by the doctrine of governmental immunity to the extent that plaintiff's action was based in contract. The order of the trial court was reversed and remanded for further proceedings.

Judge BRYANT dissenting.

Appeal by Plaintiff from order entered 8 May 2015 by Judge James C. Spencer, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 26 January 2016.

Carruthers & Roth, P.A., by Kenneth R. Keller and Mark K. York, for the Plaintiff-Appellant.

Smith Moore Leatherwood LLP, by Patrick M. Kane, and Mullins Duncan Harrell & Russell PLLC, by Alan W. Duncan and Stephen M. Russell, Jr., for the Defendant-Appellee.

Wilson, Helms & Cartledge, LLP, by Lorin J. Lapidus, and NCLM, by General Counsel Kimberly S. Hibbard and Associate General Counsel Gregory F. Schwitzgebel, III, for Amicus Curiae, North Carolina League of Municipalities.

DILLON, Judge.

David Wray ("Plaintiff") brought suit against his former employer (Defendant City of Greensboro) to recover certain employee benefits he claims he was due. The trial court dismissed Plaintiff's claim based on governmental immunity. For the following reasons, we reverse the order of dismissal and remand the matter for further proceedings.

I. Background

In 1980, the City of Greensboro passed a resolution (the "City Policy") stating that the City would pay for the legal defense and judgments on behalf of its officers and employees with respect to certain claims arising from their employment.

In 2003, Plaintiff became the Chief of Police for the City. In January 2006, Plaintiff resigned from his position as Chief of Police at the request of the City Manager, after alleged incidents within the Greensboro Police Department (the "Department") resulted in state and federal investigations of Plaintiff and the Department.

After his resignation, Plaintiff was named as a defendant in actions filed by City police officers for Plaintiff's alleged conduct occurring while he was serving as Chief of Police.[1] Plaintiff has incurred substantial litigation expenses in these actions and has requested reimbursement from the City under the City Policy. However, the City has declined Plaintiff's request.

Plaintiff filed this present action against the City seeking $220,593.71, the amount he paid defending the lawsuits filed against him. The City moved to dismiss the action pursuant to Rule 12(b)(1), (2) and (6) of the Rules of Civil Procedure. The trial court granted the City's Rule 12(b) motion to dismiss Plaintiff's complaint, concluding that the City was shielded by the doctrine of governmental immunity, holding that the City had not waived its immunity. Plaintiff timely appealed.

II. Summary of Holding

The City's motion to dismiss was made pursuant to Rule 12(b)(1), (2) and (6). The trial court granted the City's motion on the sole ground that the City was "shielded by the doctrine of governmental immunity, which immunity has not been waived." The trial court based this holding on its conclusion that the City's enactment of the City Policy pursuant to its authority granted under N.C. Gen. Stat. § 160A-167 was not an action which waives governmental immunity. However, we hold that Plaintiff has, in fact, set forth allegations that the City has waived governmental immunity, though *not* based on the City's act of enacting the City Policy, *but rather* based on the City's act of entering into an employment agreement with Plaintiff.

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1. *See Fulmore v. City of Greensboro*, 834 F. Supp.2d 396 (M.D.N.C. 2011); *Hinson v. City of Greensboro*, 232 N.C. App. 204, 753 S.E.2d 822 (2014).

Specifically, Plaintiff has made a breach of contract claim, essentially alleging that he had a contract with the City to work for the City *and* that pursuant to the City's contractual obligations, the City is required to pay for his litigation expenses. Importantly, the City is authorized to enter into employment contracts with its police officers, and the City is authorized by N.C. Gen. Stat. § 160A-167 to enact a policy by which it may contractually obligate itself to pay for certain legal expenses incurred by these officers.

Whether the City is, in fact, contractually obligated to pay for Plaintiff's litigation expenses as alleged in the present case (under a theory that the City Policy is part of his contract or based on some other theory) goes *to the merits* of Plaintiff's contract claim and is not relevant to our threshold review of whether the City *is immune* from having to defend against these contract claims in court. Rather, we merely hold that the trial court erred in dismissing Plaintiff's complaint *based on the doctrine of governmental immunity*, the only basis of its order. Accordingly, we reverse the order of the trial court.

III. Analysis

In general, the doctrine of sovereign/governmental immunity "provides the State, its counties, and its public officials with absolute and unqualified immunity from suits against them in their official capacity." *Hubbard v. County of Cumberland*, 143 N.C. App. 149, 151, 544 S.E.2d 587, 589 (2001). Under the doctrine of *sovereign* immunity, it is the State of North Carolina which "is immune from suit [in the absence of] waiver[,]" whereas under the doctrine of *governmental* immunity, counties and cities are "immune from suit for *negligenc*e of [their] employees in the exercise of governmental functions absent waiver of immunity." *Meyer v. Walls*, 347 N.C. 97, 104, 489 S.E.2d 880, 884 (1997) (emphasis added).

Our Supreme Court has instructed that when the State has the authority to enter into a contract and it does so voluntarily, "the State implicitly consents to be sued for damages on the contract in the event it breaches the contract." *Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 423-24 (1976). Likewise, a city or county waives immunity when it "*enters into a valid contract*." *M Series Rebuild v. Town of Mt. Pleasant*, 222 N.C. App. 59, 65, 730 S.E.2d 254, 259 (2012) (citations omitted) (emphasis in original). However, a municipality waives governmental immunity only for those contracts into which it is authorized to enter. *See Smith*, 289 N.C. at 322, 222 S.E.2d at 425 ("The State is liable only upon contracts authorized by law.").

The relationship between a municipality and its police officers is, indeed, contractual in nature. And a municipality is authorized to enter into employment contracts with individuals to serve as police officers. Further, relevant to this appeal, the General Assembly has authorized municipalities to provide for the defense of their officers and employees in any civil or criminal action brought against a member in the member's official or individual capacity. N.C. Gen. Stat. § 160A-167 (1980). We hold that under G.S. 160A-167, one way a municipality is authorized to provide such benefit is by contract. We note that N.C. Gen. Stat. § 160A-167 is permissive; the General Assembly does not require a city to make any provision for the defense of employees, contractual or otherwise, but if a municipality does so, "[t]he city council, authority governing board, or board of county commissioners . . . shall have adopted . . . uniform standards under which claims made or civil judgments entered against . . . employees or officers, or former employees or officers, shall be paid." N.C. Gen. Stat. § 160A-167(c).

In the present case, pursuant to its authority under N.C. Gen. Stat. § 160A-167, the City passed the City Policy, which provided as follows:

> [It] is hereby declared to be the policy of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments and to satisfy the same, either through insurance or otherwise, when resulting from any act done or omission made, or any act allegedly done or omission allegedly made, in the scope and course of their employment or duty as employees or officers of the City, except and unless it is determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption or actual malice[,] or (2) acted or failed to act in a wanton or oppressive manner.

The City enacted the City Policy in 1980 and it remained in effect during the entire time Plaintiff was employed by the City. Whether the City Policy is, in fact, an element of Plaintiff's employment contract and whether Plaintiff's litigation expenses are covered thereunder go to the merits of Plaintiff's contract claim. However, in the present appeal, we are not concerned with the *merits* of Plaintiff's contract claims; rather, we only address whether the City is shielded from having to defend against those claims based on governmental immunity.

It appears that Plaintiff was an at-will employee of the City. North Carolina has traditionally embraced a strong presumption that employment is "at-will," that is, terminable at the will of either party.

Soles v. City of Raleigh, 345 N.C. 443, 446, 480 S.E.2d 685, 687 (1997) (internal citation omitted). However, the relationship between an employer and an at-will employee is still contractual in nature. In terms of benefits earned during employment, our Court has consistently applied a unilateral contract theory to the at-will employment relationship. *See Roberts v. Mays Mills, Inc.*, 184 N.C. 406, 411-12, 114 S.E. 530, 533–34 (1922); *White v. Hugh Chatham Mem'l Hosp., Inc.*, 97 N.C. App. 130, 131–32, 387 S.E.2d 80, 81 (1990); *Brooks v. Carolina Telephone*, 56 N.C. App. 801, 804, 290 S.E.2d 370, 372 (1982). A unilateral contract is one where the offeror is the master of the offer and can withdraw it at any time before it is accepted by performance. *White*, 97 N.C. App. at 132, 387 S.E.2d at 81. While the offer is outstanding, the offeree can accept by meeting its conditions. *Id.*

In sum, Plaintiff has essentially pleaded that he had an employment relationship with the City and that the City has contractually obligated itself to pay for his defense as a benefit of his contract. Whether the City is, in fact, obligated to pay *contractually* by virtue of its passage of the City Policy goes to the merits and is not the subject of this appeal.

We are unpersuaded by the City's argument that this case is controlled by our Supreme Court's holding in *Blackwelder v. City of Winston-Salem*, in which that Court stated that "[a]ction by the City under N.C.G.S. § 160A-167 does not waive immunity." *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 324, 420 S.E.2d 432, 436 (1992). The Supreme Court was referring to immunity from *tort* actions, stating in the previous sentence that the General Assembly has expressly prescribed in N.C. Gen. Stat. § 160A-485 that "the only way a city may waive its governmental immunity is by the purchase of liability insurance." *Id.* Extending the language in *Blackwelder* to contract claims would lead to bizarre results. For instance, an employee would have no remedy if his city-employer breached an express provision in his written employment contract which stated that the city would pay for any G.S. 160A-167-type litigation expenses he might incur defending a suit brought by a third party.

We are further unpersuaded by the City's argument that Plaintiff failed to "specifically allege a waiver of governmental immunity." *Fabrikant v. Currituck County*, 174 N.C. App. 30, 38, 621 S.E.2d 19, 25 (2005). We agree that "[a]bsent such an allegation, the complaint fails to state a cause of action." *Id.* However, we do not require *precise language* alleging that the City has waived the defense of governmental immunity – "consistent with the concept of notice pleading, a complaint need only allege facts that, if taken as true, are sufficient to establish a waiver[.]"

Id.; *see also Sanders v. State Personnel Com'n*, 183 N.C. App. 15, 19, 644 S.E.2d 10, 13 (2007). Rather, we look to Plaintiff's amended complaint to determine whether Plaintiff has sufficiently alleged the City's waiver of governmental immunity. *See Sanders*, 183 N.C. App. at 19, 644 S.E.2d at 13. In the amended complaint, Plaintiff alleges that he was employed by the City's Police Department as the Chief of Police, that he was acting within the "course and scope of his employment" at all times material to his claim, that pursuant to the provisions of the City Policy he is entitled to reimbursement for his legal expenses and fees, and that the City failed to honor the City Policy. We believe that these allegations are sufficient to establish waiver through a breach of Plaintiff's contractual relationship as an employee of the City. Accordingly, this argument is overruled. In concluding as such, we take no position as to *the merits* of Plaintiff's contract action – "[t]oday we decide only that [P]laintiff is not to be denied his day in court because his contract was with the State." *Smith*, 289 N.C. at 322, 222 S.E.2d at 424.

IV. Conclusion

We hold that the City is not shielded by the doctrine of governmental immunity to the extent that Plaintiff's action is based in contract. We reverse the order of the trial court and remand this case for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

Judge ZACHARY concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

Because I believe the trial court properly granted defendant City of Greensboro's motion to dismiss plaintiff's complaint, I respectfully dissent.

In its 8 May 2015 order, the trial court concluded that defendant maintained its governmental immunity from suit: "Neither the institution of a plan adopted pursuant to N.C.G.S. § 160A-167, under which a city may pay all or part of some claims against employees of the city, nor action taken by the city under N.C.G.S. § 160A-167, waives governmental immunity. See Blackwelder v. City of Winston-Salem, 332 N.C. 319, 420 S.E.2d 432 (1992)." However, in reaching this conclusion, the trial court provided no findings of fact, and the record provides no indication that

a request for findings was made by the parties. Thus, we must determine whether there was sufficient evidence to support the trial court's presumed finding that defendant City of Greensboro did not waive its governmental immunity by express waiver, purchase of liability insurance, or entry into a valid contract. *See Data Gen. Corp. v. Cnty. of Durham*, 143 N.C. App. 97, 101, 545 S.E.2d 243, 246 (2001) ("In the absence of an express waiver of sovereign immunity by [defendant], we must determine whether there was sufficient evidence to support the presumed finding by the trial court that the county waived its sovereign immunity as to [plaintiff's] contract claims either by the purchase of liability insurance or by entering [into] a valid contract."

In his complaint, plaintiff asserts in pertinent part that he began employment with the Police Department of the City of Greensboro as a police officer in March of 1981, after the Greensboro City Council's adoption of the resolution at the center of this dispute. Through the years, plaintiff was promoted through the ranks: Sergeant, Lieutenant, Assistant Chief, and in July 2003, Chief of Police. In January 2006, plaintiff resigned as Chief of Police. Following his resignation, investigations into alleged civil rights violations perpetrated by plaintiff were conducted by federal and state bureaus of investigation. Multiple lawsuits were filed against plaintiff in Guilford County Superior Court on the basis of conduct alleged to have occurred in his role as Chief of Police. Plaintiff requested that the City provide him with legal representation but was denied. Plaintiff alleged that "[a]s an employee of the City acting within the course and scope of his employment, and pursuant to the provision of the City Policy, [plaintiff] is entitled to indemnification and reimbursement of the expenses he has incurred . . . in connection with his defense [of lawsuits totaling $220,593.71]."

In response to the allegations of the complaint, defendant City of Greensboro filed a motion to dismiss. In its motion, defendant requested that the trial court dismiss plaintiff's complaint for lack of personal and subject matter jurisdiction, and for failure to state a claim. Defendant does not contest any of the allegations asserted in plaintiff's complaint, but rather states the following:

> 4. Plaintiff contends that he is entitled to a declaratory judgment that the City should provide for a defense and indemnification under a 13 November 1980 Resolution (the "Resolution"). The Resolution addresses the provision to City Officers and employees of a defense against civil claims for acts alleged to have been performed in the scope and course of their employment "unless it is

> determined that an officer or employee (1) acted or failed to act because of actual fraud, corruption, or actual malice or (2) acted or failed to act in a wanton or oppressive manner." A copy of that Resolution is attached as Exhibit A.
>
> 5. The Resolution vests the City Manager (or his designee) with the authority to "determine whether or not a claim or suit filed against an officer or employee . . . meets the standards . . . for providing a defense for such officer or employee." (Ex. A. . . . .).

The Resolution declares "the *policy* of the City of Greensboro to provide for the defense of its officers and employees against civil claims and judgments[.]" (emphasis added). This statement prescribes an *intent* to provide for the defense of officers and employees. *See generally* N.C. Gen. Stat. § 143-300.3 (2015) ("[T]he State *may* provide for the defense of any civil or criminal action or proceeding brought against him in his official or individual capacity . . . ." (emphasis added)); *In re Annexation Ordinance*, 303 N.C. 220, 230, 278 S.E.2d 224, 231 (1981) ("We conclude that the provisions of G.S. 160A-45 [(entitled "Declaration of policy")] are statements of policy and should not be treated as part of . . . [statutory] procedure . . . ."); *Paschal v. Myers*, 129 N.C. App. 23, 29, 497 S.E.2d 311, 315 (1998) ("Plaintiff maintains . . . the mere fact that the . . . Board of County Commissioners had adopted, as an ordinance, the County's personnel policies contained in the Handbook demands that the Handbook's personnel policies were a part of his [employment] contract. This argument is unpersuasive."); *Lennon v. N.C. Dept. of Justice*, No. COA15-660, 2016 WL 1565892, at *4 (N.C. Ct. App. Apr. 19, 2016) (unpublished) ("Because petitioner cannot establish that the State was contractually bound to provide services for his legal defense in the underlying civil action, petitioner has consequently failed to establish a waiver of sovereign immunity by contract.").

Furthermore, the Resolution does not provide substantive rights or procedural steps. *Contra Bailey v. State*, 348 N.C. 130, 146, 500 S.E.2d 54, 63 (1998) (Acknowledging that "the relationship between employees vested in the retirement system and the State [was] contractual in nature," the Court found evidence in the record to support the trial court's finding that "the tax exemption was a term of the retirement benefits offered in exchange for public service to state and local governments."); *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 545, 552, 344 S.E.2d 821, 822, 826 (1986) (acting under the authority of N.C. Gen. Stat. § 160A-162 (1982), authorizing municipal corporations to fix salaries or other compensation or to approve and adopt pay plans to compensate

city employees, the City Council passed an ordinance wherein "[e]ach full-time employee shall earn vacation leave at the rate of five-sixths (5/6) workdays per calendar month of service"). Thus, I would hold that the Resolution is not a contractual provision upon which plaintiff can compel defendant's performance.

While we acknowledge there is plenary support for the proposition that an employer-employee relationship is essentially contractual and such a relationship often waives immunity from suit on the contract, *see Sanders v. State Pers. Comm'n*, 183 N.C. App. 15, 21, 644 S.E.2d 10, 14 (2007) ("[T]he existence of the relation of employer and employee . . . is essentially contractual in its nature, and is to be determined by the rules governing the establishment of contracts, express or implied. *Hollowell v. Department of Conservation and Development*, 206 N.C. 206, 208, 173 S.E. 603, 604 (1934)," as quoted by *Archer v. Rockingham Cnty.*, 144 N.C.App. 550, 557, 548 S.E.2d 788, 792–93 (2001)); *Sanders*, 183 N.C. App. at 22, 644 S.E.2d at 14 ("Under [*Smith v. State*, 289 N.C. 303, 320, 222 S.E.2d 412, 424 (1976)], because the State entered into a contract of employment with [the] plaintiffs, it now occupies the same position as any other litigant." (citation omitted)), here, the Resolution central to this action is not a contractual provision.

Though the majority opinion frames the issue as purely a determination of whether the employee-employer relationship between plaintiff and defendant is a contractual one and reasons that that alone determines the waiver of defendant's immunity, I believe that the record before the trial court was sufficient to determine that plaintiff could not establish a valid contractual agreement with defendant City of Greensboro on the issue central to this action, the provision of a legal defense as a condition of employment. Moreover, there is no indication of an express waiver or an applicable insurance provision. Thus, I would hold the trial court was correct in concluding that defendant City of Greensboro, a municipality, did not waive its governmental immunity to plaintiff's suit. Therefore, I would affirm the order of the trial court granting defendant's motion to dismiss plaintiff's complaint. Accordingly, I dissent.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 7 JUNE 2016)

ALLMOND v. GOODNIGHT No. 15-1139	Guilford (11CVS6901) (11CVS8578)	Affirmed
BIBBS v. BIBBS No. 15-1030	Wake (13CVD10578)	Reversed and Remanded
BIO-MED. APPLICATIONS OF N.C., INC. v. N.C. DEP'T OF HEALTH & HUMAN SERVS. No. 15-815	Office of Admin. Hearings (14DHR5495)	Affirmed
DIAZ v. SPANISH CONTR'RS No. 15-764	N.C. Industrial Commission (13-712593) (PH-3437)	Affirmed
DEP'T OF TRANSP. v. ASHCROFT DEV., LLC No. 15-1080	Rockingham (10CVS1365)	Affirmed
FRIDAY INVS., LLC v. BALLY TOTAL FITNESS OF MID-ATL., INC. No. 15-822	Mecklenburg (14CVS8495)	Dismissed
GRUBB v. PEAL No. 15-1109	Pitt (10CVD2687)	Affirmed
IN RE A.R. No. 15-1128	Brunswick (15JA24)	Affirmed
IN RE K.A.K. No. 15-1082	Davie (15JT2)	Affirmed
IN RE P.R. No. 15-552	Alamance (12JB154)	Affirmed
IN RE T.C.R. No. 15-1366	New Hanover (14JT82)	Affirmed
KEATON v. ERMC III No. 15-1108	N.C. Industrial Commission (14-706944)	Affirmed
PHAETON AVIATION, INC. v. 360 AVIATION, LLC No. 15-564	Wake (13CVS16833)	Affirmed

PRYOR v. CITY OF RALEIGH No. 15-1403	Wake (15CVS2882)	Affirmed
REID v. STATE No. 15-1059	Anson (14CVS407)	Affirmed
STATE v. BUMPERS No. 16-1	Franklin (14CRS52561)	Reversed
STATE v. BYRD No. 15-478	Wake (13CRS229919)	No Error
STATE v. DOWELL No. 15-1158	Forsyth (13CRS59023) (13CRS61448-49)	No Error
STATE v. GANN No. 15-1344	Buncombe (14CRS311) (14CRS84454) (14CRS84455)	Vacated
STATE v. HINTON-DAVIS No. 15-1290	Granville (14CRS50995)	No Error in Part; Vacate and Remand in Part.
STATE v. JONES No. 15-1187	Davie (14CRS350) (14CRS50082) (14CRS50083)	No Error
STATE v. LEWIS No. 15-1182	Brunswick (15CRS50950-952)	Remanded
STATE v. MARISIC No. 15-1211	Onslow (13CRS55167)	No Error
STATE v. OAKLEY No. 15-1126	Iredell (13CRS55068) (13CRS55072) (14CRS454) (15CRS540)	No error in part; vacated and remanded in part

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