248 N.C. App.—No. 1 Pages 1-123

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

NOVEMBER 5, 2018

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Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

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Assistant Director
David Alan Lagos

Staff Attorneys
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Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
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David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

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CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Mootness—past election—exception for issue capable of repetition but escaping review—not applicable—A case involving an election that had come and gone was moot. A procedural issue that the N.C. State Board of Elections contended survived was not capable of repetition, yet evading review. The U.S. Supreme Court had specified that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy would recur involving the same complaining party. Here, the Court of Appeals could not discern a reasonable expectation, much less a demonstrated probability, that the same complaining party would again be subject to the same action. **Anderson v. N.C. State Bd. of Elections, 1.**

Mootness—past election—public interest exception—not applicable—The public interest exception to mootness did not apply in a case involving a past election where the N.C. State Board of Elections' argument was focused on its own interests, in essence seeking an advisory opinion. The matter was not one of such general importance as to justify application of the public interest exception. **Anderson v. N.C. State Bd. of Elections, 1.**

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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STELLA ANDERSON, PAM WILLIAMSON, MARIANNE CLAWSON, ALAINA DOYLE, LAUREN LARUE JOYNER, IAN O'KEEFE, AND DAVID SABBAGH, PETITIONERS
v.
THE NORTH CAROLINA STATE BOARD OF ELECTIONS, RESPONDENT

No. COA14-1369

Filed 21 June 2016

1. Appeal and Error—mootness—past election—exception for issue capable of repetition but escaping review—not applicable

A case involving an election that had come and gone was moot. A procedural issue that the Board contended survived was not capable of repetition yet evading review. The United States Supreme Court has specified that there must be a "reasonable expectation" or a "demonstrated probability" that the same controversy will recur involving the same complaining party. Here, the Court of Appeals could not discern a reasonable expectation, much less a demonstrated probability, that the same complaining party would again be subject to the same action.

2. Appeal and Error—mootness—past election—public interest exception—not applicable

The public interest exception to mootness did not apply in a case involving a past election where the Board's argument was focused on its own interests, in essence seeking an advisory opinion. The matter is not one of such general importance as to justify application of the public interest exception.

Judge DILLON dissenting.

Appeal by respondent from order entered 13 October 2014 by Judge Donald W. Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 August 2015.

Bailey & Dixon, LLP, by Sabra J. Faires and William R. Gilkeson, Jr., for petitioner-appellees.

Attorney General Roy Cooper, by Special Deputy Attorney General Katherine A. Murphy, for respondent-appellant.

CALABRIA, Judge.

Respondent North Carolina State Board of Elections ("the Board") appeals from the superior court's order requiring it to adopt an early voting plan in Watauga County that included at least one site on Appalachian State University's campus during the 2014 general election. Because we hold that this appeal is moot, it must be dismissed.

I. Background

Pursuant to our General Statutes, registered voters in North Carolina may, as an alternative to voting in person at their assigned precincts on Election Day, vote by mail-in absentee ballot. N.C. Gen. Stat. §§ 163-226, -227.2 (2015). Registered voters may also cast ballots through a procedure called "one-stop absentee voting," which is also known as "early voting." *Id.* § 163-227.2 (2015).

From 2006 until its 2013 municipal election, Watauga County elections included an early voting and an Election-Day voting site in Boone on the Appalachian State University campus ("ASU"). Subsequently, the Watauga County Board of Elections ("WCBOE") made numerous changes and departed from the customary voting sites. Specifically, the early voting plan for the 2014 primary did not include any Boone site other than the required site at the WCBOE office and four sites located in rural parts of Watauga County.

On 23 July 2014, the WCBOE met to adopt an early voting plan. The three-member board submitted two early voting plans for the 2014 general election. One plan included an early voting site on ASU campus ("minority plan") and the other plan, ("the majority plan") had five sites but did not include an early voting site on ASU's campus. Although the WCBOE voted on the competing proposals, they did not reach a unanimous agreement on an early voting plan for Watauga County.

N.C. Gen. Stat. § 163-227.2(g) provides that

> [i]f a county board of elections . . . has been unable to reach unanimity in favor of a Plan, a member or members of that county board of elections may petition the State Board of Elections to adopt a plan for it. If petitioned, the State Board may also receive and consider alternative petitions from another member or members of that county board. The State Board of Elections may adopt a Plan for that county. The State Board, in that plan, shall take into consideration factors including geographic, demographic, and partisan interests of that county.

N.C. Gen. Stat. § 163-227.2(g) (2015). At the time of the 2014 general election, subsection 163-227.2(g) further provided that the Board could make available a plan that did not offer early voting at the county board of elections office, but "only if the Plan include[d] at least one site reasonably proximate to the county board of elections office and the . . . Board [found] that the sites in the Plan as a whole provide[d] adequate coverage of the county's electorate." *Id.* § 163-227.2(g) (2014).

Since the WCBOE members were unable to adopt a unanimous early voting plan, they petitioned the Board to adopt a plan for Watauga County pursuant to subsection 163-227.2(g). As a result, the competing proposals for the minority and majority plans were submitted for the Board's consideration. After the Board considered proposals at a 21 August 2014 hearing, it adopted the WCBOE's majority plan without significant changes. On 29 August 2014, the Board memorialized its decision in a form letter addressed to the WCBOE's Director.

On 19 September 2014, seven registered voters in Watauga County ("Petitioners") filed a Petition for Judicial Review in Wake County Superior Court. The petition requested that the superior court determine whether the Board abused its discretion by adopting the majority plan for Watauga County, and it was filed pursuant to N.C. Gen. Stat. 163-22(l), which provides:

> Notwithstanding any other provision of law, in order to obtain judicial review of any decision of the State Board of Elections rendered in the performance of its duties or in the exercise of its powers under this Chapter, the person seeking review must file his petition in the Superior Court of Wake County.

N.C. Gen. Stat. § 163-22(l) (2015). Petitioners alleged that the Board made no findings to explain how it took the geographic, demographic, and partisan interests of Watauga County into consideration. They also alleged that the Board violated Article I, Section 19 and Article VI, Section I of the North Carolina Constitution and the 14th and 26th Amendments to the United States Constitution by erecting barriers for voters aged 18 to 25. Based on these allegations, petitioners asked the court to remand the majority plan to the Board to enter findings and explain its bases for adopting it.

In response, the Board filed a motion to dismiss the petition on seven enumerated grounds, the majority of which challenged the trial court's subject matter jurisdiction to hear and rule on the petition. According to the Board, the petition was improperly brought because it did not seek judicial review of either a "contested case" brought under Chapter 150B of North Carolina's General Statutes or a decision of the Board "made in its quasi-judicial capacity under Chapter 163 of the General Statutes." Rather, the Board contended, the petition impermissibly sought review of the Board's decision, which was made pursuant to subsection 163-227.2(g) and "in its supervisory capacity over the [WCBOE]." After conducting a hearing on the Board's motion, the superior court entered an order on 13 October 2014. The order concluded that "[u]nder the unique circumstances of this case, [the Board's] early voting plan for [Watauga County was] subject to review by the Wake County Superior Court under [subsection] 163-22(l)." After reviewing the entire record before it, the superior court could find "no other intent from [the WCBOE's majority plan] other than to discourage student voting," and as a result, the court concluded that the plan "r[ose] to the level of a constitutional violation of [students'] right to vote." The superior court's order also denied the Board's motion to dismiss in its entirety and remanded the case for the Board to adopt an early voting plan for Watauga County for the 2014 November general election that included at least one voting site on the ASU campus. The Board appeals.

II. Analysis

A. Mootness and the Generally Applicable Law

Since the 2014 election is over and petitioners were granted the relief they sought, we must address whether the issues presented by this appeal are moot.

"A case is 'moot' when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing

controversy." *Roberts v. Madison Cnty. Realtors Ass'n*, 344 N.C. 394, 398-99, 474 S.E.2d 783, 787 (1996) (citation omitted). For well over a century, our state courts and the federal courts have largely refused to address questions deemed moot. *See, e.g.*, *Crawley v. Woodfin*, 78 N.C. 4, 6 (1878); *Mills v. Green*, 159 U.S. 651, 653, 40 L. Ed. 293, 293-94 (1895). While the mootness doctrine has been formulated in different ways, it must be understood as a core concept of justiciability, a general term which refers to whether a legal controversy is "appropriate or suitable" for judicial adjudication. *Black's Law Dictionary* 696 (9th ed. 2009); *see also Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257, 400 S.E.2d 435, 437 (1991) ("A justiciable issue has been defined as an issue that is 'real and present as opposed to imagined or fanciful.' " (quoting *K & K Dev. Corp. v. Columbia Banking Fed. Sav. & Loan*, 96 N.C. App. 474, 479, 386 S.E.2d 226, 229 (1989))) (citations omitted). However, whether a moot case is appropriate for judicial disposition may depend largely upon the tribunal that confronts it.

In the federal context, mootness was generally applied as though it were a prudential or discretionary doctrine until the mid-twentieth century. *Honig v. Doe*, 484 U.S. 305, 330, 608, 98 L. Ed. 2d 686, 711 (1988) (Rehnquist, J. concurring) ("[I]t seems very doubtful that the earliest case I have found discussing mootness, *Mills v. Green*, . . . was premised on constitutional constraints[.]"). However, in 1964, The United States Supreme Court recognized mootness as a constitutional limitation on the jurisdiction of federal courts, which pursuant to Article III, Section 2 of the United States Constitution may decide only actual, ongoing cases and controversies. *Liner v. Jafco, Inc.*, 375 U.S. 301, 306 n.3, 11 L. Ed. 2d 347, 351 n.3 (1964) ("Our lack of jurisdiction to review moot cases derives from the requirement of Article III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy."). The mootness doctrine is also rooted in the prohibition against advisory opinions. *North Carolina v. Rice*, 404 U.S. 244, 246, 30 L. Ed. 2d 413, 415 (1971). For these reasons, "Article III denies federal courts the power 'to decide questions that cannot affect the rights of litigants in the case before them,' " while confining them "to resolving 'real and substantial controvers[ies] admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.' " *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477, 108 L. Ed. 2d 400, 411 (1990) (quoting *Rice*, 404 U.S. at 246, 30 L. Ed. 2d at 415). All told, the constitutional jurisdictional underpinnings of mootness are now well

established,[1] *e.g.*, *Honig*, 484 U.S. at 317-18, 98 L. Ed. 2d at 703, and the doctrine presents issues of justiciability at all stages of judicial proceedings. *Steffel v. Thompson*, 415 U.S. 452, 459 n.10, 39 L. Ed. 2d 505, 515 n.10 (1974) ("The rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.").

By contrast, in state courts "[t]he exclusion of moot questions . . . represents a form of judicial restraint." *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). This principle of restraint does not implicate jurisdiction but rather it is partially grounded in the notion that " '[j]udicial resources should be focused on problems which are real and present rather than dissipated . . ., hypothetical[,] or remote questions[.]' " *Crumpler v. Thornburg*, 92 N.C. App. 719, 722, 375 S.E.2d 708, 710 (1989) (citation omitted). In particular, "courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912. Our state-court mootness doctrine is also justified by the notion that a judicial tribunal's "inherent function . . . is to adjudicate genuine controversies between antagonistic litigants with respect to their rights, status, or other legal relations." *Angell v. City of Raleigh*, 267 N.C. 387, 389-90, 148 S.E.2d 233, 235 (1966) (citation and internal quotation marks omitted). Therefore, as a general rule, "[w]henever, during the course of litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed[.]" *In re Peoples*, 296 N.C. at 147, 250 S.E.2d at 912.

Despite the differences in its origins at the state and federal levels, the mootness doctrine's limits "are articulated almost identically in the federal courts and the courts of this State." *Thomas v. N.C. Dep't of*

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1. We note that courts and treatises have raised significant questions about the constitutional model of mootness in federal courts. Judges and scholars alike have argued that if the mootness bar was truly jurisdictional in nature, courts would have no authority to hear moot cases, even where prudential factors favored doing so. *See, e.g.*, *Honig*, 484 U.S. at 330, 98 L. Ed. 2d at 711 (1988) (Rehnquist, J. concurring) ("If our mootness doctrine were forced upon us by the case or controversy requirement of Art. III itself, we would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review than we would to decide cases which are 'moot' but raise no such questions."); 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3533.1 (3d ed. 1998) ("There is reason to wonder whether much reliance should be placed on constitutional concepts of mootness when . . . all ordinary needs can be met by the discretionary doctrines. The Article III approach is nonetheless firmly entrenched, and must be reckoned the major foundation of current doctrine.").

Human Res., 124 N.C. App. 698, 705, 478 S.E.2d 816, 820 (1996) (citation omitted). Thus, federal treatment of the mootness doctrine may be instructive to state courts when they are confronted with moot questions in a variety of contexts.

Here, the trial court's order required the Board to adopt a plan that included the location of an early voting site on ASU's campus during the 2014 election. Since the petitioners were granted the relief they sought, and the 2014 election has come and gone, all parties agree that this case is technically moot. In addition, neither party contends that the substantive legal issue in this case—whether the WCBOE's majority plan infringed the constitutional rights of students—is still alive. The Board, however, asserts that an important procedural question has survived on appeal. Specifically, the Board argues, and asks this Court to decide, that the superior court does not have jurisdiction under subsection 163-22(l) to conduct a judicial review of a "decision made by [the] Board in the exercise of its supervisory capacity over county boards of elections."

B. Capable of Repetition, Yet Evading Review Exception to Mootness

[1] Although "the general rule is that an appeal presenting a question which has become moot will be dismissed[,]" *id.* (citation and internal quotation marks omitted), courts may consider moot cases falling within one of several limited exceptions to the doctrine. *See In re Investigation Into the Injury of Brooks*, 143 N.C. App. 601, 604, 548 S.E.2d 748, 751 (2001) (recognizing "at least five exceptions to the general rule that moot cases should be dismissed"). The Board contends that the procedural issue it has raised under subsection 163-22(l) falls within two established exceptions to mootness. The Board first argues that we are permitted to address the merits of this otherwise moot appeal because the case is " 'capable of repetition, yet evading review.' "[2] *Shell*

2. We note that the United States Supreme Court has repeatedly described mootness as " 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).' " *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n.22, 137 L. Ed. 2d 170, 193 n.22 (1997) (quoting *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397, 63 L. Ed. 2d 479, 491 (1980) (citation omitted)). However, the Court has also noted that this description of mootness "is not comprehensive." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190, 145 L. Ed. 2d 610, 633 (2000). Thus, in applying well established exceptions to the mootness doctrine, courts should not confuse mootness with standing: The "[s]tanding doctrine functions to ensure, among other things, that the scarce resources of the federal courts are devoted to those disputes in which the parties have a concrete stake. In contrast, by the time mootness is an issue, the case has been brought and litigated, often . . . for years. *Id.* at 191, 145 L. Ed. 2d at 634; *see also Renne v. Geary*, 501 U.S. 312, 320, 111 S. Ct. 2331, 2338, 115 L. Ed. 2d 288, 301

Island Homeowners Ass'n, Inc. v. Tomlinson, 134 N.C. App. 286, 292, 517 S.E.2d 401, 405 (1999); *see also Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006) ("A case is not moot . . . if a party can demonstrate that the apparent absence of a live dispute is merely a temporary abeyance of a harm that is 'capable of repetition, yet evading review.' " (quoting *Mellen v. Bunting*, 327 F.3d 355, 364 (4th Cir. 2003)). We disagree.

The " 'capable of repetition, yet evading review' " exception applies when: " '(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.' " *130 of Chatham, LLC v. Rutherford Electric Membership Corp.*, __ N.C. App. __, __, 771 S.E.2d 920, 926 (2015) (citation omitted). Since the parties agree that this case satisfies the first prong, we see no reason to address it: the majority of election cases are unique in that the controversy's endpoint, the election itself, is firmly established and beyond the control of litigants. As to the second prong, the United States Supreme Court has specified "that a mere physical or theoretical possibility [is not] sufficient to satisfy the test . . . . Rather, . . . there must be a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party."[3] *Murphy v. Hunt*, 455 U.S. 478, 482, 71 L. Ed. 2d 353, 357 (1982) (citation omitted). The Court has further stated that the capable-of-repetition exception "applies only in exceptional situations." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 75 L. Ed. 2d 675, 689 (1983). For the

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(1991) ("[T]he mootness exception for disputes capable of repetition yet evading review . . . will not revive a dispute which became moot before the action commenced.") (internal citation omitted).

3. The United States Supreme Court has determined that a "reasonable expectation may be satisfied by something less than a "demonstrated probability." *Honig*, 484 U.S. at 319 n.6, 98 L. Ed. 2d at 704 n.6 (citing "numerous cases" where the Court "found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable"). However, in *Honig*, Justice Scalia argued that the majority's reasoning on this point was circular, and he insisted that for there to be a "reasonable expectation" that a party will be subjected to the same action again, the relevant event must be a "demonstrated probability." *Id.* at 334, 108 S. Ct. 592, 610, 98 L. Ed. 2d at 714 (Scalia, J, dissenting) ("It is obvious that in saying 'a reasonable expectation or a demonstrated probability' we have used the conjunction in one of the latter, or nondisjunctive, senses. Otherwise (and according to the Court's exegesis), we would have been saying that a controversy is sufficiently likely to recur if either a certain degree of probability exists or a higher degree of probability exists."). It appears that North Carolina courts have not addressed this issue (or even included the "demonstrated probability" language in the capable-of-repetition analysis). In any event, here, the Board has failed to meet either threshold.

reasons that follow, we cannot discern a reasonable expectation, much less a demonstrated probability, that the same complaining party will again be subject to the same action.

While the term "same action" may not hold an inflexible meaning,[4] it is clear that the capable-of-repetition exception requires specificity between a case deemed moot and one that may arise in the future. *See, e.g.*, *Sullivan v. Wake Cnty. Bd. of Educ.*, 165 N.C. App. 482, 488, 598 S.E.2d 634, 638 (2004) ("There is no reasonable expectation that the same complaining party[—parents who challenged their son's elementary school assignment—]would be subject to the *same factors* used by the school board in making its assignment/transfer determinations for *any school year beyond* 2002-2003.") (emphasis added); *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 654, 566 S.E.2d 701, 704 (2002) (newspaper publisher's action against city council for alleged violations of public records laws was technically moot, but there was "a reasonable likelihood that [the council], in considering the acquisition of other property for municipal purposes, could *repeat the conduc*t which is *at issue here*, subjecting [the publisher] to the same action") (emphasis added); *Crumpler*, 92 N.C. App. at 724, 375 S.E.2d at 712 (case not capable of repetition where it had "been more than two years since plaintiff filed [his] suit and he ha[d] yet to be arrested or refused a permit for a similar demonstration"). It is equally clear that the term ordinarily refers to a decision, practice, or other harm that was challenged and litigated by a plaintiff, or a "complaining party." Although North Carolina courts have not squarely addressed this issue, the United States Supreme Court has specified that the capable-of-repetition doctrine "applies . . . generally only where the *named plaintiff* can make a reasonable showing that he will again be subjected to the alleged illegality." *Lyons*, 461 U.S. at 109, 75 L. Ed. 2d 689 (emphasis added). Thus, as a general rule, the "same action" must be understood as referring to the conduct that gave rise to the plaintiff's (or complainant's) claims in the relevant proceeding or lawsuit. *See Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011) (concluding that challenge of Virginia State Board of Elections decision brought by former congressional candidate and

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4. We note that this Court recently held the capable-of-repetition exception "does not require [an examination] of the exact same action occurring in the future[;]" rather, it allows consideration of "similarly situated parties[.]" *Cumberland Cnty. Hosp. Sys., Inc. v. N.C. Dep't of Health & Human Servs.*, __ N.C. App. __, __, 776 S.E.2d 329, 335 (2015). However, the holding in *Cumberland Cnty.* has no bearing on our analysis in this case. As explained below, the Board completely reinvents the "same action" requirement of the exception, and it cannot be considered the "same complaining party."

his supporters was " 'capable of repetition' " when " 'there [was] a reasonable expectation that the challenged provisions [would] be applied against the plaintiffs again during future election cycles' ") (citation omitted); *Shell Island Homeowners Ass'n*, 134 N.C. App. at 292, 517 S.E.2d at 405 ("Assuming *arguendo* that the claims are capable of repetition, there is no evidence to suggest that [the] plaintiff's grievances have evaded review.").

Despite these well-established principles, the Board attempts a clever "bait and switch" on appeal: it contends that the central issue is whether the superior court "has jurisdiction to hear what amounts to a collateral attack on a decision of the . . . Board to adopt an early voting plan for a county in which the county board of elections was not unanimous." Based on this characterization of the case, the Board argues that "absent a ruling from this Court clarifying the superior court's jurisdiction, it is reasonably likely that the . . . Board will again find itself in this same position, namely, forced to defend against a collateral challenge to an early voting plan that [it] has approved or adopted[.]" The Board's approach is inherently flawed, however, because it impermissibly recasts the nature of the parties' dispute. In making its arguments, the Board turns the capable-of-repetition exception on its head. Our review of the pertinent case law reveals that the exception is intended to allow plaintiffs to obtain a judgment or appellate review in cases where the two prongs are met; it is not designed to protect defendants or respondents from future lawsuits. Accordingly, based on the facts of this case, the "same action" is not whether the Board might be forced to defend against its adoption of a future early voting plan, but whether future registered voters will challenge an early voting plan adopted by the Board as violative of the constitutional rights of voters aged 18 to 25.

We agree with petitioners that a series of speculative events must occur for a similar controversy, i.e., the "same action," to arise again: (1) a local board of elections must be unable to adopt a unanimous early voting plan; (2) the majority members of the local board must adopt a plan which allegedly discriminates against young voters and violates their state and federal constitutional rights; (3) the Board must review competing plans from the local board and adopt the majority plan without significant change; (4) and one or more voters must file a petition for judicial review of the Board's decision pursuant to subsection 163-22(l). Another factor weighing against the repetition of the same action is the ever-changing composition of the Board and local boards of election. *See* N.C. Gen. Stat. §§ 163-19 (2015) (providing four-year terms (and a maximum of two consecutive terms) for members of the Board); 163-30 (2015) (providing two-year terms for members of local boards).

In a rather tepid response to this line of reasoning, the Board asserts that the issue it "asks this Court to review is the purely procedural question of whether the superior court has jurisdiction to hear a petition for judicial review of the adoption of an early voting plan, irrespective of the reasons underlying the challenge." The Board's position, as we understand it, is simply that it would like to know if its future adoptions of early voting plans for counties will be subject to judicial review under subsection 163-22(l). Indeed, at oral argument, the Board stated that it would like the "comfort" of knowing whether subsection 163-227.2(g) requires it to adjudicate the constitutional rights of voters when it adopts an early voting plan for a county. Yet as our Supreme Court has previously pointed out, it is not a proper function of courts " 'to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter.' " *Adams v. N.C. Dept. of Natural and Economic Res.*, 295 N.C. 683, 704, 249 S.E.2d 402, 414 (1978) (citation omitted). By seeking "clarification" and "comfort," the Board is surely asking us for advice we are not obliged to give. More to the point, just because the Board says the procedural issue it has identified may arise again does not make that issue the "same action" for purposes of analysis under the capable-of-repetition exception to mootness.

The second prong of the exception is also unsatisfied here because the Board—the respondent in this case—wrongly characterizes itself as the same "complaining party." *See Black's Law Dictionary* 323 (9th ed. 2009) (defining "complainant" as "[t]he party who brings a legal complaint against another; esp[ecially], the plaintiff in a court of equity or, more modernly, a civil suit"). Although situations may arise where a defendant or respondent can be considered the complaining party for purposes of this exception to mootness, we are aware of no North Carolina appellate decisions that have adopted such an approach. As we have intimated above, the implicit rule in North Carolina is that the term "complaining party" invariably refers to plaintiffs who could be subjected to the complained of activity again in the future. *See*, *e.g.*, *Sullivan*, 165 N.C. App. at 488, 598 S.E.2d at 638 (analyzing whether the respondent school board would subject the petitioners' son to the same action again); *Boney Publishers, Inc.*, 151 N.C. App. at 654, 566 S.E.2d at 704 (analyzing whether the defendant might subject the plaintiff to the same action again); *Crumpler*, 92 N.C. App. at 724, 375 S.E.2d at 712 (same). Several federal circuit courts have explicitly recognized this rule. *See Sierra Club v. Glickman*, 156 F.3d 606, 620 (5th Cir. 1998) ("By its very terms, the exception is designed to protect plaintiffs; it is not designed to protect defendants from the possibility of future lawsuits[.]"); *Fischbach*

v. N.M. Activities Ass'n, 38 F.3d 1159, 1161 (10th Cir. 1994) ("The mere fact that the [defendant] claims the action is not moot does not make [it] the complaining party for purposes of analysis under the exception to the mootness doctrine. The complaining parties in this action are the [plaintiffs], and it has been established that they will not be subjected to the actions of the [defendant] again."); *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985) ("The . . . [capable of repetition exception] usually is applied to situations involving governmental action where it is feared that the challenged action will be repeated. The defending party being constant, the emphasis is on continuity of identity of the complaining party. When the litigation is between private parties, we must consider whether the anticipated future litigation will involve the same defending party as well as the same complaining party.").

Here, petitioners' allegations that the Board adopted an unconstitutional early voting plan gave rise to the original action; however, the superior court's order resolved the case to their satisfaction, and there is no reason to believe that they will be subjected to the same action in future elections. By contrast, on appeal, the Board complains that under petitioners' "view of the law, any disgruntled voter who is dissatisfied with the early voting plan adopted for his or her county may file a petition in the Superior Court of Wake County challenging the . . . Board's approval or adoption of an early voting plan for the county, as a means of changing a plan that is not to his or her liking." This contention assumes that the superior court would find that it had jurisdiction under subsection 163-22(l) in any conceivable scenario. Furthermore, at oral argument, the Board insisted that it was "extraordinary" for the superior court to rule on petitioners' constitutional claims based on such a "thin" record (i.e., no evidentiary hearing was held and the Board made no findings). The Board then declared that petitioners should have filed an "independent" action invoking the superior court's original jurisdiction. But when asked how the record would have differed in any material way had petitioners brought a declaratory judgment action or a suit for injunctive relief, the Board had no viable answer. As such, the Board is simply positing a distinction without a difference, and it cannot be considered the complaining party for purposes of the capable-of-repetition exception to the mootness doctrine. In other words, the Board's argument is little more than a complaint about the *form* of future legal actions which may be filed against it. Even if we accepted the Board's view on the issues its appeal purportedly presents, the fact that petitioners could have obtained review of the Board's decision through other legal and procedural avenues suggests that *all* aspects of this case are moot.

In sum, since there is no reasonable expectation that petitioners (the complaining party in this case) will be subject to the same action again, the Board cannot demonstrate that this particular controversy will repeat itself. Accordingly, based on the record before us, we conclude that this case is not one that is capable of repetition, yet evading review.

C. Public Interest Exception to Mootness

[2] The Board also argues that the public interest exception to mootness applies in this case. Once again, we disagree.

A court may consider a case that is technically moot if it "involves a matter of public interest, is of general importance, and deserves prompt resolution." *N.C. State Bar v. Randolph*, 325 N.C. 699, 701, 386 S.E.2d 185, 186 (1989). However, this is a very limited exception that our appellate courts have applied only in those cases involving clear and significant issues of public interest. *See, e.g.*, *Granville Cnty. Bd. of Comm'rs v. N.C. Hazardous Waste Mgmt. Comm'n*, 329 N.C. 615, 623, 407 S.E.2d 785, 790 (1991) ("Because the process of siting hazardous waste facilities involves the public interest and deserves prompt resolution in view of its general importance, we elect to address it."); *State v. Corkum*, 224 N.C. App. 129, 132, 735 S.E.2d 420, 423 (2012) (holding that an issue of structured sentencing under the Justice Reinvestment Act of 2011 required review because "all felons seeking confinement credit following revocation of post-release supervision will face similar time constraints when appealing a denial of confinement credit effectively preventing the issue regarding the trial judge's discretion from being resolved"); *In re Brooks*, 143 N.C. App. at 605-06, 548 S.E.2d at 751-52 (applying the public interest exception to police officers' challenge of a State Bureau of Investigation procedure for handling personnel files containing "highly personal information" and acknowledging that "the issues presented . . . could have implications reaching far beyond the law enforcement community").

Our review of the Board's arguments is animated by the following principles. First, North Carolina courts "do not issue anticipatory judgments resolving controversies that have not arisen." *Bland v. City of Wilmington*, 10 N.C. App. 163, 164, 178 S.E.2d 25, 26 (1970), *rev'd on other grounds*, 278 N.C. 657, 180 S.E.2d 813 (1971). Second, litigants are not permitted "to fish in judicial ponds for legal advice." *Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 584, 347 S.E.2d 25, 29 (1986) (citation omitted).

We begin by noting that the arguments the parties make, and the words they use, before this Court matter. In the instant case, the Board

requests that we provide "proper *guidance* . . . so that [the Board] can provide the appropriate procedure at its hearings on matters brought before it pursuant to [section] 163-227.2." (Emphasis added). The Board also insists that "[t]his appeal [should] determine whether the . . . Board is *required* to conduct . . . hearings [on non-unanimous early voting plans for counties] as quasi-judicial hearings." (First emphasis added). Such language suggests that the Board intends to "put [the requested opinion] on ice to be used if and when [the] occasion might arise." *Tryon v. Power Co.*, 222 N.C. 200, 204, 22 S.E.2d 450, 453 (1942). In essence, we have been asked to render a declaratory judgment, complete with practical advice, on how the Board must perform its duties pursuant to section 163-227.2. This we cannot do. Furthermore, deciding the issues raised by the Board on appeal would require us to issue an advisory opinion, something we are unwilling and unauthorized to give. *E.g.*, *In re Wright*, 137 N.C. App. 104, 111-12, 527 S.E.2d 70, 75 (2000) (" '[T]he courts have no jurisdiction to determine matters purely speculative, enter anticipatory judgments, . . . deal with theoretical problems, give advisory opinions, . . . provide for contingencies which may hereafter arise, or give abstract opinions.' " (omission in original) (quoting *Little v. Wachovia Bank & Trust Co.*, 252 N.C. 229, 243, 113 S.E.2d 689, 700 (1960))). Although "guidance" is always useful in the election-law context, the Board's arguments fail to demonstrate why the procedural issues it raises deserve prompt resolution.

The Board also fails to explain how the particular judicial review that petitioners obtained implicates any greater public interest, nor do we believe that it does. Instead, the Board's "public interest" argument is focused on its own interests, to wit: it seeks advice on how to conduct hearings on early voting plans and what resources must be employed in that process. But self-serving contentions based upon a theoretical state of affairs cannot defeat the principle of judicial restraint that sustains our State's mootness doctrine. Simply put, the matter is not one of such "general importance" as to justify application of the public interest exception. *Beason v. N.C. Dep't of Sec'y of State*, 226 N.C. App. 233, 239, 741 S.E.2d 663, 667 (2013) (citation omitted).

III. Conclusion

The 2014 election is over and the superior court's order granted petitioners the relief they sought. As a result, this appeal presents questions that are moot. Despite the Board's arguments to the contrary, there is no reasonable expectation that petitioners will be subjected to the same action again. The issues raised before the superior court, therefore, do

not fall within the capable of repetition, yet evading review exception to the mootness doctrine. In addition, since the Board asserts little more than self-serving interests on appeal, the issues it has presented to this Court are not of such public interest as to except this matter from its otherwise moot nature. Accordingly, we dismiss the Board's appeal.

DISMISSED.

Judge ELMORE concurs.

Judge DILLON dissents by separate opinion.

DILLON, Judge, dissenting.

I agree with the majority that this case is technically moot. The 2014 election is over. However, because I conclude that the issues raised are "capable of repetition, yet evading review," my vote is *not* to dismiss this appeal based on mootness. Accordingly, I respectfully dissent.

I. Background

In August 2014, the State Board of Elections (the "Board") exercised its authority to implement a plan (the "2014 Plan") designating early voting sites in Watauga County for the 2014 general election. N.C. Gen. Stat. § 163-227.2 (2013). The 2014 Plan adopted by the Board included a number of voting sites throughout Watauga County, including one location within one mile of the Appalachian State University ("ASU") campus.

In September 2014, seven county residents filed a "Petition for Judicial Review" in Wake County Superior Court seeking an order to compel the Board to include a voting site *on* ASU's campus.

On 13 October 2014, ten days before early voting began, the superior court held a hearing on the petition and issued an order (the same day), concluding that the Plan – requiring would-be ASU students who wanted to vote early to travel one mile to cast the vote – constituted a "significant infringement of [ASU] student rights to vote and rises to the level of a constitutional violation of the right to vote[.]" Accordingly, the court compelled the Board to provide a site on ASU's campus.

On 16 October 2014, the Board filed its notice of appeal to our Court. However, by the time the record on appeal was settled and the appellate briefs had been filed, the 2014 general election was well over.

II. Discussion

The issues pertaining to the 2014 Plan are technically moot; however, the issues involved are exactly the type which are "capable of repetition, yet evading review[.]" *See Reep v. Beck*, 360 N.C. 34, 40, 619 S.E.2d 497, 501 (2005) (recognizing the "capable of repetition, yet evading review" exception as one of the "longstanding exceptions to the mootness rule"). Accordingly, I conclude that the mootness doctrine does not apply.

The Watauga County Board of Election and the Board, which are statutorily empowered to choose the location of "one stop" early voting sites in Watauga County, are each controlled by the sitting Governor's political party.[1] N.C. Gen. Stat. § 163-227.2(g) (2015). In choosing the sites, these boards are afforded some discretion, so long as the decision is not violative of applicable state or federal laws or of the state and federal constitutions. Whatever decision is made on the site locations, certain voters will be required to travel farther than other voters in order to take advantage of early voting.

In 2012, the Democratic-controlled boards decided to locate an early voting site *on* ASU's campus, requiring voters who lived near ASU to travel to the campus to vote (or to a more remote location). The 2014 Plan adopted by the Republican-controlled boards, however, would have provided a site which was more convenient than the 2012 on-campus site for certain voters but less convenient for ASU students living on campus. To be sure, politics may have played some part in the decisions of both boards, but their decisions are nonetheless permissible *unless* violative of state or federal law or our state or federal constitutions. In the same way, our General Assembly has *some* discretion to consider politics in drawing our congressional and legislative districts, *see Hunt v. Cromartie*, 526 U.S. 541, 551, 119 S. Ct. 1545, 1551, 143 L. Ed.2d 731, 741 (1999), *see also Dickson v. Rucho*, ___ N.C. ___, ___, 781 S.E.2d 404, 437 (2015) (recognizing "partisan advantage" as a "legitimate governmental interest[]"), provided the maps do not violate controlling state or federal laws or our state or federal constitutions.

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1. Control by the Governor's party is not mandated, but occurs in practice. The State Board of Elections is set up to be controlled by the Governor's political party as its five members are appointed by the Governor and the Governor is allowed to have a majority come from his/her own party. N.C. Gen. Stat. § 163-19 (2015). The State Board, in turn, appoints each county board's three members, and is allowed to have a majority (two) of each county board to come from the Governor's political party. N.C. Gen. Stat. § 163-30 (2015)

It is now 2016, and the Republicans are still in control of the Watauga County and State boards of elections. The United States Supreme Court has recognized that cases challenging election practices which may otherwise become moot due to an election being held should be nonetheless decided as the issues involved are likely to recur in subsequent elections. *Morse v. Republican Party of Va.*, 517 U.S. 186, 235 n. 48, 116 S. Ct. 1186, 1214 fb. 48, 134 L. Ed.2d 347, 382 n. 48 (1996). Here, the election practice at issue is likely to recur in the 2016 general election. However, like in the present case, any appeal regarding the 2016 general election would most likely *not* be in a position to be resolved by our state appellate courts until well after the election has been held.

In conclusion, I believe the "election practice" issues are ripe for our consideration despite the fact that the 2014 election is over. There is another election just around the corner, and the Watauga County Board will again be faced with whether their plan must provide a voting site on ASU's campus. Accordingly, I believe we should resolve this issue and not dismiss the appeal merely because the 2014 election is over.[2]

2. Also, even if the issues do not fit the criteria for being capable of repetition, yet evading review, I believe that the matter raised here involves substantial issues of public interest – issues involving the integrity of our election process – and, therefore, we should resolve the issues, notwithstanding the fact that the 2014 election is over. These issues include, for example, the scope of the authority of boards of elections to choose early voting sites, the standing of voters to seek judicial review of a decision by a board of elections regarding the location of early voting sites, and the proper procedure to challenge such decisions made by a board of elections.

IN THE MATTER OF THE ESTATE OF RICHARD DIXON PEACOCK
DATE OF DEATH: 12/19/2013

No. COA15-1238

Filed 21 June 2016

1. Husband and Wife—marriage—without license—valid

In an appeal arising from a motion to determine decedent's heirs, decedent and petitioner were held to have been married, with all of the attendant rights and obligations, where petitioner and decedent married, divorced, reconciled, and were remarried at their request by their ordained Episcopal minister at decedent's deathbed (he died the day after) without a marriage license.

2. Appeal and Error—preservation of issues—issue not addressed at trial—not argued as an alternative basis for supporting order

The issue of whether a spouse who had married without a license had renounced her rights to inherit was not before the Court of Appeals where it was not addressed by the trial court based on its resolution of the preceding issue of whether the marriage was valid. Moreover, the issue was not argued as an alternate basis in law for supporting the order.

Appeal by Bernadine Peacock from order entered by Judge Ebern T. Watson, III in Superior Court, New Hanover County. Heard in the Court of Appeals 11 April 2016.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for Appellee.

Johnson Lambeth & Brown, by Regan H. Rozier, for Appellant.

McGEE, Chief Judge.

I.

Richard Dixon Peacock ("Decedent") and Bernadine Peacock ("Petitioner") were married 1 August 1993. Decedent had two children by a prior marriage, Rachel Peacock Ceci ("Rachel") and Richard Eric Peacock ("Eric"). Decedent and Petitioner had three children: two living at the time of this action, Richard Peacock II ("Richard") and Kristen

Alicia Peacock ("Kristen"); and Jonathan Peacock, deceased and without heirs. Decedent and Petitioner divorced in 2007. The uncontested testimony is that Decedent and Petitioner reconciled, and Petitioner moved back into Decedent's house in July 2012. They attended church "every Sunday with Richard, and established a relationship with their pastor, Reverend Dena Bearl ("Reverend Bearl"). Reverend Bearl first assumed Decedent and Petitioner were married, but they informed her they had divorced and reconciled, and that they intended to re-marry, but "never made a solid date." According to Reverend Bearl, Decedent and Petitioner "just said they wanted to do it, and I said, you know, give me a call and we'll get together and discuss it. And, you know, just he got ill and we – they just – we never had that meeting that they wanted to have."

Decedent had chronic medical issues, and Petitioner cared for him. Decedent became ill on 16 November 2013, and required hospitalization. Decedent was twice transferred from the hospital to a rehabilitation facility before returning to the hospital on 14 December 2013. Decedent and Petitioner discussed marriage while Decedent was hospitalized, and decided to marry while Decedent was still in the hospital. Petitioner asked their friend, Mary Bridges "to be . . . her 'maid of honor' as a witness and [Petitioner's] son, Richard, as a best man [and the second witness]." Reverend Bearl visited Decedent in the hospital about every other day, and she agreed to officiate the wedding ceremony at Decedent's and Petitioner's request. Reverend Bearl testified she had been ordained for twenty-two years, had performed many wedding ceremonies in her capacity as a pastor, and was fully authorized by her church to do so. Reverend Bearl testified she performed the regular ceremony that she performs for weddings, though certain parts were shortened. Reverend Bearl testified both Decedent and Petitioner affirmed: "In the name of God, I take you to be my wife[/husband], to have and to hold from this day forward, for better, for worse, richer or poorer, in sickness, in health, to love and to cherish until death[.]" Reverend Bearl then "pronounce[d] [Decedent and Petitioner] husband and wife[,]" and performed "the blessing of the marriage" which, Reverend Bearl testified, "for us [her church] is very important."

However, because Decedent and Petitioner had not procured a marriage license, Reverend Bearl testified:

> It was my intent to provide what I thought was for Richard in the last days of his life some closure to something that he felt and regretted had not been done. So, it was

> a pastoral act on my part. I knew there wasn't a wedding license. I wasn't in there as a representative of the state, which clergy are, you know, when they're doing marriages and have the license present. So, I mean, we all knew that there was not a wedding, a marriage license. So, this was a pastoral and a sacramental – I would say for me it was mainly a sacramental act, a sacrament that they wanted to know that they had.
>
> Q. When you left the room, did you feel that they were now husband and wife?
>
> A. I felt that they felt that they were, that they had taken the vows seriously.
>
> . . . .
>
> Q. Did you discuss with them whether they – you could legally marry them?
>
> A. I – well, I told them that it would not be a legal marriage if we didn't have a license, and they did not have a license. But I believe the sacrament took place, and that was what was important to them.

Petitioner testified that she did not attempt to obtain a marriage license because Decedent was too ill to travel to the register of deeds, and that "we didn't really think about a marriage license, we just were happy to finally get married."

Decedent died intestate on 19 December 2013, the day following the ceremony. Rachel filed an application for letters of administration on 17 April 2014, in which she listed four known heirs: herself, Eric, Richard and Kristen. Petitioner filed a motion for determination of heirs dated 16 October 2014, contending she was the spouse of Decedent when he died and, therefore, she should be included as an heir of Decedent's estate. This matter was initially heard by an Assistant Clerk of Court of New Hanover County on 11 December 2014. The Assistant Clerk of Court concluded that the 18 December 2013 ceremony did "not make [Petitioner] an 'heir' or entitle [Petitioner] to a spousal allowance or the share of the surviving spouse or any other interest in or from the Decedent's Estate." The Assistant Clerk of Court ruled that Decedent's heirs were Rachel, Eric, Richard, and Kristen.

Petitioner appealed the decision to superior court. Petitioner's appeal was heard on 7 May 2015, and additional testimony was permitted.

The trial court, in an order entered 26 May 2015, made its own findings of fact and conclusions of law, and affirmed the Assistant Clerk of Court's decision. Petitioner appeals.

II.

Appellate review of orders of clerks of court is as follows:

> On appeal to the Superior Court of an order of the Clerk in matters of probate, the trial court judge sits as an appellate court. When the order or judgment appealed from does contain specific findings of fact or conclusions to which an appropriate exception has been taken, the role of the trial judge on appeal is to apply the whole record test. In doing so, the trial judge reviews the Clerk's findings and may either affirm, reverse, or modify them. If there is evidence to support the findings of the Clerk, the judge must affirm. . . . The standard of review in this Court is the same as in the Superior Court.

In re Estate of Pate, 119 N.C. App. 400, 402-03, 459 S.E.2d 1, 2-3 (1995) (quotations and citations omitted). "Errors of law are reviewed *de novo*." *Overton v. Camden Cty.*, 155 N.C. App. 391, 393, 574 S.E.2d 157, 160 (2002) (citation omitted). Though Petitioner argues that certain findings of fact were not supported by the evidence, we have thoroughly reviewed the findings of fact and hold that the relevant findings of fact are supported by the evidence. We therefore review the relevant conclusions of law, and the trial court's ruling, *de novo* for errors of law. *Id.*

III.

[1] Petitioner argues that the "[trial] court's judgment is inconsistent with the applicable law." We agree.

The rulings of the Assistant Clerk of Court and the trial court are based upon conclusions that the ceremony conducted on 18 December 2013 did not result in a valid marriage. The "Requisites of marriage" are set forth, in relevant part, in N.C. Gen. Stat. § 51-1 as follows:

> A valid and sufficient marriage is created by the consent of a male and female person[1] who may lawfully marry,

1. This provision limiting the definition of a valid marriage to exclude same-sex couples has been held violative of the United States Constitution. *Fisher-Borne v. Smith*, 14 F. Supp. 3d 695, 698 (M.D.N.C. 2014), *appeal dismissed*, (4th Cir. 2015).

> presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other, either:
>
> (1) a. In the presence of an ordained minister of any religious denomination, a minister authorized by a church, or a magistrate; and
>
> b. With the consequent declaration by the minister or magistrate that the persons are husband and wife[.]

N.C. Gen. Stat. § 51-1 (2015). In the present case, it is undisputed that Decedent and Petitioner were able to lawfully marry at the time of the ceremony; that they seriously and freely expressed their desire to become husband and wife in the presence of each other; that Reverend Bearl was an ordained minister with authority to conduct marriage ceremonies; and that Reverend Bearl declared during the ceremony that Decedent and Petitioner were husband and wife.

However, it is also undisputed that the ceremony was conducted without a marriage license as required by N.C. Gen. Stat. § 51-6, which states:

> No minister, officer, or any other person authorized to solemnize a marriage under the laws of this State shall perform a ceremony of marriage between a man and woman, or shall declare them to be husband and wife, until there is delivered to that person a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage license was issued or by a lawful deputy or assistant.

N.C. Gen. Stat. § 51-6 (2015). Violation of N.C. Gen. Stat. § 51-6 by a minister or other authorized person is a misdemeanor, and is punishable by a fine:

> Every minister, officer, or any other person authorized to solemnize a marriage under the laws of this State, who marries any couple without a license being first delivered to that person, as required by law, or after the expiration of such license, or who fails to return such license to the register of deeds within 10 days after any marriage celebrated by virtue thereof, with the certificate appended thereto duly filled up and signed, shall forfeit and pay two

> hundred dollars ($200.00) to any person who sues therefore, and shall also be guilty of a Class 1 misdemeanor.

N.C. Gen. Stat. § 51-7 (2015).

Our Supreme Court has discussed the consequences of violating the license requirement in N.C. Gen. Stat. § 51-6:

> C.S., 2498,[2] emphasizes the requirement that the license must be first delivered to the officer before the solemnization of the marriage:
>
> > "No minister or officer shall perform a ceremony of marriage between any two persons, or shall declare them to be man and wife, *until* there is delivered to him a license for the marriage of the said persons, signed by the register of deeds of the county in which the marriage is intended to take place, or by his lawful deputy."
>
> It is true that the marriage is not invalid because solemnized without a marriage license; *Maggett v. Roberts*, 112 N.C. 71, 16 S. E. 919; *State v. Parker*, 106 N.C. 711, 11 S.E. 517; *State v. Robbins*, 28 N.C. 23, [44 Am. Dec. 64], —or under an illegal license; *Maggett v. Roberts*, *supra* — but it is clear that both these sections of the statute require that the license shall be first delivered to the officer before the marriage is solemnized, else under the latter statute he is liable to the penalty sued for in this action.

Wooley v. Bruton, 184 N.C. 438, 440, 114 S.E. 628, 629 (1922). *Wooley* states the principal, well-established in North Carolina jurisprudence, that though violation of N.C. Gen. Stat. § 51-6 might subject a person who officiates a wedding ceremony without first receiving a marriage license to prosecution, the lack of a valid license will not invalidate that ceremony, or the resulting marriage. *Wooley*, 184 N.C. at 440, 114 S.E. at 629; *see also Sawyer v. Slack*, 196 N.C. 697, 700, 146 S.E. 864, 865 (1929) (citation omitted) ("It has, however, been uniformly held by this Court that a marriage, without a license as required by statute, is valid."); *Maggett v. Roberts*, 112 N.C. 71, 74, 16 S.E. 919, 920 (1893) (citations omitted) ("The marriage under an invalid license, or with no license, as has been repeatedly held, would be good, if valid in other respects. The

2. C.S. § 2498 was the precursor to N.C. Gen. Stat. § 51-6.

only effect of marrying a couple without a legal license is to subject the officer or minister to the penalty of $200, prescribed by The Code[.]"); *State v. Robbins*, 28 N.C. 23, 25 (1845) ("The law of this State . . . authorizes and empowers the clerks of the several county courts to grant marriage licenses, upon the applicant's giving bond and security agreeably to its provisions; but if a marriage is solemnized by a minister of the gospel or a magistrate, without a license, though he may subject himself to a penalty, the marriage is, notwithstanding, good to every intent and purpose.").

Therefore, in order to show a valid marriage,

> [N.C. Gen. Stat. § 51-1] require[s] the parties to "express their solemn intent to marry in the presence of (1) an ordained minister of any religious denomination, or (2) a minister authorized by his church or (3) a magistrate."
>
> Our Supreme Court has stated: "[u]pon proof that a marriage ceremony took place, it will be presumed that it was legally performed and resulted in a valid marriage." The burden of proof rests upon plaintiff to prove by the greater weight of the evidence grounds to void or annul the marriage to overcome the presumption of a valid marriage.

Pickard v. Pickard, 176 N.C. App. 193, 196, 625 S.E.2d 869, 872 (2006) (citations omitted). A marriage performed in full accordance with N.C. Gen. Stat. § 51-1, but lacking the license required by N.C. Gen. Stat. § 51-6, is valid, and neither void nor voidable. *Sawyer*, 196 N.C. at 700, 146 S.E. at 865. This Court must follow the law as written, and follow the precedents set by prior decisions. It is the sole province of the General Assembly to amend the laws to make a marriage license a pre-requisite to a valid marriage.

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

> 13. On or about December 18, 2013, . . . Reverend Dena Bearl, Rector of St. Paul's Episcopal Church in Wilmington, North Carolina, conducted a ceremony at the hospital involving Decedent and [Petitioner]. Reverend Bearl performed the "Celebration and Blessing of a Marriage" . . . from the Episcopal Book of Common Prayer, which is used in the Episcopal Church to perform marriage ceremonies. However, Reverend Bearl considered this a "religious wedding," and did not intend for this ceremony to be a "legal wedding."

> 14. Reverend Bearl informed the Decedent and [Petitioner] at the time of the December 18, 2013 ceremony that a marriage license was required for a legal marriage and that the ceremony she was performing did not constitute a legal marriage.
>
> . . . .
>
> 21. "[Petitioner] intended to participate in the December 18, 2013 ceremony without a marriage license, despite knowing that she needed a marriage license to be married to the Decedent."

Based in part on these findings, the trial court concluded the following:

> 1. There is insufficient evidence to show that the Petitioner and Decedent attempted to comply, intended to comply, or were unable to comply with North Carolina law requiring a marriage license for a valid, legal marriage.
>
> 2. The ceremony performed by Reverend Bearl at the hospital on December 18, 2013, with the Decedent and [Petitioner] was a religious ceremony and not a legal marriage.
>
> 3. The heirs of Decedent . . . are Rachel Peacock Ceci, Richard Eric Peacock, Richard Dixon Peacock, II, and Kristen Alicia Peacock.

Petitioner argues that our Supreme Court's opinion in *Mussa v. Palmer-Mussa*, 366 N.C. 185, 731 S.E.2d 404 (2012), supports the rulings of the Assistant Clerk of Court and the trial court in this matter. We disagree. In *Mussa*, the defendant ("the wife") was married in November 1997 to the plaintiff ("the husband"). *Id.* at 185, 731 S.E.2d at 405. The husband sought to have the marriage annulled, arguing that the wife had been married earlier to another man ("Braswell"), who was still living, and that the wife and Braswell had never divorced. *Id.* at 186-87, 731 S.E.2d at 406. The person who officiated the Islamic marriage ceremony was a friend of Braswell's named Kareem, about whom little was known. *Id.* at 187-88, 731 S.E.2d at 406. Kareem could not be located, and there was no evidence that he was a person authorized to conduct marriage ceremonies pursuant to N.C. Gen. Stat. § 51-1. *Id.* at 189, 731 S.E.2d at 407. The husband argued that his marriage to the wife was bigamous and therefore void. *Id.* at 186-87, 719 S.E.2d at 406. The trial court in *Mussa* found, and our Supreme Court noted, that no marriage license had been obtained for the ceremony performed by Kareem "because they only

intended to establish a religious union." *Id.* at 187, 719 S.E.2d at 406. Our Supreme Court held the following:

> As the attacking party, [the husband] then had the burden to demonstrate that his marriage to defendant was bigamous. But based upon the evidence presented at trial, the district court concluded that [the wife] and Braswell never were married because Kareem was not authorized to perform marriage ceremonies pursuant to the version of section 51–1 that was in effect in 1997. As we have stated previously, the prior version of section 51–1 required parties participating in a marriage ceremony to "express their solemn intent to marry in the presence of (1) 'an ordained minister of any religious denomination,' or (2) a 'minister authorized by his church' or (3) a 'magistrate.' "
>
> The district court made several uncontested findings of fact regarding Kareem's qualifications to conduct marriages. Most notably, the court found that "[t]here was insufficient evidence presented for [it] to find that Kareem had the status of either 'an ordained minister' or a 'minister authorized by his church' . . . . There was no evidence presented that Kareem was a magistrate." The court also found that "[t]here was no evidence presented about Kareem's authorization or qualification to perform the ceremony." These uncontested findings are binding, but we also observe that according to [the wife's] testimony, Kareem was an out-of-state friend of Braswell's whose primary occupation was construction – he was not an imam. Additionally, in finding of fact fifteen, the court noted that [the wife] and Braswell did not "obtain[ ] a marriage license prior to the ceremony." Based upon these findings, the court concluded that: "Because no marriage license was obtained by or issued to Defendant and Khalil Braswell, and there is insufficient evidence that the marriage ceremony met the requirements for a valid marriage, the Court cannot find that Defendant married Mr. Braswell as contemplated by the statute." The district court also concluded that plaintiff "failed to meet his burden in establishing that his marriage was bigamous" because he had not shown that [the wife] "was previously legally married."
>
> In sum, *we are bound by the district court's uncontested finding that Kareem was not authorized to perform*

> *marriage ceremonies in North Carolina. From this finding* it follows that [the husband] failed to show that his marriage to [the wife] was bigamous because he could not demonstrate that [the wife] married Braswell during a marriage ceremony that met the requirements of section 51–1.

Id. at 194, 731 S.E.2dat 410-11 (citations omitted) (emphasis added). Though our Supreme Court mentions the finding of fact by the trial court that no marriage license was procured for the ceremony conducted by Kareem, it bases its holding that the husband had failed to prove the earlier marriage was valid on the husband's failure to demonstrate that the ceremony had complied with the requirements of N.C. Gen. Stat. § 51-1 – specifically that the husband could not prove that Kareem was a person authorized to perform a marriage ceremony. *Id.* N.C. Gen. Stat. § 51-6 is not mentioned in this holding, and there is nothing in *Mussa* indicating that our Supreme Court has overruled *Wooley*, S*awyer*, *Robbins*, or other opinions which hold that the absence of a valid marriage license will not invalidate a marriage performed in accordance with the requirements of N.C. Gen. Stat. § 51-1. Further, there is nothing in *Mussa* indicating that our Supreme Court was concerned that the ceremony had "only [been] intended to establish a religious union." *Id.* at 187, 719 S.E.2d at 406. The holding in *Mussa* is based on the husband's failure to prove that Kareem was a person authorized to conduct a marriage ceremony pursuant to N.C. Gen. Stat. § 51-1.

As we have held above, the fact that the ceremony in the present case was conducted without a license could not serve to invalidate an otherwise properly performed ceremony and resulting marriage. There is no dispute that the ceremony was conducted in the presence of a minister authorized to perform marriages, and that that minister, Reverend Bearl, declared that Decedent and Petitioner were husband and wife. *See* N.C. Gen. Stat. § 51-1(1). There is no dispute that Decedent and Petitioner could lawfully marry at the time the ceremony was conducted, and that they stated at the ceremony that they would take each other as "husband and wife freely, seriously and plainly expressed by each in the presence of the other[.]" N.C. Gen. Stat. § 51-1. The only remaining question is whether Decedent and Petitioner "consented" to take each other as "husband and wife," as contemplated by N.C. Gen. Stat. § 51-1. Stated differently, if Decedent and Petitioner believed the ceremony to have been a religious ceremony only, and not a legal ceremony, could they be found to have "consented" as required by N.C. Gen. Stat. § 51-1.

We note, based upon a plain reading of N.C. Gen. Stat. § 51-1, that the intent of the person performing the ceremony is not a relevant factor in determining whether a valid marriage has resulted. Therefore, Reverend Bearl's intent to perform a "religious ceremony" but not a "legal ceremony" does not affect the outcome in the present case. Further, there is nothing in N.C. Gen. Stat. § 51-1 requiring that a valid marriage ceremony is contingent upon the persons being married understanding or agreeing with all the legal consequences of that marriage. They must only be free to "lawfully marry," and "consent . . . presently to take each other as husband and wife, freely, seriously and plainly expressed by each in the presence of the other[.]" *Id.* It is uncontested that Decedent and Petitioner reconciled after their divorce, that Petitioner moved back in with Decedent, that they functioned as a family with Richard, and that they both discussed their desire to remarry with Reverend Bearl. Simply put, there was no evidence presented that the ceremony conducted by Reverend Bearl on 18 December 2013 failed to comply with N.C. Gen. Stat. § 51-1. Because the 18 December 2013 ceremony complied with N.C. Gen. Stat. § 51-1, and because our Supreme Court has repeatedly held that a marriage license is not a prerequisite to a valid marriage, we hold that Decedent and Petitioner were married on 18 December 2013. This marriage included all the attendant rights and obligations.

IV.

[2] As Kristen notes in the fact section of her brief, Petitioner testified at trial that she would renounce her rights to inherit from Decedent's estate. Kristen's trial attorney requested that the trial court rule that Petitioner had renounced her rights to inherit in the event the trial court decided that the ceremony resulted in a valid marriage. Because the trial court ruled there was no valid marriage, it did not address the issue of renunciation. Although Kristen, in her brief, notes Petitioner's testimony, Kristen does not argue in her brief that Petitioner's alleged renunciation constituted "an alternate basis in law for supporting the order[.]" N.C.R. App. P. Rule 10(c). This issue is therefore not before us. *See City of Asheville v. State*, __ N.C. App. __, __, 777 S.E.2d 92, 102-03, (2015), *review allowed*, *writ allowed*, __ N.C. __, 781 S.E.2d 476 (2016); *Maldjian v. Bloomquist*, __ N.C. App. __, __, 782 S.E.2d 80, 85 (2016).

We reverse the trial court's order affirming the decision of the Assistant Clerk of Court, and remand to the trial court for remand to the New Hanover County Clerk of Superior Court with instruction to acknowledge the validity of the 18 December 2013 marriage of Decedent and Petitioner, and take further action regarding Decedent's

estate consistent with Petitioner's status as Decedent's spouse at the time of his death.

REVERSED AND REMANDED.

Judges STEPHENS and DAVIS concur.

IN THE MATTER OF THE ESTATE OF CATHLEEN BASS SKINNER

No. COA15-384

Filed 21 June 2016

Trusts—Special Needs Trust—purchase of home and furnishings by trustee

On appeal from an order removing respondent (Mr. Skinner) as Trustee of the Cathleen Bass Skinner Special Needs Trust and as Guardian of Estate of Cathleen Bass Skinner, the Court of Appeals reversed the order based on several errors of law. The order was erroneous where it concluded the following: that the Trust's purpose was to save money for Mrs. Skinner's future medical needs; that the Trust prohibited the use of assets for prepaid burial insurance; that the purchase of a house, furniture, and appliances violated the provisions of the Trust; that such purchases were wasteful and imprudent; that such purchases were not for Mrs. Skinner's "sole benefit"; and that Mr. Skinner engaged in a serious breach of trust by using Trust assets to pay for attorney's fees incurred for guardianship proceedings occurring prior to establishment of the Trust.

Judge BRYANT dissenting.

Appeal by respondent from order entered 22 October 2014 by Judge Donald Stephens in Wake County Superior Court. Heard in the Court of Appeals 12 January 2016.

Ward and Smith, P.A., by Jenna Fruechtenicht Butler and Michael J. Parrish, for petitioner-appellees.

Braswell Law, PLLC, by Ira Braswell, IV, for respondents-appellant.

ZACHARY, Judge.

Respondent Mark Skinner ("Mr. Skinner") appeals from the trial court's order affirming an order entered by Wake County Assistant Clerk of Court Bill Burlington ("assistant clerk of court") removing Mr. Skinner as Trustee of the Cathleen Bass Skinner Special Needs Trust and as Guardian of the Estate (GOE) of Cathleen Bass Skinner. On appeal, Mr. Skinner argues that the order of the assistant clerk of court contains findings that are not supported by the evidence and certain conclusions that are legally erroneous. For the reasons discussed below, we agree.

I. Background

Cathleen Bass Skinner (Mrs. Skinner) suffers from cognitive and physical difficulties. On 13 April 2010, the assistant clerk of court adjudicated Mrs. Skinner to be "incompetent to a limited extent" and appointed "Wake County Human Services" as Mrs. Skinner's guardian. The order provided that Mr. Skinner could apply to become Mrs. Skinner's guardian in six months. Mrs. Skinner submitted a handwritten appeal from the clerk's order, asking that Mr. Skinner be appointed as her guardian. On 3 August 2010, Mrs. Skinner and Mr. Skinner were married, and on 4 August 2010, Mr. Skinner filed a motion to modify the guardianship order and appoint him as Mrs. Skinner's guardian. The parties to the motion included Mrs. Skinner, Mr. Skinner, Mrs. Skinner's Guardian ad Litem, Mary Easterling, Kathy Shelton,[1] and Wake County Human Services. On 20 January 2011, the assistant clerk of court entered a consent order appointing Mr. Skinner as the guardian of the person of Mrs. Skinner. On 27 August 2012, Mrs. Skinner's mother died, and on 23 August 2013, two of Mrs. Skinner's siblings filed a petition asking the assistant clerk of court to appoint Mrs. Skinner's sister Nancy Bass Clark (Mrs. Clark) as GOE for Mrs. Skinner.

The court appointed Kimberly Richards as temporary GAL for Mrs. Skinner, and Ms. Richards reviewed the files in this case and interviewed Mr. Skinner, Mrs. Skinner, and Mrs. Skinner's family members. Mrs. Skinner informed Ms. Richards that she wanted Mr. Skinner appointed as her GOE, while Mrs. Skinner's siblings preferred that Mrs. Clark be appointed. In her report to the assistant clerk of court, Ms. Richards stated that:

> By all accounts, Mark Skinner has taken care of Cathy Bass Skinner for the past two years and her family has not been

1. The record indicates that Mary Easterling and Kathy Shelton had each petitioned to be appointed as Mrs. Skinner's guardian, and that Mary Easterling was a "family friend." Both Easterling and Shelton consented to Mr. Skinner serving as Mrs. Skinner's guardian and agreed to withdraw their petitions for guardianship.

> actively involved in her life. It appeared to me that Mark and Cathy care for each other and are actively involved in each other's lives. A family friend, Mary Easterling, reports that the couple is loving and happy.

On 9 October 2013, Mr. Skinner was appointed as the GOE of Mrs. Skinner, and on 5 December 2013, Mr. Skinner was bonded for $250,000. The GOE order, which found that Mrs. Skinner's inheritance was expected to be between $200,000 and $250,000, required that Mr. Skinner set up a Special Needs Trust for Mrs. Skinner. Accordingly, the Cathleen Bass Skinner Special Needs Trust was established and executed on 18 March 2014, and provided that Mr. Skinner would act as Trustee. On 25 March 2014, the assistant clerk of court entered an order approving the Trust and finding that the parties were "in agreement with the provisions of the Cathleen Bass Skinner Special Needs Trust," which included having Mr. Skinner serve as the Trustee of the Trust. The Trust was funded on 10 June 2014 with an initial distribution from the estate of $170,086.67. Shortly thereafter, Mr. Skinner used Trust assets to purchase a house where he and Mrs. Skinner live together, as well as some furniture and appliances.

On 28 July 2014, two of Mrs. Skinner's siblings filed a petition to remove Mr. Skinner as Trustee, on the grounds that Mr. Skinner had not complied with the Trust's requirement that Mr. Skinner provide Mrs. Clark with monthly bank statements. A hearing was conducted on 18 August 2014, at which the parties agreed that additional issues could be raised. On 27 August 2014, the assistant clerk of court entered an order removing Mr. Skinner both as GOE and as Trustee of the Cathleen Bass Skinner Special Needs Trust and replacing him with Mrs. Clark. Mr. Skinner appealed to the superior court of Wake County, and on 22 October 2014, the trial court entered a summary order affirming the assistant clerk of court's order. Mr. Skinner has appealed to this Court from the trial court's order.

II. Standard of Review

The assistant clerk of court removed Mr. Skinner as both GOE and as Trustee. N.C. Gen. Stat. § 35A-1290(a) (2015) gives the clerk of court the authority "to remove any guardian . . . to appoint successor guardians, and to make rules or enter orders for the better management of estates and the better care and maintenance of wards and their dependents." Under N.C. Gen. Stat. § 35A-1290(b) (2015), it "is the clerk's duty to remove a guardian" if the guardian "wastes the ward's money or estate

or converts it to his own use," "mismanages the ward's estate," or "has violated a fiduciary duty through default or misconduct."

Regarding the clerk's authority to remove a trustee, N.C. Gen. Stat. § 36C-7-706(b) (2015) provides in relevant part that the clerk "may remove a trustee" if "(1) The trustee has committed a serious breach of trust" or "(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries[.]"

N.C. Gen. Stat. § 1-301.3 (2015) provides that a party aggrieved by an order of the clerk arising from the administration of trusts and estates may appeal to superior court, and that upon appeal:

> [T]he judge of the superior court shall review the order or judgment of the clerk for the purpose of determining only the following: (1) Whether the findings of fact are supported by the evidence, (2) Whether the conclusions of law are supported by the findings of facts, [and] (3) Whether the order or judgment is consistent with the conclusions of law and applicable law.

Upon Mr. Skinner's appeal from the trial court's order affirming the order entered by the assistant clerk of court, this Court is called upon to review a non-jury proceeding. As a general rule:

> The standard of review of a judgment rendered following a bench 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." "Findings of fact by the trial court in a non-jury trial are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*."

Gilbert v. Guilford County, __ N.C. App. __, __, 767 S.E.2d 93, 95 (2014) (quoting *Hanson v. Legasus of N.C., LLC*, 205 N.C. App. 296, 299, 695 S.E.2d 499, 501 (2010)). "If the court's findings of fact are supported by competent evidence, they are conclusive on appeal, even if there is contrary evidence." *Collins v. Collins*, __ N.C. App. __, __, 778 S.E.2d 854, 856 (2015) (citation omitted).

If the assistant clerk of court's findings are supported by the evidence and its conclusions of law are supported by the findings, then the clerk's decision on the appropriate action to take is reviewed for abuse of discretion.

> As the removal of a trustee is left to the discretion of the clerks of superior court . . . our review is limited to determining whether the trial court abused its discretion. Under this standard, we accord "great deference" to the trial court, and its ruling may be reversed only upon a showing that its action was "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision."

In re Estate of Newton, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576 (2005) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). In determining whether there was an abuse of discretion, "[w]e may not substitute our own judgment for that of the trial court." *Kinlaw v. Harris*, 364 N.C. 528, 533, 702 S.E.2d 294, 297 (2010) (citing *Worthington v. Bynum*, 305 N.C. 478, 487, 290 S.E.2d 599, 605 (1982)). Further, "[i]t is axiomatic that it is within a trial court's discretion to determine the weight and credibility that should be given to all evidence that is presented during the trial." *Don't Do It Empire, LLC v. Tenntex*, __ N.C. App. __, __, 782 S.E.2d 903, __ (2016) (internal quotation omitted). Therefore, in our review of the order entered by the assistant clerk of court, we are neither "reweighing the evidence" nor "disregarding the deferential standard of review." Nor do we express any opinion on the merits of the clerk's determination that Mr. Skinner was no longer the best person to serve as GOE and as trustee, or on the clerk's assessment of the credibility and weight of evidence or his resolution of evidentiary inconsistencies.

However, "an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction." *Koon v. United States*, 518 U.S. 81, 100, 2047, 135 L. Ed. 2d 392 (1996). "[F]indings made under a misapprehension of law are not binding," and "[w]hen faced with such findings, the appellate court should remand the action for consideration of the evidence in its true legal light." *Allen v. Rouse Toyota Jeep, Inc.*, 100 N.C. App. 737, 740, 398 S.E.2d 64, 65 (1990) (citing *Dishman v. Dishman*, 37 N.C. App. 543, 246 S.E.2d 819 (1978) (other citation omitted). " 'While this Court is bound by the findings of fact made by the [trial court] if supported by evidence, it is not bound by that court's conclusions of law based on the facts found.' Accordingly, we review the trial court's conclusions of law *de novo*." *State v. Rhodes*, 366 N.C. 532, 536, 743 S.E.2d 37, 39 (2013) (quoting *State v. Wheeler*, 249 N.C. 187, 192, 105 S.E.2d 615, 620 (1958)). In sum, we review for abuse of discretion only those of the clerk's decisions that are based upon properly supported findings and legally correct conclusions:

> In the event that the result reached with respect to a particular issue is committed to the sound discretion of the trial court, appellate review is limited to determining whether the trial court abused that discretion. "A [trial] court by definition abuses its discretion when it makes an error of law." As a result . . . the extent to which the trial court exercised its discretion on the basis of an incorrect understanding of the applicable law raises an issue of law subject to *de novo* review on appeal.

In re A.F., 231 N.C. App. 348, 352, 752 S.E.2d 245, 248 (2013) (quoting *Koon*, 518 U.S. at 100, 135 L. Ed. 2d at 414, and citing *Rhodes*, 366 N.C. at 536, 743 S.E.2d at 39, and *Falk Integrated Technologies, Inc. v. Stack*, 132 N.C. App. 807, 809, 513 S.E.2d 572, 574 (1999)).

In this case, although Mrs. Skinner's siblings filed the petition to remove Mr. Skinner as GOE and as Trustee, they did not present any witnesses at the hearing. Instead, Mr. Skinner was the only witness who testified at the hearing, and accordingly Mr. Skinner's testimony was uncontradicted by any other witness. The assistant clerk of court was free to evaluate the credibility and weight of this evidence. In addition, the assistant clerk of court properly considered the extent, if any, to which Mr. Skinner's testimony was contradicted by the documentary evidence, such as the GOE order and the Trust instrument. However, the clerk's findings of fact necessarily had to be based on his assessment of the competent evidence. "[I]t is axiomatic that the arguments of counsel are not evidence." *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996).

III. U.S.C. § 1396p(d)(4)(A) Trust—Introduction

The term "special needs trust" (SNT) refers generally to a trust created for the benefit of a disabled person in accordance with governmental and statutory regulations so that the disabled person maintains his or her eligibility for government benefits. There are several types of SNTs, each with different specific statutory and regulatory requirements in order to be effective.

The Cathleen Bass Skinner Special Needs Trust is a self-settled, sole benefit trust, established pursuant to 42 U.S.C. § 1396p(d)(4)(A) for the purpose of allowing Mrs. Skinner to enhance the quality of her life without jeopardizing her eligibility for Medicaid and Social Security (SSI) benefits. To be eligible for Medicaid and Social Security disability benefits, an individual's financial resources must be below a specified amount. U.S.C. § 1396p(d)(4)(A) states that the assets in a trust will not

count toward an applicant's available resources, provided that the trust has the following characteristics:

> (A) A trust containing the assets of an individual under age 65 who is disabled . . . and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under [42 U.S.C. § 1396 *et. seq.*].

Thus, a U.S.C. § 1396p(d)(4)(A) trust has three requirements:

> 1. It is established for the benefit of a beneficiary who is under 65 years old and is disabled.
>
> 2. The trust, despite the label "self-settled," must be established for the benefit of the beneficiary with the assets of the beneficiary by a third party such as the beneficiary's parent, a court, etc.
>
> 3. The trust must include a "payback" provision stating that upon the death of the beneficiary or the early termination of the trust the state will be reimbursed for the beneficiary's Medicaid expenditures before any other distribution may be made. Because a U.S.C. § 1396p(d)(4)(A) trust has a payback provision, it is not required to be administered in an "actuarially sound" manner whereby the entire trust is distributed during the beneficiary's lifetime.

In this case, there is no dispute that the Cathleen Bass Skinner Special Needs Trust meets the requirements set out in U.S.C. § 1396p(d)(4)(A).

IV. Purpose of U.S.C. § 1396p(d)(4)(A) trust

In Finding No. 10 of his order, the assistant clerk of court stated that the GOE order had directed establishment of a special needs trust "in order to preserve those assets for [Mrs. Skinner's] long term health needs." This is an error of fact and law.

First, the GOE order does not state that the purpose of the Trust is to provide for Mrs. Skinner's future medical needs. Thus, this finding is not supported by the evidence. In addition, because a special needs trust established under U.S.C. § 1396p(d)(4)(A) is, by definition, for the benefit of a person who is disabled and is receiving Medicaid benefits,

its purpose is not to save money for the person's future medical needs; rather, this type of trust is "intended to provide disabled individuals with necessities and comforts not covered by Medicaid" while maintaining Medicaid eligibility. *Lewis v. Alexander*, 685 F.3d 325, 331 (3rd Cir. 2012), *cert. denied*, __ U.S. __, 133 S. Ct. 933, 184 L. Ed. 2d 724 (2013). Accordingly, § 2.03 of the Cathleen Bass Skinner Special Needs Trust bars the Trustee from using trust funds for "any property, services, benefits, or medical care otherwise available from any local, state, or federal governmental source[.]"

The Cathleen Bass Skinner Special Needs Trust, as a U.S.C. § 1396p(d)(4)(A) trust, states the following regarding its purpose:

> This Irrevocable Trust is to enable [the] Beneficiary to qualify for (i) the Supplemental Security Income ("SSI") Program; (ii) medical assistance under the Medicaid program as provided for by Section 1396p(d)(4)(A) of Title 42 of the United States Code . . . or (iii) any other governmental program.

In addition, § 1.04, Statement of Grantor's Intent, states that:

> Grantor is creating this trust as a Means by which trust assets may be held for the sole benefit of . . . [Mrs. Skinner] on the terms and conditions set forth in this instrument.
>
> It is Grantor's intent to create a Special Needs Trust that conforms to North Carolina law.
>
> This trust is created expressly for [the] Beneficiary's supplemental care, maintenance, support, and education, in addition to the benefits Beneficiary otherwise receives or may receive from . . . any local, state or federal government, or from any private agency . . . or from any private insurance Carriers covering Beneficiary.
>
> It is Grantor's intent that the funding and administration of this trust will not subject Beneficiary to a period of ineligibility under Medicaid law pursuant to U.S.C. § 1396p(d)(4)(A) and North Carolina law. . . .

Clearly the subject assets were not intended to be used for Mrs. Skinner's future medical needs, and in ruling otherwise, the assistant clerk of court made an error of law.

V. Mr. Skinner's Duty to Provide Bank Statements

Two of Mrs. Skinner's siblings alleged that Mr. Skinner had failed to comply with the Trust's accounting requirement. § 5.04 of the Cathleen Bass Skinner Special Needs Trust provides that:

> The Trustee shall cause monthly statements reflecting the current balance of the Trust's assets and all receipts, disbursements, and distributions made within the reporting period to be mailed to Beneficiary, Nancy Bass Clark (or to any successor appointed by Nancy Bass Clark), and to the Beneficiary's legal representative. . . .
>
> . . .
>
> Failure to provide reports, statements or returns within seven (7) days after the date such report, statement or return was due or became available shall result in the disqualification of the Trustee. . . .

The petition for Mr. Skinner's removal as Trustee alleged, not that Mr. Skinner had failed to provide bank statements, but that a recent bank statement indicated that Mr. Skinner had "us[ed] a debit transaction in order to obtain cash - thus hiding the purpose and entity to which Trust funds are being transferred." At the hearing, Mr. Skinner testified that when the Trust was first established he had no printed checks and therefore used cashier's checks to pay for several expenditures. The bank statement did not show the payee of the cashier's checks, so Mr. Skinner later provided Mrs. Clark with this information. Thus, it was undisputed that Mr. Skinner did send bank statements, but that he had used several cashier's checks that did not reveal the purpose for which the money was spent.

This evidence does not appear to establish that, as a matter of law, Mr. Skinner breached the trust's accounting requirement. However, we need not resolve this issue, given that the assistant clerk of court's order does not mention Mr. Skinner's compliance or lack of compliance with the accounting requirement. Had the assistant clerk of court found that Mr. Skinner breached the Trust's provision requiring accounting, we could review the clerk's findings and conclusions on this issue. However, the clerk made no such findings or conclusions and it is axiomatic that "[a]n appellate court does not weigh the evidence in order to make new findings[.]" *Timmons v. North Carolina DOT*, 351 N.C. 177, 182, 522 S.E.2d 62, 65 (1999).

VI. Prepaid Burial Insurance

In Finding No. 24 of his order, the assistant clerk of court states that the "trust specifically states that funeral expenses are not permitted to be paid from the Trust prior to reimbursement to North Carolina (or any other state) for medical expenses." This finding is factually inaccurate. On the basis of this finding, the assistant clerk of court concludes in Conclusion of Law No. 4 that "Mr. Skinner's payment of $3,644.00 to Columbus Life for prepaid funeral expenses also is in contradiction to the terms of the Trust and in violation of his fiduciary duties as Trustee." This conclusion of law is in error.

A trust established under U.S.C. § 1396p(d)(4)(A), such as the Cathleen Bass Skinner Special Needs Trust, must provide for reimbursement of Medicaid payments upon the death of the beneficiary or early termination of the trust. Accordingly, Article Four of the Trust, "Administration of the Cathleen Bass Skinner Special Needs Trust upon Beneficiary's Death," provides in relevant part that:

> Upon Beneficiary's death, the Trustee shall notify the appropriate state agency of Beneficiary's death and must promptly obtain an accounting from the states (or local Medicaid agencies of the states) that have made Medicaid payments on Beneficiary's behalf during her lifetime.
>
> Upon receipt of such accounting, the Trustee will distribute all of the trust property as follows:
>
> (i) first, the Trustee must reimburse the state as provided in Section 4.01, entitled "Reimbursement to State," below;
>
> (ii) second, the Trustee may pay the expenses specified in Section 4.02, entitled "Payment of Expenses and Taxes," below[.] (emphasis added).

Section 4.01 requires the Trustee to repay to state or local Medicaid agencies "the lesser of" either the total amount of Medicaid benefits paid on Beneficiary's behalf during her lifetime, or "the entire balance of the Trust Estate." Section 4.02 states that upon "full reimbursement" to state and local Medicaid agencies, any funds remaining in the trust may be used for specified purposes, including "Beneficiary's funeral expenses." These "payback" provisions, which are required for a trust to comply with U.S.C. § 1396p(d)(4)(A), establish that upon termination of the trust, Medicaid is to be repaid first, even if this requires depletion of the entire trust.

The requirement that, upon termination of the trust, the State must be reimbursed before any other distribution may be made is restated in Article Three, which addresses termination of the trust prior to the beneficiary's death. Section 3.04 of this article requires that, in the event of early termination of the Trust, "[t]he following expenses and payments are examples of some of the types [of payments] not permitted prior to reimbursement to North Carolina (or any other state) for medical assistance . . . (iv) funeral expenses[.]" This section simply means that the order of payments upon termination is the same for both termination upon death of the beneficiary and for early termination.

These provisions serve the express purpose of ensuring that, upon termination of the Trust, Medicaid agencies are reimbursed before any other expenses, including funeral expenses, may be met with Trust funds. However, the provisions dealing with the order of repayment upon termination of the Trust do not govern the allowable expenditures during the Beneficiary's lifetime. The Trust does not bar the use of Trust funds to purchase a prepaid burial insurance policy. The assistant clerk of court's order cites no legal authority for the proposition that SNT funds cannot be used to purchase prepaid burial insurance. In fact, the expenditure was approved by the Medicaid provider prior to being purchased. The clerk made an error of law by failing to distinguish between the use of Trust funds for funeral expenses after termination of the Trust and use of Trust funds for purchase of prepaid funeral or burial insurance during the Beneficiary's lifetime.

VII. Purchase of House, Appliances, and Furniture

A. Introduction

In the order removing Mr. Skinner as trustee, the assistant clerk of court made several findings relevant to the use of Trust assets to purchase a home in which Mrs. Skinner and Mr. Skinner were living at the time of the hearing:

> 21. Mr. Skinner also used the Trust assets to purchase a house (Wake Co. Deed Book 014713, Page 01402-06), new furniture, [and] new appliances[.]
>
> 22. Mr. Skinner resides with [Mrs. Skinner] in the house purchased by the Trust and he benefits from the Trust purchases and expenditures relating to the house.
>
> 23. The terms of the Trust require that the Trust assets be used for [Mrs. Skinner's] sole benefit.

The assistant clerk of court reached the following conclusions of law that appear to be related to Mr. Skinner's use of Trust funds to purchase a house, furniture, and appliances for Mrs. Skinner:

> 5. A Trustee is required, among other things, to administer a trust as a prudent person would by considering the purposes, terms, distributional requirements, and other circumstances of the trust in the exercise of reasonable care, skill, and caution.
>
> 6. Mr. Skinner has demonstrated that he lacks appropriate judgment and prudence.
>
> 7. Mr. Skinner is in breach of his fiduciary duties pursuant to the terms of the Trust, the terms of the GOE Order, and applicable law.
>
> 8. Mr. Skinner has wasted the Trust assets, mismanaged the Trust assets, and converted the Trust's assets to his own use. [(the conclusion regarding conversion arises from Mr. Skinner's use of trust funds to pay certain attorneys' fees, as discussed below)].

The assistant clerk of court's rulings reflect the clerk's conclusions that (1) the terms of the Trust did not permit the Trustee to use Trust assets for the purpose of a house, furniture, or appliances; (2) the purchase of a house and furniture with Trust assets constituted waste and mismanagement of Trust assets; and (3) the fact that Mr. Skinner lived with Mrs. Skinner and presumably used the appliances and furniture was, as a matter of law, a violation of the requirement that the Trust be administered for the "sole benefit" of Mrs. Skinner. The first and third conclusions are errors of law, and the second is unsupported by any record evidence.

B. The Trust Permits the Purchase of a House, Furniture, and Appliances with Trust Assets

On appeal, Mr. Skinner argues that he did not violate the terms of the Trust or violate his fiduciary duty as a Trustee by using assets of the Trust to purchase a house, furniture, and appliances for the beneficiary. We agree.

The distribution of Trust funds is addressed in Article Two of the Trust, which states that:

> The Trustee will hold, manage, invest and reinvest the Trust Estate, and will pay or apply the income and principal of the Trust Estate in the following manner:
>
> During Beneficiary's lifetime, the Trustee will pay from time to time such amounts from the Trust Funds for the satisfaction and benefit of [the] Beneficiary's Special Needs (as hereinafter defined), as the Trustee determines in the Trustee's discretion, as hereinafter provided. . . .

Section 7.02(a) defines the term 'special needs' as the "Beneficiary's needs that are not covered or available from any local, state, or federal government, or any private agency, or any private insurance carrier covering Beneficiary."

In this case, the evidence indicates that Mr. Skinner authorized the following expenditures from Trust assets: (1) approximately $135,000 for the purchase of a house, which is titled to the Trust; and (2) between $3200 and $4500 for furniture, appliances, and repairs to the house. The uncontradicted evidence shows that the house, furnishings, and appliances are owned by the Trust; the house is handicapped accessible; the location of the house, which is close to where Mrs. Skinner previously lived, is helpful to Mrs. Skinner, given her cognitive limitations; and the purchase of a house was something that Mrs. Skinner had wanted and that had improved the quality of her life. Therefore, as a general proposition, these expenditures were clearly within the Trust's definition of "special needs." The purchase of a house, furniture, and appliances fits squarely within the permissible uses of Trust assets under the terms of the Cathleen Bass Skinner Special Needs Trust. The assistant clerk of court erred as a matter of law by ruling otherwise.

C. No Evidence Suggests Trust Assets were Wasted

Mr. Skinner also argues that the assistant clerk of court erred by concluding that Mr. Skinner had failed to manage the trust in a prudent manner and that the Trust assets had been "wasted" and "mismanaged." We agree, and conclude that the clerk's findings and conclusions on this issue are unsupported by any record evidence.

Although some funds were spent on furniture and appliances for the house, the bulk of the Trust expenditure was the purchase of a handicapped accessible house, which is titled in the name of the Trust and in which Mrs. Skinner has an equitable ownership interest. Upon Mrs. Skinner's death, the house will be an asset of the Trust that could be sold and used to repay her Medicaid benefits. If the funds are needed prior

to Mrs. Skinner's death, the house may be sold at that time. Therefore, the money is not "gone" but has been invested in real estate, which is permitted under the Trust provisions. The wisdom of this investment is a separate question, but it is factually and legally inaccurate to state that the Trust assets were "wasted" or "depleted" in the absence of any findings regarding the wisdom of this particular investment.

The fact that the purchase of a house is authorized by the terms of the Trust does not necessarily mean that it was a wise investment. Under specific factual circumstances the purchase of a house might constitute an imprudent investment or a wasteful use of the assets of a trust. This might be the case if, for example, evidence were introduced showing that the house was in serious disrepair, was in a neighborhood with declining real estate values, was overpriced, or was inappropriately large or luxurious for the beneficiary's needs and circumstances.

However, in this case, the only evidence introduced on this subject indicates that the house was purchased for the relatively modest sum of $135,000, an amount which was less than its appraised value. There was no other evidence regarding whether the house was a prudent investment of the Trust assets. Nor was evidence introduced regarding the costs or savings attributable to Mrs. Skinner's living in her own house, with Mr. Skinner providing care for her at no charge. Therefore, the assistant clerk of court's conclusion that the purchase of a house, furniture, and appliances demonstrated Mr. Skinner's lack of prudence is unsupported by any record evidence and is therefore erroneous as a matter of law.

D. The Trust was Administered for the "Sole Benefit of Mrs. Skinner"

Mr. Skinner argues next that the assistant clerk of court erred by finding that because Mr. Skinner lived in the house with Mrs. Skinner, his wife, and presumably used the furniture and appliances, that Mr. Skinner "benefitted" from the purchase of a house and furniture. On this basis the assistant clerk of court concluded that these purchases violated the requirement that the Trust be administered for the "sole benefit" of Mrs. Skinner. In reaching this conclusion, the assistant clerk of court apparently employed a personal, colloquial definition of "benefits." Mr. Skinner contends that under the relevant Medicaid and Social Security regulations, and pursuant to the interpretation of these regulations by the Wake County agencies charged with administration of these programs, the clerk erred in its interpretation of the term "sole benefit." We agree and conclude that an examination of the relevant regulations in the context of trust common law and the common sense realities of

the life of any person, and especially of the challenges faced by a disabled person, makes it clear that the term "sole benefit" does not mean that a disabled person with a U.S.C. § 1396p(d)(4)(A) trust must live in a state of bizarre isolation in which no other person may "benefit" from her house or furnishings.

In concluding that the Trust was not administered for Mrs. Skinner's sole benefit, the assistant clerk of court applied an informal or conversational definition of "benefits" as arising, not from the legal or financial effect of transactions involving Trust assets, but as depending instead on whether Mr. Skinner used or enjoyed - and thus "benefitted" from - the house, furniture, and appliances. The assistant clerk of court's ruling was not supported by citation to legal authority or by reference to any negative actions taken regarding Mrs. Skinner's receipt of Medicaid or SSI, such as suspending or decreasing Mrs. Skinner's benefits, and Mr. Skinner testified that he consulted with and had the approval of local aid agencies before making the purchase with trust funds.

The assistant clerk of court's interpretation of the legal term "sole benefits" would lead to an absurd result. Members of the general population are free to determine with whom to live and socialize, and how to entertain or otherwise interact with other people. Under the assistant clerk of court's interpretation of the requirement that a U.S.C. § 1396p(d)(4)(A) trust be administered for the "sole benefit" of the beneficiary, if a trustee uses the assets of a special needs trust to purchase items such as a handicapped accessible home, specially equipped car, or furniture, then the disabled beneficiary must either live alone or charge "rent" to her husband, who presumably must have his own separate furniture, washer and dryer, etc. The beneficiary of a U.S.C. § 1396p(d)(4)(A) trust could not allow another to drive or ride in her specially equipped car, to watch her TV, or have a visitor for supper, lest the other person's use of the dishes, enjoyment of a television program, or shared ride to a restaurant constitute a violation of the "sole benefit" rule. The clerk's interpretation is particularly absurd given the likelihood that a disabled person may need assistance from someone living in the home.

We wish to emphasize that in our analysis of this issue we do not consider the clerk's evaluation of the weight or credibility of any evidence, but only the clerk's ruling on the meaning of the legal term "sole benefit." It is long established that an appellate court should, when possible, avoid a statutory interpretation that yields an unjust or absurd result:

> "The Court will not adopt an interpretation which resulted in injustice when the statute may reasonably be otherwise

> consistently construed with the intent of the act. Obviously, the Court will, whenever possible, interpret a statute so as to avoid absurd consequences."

Nationwide Mut. Ins. Co. v. Mabe, 342 N.C. 482, 494, 467 S.E.2d 34, 41 (1996) (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)). Moreover, our review of the relevant statutes and regulations leads us to conclude that there is no indication that the legal conclusion reached by the assistant clerk of court correctly interpreted U.S.C. § 1396p(d)(4)(A), or that it comports with North Carolina trust law.

At the outset, we note that there appear to be no appellate cases in which a Court has held that the use of assets in a U.S.C. § 1396p(d)(4)(A) trust to purchase a house in which the beneficiary lives with his or her spouse or family members constitutes a *per se* violation of the sole benefit rule, without regard to the specific circumstances of the purchase. Given that Congress passed the legislation authorizing § 1396p(d)(4)(A) trusts in 1993, we believe that the absence of any cases that have applied the definition utilized by the assistant clerk of court indicates that the agencies charged with administration of Medicaid and Social Security have not taken the position espoused by the assistant clerk of court. Moreover, Mr. Skinner's uncontradicted testimony was that he had obtained the approval of the local administrators of Medicaid and Social Security prior to purchasing the house and other items.

Nor is the assistant clerk of court's position supported by the relevant regulations. The Social Security Administration (SSA) issues a Program Operations Manual System, known as POMS, that instructs SSA employees on the SSA's interpretation of U.S.C. § 1396p(d)(4)(A). "The POMS represent 'the publicly available operating instructions for processing Social Security claims.' The Supreme Court has stated that '[w]hile these administrative interpretations are not products of formal rulemaking, they nevertheless warrant respect.' " *Kelley v. Comm'r of Soc. Sec.*, 566 F.3d 347, 351 n.7 (3rd Cir. 2009) (quoting *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385, 154 L. Ed. 2d 972, 986 (2003)).

> The Medicaid statute is complex, and the day-to-day application of the statute has been largely left to administrative agencies. Where that is the case, a court construing a statute will often look to the manner in which the administrative agencies have interpreted that statute, giving

> deference to the construction placed on the statute by presumed experts in the field.

Hobbs v. Zenderman, 542 F. Supp. 2d 1220, 1228 (D.N.M. 2008) (citation omitted), *aff'd*, 579 F.3d 1171 (10th Cir. N.M. 2009).

POMS Transmittal 48, SI 01120 TN 48, effective 15 May 2013, "modified [SSA's] policy on how to interpret the 'sole benefit' requirement for special needs and pooled trusts[,]" which includes a trust established under U.S.C. § 1396p(d)(4)(A). Transmittal 48 states in relevant part that:

> 2. Trust established for the sole benefit of an individual.
>
> a. General rule regarding sole benefit of an individual.
>
> Consider a trust established for the sole benefit of an individual if the trust benefits no one but that individual, whether at the time the trust is established or at any time for the remainder of the individual's life. Except as provided in SI 01120.201F.2.b. in this section and SI 01120.201F.2.c. in this section, do not consider a trust that provides for the trust corpus or income to be paid to or for a beneficiary other than the SSI applicant/recipient to be established for the sole benefit of the individual.
>
> b. Exceptions to the sole benefit rule for third party payments. Consider the following disbursements or distributions to be for the sole benefit of the trust beneficiary:
>
> Payments to a third party that result in the receipt of goods or services by the trust beneficiary[.] . . .

The SSA's general definition of "sole benefit" is somewhat circular, as it defines a "sole benefit" trust as one that "benefits no one but that individual." The listed exception makes clear, however, that payment to a third party for a house, furniture, or appliances does not violate the sole benefit requirement. Similarly, the North Carolina Adult Medicaid Manual, in discussing the sole benefit requirement of a U.S.C. § 1396p(d)(4)(A) trust, states that "Sole benefit means that any real or personal property which is capable of being titled and is purchased by the trust must be titled solely in the name of the trust," exactly as was done in the present case.

Based upon a review of the regulatory definitions and the common law principles of trust law, the reasonable interpretation of the "sole benefit" rule for a U.S.C. § 1396p(d)(4)(A) trust is that:

> 1. The trust must have no primary beneficiaries other than the disabled person for whom it is established.
>
> 2. The trust may not be used to effect uncompensated transfers or other sham transactions. For example, the sole benefit provision would be violated if the beneficiary's parents funded the trust with the assets of the beneficiary and then had the beneficiary give the money to her parents in a sham transaction.
>
> 3. The trust is one in which the trustee does not have a duty to balance the fiduciary benefit to the beneficiary with a duty to ensure that funds remain for creditors such as Medicaid or for contingent beneficiaries.
>
> 4. When trust assets are used for investments, the financial and legal benefit of these transactions must remain with the trust.

In this case, Mrs. Skinner is the only primary Beneficiary named in the Trust. The house purchased with Trust assets is titled in the name of the Trust. (Mrs. Skinner would be considered to be living in her own house based on her equitable ownership of the residence.) The accrual of equity in the house or increase in the house's market value remains with the Trust, and thus is for Mrs. Skinner's legal benefit. The use of Trust assets to purchase a house, furniture, and appliances for Mrs. Skinner was an expenditure that resulted in her receiving goods. We conclude that the Cathleen Bass Skinner Special Needs Trust was established, and is being administered, for Mrs. Skinner's sole benefit. We have reached this conclusion without consideration of any aspect of this case that might implicate the weight or credibility of evidence, such as Mr. Skinner's testimony that Mrs. Skinner's parents wanted her to have a house. Instead, we have based our conclusion solely upon the undisputed terms of the Trust and the applicable jurisprudence.

VIII. Use of Trust Funds for Mr. Skinner's Attorneys' Fees

Section 5.03 of the Cathleen Bass Skinner Special Needs Trust states that:

> The Trustee may retain and pay for attorneys . . . and any other professional[s] required for Beneficiary's benefit in the discretion of the Trustee, subject to the limitations set forth in this trust.

> Specifically, the Trustee may pay for attorney fees and disbursements and court fees related to (i) any guardianship proceeding pertaining to Beneficiary . . . and (ii) attorney fees related to the preparation, funding, maintenance, and administration of this trust.

(emphasis added). The record indicates that Mr. Skinner used Trust assets to reimburse himself for attorneys' fees incurred in connection with guardianship proceedings that took place prior to establishment of the Cathleen Bass Skinner Special Needs Trust. The assistant clerk of court concluded that the Trust funds could not properly be used to reimburse these attorneys' fees because the fees arose from the Mr. Skinner's research into whether he could legally marry Mrs. Skinner and the proceedings for him to be appointed as her guardian, rather than pursuant to guardianship proceedings occurring after Mr. Skinner was appointed Mrs. Skinner's guardian.

The relevant Trust provisions are ambiguous, in that they allow reimbursement for attorneys' fees "related to (i) any guardianship proceeding pertaining to Beneficiary" without specifying that this means "any guardianship proceeding pertaining to Beneficiary and that occurs after the trust is established." N.C. Gen. Stat. § 36C-10-1006 provides that a "trustee who acts in reasonable reliance on the terms of the trust as expressed in a trust instrument is not liable for a breach of trust to the extent that the breach resulted from the reliance."

Moreover, assuming that it was a violation of the Trust's provisions for Mr. Skinner to use Trust assets for this purpose, the assistant clerk of court made no findings to support its implied conclusion that this error constitutes "a serious breach of trust" as opposed to an honest mistake. The Official Comment to N.C. Gen. Stat. § 36C-7-706 states that:

> Subsection (b)(1) . . . makes clear that not every breach of trust justifies removal of the trustee. The breach must be "serious." A serious breach of trust may consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of a series of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together. (emphasis added).

In this case, Mr. Skinner's uncontradicted testimony was that he believed that he could use Trust funds to reimburse himself for attorneys' fees incurred in connection with the guardianship proceedings for

Mrs. Skinner, although the fees were incurred before he was named as GOE. In addition, the record indicates that he agreed to repay the Trust when this error was pointed out. This single error would not, standing alone, support a conclusion that Mr. Skinner had committed "a serious breach of trust."

IX. Conclusion

We conclude that we are not required to address Mr. Skinner's compliance with the Trust's accounting requirement, because it was not included in the assistant clerk of court's order. We further conclude that the clerk's order removing Mr. Skinner as GOE and Trustee was based upon several significant errors of law. The assistant clerk of court erred by concluding that the purpose of the Trust was to save money for Mrs. Skinner's future medical needs, and by holding that the Trust prohibited the use of Trust assets for prepaid burial insurance. In addition, the assistant clerk of court erred as a matter of law by ruling that the Trustee's use of Trust assets to purchase a house, furniture, and appliances violated the provisions of the Trust. The clerk's conclusion that these purchases were wasteful or imprudent was not supported by any evidence. The assistant clerk of court made another error of law by adopting a interpretation of the requirement that the Trust be for "the sole benefit" of Mrs. Skinner that is not supported by the pertinent regulations or citation to appellate authority. Finally, the order does not contain findings that would support the clerk's implied conclusion that Mr. Skinner engaged in a serious breach of trust by using Trust assets to pay for attorney's fees incurred for guardianship proceedings occurring prior to establishment of the Trust.

We agree with the dissent that an appellate court should not reweigh the evidence, second-guess the fact finder's determinations of the weight or credibility of the evidence, or substitute its judgment on a matter committed to the discretion of the trial court. We have adhered to these well-known principles, and there are no factual findings or discretionary decisions by the clerk that we have failed to respect. Nor are we suggesting that the assistant clerk of court's subjective judgment on the merits of Mr. Skinner as a GOE or Trustee was unreasonable. However, for the reasons discussed above, we conclude that the Order removing Mr. Skinner as Trustee of the Cathleen Bass Skinner Special Needs Trust and as GOE was based on several significant errors of law and must be reversed for application of the proper legal standards.

REVERSED.

Judge DILLON concurs.

Judge BRYANT dissents by separate opinion.

BRYANT, Judge, dissenting.

The majority opinion reverses the superior court's order, which affirmed the Assistant Clerk of Court's (the "Clerk's") order, by determining that the Clerk's order contains findings that are not supported by the evidence and conclusions that are legally erroneous. Because the majority opinion functions to essentially reweigh the evidence, despite its many disclaimers to the contrary, and disregards the deferential standard of review on appeal, I respectfully dissent.

The decision to remove a trustee is "left to the *discretion* of the clerks of superior court," or, in [some] case[s] the trial court, [and this Court's] review is limited to determining whether the trial court [or clerk] abused its discretion. *In re Estate of Newton*, 173 N.C. App. 530, 539, 619 S.E.2d 571, 576 (2005) (emphasis added) (citing *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "Under this standard, *we accord 'great deference' to the trial court*, and its ruling may be reversed only upon a showing that its action was 'manifestly unsupported by reason' or 'so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (emphasis added) (quoting *White*, 312 N.C. at 777, 324 S.E.2d at 833); *see also Smith v. Underwood*, 336 N.C. 306, 306, 442 S.E.2d 322, 322 (1994) (reversing this Court and determining the trial court *did not* abuse its discretion by failing to remove a trustee).

In determining whether a clerk of superior court or a trial court abused its discretion in removing a trustee, this Court reviews the record in order to determine whether "*sufficient evidence supports the trial court's findings of fact, and its findings of fact support its conclusions of law.*" *Newton*, 173 N.C. App. at 540, 619 S.E.2d at 577 (emphasis added).

In reviewing the Clerk's decision to remove Mr. Skinner as guardian, this Court reviews "(1) whether the Assistant Clerk's *findings of fact are supported by the evidence, and (2) whether those findings support the Assistant Clerk's conclusions and order.*" *In re Estate of Armfield*, 113 N.C. App. 467, 469–70, 439 S.E.2d 216, 217 (1994) (emphasis added).[1]

1. I note also that "[a] guardianship is a trust relation and in that trust relationship *the guardian is a trustee* who is governed by the same rules that govern other trustees." *Armfield*, 113 N.C. App. at 474, 439 S.E.2d at 220 (emphasis added) (citing *Owen v. Hines*,

Furthermore, regardless of whether this Court is reviewing a Clerk's order removing a guardian or a trustee, "an appellate court, or a trial court engaged in the appellate review of an order of the clerk of court, may neither reweigh the evidence, nor disregard findings of fact when supported by competent evidence, even if the evidence would also support a contrary result." *In re Estate of Van Lindley*, No. COA06-1281, 2007 WL 2247269, *10, 2007 N.C. App. LEXIS 1731, *28–29 (2007) (unpublished) (citing *Hearne v. Sherman*, 350 N.C. 612, 620, 516 S.E.2d 864, 868 (1999) and *Joyner v. Adams*, 87 N.C. App. 570, 574, 361 S.E.2d 902, 904 (1987)); *see also Garrett v. Burris*, 224 N.C. App. 32, 38, 735 S.E.2d 414, 418 (2012) ("It is not the function of this Court to reweigh the evidence on appeal.").

Mr. Skinner's removal as guardian of the estate and trustee is before this Court after a proceeding before the Clerk of Superior Court and an appeal heard before the superior court. The Clerk, after hearing evidence and arguments of counsel, made findings of fact and conclusions of law and removed Mr. Skinner as guardian of the estate and trustee. The superior court then affirmed the Clerk's order, and stated that

> [a]fter hearing the arguments of counsel and reviewing portions of the Record on Appeal, including in detail, the [Clerk's] August 27, 2014 Order, the [superior] [c]ourt finds and concludes that the findings of fact in the August 27, 2014 Order are supported by the evidence, the conclusions of law are supported by the findings of fact, and the August 27, 2014 Order is consistent with the conclusions of law and applicable law.

We should not, at this stage—far-removed from the original fact-finder—"second-guess [both] the court's [and the Clerk's] reasoning and attempt to impose any differing opinion we may have; [the Clerk] was in a better position than we to assess" Mr. Skinner's credibility over four years of incompetency, guardianship, and removal proceedings involving both Cathy and Mr. Skinner. *See Smith v. Underwood*, 113 N.C. App. 45, 56–57, 437 S.E.2d 512, 518 (1993) (John, J., dissenting), *rev'd by*

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227 N.C. 236, 41 S.E.2d 739 (1947)) (affirming the removal of guardians of the estate). "Because respondents [guardians of the estate] are governed by the same rules that govern other trustees they are 'held to something stricter than the morals of the marketplace.' " *Id.* at 475, 439 S.E.2d at 220–21 (quoting *Wachovia Bank & Trust Co. v. Johnston*, 269 N.C. 701, 711, 153 S.E.2d 449, 457 (1967)).

336 N.C. 306, 442 S.E.2d 322 (1994) (per curiam) (reversing for the reasons stated in the dissenting opinion). Indeed,

> [a] trial court may be reversed for abuse of discretion *only* upon a showing that its actions are *manifestly unsupported by reason*. A ruling committed to a trial court's discretion is to be accorded *great deference* and will be upset *only* upon a showing that it was so arbitrary that it *could not have been the result of a reasoned decision*.

White, 312 N.C. at 777, 324 S.E.2d at 833 (emphasis added) (citation omitted).

In reversing the superior court's order, which affirmed the Clerk's order removing Mr. Skinner as trustee and guardian of the estate, the majority reaches the conclusion that the decisions of the fact-finder (the Clerk) and the superior court—to whom we accord *great deference*—were *both* "*manifestly unsupported by reason*." *See id.* (emphasis added). The Clerk made findings of fact which were supported by competent evidence (with the exception of the Clerk's finding that funeral expenses are not permitted to be paid from the Trust, on which point I agree with the majority that the Clerk erred in making this finding), and those findings in turn supported his conclusion that Mr. Skinner "is unsuitable to continue serving as Trustee of the Trust and [GOE]." The Clerk subsequently removed Mr. Skinner as Trustee and GOE, and the superior affirmed this decision after "reviewing . . . in detail, the [Clerk's] August 27, 2014 Order." With the exception of the finding as to funeral expenses, the record contains sufficient, competent evidence to support the Clerk's findings of fact and conclusions of law. Thus, I cannot agree with the majority's conclusion that the orders of the Clerk and the superior court are both "manifestly unsupported by reason."

Ultimately, it does not matter that the majority considers that the implications of the Clerk's ruling (that Mr. Skinner breached his fiduciary duties pursuant to the terms of the Trust, based on, *inter alia*, his use of Trust assets to purchase a home in which he also lived, in contradiction with the terms of the Trust which require that Trust assets be used for Cathy's "sole benefit") would lead to an absurd result. This is not the standard. The standard is whether the Clerk's findings of fact are supported by the evidence, which findings in turn support the conclusions of law. *See Armfield*, 113 N.C. App. at 469–70, 439 S.E.2d at 217.

According the proper deference to the Clerk's findings, which support the determination that Mr. Skinner "is unsuitable to continue serving

as Trustee of the Trust and [GOE]," as well as to the *discretionary* decision to remove Mr. Skinner, I respectfully submit that the majority opinion erroneously reverses the trial court's order affirming the Clerk's order for abuse of discretion, where it has not been established "that its actions are *manifestly unsupported by reason*." *See White*, 312 N.C. at 777, 324 S.E.2d at 833 (emphasis added) (internal citation omitted).

For the forgoing reasons, I respectfully dissent.

IN THE MATTER OF M.A.W.

No. COA15-1153

Filed 21 June 2016

Termination of Parental Rights—juvenile neglected by mother—incarcerated father

The trial court erred by terminating a father's parental rights upon the conclusion that the child was neglected where there was a prior adjudication of neglect by the mother, the father was incarcerated, the permanent plan was initially reunification with the father, dependent on his reunification efforts, and the court expressed disapproval of the father's reunification efforts after his release and changed the permanent plan to adoption. There was no evidence before the trial court, and no findings of fact, that father had previously neglected the child at the time of the hearing.

Appeal by respondent from order entered 12 August 2015 by Judge J.H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 31 May 2016.

New Hanover County Department of Social Services, by Regina Floyd-Davis, for petitioner-appellee.

Parker Poe Adams & Bernstein LLP, by William L. Esser IV, for guardian ad litem.

Rebekah W. Davis, for respondent-appellant.

CALABRIA, Judge.

IN RE M.A.W.

[248 N.C. App. 52 (2016)]

Respondent-appellant ('father") of the juvenile M.A.W. ("Mary")[1] appeals from an order terminating his parental rights. We reverse.

On 11 March 2013, New Hanover County Department of Social Services ("DSS") filed a petition alleging that Mary was a neglected juvenile. DSS alleged that Mary's mother ("L.W.") "has a history of substance abuse and mental health issues, which has previously interfered with her ability to provide appropriate care for her children." On 19 February 2013, L.W. tested positive for Percocet, a narcotic for which she did not have a prescription. Additionally, two social workers who were present for her drug screen detected the odor of alcohol emanating from L.W. At the time the petition was filed, father was incarcerated. Accordingly, DSS claimed that Mary, who was less than two months old, was living in an environment injurious to her welfare and did not have the ability to protect or provide for herself. DSS obtained non-secure custody of Mary. On 5 July 2013, the trial court adjudicated Mary neglected and dependent based upon the parties' stipulations to the allegations in the petition.

The trial court held a permanency planning review hearing on 10 April 2014. The trial court ceased further reunification efforts between Mary and L.W., and L.W. executed a consent for adoption. The trial court determined that the permanent plan for Mary should be reunification with father. The court noted, however, that father was still incarcerated, had a "drinking problem," and that "[h]is continued sobriety is paramount to any plan of reunification."

On 4 September 2014, the trial court held another permanency planning review hearing. The court found that father had been released from incarceration. The court noted that, during his incarceration, father had "completed a parenting education class, regularly attended Alcoholic Anonymous meetings and worked towards obtaining his GED." The court found that DSS should continue to make reasonable efforts towards a permanent plan of reunifying Mary with father. At a subsequent permanency planning review hearing, however, the trial court expressed disapproval regarding father's efforts at reunification. Accordingly, the trial court ceased reunification efforts and changed Mary's permanent plan for Mary to adoption.

On 10 February 2015, DSS filed a petition to terminate father's parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(1) (neglect) and

1. A pseudonym is used to protect the juvenile's identity and for ease of reading.

(5) (failure to legitimate). On 12 August 2015, the trial court terminated father's parental rights on the ground of neglect. Father appeals.

Father argues that the trial court erred by concluding that grounds existed to terminate his parental rights. We agree.

Section 7B-1111 sets out the statutory grounds for terminating parental rights. "A finding of any one of the grounds enumerated therein, if supported by competent evidence, is sufficient to support a termination." *In re J.L.K.*, 165 N.C. App. 311, 317, 598 S.E.2d 387, 391. "The standard of appellate review is whether the trial court's findings of fact are supported by clear, cogent, and convincing evidence and whether the findings of fact support the conclusions of law." *In re D.J.D.*, 171 N.C. App. 230, 238, 615 S.E.2d 26, 32 (2005) (citing *In re Huff*, 140 N.C. App. 288, 291, 536 S.E.2d 838, 840 (2000).

In the instant case, the trial court concluded that grounds existed to terminate father's parental rights based on neglect. N.C. Gen. Stat. § 7B-1111(a)(1) (2015). A "Neglected juvenile" is defined as:

> [a] juvenile who does not receive proper care, supervision, or discipline from the juvenile's parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care; or who is not provided necessary remedial care; or who lives in an environment injurious to the juvenile's welfare; or who has been placed for care or adoption in violation of law.

N.C. Gen. Stat. § 7B-101(15) (2015). Generally, "[i]n deciding whether a child is neglected for purposes of terminating parental rights, the dispositive question is the fitness of the parent to care for the child 'at the time of the termination proceeding.' " *In re L.O.K.*, 174 N.C. App. 426, 435, 621 S.E.2d 236, 242 (2005) (quoting *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984)). When, however, as here, "a child has not been in the custody of the parent for a significant period of time prior to the termination hearing, 'requiring the petitioner in such circumstances to show that the child is currently neglected by the parent would make termination of parental rights impossible.' " *Id.* (quoting *In re Shermer*, 156 N.C. App. 281, 286, 576 S.E.2d 403, 407 (2003)). "In those circumstances, a trial court may find that grounds for termination exist upon a showing of a 'history of neglect by the parent and the probability of a repetition of neglect.' " *Id.*

In this case, while there was a prior adjudication of neglect, the party responsible for the neglect was the juvenile's mother, not father.

At the time the petition was filed, father was incarcerated, and the trial court noted that father "was the non-offending parent at the time of [the juvenile's] removal." Therefore, there was no evidence before the trial court, and no findings of fact, that father had previously neglected Mary. Without evidence of any prior neglect, petitioner failed to show neglect at the time of the hearing. *In re J.G.B.*, 177 N.C. App. 375, 382, 628 S.E.2d 450, 455 (2006). Furthermore, the evidence, as well as the trial court's findings, do not support a conclusion that there was ongoing neglect at the time of the termination hearing. Accordingly, we hold that the trial court erred in concluding grounds existed under N.C. Gen. Stat. § 7B–1111(a)(1) to terminate father's parental rights and reverse the order entered.

REVERSED.

Judges DILLON and INMAN concur.

MICHAEL P. LONG AND MARIE C. LONG, PETITIONER-PLAINTIFFS
v.
CURRITUCK COUNTY, NORTH CAROLINA AND ELIZABETH LETENDRE, RESPONDENTS

No. COA15-376

Filed 21 June 2016

Zoning—unified development ordinance—single family residential

The trial court erred by affirming the Board of Adjustment's decision that a structure proposed for construction on property owned by respondent Letendre was a single family detached dwelling under the unified development ordinance and a permitted use in the single family residential remote zoning district. The project included multiple "buildings," none of which were "accessory structures." Any determination that this project fit within the definition of single family dwelling required disregarding the structural elements of the definition.

Appeal by petitioner-plaintiffs Michael P. Long and Marie C. Long from decision and order entered 8 December 2014 by Judge Cy A. Grant in Superior Court, Currituck County. Heard in the Court of Appeals 23 September 2015.

George B. Currin, for petitioner-plaintiff-appellants Michael P. Long and Marie C. Long.

Donald I. McRee, Jr., for respondent-appellee Currituck County.

Gregory E. Wills, P.C., by Gregory E. Wills, for respondent-appellee Elizabeth Letendre.

STROUD, Judge.

Petitioner-plaintiffs Michael Long and Marie Long appeal a Superior Court (1) "DECISION AND ORDER" affirming the Currituck County Board of Adjustment's decision "that a structure proposed for construction on property owned by Respondent Elizabeth Letendre is a single family detached dwelling under the Currituck County Unified Development Ordinance and a permitted use in the Single Family Residential Outer Banks Remote Zoning District" and dismissing petitioners' petition for writ of certiorari and (2) "ORDER" denying petitioners' petition for review of the Currituck County Board of Adjustment's decision and again affirming the Currituck County Board of Adjustment's decision. For the following reasons, we reverse and remand.

I. Background

Respondent Ms. Letendre owns an ocean-front lot in Currituck County and planned to build a project of approximately 15,000 square feet on the lot. The project consisted of "a three-story main building that includes cooking, sleeping, and sanitary facilities" and two "two-story side buildings that include sleeping and sanitary facilities." The main building and side buildings are connected by "conditioned hallways" so that all three may be used together as one unit, and each of the three buildings is approximately 5,000 square feet. Petitioners, who are adjacent property owners, challenged the construction of respondent Letendre's project claiming that the project as proposed was not a permitted use in the Single Family Residential Outer Banks Remote District ("SF District") because it is not a "single family detached dwelling" ("Single Family Dwelling") as defined by the Currituck County Unified Development Ordinance ("UDO").

The Currituck County Planning Director determined that respondent Letendre's project was a "single family detached dwelling;" the Currituck County Board of Adjustment ("BOA") affirmed the Planning Director's decision. Petitioners then appealed the BOA's decision to the Superior Court, and the Superior Court agreed, concluding that the

"structure proposed for construction on property owned by Respondent Elizabeth Letendre is a single family detached dwelling under the Currituck County Unified Development Ordinance and a permitted use in the Single Family Residential Outer Banks Remote Zoning District" and therefore denied "Petitioner's Petition for Review of the Currituck County Board of Adjustments Order" and affirmed "[t]he Order of the Currituck County Board of Adjustments dated May 9, 2014[.]" Petitioners appealed the Superior Court's orders to this Court, and for the reasons discussed below, we reverse and remand.

On appeal, there is no real factual issue presented but only an issue of the interpretation of the UDO. The parties have made many different arguments, with petitioners focusing upon the applicable definitions and provisions of the UDO, and respondents focusing upon the intended use and function of the project. This case ultimately turns upon the definition of a "single family detached dwelling[.]" Currituck County, N.C., Unified Development Ordinance of Currituck County, North Carolina § 10.1.7 ("UDO").

II. Single-Family Residential Outer Banks Remote District

Petitioners first contend that "the Superior Court erred in affirming the Currituck County Board of Adjustment's decision to uphold the planning director's determination that the proposed structures met the definition of the term 'single family detached dwelling,' as that term is used and defined in the Currituck County Unified Development Ordinance." (Original in all caps.) The parties agree on the background underlying this appeal and one of the most salient facts is that the project is comprised of multiple buildings.[1] The project "plans indicate a three-story main building that includes cooking, sleeping, and sanitary facilities; as well as two-story side buildings that include sleeping and sanitary facilities." Each building is approximately 5,000 square feet.[2] The main

1. We have had difficulty determining what noun to use to describe the buildings which are the subject of this litigation. In this opinion, we will refer to the entire group of buildings, variously described in the record and briefs as three or four separate buildings, as the "project." Since the words "building" and "structure" have definitions in the ordinance which are somewhat different than the common use of these words, we will place these words in quotation marks if we are using them as terms defined in the ordinance; if these words are not in quotes, we are using them colloquially. *See* Currituck County, N.C., Unified Development Ordinance of Currituck County, North Carolina §§ 10.43, .83.

2. In addition to the county's approval, the project required a Coastal Area Management Act ("CAMA") permit. Generally speaking, CAMA regulations require a greater set-back from the ocean for larger buildings; in other words, a 15,000 square foot building would need to be "set back further" than a 5,000 square foot building.

building and side buildings are connected by "conditioned hallways[.]"[3] The hallways were originally proposed as uncovered decking but the Currituck County Planning Director determined that the uncovered decking did not comply with the ordinances, and thus the project plans were revised to connect the buildings via "conditioned hallways" which the Planning Director determined would make the entire project "a single principal structure" based upon the functioning of the three buildings as one dwelling.

In this appeal, the issue is the county's classification of the project as a "single principal structure" based upon the use or function of the project. The parties agree that (1) the classification of the project is governed by the UDO; (2) pursuant to the UDO the lot is zoned as SF District; and (3) this project must fit within the definition of Single Family Dwelling in order to comply with the UDO. Both the BOA and the Superior Court determined that the project did constitute a Single Family Dwelling, but on appeal, interpretation of a municipal ordinance requires this Court to engage in *de novo* review. *See Morris Commc'ns Corp. v. City of Bessemer City Zoning Bd. of Adjust.*, 365 N.C. 152, 155, 712 S.E.2d 868, 870-71 (2011) ("We review the trial court's order for errors of law. . . . Reviewing courts apply *de novo* review to alleged errors of law, including challenges to a board of adjustment's interpretation of a term in a municipal ordinance.")

> In reviewing a decision of the Board of Adjustment for errors of law in the application and interpretation of a zoning ordinance, the superior court applies a *de novo* standard of review and can freely substitute its judgment for that of the board. Similarly, in reviewing the judgment of the superior court, this Court applies a *de novo* standard of review in determining whether an error of law exists and we may freely substitute our judgment for that of the superior court. Questions involving the interpretation of ordinances are questions of law. . . .
>
> In determining the meaning of a zoning ordinance, we attempt to ascertain and effectuate the intent of the legislative body. Unless a term is defined specifically within the ordinance in which it is referenced, it should be assigned its plain and ordinary meaning. In

3. The Planning Director defined "conditioned space" as "[a]n area or room within a building being heated or cooled, contained uninsulated ducts, or with a fixed opening directly into an adjacent conditioned space[.]"

> addition, we avoid interpretations that create absurd or illogical results.

Ayers v. Bd. of Adjust. for Town of Robersonville, 113 N.C. App. 528, 530-31, 439 S.E.2d 199, 201 (1994) (citations and quotation marks omitted). We therefore review "the application and interpretation of [the] zoning ordinance" *de novo*. *Id.*

Before turning to the specific applicable ordinances, we note that the UDO itself provides that "[w]ords and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases that may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning." UDO § 10.1.7. The UDO provides that the SF District

> [i]s established to accommodate very low density residential development on the portion of the outer banks north of Currituck Milepost 13. The district is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events. *The district accommodates single-family detached homes* . . . . Public safety and utility uses are allowed, while commercial, office, and industrial uses are prohibited.

UDO § 3.4.4 (emphasis added). The UDO defines "DWELLING, SINGLE-FAMILY DETACTED" as follows: "*A residential building* containing not more than one dwelling unit to be occupied by one family, not physically attached to any other principal structure." UDO § 10.51 (emphasis added).[4] Thus, the definition of a Single Family Dwelling has five elements: (1) A building, (2) for residential use, (3) containing not more

4. Many of the ordinance provisions in our record are identified by a clear subsection number. An example is "Subsection 3.4.4: Single-Family Residential Outer Banks Remote (SFR) District." UDO § 3.4.4. However, in Chapter 10 of the UDO, at least for the pages in our record, definitions of terms appear in alphabetical order without specific subsection numbering for each term. Our citations in this opinion are thus based upon the large bold number in the bottom right-hand corner of each page of the UDO. We also have to rely solely upon the ordinance provisions as provided in the record since this Court cannot take judicial notice of municipal ordinances. *See Surplus Co. v. Pleasants*, 263 N.C. 587, 592, 139 S.E.2d 892, 896 (1965) ("[W]e do not take judicial notice of a municipal ordinance or resolution.")

than one dwelling unit,[5] (4) to be occupied by one family, and (5) not physically attached to any other "principal structure."[6] The definition of a Single Family Dwelling includes portions that address the physical structure of the proposed dwelling: "a building[,]" "containing not more than one dwelling unit[,]" and "not physically attached to any other principal structure." *Id.* But portions of the definition of a Single Family Dwelling also address the use and function of the proposed dwelling, requiring the building be for "residential" use and "occupied by one family[.]" *Id.* To qualify as a Single Family Dwelling, a project must fulfill each element of the definition, including both structural and functional provisions. The parties' briefs have addressed each part of the definition at length, but the structural portion of the definition, and particularly the first element -- a building -- is controlling in this case.

Petitioners argue that the project is not "[*a*] residential building[,]" but rather multiple buildings. *Id.* (emphasis added). Respondent Currituck County barely addresses that the project must be "a residential building" but focuses mainly on the use of the project and meaning of "one dwelling unit[.]" *Id.* Respondent Elizabeth Letendre contends that "*the characterization of a 'building'* and the methods used to lay a foundation *does* [(sic)] *not matter under the UDO*. The connection of the rooms so as to ensure that it will 'function' as a 'dwelling unit' is what counts." (Emphasis added.) Respondent Letendre further argues that that petitioners' arguments based upon the word "building" being singular is "a complete red herring" which "only works if one ignores the UDO definitions, ignores what [the Planning Director] wrote when analyzing two different sets of plans, and ignores what he said under oath at the BOA hearing." Respondent Letendre would be correct if the

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5. The UDO defines "dwelling unit" as "one room or rooms connected together, constituting a separate, independent housekeeping establishment for owner or renter occupancy, and containing independent cooking and sleeping facilities, and sanitary facilities." UDO § 10.51.

6. Although the term "structure" is defined by the UDO, the term "principal structure" is not. *See* UDO § 10.83. The UDO does define "accessory structure" as "[a] structure that is subordinate in use and square footage to a principal structure or permitted use." UDO § 10.34. In his testimony before the BOA on 13 March 2014, the Planning Director described his understanding of the term: "I would consider the building that contains all the components of a single-family detached dwelling as the principal structure. I consider the other structures to be accessory structures that weren't consistent with the ordinance or did not meet the requirements of the ordinance." The Planning Director went on to clarify that he considered all the buildings of the project as one "principal structure": "I think collectively the buildings are connected with the conditioned space, and I think they function as a principal structure."

UDO defined a Single Family Dwelling based only upon the function of the project -- whether it has a "residential" use as "one dwelling unit" for "one family" -- but again, the use argument fails to address the structural portion of the definition: "[a] building." *Id.* We have considered the Planning Director's interpretations of the UDO and his testimony, which focused upon the use and function of the three buildings, but this Court is required to perform a *de novo* interpretation of the UDO, a municipal ordinance. *See Morris Commc'ns Corp.*, 365 N.C. at 155, 712 S.E.2d at 871.

We therefore turn to the applicable ordinance provisions and definitions. The UDO definition of "BUILDING" provides, "See 'Structure'." UDO § 10.43. The definition of "STRUCTURE" provides that anything that "requires a location on a parcel of land" is a "structure" and thereby, apparently, also a "building":

> [a]nything constructed, installed, or portable, the use of which requires a location on a parcel of land. This includes a fixed or movable building which can be used for residential, business, commercial, agricultural, or office purposes, either temporarily or permanently. "Structure" also includes, but is not limited to, swimming pools, tennis courts, signs, cisterns, sewage treatment plants, sheds, docks, mooring areas, and similar accessory construction.

UDO § 10.83. Thus, pursuant to the UDO, a "building" is a "structure[,]" since a "building" is "constructed [or] installed" and it "requires a location on a parcel of land." *Id.* As all of the "buildings" in the project are constructed on a "location on a parcel of land" each is both a "building" and a "structure[.]" *Id.* There is no dispute that this project includes multiple "buildings" or "structures." The ordinance allows only for a singular "building[,]" UDO § 10.51, although a project may include other structures such as "swimming pools, tennis courts, signs, cisterns, sewage treatment plants, sheds, docks, mooring areas, and similar accessory construction[,]" all of which are obviously not buildings in the colloquial sense. UDO § 10.83. These other "structures" instead serve the needs of residents of the "building" which is the dwelling. *See generally id.*

Thus far, at each level of review, the focus has been on the residential use of the project and the definition of "one dwelling unit" based upon the intended function of the project, while overlooking the essential element that such dwelling unit must be within "a residential building[.]" UDO § 10.51. Even if we assume that the use of the project is residential and that the multiple buildings will be used as "one dwelling

unit" for "one family," the project still includes three "buildings." *Id.* The 22 November 2013, LETTER OF DETERMINATION from the Planning Director describes the project as follows: "The plans indicate a three-story main building that includes cooking, sleeping, and sanitary facilities; as well as two-story side buildings that include sleeping and sanitary facilities. The building plans also show two conditioned hallways connecting rooms within the proposed single family detached dwelling." This is an accurate and undisputed description of the project. The BOA affirmed the Planning Director's description, and the Superior Court affirmed the BOA's decision. The description is not challenged on appeal. Thus, the Planning Director, BOA, and the Superior Court all have found that this project includes a main building and two side buildings, each of approximately 5000 square feet. No one has ever described this project as a single "building[,]" and they simply did not address the structural portion of the plain definition of a Single Family Dwelling. *See generally* UDO § 10.51.

Our interpretation of the definition of Single Family Dwelling is also consistent with the definitions of other types of dwellings in the ordinances. *See generally* UDO §§ 10.50-51. The UDO provides eleven distinct definitions regarding dwellings, including: duplex dwelling, live/work dwelling, mansion apartment dwelling, manufactured home dwelling – class A, manufactured home dwelling – class B, manufactured home dwelling – class C, multi-family dwelling, single-family detached dwelling, townhouse dwelling, upper story dwelling, and dwelling unit. UDO §§ 10.50-51. The other definitions are primarily functional, and the definition of the Single Family Dwelling is the *only* definition which includes "a residential building" or in fact, *any* reference to a "building" in the definition. *Contrast* UDO §§ 10.50-51. Thus, "a residential building" -- singular -- is a necessary and not merely superfluous part of the definition a Single Family Dwelling. *Contrast* UDO §§ 10.50-51.

Yet the definition of Single Family Dwelling clearly allows more than one "building" or "structure" to be constructed on the same lot, so the presence of three "buildings" alone does not disqualify the project. However, the remainder of the definition does disqualify the project. The last element in the definition of a Single Family Dwelling is "[n]ot physically attached to *any other* principal structure." UDO § 10.51. (emphasis added). In other words, the Single Family Dwelling is "detached[,]" which is part of the title. *Id.* The UDO provides that "[w]ords used in the singular number include the plural number and the plural number includes the singular number, unless the context of the particular usage clearly indicates otherwise." UDO § 10.1.11. In the definition of Single

Family Dwelling, the context does clearly indicate otherwise. We cannot substitute the word "buildings" for "a building" without rendering the last phrase of the definition, "not physically attached to any other principal structure" either useless or illogical. The Planning Director determined that the multiple buildings together function as a principal structure, but even if they are functionally used as one dwelling unit, each individual building is itself a "structure." *See* §§ 10.43, .83. Thus, each building is necessarily either an "accessory structure" or a principal structure. And respondents do not argue that the side buildings are "accessory structures;" they argue only that the entire project *functions* as one "principal structure." Although the ordinance does not define principal structure, it does define "accessory structures" as "subordinate in use *and square footage*" to a principal structure. UDO § 10.34 (emphasis added).[7] Even assuming that the two side "buildings" or "structures" are subordinate in use to the center "building," it is uncontested that all of the buildings are approximately 5,000 square feet. No building is subordinate in square footage to another so none can meet the definition of an "accessory structure." *See id.* This would mean that each building is a principal structure, however a Single Family Dwelling only allows for one. *See* UDO § 10.51. In addition, the ordinary meaning of "principal" is in accord. *See* Webster's Seventh New Collegiate Dictionary 676 (1969). "Principal" is defined as "most important[.]" *Id.* There can be only one "principal structure" on a lot in the SF District and that principal structure can be attached only to "accessory structures[.]" *See generally* UDO § 10.51.

Respondent Currituck County argues that to interpret the UDO to allow only one "building" would create "absurd consequence[s]" because this would mandate that "nowhere in Currituck County could a property owner construct a single-family residential dwelling with wings, supported by their own foundation, connected by conditioned space or connect a main house to a garage with bedroom or other habitable space located above by way of conditioned space." But these hypotheticals are not comparable to this project, since both include one building, the main house, which is a principal structure and is physically attached to "accessory structures," the wings or the garage with a bedroom above the garage. *See* UDO § 10.34. In the hypotheticals, the accessory structures are "subordinate in use and square footage"

7. Again, "principal structure" is not defined, but it is clear a principal structure cannot be a structure that is "subordinate in use and square footage" as that would make it an "accessory structure." UDO § 10.34

to *a* principal structure. *Id.* Perhaps a more "absurd" result would be if we were to read the ordinances to focus only upon the "use" portion of Single Family Dwelling definition, as respondents argue, while ignoring the structural portion, since it would not matter how many "buildings" are connected by "conditioned hallways" if they are *functioning* as one dwelling for one family. Were we to adopt respondent Currituck County's interpretation, a project including ten 5,000 square foot buildings, all attached by conditioned hallways, which will be used as a residential dwelling for one family with a kitchen facility in only one of the buildings would qualify as a Single Family Dwelling. Respondents' interpretation would also be contrary to the stated purpose of the zoning, which calls for "very low density residential development" and "is intended to accommodate limited amounts of development in a manner that preserves sensitive natural resources, protects wildlife habitat, recognizes the inherent limitations on development due to the lack of infrastructure, and seeks to minimize damage from flooding and catastrophic weather events." UDO § 3.4.4.

In summary, this project includes multiple "buildings," none of which are "accessory structures;" *see* UDO § 10.34. Any determination that this project fits within the definition of Single Family Dwelling requires disregarding the structural elements of the definition, including the singular "a" at the beginning of the definition to describe "building" and allowing multiple attached "buildings," none of which are accessory structures, to be treated as a Single Family Dwelling in clear contravention of the UDO. UDO § 10.51. The project does not fit within the plain language of the definition of Single Family Dwelling, and thus is not appropriate in the SF District. *See* UDO §§ 3.4.4; 10.51. We therefore must reverse the Superior Court order and remand for further proceedings consistent with this opinion.

III. Conclusion

For the foregoing reasons, we reverse and remand.

REVERSED AND REMANDED.

Judges CALABRIA and INMAN concur.

STATE v. ARMSTRONG

[248 N.C. App. 65 (2016)]

STATE OF NORTH CAROLINA, PLAINTIFF
v.
ARTHUR ORLANDUS ARMSTRONG, DEFENDANT

No. COA 15-1324

Filed 21 June 2016

Jurisdiction—subject matter jurisdiction—superior court—dismissal of felony charge before trial

The superior court did not retain subject matter jurisdiction over a misdemeanor driving while license revoked offense and speeding infraction after the State dismissed the felony charge of habitual impaired driving before trial. Under section 7A-271(c), once the felony was dismissed prior to trial, the court should have transferred the two remaining charges to the district court.

Appeal by Defendant from judgment entered 20 May 2015 by Judge Alma L. Hinton in Nash County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General David L. Gore, III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for Defendant-Appellant.

HUNTER, JR. Robert N., Judge.

Arthur Orlandus Armstrong ("Defendant") appeals from a jury's verdict convicting him of misdemeanor driving while license revoked and finding him responsible for speeding. Defendant contends the superior court did not retain subject matter jurisdiction over the misdemeanor offense and the infraction after the State dismissed the felony charge before trial. We agree. As a result, we vacate the convictions and judgment of the superior court.

I. Factual and Procedural History

On 12 January 2015, a grand jury indicted Defendant on three charges in three separate indictments: habitual impaired driving, driving while license revoked ("DWLR"), and speeding. On 20 April 2015, the State dismissed the felony habitual impaired driving charge following a report from the State Crime Laboratory showing Defendant's

blood-alcohol concentration ("BAC") was 0.00 when Trooper Michael Davidson stopped him. The trial for misdemeanor DWLR and the infraction of speeding began in superior court on 19 May 2015. The State presented one witness, Trooper Davidson of the North Carolina Highway Patrol.

On 2 November 2013, Trooper Davidson patrolled the area near North Carolina Highway 97 around 2:00 a.m. While stopped at an intersection, he observed a vehicle that "appeared [to be] speeding" traveling east on N.C. 97. He followed the vehicle, using radar and a pace check to obtain its speed. He noted the radar reading, 72 miles per hour in a 55 mile per hour zone. The vehicle "crossed the center line and touched the fog-line" of the highway. Trooper Davidson then activated his lights and siren, and stopped the vehicle at a nearby gas station.

Trooper Davidson asked Defendant to produce his license and registration. Defendant did not produce a license or registration for the vehicle. Defendant stated "he was in the process of getting his license back. That there was an error, but he thought his license was valid." Defendant exited his vehicle and sat in the passenger seat of Trooper Davidson's patrol car. Defendant provided Trooper Davidson with his name, address, and date of birth for Trooper Davidson to search Defendant's license information in Trooper Davidson's on-board computer.

Trooper Davidson charged Defendant with speeding and DWLR. Trooper Davidson "thought [he] smelled a little bit of alcohol coming from [Defendant]." Trooper Davidson charged Defendant with driving while impaired ("DWI").

The State rested its case. Defendant moved to dismiss the charge of DWLR, which the court denied. The defense did not present any evidence. Defendant renewed his motion to dismiss, which the court again denied. Neither the State nor the Defendant raised any jurisdictional issues at trial. The jury returned a verdict of guilty of DWLR and found Defendant responsible of speeding. The superior court sentenced Defendant to 120 days active confinement. Defendant timely gave oral and written notice of appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b), which provides for an appeal of right to the Court of Appeals from any final judgment of a superior court.

III. Standard of Review

An argument regarding subject matter jurisdiction may be raised at any time, including on appeal. *See In Re T.R.P.*, 360 N.C. 588, 595, 636 S.E. 2d 787, 793 (2006). "Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E. 2d 590,592 (2010). Even if a party did not object to it at trial, they may contest jurisdiction. *See Pulley v. Pulley*, 255 N.C. 423, 429, 121 S.E. 2d 876, 880 (1961).

IV. Analysis

Generally, once jurisdiction of a court attaches, a subsequent event will not undo jurisdiction, even if the subsequent event would have prevented jurisdiction from attaching in the first place. *In Re Peoples*, 296 N.C. 109, 146, 250 S.E. 2d 890, 911 (1978). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial. *Id.* (quoting *Silver Surprize, Inc. v. Sunshine Mining Co.*, 74 Wash. 2d 519, 523, 445 P.2d 334, 336-37 (1968)).

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E. 2d 673, 675 (1987). In criminal cases, the State bears the burden of "demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E. 2d 826, 829 (2013). A defendant may raise the question of subject matter jurisdiction at any time, including on appeal. *Id.*

In 1961, the General Assembly enacted House Bill 104, entitled "An Act to Amend the Constitution of North Carolina by Rewriting Article IV Thereof and Making Appropriate Amendments of Other Articles so as to Improve the Administration of Justice in North Carolina." 1961 N.C. Sess. Laws 436. This constitutional amendment, ratified by the People on 6 November 1962, provides, in pertinent part:

> (3) Superior Court. Except as otherwise provided by the General Assembly, the Superior Court shall have original general jurisdiction throughout the State. The Clerks of Superior Court shall have such jurisdiction and powers as the General Assembly shall prescribe by general law uniformly applicable in every county of the State.
>
> (4) District Courts; Magistrates. The General Assembly shall, by general law uniformly applicable in every local

> court district of the State, prescribe the jurisdiction and powers of the District Courts and Magistrates.

N.C. Const. art. IV §12(3-4).

In 1965, pursuant to the rewritten Article IV, the General Assembly enacted House Bill 202, entitled "An Act to Implement Article IV of the Constitution of North Carolina by Providing for a New Chapter of the General Statutes of North Carolina, to be Known as 'Chapter 7A-Judicial Department', and for Other Purposes." 1965 N.C. Sess. Laws 369. These statutes now provide, in pertinent part:

> §7A-271. Jurisdiction of Superior Court.
>
> (a) The superior court has exclusive, original jurisdiction over all criminal actions not assigned to the district court division by this Article, except that the superior court has jurisdiction to try a misdemeanor:
>
> (1) Which is a lesser included offense of a felony on which an indictment has been returned, or a felony information as to which an indictment has been properly waived; or
>
> (2) When the charge is initiated by presentment; or
>
> (3) Which may be properly consolidated for trial with a felony under G.S. 15A-926;
>
> (4) To which a plea of guilty or nolo contendere is tendered in lieu of a felony charge; or
>
> (5) When a misdemeanor conviction is appealed to the superior court for trial de novo, to accept a guilty plea to a lesser included or related charge.
>
> . . .
>
> (c) When a district court is established in a district, any superior court judge presiding over a criminal session of court shall order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court.
>
> §7A-272. Jurisdiction of district court; concurrent jurisdiction in guilty or no contest pleas for certain felony offenses; appellate and appropriate relief procedures available.

> (a) Except as provided in this Article, the district court has exclusive, original jurisdiction for the trial of criminal actions, including municipal ordinance violations, below the grade of felony, and the same are hereby declared to be petty misdemeanors.

N.C. Gen. Stat. §7A-271(a), (c), 272(a) (2015).

North Carolina superior courts have jurisdiction to try a misdemeanor "[w]hich may be properly consolidated for trial with a felony under G.S. 15A-926." N.C. Gen. Stat. §7A-271(a)(3) (2015). Two or more offenses, "whether felonies or misdemeanors or both," may "be joined in one pleading or for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan." N.C. Gen. Stat. §15A-926(a) (2015).

For example, in *State v. Pergerson*, a grand jury indicted a defendant and he stood trial for larceny of an automobile (a felony) and unlawful operation of a vehicle (a misdemeanor) in superior court. 73 N.C. App. 286, 287, 326 S.E. 2d 336, 337 (1985). At the close of the State's evidence, the court dismissed the felony larceny charge. *Id.* This Court held the superior court retained jurisdiction over the misdemeanor charge after the felony charge had been dismissed, as "[c]learly, the two offenses . . . were based on the same act or transaction." *Id.* at 289, 326 S.E. 2d at 338. The superior court had jurisdiction at the time the case went to trial because the State properly joined the felony offense with the misdemeanor offense. The critical fact in *Pergerson* was the superior court properly had jurisdiction at the time of trial. This follows the general principle of invocation of jurisdiction, as the superior court had jurisdiction at the time the case proceeded to trial and jurisdiction existed throughout the duration of the trial.

In contrast, in *State v. Wall*, the superior court accepted a defendant's plea of guilty to two misdemeanor charges. 271 N.C. 675, 677, 157 S.E. 2d 363, 365 (1967). The grand jury did not indict the defendant on any felony charge. The Supreme Court held the "superior court was without jurisdiction to *proceed to trial* on [the] . . . indictments." *Id.* at 368, 157 S.E. 2d at 682. (emphasis added). The superior court was without jurisdiction to proceed to trial because "[p]resently, defendant is under indictment for misdemeanors." *Id.* As a result, jurisdictional status hinges upon the circumstances as they exist at the time a case is to "proceed to trial." *Id.* Once established, jurisdiction cannot be taken away.

With regard to infractions, including speeding, N.C. Gen. Stat. §7A-271(d) provides a superior court has jurisdiction over an infraction in two instances. First, a superior court has jurisdiction when the infraction is a lesser-included offense of a "criminal action properly before the court." N.C. Gen. Stat. §7A-271(d)(1) (2015). The second instance is when the infraction is a lesser-included offense of a "criminal action properly before the court, or . . . a related charge." A superior court has jurisdiction to accept an admission of responsibility for the infraction. N.C. Gen. Stat. §7A-271(d)(2) (2015).

N.C. Gen. Stat. §7A-271(c) establishes the procedure for trial court judges to follow when the superior court does not have subject matter jurisdiction over a pending case pursuant to N.C. Gen. Stat. §7A-271(a):

> When a district court is established in a district, any superior court judge presiding over a criminal session of court *shall* order transferred to the district court any pending misdemeanor which does not fall within the provisions of subsection (a), and which is not pending in the superior court on appeal from a lower court.

N.C. Gen. Stat §7A-271(c) (2015). (emphasis added). The transfer of a matter not properly before a superior court is not a decision that rests within the discretion of a superior court judge. On the contrary, the statute requires a superior court judge "shall order" pending cases without subject matter jurisdiction to be transferred to the district court. Before a case proceeds to trial, a superior court judge must transfer to the appropriate court a pending matter which is not properly before the superior court. *Id.*

"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. Felmet*, 302 N.C. 173, 176, 273 S.E. 2d 708, 711 (1981). Where a trial court lacks jurisdiction to allow a conviction, the appropriate remedy is to vacate the judgment of the trial court. *See State v. Partridge*, 157 N.C. App. 568, 571, 579 S.E. 2d 398, 400 (2003).

Here, Defendant contends the superior court lacked jurisdiction to try him on the misdemeanor DWLR charge and the infraction of speeding. Defendant argues his case presents none of the exceptions listed in N.C. Gen. Stat. §7A-271 in which a superior court has jurisdiction to try a misdemeanor or an infraction. He argues N.C. Gen. Stat. §7A-271(c) directs a superior court in this situation to transfer the matter to the

appropriate district court. Defendant asks us to vacate the judgment of the superior court. We are persuaded by Defendant's arguments.

The grand jury issued three indictments charging Defendant with three offenses: a felony, a misdemeanor, and an infraction. The State properly joined the three offenses for trial under N.C. Gen. Stat. 15A-926, as the offenses were part of the same act, specifically Defendant's operation of the motor vehicle on 2 November 2013. Had the case gone to trial at this point, the superior court would have had jurisdiction over the misdemeanor and the infraction. However, the State dismissed the felony charge of habitual impaired driving on 20 April 2015. At the time the case proceeded to trial in superior court, only a misdemeanor and an infraction remained. Without the felony offense, the misdemeanor fell under none of the exceptions in N.C. Gen. Stat. §7A-271(a), and the infraction fell under none of the exceptions in N.C. Gen. Stat. 7A-271(d). Thus, under N.C. Gen. Stat. §7A-271(c), once the felony was dismissed prior to trial, the court should have "transferred" the two remaining charges to the district court.

The record here shows after dismissal of the felony the superior court lacked jurisdiction over the misdemeanor and the infraction. We hold the superior court did not properly have subject matter jurisdiction in this case.

V. Conclusion

We vacate the judgment of the superior court.

VACATED.

Judges CALABRIA and TYSON concur.

STATE OF NORTH CAROLINA
v.
DON NEWTON BROWN

No. COA15-1347

Filed 21 June 2016

Searches and Seizures—probable cause for warrant—confidential informant's statement—time criminal activities seen—not included—evidence suppressed

In a prosecution which began with a statement made by a confidential informant and concluded with a guilty plea, the trial court erred by denying defendant's motion to suppress evidence that was the result an affidavit that did not specify when the informant witnessed the alleged criminal activities.

Appeal by Defendant from order entered 19 March 2013 by Judge James W. Morgan and judgment entered 20 July 2015 by Judge Jesse B. Caldwell III in Gaston County Superior Court. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Phillip K. Woods, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Michele A. Goldman, for Defendant.

STEPHENS, Judge.

In this case, a search warrant was issued based on an affidavit that failed to specify when an informant witnessed Defendant's allegedly criminal activities. Such an affidavit contains insufficient information to establish probable cause and thus cannot support the issuance of a search warrant. Accordingly, we reverse the trial court's order denying Defendant's motion to suppress evidence discovered as a result of the execution of that search warrant and vacate the judgment entered upon Defendant's subsequent guilty pleas.

Factual and Procedural Background

This case arises from the execution of a search warrant applied for and granted to Detective Kevin Putnam of the Gastonia Police Department ("GPD") on 26 November 2012. On that date, Putnam

sought and received a warrant to search the residence of Defendant Don Newton Brown at 1232 North Ransom Street in Gaston County for counterfeit currency and related items, as well as firearms. The application included an affidavit by Putnam that averred, *inter alia*, Putnam had received a counterfeit $100 bill from an informant who claimed it had been obtained from Brown's home, where the informant also claimed to have seen firearms, including a handgun. As a result of items found during the search of Brown's residence, he was indicted on one count each of possession of a stolen motor vehicle, possession of five or more counterfeit instruments, and possession of a firearm by a felon.

On 7 January 2013, Brown moved to suppress the fruits of the search of his residence, asserting that "[t]hat the application and warrant fail to contain the information necessary to meet the 'lack of staleness' requirement . . . ." The motion to suppress was heard in the Gaston County Superior Court on 18 March 2013 before the Honorable James W. Morgan, Judge presiding. At the hearing, Putnam was the sole witness, testifying about what he intended for the affidavit to state in an effort to clarify vague language about when the informant obtained his information regarding Brown's allegedly criminal activities. The trial court denied Brown's motion in open court and entered a written order memorializing the ruling on 19 March 2013 ("the suppression order").

The case came on for trial at the 20 July 2015 criminal session of Gaston County Superior Court, the Honorable Jesse B. Caldwell III, Judge presiding. Brown pled guilty to all three charges against him, specifically reserving his right to appeal the suppression order. The trial court consolidated the convictions for judgment, imposing a term of 25-39 months in prison. Brown gave notice of appeal in open court.

Discussion

On appeal, Brown argues that the trial court erred in (1) denying his motion to suppress the evidence discovered as a result of the search, (2) calculating his prior record level, and (3) including a civil judgment for restitution in the written judgment which was not part of the court's oral ruling. We reverse the order denying the motion to suppress and vacate the judgment entered upon Brown's subsequent guilty pleas. As a result, we do not consider Brown's other arguments.

I. Motion to suppress

Brown argues that the trial court erred in denying his motion to suppress. Specifically, Brown contends that Putnam's affidavit in support of his search warrant application was conclusory and lacked sufficient

details about when the informant ("the CRI") acquired the information that formed the basis of Putnam's warrant request. We agree.

A. Standard of review on appeal

> The scope of appellate review of a ruling upon a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.

State v. Johnston, 115 N.C. App. 711, 713, 446 S.E.2d 135, 137 (1994) (citation and internal quotation 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). "An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence." *Johnston*, 115 N.C. App. at 713, 446 S.E.2d at 137 (citations omitted).

> This deference, however, is not without limitation. A reviewing court has the duty to ensure that a [judicial officer] does not abdicate his or her duty by "mere[ly] ratif[ying] . . . the bare conclusions of [affiants]." [*Illinois v.*] *Gates*, 462 U.S. [213,] 239, 103 S. Ct. [2317,] 2333, 76 L. Ed. 2d [527,] 549 [(1983)]; *see State v. Campbell*, 282 N.C. 125, 130-31, 191 S.E.2d 752, 756 (1972) ("Probable cause cannot be shown by affidavits which are purely conclusory . . . ." (citation and internal quotation marks omitted)); *see also United States v. Leon*, 468 U.S. 897, 914, 104 S. Ct. 3405, 3416, 82 L. Ed. 2d 677, 693 (1984) ("[C]ourts must . . . insist that the [judicial officer] purport to perform his neutral and detached function and not serve merely as a rubber stamp for the police.") (citations and internal quotation marks omitted), *superseded in part by* Fed. R. Crim. P. 41(e).

State v. Benters, 367 N.C. 660, 665, 766 S.E.2d 593, 598 (2014).

B. Standard and scope of review at the suppression hearing

The question for a trial court

> reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the

> [judicial officer's] decision to issue the warrant. North Carolina [employs] the totality of the circumstances approach for determining the existence of probable cause . . . . Thus, the task of the issuing judicial officer is to make a common-sense decision based on all the circumstances that there is a fair probability that contraband or evidence of a crime will be found in a particular place.

State v. McCoy, 100 N.C. App. 574, 576, 397 S.E.2d 355, 357 (1990) (citations and internal quotation marks omitted).

Because its duty in ruling on a motion to suppress based upon an alleged lack of probable cause for a search warrant involves an evaluation of the judicial officer's decision to issue the warrant, the trial court should consider only the information before the issuing officer. Thus, although our appellate courts have held that "the scope of the court's review of the [judicial officer's] determination of probable cause is not confined to the affidavit alone[,]" additional information can only be considered where

> [t]he evidence shows that the [judicial officer] *made his notes on the exhibit contemporaneously from information supplied by the affiant under oath*, that the paper was not attached to the warrant in order to protect the identity of the informant, that the notes were kept in the magistrate's own office drawer, and that the paper was in the same condition as it was at the time of the issuance of the search warrant.

State v. Hicks, 60 N.C. App. 116, 119, 120-21, 298 S.E.2d 180, 183 (1982) (internal quotation marks omitted; emphasis added), *disc. review denied*, 307 N.C. 579, 300 S.E.2d 553 (1983). In such circumstances, an appellate court may consider whether probable cause can be supported by the affidavit in conjunction with the aforementioned notes. *Id.* at 121, 298 S.E.2d at 183; *see also* N.C. Gen. Stat. § 15A-245(a) (2015) ("Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, *but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.*") (emphasis added). Outside of such contemporaneously recorded information in the record, however, it is error for a reviewing court to "rely[] upon facts elicited at

the [suppression] hearing that [go] beyond 'the four corners of [the] warrant.' " *See Benters*, 367 N.C. at 673, 766 S.E.2d at 603.

C. "Staleness" of information supporting issuance of a search warrant

The concern regarding the possible "staleness" of information in an affidavit accompanying a search warrant application arises from the requirement that

> proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a reasonable time may have elapsed. The test for staleness of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued. Common sense must be used in determining the degree of evaporation of probable cause. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock.
>
> *As a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant.*

State v. Lindsey, 58 N.C. App. 564, 565-66, 293 S.E.2d 833, 834 (1982) (citations, internal quotation marks, and ellipsis omitted; emphasis added). However, where the alleged criminal activity has been observed within a day or two of the affidavit and warrant application, the information is generally not held to be stale. *See*, *e.g.*, *State v. Walker*, 70 N.C. App. 403, 405, 320 S.E.2d 31, 33 (1984) (upholding a search warrant for a location where an informant had seen marijuana within the past 48 hours); *State v. Barnhardt*, 92 N.C. App. 94, 97, 373 S.E.2d 461, 463 (upholding a search warrant for a location where an informant had seen cocaine within the past 24 hours), *disc. review denied*, 323 N.C. 626, 374 S.E.2d 593 (1988).

D. Analysis

Here, in support of his warrant application, Putnam submitted an affidavit stating:

> *In the past 48 hours, Det. Putnam spoke with a person whose name cannot be revealed. This person has concern*

> *for their [sic] safety, and Det. Putnam feels this person would be of no further value to law enforcement if their [sic] true identity was revealed. For the remainder of this application Det. Putnam will refer to this person as "CRI #1095." CRI #1095 has been in contact with Don Brown and has provided Det. Putnam with a counterfeit $100 bill that came from 1232 N. Ransom St. Det. Putnam verified that this is the addess [sic] of Don Newton Brown. Don Brown resides at this residence with a black female by the name of Kisha Harris. The house is also frequented by Paquito Brown and Don . . . Brown. Don Brown is known to have firearms and the CRI stated that Don Brown has been seen with a handgun.*
>
> In the past 48 hours, Det. Putnam spoke to Special Agent Rumney, United States Secret Service (USSS), Charlotte Field Office. Agent Rumney conducted a couneterfeit [sic] (CFT) note search on the serial number provided by CRI #1095. The searial [sic] number is of record with the USSS with passes having been conducted in the Gaston County area in 2005 and 2006.
>
> Furthermore, SA Rumney (USSS) stated that Don Brown is of record with the USSS from a previous counterfeit case involving the manufacturing a [sic] passing of CFT Federal Reserve Notes (FRNS) in 2005 and 2006 in Gaston County and surrounding counties.
>
> Additionally, SA Rumney (USSS) stated that in Nov. 2010, he interviewed Paquito Rafeal Brown, nephew of Don Brown, at the Gaston County Jail, after P. Brown was found to be in possession of a CFT $100 FRN. A CFT FRN inquiry on the serial number in P. Brown's possession matched those involved in the 2005-2006 counterfeit case involving Don Brown.

(Emphasis added).

At the suppression hearing, Putnam testified that what he *meant* to say in the first paragraph of the affidavit was both (1) that the CRI told Putnam the information about Brown within 48 hours of applying for the warrant and also (2) that the CRI had obtained the counterfeit money within that time period. At the hearing, as on appeal, Brown did not dispute that Putnam *intended* to say that the CRI had gathered the information he gave Putnam within 48 hours of the warrant application.

Instead, he argued that: (1) Putnam's affidavit did not state when the CRI obtained the information about Brown, making it impossible to evaluate the information's staleness; and, (2) in ruling on the question of staleness, the trial court should not consider Putnam's hearing testimony about what he intended to say in the affidavit:

> . . . . Now, I understand [Putnam's] explanation is that he meant this to say that all of that occurred within 48 hours. Any independent person reading [the affidavit] has no way of understanding that. That's not what—that's not what's written here, that's not what's understood by any independent person reading this. There is no way that occurs.
>
> There is no information in this affidavit as to when that information the CRI supposedly gave this officer, there is no information about when that information was gathered by the CRI, anything. All we know is when that CRI told that officer that information.
>
> . . . .
>
> As the [c]ourt is aware, the magistrate is stuck with what—the magistrate and this [c]ourt are stuck with what's in the application in this writing unless they reduce or record any other information, or put it on the search warrant, anything like that. None of that occurred in this case. When any independent third[]party reads this application they [sic] have no idea when that information was gathered. If you read the warrant actually it looks like it could have been from 2005 through 2010, just as readily as it was supposedly from what the officer said that day. That's what he put in the application. Any independent third[]party doesn't have the information necessary to make a decision to issue a valid warrant.

The State, in contrast, "contend[ed] [Putnam] can explain what he put in the affidavit . . . . This would go to explain his writing with regard to the affidavit and what sources he relied on."

The trial court denied Brown's motion in open court and entered a written order memorializing the ruling on 19 March 2013. That order contains the following findings of fact:

> 1. On November 26, 2012, Detective Putnam obtained a search warrant from a Gaston County Magistrate related to

> this matter, a copy of said search warrant was attached to [the] defendant's motion to suppress.
>
> 2. Detective Putnam stated in said application for search warrant that in the past 48 hours Detective Putnam had spoken with a confidential informant. That the confidential informant had given him a counterfeit $100 bill that had come from 1232 North Ransom Street, an address verified to be that of the defendant.
>
> 3. *Detective Putnam testified* that the 48 hours referred to conversations with the confidential informant occurring on November 23rd, November 24th, and November 26th.
>
> 4. Further, Detective Putnam spoke with Special Agent Rumney, of the United States Secret Service, regarding connections between the counterfeit note and prior investigations between 2005 and 2010, which referred to the defendant.

(Emphasis added). As a result of these factual findings, the court concluded that the motion should be denied because, "under the totality of the circumstances[,] there is a substantial basis for the magistrate's finding of probable cause . . . ."

The suppression order clearly indicates that the trial court *did* consider Putnam's hearing testimony about what he intended the affidavit to mean—evidence outside the four corners of the affidavit and not recorded contemporaneously with the magistrate's consideration of the application—in determining whether a substantial basis existed for the magistrate's finding of probable cause. As noted *supra*, this was error. *See* N.C. Gen. Stat. § 15A-245(a); *see also Benters*, 367 N.C. at 673, 766 S.E.2d at 604. More importantly, however, a plain reading of the order indicates a more significant error: the trial court *did not* resolve the critical issue of whether Putnam's affidavit could be fairly read as stating that *the CRI obtained the information allegedly incriminating Brown within 48 hours of the warrant application*. Our case law makes clear that it cannot.

Regarding staleness, we find the wording of the affidavit here strikingly similar to that in *State v. Newcomb*:

> . . . . Within the past five days from [the date of the warrant application], the person who I will refer to as "He," regardless of the person's sex, contacted me. This person offered

> his assistance to the City-county vice unit in the investigation of drug sales in the Burlington-Alamance County area. This person told myself [sic] that he had been inside the residence described herein being Rt. 8, Box 122, Lot #82 County Club Mobile Home Park, Burlington, where he observed a room filled with marijuana plants. He stated that the suspect Charles Wayne Newcomb was maintaining the plants. . . .

84 N.C. App. 92, 93, 351 S.E.2d 565, 566 (1987). As did Putnam here, the officer in *Newcomb* "failed to state . . . the time the informant's observations were made." *Id.* at 93-94, 351 S.E.2d at 565. Rather, as in Putnam's affidavit, the affidavit in *Newcomb* only provided information regarding the time when the informant spoke to the officer. *Id.* In determining that this "bare-bones affidavit" contained insufficient information to establish probable cause and support the issuance of a search warrant, this Court observed that

> [t]he information [the informant] supplied is sparse. His statement gives no details from which one could conclude that *he had current knowledge of details or that he had even been inside the defendant's premises recently*. The affidavit contains a mere naked assertion that the informant *at some time* saw a 'room full of marijuana' growing in [the] defendant's house.

Id. at 95, 351 S.E.2d at 567 (emphasis added). *Compare id. with Walker*, 70 N.C. App. at 405, 320 S.E.2d at 33 (upholding search warrant based upon an affidavit stating, *inter alia*, "the informant stated he had been in [the] defendant's house within the past 48 hours and had seen marijuana") *and Barnhardt*, 92 N.C. App. at 97, 373 S.E.2d at 463 (upholding search warrant based upon an affidavit stating, *inter alia*, "cocaine was seen in the residence located at 914 South Carolina Ave. by the confidential informant within the past 24 hours"). We cannot distinguish the staleness of the CRI's information contained in Putnam's affidavit from that in *Newcomb*. Accordingly, we reverse the trial court's suppression order and vacate the judgment entered upon Brown's subsequent guilty pleas. In view thereof, it is unnecessary to address Brown's remaining arguments.

ORDER REVERSED; JUDGMENT VACATED.

Chief Judge McGEE and Judge DAVIS concur.

STATE OF NORTH CAROLINA
v.
DITTRELL LESHEA DOVE, DEFENDANT

No. COA15-1273

Filed 21 June 2016

Criminal Law—altering, stealing, or destroying criminal evidence—motion to dismiss—theft of money—controlled sale of illegal drugs

The trial court erred by denying defendant's motion to dismiss the charge of altering, stealing, or destroying criminal evidence based upon his alleged theft of money obtained from the controlled sale of illegal drugs. The money was not evidence as defined by statute.

Appeal by defendant from judgment entered 10 June 2015 by Judge John E. Nobles, Jr. in Onslow County Superior Court. Heard in the Court of Appeals 28 April 2016.

Roy Cooper, Attorney General, by Kenneth A. Sack, Assistant Attorney General, for the State.

William D. Spence for defendant-appellant.

ZACHARY, Judge.

Defendant was charged with altering, stealing, or destroying criminal evidence, based upon his alleged theft of money obtained from the controlled sale of illegal drugs. Because the money in question was not evidence as defined by statute, the trial court erred in denying defendant's motion to dismiss the charge of altering, stealing, or destroying criminal evidence.

I. Factual and Procedural Background

On 12 September 2012, Detective Joshua Porter (Det. Porter), an employee of the narcotics division of the Jacksonville Police Department and the United States Drug Enforcement Administration task force (DEA), learned of Dittrell Dove (defendant) from the Kansas field office of the DEA. Defendant had been stopped by the Kansas Highway Patrol with a large amount of marijuana in his vehicle, bound for Jacksonville, North Carolina. Defendant was willing to cooperate with

law enforcement by delivering the drugs to their intended recipient, a Mr. Thompson of Jacksonville.

Det. Porter and the narcotics division formulated a plan to facilitate defendant's delivery of the drugs. Defendant would be flown to Jacksonville with 14 pounds of marijuana and taken into custody by Det. Porter, and would then drive in a rented vehicle with the drugs to a designated location for the sale of the drugs, at which point law enforcement would arrest Thompson. After the arrest, defendant would surrender the money received for the drugs to the Jacksonville Police Department.

Shortly before midnight on 24 September 2012, and during the early morning hours of 25 September 2012, defendant and Thompson agreed on a meeting place. Pursuant to plan, defendant wore a recording device. Defendant drove the rented vehicle to the meeting place, with law enforcement following directly behind. After meeting with Thompson, defendant drove to Thompson's residence to complete the transaction. Defendant then contacted Det. Porter to confirm that the deal was concluded, and that defendant had the money. Defendant met Det. Porter in person and informed him that Thompson had paid defendant $20,000, and owed him $10,000 more. Defendant gave Det. Porter a shopping bag filled with currency. Det. Porter then searched defendant, and found currency "stuffed up his coat sleeves, in his pockets, like, down his pants . . . ." There was money "all over his vehicle" and "money stuffed in some of his luggage . . . There was just money everywhere, including on his person." The shopping bag contained $19,120, and $4,608 was found on defendant's person and in his vehicle. Defendant told Det. Porter that he had children, and admitted to stealing the money. Defendant was arrested and charged with stealing evidence pursuant to N.C. Gen. Stat. § 14-221.1; upon his being booked into jail, another $1,000 was found on his person by jail staff. Defendant was tried at the 8 June 2015 session of Onslow County Superior Court. At the close of State's evidence, defendant moved to dismiss the charges. Defendant presented no evidence.

The jury found defendant guilty of altering, stealing, or destroying criminal evidence. The trial court found defendant to have a prior felony record level III, and sentenced defendant in the presumptive range to 6-17 months' imprisonment. The trial court then suspended this sentence, and ordered defendant to be placed on supervised probation for 60 months.

This Court granted defendant's petition for writ of certiorari to review this case.

II. Standard of Review

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007).

" 'Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.' " *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (quoting *State v. Barnes*, 334 N.C. 67, 75, 430 S.E.2d 914, 918 (1993)), *cert. denied*, 531 U.S. 890, 148 L. Ed. 2d 150 (2000).

III. Motion to Dismiss

In his sole argument on appeal, defendant contends that the trial court erred in denying his motion to dismiss. We agree.

Defendant was charged with stealing criminal evidence, pursuant to N.C. Gen. Stat. § 14-221.1. This statute provides, in relevant part:

> Any person who breaks or enters any building, structure, compartment, vehicle, file, cabinet, drawer, or any other enclosure wherein evidence relevant to any criminal offense or court proceeding is kept or stored with the purpose of altering, destroying or stealing such evidence; or any person who alters, destroys, or steals any evidence relevant to any criminal offense or court proceeding shall be punished as a Class I felon.
>
> As used in this section, the word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice being retained for the purpose of being introduced in evidence or having been introduced in evidence or being preserved as evidence.

N.C. Gen. Stat. § 14-221.1 (2015).

The language of the statute is explicit. "[T]he word evidence shall mean any article or document in the possession of a law-enforcement officer or officer of the General Court of Justice…." Defendant was neither of these things; at most, the argument could be made that he was an agent of law-enforcement officers, but he was not one himself.

Nor are we prepared to assume that this statute was intended to apply to agents of law enforcement other than those explicitly named

in the statute. Inasmuch as the statutory language could be considered ambiguous, the rule of lenity demands that we construe such ambiguity in favor of defendant.

This is not to say that defendant's actions were not criminal. It is entirely possible that defendant could have been tried for some other offense. However, at issue in this case is the offense of altering, stealing, or destroying criminal evidence, and that offense requires that the evidence at issue be "in the possession of a law-enforcement officer or officer of the General Court of Justice…." We hold that the money in question did not meet this statutory definition, that the State failed to present substantial evidence of this element of the offense, and that the trial court erred in denying defendant's motion to dismiss.

REVERSED.

Chief Judge McGEE and Judge DILLON concur.

STATE OF NORTH CAROLINA
v.
JOSHUA WAYNE MARTIN, DEFENDANT

No. COA15-1104

Filed 21 June 2016

Criminal Law—prosecutor's arguments—misstatement of law

Where the prosecutor made a misstatement of law during closing arguments in defendant's trial for robbery with a dangerous weapon, defendant nonetheless received a trial free from prejudicial error because the trial court took appropriate steps to correct the prosecutor's misstatements of law and otherwise properly instructed the jury on the law and the offenses at issue.

Appeal by defendant from judgment entered 14 January 2015 by Judge Michael D. Duncan in Forsyth County Superior Court. Heard in the Court of Appeals 30 March 2016.

Kimberly P. Hoppin for defendant.

Attorney General Roy Cooper, by Assistant Attorney General Andrew O. Furuseth, for the State.

ELMORE, Judge.

A jury found Joshua Wayne Martin (defendant) guilty of robbery with a dangerous weapon. On appeal by writ of *certiorari*, defendant argues that the trial court committed reversible error and abused its discretion by overruling his objections during the State's closing arguments. We hold that defendant received a trial free from prejudicial error.

I. Background

The State's evidence at trial tended to show the following: On 22 April 2014, defendant entered the Adams Market convenience store with a shotgun and demanded money from the manager, Wanda Robinson. Ms. Robinson complied, turning over approximately $250.00 from the cash register. Defendant then fled from the convenience store, leaving Ms. Robinson unharmed. Police identified defendant as the robbery suspect and arrested him three days later.

During interrogation, defendant told police that the shotgun used in the robbery was under a truck bed cover behind his father's house. Police found the shotgun in that same location. It was unloaded. Defendant's father testified that the shotgun was his, though he did not have ammunition for it and had not fired it since he was thirteen or fourteen years old. He also testified that he did not know when defendant took the shotgun.

At trial, defendant admitted that he "robbed the store." When asked how he used the shotgun, defendant testified, "I pointed it towards Ms. Wanda and asked for the money and then I pointed it away from her and grabbed the money." According to defendant, however, the shotgun was unloaded during the robbery. During closing arguments, both attorneys argued whether the shotgun defendant used during the robbery could be considered a dangerous weapon. Defendant's counsel stated on several occasions that "the law recognizes that an unloaded gun is not a dangerous weapon." She also acknowledged that an unloaded gun could be a dangerous weapon if it was used to strike someone, "but there is no evidence of that" in this case. Over defendant's objections, the prosecution argued to the jury that the shotgun could be a dangerous weapon even if it was unloaded:

> It is easy to say there is no ammunition in the shotgun. It is easy to remove ammunition from the shotgun in the three-day period from the robbery until the gun was found, but again at the end of the day, as we'll go through in a few moments with the elements of a crime[,] *it doesn't matter whether there is ammunition in the shotgun or not.*

MS. TOOMES: Objection.

THE COURT: Overruled.

. . . .

The sixth and seventh elements, ladies and gentlemen of the jury[,] are the key to the case. This is what makes this case an Armed Robbery case as opposed to a Common Law Robbery case. The sixth element is that at the time the defendant obtained the property, at the time they [sic] took the money, this defendant was in possession of a dangerous weapon. You are going to be told that a dangerous weapon is one, once again[,] that is likely to cause death or serious bodily injury. You are also going to be told and that parenthetical is important is very important as well " . . . or, that it reasonably appeared to the victim that a dangerous weapon was being used in which case you may infer the[ ] said instrument was what the defendant's conduct represented it to be."

Once again we know that this shotgun is a dangerous weapon for two reasons: No. 1) because someone can fire the shotgun and shoot someone else with a projectile or projectiles that would come from the shotgun, and No. 2) even if a shotgun is not loaded with any ammunition, it is a dangerous weapon in and of itself. You have heard testimony, the barrel of a shotgun is made of steel. It is a hard surface. This is not foam. This is not [s]alt. This is not plastic. This is not a toy. This [is] real. What the defendant used is real. One can imagine, if a person takes this shotgun and strikes or assaults someone, especially doing so repeatedly, that will likely cause or will cause serious bodily injury or death. Our common sense and reason tell us that. *That is why if the defendant had brought in a plastic or toy gun and pointed that at the victim, this would not be an armed robbery case, or when you bring a real gun and point a shotgun at someone it is armed robbery.*

MS. TOOMES: I'm going to object, Your Honor.

THE COURT: Overruled.

(Emphasis added.)

Immediately after closing arguments, the trial court instructed the jury that "[b]oth attorneys in their closing arguments have stated what they believe the law is in this case. I will instruct you that if their statements in closing arguments differ from what I am getting ready to tell you the law is then you are to follow the instructions of the law as I given it [sic] to you." The court then instructed the jury on the elements of robbery with a dangerous weapon and common law robbery. As to the dangerous weapon element, the court explained that

> an object incapable of endangering or threatening lives cannot be considered a dangerous weapon. In determining whether evidence of a particular instrument constitutes evidence of a dangerous weapon, the determinative question is whether there is evidence that a person's life was in fact endangered or threatened. Now members of the jury, a robbery victim, that is one who is a victim of a robbery, more particularly, an armed robbery, should not have to force the issue of whether the instrument being used actually is also loaded and can shoot a bullet.
>
> In an Armed Robbery case the jury may conclude that the weapon is what it appeared to the victim to be, a loaded gun; if, however, there is any evidence that the weapon was in fact not what it appeared to be, that is a loaded gun, to the victim, the jury must determine what, in fact, the instrument was. It is for the jury to determine the nature of the weapon, and [ ] how it was used[,] and [ ] you could, but you're not required to infer from the appearance of the instrument[ ] to the victim or alleged victim that it was a dangerous weapon.

On 14 January 2015, the jury found defendant guilty of robbery with a dangerous weapon, and the trial court sentenced defendant to an active term of sixty-seven to ninety-three months of imprisonment. Defendant filed a written notice of appeal on 20 January 2015, though the notice failed to "designate the judgment or order from which appeal is taken," as required by Rule 4. N.C. R. App. P. 4(b) (2016). Despite the timely filing and service on the State, appellate entries were not made until 6 April 2015. Nevertheless, we allow defendant's petition for writ of *certiorari* pursuant to Rule 21(a)(1) to review the merits of the appeal. N.C. R. App. P. 21(a)(1) (2016) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action . . . ."));

see State v. Gordon, 228 N.C. App. 335, 337, 745 S.E.2d 361, 363 (2013) (" 'Appropriate 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." (citing *State v. Hammonds*, 218 N.C. App. 158, 163, 720 S.E.2d 820, 823 (2012))).

II. Discussion

Defendant argues that the trial court erred in overruling his objections to the statements made by the prosecutor during its closing argument regarding whether the shotgun was a dangerous weapon.

"It is well settled that the arguments of counsel are left largely to the control and discretion of the trial judge and that counsel will be granted wide latitude in the argument of hotly contested cases." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). Pursuant to N.C. Gen. Stat. § 15A-1230, counsel

> may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230(a) (2015). "Counsel are entitled to argue to the jury all the law and facts in evidence and all reasonable inferences that may be drawn therefrom, but may not place before the jury incompetent and prejudicial matters and may not travel outside the record by interjecting facts of their own knowledge or other facts not included in the evidence." *State v. Syriani*, 333 N.C. 350, 398, 428 S.E.2d 118, 144 (1993) (citing *State v. McNeil*, 324 N.C. 33, 48, 375 S.E.2d 909, 918 (1989), *sentence vacated*, 494 U.S. 1050, 108 L. Ed. 2d 756, *on remand*, 327 N.C. 388, 395 S.E.2d 106 (1990), *cert. denied*, 499 U.S. 942, 113 L. Ed. 2d 459 (1991)). "Incorrect statements of law in closing arguments are improper . . . ." *State v. Ratliff*, 341 N.C. 610, 616–17, 461 S.E.2d 325, 328–29 (1995) (holding that the trial court erred in failing "to sustain defendant's objection and instruct the jury to disregard" the prosecutor's improper statement of the law).

"The standard of review for improper closing arguments that provoke timely objection from opposing counsel is whether the trial court abused its discretion by failing to sustain the objection." *State v. Jones*,

355 N.C. 117, 131, 558 S.E.2d 97, 106 (2002) (citations and quotation marks omitted). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). "[S]tatements contained in closing arguments to the jury are not to be placed in isolation or taken out of context on appeal. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." *State v. Green*, 336 N.C. 142, 188, 443 S.E.2d 14, 41 (1994).

In North Carolina, armed robbery is defined in N.C. Gen. Stat. § 14-87 as follows:

> (a) Any person or persons who, having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business, residence or banking institution or any other place where there is a person or persons in attendance, at any time, either day or night, or who aids or abets any such person or persons in the commission of such crime, shall be guilty of a Class D felony.

N.C. Gen. Stat. § 14-87(a) (2015). "The essential difference between armed robbery and common law robbery is that the former is accomplished by the use or threatened use of a firearm or other dangerous weapon whereby the life of a person is endangered or threatened." *State v. Lee*, 282 N.C. 566, 569, 193 S.E.2d 705, 707 (1973).

In *State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986), our Supreme Court summarized the evidentiary rules in armed robbery cases where the "dangerous weapon" element is at issue:

> (1) When a robbery is committed with what appeared to the victim to be a firearm or other dangerous weapon capable of endangering or threatening the life of the victim and there is no evidence to the contrary, there is a mandatory presumption that the weapon was as it appeared to the victim to be. (2) If there is some evidence that the implement used was not a firearm or other dangerous weapon which could have threatened or endangered the life of the victim, the mandatory presumption disappears leaving only a permissive inference, which permits but

> does not require the jury to infer that the instrument used was in fact a firearm or other dangerous weapon whereby the victim's life was endangered or threatened. (3) If all the evidence shows the instrument could not have been a firearm or other dangerous weapon capable of threatening or endangering the life of the victim, the armed robbery charge should not be submitted to the jury.

Id. at 124–25, 343 S.E.2d at 897.

Here, defendant argues that the prosecutor made an incorrect statement of the law when he told the jury that "it doesn't matter whether there is ammunition in the shotgun or not." According to defendant, the prosecutor's statements turned the "permissive inference," whereby the jury was permitted but not required to infer that the shotgun was a dangerous weapon, into a "mandatory presumption that the weapon was as it appeared to the victim to be." Defendant also contends that it was improper for the prosecutor to tell the jury that "when you bring a real gun and point a shotgun at someone it is armed robbery," as that statement, in context, suggests the shotgun was a dangerous weapon "in and of itself" because it could be used to "strike or assault" someone. We agree.

Whether the shotgun was loaded at the time of the robbery was relevant because "[a]n object incapable of endangering or threatening life cannot be considered a dangerous weapon." *State v. Frazier*, 150 N.C. App. 416, 419, 562 S.E.2d 910, 913 (2002) (citing *Allen*, 317 N.C. at 122, 343 S.E.2d at 895). In *Frazier*, we explained that "where a defendant presents evidence that the weapon used during a robbery was unloaded or otherwise incapable of firing, such evidence 'tend[s] to prove the absence of an element of the offense [of armed robbery].' " *Id.* (quoting *State v. Joyner*, 67 N.C. App. 134, 136, 312 S.E.2d 681, 682 (1984), *aff'd*, 312 N.C. 779, 324 S.E.2d 841 (1985)). If the jury believed defendant's evidence tending to show that the shotgun was unloaded, it should have found defendant not guilty of armed robbery.

In addition, while prior decisions have held that a firearm incapable of firing may be a dangerous weapon where it was used to strike or bludgeon the victim, *e.g.*, *State v. Funderburk*, 60 N.C. App. 777, 778–79, 299 S.E.2d 822, 823 (1983), there was no evidence in this case that defendant used the shotgun to strike Ms. Robinson. By suggesting that the shotgun could have been used to strike her, the prosecutor ignored "the circumstances of use" from which we "determine whether an instrument is capable of threatening or endangering life." *State v. Westall*,

116 N.C. App. 534, 539, 449 S.E.2d 24, 27 (1994) (citing *State v. Pettiford*, 60 N.C. App. 92, 298 S.E.2d 389 (1982)); *see State v. Alston*, 305 N.C. 647, 650, 290 S.E.2d 614, 616 (1982) ("[T]he determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." (citing *State v. Moore*, 279 N.C. 455, 183 S.E.2d 546 (1971))).

Although we agree that the prosecutor's statements were improper, defendant has failed to show prejudice. N.C. Gen. Stat. § 15A-1442(6), -1443(a) (2015). "[A]s a general rule, a trial court cures any prejudice resulting from a prosecutor's misstatements of law by giving a proper instruction to the jury." *State v. Goss*, 361 N.C. 610, 626, 651 S.E.2d 867, 877 (2007) (citing *State v. Trull*, 349 N.C. 428, 452, 509 S.E.2d 178, 194 (1998), *cert. denied*, 528 U.S. 835, 145 L. Ed. 2d 80 (1999)). After closing arguments, the trial court admonished the jury to follow its own instructions and not the attorneys' statements of the law. The court then properly instructed the jury on the elements of armed robbery, including the permissive inference regarding the "dangerous weapon" element, and the lesser-included offense of common law robbery. Based on the steps taken by the trial court, defendant has failed to show prejudice which would warrant a new trial.

III. Conclusion

We conclude that defendant received a trial free from prejudicial error. The trial court took appropriate steps to correct the prosecutor's misstatements of the law and otherwise properly instructed the jury on the law and the offenses at issue.

NO PREJUDICIAL ERROR.

Judges HUNTER, JR. and DAVIS concur.

STATE OF NORTH CAROLINA
v.
BARSHIRI SANDY, DEFENDANT

STATE OF NORTH CAROLINA
v.
HENRY SURPRIS, DEFENDANT

No. COA15-996

Filed 21 June 2016

Appeal and Error—writ of certiorari—motion for appropriate relief—consideration of email communications outside of record

The Court of Appeals invoked Rule 2 of the North Carolina Rules of Appellate Procedure to consider certain e-mail communications outside the record in order to prevent manifest injustice. Defendants were entitled to the relief they sought in their motion for appropriate relief. Their constitutional rights were violated by the assistant district attorney's failure to provide information which Defendants could have used in a robbery case to make their own case and impeach the alleged victim's testimony that he was not a drug dealer. Accordingly, the judgments were vacated and remanded to the trial court.

Appeal by Defendants from judgments entered 14 December 2014 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 24 February 2016.

Attorney General Roy A. Cooper, III, by Assistant Attorney General LaShawn Piquant and Assistant Attorney General Robert D. Croom, for the State.

Appellate Defender Staples S. Hughes, by Assistant Appellate Defender Paul M. Green, for Defendant-Appellant Barshiri Sandy.

Cooley Law Office, by Craig M. Cooley, for Defendant-Appellant Henry Surpris.

DILLON, Judge.

Defendants Barshiri Sandy ("Sandy") and Henry Surpris ("Surpris") (collectively referred to as "Defendants") were indicted for various

charges for allegedly robbing Marcus Smith ("Mr. Smith") at gunpoint in Mr. Smith's garage. Defendants were tried together, and the jury returned guilty verdicts on three felony charges. Defendants gave notice of appeal. While their appeals were pending before this Court, Defendants filed motions for appropriate relief ("MARs"). In their MARs, Defendants ask this Court to vacate the judgments, contending that their constitutional rights were violated during the prosecution of their cases. We grant Defendants' MARs and order that the judgments entered against them be vacated, we dismiss Defendants' underlying appeal as moot, and we remand the matters to the trial court for further proceedings consistent with this opinion.

I. Background

A. The "Armed Robbery"

In April 2013, the two Defendants, along with Bryant Baldwin ("Mr. Baldwin"), approached Marcus Smith in his garage as he was exiting his car. During the encounter, the following occurred: (1) Defendants obtained $1,153.00 and a ring from Mr. Smith; (2) Mr. Smith grabbed a gun and shot both Defendants; (3) Mr. Smith was shot in the arm by one of the Defendants; and (4) Defendants fled in a car driven by Mr. Baldwin.

Defendants and Mr. Baldwin were subsequently arrested. Though Mr. Baldwin initially stated he was not present during the shooting, he changed his story and agreed to testify against Defendants after being confronted with certain evidence that placed him at the scene.

B. The Trial

In October 2014, Defendants were jointly tried for a number of felonies in connection with the alleged robbery/shooting in Mr. Smith's garage. All four men who were at the scene on the night in question testified at the trial: Mr. Baldwin and Mr. Smith testified for the State, and Defendants testified on their own behalf.

The State's evidence tended to show as follows: Defendants entered Mr. Smith's garage *with the intent to rob Mr. Smith*. Mr. Smith testified that he was a "club promoter," a position that required him to carry cash which accounted for the large amount of money he carried from time to time. He testified that Defendants approached him in his garage wearing masks and robbed him of $1,153.00 and some jewelry. He stated that he was able to shoot Defendants during the robbery, but was struck once in the arm by a bullet fired by one of the Defendants. Mr. Smith denied

being a drug dealer. Mr. Baldwin's testimony essentially corroborated Mr. Smith's account of the robbery.

Defendants' evidence tended to show as follows: Defendants testified that Mr. Smith was, in fact, an active drug dealer. Defendants went to see Mr. Smith, not to rob him, but rather *to confront him* about marijuana they claimed they had purchased from him but had not yet received. Mr. Smith admitted to owing Defendants marijuana. Mr. Smith stated that he did not want to conduct business inside his residence (as his family was inside), but that he would give them $1,153.00 in cash and a ring in lieu of the marijuana owed to Defendants. After handing over the money and ring, Mr. Smith grabbed a gun and shot both Defendants. Defendants fled in a vehicle driven by Mr. Baldwin. Defendants presented no evidence that Mr. Smith was, in fact, a major marijuana dealer besides their own self-serving testimony.

Defendants were convicted of all charges. The trial court entered judgments and sentenced them accordingly.

C. The Appeal/Motions for Appropriate Relief

Defendants timely appealed their convictions to this Court. In February 2015, before this appeal was heard, the State's key witness, Mr. Smith, was indicted by the federal government for trafficking large amounts of marijuana. Mr. Smith's indictment was based largely on evidence uncovered during an ongoing investigation by the Raleigh Police Department (the "RPD"). Through information obtained during the federal prosecution of Mr. Smith, Defendants' counsel has learned of information which suggests that *prior* to Defendants' trial: (1) The lead assistant district attorney (the "ADA") in Defendants' case was fully aware of the RPD investigation of Mr. Smith's drug trafficking activities; (2) the ADA corresponded with the lead RPD detective through a private e-mail account she maintained regarding the RPD's active investigation of Mr. Smith's involvement in drug trafficking; (3) when the RPD detective had cause to arrest Mr. Smith for drug trafficking, the ADA encouraged the RPD detective to hold off on the arrest until after she had completed her prosecution of Defendants; and (4) during Defendants' trial, the ADA called Mr. Smith as her key witness, who testified that he was not a drug trafficker, testimony which the ADA knew or should have known was false.

Defendants have filed MARs with this Court pursuant to N.C. Gen. Stat. § 15A-1418, requesting that their convictions be vacated. Their MARs are based, in large part, on information outside the Record on Appeal (the "Record"), including information contained in the court

filings in the federal prosecution of Mr. Smith. As indicated in Defendant Surpris's MAR:

> Defense and State witnesses gave drastically different accounts of the events of 17 April 2013. The key issue producing these radically dissimilar accounts was whether Marcus Smith [the victim and the State's key witness] trafficked large amounts of marijuana. The defense argued he did. The State argued he did not.
>
> The defense was correct, but did not have the direct evidence to prove it because the State suppressed substantial evidence documenting Marcus Smith's marijuana trafficking. The State, on the other hand, knew Smith trafficked marijuana, but allowed Smith to falsely tell the jury he made money legitimately as a club promoter.

Defendants argue that they were denied constitutional due process based, in part, on the ADA's failure to disclose evidence of Mr. Smith's drug trafficking activities during discovery, *see Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed.2d 215 (1963), and the ADA's failure to act when the State's key witness, Mr. Smith, gave testimony at Defendants' trial that he was not involved in drug dealing, testimony the ADA knew or should have known was misleading or false. *See Napue v. Illinois*, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed.2d 1217 (1959).

II. Summary of Holding

In disposing of the MARs, we invoke Rule 2 of the North Carolina Rules of Appellate Procedure to consider certain e-mail communications outside the Record in order to prevent manifest injustice as the "substantial rights of an appellant are affected." *State v. Hart*, 361 N.C. 309, 316, 644 S.E.2d 201, 205 (2007). Specifically, in our consideration of the MARs, we look not only to the Record but also to certain e-mails between the ADA and the RPD detective and an e-mail communication from the ADA to Defendants' counsel. We note that the State has not disputed the authenticity of these e-mails or made any argument that an evidentiary hearing is necessary to determine the authenticity of these e-mails. Accordingly, we conclude that invocation of Rule 2 is appropriate in this case.[1]

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1. The State has argued that our Supreme Court's recent decision in *State v. Benitez* bars appellate review of an MAR filed pursuant to N.C. Gen. Stat. § 15A-1418 if the underlying evidence is not part of the record on appeal. *State v. Benitez*, 368 N.C. 350, 350, 777 S.E.2d 60, 60 (2015). However, *Benitez* is distinguishable because in that case there was a need for the trial court to make findings regarding an evidentiary dispute, whereas here,

We further hold that these e-mails and the Record are sufficient for our Court to conclude that Defendants are entitled to the relief they seek in the MARs. Specifically, it is clear that their constitutional rights were violated, at the very least by the ADA's failure to provide information which Defendants could use to make their own case and impeach Mr. Smith's testimony, namely, his assertions that he was not a drug dealer. Accordingly, we vacate the judgments against Defendants and remand the matters to the trial court for further proceedings consistent with this opinion.

III. Discussion

A. Legal Grounds for Defendants' MARs: *Brady* and *Napue* Violations

In the present case, Defendants argue the following: (1) the ADA had reason to know that Mr. Smith was active in dealing marijuana (as asserted by Defendants during the trial); (2) the ADA, whether intentionally or unintentionally, suppressed evidence concerning Mr. Smith's drug activities (information which Defendants could have used to impeach Mr. Smith and corroborate their version of what occurred during the shooting); and (3) the ADA failed to act when her witness, Mr. Smith, gave the false impression that he was not actively involved in dealing marijuana, in violation of *Brady* and *Napue*.

In *Brady*, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment." *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed.2d at 218. Further, that Court has instructed that "[i]mpeachment evidence [which the defense could use against a government witness] as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380, 87 L. Ed.2d 481, 490 (1985); *see also State v. Williams*, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (recognizing that the Due Process Clause prohibits a prosecution from suppressing "impeachment evidence or exculpatory evidence"). Further, a prosecutor's duty to disclose extends beyond the prosecutor's case file to other materials in the possession of governmental investigative agencies. *Kyle v. Whitley*, 514 U.S. 419, 437, 115 S. Ct. 1555, 1567, 131 L. Ed.2d 490, 508 (1995) (recognizing that the "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police"). And a Due Process Clause violation occurs when such evidence is suppressed "irrespective

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the State has not argued that the e-mails are not authentic. Further, in *Benitez*, there was no invocation of Rule 2 for the consideration of evidence outside the record.

of the good faith or bad faith of the prosecution." *Williams*, 362 N.C. at 636, 669 S.E.2d at 296.

In *Napue*, the United States Supreme Court held that a due process violation occurs when a State witness offers false testimony which the prosecution knew or should have known was false. *Napue*, 360 U.S. at 269, 272, 79 S. Ct. at 1177, 1178-79, 1179, 3 L. Ed.2d at 1221, 1222-23. *See also Giglio v. United States*, 405 U.S. 150, 153-55, 92 S. Ct. 763, 766, 31 L. Ed.2d 104, 108-09 (1972) (reaffirming *Napue* holding in matter involving prosecution's nondisclosure of a promise to witness, namely: that he would not be charged if he testified on behalf of the prosecution). A violation occurs even where "the State, although not soliciting false evidence, allows it to go uncorrected when it appears." *Napue*, 360 U.S. at 269, 79 S. Ct. at 1177, 3 L. Ed.2d at 1221. *See also State v. Wilkerson*, 363 N.C. 382, 402-03, 683 S.E.2d 174, 187 (2009) (citing the *Napue* decision for the general proposition that the use of false evidence is improper even if the prosecution does not solicit it).

B. Our Court's Authority to Rule on MARs

A defendant may seek a motion for appropriate relief where "[t]he conviction was obtained in violation of the Constitution of the United States or the Constitution of North Carolina." N.C. Gen. Stat. § 15A-1415(b)(3) (2013). And a defendant may make such motion *in the appellate division* when the case is pending in the appellate division. N.C. Gen. Stat. § 15A-1418(a) (2013).

Our Court has the statutory authority *to dispose of* a MAR filed in our Court during an appeal if the taking of additional evidence is not necessary. *See* N.C. Gen. Stat. § 15A-1418(b) ("motion may be determined on the basis of the materials before" the appellate division). *See also State v. Jones*, 296 N.C. 75, 78, 248 S.E.2d 858, 860 (1978) (granting a motion for appropriate relief under N.C. Gen. Stat. § 15A-1418(a) as: "(1) the facts were sufficiently developed in the documents to enable us to rule on the legal question presented"; "(2) there was no controversy between the state and defendant as to any of the essential facts"; and "(3) it was not necessary to remand the case to the trial division [to take additional evidence and make findings]"). Otherwise, if the taking of additional evidence is necessary, it is the appellate court's duty to remand the MAR to the trial division for the taking of additional evidence. *See id.*

C. Our Consideration of Matters Outside the Record in Ruling on the MARs

Normally, any matter on appeal is decided solely on information contained in the record on appeal. However, Rule 2 of our Rules of Appellate Procedure recognizes the "residual power possessed by any

authoritative rule-making body to suspend or vary operation of its published rules in specific cases *where this is necessary to accomplish a fundamental purpose of the rules*." *Hart*, 361 N.C. at 316, 644 S.E.2d at 205. Our courts have not hesitated to invoke Rule 2 where the substantial rights of criminal defendants are implicated. *See*, *e.g.*, *State v. Sanders*, 312 N.C. 318, 320, 321 S.E.2d 836, 837 (1984) (per curiam).

Here, Defendants seek relief on the basis of newly discovered, documentary evidence obtained subsequent to the filing of the Record which establishes the ADA's failure to disclose information which she knew or had reason to know was favorable to Defendants, in violation of their substantial rights under *Brady* and *Napue*. The e-mails contain the ADA's own words, and the State makes no argument that the e-mails are not authentic. We conclude that it is not necessary to remand the matter to the trial court to conduct an evidentiary hearing on the matter. The e-mails speak for themselves. These e-mail communications establish that on 22 August 2014 – two months prior to Defendants' trial – the RPD raided a "stash" house operated by Mr. Smith and others while Mr. Smith was not present, and discovered a large quantity of marijuana.[2]

In December 2015, based on information uncovered during Mr. Smith's federal prosecution, Defendants' counsel contacted the ADA about certain correspondence she had with the RPD detective regarding a 22 August 2014 raid on a certain drug stash house. The ADA responded that she had no notes of any such conversations or any e-mails with the RPD except those which she had already provided.

Thereafter, Defendants' counsel was told by Mr. Smith's defense attorney in the federal prosecution that the federal prosecutor had disclosed specific e-mail communications between the ADA and the RPD detective regarding the stash house raid. Upon learning this information, Defendants' counsel again contacted the ADA about alleged communications she had with the RPD prior to Defendants' trial concerning her star witness' drug activities, to which she admitted that she communicated with the RPD detective through her private Yahoo e-mail account:

> *Back in December [2015], I told you that I had looked through my "nccourts" email account and had not found*

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2. We note that during discovery, Defendants specifically made a discovery request seeking *Brady* evidence, including "[a]ny notes taken or reports made by investigating officers which would . . . contradict other evidence to be presented by the State" and also "any and all information of any of the types herein requested that comes to the attention of the District Attorney's Office after compliance with this request, or which, by the exercise of due diligence should have been known to the District Attorney."

> *any correspondence with [the RPD detective], which is accurate. However, right after the holidays, as I was driving to work one morning, it dawned on me that back at that time [summer/fall of 2014] that I tried your client,* ***I often used a "yahoo" email account to correspond with law enforcement officers, and I had not looked in that account. As soon as I got to work, I looked through that account, and located the five emails that I have attached.***

(Emphasis added.) The ADA then disclosed five e-mails containing correspondence between her and the RPD detective prior to Defendants' trial concerning Mr. Smith's drug trafficking activities, activities which Mr. Smith denied on the stand during Defendants' trial:

27 July 2014 e-mail from the ADA to the RPD detective investigating Marcus Smith for alleged drug trafficking (one month prior to the stash house raid):

> I am . . . reaching out to you because Marcus Smith is the victim in a fairly nasty home-invasion case of mine that is set to go to trial in the very near future, so I'd like to talk to you a bit about it, as well as educate myself on what your investigation entails, before anything too much further happens.

27 July 2014 e-mail response from RPD detective to ADA:

> I . . . would be happy to meet at your convenience. Please call or text my cell phone and we can schedule a time.

30 July 2014 e-mail from ADA to RPD detective:

> Please don't hate me, but we've set the trial date for 10/6. Good news is that I will do all three of my defendants [Defendants and Mr. Baldwin], so once we're done, we'll be really done! I'm sorry – but I really appreciate your understanding and willingness to work with me on this . . . .

19 August 2014 e-mail from RPD detective to ADA (3 days before the stash house raid):

> I have located the stash house for Mr. Smith and have obtained P.C. [probable cause] to apply for a search warrant for it. I would like to execute the search warrant on the home this week when Smith is not there. It is not

> Smith's house. He does not maintain any utilities there. I would not be charging Smith with any crimes. Please get back to me when you have time.

26 September 2014 e-mail from ADA to RPD detective (1 month after the raid):

> I assume nothing earth-shattering is happening on your end, otherwise I would've gotten a call from either you or [Mr. Smith's] lawyer :). I wanted to tell you that (let me preface this with: PLEASE DON'T HATE ME PLEASE DON'T HATE ME PLEASE DON'T HATE ME) [Defendant] Sandy's lawyer got scheduled by a federal court judge for next week [the scheduled 10/6 trial date], and we've had to bump the trial back a month. We are now set for 10/26 . . . .

The State has made no argument that these e-mails are inauthentic.

D. Evidence in the Record Relevant to the MAR

In the Record itself, there are numerous statements made by Mr. Smith and by the ADA during the October 2014 trial, two months after the stash house raid, which suggest that Mr. Smith was not a drug trafficker. For example, the ADA elicited testimony from Mr. Smith that he had no pending charges, testimony, which though true, can be viewed as misleading. During the course of the trial, the ADA admitted that Mr. Smith had denied any involvement in drug trafficking:

> Mr. Smith has been asked . . . is he still participating in drug sale activity. *His answer was no*. . . . I, again, no problem with him being asked if he is still participating in that type of activity. *He asked and he answered the question.*

(Emphasis added.) During closing arguments, the ADA discounted Defendants' version of the events, namely that Defendants were confronting a drug dealer about a recent transaction, by pointing out the lack of evidence that Mr. Smith was involved in drug trafficking:

> There has been absolutely no evidence from the witness stand outside the Defendants' testimony that this has anything to do with drugs . . . . The Defendants are the only people who've been talking about drugs . . . . *From that, the defense wants to make you believe that Marcus Smith is apparently a drug kingpin.*

(Emphasis added.)

E. Violation of Defendants' Constitutional Rights

On the basis of the materials in the Record and the undisputed, documentary evidence submitted in support of the MARs, we hold that Defendants' constitutional rights were violated. Their due process rights were violated by the ADA's failure to provide them information concerning the drug trafficking activities of the State's star witness, Mr. Smith. *See Brady*, 383 U.S. at 87, 83 S. Ct. at 1196-97, 10 L. Ed.2d at 218. Defendants' version of events on the night in question was built on the premise that the alleged victim, Mr. Smith, was in fact a drug dealer. The ADA's e-mails cited above conclusively establish that the ADA knew or had reason to know of information which would have been helpful to Defendants and failed to disclose it. We see no need to remand the matter to the trial court for the taking of additional evidence *on this point*. Again, the e-mails speak for themselves.

Further, Defendants' due process rights were violated by the ADA's failure to correct the false testimony given by the State's star witness, Mr. Smith. As the United States Supreme Court has stated:

> 'It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct when [s]he knows to be false and elicit the truth. [Even if] the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair.'

Napue, 360 U.S. at 269-70, 79 S. Ct. at 1177, 10 L. Ed.2d. at 1221. *See Hamric v. Bailey*, 386 F.2d 390, 394 (4th Cir. 1967) ("[D]ue process is violated not only where the prosecution uses perjured testimony to support its case, but also where it uses evidence which it knows creates a false impression of a material fact.")

We hold that these violations were prejudicial in nature. Defendants' version of the shooting was based on their contention that they were in Mr. Smith's garage to settle accounts with Mr. Smith, not to rob him. Their self-serving testimony, however, was the only evidence that Mr. Smith was, in fact, a drug trafficker. Further, the State's key evidence was Mr. Smith's testimony. Evidence which would tend to show that at least part of his testimony was false could have made a difference in the outcome. *See U.S. v. Parker*, 790 F.3d 550, 558 (4th Cir. 2015)

(citing *Brady* decision to hold that prosecution violated defendants' constitutional rights by failing to provide counsel with SEC impeachment evidence). It bears repeating that the State has failed to make any argument disputing the authenticity of the ADA-RPD e-mails. There are no questions of fact that would require an evidentiary hearing. As such, the State's reliance on *Benitez* and similar cases is misplaced.[3]

IV. Conclusion

We grant Defendants' MARs, thereby vacating the judgments against them. We, therefore, dismiss Defendants' appeal as moot.

VACATED AND REMANDED.

Judges CALABRIA and DIETZ concur.

3. We note that Defendants have produced *other* information in support of their MARs. Further, we note that some of this *other* information may require the taking of additional evidence. However, we conclude that we can resolve Defendants' MARs based on the e-mails alone. Perhaps more evidence is required to discover the ADA's true motive; however, such evidence is not necessary for our purposes in this appeal. The constitutional violation occurred irrespective of the ADA's motive. *Williams*, 362 N.C. at 636, 669 S.E.2d at 296.

STATE OF NORTH CAROLINA
v.
ROBERT EARL SPENCE, JR., DEFENDANT

No. COA15-549

Filed 21 June 2016

1. Sentencing—remand—resentencing—de novo

Where defendant appealed from the trial court's judgments resentencing him in the presumptive range following a remand from the Court of Appeals for a new sentencing hearing, the Court of Appeals rejected defendant's argument that the trial court failed to conduct the resentencing hearing de novo. The trial court did not need to make specific findings of mitigating factors for a sentence in the presumptive range, and the record indicated that the court did review the evidence and factors presented anew.

2. Sentencing—remand—resentencing—clerical errors

Where defendant appealed from the trial court's judgments resentencing him in the presumptive range following a remand from the Court of Appeals for a new sentencing hearing, the Court of Appeals held that the trial court used incorrect language on the judgment forms when it wrote that it had arrested judgment on three sex offense convictions based on the judgment of the Court of Appeals vacating the convictions. The trial court also erred by including one of the sex offense convictions in the vacated judgments when the Court of Appeals had not ordered that conviction to be vacated. The Court of Appeals remanded the case for the trial court to correct the clerical errors.

Appeal by defendant from judgments entered 18 December 2014 by Judge Paul C. Ridgeway in Superior Court, Wake County. Heard in the Court of Appeals 19 November 2015.

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

Amanda S. Zimmer for defendant-appellant.

STROUD, Judge.

Defendant Robert Earl Spence, Jr. appeals from the trial court's judgments resentencing him in the presumptive range to three consecutive sentences of 230 to 285 months. On appeal, defendant argues that the trial court failed to conduct the resentencing hearing *de novo*. He also argues that the court failed to comply with an earlier mandate issued by this Court when it arrested judgment on three sex offense convictions that were vacated by this Court. Since the trial court need not make specific findings of mitigating factors for a sentence in the presumptive range, and the record indicates that the court did review the evidence and factors presented anew, we conclude that it properly conducted a resentencing hearing *de novo*. Moreover, we find that the trial court improperly stated that it "arrested judgment" on the first-degree sex offense convictions in all four judgments, rather than properly indicating that three of those convictions were in fact vacated by this Court previously. In addition, the court also included one sex offense conviction that was not vacated by this Court in the group of "arrested" judgments. Accordingly, we affirm the trial court's judgments in part but vacate the judgment for each case in which the court noted that it was "arresting judgment" on the first-degree sex offenses and remand for proper entry and to correct the record accordingly.

Facts

Defendant was indicted on 12 December 2011 for four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative stemming from numerous acts of sexual misconduct committed by defendant to his daughter, Donna[1], from the time she was five years old until she reached the age of 12. Defendant was tried by jury from 10 June 2013 until 18 June 2013. At the trial, Donna could recall the locations where the sexual attacks occurred but could not remember dates or time frames. The State tried to establish the time frames of the offenses by establishing when defendant lived at the various locations. On 18 June 2013, a jury found him guilty of four counts of first-degree rape, four counts of first-degree sex offense, and four counts of incest with a near relative. Defendant was sentenced in the presumptive range to three consecutive sentences of 230 to 285 months. Defendant appealed to this Court.

On 18 November 2014, this Court issued an opinion finding no error in part but also vacating three of the four convictions for first-degree sexual offense, in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774,

1. We use a pseudonym to protect the privacy of the juvenile victim.

because there was insufficient evidence in the record to establish that those offenses occurred in 2001, 2004, or 2005 as alleged in the indictments. This Court noted: "With regard to 11 CRS 226769, the only evidence that a sex offense had occurred was when Donna read an entry from her journal that chronicled her prior abuse and other witnesses testified about statements Donna made to them prior to trial." After explaining its reasoning in more detail, this Court then concluded: "the State failed to provide substantial evidence of a first-degree sex offense in 2001, and the trial court erred by denying defendant's motion to dismiss this charge in 11 CRS 226769." This Court found further that "the State failed to provide substantial substantive evidence of a 'sexual act' for the first-degree sex offense charges in 11 CRS 226773 and 11 CRS 226774." The case was remanded for a new sentencing hearing in light of this opinion.

On remand, the trial court acknowledged that the sex offense convictions had been vacated in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774. At the resentencing hearing, the State explained that those three convictions originally "were all consolidated with other charges." Then, the State requested "that the same sentencing occur and just subtract those." Defendant's trial counsel asked the court to consider and find multiple mitigating factors. After hearing those factors, the trial court informed defendant that it would "enter three judgments consistent with the Court of Appeals ruling or mandate in this case, and the net effect will be the same as the sentences that are already imposed. These judgments are within the presumptive range."

The court entered a judgment in 11 CRS 226769 with the following note:

> In accordance to the North Carolina Court of Appeals judgment dated 8 December 2014, the court will vacate the judgments that were entered for first degree sexual offense in case numbers 11CRS 226769, 11CRS 226773, and 11CRS 226774. Therefore this court will have to conduct a new sentencing hearing.

The trial court entered judgments in 11 CRS 226769, 11 CRS 226773, 11 CRS 226774, and 11 CRS 226775 relating to the first-degree sexual offense convictions stating that "[t]he Court arrested judgment on this count based on the judgment from the Court of Appeals vacating this conviction." The court then resentenced defendant in the presumptive range to three consecutive sentences of 230 to 285 months. Defendant timely appealed to this Court.

Discussion

I. Referred motion to dismiss

The State filed a motion to dismiss defendant's appeal, arguing that defendant has no statutory right to appeal his presumptive range sentences imposed under N.C. Gen. Stat. § 15A-1444(a1) (2015). N.C. Gen. Stat. § 15A-1444(a1) provides:

> (a1) A defendant who has been found guilty, or entered a plea of guilty or no contest to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense. Otherwise, the defendant is not entitled to appeal this issue as a matter of right but may petition the appellate division for review of this issue by writ of certiorari.

Specifically, the State argues that since defendant "was sentenced in the presumptive range, he does not have a right to appeal this issue under section 15A-1444(a1)."

Defendant points out, however, that he does not challenge on appeal whether his sentences were supported by the evidence. Rather, defendant raises issue with whether the trial court failed to conduct his resentencing hearing *de novo* and whether the trial court erred by arresting judgment on the sex offense convictions. Thus, since defendant makes no challenge regarding the sufficiency of the evidence, defendant argues N.C. Gen. Stat. § 15A-1444(a1) is inapplicable. We agree.

This Court addressed a similar situation in *State v. Hagans*, 188 N.C. App. 799, 656 S.E.2d 704 (2008). In *Hagans*, the defendant appealed after a jury found him guilty of possession of a firearm by a felon, assault with a deadly weapon, and discharge of a firearm into an occupied vehicle. *Id.* at 800, 656 S.E.2d at 705. This Court then vacated the possession of a firearm by a felon conviction and remanded to the trial court for resentencing. *Id.* The defendant appealed from his new sentence, arguing that "the trial judge who sentenced him was biased and that his due process rights, therefore, were violated." *Id.* at 801, 656 S.E.2d at 706. On appeal, this Court concluded that the defendant "does not contend that his sentence was not supported by the evidence, but rather than the sentencing judge was biased. Therefore, section 15A-1444(a1) does not bar defendant's appeal of this matter." *Id.* at 801 n. 2, 656 S.E.2d at 706 n.2.

Similarly, here, defendant raises issue not with whether his sentence was supported by the evidence but rather with whether the trial court applied the proper standard of review and whether it correctly followed this Court's earlier mandate to vacate three of the offenses. Since defendant, like the defendant in *Hagans*, does not challenge whether his sentence is supported by the evidence, N.C. Gen. Stat. § 15A-1444(a1) does not bar his appeal. Accordingly, we deny the State's referred motion to dismiss defendant's appeal and turn now to the issues raised on appeal.

II. Resentencing Hearing: *De novo* review

[1] On appeal, defendant first argues that the trial court erred and failed to conduct his resentencing hearing *de novo*. "Should this Court find a sentencing error and remand a case to the trial court for resentencing, that hearing shall generally be conducted *de novo*. Pursuant to a de novo review on resentencing, the trial court must take its own look at the evidence." *State v. Paul*, 231 N.C. App. 448, 449-50, 752 S.E.2d 252, 253 (2013) (internal citation, quotation marks, and brackets omitted).

Defendant argues that the trial court erred in this case because his defense counsel presented a list of mitigating factors to be considered by the trial court and "[w]ithout indicating it had newly considered these factors, the trial court stated, 'I'm going to enter three judgments consistent with the Court of Appeals ruling or mandate in this case, and the net effect will be the same as the sentences that are already imposed. These judgments are in the presumptive range.' " Thus, defendant contends that the trial court erred because it did not expressly indicate that it would consider those factors or look at the matter anew.

Defendant relies on this Court's decision in *State v. Jarman*, __ N.C. App. __, __, 767 S.E.2d 370, 372 (2014), where a defendant likewise claimed that the trial court had failed to conduct the resentencing hearing *de novo*. In *Jarman*, after being sentenced based on a prior record level designation as a level IV offender, the defendant "filed a motion for appropriate relief requesting a resentencing hearing to correct his prior record level designation from a designation as a level IV offender to a designation as a level III offender, and to reconsider his sentence . . . in light of the correction to his prior record level determination." *Id.* at __, 767 S.E.2d at 371. Following his resentencing hearing, the defendant appealed to this Court, arguing that "the trial court made statements 'indicating that it was not conducting a *de novo* resentencing and did not understand that it should.' " *Id.* at __, 767 S.E.2d at 372.

This Court disagreed and explained:

> It has been established that each sentencing hearing in a particular case is a *de novo* proceeding. The judge hears the evidence without a jury, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists. Although the judge must consider all statutory aggravating and mitigating factors that are supported by the evidence, the judge weighs the credibility of the evidence and determines by the preponderance of the evidence whether such factors exist. At each sentencing hearing, the trial court must make a new and fresh determination of the sufficiency of the evidence underlying each factor in aggravation and mitigation, and must find aggravating and mitigating factors without regard to the findings in the prior sentencing hearings.
>
> However, the trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences. When a trial court enters a sentence within the presumptive range, the court does not err by declining to formally find or act on a defendant's proposed mitigating factors, regardless of whether evidence of their existence was uncontradicted and manifestly credible.

Id. at __, 767 S.E.2d at 372-73 (internal citations, quotation marks, and brackets omitted).

Like the *Jarman* Court, "we are not persuaded that the trial court's . . . remarks demonstrate that it did not understand its obligation to conduct a *de novo* review of the evidence that was properly before it for consideration." *Id.* at __, 767 S.E.2d at 373 (internal quotation marks omitted). The State pointed out to the trial court that defendant's first-degree sex offense convictions in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774 had been vacated by this Court. The State requested that defendant be sentenced to the same sentence length as he was previously since the vacated convictions had previously just been consolidated with other charges that still remained. The court also heard from defendant and his defense counsel submitted several mitigating factors for consideration, including: that defendant had good character and reputation in his community prior to the time of his conviction; that prior to his arrest he supported his family; that he has an extensive family support system in Wake County; and that he had a positive employment

history and was gainfully employed prior to his arrest. The trial court heard all this evidence, then informed defendant: "I'm going to enter three judgments consistent with the Court of Appeals ruling or mandate in this case, and the net effect will be the same as the sentences that are already imposed. These judgments are within the presumptive range."

The transcript shows that the trial court did consider defendant's requests, and that is all that the trial court is required to do. The trial court is not required to change the sentences or make any particular findings about the defendant's evidence to demonstrate its consideration. *See, e.g.*, *State v. Dorton*, 182 N.C. App. 34, 43, 641 S.E.2d 357, 363 (2007) ("[T]he trial court need make findings of the aggravating and mitigating factors present in the offense only if, in its discretion, it departs from the presumptive range of sentences[.] As the trial court in the present case entered a sentence within the presumptive range, the court did not err by declining to formally find or act on defendant's proposed mitigating factors, regardless whether evidence of their existence was uncontradicted and manifestly credible." (internal citation and quotation marks omitted)). Moreover, "[a] trial court's resentencing of a defendant to the same sentence as a prior sentencing court is not *ipso facto* evidence of any failure to exercise independent decision-making or conduct a *de novo* review." *State v. Morston*, 221 N.C. App. 464, 470, 728 S.E.2d 400, 406 (2012).

Here, defendant's offenses were consolidated for sentencing. Under N.C. Gen. Stat. § 15A-1340.15(b) (2015), when an offender's offenses are consolidated, "[t]he judgment shall contain a sentence disposition specified for the class of offense and prior record level of the most serious offense[.]" *See also State v. Skipper*, 214 N.C. App. 556, 557-58, 715 S.E.2d 271, 273 (2011) ("[I]f the trial court consolidates offenses into a single judgment, it is required by the Structured Sentencing Act to enter judgment on a sentence for the most serious offense in a consolidated judgment."). Thus, since defendant's offenses were consolidated and the most serious offense remained, the trial court was well within its discretion to sentence defendant to the same presumptive range sentence as was previously entered after conducting a new sentencing hearing. Accordingly, we conclude that the trial court in this case did properly conduct the resentencing hearing *de novo*.

III. Arrested Judgment on Sex Offenses

[2] Defendant also argues that the trial court failed to comply with the mandate of this Court to vacate three of the sex offense convictions when it instead wrote on the judgment forms: "The Court arrested judgment

on this count based on the judgment from the Court of Appeals vacating this conviction."

In defendant's prior appeal, *State v. Spence*, __ N.C. App. __, __, 764 S.E.2d 670, 681 (2014), this Court vacated defendant's sex offense convictions in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774 and remanded to the trial court for a new sentencing hearing. At the resentencing hearing, the trial court informed defendant that it would "enter three judgments consistent with the Court of Appeals ruling or mandate in this case[.]" After the hearing, the trial court entered the following note with its judgment in 11 CRS 226769:

> In accordance to the North Carolina Court of Appeals judgment dated 8 December 2014, the court will vacate the judgments that were entered for first degree sexual offense in case numbers 11CRS 226769, 11CRS 226773, and 11CRS 226774. Therefore this court will have to conduct a new sentencing hearing.

In addition, the court included the following language in reference to the sex offense conviction in 11 CRS 226769, 11 CRS 226773, 11 CRS 226774, and 11 CRS 226775: "The Court arrested judgment on this count based on the judgment from the Court of Appeals vacating this conviction."

Defendant argues that the trial court should have vacated those judgments, rather than arresting judgment. "While . . . in certain cases an arrest of judgment does indeed have the effect of vacating the verdict, . . . in other situations an arrest of judgment serves only to withhold judgment on a valid verdict which remains intact." *State v. Pakulski*, 326 N.C. 434, 439, 390 S.E.2d 129, 132 (1990). Here, this Court mandated that the trial court vacate three of the sex offense convictions; it was not ordered to arrest judgment and doing so is not proper in this case.

It seems, however, that the trial court understood this Court's mandate and simply used incorrect language on its form, leading to this confusing result. Essentially, this is a clerical error. Although the judgments state that the court "arrested judgment" on these three offenses, it is evident from the resentencing hearing transcript and the language used by the court itself that it was aware that this Court had vacated those convictions. The court's language, that it "arrested judgment on this count based on the judgment from the Court of Appeals vacating this conviction[,]" shows that it was aware of what this Court did. Furthermore, the trial court did not include those convictions when it resentenced defendant based on the remaining consolidated offenses.

The court merely used improper wording on the form when entering the new sentences on the judgment forms to address the charges that were removed. Nevertheless, this was done in error and must be corrected on remand.

In addition, the trial court arrested judgment on the sex offense conviction from 11 CRS 226775 as well, even though this Court did not mandate that the court vacate this conviction. This was in error, as the prior mandate by this Court vacated only the sex offense convictions in 11 CRS 226769, 11 CRS 226773, and 11 CRS 226774. This Court left the sex offense conviction in 11 CRS 226775 intact. Thus, the trial court both used incorrect language and erred in that it should not have included that conviction in the vacated judgments. We, therefore, must vacate and remand simply for the trial court to correct the clerical errors in the order to reflect the accurate disposition of those offenses.

Conclusion

In conclusion, we hold that the trial court did conduct a proper *de novo* review at defendant's resentencing hearing. We also find that while the trial court understood that the sex offense convictions were vacated, the wrong language was used on the judgment forms, and judgment on one sex offense count that was not vacated by this Court previously was inadvertently "arrested." Thus, we vacate those judgments and remand so that the trial court can correct these errors consistent with this opinion.

VACATED AND REMANDED.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
SAMUEL EUGENE WILLIAMS, JR.

No. COA15-1004

Filed 21 June 2016

1. Sentencing—motion to strike—aggravating factors—prior notice

The trial court did not err in a driving while impaired case by denying defendant's motion to strike grossly aggravating and aggravating factors. Defendant's sentence was enhanced based only on his prior convictions. Also, defendant received prior notice of the State's intent to use aggravating factors seven days prior to trial.

2. Motor Vehicles—driving while impaired—motion to suppress—probable cause

The trial court did not commit plain error when it denied defendant's motion to suppress evidence of his driving while impaired arrest based on alleged lack of probable cause. The trial court's findings and conclusions were such that one could reasonably conclude that defendant operated a vehicle on a street or public vehicular area while under the influence of an impairing substance.

Appeal by defendant from judgment entered 19 February 2015 by Judge Wayland J. Sermons, Jr., in Hyde County Superior Court. Heard in the Court of Appeals 9 February 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hal F. Askins, for the State.

The Robinson Law Firm, P.A., by Leslie S. Robinson, for defendant.

BRYANT, Judge.

Where the trial court enhanced a sentence based solely on a defendant's prior record of convictions, defendant's Sixth Amendment right to "reasonable notice" was not violated. Further, where the underlying facts support the trial court's conclusions of law, the trial court did not err in denying defendant's motion to suppress.

On 21 June 2011, Ms. Laura Weatherspoon and her boyfriend were on vacation on Ocracoke Island, when they observed a golf cart traveling

on the road nearby. She described the golf cart as going really fast and noted that the three passengers on the golf cart were being very loud and rocking the golf cart, causing it to sway back and forth. As the golf cart approached Weatherspoon's location, the driver suddenly made a hard U-turn, and the passenger riding on the rear of the golf cart, Clay Evans, fell off. Weatherspoon and others attempted to assist Evans, but he was rendered unconscious by the fall and died later that evening.

Deputy Sheriff Scott W. Wilkerson, employed by the Hyde County Sheriff's Department, was on duty on Ocracoke Island. Deputy Wilkerson received a call to report to the scene of an accident involving a golf cart. He arrived at approximately 8:41 PM and observed an individual lying in the roadway, with a golf cart right in front of him and being attended to by a number of people. Deputy Wilkerson questioned people at the scene to determine the identity of the driver of the golf cart. Samuel Eugene Williams, Jr., defendant, responded that he was the driver.

Deputy Wilkerson detected a strong odor of alcohol coming from defendant's breath. He also noted that defendant's clothes were bloody, that he was very talkative and repeated himself, stating at least nine times that he had been trying to make a U-turn. Deputy Wilkerson further observed that defendant's eyes were red and glassy and, as they spoke, defendant had to lean against the deputy's patrol car. Based on his observations of defendant, including the odor of alcohol on his breath, his repeating the same sentence over and over, his red and glassy eyes, and defendant's leaning on the patrol car, Deputy Wilkerson formed an opinion that defendant was impaired. Defendant was asked if he had been drinking, to which defendant replied that he had only had "six beers since noon." Defendant was requested to submit a breath sample into a portable breath testing device while at the scene. Defendant provided multiple breath samples, which resulted in a positive result for alcohol. Defendant was then placed under arrest and transported to the Hyde County Sheriff's Office substation on Ocracoke Island.

At the Sheriff's Office, defendant was taken to the intoxolizer room and advised of his implied consent rights around 9:28 PM. Defendant spontaneously stated to Deputy Wilkerson that he had consumed three "Jager bombs" after he left the bar and prior to the accident. However, defendant refused to submit to a chemical breath test. Subsequently, troopers with the North Carolina State Highway Patrol brought in a blood test kit and, at approximately 10:27 PM, defendant signed a consent form to having his blood drawn, which was done.

On 20 February 2012, a Hyde County Grand Jury indicted defendant for Driving While Impaired ("DWI"). Prior to trial, defendant filed multiple motions to suppress evidence. On 25 May 2012, defendant filed a motion to suppress that challenged the probable cause to arrest him for impaired driving.[1] Defendant's motion to suppress based on lack of probable cause to arrest was heard on 9 May 2013 during the Administrative Session of Hyde County Superior Court before the Honorable Wayland J. Sermons, Jr., Judge presiding. By order entered 23 July 2013, Judge Sermons denied defendant's motion.

On 9 February 2015, the State served Notice of Grossly Aggravating and Aggravating Factors on counsel for defendant. This case came on for trial during the 16 February 2015 session of Hyde County Criminal Superior Court before the Honorable Wayland J. Sermons, Jr., Judge presiding. Defendant filed a Motion to Strike Grossly Aggravating and Aggravating Factors, which motion was denied.

The jury returned verdicts of Guilty of DWI and Not Guilty of Aggravated Felony Death by Motor Vehicle. After the jury verdict but prior to sentencing, the trial court conducted a hearing on defendant's Motion to Strike. Although the trial court denied defendant's Motion to Strike, the court elected not to consider any factors in aggravation other than defendant's prior record history or submit to the jury any factors in aggravation.

At sentencing, the trial court found the existence of two grossly aggravating factors, *i.e.*, that defendant had two or more convictions involving impaired driving, also which occurred within seven years before the date of the offense. The trial court found two factors in mitigation. Defendant was sentenced to Level One punishment with an active sentence of eighteen months in the Misdemeanant Confinement Program. Defendant gave notice of appeal in open court.

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1. Defendant also filed a motion to suppress results of the Alco-Sensor test administered to him prior to his arrest and, on 16 July 2012, defendant filed another motion to suppress the results of an analysis of blood samples seized from him after his arrest. These motions were also heard on 9 May 2013. Judge Sermons granted defendant's motion to suppress the blood analysis, and denied defendant's motion to suppress the results of the Alco-Sensor test. On 29 July 2013, the State filed a notice of appeal to this Court from Judge Sermon's 23 July 2013 order suppressing the blood analysis. On 17 July 2014, this Court filed a published opinion that affirmed Judge Sermons's order. On 22 July 2014, the State filed petitions for writ of supersedeas and discretionary review in the North Carolina Supreme Court. The Court denied both petitions on 19 August 2014. *See State v. Williams*, ___ N.C. App. ___, 759 S.E.2d 350, *disc. review denied*, 367 N.C. 528, 762 S.E.2d 201 (2014).

On appeal, defendant argues that the trial court erred when it (I) denied defendant's Motion to Strike; (II) found two grossly aggravating factors; and (III) denied defendant's motion to suppress evidence obtained as a result of his DWI arrest. Because defendant's arguments (I) and (II) are primarily based on the State's alleged failure to comply with the ten-day statutory notice requirement set out in N.C. Gen. Stat. § 20-179(a1)(1), we address these arguments together.

I & II

[1] Defendant first argues that the trial court erred when it denied defendant's Motion to Strike Grossly Aggravating and Aggravating Factors. Specifically, defendant contends that the State served its notice of grossly aggravating and aggravating factors on defense counsel seven days before trial—and three years after defendant was indicted—in violation of N.C. Gen. Stat. § 20-179(a1)(1). Defendant asserts that the notice provisions contained in N.C.G.S. § 20-179 were enacted as part of the Motor Vehicle Driver Protection Act of 2006, in order to protect defendant's Sixth Amendment right to notice of aggravating factors. He further argues that the State's failure to comply with the ten-day requirement violates the United States Supreme Court's holding in *Blakely v. Washington*, 542 U.S. 296, 304, 159 L. Ed. 2d 403, 414 (2004) ("When a judge inflicts punishment that the jury's verdict does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." (internal citation omitted)).

Defendant contends that, as a result of the trial court's denial of his Motion to Strike, the trial court consequently erred when it found two grossly aggravating factors, sentenced defendant to Level One punishment, and imposed an active sentence. We disagree.

Statutory errors are questions of law reviewed *de novo*. *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citations omitted). Under the *de novo* standard, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Appeal of The Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

The statute here at issue states as follows, in pertinent part:

> (1) **Notice.** – *If the defendant appeals to superior court*, and the State intends to use one or more aggravating

> factors under subsections (c) or (d) of this section, the State must provide the defendant with notice of its intent. The notice shall be provided no later than 10 days prior to trial and shall contain a plain and concise factual statement indicating the factor or factors it intends to use under the authority of subsections (c) and (d) of this section. The notice must list all the aggravating factors that the State seeks to establish.

N.C. Gen. Stat. § 20-179(a1)(1) (2014), *amended by* 2015 N.C. Sess. Laws 2015-264, § 38(b), eff. Dec. 1, 2015 (emphasis added) (amending subsection (c) of N.C. Gen. Stat. § 20-179 to state that the grossly aggravating factor "Driving by the defendant at the time of the offense while his driver's license was revoked" is subject to the notice provision in N.C.G.S. § 20-179(a1)). This amendment was added subsequent to defendant's trial.

With regard to defendant's statutory argument, we acknowledge the plain language of the statute, which would seem to preclude this notice provision from applying in this case. The notice provision states that it only applies to sentencing in cases where "*the defendant appeals to superior court . . . .*" *See id.* (emphasis added). The record clearly indicates that defendant was indicted in superior court on the impaired driving offense, and therefore, the charge was not *on appeal* to the superior court. *Cf. State v. Reeves*, 218 N.C. App. 570, 576–77, 721 S.E.2d 317, 322 (2012) (remanding for resentencing where the defendant appealed to superior court after he was found guilty of DWI after jury trial in district court, and where "the State failed to provide [d]efendant with the statutorily required notice of its intention to use an aggravating factor"—that the defendant's driving was "especially reckless"—pursuant to N.C.G.S. § 20-179(a1)(1)). Where, as here, the charge in question was not on appeal to the superior court, defendant's argument that his seven-day notice was in violation of the statute providing for ten-day notice, is overruled.

We also address defendant's main argument, which is a constitutional one—that the State's failure to comply with statutory notice requirements amounts to a Sixth Amendment violation, as set forth in *Blakely*.

The Sixth Amendment guarantees defendant the right to be informed of the charges against him and, specifically, any fact that could increase the maximum penalty beyond that for the crime charged in the indictment. *See* U.S. Const. amend. VI; *Blakely*, 542 U.S. at 301–02, 159 L. Ed. 2d at 412 ("[A]n accusation which lacks any particular fact which the

law makes essential to the punishment is . . . no accusation within the common law . . . .” (citation and quotation marks omitted)). “ ‘Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.’ ” *Blakely*, 542 U.S. at 301, 159 L. Ed. 2d at 412 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)).

Where, as here, the trial court enhances a sentence based solely on a defendant’s prior record of convictions, a defendant’s Sixth Amendment right to “reasonable notice” is not violated. *See State v. Pace*, ___ N.C. App. ___, ___, 770 S.E.2d 677, 683 (2015) (“We do not believe [d]efendant’s Sixth Amendment right to ‘reasonable notice’ is violated where the State provides no prior notice that it seeks an enhanced sentence based on the fact of prior conviction.”). *But see State v. Keel*, No.COA15-69, 2015 WL 4620513, at *1, *5 (N.C. Ct. App. Aug. 4, 2015) (unpublished) (remanding for new sentencing hearing following DWI conviction where the State “failed to file the notice of sentencing factors in the trial court, and it was not included in the trial court record”).

Here, defendant’s sentence was enhanced based only on his prior convictions. Also, defendant received prior notice of the State’s intent to use aggravating factors seven days prior to trial. Accordingly, defendant’s argument that he was improperly sentenced because his right to constitutionally adequate notice was violated is overruled.

III

[2] Lastly, defendant argues that the trial court committed plain error when it denied his motion to suppress evidence of his DWI arrest based on lack of probable cause. Defendant asserts there was no evidence to establish that the golf cart was operated in an “other than normal” fashion, that his balance, coordination, and speech were normal, and he was not requested to submit to any field sobriety test.[2] We disagree.

A “pretrial motion to suppress is not sufficient to preserve for appeal the question of admissibility of [evidence]” where the defendant does not object at the time the evidence is offered at trial. *See State v. Golphin*, 352 N.C. 364, 405, 533, S.E.2d 168, 198 (2000) (“[W]e have previously stated

2. Defendant also contends that the Alco-Sensor result cannot be used to establish probable cause where the State failed to produce evidence that the device used was an appropriate one and that it was used in the approved manner. Defendant’s contention regarding the Alco-Sensor will not be considered where the trial court denied defendant’s motion to suppress the results of the Alco-Sensor test, and defendant did not challenge that ruling on appeal.

that a motion *in limine* was not sufficient to preserve for appeal the question of admissibility of evidence if the defendant does not object to that evidence at the time it is offered at trial. . . . As a pretrial motion to suppress is a type of motion *in limine*, [defendant's] pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of his statement because he did not object at the time the statement was offered into evidence." (citations omitted)).

Here, defendant filed a pretrial motion to suppress evidence of his arrest alleging that there was not sufficient evidence to establish probable cause for his arrest. That motion was decided after an evidentiary hearing and denied. Thereafter, the record is silent as to any further objection from defendant to the introduction of the same evidence at the trial of this case. Therefore, defendant has waived any objection to the denial of his motion to suppress, and it is not properly preserved for this Court's review. *See State v. Oglesby*, 361 N.C. 550, 553–54, 648 S.E.2d 819, 821 (2007); *Golphin*, 352 N.C. at 405, 533 S.E.2d at 198. Defendant, however, attempts to cure this defect by arguing that the trial court committed plain error instead.

> In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C. R. App. P. 10(a)(4) (2015); *see also State v. Goss*, 361 N.C. 610, 622–23, 651 S.E.2d 867, 874–75 (2007). The North Carolina Supreme Court "has elected to review unpreserved issues for plain error when they involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of the evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted). Under the plain error rule, defendant must establish " 'that a fundamental error occurred at trial' " and that absent the error, it is probable the jury would have returned a different verdict. *State v. Carter*, 366 N.C. 496, 500, 739 S.E.2d 548, 551 (2013) (quoting *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012)).

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are exclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C.

132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). "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).

In determining whether probable cause is present, the North Carolina Supreme Court has stated that

> "[p]robable cause for an arrest has been defined to be a reasonable ground of suspicion, supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty. . . . To establish probable cause the evidence need not amount to proof of guilt, or even to prima facie evidence of guilt, but it must be such as would actuate a reasonable man acting in good faith." . . .
>
> Probable cause "deal[s] with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."

State v. Bone, 354 N.C. 1, 10, 550 S.E.2d 482, 488 (2001) (alteration in original) (internal citation omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175, 93 L. Ed. 1879, 1890 (1949)).

Here, the uncontested facts[3] found by the trial court in its order include that the charging officer, Deputy Wilkerson, responded to a call involving the operation of a golf cart and serious injury to an individual still in the roadway when he arrived at the scene. Defendant admitted to Deputy Wilkerson that he was the driver of the golf cart. Defendant had "very red and glassy" eyes and "a strong odor of alcohol coming from his breath." Defendant's clothes were bloody, and he was very talkative, repeating himself several times. Defendant's mannerisms were "fairly slow," and defendant placed a hand on the deputy's patrol car to maintain his balance. Defendant further stated that he had "6 beers since noon." Defendant submitted to an Alco-Sensor test, the result of which was positive for alcohol. This evidence was sufficient to provide probable cause to arrest defendant for DWI.

Therefore, the trial court's findings and conclusions were such that one could reasonably conclude that defendant operated a vehicle

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3. Defendant does not contest that the trial court's findings of fact are supported by evidence, but only challenges its conclusions of law. Therefore, the facts found by the trial court are binding on this Court. *State v. White*, 232 N.C. App. 296, 302–03, 753 S.E.2d 698, 702 (2014) ("[U]nchallenged findings of fact . . . are binding on appeal . . . .").

on a street or public vehicular area while under the influence of an impairing substance in violation of N.C. Gen. Stat. § 20-138.1. *See State v. Townsend*, ___ N.C. App. ___, ___, 762 S.E.2d 898, 905 (2014) (holding there was sufficient probable cause for officer to arrest a defendant for driving while impaired where defendant had "bloodshot eyes and a moderate odor of alcohol about his breath," admitted to "drinking a couple of beers earlier," and two Alco-Sensor tests yielded positive results); *State v. Tappe*, 139 N.C. App. 33, 38, 533 S.E.2d 262, 265 (2000) ("[Officer's] observations of defendant, . . . including his observation of defendant's vehicle crossing the center line, defendant's glassy, watery eyes, and the strong odor of alcohol on defendant's breath, provided sufficient evidence of probable cause to justify the warrantless arrest of defendant." (citations omitted)). The trial court did not commit error, plain or otherwise, in denying defendant's motion to suppress. Defendant's argument is overruled.

NO ERROR.

Judges DILLON and ZACHARY concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 JUNE 2016)

DAMMONS v. N.C. DEP'T OF PUB. SAFETY No. 15-1252	N.C. Industrial Commission (TA-22267)	Affirmed
FRIESON v. TURPIN No. 15-1094	Wilson (13CVS197)	No Error
HENDERSON v. GARCIA MOTORRAD, LLC No. 15-1250	Wake (13CVS5714)	Affirmed in part; Reversed in part, and remanded
IN RE C.B. No. 16-93	Madison (14JA38) (14JA39)	Affirmed
IN RE CRANOR No. 15-1119	Durham (13SP721) (15M56)	Dismissed
IN RE D.T. No. 16-39	Cumberland (10JT556) (11JT477) (12JT623) (14JT16)	Affirmed
IN RE J.O.M. No. 15-1320	Nash (13JT137)	Affirmed
IN RE K.R. No. 15-1367	Rowan (14JA145)	Affirmed in part; Reversed and remanded in part.
IN RE S.M.M. No. 15-1295	Henderson (15JB60)	Vacated
IN RE T.D.C. No. 15-1269	Guilford (13JT329) (13JT330) (13JT331)	Affirmed
LCA DEV., LLC v. WMS MGMT. GRP., LLC No. 15-1110	Pitt (12CVS3376)	Affirmed
NAYLON v. NAYLON No. 15-1247	New Hanover (07CVD1112)	Vacated

POWERS v. POWERS No. 15-1378	Wake (10CVD16478)	Vacated and remanded in part, dismissed in part, affirmed in part
STATE v. AGATI No. 15-1053	Mecklenburg (14CRS203823)	No Error
STATE v. CHAVIS No. 16-222	Robeson (10CRS50116)	Reversed and Remanded
STATE v. CLINTON No. 15-1105	Forsyth (12CRS58153) (13CRS138)	No error in part; Dismissed without prejudice in part
STATE v. FRAZIER No. 15-568	Randolph (11CRS50526)	No Error
STATE v. GRAHAM No. 15-1155	Guilford (14CRS68910)	12 CRS 98010-1: Petitions for Writ of Certiorari allowed; judgments Affirmed 14 CRS 68910: Affirmed in part; Dismissed without prejudice in part
STATE v. HYDE No. 15-1260	Davie (13CRS50554) (13CRS50555)	Affirmed; remanded for correction of clerical error
STATE v. JOHNSON No. 15-1156	Gaston (13CRS10402) (13CRS61976-77)	No prejudicial error in part and remanded in part.
STATE v. JONES No. 15-569	Guilford (12CRS32808) (12CRS75793) (12CRS75803) 12CRS75807) (12CRS75909)	No Error
STATE v. LINDSEY No. 15-1251	Craven (09CRS51204)	Vacated and Remanded
STATE v. LINEBERGER No. 15-1233	Catawba (14CRS5074)	No Error
STATE v. MURPHY No. 15-1169	Nash (12CRS50961)	Affirmed

STATE v. SUGGS No. 15-1371	Iredell (12CRS57980-82) (13CRS3136)	No Error
STATE v. THOMPSON No. 15-633	Onslow (14CRS50763)	Dismissed
STATE v. WEST No. 15-860	Forsyth (13CRS57248)	No Error
STATE v. WILLIAMS No. 15-635	Mecklenburg (13CRS223872)	No prejudicial error.
STATE v. WRIGHT No. 15-1218	Sampson (14CRS50729-30)	No Plain Error
WHICHARD v. CH MORTG. CO., INC. No. 15-1200	Guilford (15CVS3811)	Affirmed

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