248 N.C. App.—No. 4 Pages 456-837

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 14, 2019

MAILING ADDRESS: The Judicial Department
P. O. Box 2170, Raleigh, N. C. 27602-2170

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

LINDA M. McGEE

Judges

WANDA G. BRYANT
ANN MARIE CALABRIA
RICHARD A. ELMORE
DONNA S. STROUD
ROBERT N. HUNTER, JR.
CHRIS DILLON
MARK DAVIS
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
WENDY M. ENOCHS[1]
PHIL BERGER, JR.[2]
HUNTER MURPHY[3]
JOHN S. ARROWOOD[4]

Emergency Recall Judges

GERALD ARNOLD
RALPH A. WALKER

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN

Former Judges

WILLIAM E. GRAHAM, JR.
JAMES H. CARSON, JR.
J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
HARRY C. MARTIN
E. MAURICE BRASWELL
WILLIS P. WHICHARD
DONALD L. SMITH
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
SYDNOR THOMPSON
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
HUGH B. CAMPBELL, JR.
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON
ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS[5]
J. DOUGLAS McCULLOUGH[6]

[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2017 [4]Appointed 24 April 2017
[5]Retired 31 December 2016 [6]Retired 24 April 2017

Clerk
DANIEL M. HORNE, JR.

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF STAFF COUNSEL

Director
Leslie Hollowell Davis

Assistant Director
David Alan Lagos

Staff Attorneys
John L. Kelly
Bryan A. Meer
Eugene H. Soar
Nikiann Tarantino Gray
Michael W. Rodgers
Lauren M. Tierney
Justice D. Warren

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Marion R. Warren

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

H. James Hutcheson
Kimberly Woodell Sieredzki
Jennifer C. Peterson

COURT OF APPEALS

CASES REPORTED

FILED 2 AUGUST 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

APPEAL AND ERROR

ordinarily used). Defendant did not present the trial court with specific reasoning, and it was not clear that defendant had preserved the issue for appeal. **State v. Charleston, 671.**

Appeal and Error—untimely pretrial motion—trial court's discretion—not revisited—Although defendant's pretrial motion to suppress was untimely, the trial court's discretionary decision to consider the motion was not revisited on appeal. **State v. Cobb, 687.**

ASSAULT

Assault—dismissal of claims—expiration of statute of limitations—The trial court did not err by dismissing plaintiff's assault claims against defendants Zanzarella, Progelhof, Buccafurri, and Hull, and all but one of her assault claims against defendant Murray based on expiration of the pertinent statute of limitations. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

ASSOCIATIONS

Associations—homeowners'—declaration/covenants—amendment—A homeowners' association that was formed prior to 1999 was authorized to amend the declaration/covenants where there was nothing in the declaration or the articles of incorporation which expressly prohibited the application of N.C.G.S. § 47F-2-117. N.C.G.S. § 47F-2-117 applies to pre-1999 planned communities where either the terms of the declaration or articles of incorporation do not provide to the contrary or the association has adopted the terms of the Planned Community Act. **Kimler v. Crossings at Sugar Hill Prop. Owner's Ass'n, Inc., 518.**

Associations—homeowners'—declarations/covenants—amendment—reasonable—An amendment to declarations/covenants by the homeowners' association (HOA) was not unreasonable where the intent of the amendment was to clarify a paragraph of the covenants as originally written. The issue involved a clause allowing the purchasers of contiguous lots from the developer to pay dues based on only one lot; the deeds from the developer in most instances did not describe the exempt lots, as the declaration required, and the practice of the HOA had been to exempt all of the owners of multiple lots from paying dues on more than one lot, whether they purchased the lots from the developer or not. **Kimler v. Crossings at Sugar Hill Prop. Owner's Ass'n, Inc., 518.**

ATTORNEY FEES

Attorney Fees—negligence and workers' compensation actions—findings—cost of third-party litigation—In an action arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies, the trial court's findings adequately addressed the required consideration of the amount of the cost of third-party litigation to be shared between the employer and employee. The trial court considered the amount that plaintiff and his attorney had and would receive as a result of the third-party litigation, took into account the court costs that had been paid, and noted that the employer and its servicing agent intended to exclude plaintiff's attorney fees from the amount of the workers' compensation subrogation lien. **Dion v. Batten, 476.**

and denying defendants' motion to dismiss. Plaintiff had standing to sue defendant homeowners' association, and plaintiff's complaint was not barred by the statute of limitations. Defendant's affirmative defenses of estoppel, laches, and waiver were inapplicable. **Ocracomax, LLC v. Davis, 532.**

EMOTIONAL DISTRESS

Emotional Distress—intentional infliction of emotional distress—statute of limitations—tolled claims—The trial court did not err by dismissing plaintiff's claims for intentional infliction of emotional distress (IIED) against defendant homeowners' association based on expiration of the pertinent statute of limitations. However, the trial court erred by dismissing IIED claims against defendant individuals because those actions were tolled during the pendency of the federal action. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

Emotional Distress—negligent infliction of emotional distress—motion to dismiss—intentional conduct—The trial court did not err by dismissing plaintiff's negligent infliction of emotional distress claims. Plaintiff's allegations in her second amended complaint repeatedly referenced a pattern of intentional conduct by defendants. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

EMPLOYER AND EMPLOYEE

Employer and Employee—whistleblower claim—causal connection—retaliatory motive—The trial court properly granted summary judgment for defendants in a whistleblower action arising from the termination of plaintiff's employment from N.C. State. Assuming that plaintiff reported a protected activity, she could not produce evidence to support causal connection, an essential element of her claim. A mixed motive analysis was not appropriate because plaintiff failed to present any direct evidence of a retaliatory motive, and plaintiff failed to raise a factual issue regarding whether the proffered reasons for the discharge were pretextual. **Hubbard v. N.C. State Univ., 496.**

Employer and Employee—whistleblower claim—dismissal—tortious interference with contract—The trial court did not err by awarding summary judgment to defendants for tortious interference with contract following a whistleblower claim and dismissal. Although plaintiff argued that her supervisor (Stallings) acted without justification when she induced her employer (NCSU) to discharge her, plaintiff could not establish that Stallings acted without justification, an essential element of her claim. **Hubbard v. N.C. State Univ., 496.**

Employer and Employee—whistleblower report—free speech—adequate state law remedy—Plaintiff's claim under N.C.G.S. § 126-84 arising from a whistleblower report and dismissal was an adequate state law remedy, and the trial court properly granted summary judgment for defendants on plaintiff's constitutional claim. **Hubbard v. N.C. State Univ., 496.**

EVIDENCE

Evidence—expert testimony—forensic pathologist—opinion based on non-medical information—There was error in a first-degree murder prosecution, but not plain error, where a forensic pathologist testified to his opinion that the victim's death was a homicide rather than a suicide based on non-medical information

provided by law enforcement officers. However, given the entire record, the error did not have a probable impact on the jury's verdict. **State v. Daughtridge, 707.**

Evidence—invited error—cross-examination—investigator's opinion of defendant—In a prosecution for first-degree murder and possession of a firearm by a felon, testimony by an investigator on cross-examination that defendant was deceptive was admissible as invited error and did not constitute plain error. **State v. Daughtridge, 707.**

Evidence—marijuana—expert testimony—reliability analysis—The trial court did not abuse its discretion in a drug case by admitting expert testimony identifying the substance recovered from defendant's home as marijuana. The agent's testimony was the product of reliable principles and methods applied reliably to the facts of the case, which satisfied the two challenged prongs of the reliability analysis under Rule 702(a). **State v. Abrams, 639.**

Evidence—medical information—disclosure—vehicle crash—The information listed in N.C.G.S. § 90-21.20B(a1) may be disclosed, at the request of law enforcement officials investigating a vehicle crash, while disclosure of additional identifiable health information in the same context is possible with a warrant or judicial order that specifies the information sought. Under N.C.G.S. § 90-21.20B(1a)(3), identifiable health information obtainable by warrant is not strictly limited to name, current location, and perceived state of impairment. **State v. Smith, 804.**

Evidence—medical records—federal regulations—search warrant—Defendant did not demonstrate that his medical records were obtained in violation of 45 C.F.R. § 164.512(f) (and thus N.C.G.S. § 90-21.20B(a)). By its plain language, 45 C.F.R. 164.512(f) permits disclosure of health information to law enforcement as required by a search warrant if certain conditions are met. **State v. Smith, 804.**

Evidence—medical records—release—statutory authority—N.C.G.S. § 8-53 (physician-patient privilege) is not the only statute under which patient medical records may be requested and released. N.C.G.S. § 90-21.20B allows law enforcement to obtain medical records through a search warrant for criminal investigative purposes. **State v. Smith, 804.**

Evidence—officer's perception of defendant's demeanor—investigative process—The trial court did not err in a prosecution for first-degree murder and possession of a firearm by a felon by allowing an investigator to testify about his perception of defendant's demeanor during questioning. The testimony served to assist the jury in understanding the investigative process and why the officer continued the investigation instead of accepting defendant's explanation of events. It did not speak to the ultimate issue of guilt or innocence. **State v. Daughtridge, 707.**

Evidence—other crimes—inadmissible to prove defendant's propensity—admissible for other purposes—identifying defendant—natural development of facts—Defendant's claim of ineffective assistance of counsel was overruled where counsel did not object to evidence of another crime that was used to show the process of identifying defendant and to present the narrative of the facts. **State v. Gates, 732.**

Evidence—photographs—identified as perpetrator—not identified as defendant—defendant present in courtroom—jury able to draw conclusions—There was no plain error in the admission of photo line-up evidence where no one testified that defendant was the person depicted in any photo identified. The jurors

was supported by the findings, which cast doubt upon the credibility of the model developed by the Bureau's witness. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 602.**

Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—net cost of reinsurance—The N.C. Commissioner of Insurance did not err by rejecting the N.C. Rate Bureau's filed net cost of reinsurance of 17.5% of premium and ordering a net cost of reinsurance of 10% of premium. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 602.**

Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—modeled hurricane losses—The N.C. Commissioner of Insurance did not err by reducing the modeled hurricane losses in the N.C. Rate Bureau's filing. The Commissioner performed a careful review of the evidence and did not arbitrarily reduce the modeled hurricane losses to be used in ratemaking. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 602.**

Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—underwriting profit—Where the N.C. Commissioner of Insurance rejected the N.C. Rate Bureau's filed rate increases and imposed alternative rate changes, the Court of Appeals held that the Commissioner did not violate any constitutionally mandated standard by refusing to accept the Bureau's cost of equity profit methodology and by adopting an underwriting profit provision that did not return a profit within the range identified by the Bureau's expert witness. The Commissioner's profit methodology was in accord with a methodology upheld by the Court of Appeals in a previous case. **State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 602.**

JUDGMENTS

Judgments—findings and conclusions—mislabeled—nearly identical—The trial court did not err when ruling on a pretrial motion to suppress where defendant contended that findings were mislabeled as conclusions and vice versa. The findings and conclusions were nearly identical. **State v. Cobb, 687.**

KIDNAPPING

Kidnapping—first-degree—victim not released in safe place—victim seriously injured—The evidence in a first-degree kidnapping prosecution was sufficient to support the element that the victim was not left in a safe place or was seriously injured where she was strangled until she was unconscious and dragged down the road by her hair to a gravel driveway. An unconscious person lying on the side of a road or in a driveway where a car may hit her is not safe; moreover, the victim suffered serious injuries. **State v. James, 751.**

Kidnapping—purpose—terrorizing victim—evidence sufficient—There was sufficient evidence to support the State's theory that defendant's motive in kidnapping the victim was to terrorize her where multiple witnesses heard defendant telling the victim that he was going to kill her and he demonstrated that his threat was real by assaulting, placing her in a headlock, and choking her. The evidence showed that the victim was in a state of intense fright and apprehension. **State v. James, 751.**

POLICE OFFICERS

Police Officers—retirement—service with multiple agencies—The trial court erred by granting partial summary judgment to plaintiff law enforcement officer in an action to determine the amount of his retirement where he had served in different agencies. Plaintiff was an elected Sheriff when he retired but had been a local police officer and state trooper, and as such, had been a member of the Teachers' and State Employees Retirement System (TSERS). However, he began a beneficiary of TSERS, and thus not a member, before he retired as sheriff. His special separation allowance from the County was therefore based only on his service with the County. **Lovin v. Cherokee Cty., 527.**

PROBATION AND PAROLE

Probation and Parole—revocation—grounds—independent determination by trial court—Defendant did not show that the trial court's decision to revoke his probation was legally erroneous, unsupported by the evidence, or manifestly unreasonable. Even though the State conceded error, the Court of Appeals was not bound by that concession. Due to the timing of the underlying offense, defendant was not subject to the Justice Reinvestment Act of 2011 (JRA) and its absconding condition, and his probation could only be revoked upon a finding that he committed a new criminal offense. Although defendant argued that the mere fact of being charged was insufficient to support a finding of commission of an offense, a defendant need not be convicted for the trial court to find that defendant violated N.C.G.S. § 15A-1343(b)(1) by committing an offense. **State v. Hancock, 744.**

PUBLIC OFFICERS AND EMPLOYEES

Public Officers and Employees—magistrates—salary steps—suspended—no breach of contract—The trial court correctly granted defendants' motion to dismiss under Rule 12(b)(6) where plaintiffs were a class of magistrates to whom the Legislature's suspension of salary step increases applied. Plaintiffs failed to meet their burden of showing that the Salary Statute created a binding contractual right to receive a salary in the future for work performed in the future. **Adams v. State of N.C., 463.**

PUBLIC RECORDS

Public Records—mass request—reasonable accommodation—Summary judgment was properly granted for defendants in an action under the Public Records Act where plaintiff made a request for a mass search of all records and defendants made reasonable accommodations to allow plaintiff timely access. **Brooksby v. N.C. Admin. Office of Courts, 471.**

SEARCH AND SEIZURE

Search and Seizure—consent to search—defendant not in custody—Defendant was not in custody and his consent to search his house was voluntary, considering the totality of the circumstances, where officers came to defendant's rooming house to investigate another crime, defendant was sitting on the porch and went inside for his identification and motioned an officer to come with him, the officer smelled marijuana and asked permission to search defendant and then the room, and defendant consented. Defendant's movements were not restricted and defendant chose to stay while officers searched the room. The officers' guns were

holstered, and they did not make physical contact with defendant until after cocaine was found, and they did not make threats, use harsh language, or raise their voices at any time. **State v. Cobb, 687.**

Search and Seizure—knock and talk—totality of circumstances—defendant not seized—Based on the totality of the circumstances, the trial court correctly concluded that officers did not act in a physically or verbally abusive manner during a knock and talk approach to defendant in his house and that no seizure of defendant occurred. **State v. Marrero, 787.**

Search and Seizure—protective sweep of house—exigent circumstances—Exigent circumstances existed for a protective sweep of defendant's residence and to ensure that evidence was not destroyed where, under the totality of the circumstances, a dangerous and emergent situation existed. **State v. Marrero, 787.**

Search and Seizure—vehicle checkpoint—odor of marijuana inside car—no link to defendant—The trial court erred by denying defendant's motion to suppress evidence of cocaine found during a search of his person at a vehicle checkpoint where the deputy had probable cause to search the vehicle but not defendant's person. There was nothing linking the odor of marijuana in the vehicle to defendant. The inevitable discovery doctrine was not raised below. **State v. Pigford, 797.**

SENTENCING

Sentencing—habitual felon—not cruel and unusual punishment—Defendant's sentence under the Habitual Felon Act did not deny defendant his right to be free of cruel and unusual punishment. **State v. Cobb, 687.**

Sentencing—right to be present—appointed counsel costs—Defendant's right to be present during his sentencing was not violated where the trial court assigned attorney fees to a Class G felony judgment in open court and in defendant's presence. When the written judgments were entered, the trial court merely made sure the fines were properly calculated at Class D rates. **State v. Charleston, 671.**

Sentencing—two felonies—appointed counsel—When sentencing defendant for discharging a firearm into an occupied dwelling and possession of a firearm by a felon, the trial court did not err by making payment of all of the costs of appointed counsel a condition of defendant's probation for possession of a firearm by a felon. Although defendant argued that the costs would have been a civil lien had the attorney's fees been assigned to the judgment for discharging a firearm into an occupied building, the lien judgment was already ordered to be entered by statute. The only change resulting from defendant's being given probation for possession of a firearm by a felon was that payment became a condition of probation. There was only one fee which covered both charges because defendant was convicted of both felonies on the same day before the same judge. **State v. Charleston, 671.**

SEXUAL OFFENSES

Sexual Offenses—second-degree—indictment—only attempt charged—only verdict for attempted offense supported—The trial court erred by accepting the jury's verdict of guilty of second-degree sexual offense when the indictment charged attempted second-degree sexual offense. The indictment failed to allege that defendant actually committed a sex offense, so it was ineffective to confer jurisdiction

upon the trial court to convict defendant of second-degree sexual offense; however, the indictment sufficiently alleged attempted second-degree sexual offense and the verdict supported a conviction for that offense. **State v. Gates, 732.**

STATUTES OF LIMITATION AND REPOSE

Statutes of Limitation and Repose—reclassification of water meters—continual ill effects—not continuing wrong—The statute of limitations barred plaintiff's claim that defendant's reclassification of water meters (which resulted in a higher monthly bills) was arbitrary, capricious, unreasonable, and discriminatory. Although plaintiff claimed that the continuing wrong doctrine applied, there were only continual ill effects from the reclassification. Defendant did not reclassify the water meters each month. **Acts Ret.-Life Cmtys., Inc. v. Town of Columbus, 456.**

TORT CLAIMS ACT

Tort Claims Act—discrimination based on race, religion, ethnicity, or gender—collateral estoppel—The trial court did not err by dismissing plaintiff's claim under N.C.G.S. § 99D-1 involving motivation by either a racial, religious, ethnic, or gender-based discriminatory animus. Plaintiff was collaterally estopped from asserting this claim because this issue was already fully determined in the federal action. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

WORKERS' COMPENSATION

Workers' Compensation—subrogation lien—amount—The trial court did not err in calculating the amount of a subrogation lien in a case arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies. **Dion v. Batten, 476.**

Workers' Compensation—subrogation lien—amount—finding—The trial court did not abuse its discretion in determining the amount of the workers' compensation subrogation lien. The trial court made findings cogently identifying the parties and explaining the proceedings, and conclusions demonstrating its thorough consideration of the necessary statutory factors. The court then excluded court costs, attorney fees, and interest from the judgment. **Dion v. Batten, 476.**

Workers' Compensation—subrogation lien—standing—In an action arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies, N.C.G.S. § 97-10.2(j) conferred standing upon Foremost Insurance Company as a third party for determination of the subrogation amount. **Dion v. Batten, 476.**

Workers' Compensation—subrogation lien—subject matter jurisdiction—The trial court possessed subject matter jurisdiction to rule on Foremost Insurance Company's application to determine the subrogation amount in a case involving a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies. The Court of Appeals declined to draw a distinction between "determining" the amount of a subrogation lien under N.C.G.S. § 97-10.2(j) and "reducing" or "eliminating" the lien. The amount of a subrogation lien cannot exceed the amount of the proceeds recovered from third-party tortfeasors. **Dion v. Batten, 476.**

WRONGFUL INTERFERENCE

Wrongful Interference—tortious interference with economic advantage—prospective employment—The trial court erred by dismissing plaintiff's tortious interference with prospective economic advantage claims against defendants Hull, Progelhof, Zanzarella, and Murray based on plaintiff's prospective employment with the United Methodist Church. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

Wrongful Interference—tortious interference with economic advantage—prospective employment—failure to make specific factual allegations—The trial court did not err by dismissing plaintiff's tortious interference with prospective economic advantage (TIPEA) claims against defendants Hull, Progelhof, Zanzarella, and Murray based on plaintiff's prospective employment with the Boys and Girls Home. Plaintiff failed to make specific factual allegations. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

Wrongful Interference—tortious interference with economic advantage—statute of limitations—tolled claims—The trial court did not err by dismissing plaintiff's tortious interference with prospective economic advantage (TIPEA) claims against defendant homeowners' association and defendant Dinero as time barred. However, the trial court erred by dismissing plaintiff's TIPEA claims against defendants Hull, Progelhof, Zanzarella, Murray, and Buccafurri because those actions were tolled during the pendency of the federal action. **Radcliffe v. Avenel Homeowners Ass'n, Inc., 541.**

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.

ACTS RETIREMENT-LIFE COMMUNITIES, INC., PLAINTIFF
v.
TOWN OF COLUMBUS, NORTH CAROLINA, DEFENDANT

No. COA15-1333

Filed 2 August 2016

Statutes of Limitation and Repose—reclassification of water meters—continual ill effects—not continuing wrong

The statute of limitations barred plaintiff's claim that defendant's reclassification of water meters (which resulted in a higher monthly bills) was arbitrary, capricious, unreasonable, and discriminatory. Although plaintiff claimed that the continuing wrong doctrine applied, there were only continual ill effects from the reclassification. Defendant did not reclassify the water meters each month.

Appeal by plaintiff and defendant from judgment entered 18 June 2015 by Judge Jeffrey P. Hunt in Polk County Superior Court. Heard in the Court of Appeals 11 May 2016.

Parker, Poe, Adams & Bernstein L.L.P., by Benjamin Sullivan, for plaintiff.

Cranfill Sumner & Hartzog LLP, by Ryan D. Bolick and Virginia M. Wooten, for defendant.

ELMORE, Judge.

In June 2002, the Town Council in the Town of Columbus, North Carolina (defendant) voted to reclassify two water meters from commercial to residential at Tryon Estates, a retirement facility owned and operated by ACTS Retirement-Life Communities, Inc. (plaintiff). In response, plaintiff filed a complaint in February 2011. After a bench trial, the trial court ordered that the June 2002 reclassification and concurrent change in billing methodology was arbitrary, capricious, unreasonable, and unreasonably discriminatory in violation of N.C. Gen. Stat. § 160A-314. Defendant appeals and plaintiff has filed a cross appeal. Because we conclude that the statute of limitations bars plaintiff's complaint, we reverse and remand.

I. Background

Tryon Estates has received water and sewer services from defendant since it opened in 1992. From 1992 through June 2002, defendant billed Tryon Estates at the commercial rates for such services. On 18 June 2002, the Town Council held a meeting in which it decided that two of the six water meters at Tryon Estates should be classified as residential, not commercial, for billing purposes. One of the relevant two meters serves, *inter alia*, 276 individual apartment units, and the other meter serves ten villas, all located within the Tryon Estates community. The reclassification took effect on 1 July 2002 and, based on defendant's fee schedule which contained different rates for residential and commercial water and sewer services, resulted in plaintiff receiving higher monthly water and sewer bills.

On 9 February 2011, plaintiff filed a complaint in Polk County Superior Court seeking a declaration that defendant's decision to charge Tryon Estates the commercial rate for some water and sewer services but the residential rate for others (1) violated defendant's Charter; (2) violated Article I, Section 1 of the North Carolina Constitution; (3) was a form of discriminatory taxation in violation of Article I, Section 1 and Article V, Section 2 of the North Carolina Constitution as well as the Fourteenth Amendment to the United States Constitution; and (4) violated the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Plaintiff also alleged a claim for relief based on unjust enrichment and requested a permanent injunction requiring defendant to reclassify the two water meters as commercial.

After defendant filed a notice of removal to the United States District Court for the Western District of North Carolina, the federal district court filed a Memorandum of Decision and Order remanding the matter to Polk County Superior Court due to lack of subject matter jurisdiction under the Johnson Act, 28 U.S.C. § 1342. Subsequently, plaintiff filed a notice of dismissal of some of its claims under Rule 41(a), dismissing its third, fourth, and sixth claims, solely to the extent they relied on the United States Constitution or federal law. Prior to trial, defendant filed a motion to dismiss and both parties filed motions for summary judgment, all of which were denied. Finally, after a bench trial, the Honorable Jeffrey P. Hunt entered a judgment in which he ordered the following:

> By way of DECLARATORY JUDGMENT, this COURT rules hereby that [defendant's] June 2002 reclassifications and

> concurrent changes in billing methodology, including the application of base monthly charges per each individual villa and apartment unit, is arbitrary, capricious, and unreasonable and, in its effects on [plaintiff], is unreasonably discriminatory, all in violation of N.C.G.S. sec. 160A-314,[1] et seq. and the case law of North Carolina.

The trial court awarded plaintiff compensatory damages in the amount of $947,813.27, "representing the total of monthly overpayments paid by [plaintiff] since February 2008, together with interest on that total from the date of the filing of this action." The trial court did not rule on plaintiff's claims based on the North Carolina Constitution, and it denied plaintiff's request for injunctive relief. Both plaintiff and defendant appeal.

II. Analysis

"It is well settled that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether the conclusions of law were proper in light of such facts. A trial court's conclusions of law, however, are reviewable *de novo*." *Anthony Marano Co. v. Jones*, 165 N.C. App. 266, 267–68, 598 S.E.2d 393, 395 (2004) (citations omitted).

At the outset, defendant claims that the trial court erred in concluding as a matter of law that plaintiff's complaint is not barred by the statute of limitations. Defendant argues that the three-year statute of limitations in N.C. Gen. Stat. § 1-52(2) and (5) (2009) began to run immediately after the June 2002 reclassification took effect, and because plaintiff did not file suit until 9 February 2011, plaintiff's complaint is time-barred.

Plaintiff argues that the continuing wrong doctrine applies and that "[t]he limitations period for [its] claims was not triggered by the Council's June 2002 decision to change billing practices for Tryon Estates. That limitations period was triggered only when [defendant] *injured* [plaintiff] by repeatedly sending bills that overcharged for water and sewer." Thus, plaintiff claims that "[e]ach illegal bill was a separate wrong that triggered its own limitations period."

---

1. N.C. Gen. Stat. § 160A-314(a) (2015) states, "A city may establish and revise from time to time schedules of rents, rates, fees, charges, and penalties for the use of or the services furnished by any public enterprise." Moreover, "Schedules of rents, rates, fees, charges, and penalties may vary according to classes of service, and different schedules may be adopted for services provided outside the corporate limits of the city." *Id.*

In North Carolina, "[o]nce a defendant raises a statute of limitations defense, the burden of showing that the action was instituted within the prescribed period is on the plaintiff. A plaintiff sustains this burden by showing that the relevant statute of limitations has not expired." *Horton v. Carolina Medicorp, Inc.*, 344 N.C. 133, 136, 472 S.E.2d 778, 780 (1996) (citations omitted). The parties do not contest that a three-year statute of limitations applies to plaintiff's claims, but they disagree as to when plaintiff's claims accrued.

"A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Penley v. Penley*, 314 N.C. 1, 20, 332 S.E.2d 51, 62 (1985) (citations omitted); *see also* N.C. Gen. Stat. § 1-15(a) (2015). Our courts have accepted the "continuing wrong" or "continuing violation" doctrine as an exception to that general rule. *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 179, 581 S.E.2d 415, 423 (2003) (citing *Faulkenbury v. Teachers' & State Employees' Ret. Sys.* (*Faulkenbury II*), 345 N.C. 683, 694–95, 483 S.E.2d 422, 429–30 (1997)). In order for the doctrine to apply, there must be a continuing violation, which "is occasioned by continual unlawful acts, not by continual ill effects from an original violation." *Id.* (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)) (quotations omitted). This Court, however, has "acknowledge[d] that the distinction between on-going violations and continuing effects of an initial violation is subtle[.]" *Faulkenbury v. Teachers' & State Employees' Ret. Sys.* (*Faulkenbury I*), 108 N.C. App. 357, 369, 424 S.E.2d 420, 425 (holding that the plaintiffs were suffering from the continuing effects of the defendants' original action of amending the statute),[2] *aff'd per curiam*, 335 N.C. 158, 436 S.E.2d 821 (1993).

To determine whether plaintiff is suffering from a continuing violation, we consider "the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged." *Id.* at 368, 424 S.E.2d at 425 (citing *Cooper v. United States*, 442 F.2d 908, 912 (7th Cir. 1971)). " '[I]f the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation . . . .' " *Williams*, 357 N.C. at 179–80, 581 S.E.2d at 423 (quoting *Perez v. Laredo Junior Coll.*, 706 F.2d 731, 733 (5th Cir. 1983)).

---

2. See *Liptrap v. City of High Point*, 128 N.C. App. 353, 358–61, 496 S.E.2d 817, 820–22 (1998), for a thorough analysis on the history of *Faulkenbury I* and *Faulkenbury II* and the continuing wrong doctrine.

Here, the trial court did not specifically rely on the continuing wrong doctrine but appears to have applied it. Regarding the statute of limitations, the trial court concluded as a matter of law the following:

> For purposes of the applicable statute of limitations asserted by [defendant] herein, each monthly invoice presented by [defendant] to [plaintiff] since [defendant's] June 2002 reclassification and billing methodology change was an additional independent wrongful act committed by [defendant]. The three-year statute of limitations applies and does not act to bar the claims for relief of [plaintiff] herein. However, [plaintiff] may only recover damages against [defendant] for overcharges asserted by [plaintiff], and paid by [plaintiff] under [defendant's] June 2002 reclassification and changes in billing methodology, for that period of time beginning three years before the date upon which [plaintiff] filed the Complaint in this action.

Before we analyze whether the continuing wrong doctrine applies, we must first determine when plaintiff's cause of action accrued. Under the general rule regarding the statute of limitations stated above, plaintiff's cause of action accrued on 1 July 2002 when the reclassification took effect and plaintiff had the right to institute and maintain a suit. *See Penley*, 314 N.C. at 20, 332 S.E.2d at 62. Accordingly, based on the three-year statute of limitations, plaintiff would have had to file suit prior to 1 July 2005.

On appeal, plaintiff argues, consistent with the trial court's conclusion, that each monthly bill was a "separate wrong," and based on the continuing wrong doctrine, plaintiff's February 2011 complaint is not time-barred.

In determining if the continuing wrong doctrine applies, we consider "the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged." *Faulkenbury I*, 108 N.C. App. at 368, 424 S.E.2d at 425. Our Supreme Court has stated, "Statutes of limitation are intended to afford security against stale claims." *Estrada v. Burnham*, 316 N.C. 318, 327, 341 S.E.2d 538, 544 (1986), *superseded by statute on other grounds as stated in Turner v. Duke Univ.*, 325 N.C. 152, 381 S.E.2d 706 (1989). "With the passage of time, memories fade or fail altogether, witnesses die or move away, evidence is lost or destroyed; and it is for these reasons, and others, that statutes of limitations are inflexible and unyielding and operate without regard to the merits of a cause of action." *Id.*

While plaintiff submits a number of cases on the continuing wrong doctrine and a series of hypotheticals indicating that the statute of limitations defense cannot "grandfather repeated wrongdoing," we agree with defendant that plaintiff has mischaracterized its own claims to attempt to avoid the statute of limitations. On appeal, plaintiff argues that defendant had a continuing legal duty to comply with N.C. Gen. Stat. § 160A-314, which grants a city the authority to establish and revise "schedules of rates," and each monthly bill violated that duty. Yet, the actual wrongdoing of which plaintiff complained was defendant's decision to reclassify two water meters at Tryon Estates from commercial to residential, which occurred in June 2002.

Moreover, as stated throughout the trial court's judgment, the relief granted "invalidat[ed]" the June 2002 reclassification. In relevant part, the trial court made the following conclusions of law:

> 3. [Defendant's] June 2002 reclassification of two of [plaintiff's] meters and [defendant's] concurrent changes in its billing methodology . . . unreasonably discriminate against [plaintiff], which ultimately result in overcharging of [plaintiff] each month . . . .
>
> 4. Likewise, just as [defendant's] June 2002 reclassification of two of [plaintiff's] meters and [defendant's] concurrent changes in its billing methodology . . . is unreasonably discriminatory in its effects on [plaintiff,] these actions by [defendant] were arbitrary, capricious, [and] unreasonable . . . .
>
> 5. As a result, [plaintiff] has been overbilled and has overpaid each billing period, for water and sewer services since [defendant] implemented its June 2002 reclassification and concurrent changes in billing methodology, as described herein.
>
> . . . .
>
> 13. [Plaintiff] is entitled to recover the amount of overpayments it has paid each month as a result of [defendant's] reclassifications . . . .
>
> 14. [Plaintiff] has carried its burden of proof in showing that [defendant] has acted arbitrarily, capriciously, and unreasonably in its June 2002 reclassifications and the changes in its monthly billing methodology and the implementations thereof; as well as showing that the same was,

> in its effect as to [plaintiff], unreasonably discriminatory; as well as showing its damages.

In sum, the trial court concluded that the reclassification and change in billing was unlawful. The overcharges were resulting damages. Such a conclusion, however, is inconsistent with our application of the continuing wrong doctrine.

We conclude that there was not a continuing violation, "occasioned by continual unlawful acts," but rather only "continual ill effects from an original violation." *Williams*, 357 N.C. at 179–80, 581 S.E.2d at 423. The only alleged unlawful act was the June 2002 reclassification. The higher monthly bills constituted the continual ill effects from that reclassification. The Town Council did not reclassify the water meters at Tryon Estates as residential or commercial each month. Because the same alleged violation was not committed each month, the limitations period cannot begin anew. *See id.* at 179, 581 S.E.2d at 423.

Plaintiff waited over eight-and-a-half years to challenge the Town Council's decision to reclassify two meters at Tryon Estates. Since the June 2002 decision, three new town managers have served, there were four changes to the Town Council, and plaintiff had paid over one hundred monthly bills. Plaintiff had the option, which it pursued, to attempt to negotiate with defendant.[3] However, plaintiff cannot now challenge the Town Council decision by claiming that it is affected by a continuing wrong. Accordingly, we hold that the statute of limitations bars plaintiff's claims.

III. Conclusion

Because we conclude that the statute of limitations bars plaintiff's claims, we reverse and remand the trial court's order, and we do not reach the parties' additional arguments.

REVERSED AND REMANDED.

Judges McCULLOUGH and ZACHARY concur.

---

3. We note that the federal district court concluded that "[p]laintiff was given notice and a chance to be heard on the change in classification[;]" that "[d]efendant acknowledge[d] that it met and communicated with the [p]laintiff's representatives before making the reclassification[;]" and that "after the initial reclassification, the [p]laintiff repeatedly communicated with the [d]efendant to request that the meters be reclassified as commercial." *ACTS Ret.-Life Cmtys., Inc. v. Town of Columbus*, No. 1:11CV50, 2012 WL 727033, at *6 (W.D.N.C. Mar. 6, 2012). Plaintiff represented to the federal district court that it had "ample notice and an opportunity to be heard," as the Johnson Act only applied "if a rate order was 'made after reasonable notice and hearing.' " *Id.* (citing 28 U.S.C. § 1342).

ADAMS v. STATE OF N.C.

[248 N.C. App. 463 (2016)]

RODNEY K. ADAMS, ELIZABETH I. ALLEN, JOSEPH J. BATEMAN, WILLIAM PAUL BATEMAN, GILBERT A. BREEDLOVE, DEBRA D. CARSWELL, JASON GRAY CHEEK, CHRISTOPHER E. DUCKWORTH, BRYAN G. FARLEY, MELISSA FERREL, JAMES ROBERT FREEMAN, JOSHUA PHILLIP GRANT, WANDA M. HAMMOCK, MARLENE HAMMOND, THOMAS MURPHY HARRIS, RONALD E. HODGES, THOMAS W. HOLLAND, GARY H. LITTLETON, LINDA B. LONG, PANSY K. MARTIN, SHARON S. McLAURIN, BRUCE A. McPHERSON, THOMAS G. MILLER, JEFFREY MITCHELL, DONALD D. PASCHALL, SR., ROBERT WARREN PEARCE, CONNIE C. PEELE, JULIAN R. POTEAT, MARGARET L. RATHBONE, RONALD RAYMOND ROBERTS, JR., RAE RENEE ROTHROCK, SUZANNE SHEEHAN, SUSAN B. SMEVOG, KENNETH SPEARS, STEVEN R. STORCH, CECIL LYNN WEBB, EMILY ALICIA WESTOVER, WILLIAM ERIC WHITTEN, AND WILLIAM T. WINSLOW, INDIVIDUALLY AND ON BEHALF OF A CLASS OF SIMILARLY SITUATED PERSONS, PLAINTIFFS

v.

THE STATE OF NORTH CAROLINA, PATRICK L. McCRORY, GOVERNOR OF THE STATE OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY, LEE HARRIS ROBERTS, STATE BUDGET DIRECTOR, IN HIS OFFICIAL CAPACITY, AND DR. LINDA MORRISON COMBS, STATE CONTROLLER, IN HER OFFICIAL CAPACITY, DEFENDANTS

No. COA15-1275

Filed 2 August 2016

1. Public Officers and Employees—magistrates—salary steps—suspended—no breach of contract

The trial court correctly granted defendants' motion to dismiss under Rule 12(b)(6) where plaintiffs were a class of magistrates to whom the Legislature's suspension of salary step increases applied. Plaintiffs failed to meet their burden of showing that the Salary Statute created a binding contractual right to receive a salary in the future for work performed in the future.

2. Constitutional Law—takings—magistrates—salary steps—not a vested contract right

The trial court correctly granted defendants' motion to dismiss under Rule 12(b)(6) a takings claim under the Law of the Land Clause of the North Carolina Constitution. The case arose from the freezing of plaintiffs' salary steps by the Legislature. Plaintiffs did not establish the presence of a vested contractual right.

Appeal by Plaintiffs from order entered 13 July 2015 by Judge Michael O'Foghludha in Wake County Superior Court. Heard in the Court of Appeals 14 April 2016.

Cloninger, Barbour, Searson, & Jones, PLLC, by Frederick S. Barbour and W. Scott Jones, and the Law Office of David A. Wijewickrama, by David A. Wijewickrama, for the Plaintiffs-Appellants.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Marc Bernstein, for the Defendants-Appellees.

DILLON, Judge.

Plaintiffs appeal from the trial court's order granting Defendants' motion to dismiss and entering final judgment dismissing Plaintiffs' claims for (1) breach of contract, (2) impairment of contract under Article I, Section 10 of the United States Constitution, (3) violations of Article I, Sections 18 and 19 of the North Carolina Constitution, and (4) specific performance.

I. Background

Plaintiffs are all employed by the State of North Carolina as magistrates.[1] The office of magistrate was created by constitutional amendment in 1962 as part of a comprehensive revision of the North Carolina court system spearheaded by Governor Luther H. Hodges and leaders of the North Carolina Bar Association.[2] The North Carolina Constitution provides that "[t]he General Assembly shall prescribe and regulate the . . . salaries . . . of all officers provided for in [] Article [IV]," N.C. Const. art. IV, § 21, which includes the salaries of magistrates. *See* N.C. Const. art. IV, § 10.

The General Assembly enacted a salary schedule for magistrates in 1977. Since 1977, this salary schedule has been amended numerous times. The current version is codified in N.C. Gen. Stat. § 7A-171.1 (the "Salary Statute") and provides for the salaries of magistrates as follows:

> (1) A full-time magistrate shall be paid the annual salary indicated in the table set out in this subdivision. . . . Initial appointment shall be at the entry rate. A magistrate's salary shall increase to the next step every two years on

1. The class of Plaintiffs consists of all magistrates employed by the State of North Carolina at any time between 30 June 2009 and 1 July 2014, who had not, as of 1 July 2014, reached Step 6 of the pay schedule set forth in N.C. Gen. Stat. § 7A-171.1.

2. In a special message to the General Assembly in March 1959, Governor Hodges encouraged the North Carolina Bar Association to "take the lead in making a thorough and objective study of our courts," and to "show our State what should be done to improve the administration of justice in North Carolina." Special Message of Governor Luther H. Hodges to the North Carolina General Assembly, Article IV—Judicial Department (March 12, 1959), *in Journal of the House of Representatives of the General Assembly of the State of North Carolina*, at 209 (1959) (available at http://digital.ncdcr.gov/u?/p249901coll22,558990).

> the anniversary of the date the magistrate was originally appointed for increases to Steps 1 through 3, and every four years on the anniversary of the date the magistrate was originally appointed for increases to Steps 4 through 6.
>
> Table of Salaries of Full-Time Magistrates
>
> | Step Level | Annual Salary |
> |---|---|
> | Entry Rate | $35,275 |
> | Step 1 | 37,950 |
> | Step 2 | 40,835 |
> | Step 3 | 43,890 |
> | Step 4 | 47,550 |
> | Step 5 | 51,960 |
> | Step 6 | 56,900 |

N.C. Gen. Stat. § 7A-171.1(a)(1) (2015).

On 1 July 2009, the General Assembly enacted legislation suspending the step increases under the Salary Statute for fiscal years 2009-2010 and 2010-2011, such that no magistrate could ascend to a higher step of the pay schedule during those years. The step increases were again suspended by the General Assembly in 2011 for the 2011-2013 fiscal biennium[3] and in 2013 for the 2013-2015 fiscal biennium. On 1 July 2014, however, the General Assembly fully reinstated the pay schedule and step increases.

Plaintiffs filed suit against the State of North Carolina in May 2014, alleging that when they accepted employment as magistrates, the pay schedule set forth in the Salary Statute became a vested contractual right and that the State committed a breach of contract by suspending the step increases. Plaintiffs also asserted related constitutional claims, as well as claims for specific performance and declaratory judgment.

Defendants filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), (2), and (6). The trial court granted Defendants' motion to dismiss, specifically concluding that Plaintiffs' complaint "failed to state a claim upon which relief can be granted[.]" *See* N.C. Gen.

---

3. However, in 2012, the General Assembly granted magistrates and most other state employees a 1.2% pay increase and increased the entire salary schedule in N.C. Gen. Stat. § 7A-171.1 by 1.2%. 2012 N.C. Sess. Laws 142, § 25.1A(b) & (g).

Stat. § 1A-1, Rule 12(b)(6) (2015). In its order, the trial court specifically concluded that N.C. Gen. Stat. § 7A-171.1 did not create any contractual right for the Plaintiffs to receive step increases, and therefore Plaintiffs' claims were barred by the doctrine of sovereign immunity. We agree, and therefore affirm the trial court's order granting Defendants' motion to dismiss.

II. Analysis

[1] On appeal from a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, this Court conducts a *de novo* review of "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory."[4] *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). Plaintiffs argue that their complaint did, in fact, state a claim for breach of contract entitling them to relief. Plaintiffs also contend that they are entitled to relief under the Contract Clause of the United States Constitution and the Law of the Land Clause of the North Carolina Constitution.[5] We address each of these arguments in turn.

A. Principles Governing Contracts With the State

It is well established in North Carolina that "an appointment or election to public office does not establish contract relations between the person[s] appointed or elected and the State." *Smith v. State*, 289 N.C. 303, 307, 222 S.E.2d 412, 416 (1976); *see also Mial v. Ellington*, 134 N.C. 131, 46 S.E. 961 (1903). Unless specifically prohibited by our Constitution, as a general rule, "[t]he Legislature may reduce or increase the salaries of such officers . . . during their term of office, but cannot deprive them of the whole." *Cotton v. Ellis*, 52 N.C. 545, 545 (1860). "[I]f the Legislature should increase the duties and responsibilities, or diminish the emoluments of the office, the officer must submit. Clearly any other rule would subordinate the public welfare to the interest of the officer. [The officer] takes subject to the power of the Legislature to change [the] duties and emoluments as the public good may require." *State ex rel. Bunting v. Gales*, 77 N.C. 283, 285 (1877).

---

4. We consider the merits of Plaintiffs' contract claim because the trial court specifically dismissed their complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

5. Plaintiffs did not address the trial court's dismissal of their remaining claims on appeal, and these claims are therefore deemed abandoned. N.C. R. App. P. 28(a).

The relationship between magistrates and the State is contractual in nature in one respect in that the magistrates are employees who provide labor in exchange for wages and benefits. And it is true that a statute enacted by our General Assembly can create a vested contractual right where the statute provides a benefit for work already performed. For instance, our Supreme Court has clearly stated:

> . . . that when the General Assembly enacted laws which provided for certain benefits to those persons who were to be employed by the state and local governments and who fulfilled certain conditions, this could reasonably be considered by those persons as offers by the state or local government to guarantee the benefits *if those persons fulfilled the conditions*. When they did so, the contract was formed.

Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina, 345 N.C. 683, 691, 483 S.E.2d 422, 427 (1997) (emphasis added). That is, the Supreme Court has concluded that if an employee fulfills certain conditions under a statute and thereby becomes entitled to a benefit, the benefit is considered "vested" and may not be taken from the employee by legislative action. *Id.* at 692, 483 S.E.2d at 428.

However, our Supreme Court more recently has reiterated the principle that there is a strong presumption that a statute does not create contractual rights. *N.C. Ass'n of Educators v. State*, ___ N.C. ___, ___, 786 S.E.2d 255, 262 (2016). Specifically, the Court stated as follows:

> The United States Supreme Court has recognized a presumption that a state statute is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. This presumption is rooted in the long-standing principle that the primary function of the legislature is to make policy rather than contracts. A party asserting that a legislature created a statutory contractual right bears the burden of overcoming that presumption by demonstrating that the legislature manifested a clear intention to be contractually bound. Construing a statute to create contractual rights in the absence of an expression of unequivocal intent would be at best ill-advised, binding the hands of future sessions of the legislature and obstructing or preventing subsequent revisions and repeals. We are deeply reluctant to limit drastically the essential powers of a

> legislative body by finding a contract created by statute without compelling supporting evidence.

Id. at ___, 786 S.E.2d at 262-63 (internal marks and citations omitted).

In the present case, we hold that Plaintiffs failed to meet their burden of showing that the Salary Statute creates a binding contract right for magistrates to receive a certain salary in the future *for work performed in the future*. Rather, the General Assembly is free to amend the Salary Statute so long as, in doing so, the General Assembly does not reduce a magistrate's salary for work already performed. The General Assembly's suspension of raises under the Salary Statute is much different than the legislation at issue in *Faulkenbury*, which reduced the amount of future pension benefits State employees would receive for work *already performed*. *See Faulkenbury*, 345 N.C. at 691, 483 S.E.2d at 427 ("[P]ensions for teachers and state employees [are] delayed salaries.").

Although our Supreme Court concluded in the recent case of *N.C. Ass'n. of Educators* that the Career Status Law itself did not create a contractual right to tenure, the Court did conclude that the individual teacher contracts contained an implied right to tenure for those who had already attained career status. *N.C. Ass'n of Educators*, ___ N.C. at ___, 786 S.E.2d at 264 (concluding that the repeal of the Career Status Law "unlawfully infringe[d] upon the contract rights of teachers *who had already achieved career status*" (emphasis added)). And our Court concluded that teachers who had not yet worked the requisite years to attain career status had no contractual right to receive tenure in the future by completing the requisite years of service, an issue which was not considered or otherwise disturbed by our Supreme Court. *N.C. Ass'n of Educators*, ___ N.C. App. ___, ___, 776 S.E.2d 1, 23-24 (2015). The magistrates here are much like the teachers in *N.C. Ass'n. of Educators* who had not yet worked the requisite number of years to have a contractual right to career status. Here, a magistrate could not have a contractual right to receive a higher salary in a future year simply until the magistrate completed work in that future year. The actions of the General Assembly in suspending step increases *for future work* did not take away any benefit already earned by Plaintiffs, whereas in *N.C. Ass'n of Educators*, the successful plaintiffs had already worked the requisite years to earn career status. *See Schimmeck v. City of Winston-Salem*, 130 N.C. App. 471, 475, 502 S.E.2d 909, 912 (1998) (holding that a statute in force at the time plaintiff police officer began employment allowing disabled officers with five years of service to retire with benefits did not apply to plaintiff because the legislature amended the statute to provide for disabled officers to be transferred to other departmental duties prior

to plaintiff's rights vesting with five years of service.) Accordingly, we hold that the trial court properly concluded that the General Assembly is free to alter the salary schedule before the work supporting each step increase is actually performed by a magistrate.

Plaintiffs also argue that the pay schedule and the representations of agents and employees of the State of North Carolina regarding their pay became contractual terms because they relied on these representations by accepting their positions as magistrates. While our Court has previously held that representations of an employer regarding benefits of employment can form supplementary employment contracts, we also noted that the plaintiffs in that case were "not seeking to prevent the city from changing the benefits to be earned in the future[.]"[6] *Pritchard v. Elizabeth City*, 81 N.C. App. 543, 552-53, 344 S.E.2d 821, 826 (1986). Rather, they sought to recover "for benefits allegedly already conferred on them by virtue of the ordinance and their contracts for services previously rendered[.]" *Id.* at 553, 344 S.E. 2d at 826.

In fact, if we were to find the presence of a contract in this case, it would still be true that even "[i]f an Act prescribing the duties and compensation of a public officer can in any case be held to be a contract, . . . it is a contract *subject to the general law*, and therefore containing within itself a provision that such duties and compensation may be changed by any general law whenever the Legislature shall think a change required by the public good." *State ex rel. Bunting v. Gales*, 77 N.C. 283, 286-87 (1877) (emphasis added); *see also Mills v. Deaton*, 170 N.C. 386, 87 S.E. 123, 124 (1915) (noting that the legislature may, "within reasonable limits[,] diminish the emoluments of an office . . . by reducing the salary or the fees, for the incumbent takes the office subject to the power of the Legislature to make such changes as the public good may require"). Because the Plaintiffs in this case did not have a vested right to every step pay increase, they had no contractual right for their future salaries as set forth in the Salary Statute.

B. Constitutional Claims

[2] Because we have determined that Plaintiffs did not have a contractual right to the future pay schedule in the Salary Statute, Plaintiffs' arguments regarding the Contract Clause of the United States Constitution have no merit on appeal. *See Bailey v. State*, 348 N.C. 130, 141, 500 S.E.2d

6. In addition, the ordinance which created the benefit at issue in *Pritchard* "clearly contemplate[d] that the . . . benefit program would assist in recruiting city employees and would become part of their contracts." *Pritchard*, 81 N.C. App. at 552, 344 S.E.2d at 826.

54, 60 (1998); *see also U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1 (1977). Plaintiffs' remaining argument on appeal is for an unconstitutional taking claim based on the Law of the Land Clause of the North Carolina Constitution, which has been used in our State to allow "taking challenges on the basis of constitutional and common-law principles." *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 179, 594 S.E.2d 1, 14 (2004); *see also* N.C. Const., art. I, § 19. For an unconstitutional taking to occur, Plaintiffs must have a recognized property interest for the State to take. *See e.g.*, *Rhyne*, 358 N.C. at 179, 594 S.E.2d at 14-15. Although we recognize that vested contractual rights are property and are protected by the Law of the Land Clause of our Constitution, *Bailey*, 348 N.C. at 154, 500 S.E.2d at 68, we reject Plaintiffs' taking argument because they have failed to establish the presence of a vested contractual right to the future pay schedule set forth in the Salary Statute.

III. Conclusion

We conclude that the Salary Statute does not create vested contractual rights for magistrates to receive future salary increases for work not already performed. Therefore, the General Assembly was free to suspend step increases under the Salary Statute. Accordingly, we hold that the trial court did not err in dismissing Plaintiffs complaint for failure to state any claim upon which relief could be granted, and we affirm the ruling of the trial court.

AFFIRMED.

Chief Judge McGEE and Judge DAVIS concur.

BROOKSBY v. N.C. ADMIN. OFFICE OF COURTS

[248 N.C. App. 471 (2016)]

CRAIG BROOKSBY & PAM GUNDERSON, INDIVIDUALS, AND THE ESTATES LLC, A UTAH LIMITED LIABILITY COMPANY, PLAINTIFFS
v.
NORTH CAROLINA ADMINISTRATIVE OFFICE OF THE COURTS, JOHN W. SMITH, II, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE COURTS; AND PAMELA HILL, IN HER OFFICIAL CAPACITY AS THE CLERK OF RANDOLPH COUNTY SUPERIOR COURT, DEFENDANTS

No. COA15-1397

Filed 2 August 2016

Public Records—mass request—reasonable accommodation

Summary judgment was properly granted for defendants in an action under the Public Records Act where plaintiff made a request for a mass search of all records and defendants made reasonable accommodations to allow plaintiff timely access.

Appeal by Plaintiffs from an order entered 26 June 2015 by Judge W. Erwin Spainhour in Randolph County Superior Court. Heard in the Court of Appeals 6 June 2016.

Moffatt & Moffatt, PLLC, by Tyler R. Moffatt, for Plaintiff-Appellants.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for Defendant-Appellees.

HUNTER, JR., Robert N., Judge.

Craig Brooksby, Pam Gunderson, and The Estates LLC (collectively "Plaintiffs"), appeal following an order awarding the North Carolina Administrative Office of the Courts, John W. Smith, II, and Pamela Hill (collectively "Defendants") summary judgment on Plaintiffs' North Carolina Public Records Act ("Public Records Act") claim. On appeal, Plaintiffs contend the trial court erred in awarding Defendants summary judgment. We disagree and affirm the trial court.

I. Factual and Procedural Background

Plaintiff The Estates LLC ("The Estates") is a Utah real estate company that buys and sells distressed properties in North Carolina; Plaintiffs Brooksby and Gunderson work for The Estates. In the course of The Estates' business, it contacted clerks' offices in ninety North Carolina counties. In these counties, the Clerks of Court allowed The Estates to copy and scan public foreclosure records using its "staff and

equipment." The Estates uses its staff to pull foreclosure records, then scan the records using cell phone cameras, digital cameras, and tablet cameras to copy "[twenty] files at a time per [staff] person," to save time and money.

On 5 June 2013, Plaintiffs traveled to the Randolph County Clerk's Office, where Pamela Hill ("Hill") is the Clerk of Court. Plaintiffs requested all foreclosure records from 2010 to present, and asked Hill if they could use their staff and scanning equipment. Hill denied their request.

On 30 August 2013, Plaintiffs made a written request to come into Hill's office, and copy records on 30 September and 1 October 2013 using their staff and equipment, and once per week thereafter until they copied all of their desired documents. In the alternative, Plaintiffs told Hill, "If, you prefer to do this yourself then we request pursuant to N.C. Gen. Stat. § 132-6.2, that these records be provided in digital pdf format (CD, DVD or digital copy) or by fax within 15 days . . . ." Hill denied Plaintiffs' request through counsel on 20 September 2014. Hill's counsel stated, on her behalf, "she does not have sufficient staff so that someone could supervise such an operation and ensure the integrity of the court's records." Hill proposed a compromise and offered to provide fifteen to twenty records to Plaintiffs on a weekly basis. Plaintiffs did not accept Hill's offer and on 9 October 2013 they filed a complaint against Hill and others, raising a public records action.

Defendants answered on 14 November 2013 and generally denied the allegations and admitted some facts. Defendants stated they acted in accordance with the Public Records Act and did not deny Plaintiffs access to the foreclosure documents. To their answer, Defendants attached an email between them and Plaintiffs' counsel in which Defendants offered to produce weekly records to Plaintiffs in lieu of giving Plaintiffs the autonomy they desired.

On 3 January 2014, the trial court ordered the parties to attend a mediated settlement conference. The parties met on 5 May 2014 and they agreed to Plaintiffs' use of a handheld scanner to copy foreclosure records but they did not agree "as to the specific mechanics and terms." The parties failed to reduce their agreement to writing. Following the mediation conference, Plaintiffs agreed to obtain five foreclosure records at a time from Hill using a handheld scanner approved by the Randolph County Sheriff. Although the parties used this method to obtain records "without issue" for months, Plaintiffs persisted in their demand "to pull [fifteen] copies [or more of public records] at a time," based on their proposed terms. Hill again denied their request.

On 26 May 2015, Defendants moved for summary judgment pursuant to Rule 56. Defendants contended Plaintiffs' Public Records Act claim should be dismissed because "there are no issues of material fact remaining."

The trial court heard the parties on the Defendants' motion for summary judgment on 8 June 2015. At the hearing, Defendants submitted the following documents: (1) an administrative order from the Randolph County Courthouse, which bars the use of cell phones in the courthouse; (2) an email sent from Plaintiffs to Defendants on 30 August 2013 requesting independent access to public records; and (3) an affidavit from J. Denton Adams, Plaintiffs' former counsel, who attended the 5 May 2014 mediation conference. Defendants also submitted an affidavit from Diana Brown, Assistant Clerk of Superior Court in Randolph County and supervisor of the foreclosure records in question, which stated the parties agreed to Plaintiffs' use of a digital imaging wand that the Randolph County Sheriff approved. At the summary judgment hearing, Plaintiffs and Defendants agreed there "is no genuine issue as to any material fact." Based upon the record evidence, the trial court granted summary judgment in Defendants' favor and dismissed Plaintiffs' claims with prejudice on 26 June 2015. Plaintiffs timely filed notice of appeal on 14 July 2015.

II. Standard of Review

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

III. Analysis

Plaintiffs contend the trial court "erred in holding that the Clerk of Court may prohibit the Plaintiffs from inspection [sic] copying of the Randolph County Special Proceeding files through the use of digital cameras, cell phone cameras and/or tablet cameras." They contend there is a genuine issue of material fact as to whether Defendants unreasonably restricted their access to public records. We disagree.

Pursuant to Rule 56, summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015).

> The party moving for summary judgment has the burden of establishing the lack of any triable issue. The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial.* All inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion.

Collingwood v. Gen. Elec. Real Estate Equities, Inc., 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (citations omitted) (emphasis added).

Under the North Carolina Public Records Act, "[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law." N.C. Gen. Stat. § 132-6(a) (2015); N.C. Gen. Stat. § 132-1 *et. seq.* (2015). The Public Records Act provides the following:

> Persons requesting copies of public records may elect to obtain them in any and all *media in which the public agency is capable of providing them.* No request for copies of public records in a particular medium shall be denied on the grounds that the *custodian* has made or prefers to make the public records available in another medium. The public agency may assess different fees for different media as prescribed by law.

N.C. Gen. Stat. § 132-6.2(a) (2015) (emphasis added).

To establish a *prima facie* case under the Public Records Act, a plaintiff must show: "(1) a person requests access to or copies of public records from a government agency or subdivision, (2) for the purposes of inspection and examination, and (3) access to or copies of the requested public records are denied." *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 207, 695 S.E.2d 91, 93 (2010). Our Supreme Court held "it is clear that the legislature intended to provide that, as a general rule, the public would have liberal access

to public records." *News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984) (citation omitted).

Here, Plaintiffs failed to forecast evidence of a *prima facie* case under the Public Records Act because they failed to show that "access to or copies of the requested public records [was] denied." *State Emps. Ass'n of N.C., Inc.*, 364 N.C. at 207, 695 S.E.2d at 93. Plaintiffs' evidence shows they were not allowed to access the Clerk's Office on the explicit terms they requested. While the Court recognizes that there may be circumstances where public officials deny access to records on grounds of resources as a pretext for frustrating the intent of the law to provide open access, we hold under these circumstances no such factual question has been raised. Under the limitations of the Clerk's Office and the availability of its employees, Defendants made reasonable accommodations to allow Plaintiffs access to the documents in a timely manner.

The issues raised here regard a request for mass records search of all records. The need for the records custodian to maintain the integrity of the records for its own use and the use of others, the custodian's fiscal responsibility in maintaining the records, the duty to the public, the protection of public resources, and the exigency of the public's need for the information are some, but not all, of the factors that shape a court's inquiry in a records request. We note both parties conceded this matter was appropriate for summary judgment. This indicates the presence of a pure question of law.

After reviewing the record *de novo* in the light most favorable to Plaintiffs, we hold Defendants are entitled to summary judgment.

IV. Conclusion

For the foregoing reasons, we affirm the trial court.

AFFIRMED.

Judges CALABRIA and DILLON concur.

THOMAS DAVID DION, PLAINTIFF
v.
WILLIAM ROBERT BATTEN, SR., DEFENDANT

No. COA16-63

Filed 2 August 2016

1. Workers' Compensation—subrogation lien—standing

In an action arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies, N.C.G.S. § 97-10.2(j) conferred standing upon Foremost Insurance Company as a third party for determination of the subrogation amount.

2. Workers' Compensation—subrogation lien—subject matter jurisdiction

The trial court possessed subject matter jurisdiction to rule on Foremost Insurance Company's application to determine the subrogation amount in a case involving a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies. The Court of Appeals declined to draw a distinction between "determining" the amount of a subrogation lien under N.C.G.S. § 97-10.2(j) and "reducing" or "eliminating" the lien. The amount of a subrogation lien cannot exceed the amount of the proceeds recovered from third-party tortfeasors.

3. Workers' Compensation—subrogation lien—amount

The trial court did not err in calculating the amount of a subrogation lien in a case arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance companies.

4. Workers' Compensation—subrogation lien—amount—finding

The trial court did not abuse its discretion in determining the amount of the workers' compensation subrogation lien. The trial court made findings cogently identifying the parties and explaining the proceedings, and conclusions demonstrating its thorough consideration of the necessary statutory factors. The court then excluded court costs, attorney fees, and interest from the judgment.

5. Attorney Fees—negligence and workers' compensation actions—findings—cost of third-party litigation

In an action arising from a car accident, workers' compensation, a negligence action and arbitration, and multiple insurance

companies, the trial court's findings adequately addressed the required consideration of the amount of the cost of third-party litigation to be shared between the employer and employee. The trial court considered the amount that plaintiff and his attorney had and would receive as a result of the third-party litigation, took into account the court costs that had been paid, and noted that the employer and its servicing agent intended to exclude plaintiff's attorney fees from the amount of the workers' compensation subrogation lien.

Appeal by Plaintiff and Unnamed Defendants Neuwirth Motors and Brentwood Services, Inc. from order entered 4 June 2015 by Judge W. Allen Cobb, Jr. in Superior Court, Duplin County. Heard in the Court of Appeals 6 June 2016.

Baker & Slaughter, by H. Mitchell Baker, for Plaintiff.

Teague Campbell Dennis & Gorham, LLP, by Bruce A. Hamilton, Matthew W. Skidmore, and Justin G. May, for Unnamed Defendants Neuwirth Motors and Brentwood Services, Inc.

Hoof & Hughes, PLLC, by J. Bruce Hoof, for Unnamed Defendant Foremost Insurance Company.

Hedrick, Gardner, Kincheloe & Garofalo, L.L.P., by Ellen P. Wortman, for Unnamed Defendant Government Employees Insurance Company.

McGEE, Chief Judge.

Thomas David Dion ("Plaintiff"), Neuwirth Motors ("Neuwirth"), and Brentwood Services, Inc. ("Brentwood") appeal from an order determining the amount of a workers' compensation subrogation lien on a judgment obtained by Plaintiff against William Robert Batten, Sr. ("Defendant"). We affirm.

I. Background

Plaintiff was employed by Neuwirth as a servicing agent. In the course and scope of his employment with Neuwirth, Plaintiff was driving on Oriole Drive in Wilmington, North Carolina on 20 March 2008, when the vehicle he was driving was struck by a vehicle driven by Defendant, who had failed to stop at a red light. As a result of the crash, Plaintiff sustained multiple injuries. Because the crash occurred during the course and scope of Plaintiff's employment with Neuwirth, Plaintiff

was entitled to, and filed a claim for, workers' compensation benefits pursuant to Chapter 97 of the North Carolina General Statutes. Plaintiff, Neuwirth, and Neuwirth's workers' compensation servicing agent, Brentwood, agreed that Plaintiff was entitled to $528,665.61 for injuries sustained in the crash. The agreement between Plaintiff, Neuwirth, and Brentwood was approved by the Industrial Commission by order entered 14 November 2012.[1] Pursuant to N.C. Gen. Stat. § 97-10.2(f), Neuwirth and Brentwood asserted a lien against any third party recovery.

In addition to the workers' compensation claim, Plaintiff filed the present lawsuit against Defendant on 16 November 2010, asserting a claim of negligence. After the complaint was filed, and as permitted by N.C. Gen. Stat. § 20-279.21(b)(4), a trio of interested insurance companies entered the lawsuit by filing answers as unnamed defendants: Nationwide Mutual Insurance Company ("Nationwide"); Foremost Insurance Company ("Foremost"); and Government Employees Insurance Company ("GEICO"). Defendant maintained a policy with Nationwide that provided liability insurance coverage in the amount of $30,000.00, and underinsured motorist coverage ("UIM coverage") in the amount of $100,000.00. Plaintiff maintained insurance policies with Foremost and GEICO that provided UIM coverage for damages Defendant was entitled to in excess of the limits of Defendant's Nationwide policy.

Sometime after filing an answer to Plaintiff's complaint, Nationwide tendered its policy limits of $100,000.00.[2] Disbursement of the funds was approved by the Industrial Commission by order entered 9 December 2011, and provided that the $100,000.00 would be dispersed in equal shares to: (1) Plaintiff; (2) Plaintiff's counsel, for attorney's fees; and (3) Neuwirth and Brentwood. The order also stated that "[n]othing contained in this Order shall be construed as a waiver of . . . defendant/workers' compensation carrier's lien. Plaintiff and defendant/workers' compensation carrier explicitly acknowledge the defendant/workers' compensation carrier's

---

1. The Industrial Commission's order provided that Plaintiff's attorney was to receive a fee of $50,000.00, to be paid out of the total recovery.

2. UIM coverage "is deemed to apply to the first dollar of an underinsured motorist coverage claim beyond amounts paid to the claimant under the exhausted liability policy." N.C. Gen. Stat. § 20-279.21(b)(4) (2015). The limit of UIM coverage "applicable to any claim is determined to be the difference between the amount paid to the claimant under the exhausted policy . . . and the limit of [UIM coverage] applicable to the motor vehicle involved in the accident." *Id.* Accordingly, Nationwide paid $30,000.00 under the "exhausted policy," and $70,000.00 in UIM coverage, for a total of $100,000.00.

right to assert a lien against the proceeds of any additional third-party funds paid to [P]laintiff." Plaintiff's insurance policies with Foremost and GEICO each provided that either party had the option to require arbitration. Plaintiff, Foremost, and GEICO decided to exercise that option, and the matter was referred to arbitration. Arbitration began on 8 April 2015 and, on 13 April 2015, the arbitration panel decided Plaintiff was entitled to recover $285,000.00 from Defendant for personal injuries sustained in the 20 March 2008 crash.

The trial court entered the arbitration award as a judgment on 12 May 2015. In entering the judgment, the trial court determined that the arbitration award "should be reduced by the amount of $100,000.00 which had previously been paid to Plaintiff" by Nationwide. The trial court awarded interest on the full amount, $285,000.00, from 16 November 2010, when the lawsuit was filed, to 9 December 2011, when Nationwide tendered its policy limits. The trial court also awarded interest on the reduced amount, $185,000.00, from 10 December 2011 through 1 May 2015.

Foremost filed a motion on 4 May 2015 to determine the subrogation amount pursuant to N.C.G.S. § 97-10.2(j), and the trial court held a hearing on Foremost's motion three days later. Following the hearing, the trial court entered a written order on 4 June 2015 "determin[ing]" the appropriate amount of Neuwirth's and Brentwood's workers' compensation subrogation lien. The trial court concluded as a matter of law that the

> rights to, and the amount of the employers and workers['] compensation carrier's lien under [N.C.G.S. §] 97-10.2 were created by, and set forth and defined in, and are limited by [N.C.G.S. §] 97-10.2 and specifically sub-sections (f)(1)c. and (j)[.] . . . As that lien is a creature of statute, employers and workers['] compensation carriers necessarily have no right to recover any amount of money by reason of such lien which is greater than, or other than such amount as provided by [N.C.G.S.] § 97-10.2(f)(1)c. and (h).

The trial court further concluded that although Neuwirth and Brentwood paid workers' compensation benefits to Plaintiff totaling $528,665.61, "their workers[']compensation subrogation lien [could not] exceed $285,000.00, that being the total amount of the [j]udgment obtained by [Plaintiff] in this lawsuit in compensation for his injuries." Accordingly, the trial court found the amount of the workers' compensation subrogation lien to be "$190,000.000, which is calculated by subtracting attorney's

fees ($95,000.00), interest ($74,291.50) and court costs ($160.00) from the judgment amount obtained by Plaintiff [] by [j]udgment in this lawsuit ($359,451.50)." Plaintiff, Brentwood, and Neuwirth appeal.

II. Analysis

Plaintiff, Brentwood, and Neuwirth (collectively, "Appellants") present two jurisdictional arguments: (1) Foremost – as a "third party," and not an "employer" or "employee" – lacked standing to apply for a determination of the subrogation amount; and (2) even if Foremost did have standing, the trial court nevertheless acted outside of its subject matter jurisdiction when ruling on Foremost's motion. In the alternative, Appellants contend the trial court: (1) misinterpreted N.C. Gen. Stat. § 97-10.2(j); (2) abused its discretion by reducing the amount of the workers' compensation lien from the "statutory amount;" and (3) erred by failing to make findings of fact that adequately evidenced the trial court's consideration of a statutorily required factor.

(A) Standing

[1] Appellants contest Foremost's standing to apply for a determination of the subrogation amount. Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter." *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 886 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 31 L. Ed. 2d 636 (1972)).[3] "Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (citation omitted). Whether a party has standing is a question of law that this Court reviews *de novo*. *Indian Rock Ass'n v. Ball*, 167 N.C. App. 648, 650, 606 S.E.2d 179, 180 (2004). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that" of the trial court. *Craig v. New Hanover Cty. Bd. of Educ.*, 363 N.C. 334, 337, 678 S.E.2d 351, 354 (2009) (citation and internal quotation marks omitted).

---

3. While Appellants did not challenge Foremost's standing in the trial court, "subject matter jurisdiction exists only if a plaintiff has standing and subject matter jurisdiction can be raised at any time in the court proceedings, including on appeal." *Village Creek Prop. Owners' Ass'n, Inc. v. Town of Edenton*, 135 N.C. App. 482, 485 n.2, 520 S.E.2d 793, 795 n.2 (1999) (citation omitted).

In determining whether N.C.G.S. § 97-10.2(j) confers standing upon Foremost to apply for a determination of the subrogation amount, we begin with the text of the statute. *See Correll v. Division of Social Services*, 332 N.C. 141, 144, 418 S.E.2d 232, 235 (1992) ("Statutory interpretation properly begins with an examination of the plain words of the statute." (citation omitted)). "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted); *see also State v. Wiggins*, 272 N.C. 147, 153, 158 S.E.2d 37, 42 (1967) ("It is elementary that in the construction of a statute words are to be given their plain and ordinary meaning unless the context, or the history of the statute, requires otherwise." (citation omitted)).

The statute at issue in this case, N.C.G.S. § 97-10.2(j), provides in relevant part:

> Notwithstanding any other subsection in this section, in the event that a judgment is obtained by the employee in an action against a third party, or in the event that a settlement has been agreed upon by the employee and the third party, *either party may apply* to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, to determine the subrogation amount.

N.C. Gen. Stat. § 97-10.2(j) (2015) (emphasis added). Considering the words as they appear in the statute, and giving those words their plain and ordinary meaning, it is clear that N.C.G.S. § 97-10.2(j) permits Foremost to apply for a determination of the subrogation amount. The statute provides that when an "employee" – such as Plaintiff – obtains a judgment against, or arrives at a settlement with, a "third party," then "either party may apply . . . to determine the subrogation amount." *Id.* Under subsection (j), either the "employee" or the "third party" may apply for a determination of the subrogation amount. Thus, whether Foremost could apply for a determination of the subrogation amount turns on whether it was a "third party" as that term is used in the statute.

Subsection (a) of the same statute confirms that Foremost is, indeed, a "third party" with standing to make the motion. Subsection (a) describes who qualifies as a "third party":

> The right to compensation and other benefits under this Article for disability, disfigurement, or death shall not be

> affected by the fact that the injury or death was caused under circumstances creating a liability in some person other than the employer to pay damages therefor, such person hereinafter being referred to as the "third party."

N.C. Gen. Stat. § 97-10.2(a) (2015). Foremost, as the underinsured motorist carrier liable for payment of damages for the injuries Defendant caused Plaintiff, meets that statutory definition. *See Levasseur v. Lowery*, 139 N.C. App. 235, 238, 533 S.E.2d 511, 513-14 (2000) (noting that "under N.C. Gen. Stat. § 97-10.2, payments made by the UIM carrier as well as the tort-feasor are from a 'third party' " (citation omitted)); *Creed v. R.G. Swaim and Son, Inc.*, 123 N.C. App. 124, 128-29, 472 S.E.2d 213, 216 (1996) (same). This reading of N.C.G.S. §§ 97-10.2(a) and (j) is reinforced by N.C. Gen. Stat. § 20-279.21(b)(4), which provides that underinsured motorist insurers "shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party." N.C. Gen. Stat. § 20-279.21(b)(4) (2015).

Appellants contend this reading of the statutory text is foreclosed by this Court's decision in *Easter-Rozzelle v. City of Charlotte*, ___ N.C. App. ___, 780 S.E.2d 244 (2015). Specifically, Appellants point to the following excerpt from *Easter-Rozzelle*:

> Pursuant to subsection (j) of [N.C. Gen. Stat. § 97-10.2], following the employee's settlement with the third party, *either the employee or the employer may apply* to a superior court judge to determine the subrogation amount. N.C. Gen. Stat. § 97-10.2(j) (2013). "After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien."

Easter-Rozzelle, ___ N.C. App. at ___, 780 S.E.2d at 248 (emphasis added). We agree that this quotation, standing alone, appears to provide that only an "employer" or an "employee" – but not a "third party" – may move to determine the subrogation amount. It is well settled that "[w]here a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

However, it is equally well settled that "[l]anguage in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." *Trustees of Rowan Tech. v. Hammond Assoc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) (citations omitted); *see also Baker v. Smith*, 224 N.C. App. 423, 431 n.5, 737 S.E.2d 144, 149 n.5 (2012).

> Our Supreme Court has stressed: "[I]t is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit where the very point is presented for decision."

MLC Auto., LLC v. Town of Southern Pines, 207 N.C. App. 555, 564, 702 S.E.2d 68, 75 (2010) (quoting *State v. Jackson*, 353 N.C. 495, 500, 546 S.E.2d 570, 573 (2001)).

An examination of *Easter-Rozelle* reveals that the quote Appellant's urge us to follow is *obiter dictum*. *Easter-Rozelle* involved the question of whether an employee, injured during the course and scope of his employment, could seek worker's compensation benefits after he had settled a personal injury claim with a third-party tortfeasor without the employer's or the Industrial Commission's knowledge or consent. *Easter-Rozelle*, ___ N.C. App. at ___, 780 S.E.2d at 246-50. Which parties had standing to apply for a determination of the subrogation amount was not a question presented for adjudication in *Easter-Rozelle*. *See id.*

In the present case, by contrast, Plaintiff properly filed for workers' compensation benefits, and received the Industrial Commission's approval for disbursement of third party funds. And, unlike in *Easter-Rozelle*, the standing issue is squarely presented for adjudication in the case now before us. Accordingly, we find the above-quoted passage from *Easter-Rozelle* to be *obiter dictum*, by which we are not bound. We do not lightly disregard any statement in a prior published opinion of this Court. However, applying fundamental principles of statutory construction, discussed above, we hold that N.C.G.S. § 97-10.2(j) confers standing upon Foremost, as a "third party," to apply for a determination of the subrogation amount.

(B) Subject Matter Jurisdiction

[2] Appellants argue that, notwithstanding Foremost's standing to move for a determination of the subrogation amount, the trial court lacked subject matter jurisdiction to rule on Foremost's motion. Appellants

contend the amount of the workers' compensation lien is statutorily set and, thus, the trial court has extremely circumscribed ability to reduce the amount of the lien. Subject matter jurisdiction refers to a court's "power to pass on the merits of the case," *Boyles v. Boyles*, 308 N.C. 488, 491, 302 S.E.2d 790, 793 (1983), and is "conferred upon the courts by either the North Carolina Constitution or by statute." *Dare Cnty. v. N.C. Dep't of Ins.*, 207 N.C. App. 600, 610, 701 S.E.2d 368, 375 (2010) (citation and quotation marks omitted). Whether a trial court has subject matter jurisdiction is a question of law, which is reviewed *de novo* on appeal. *Phillips v. Orange County Health Dep't*, ___ N.C. App. ___, ___, 765 S.E.2d 811, 815 (2014).

In the present case, the relevant statute provides that if: (1) a judgment is obtained by the employee in an action against a third party; or (2) a settlement has been agreed upon by the employee and the third party,

> either party may apply to the resident superior court judge of the county in which the cause of action arose or where the injured employee resides, or to a presiding judge of either district, *to determine the subrogation amount*. After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, *the judge shall determine*, *in his discretion*, *the amount*, *if any*, *of the employer's lien*[.]

N.C.G.S. § 97-10.2(j) (emphasis added). In the present case, a judgment was obtained by Plaintiff against Defendant, and Foremost applied – as it was entitled, *see supra* at 5-11 – for a determination of the subrogation amount. Under the plain language of the statute, the authority of the trial court was triggered, allowing it to exercise discretion in determining the subrogation amount. Therefore, the trial court possessed subject matter jurisdiction pursuant to N.C.G.S. § 97-10.2(j) to determine the subrogation amount.

Appellants ask us to draw a distinction between "determining" the amount of a subrogation lien – which, in their view, a trial court lacks subject matter jurisdiction over because the amount of the lien is statutorily set – and "reducing" or "eliminating" the lien – over which, according to Appellants, a trial court possesses subject matter jurisdiction, but only in a limited set of circumstances. We find no support for this argument in the text of N.C.G.S. § 97-10.2(j) or this Court's precedent.

N.C.G.S. § 97-10.2(j) itself uses the word "determine," and states that, after a proper party has applied to a judge "to *determine* the subrogation amount," the judge "shall *determine*, in his discretion, the amount, if any, of the employer's lien." N.C.G.S. § 97-10.2(j) (emphases supplied). It is true, as Appellants note, that cases from this Court have used an assortment of verbs, sometimes in the same case, to describe the trial court's powers under N.C.G.S. § 97-10.2(j). *See, e.g.*, *Alston v. Fed. Express Corp.*, 200 N.C. App. 420, 424-25, 684 S.E.2d 705, 708 (2009) (stating the trial court has discretion under N.C.G.S. § 97-10.2(j) to "adjust" the amount of a workers' compensation lien"); *Childress v. Fluor Daniel, Inc.*, 172 N.C. App. 166, 168-69, 615 S.E.2d 868, 869-70 (2005) (stating an employer's lien on third party recovery can be "reduced or eliminated" pursuant to N.C.G.S. § 97-10.2); *id.* at 169, 615 S.E.2d at 870 (noting that N.C.G.S. § 97-10.2(j) explicitly gives the trial court jurisdiction to "set" the amount of the workers' compensation subrogation lien). However, cases from this Court and our Supreme Court have also used "determine," the statutory term. *Johnson v. Southern Industrial Constructors*, 347 N.C. 530, 535, 495 S.E.2d 356, 358 (1998); *Hieb v. Lowery*, 344 N.C. 403, 409, 474 S.E.2d 323, 326 (1996); *Holden v. Boone*, 153 N.C. App. 254, 259, 569 S.E.2d 711, 714 (2002); *Levasseur*, 139 N.C. App. at 238, 533 S.E.2d at 513-14. Given use of the term "determine" by both appellate courts to describe the trial court's powers under N.C.G.S. § 97-10.2(j), and use of that term by the General Assembly in drafting N.C.G.S. § 97-10.2(j), we decline to draw an unyielding distinction between "reducing" or "eliminating" a workers' compensation subrogation lien, and "determining" the amount of such a lien. Pursuant to N.C.G.S. § 97-10.2(j), the trial court possessed subject matter jurisdiction to rule on Foremost's application to "determine" the subrogation amount.

C. Interpretation of N.C.G.S. § 97-10.2

[3] Appellants argue the trial court erred in its interpretation of N.C.G.S. § 97-10.2. They contend the trial court miscalculated the statutory amount of a workers' compensation subrogation lien, and erred by concluding that a workers' compensation lien cannot exceed the amount of proceeds recovered against the third party tortfeasor. We review the trial court's statutory interpretation *de novo*. *A&F Trademark, Inc. v. Tolson*, 167 N.C. App. 150, 153, 605 S.E.2d 187, 190 (2004) (citations omitted). Statutory interpretation begins with the plain meaning of the words of the statute. *Radzisz v. Harley Davidson of Metrolina*, 346 N.C. 84, 89, 484 S.E.2d 566, 569 (1997) (citation omitted).

The present case involves a situation in which the amount paid by the employee and its workers' compensation servicing agent is much

greater than the amount of the third party recovery; while Neuwirth and Brentwood paid $528,665.61 in workers' compensation benefits, Plaintiff was awarded a substantially smaller sum, $285,000.00, in his third party suit against Defendant. Appellants argue that the amount of the lien may exceed the amount of proceeds recovered against a third party tortfeasor. We disagree.

N.C.G.S. § 97-10.2 provides, as relevant to this argument:

> (f)(1) . . .if an award final in nature in favor of the employee has been entered by the Industrial Commission, then *any amount obtained by any person* by settlement with, judgment against, or otherwise from the third party by reason of such injury or death shall be disbursed by order of the Industrial Commission for the following purposes and in the following order of priority:
>
> . . .
>
> c. Third to the reimbursement of the employer for all benefits by way of compensation or medical compensation expense paid or to be paid by the employer under award of the Industrial Commission.
>
> . . .
>
> (h) In any . . . settlement with the third party, every party to the claim for compensation *shall have a lien to the extent of his interest under (f) hereof upon any payment made* by the third party by reason of such injury . . . and such lien may be enforced against any person receiving such funds.

N.C.G.S. §§ 97-10.2(f)(1), (h) (emphasis added). A reading of N.C.G.S. §§ 97-10.2(f)(1) and (h) confirms that the amount of a workers' compensation subrogation lien cannot exceed the amount of proceeds recovered from third party tortfeasors. N.C.G.S. §97-10.2(h) gives an employer who has paid workers' compensation benefits a "lien to the extent of his interest *under (f) hereof upon any payment made* by the third party[.]" N.C.G.S. § 97-10.2(h) (emphasis added). N.C.G.S. § 97-10.2(f)(1), in turn, states that the only funds subject to the lien are the "amount obtained . . . from the third party[.]" Intuitively, the Industrial Commission cannot disburse, and the employer cannot have a lien on, an amount larger than the amount actually recovered from the third party tortfeasor, in this

case $285,000.00. *See also Grant Constr. Co. v. McRae*, 146 N.C. App. 370, 374, 553 S.E.2d 89, 91-92 (2001) ("If [an] employee is injured by a third party, the non-negligent employer must still pay workers' compensation benefits, but can claim a subrogation lien *on any proceeds the employee wins in a subsequent lawsuit* against the third party." (emphasis added) (citation omitted)); George L. Simpson, III, *North Carolina Uninsured and Underinsured Motorist Insurance* § 1:12 n.4 (2015-16 ed.) (noting that N.C.G.S. §§ 97-1 et seq. "gives the employer and its workers' compensation insurer a lien *on payments made* to the injured employee by any third-party tortfeasor, to the extent of the workers' compensation benefits paid to the employee. (emphasis added)). Accordingly, we hold that where the amount of workers' compensation benefits paid by the employer and their servicing agent to an employee is greater than all amounts obtained by the employee from a third party tortfeasor, the amount of the workers' compensation lien is equal to the amount of the judgment, and shall be disbursed pursuant to N.C.G.S. § 97-10.2.

D. Abuse of Discretion

[4] Appellants next argue the trial court abused its discretion in determining the amount of the workers' compensation subrogation lien to be $190,000.00. N.C.G.S. § 97-10.2(j) "grants the trial court discretion to determine the amount of a workers' compensation lien and the trial court's decision is reviewed on appeal under an abuse of discretion standard." *Kingston v. Lyon Constr., Inc.*, 207 N.C. App. 703, 711, 701 S.E.2d 348, 354 (2010) (citation omitted). "In exercising its discretion, the trial court is to make a reasoned choice, a judicial value judgment, which is factually supported by findings of fact and conclusions of law sufficient to provide for meaningful appellate review." *Id.* (quotation marks, ellipses, and citation omitted).

In its order determining the amount of Neuwirth's and Brentwood's workers' compensation subrogation lien, the trial court made fourteen findings of fact cogently identifying the parties and explaining the proceedings, both in this case and in the workers' compensation case between Plaintiff, Neuwirth, and Brentwood. The trial court then made eleven conclusions of law that demonstrate its thorough consideration of the necessary statutory factors. Beginning with the amount of the judgment – $285,000.00 – the trial court correctly identified that court costs, attorney's fees, and interest are not subject to the workers' compensation subrogation lien. *See* N.C.G.S. § 97-10.2(f)(1)a.–b. (providing that a judgment against a third party tortfeasor "shall be disbursed" first to the "payment of actual court costs" and second to the payment of the "fee of the attorney representing the person making settlement or

obtaining judgment"); *Bartell v. Sawyer*, 132 N.C. App. 484, 486, 512 S.E.2d 93, 94 (1999) (holding that a workers' compensation lien holder is not entitled to "a pro-rata share of the pre-judgment interest [a] plaintiff received on his third party recovery").

Nevertheless, Appellants argue that the trial court abused its discretion by determining the workers' compensation subrogation lien was $190,000.00, because doing so "effectively releas[ed] Foremost and GEICO from liability[.]" We do not agree. Foremost and GEICO contractually obligated themselves to provide Plaintiff with UIM coverage in satisfaction of the judgment obtained against Defendant. The arbitration panel decided Plaintiff was entitled to $285,000.00 in compensation for injuries he sustained – not $528,665.61. The trial court – in accordance with N.C.G.S. §§ 97-10.2(f)(1)(2) and *Bartell* – then excluded court costs, attorney's fees, and interest from the amount of the judgment, and determined the amount of Neuwirth's and Brentwood's workers' compensation subrogation lien to be $190,000.00. The trial court did not abuse its discretion in doing so.

E. Sufficiency of the Trial Court's Findings of Facts

[5] Finally, Appellants argue the trial court failed to make statutorily-required findings of fact in its 4 June 2015 order. Alleged violation of a statutory mandate presents a question of law, which we review *de novo* on appeal. *See Brown v. Flowe*, 349 N.C. 520, 523, 507 S.E.2d 894, 896 (1998). N.C.G.S. § 97-10.2(j) provides in relevant part:

> After notice to the employer and the insurance carrier, after an opportunity to be heard by all interested parties, and with or without the consent of the employer, the judge shall determine, in his discretion, the amount, if any, of the employer's lien, whether based on accrued or prospective workers' compensation benefits, *and the amount of cost of the third-party litigation to be shared between the employee and employer.* The judge shall consider the anticipated amount of prospective compensation the employer or workers' compensation carrier is likely to pay to the employee in the future, the net recovery to plaintiff, the likelihood of the plaintiff prevailing at trial or on appeal, the need for finality in the litigation, and any other factors the court deems just and reasonable, in determining the appropriate amount of the employer's lien.

N.C.G.S. § 97-10.2(j) (emphasis added). Appellants contend that N.C.G.S. § 97-10.2(j) mandates a finding by the trial court regarding the "amount

of costs of the third-party litigation to be shared between the employee and employer" (the "cost sharing consideration"), and that, in the present case, the trial court's order is incomplete for failing to make any findings of fact regarding the cost sharing consideration. While we agree with Appellants that, under our precedents, an order must contain a finding of fact regarding the cost of the third party litigation to be shared between the employee and employer, we conclude that the trial court's order in the present case adequately addressed this required consideration.

Subsection (j) consists of four sentences; the second and third sentences (quoted above) are relevant to this argument. Whether N.C.G.S. § 97-10.2(j) requires findings of fact regarding the cost of third-party litigation to be shared between an employer and employee was squarely addressed by this Court in *In re Estate of Bullock*, 188 N.C. App. 518, 655 S.E.2d 869 (2008). In *Bullock*, this Court quoted the second and third sentences of subsection (j), and held that "it is clear from the use of the words 'shall' and 'and' in subsection (j), that the trial court must, at a minimum, consider the factors that are expressly listed in the statute. Otherwise, such words are rendered meaningless." 188 N.C. App. at 526, 655 S.E.2d at 874. The Court then went on to describe "the cost of litigation to be shared between [employee] and [employer]" as a "mandated statutory factor[]," and faulted the trial court in that case for not making a finding nor giving "any indication" that the factor was "considered." *Id.* In accord with *Bullock*, a trial court determining the amount of a workers' compensation subrogation lien is required, at a minimum, to take into consideration the cost of the third party litigation to be shared between the employee and employer.[4]

In the present case, we conclude that the trial court's order gives sufficient indication that the "mandatory statutory factor" regarding the cost of the third party litigation to be shared between the employee and employer was considered. The trial court's order notes that: (1) the arbitration panel found that Plaintiff was entitled to recover $285,000.00 against Defendant; (2) the court costs were $160.00; (3) Plaintiff's attorney's fees as of the date of the order totaled $83,333.33 – $50,000.00 of which is attributed to work done as part of the workers' compensation case, and the other $33,333.33 originating from Nationwide's payment of

4. In its brief, GEICO contends a plain reading of N.C.G.S. § 97-10.2(j) shows there is no such requirement, and urges this Court to disregard cases which hold to the contrary. Of course, "[w]e have no authority to overrule this Court's prior decision" in *Bullock*. *Wells v. Cumberland Cty. Hosp. Sys., Inc.*, 181 N.C. App. 590, 593, 640 S.E.2d 400, 403 (2007); *see also In the Matter of Appeal from Civil Penalty*, 324 N.C. at 384, 379 S.E.2d at 37. We therefore decline GEICO's invitation to do so.

$100,000.00 in the third-party litigation; (4) Plaintiff's attorney's fee agreement with Plaintiff "relative to the civil action is one third (1/3) of the amount paid on the judgment in this case, after litigation expenses and costs are paid;" and (5) the "workers[']compensation carrier intend[ed] to allow [Plaintiff's attorney] to recover his agreed upon attorney fee and . . . exclude[d] that attorney fee from the amount of the Employer/Workers['] Compensation carrier's subrogation lien."

In its order, the trial court considered the amount Plaintiff and his attorney had received, and would receive in the future, as a result of the third party litigation; took into account the court costs that had been paid; and noted that Neuwirth and Brentwood intended to exclude Plaintiff's attorney's fees from the amount of the workers' compensation subrogation lien. Taken together, these findings of fact are sufficient to show that the trial court considered "the amount of cost of the third-party litigation to be shared between the employee and employer." N.C.G.S. § 97-10.2(j); *see also Bullock*, 188 N.C. App. at 526, 655 S.E.2d at 874.

III. Conclusion

For the reasons stated, Foremost had standing to apply for a determination of the subrogation amount, and the trial court possessed subject matter jurisdiction to determine the amount. The trial court's 4 June 2015 order determining the amount of Neuwirth's and Brentwood's workers' compensation subrogation lien is affirmed.

AFFIRMED.

Judges HUNTER JR. and DILLON concur.

HATCHER v. MATTHEWS

[248 N.C. App. 491 (2016)]

BRYANT HATCHER, PLAINTIFF
v.
RENEE MATTHEWS, DEFENDANT

No. COA15-1167

Filed 2 August 2016

Child Custody and Support—child custody modification—improper best interests analysis—substantial change in circumstances required

The trial court erred in a child custody modification case by failing to apply the correct legal standard. It conducted a best interests analysis without first determining whether a substantial change in circumstances had occurred. The case was vacated and remanded.

Appeal by plaintiff from order entered 27 April 2015 by Judge Michelle Fletcher in Guilford County District Court. Heard in the Court of Appeals 11 April 2016.

Samuel S. Spagnola for plaintiff-appellant.

No brief filed on behalf of defendant-appellee.

DAVIS, Judge.

Plaintiff Bryant Hatcher ("Hatcher") appeals from a custody order determining that the best interests of his children required that they remain in the primary physical custody of their mother, Defendant Renee Matthews ("Matthews"). After careful review, we vacate the order and remand for further proceedings.

Factual Background

Hatcher and Matthews were married in 1998 and divorced in 2009. Following their divorce, the Circuit Court of Fairfax County, Virginia entered an order captioned "Final Custody Order" (the "Virginia Order") on 10 December 2010 giving Matthews sole legal custody and primary physical custody of their children and specifying regular visitation periods for Hatcher.[1] The order was registered in North Carolina on 22 July 2011.

1. We note that the Virginia Order references an earlier custody order entered January 2009 in which the same Virginia trial court had placed sole legal custody and primary physical custody with Matthews. While the January 2009 order is not contained in the record on appeal, its absence does not preclude us from addressing the issues raised in this appeal.

Upon Matthews' 26 August 2011 motion filed in Guilford County District Court for an emergency *ex parte* custody order, the trial court entered an emergency custody order on 30 August 2011 and then a temporary custody order on 23 November 2011, adjusting Hatcher's visitation pending a new custody hearing. On 20 April 2012, Hatcher filed a motion to modify custody. In his motion, he provided factual allegations in support of his assertion that Matthews had "done everything in her power to completely alienate any form of a relationship between [him] and the minor children[.]" He also claimed that because no final custody order had ever been entered in the case he was not required to show a substantial change in circumstances in order to modify custody. However, he contended that even assuming such a finding was, in fact, necessary, Matthews' recent conduct constituted a substantial change in circumstances.

After the issuance of two temporary orders by the trial court, a hearing was held beginning 29 January 2015 before the Honorable Michelle Fletcher in Guilford County District Court. At the hearing, the trial court heard testimony from each of the parties and admitted into evidence a child custody evaluation that had been conducted at the court's direction.

The trial court issued a new custody order on 27 April 2015, which (1) gave the parties joint legal custody of the children; (2) determined that it was "in the best interests of the minor children that their primary [physical] custody remain with [Matthews]"; and (3) adjusted Hatcher's visitation rights with the children. Hatcher filed a timely notice of appeal.

Analysis

On appeal, Hatcher argues that the trial court erred in awarding primary physical custody to Matthews because (1) its findings of facts did not support its legal conclusion that the best interests of the children would be served by Matthews retaining primary physical custody; and (2) at least one of its findings of fact was not supported by competent evidence in the record.

"When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence." *Shipman v. Shipman*, 357 N.C. 471, 474, 586 S.E.2d 250, 253 (2003). If so, we "must determine if the trial court's factual findings support its conclusions of law." *Id.* at 475, 586 S.E.2d at 254. The issue of whether a trial court has utilized the correct legal standard in ruling on a request for modification of custody is a question of law that we review *de novo*. *Peters v. Pennington*, 210 N.C. App. 1, 13, 707 S.E.2d 724, 733 (2011).

N.C. Gen. Stat. § 50-13.7(b) addresses the modification of out-of-state custody orders.

> [W]hen an order for custody of a minor child has been entered by a court of another state, a court of this State may, upon gaining jurisdiction, and a showing of changed circumstances, enter a new order for custody which modifies or supersedes such order for custody.

N.C. Gen. Stat. § 50-13.7(b) (2015).

However, this requirement that a party seeking modification of custody must show a substantial change in circumstances applies only when the preexisting custody order is a permanent (or final) order rather than merely a temporary one.

> If a child custody order is final, a party moving for its modification must first show a substantial change of circumstances. If a child custody order is temporary in nature . . . the trial court is to determine custody using the best interests of the child test without requiring either party to show a substantial change of circumstances.

LaValley v. LaValley, 151 N.C. App. 290, 292, 564 S.E.2d 913, 914-15 (2002) (internal citations and footnote omitted).

The issue of whether an order is temporary or final in nature is a question of law that is reviewed *de novo* on appeal. *Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009). An order is temporary "if either (1) it is entered without prejudice to either party; (2) it states a clear and specific reconvening time in the order and the time interval between the two hearings was reasonably brief; or (3) the order does not determine all the issues." *Id.* (citation, quotation marks, and brackets omitted). If an order does not meet any of these criteria, it is considered permanent. *Peters*, 210 N.C. App. at 14, 707 S.E.2d at 734. A trial court's designation of an order as "temporary" or "permanent" is not dispositive or binding on an appellate court. *Smith*, 195 N.C. App. at 249, 671 S.E.2d at 582.

In determining whether the trial court conducted the correct legal analysis in its 27 April 2015 order, we must first determine whether the Virginia Order was a temporary or permanent custody order. Based on the factors set out above, we conclude that the Virginia Order was a permanent custody order as it (1) was not entered into without prejudice to either party; (2) did not state a reconvening time; and (3) determined all of the issues, including legal and physical custody and ongoing visitation.

Thus, because the Virginia Order was a permanent custody order, the trial court was required to engage in a two-step analysis in addressing Hatcher's motion to modify custody. First, the court had to determine whether a substantial change in circumstances affecting the welfare of the children had occurred. If — and only if — the trial court expressly found such a change in circumstances was it then permitted to determine whether a modification of custody would be in the best interests of the children. *See West v. Marko*, 141 N.C. App. 688, 690-91, 541 S.E.2d 226, 228 (2001) ("Permanent custody orders can only be modified by *first* finding that there has been a substantial change of circumstances affecting the welfare of the child. Once the trial court makes the threshold determination that a substantial change has occurred, the trial court then must consider whether a change in custody would be in the best interests of the child." (internal citations omitted and emphasis added)).

"There are no exceptions in North Carolina law to the requirement that a change in circumstances be shown before a custody decree may be modified." *Hibshman v. Hibshman*, 212 N.C. App. 113, 124, 710 S.E.2d 438, 445 (2011) (citation and emphasis omitted). As such, "the trial court commits reversible error by modifying child custody absent any finding of substantial change of circumstances affecting the welfare of the child." *Cox v. Cox*, __ N.C. App. __, __ 768 S.E.2d 308, 316 (2014) (citation omitted).

We conclude that the trial court here did not apply the correct legal standard in that it conducted a best interests analysis without first determining whether a substantial change in circumstances had occurred. The court's 27 April 2015 order contains no findings regarding a change in circumstances and instead proceeds straight into a best interests analysis. Moreover, the trial court's order, without explanation, purported to change the children's legal custody — which the Virginia Order had vested solely with Matthews — to joint legal custody between Matthews and Hatcher.

In his brief to this Court, Hatcher acknowledges that the trial court would have been required to find a substantial change in circumstances before modifying custody and that its order did not expressly do so. He argues, however, that *Raynor v. Odom*, 124 N.C. App. 724, 478 S.E.2d 655 (1996), supports his contention that "a trial court need not use the term 'substantial change of circumstances' for a substantial change of circumstances to exist and to be documented in the court's order."

However, Hatcher misreads our decision in *Raynor*. In that case, the issue was whether "the properly supported legal conclusion of the trial

court that the natural mother is an unfit parent satisf[ied] the statutory requirement of finding a change in circumstances . . . ." *Id.* at 733, 478 S.E.2d at 661. We held that

> [u]nder the [initial custody order] plaintiff was found to be a fit and proper parent; therefore, a finding of unfitness in a subsequent order is a substantial change in circumstances. Furthermore, because the standard for finding unfitness is much higher than the standard for finding a change in circumstances, it would seem absurd for a finding of unfitness to not be considered a change of circumstances . . . .

Id. at 734, 478 S.E.2d at 661.

Thus, the trial court's specific finding in *Raynor* that the mother had become unfit to serve as a parent to her child constituted such a fundamental change in circumstances that an explicit supplemental finding that there had been a "substantial change in circumstances" was unnecessary. In the present case, Hatcher has failed to identify any portion of the trial court's order containing a finding as to Matthews comparable to the one in *Raynor*.

Therefore, because the trial court applied an incorrect legal standard in its 27 April 2015 order, we must vacate the order and remand for further proceedings. *See Decker v. Homes, Inc./Constr. Mgmt. & Fin. Grp.*, 187 N.C. App. 658, 661, 654 S.E.2d 495, 498 (2007) ("We hold that the trial court applied an incorrect legal standard in ruling on this motion and we remand this portion of the case for further proceedings."); *Parsons v. Pantry, Inc.*, 126 N.C. App. 540, 543, 485 S.E.2d 867, 869 (1997) (reversing and remanding "for findings and conclusions using the proper standard"); *see also McMillan v. Town of Tryon*, 200 N.C. App. 228, 238, 683 S.E.2d 747, 754 (2009) ("[W]e remand the matter to the trial court for imposition of the proper standard of review . . . .").

On remand, we direct the trial court to enter a new order containing express findings as to whether a substantial change in circumstances has occurred. If the court determines that a substantial change has, in fact, occurred, then a best interests analysis will be necessary.[2] If, conversely, the trial court finds that no substantial change in circumstances

---

2. Because of our holding that the trial court failed to apply the correct legal standard, we decline to address Hatcher's arguments regarding whether competent evidence supported the trial court's findings of fact and whether those findings supported its conclusions of law.

has occurred, then modification of custody would be inappropriate. We leave it to the trial court's discretion whether the receipt of new evidence and a new hearing are required.

Conclusion

For the reasons stated above, we vacate the trial court's 27 April 2015 order and remand for further proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

Chief Judge McGEE and Judge STEPHENS concur.

DENISE MALLOY HUBBARD, Plaintiff
v.
NORTH CAROLINA STATE UNIVERSITY and ANITA STALLINGS
in her individual and official capacity, Defendants

No. COA16-38

Filed 2 August 2016

1. Employer and Employee—whistleblower claim—causal connection—retaliatory motive

The trial court properly granted summary judgment for defendants in a whistleblower action arising from the termination of plaintiff's employment from N.C. State. Assuming that plaintiff reported a protected activity, she could not produce evidence to support causal connection, an essential element of her claim. A mixed motive analysis was not appropriate because plaintiff failed to present any direct evidence of a retaliatory motive, and plaintiff failed to raise a factual issue regarding whether the proffered reasons for the discharge were pretextual.

2. Employer and Employee—whistleblower claim—dismissal—tortious interference with contract

The trial court did not err by awarding summary judgment to defendants for tortious interference with contract following a whistleblower claim and dismissal. Although plaintiff argued that her supervisor (Stallings) acted without justification when she induced her employer (NCSU) to discharge her, plaintiff could not establish that Stallings acted without justification, an essential element of her claim.

3. Employer and Employee—whistleblower report—free speech —adequate state law remedy

Plaintiff's claim under N.C.G.S. § 126-84 arising from a whistleblower report and dismissal was an adequate state law remedy, and the trial court properly granted summary judgment for defendants on plaintiff's constitutional claim.

Appeal by plaintiff from Judgment entered 7 October 2015 by Judge James K. Roberson in Wake County Superior Court. Heard in the Court of Appeals 8 June 2016.

NICHOLS, CHOI & LEE, PLLC, by M. Jackson Nichols and Catherine E. Lee, for plaintiff.

Attorney General Roy Cooper, by Assistant Attorney General Laura H. McHenry, for defendants.

ELMORE, Judge.

Following termination from her employment, Denise Malloy Hubbard (plaintiff) filed a complaint on 12 November 2014 against North Carolina State University (NCSU) and Anita Stallings (Stallings) in her official and individual capacities (collectively defendants). Plaintiff appeals from the trial court's 7 October 2015 award of summary judgment in favor of defendants. We affirm.

I. Background

In October 2004, plaintiff began working as the Director of Development in the College of Physical and Mathematical Sciences, which became the College of Sciences in July 2013. Throughout plaintiff's employment at NCSU, Stallings was plaintiff's direct supervisor. Toward the end of 2013, plaintiff began to report alleged misconduct by Stallings. Such reporting formed the basis of plaintiff's lawsuit.

On 24 April 2014, Dan O'Brien, Senior Employee Relations Strategic Partner, and Stallings met with plaintiff and gave her a letter signed by Warwick A. Arden, Provost and Executive Vice Chancellor, which stated that her at-will employment with NCSU would be terminated, effective 24 July 2014. Subsequently, plaintiff filed a complaint in Wake County Superior Court on 12 November 2014, alleging (1) a violation of the North Carolina Whistleblower Act against NCSU and Stallings in her individual and official capacities; (2) wrongful termination in violation of public policy against NCSU and Stallings in her official capacity; (3) tortious

interference with contract against Stallings in her individual capacity; and (4) a direct constitutional claim against NCSU and Stallings in her official and individual capacities.

On 13 January 2015, defendants filed an answer and motion to dismiss pursuant to Rules 12(b)(1), (2), and (6) of our Rules of Civil Procedure. On 7 April 2015, the trial court entered an order granting defendants' motion to dismiss plaintiff's claim for wrongful termination in violation of public policy. The trial court denied defendants' motion with respect to plaintiff's other three claims. Subsequently, on 5 August 2015, defendants filed a motion for summary judgment. After a hearing, the trial court entered an order on 7 October 2015 granting defendants' motion for summary judgment on plaintiff's remaining three claims. Plaintiff appeals from that order.

II. Analysis

"The standard of review for summary judgment is *de novo*." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2015). "The trial court may not resolve issues of fact and must deny the motion if there is a genuine issue as to any material fact." *Forbis*, 361 N.C. at 524, 649 S.E.2d at 385 (citing *Singleton v. Stewart*, 280 N.C. 460, 464, 186 S.E.2d 400, 403 (1972)). "A party moving for summary judgment may prevail if it meets the burden (1) of proving an essential element of the opposing party's claim is nonexistent, or (2) of showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim." *City of Thomasville v. Lease-Afex, Inc.*, 300 N.C. 651, 654, 268 S.E.2d 190, 193 (1980) (citations omitted).

A. North Carolina Whistleblower Act Claim

[1] In order to maintain a claim under the North Carolina Whistleblower Act, N.C. Gen. Stat. § 126-84, *et seq.*, a plaintiff must prove by a preponderance of the evidence the following three elements: "(1) that the plaintiff engaged in a protected activity, (2) that the defendant took adverse action against the plaintiff in his or her employment, and (3) that there is a causal connection between the protected activity and the adverse action taken against the plaintiff." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 788, 618 S.E.2d 201, 206 (2005).

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

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

Here, plaintiff alleged that she reported protected activity as follows: On 2 December 2013, plaintiff met with NCSU Human Resources representatives Alicia Robinson (now Alicia Lecceardone) and Joyce Stevens, and reported the following concerns: accounting irregularities involving transfers of donor funds, which Stallings authorized, from restricted endowments to an unrestricted endowment; Stallings' extravagant personal expenses funded by unrestricted accounts; nepotism by Stallings; age and gender discrimination by NCSU and Stallings; EPA (Exempt from the State Personnel Act) designations for employees performing under SPA (Subject to the State Personnel Act) descriptions; and fear of retaliation by Stallings for reporting such concerns. On 6 January 2014, plaintiff met with Lecceardone and Ursula Hairston, Assistant Vice Provost for Equal Opportunity in the Office for Institutional Equity and Diversity (OIED), to discuss the same concerns she raised during the 2 December 2013 meeting. The following day, on 7 January 2014, plaintiff met with Cecile Hinson, Director of Internal Audit (IA), and Leo Howell, Assistant Director of IA at the time, and alleged that Stallings had improperly transferred donor funds among accounts, incurred excessive travel expenses, and extravagantly spent donor funds. IA commenced a thorough investigation, and it concluded in a final report that plaintiff's allegations could not be substantiated.

Assuming that plaintiff reported protected activity, the trial court properly granted summary judgment in favor of defendants because plaintiff cannot produce evidence to support an essential element of

her claim, causal connection.[1] Relevant here, a plaintiff may seek to establish a causal connection between the protected activity and adverse employment action through "circumstantial evidence that the adverse employment action was retaliatory and that the employer's proffered explanation for the action was pretextual." *Newberne*, 359 N.C. at 790, 618 S.E.2d at 207 (citation omitted). Such cases are commonly referred to as "pretext" cases. *Id.*

Or, "when the employer claims to have had a good reason for taking the adverse action but the employee has direct evidence of a retaliatory motive, a plaintiff may seek to prove that, even if a legitimate basis for discipline existed, unlawful retaliation was nonetheless a substantial causative factor for the adverse action taken." *Id.* at 791, 618 S.E.2d at 208 (citation and quotations omitted). Such cases are commonly referred to as "mixed-motive" cases. *Id.* (citations and quotations omitted).

Here, plaintiff claims that she has direct evidence of a retaliatory motive and this case is, therefore, governed by the "mixed-motive" analysis. The "direct evidence" required in a mixed-motive case has been defined as "evidence of conduct or statements that both reflect directly the alleged [retaliatory] attitude and that bear directly on the contested employment decision." *Id.* at 792, 618 S.E.2d at 208–09 (citation omitted). Because plaintiff has failed to present any direct evidence of a retaliatory motive, a mixed-motive analysis is not appropriate.

Alternatively, plaintiff also claims that circumstantial evidence establishes that the adverse action was retaliatory under the "pretext" analysis and the burden shifting schemes developed by the Supreme Court in *McDonnell Douglas Corporation v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). The *Newberne* Court described the analysis as follows:

> Under the *McDonnell Douglas/Burdine* proof scheme, once a plaintiff establishes a prima facie case of unlawful retaliation, the burden shifts to the defendant to articulate a lawful reason for the employment action at issue. *See Burdine*, 450 U.S. at 252–53, 67 L. Ed. 2d at 215 (citing *McDonnell Douglas*, 411 U.S. at 802, 36 L. Ed. 2d at 677–78). If the defendant meets this burden of production, the burden shifts back to the plaintiff to demonstrate that the defendant's proffered explanation is pretextual. *Id.* (citing

1. The parties do not dispute that NCSU terminated plaintiff's employment, satisfying the second element, adverse action.

> *McDonnell Douglas*, 411 U.S. at 804, 36 L. Ed. 2d at 679). The ultimate burden of persuasion rests at all times with the plaintiff. *Id.*

Newberne, 359 N.C. at 791, 618 S.E.2d at 207–08.

"[U]nder the *McDonnell Douglas/Burdine* burden-shifting proof scheme, in order to survive summary judgment, Plaintiff would have to raise a factual issue regarding whether these proffered reasons for firing Plaintiff were pretextual." *Manickavasagar v. N.C. Dep't of Pub. Safety*, ___ N.C. App. ___, ___, 767 S.E.2d 652, 659 (Dec. 31, 2014) (COA14-757). " 'To raise a factual issue regarding pretext, the plaintiff's evidence must go beyond that which was necessary to make a *prima facie* showing by pointing to specific, non-speculative facts which discredit the defendant's non-retaliatory motive.' " *Id.* at ___, 767 S.E.2d at 659 (quoting *Wells v. N.C. Dep't of Corr.*, 152 N.C. App. 307, 317, 567 S.E.2d 803, 811 (2002)).

Plaintiff argues that defendants' alleged reasons for terminating her employment were pretextual because she was meeting development goals; she followed Stallings' direction on fundraising; she received no coaching or mentoring related to alleged low performance; she did not incur unexpected or excessive absences or tardiness; and she did not engage in inappropriate communications, create divisions, or behave disrespectfully. Plaintiff's argument hinges on her belief that Stallings personally decided to terminate plaintiff's employment on 21 March 2014, following Stallings' 19 March 2014 interview with IA and the fact that Stallings cancelled a meeting on 20 March 2014, citing a personnel issue.

Defendants argue, "Plaintiff's suspicions about when Stallings began discussing Plaintiff's discontinuation with HR are irrelevant; the affidavits, exhibits and deposition testimony supporting Defendants' motion for summary judgment indicate that the process began long before the cancelled meeting[.]" Defendants contend that "Stallings had absolutely no knowledge" about plaintiff's reports, and plaintiff's "conclusory allegations and unsupported speculation are insufficient to discredit Defendants' legitimate non-retaliatory explanation for Plaintiff's discontinuation[.]" Defendants maintain that "[p]laintiff was discontinued as a result of her failure to meet performance goals and pattern of unprofessional conduct over a significant period of time[.]"

Assuming that plaintiff can establish a *prima facie* case of unlawful retaliation, defendants have met their burden of articulating a lawful reason for the employment action at issue. Plaintiff cannot meet

her burden of demonstrating that defendants' proffered explanation is pretextual. *Newberne*, 359 N.C. at 791, 618 S.E.2d at 207–08. Here, the record evidence shows that Stallings expressed dissatisfaction with plaintiff's job performance and behavior in the workplace for around eighteen months before officially recommending that NCSU discontinue her employment. Plaintiff's own statements reveal that issues had been ongoing since the summer of 2012. Stallings repeatedly discussed the issues with Human Resources and the Dean of the College of Sciences, and allowed a time period for possible improvement, to no avail.

Stallings' "Documentation of Issues with Denise Hubbard" detailed with specificity numerous problem areas, including, *inter alia*, plaintiff's low performance, unacceptable behavior with team members as well as other staff and donors, resistance in taking direction particularly involving directives to focus on individual giving as opposed to corporate fundraising, failure to engage in "quality" visits and properly record such visits, decision to implement her own agenda rather than the agenda set by the Dean, failure to timely submit contact reports, decision to inform a donor about a committee that had not been approved regarding a fund that she had been told was not "high priority," and attempting to undermine Stallings' authority in front of other staff members.

Jo-Ann Cohen, Associate Dean for Academic Affairs in the College of Sciences, averred that she felt plaintiff was the source of dissension between the Office of Diversity and Student Services, and the Advancement Office. During the fall of 2013, she informed Daniel Solomon, then Dean of the College of Sciences, and O'Brien of her concerns and belief that plaintiff's actions were creating a divisive atmosphere across the Academic Affairs and Advancement units. Solomon's and O'Brien's affidavits confirm that Cohen reported such concerns at that time. Cohen also averred that Stallings told her that plaintiff's employment was going to be discontinued before Stallings learned that the Office of Advancement would be audited, and Stallings believed it was only a routine audit.

In Lecceardone's affidavit, she stated that during the 2 December 2013 meeting with plaintiff and Stevens, plaintiff shared concerns about her salary being less than that of younger male co-workers, and she mentioned that she had received poor annual reviews from Stallings even though she was "making her numbers." Plaintiff gave Lecceardone a packet of notes at the meeting, outlining her concerns. In plaintiff's packet of notes, under "Exclusions," she stated that she helped create the Alumni and Friends Advisory Board, SCOPE Academy, and ACCESS Day, but when Marla Gregg was hired, Gregg was given responsibility

for all three. Under "Additional," she stated that in the past two years, she had been excluded from events with donors, luncheons to introduce new department heads, and prospect strategy sessions for events. She also noted, "Without my input, Stallings redesigned the geographical areas and departments of responsibility for the Development Officers." Under "Reason for Current Concerns," plaintiff stated, "Relationship with Stallings has been deteriorating for the past 18 months. Stallings has excluded me from planning and areas of responsibility which I had previously been an active participant." Moreover, plaintiff noted, "I am currently scheduled for a 'mid-year review,' an event that had never occurred in my prior 9 years at NCSU. . . . After Stallings met with Dan O'Brien . . . on 11/22, she cancelled my participation in the 12/2/13 meeting and scheduled the 'mid-year review' for 12/5/13."

Lecceardone also averred that during the 6 January 2014 meeting with plaintiff and Hairston, plaintiff again claimed that Stallings had been leaving her out of meetings about assignments, and plaintiff complained that she was not invited to football games with donors. Plaintiff stated that she knew Stallings was having "secret HR meetings" with O'Brien, and she was aware that they had met on 22 November 2013. Lecceardone stated that based on the wide range of topics discussed and the dated issues, "[i]t was clear to me that Plaintiff believed her job to be in jeopardy and she was bringing forth anything and everything relating to her supervisor." In Hairston's affidavit, she stated that during the meeting, plaintiff "indicated to us that she thought her job was at risk because she was receiving criticism for her 'low numbers.' " Hairston's handwritten notes from the meeting reveal that one of plaintiff's concerns was that she was "no longer included in decision making for games."

In Hinson's affidavit, she stated that on 7 January 2014, "plaintiff admitted during the meeting that there was a breakdown in her relationship with Defendant Stallings." Hinson also stated, "It is my practice and that of members of the Office of Internal Audit to never inform any person or department being investigated as to whom initiated the complaint."

Mike Dickerson, Director of Information and Accounting Systems in Foundations Accounting and Investments, averred that Stallings contacted him in February 2014 and asked if she should be concerned about the audit. Dickerson told Stallings that IA had been planning to restart its randomized audits, "that they must be getting started back on that endeavor[,] . . . [and] that she need not be concerned about the audit[.]"

O'Brien averred that Stallings contacted him in the summer of 2013 to discuss plaintiff's performance and behavioral issues. At that time, he and Stallings discussed the possibility of discontinuing plaintiff's at-will employment. Stallings stated that a readiness report completed by consultant Charles Witzleben confirmed her suspicions about plaintiff's productivity. Witzleben's affidavit reveals that plaintiff's "time spent on corporate donors was not producing the results relative to time expended[.]" O'Brien stated that Stallings sought guidance on how to move forward with plaintiff, and Stallings suggested giving plaintiff six to twelve months to improve, unless plaintiff's performance and behavioral issues worsened, in which case she would move to discontinue plaintiff's employment. Based on his experience working in human resources, he stated that six to twelve months was more than enough time for an employee to show or fail to show improvement. O'Brien stated that he and Stallings discussed developing an improvement plan and conducting a mid-year review for plaintiff.

O'Brien also averred that he met with Stallings on 22 November 2013 regarding an altercation with plaintiff the previous day, which was prompted by a conflict about an upcoming football game. According to O'Brien, Stallings stated that plaintiff was unprofessional and disrespectful, and her behavior was impacting the well-being, efficiency, and effectiveness of the office. O'Brien and Stallings again discussed discontinuing plaintiff's employment. O'Brien and Stallings met on 5 February 2014 regarding continued problems with plaintiff's performance. O'Brien stated that at this meeting, Stallings indicated she was ready to begin the process to discontinue plaintiff's employment.

In Solomon's affidavit, he stated that beginning in 2011, Stallings had concerns about plaintiff and her reluctance to shift her fundraising focus from corporate gifts to individual giving of major gifts. By the summer of 2013, plaintiff did not adjust her focus, and Stallings again relayed her concerns about plaintiff's performance. Plaintiff began having negative interactions with Stallings and others in the Advancement Office, requiring Stallings to seek guidance from Human Resources and specifically, O'Brien, in Employee Relations. Solomon stated that in February 2014, Stallings informed him that she wanted to discontinue plaintiff's employment. Solomon stated that he gave his approval for Stallings to initiate the steps to move forward with discontinuation. He further stated that Stallings' decision was based on her assessment that plaintiff was no longer adding value to the unit and was not taking steps to work on deficiencies.

In March 2014, Stallings provided Solomon with a written overview of the efforts she made over the last eighteen months to work with plaintiff. Solomon, O'Brien, and Stallings met in April 2014 to discuss plaintiff's departure, noting that because of her involvement with donors, "it was important to ensure that the discontinuation was handled appropriately and that a plan was in place to notify individual donors with whom Plaintiff had worked over the years." Additionally, he stated that "the timing of discontinuation was affected by a vacation that Plaintiff had planned around that same time period." Solomon averred that he "was completely comfortable making the recommendation to the Provost to discontinue Plaintiff's employment."

Based on the above sworn statements of multiple individuals, as well as plaintiff's own admissions in her reports, the issues that ultimately prompted NCSU to terminate plaintiff's employment arose around eighteen months prior to the IA investigation. The record evidence shows that Stallings allotted a specific time period for plaintiff to improve, which did not prove successful, and that the decision to terminate plaintiff's employment was based on plaintiff's performance and behavior. Moreover, Stallings made the recommendation to terminate plaintiff's employment prior to being interviewed by IA and prior to learning that plaintiff alleged misconduct. Plaintiff's "belief" to the contrary, without more, does not constitute specific, non-speculative facts, discrediting defendants' non-retaliatory motive. *Manickavasagar*, ___ N.C. App. at ___, 767 S.E.2d at 659. The official letter from the Provost informing plaintiff that her employment was terminated came several weeks later because multiple levels of approval were required. The delay was also due to the need to individually inform certain donors as well as plaintiff's scheduled vacation.

Plaintiff has failed to raise a factual issue regarding whether the proffered reasons for terminating her employment were pretextual. *Manickavasagar*, ___ N.C. App. at ___, 767 S.E.2d at 659. Accordingly, because defendants met their burden of showing that plaintiff cannot produce evidence to support an essential element of her claim—that there is a causal connection between the protected activity and the adverse action taken against her—the trial court properly granted summary judgment in favor of defendants. *Newberne*, 359 N.C. at 788, 618 S.E.2d at 206.

B. Tortious Interference With Contract Claim

[2] Next, plaintiff claims that the trial court erred in awarding defendants summary judgment on her tortious interference with contract claim.

To survive a motion for summary judgment on a claim of tortious interference with contract, a plaintiff must forecast evidence of the following elements:

> (1) A valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person;
>
> (2) the outsider had knowledge of the plaintiff's contract with the third person;
>
> (3) the outsider intentionally induced the third person not to perform his contract with the plaintiff;
>
> (4) in doing so the outsider acted without justification; and
>
> (5) the outsider's act caused the plaintiff actual damages.

See Varner v. Bryan, 113 N.C. App. 697, 701, 440 S.E.2d 295, 298 (1994) (citing *Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181–82 (1954)).

In *Smith v. Ford Motor Company*, our Supreme Court explained that the term "outsider" "appears to connote one who was not a party to the terminated contract and who had no legitimate business interest of his own in the subject matter thereof." 289 N.C. 71, 87, 221 S.E.2d 282, 292 (1976). A "non-outsider," however, "is one who, though not a party to the terminated contract, had a legitimate business interest of his own in the subject matter." *Id.* Nonetheless, "one who is not an outsider to the contract may be liable for interfering therewith if he acted maliciously." *Varner*, 113 N.C. App. at 701–02, 440 S.E.2d at 298. "It is not enough, however, to show that a defendant acted with actual malice; the plaintiff must forecast evidence that the defendant acted with legal malice." *Id.* at 702, 440 S.E.2d at 298. "A person acts with legal malice if he does a wrongful act or exceeds his legal right or authority in order to prevent the continuation of the contract between the parties." *Id.*

At issue here is the fourth element of a claim. Plaintiff argues that "Stallings acted without justification when she induced NCSU to discharge [plaintiff.]" Further, plaintiff argues that although defendants attempt to justify plaintiff's discharge, "[s]ufficient evidence exists to raise a genuine issue of material fact as to the truth of each purported reason."

"In order to demonstrate the element of acting without justification, the action must indicate 'no motive for interference other than malice.' " *Area Landscaping, L.L.C. v. Glaxo-Wellcome, Inc.*, 160 N.C. App. 520, 523, 586 S.E.2d 507, 510 (2003) (quoting *Filmar Racing, Inc. v. Stewart*, 141 N.C. App. 668, 674, 541 S.E.2d 733, 738 (2001)). Here, plaintiff cannot

establish that Stallings acted without justification. For the reasons stated in the previous section, the affidavits and record evidence show that Stallings had legitimate reasons to recommend that plaintiff's employment be terminated. Accordingly, because defendants have shown that plaintiff cannot produce evidence to support an essential element of her claim, the trial court properly granted summary judgment in favor of defendants.

C. Constitutional Claim

[3] Lastly, plaintiff claims that the trial court "erred in dismissing [her] *Corum* claim." Plaintiff argues that she "presented evidence that her protected activity was a substantial or motivating factor in Defendants' decision to discharge her. Defendants cannot establish, by a preponderance of the evidence, that they would have discharged [her] in the absence of her protected activity."

Plaintiff alleged a direct constitutional claim against NCSU and Stallings in both her official and individual capacities for violating plaintiff's right to freedom of speech. It is well established, however, that a "plaintiff may assert his freedom of speech right only against state officials, sued in their official capacity." *Corum v. Univ. of North Carolina*, 330 N.C. 761, 788, 413 S.E.2d 276, 293 (1992) ("[P]laintiff cannot rely on the Constitution to support a claim for money damages against individuals, acting in their personal capacities for the alleged violation of freedom of speech rights recognized under the Constitution."); *Swain v. Elfland*, 145 N.C. App. 383, 391, 550 S.E.2d 530, 536 (2001) ("To the extent that plaintiff alleges a *Corum* claim against defendants in their individual capacity, the claim must be dismissed."). Accordingly, the trial court properly granted summary judgment in favor of Stallings based on the claim against her in her individual capacity.

In *Corum*, our Supreme Court held, "[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution." *Corum*, 330 N.C. at 782, 413 S.E.2d at 289. In *Swain v. Elfland*, this Court held that a claim based on an alleged violation of North Carolina's Whistleblower Act was an adequate state remedy that precluded a direct cause of action for a violation of a plaintiff's right to free speech under the North Carolina Constitution. 145 N.C. App. at 391, 550 S.E.2d at 536. Even though the plaintiff was unsuccessful on the Whistleblower Act claim, we held that the trial court properly dismissed the constitutional claim because the plaintiff had an adequate state law remedy available to him, which he pursued. *Id.*

Here, plaintiff's claim under N.C. Gen. Stat. § 126-84 is an adequate state law remedy for her alleged free speech violation. Accordingly, the trial court properly granted summary judgment in favor of defendants on plaintiff's constitutional claim.

III. Conclusion

The trial court did not err in granting defendants' motion for summary judgment on plaintiff's Whistleblower Act claim, tortious interference with contract claim, and constitutional claim.

AFFIRMED.

Judges DAVIS and DIETZ concur.

IN THE MATTER OF K.C. & W.G.

No. COA16-87

Filed 2 August 2016

Child Abuse, Dependency, and Neglect—permanency planning hearing—lack of notice

The trial court erred by holding a permanency planning review hearing without providing respondent mother with the statutorily required notice. The trial court scheduled a custody review but changed it to a permanency planning hearing, and respondent objected to the lack of notice.

Appeal by respondent from orders entered 26 October 2015 by Judge Beverly Scarlett in Orange County District Court. Heard in the Court of Appeals 5 July 2016.

Richard Croutharmel for respondent-appellant.

Holcomb & Cabe, LLP, by Samantha H. Cabe, for petitioner-appellee Orange County Department of Social Services.

Administrative Office of the Courts, by Appellate Counsel Matthew D. Wunsche, for guardian ad litem.

ELMORE, Judge.

Respondent, the mother of the juveniles K.C. (Karen) and W.G. (Walter),[1] appeals from orders (1) awarding custody of Karen to her paternal grandparents, and (2) placing Walter in the guardianship of his paternal aunt and uncle. After careful review, we vacate and remand.

I. Background

On 28 April 2015, the Orange County Department of Social Services (DSS) filed a petition alleging that Walter was an abused, neglected, and dependent juvenile, and a separate petition alleging that Karen was a neglected and dependent juvenile. DSS alleged that it received a report that Walter had been taken to the hospital by a family friend after she discovered marks and bruises on his body. Respondent reported that her babysitter's boyfriend had fallen while holding Walter. Walter "was observed to have bruising from the mid-back area to the bottom of the buttocks and bruising from the left hip to the right hip. [Walter] had abrasions on both cheeks and deeper abrasions on the nose, lip, and forehead." The bruises were reportedly less than twenty-four hours old. The hospital report cast doubt on respondent's claims regarding the cause of the bruising. Respondent stayed with Walter at the hospital, but reportedly "slept most of the time and was not attentive to [Walter's] needs."

DSS further alleged that Walter was staying with a family friend in Sanford, and resided with respondent "sporadically." Karen had been residing with a family in Durham for about a month, but there was very little interaction between respondent and the family, and there was no plan in place regarding the child. DSS claimed that the juveniles were "left by mother with baby-sitters who are known drug users and live in a 'crack house.' " DSS further claimed that respondent had a history of cocaine abuse, she prostituted herself for drugs and money, and she was living with a man who was reportedly using drugs. DSS asserted that the juveniles had no stability and were at high risk of harm if left in respondent's custody.

DSS obtained non-secure custody of the juveniles. On 9 July 2015, the trial court adjudicated both juveniles neglected and dependent. Karen was placed with her paternal grandparents, while Walter was placed with his paternal aunt and uncle. On 26 October 2015, the court entered permanency planning review orders. The trial court awarded custody of Karen to her paternal grandparents and granted respondent visitation rights. The trial court then closed the juvenile matter and

1. We use these pseudonyms to protect the identities of the minor children and to promote ease of reading.

transferred the case to a Chapter 50 civil custody action. In a separate order, the trial court ceased reunification efforts between Walter and respondent, changed the permanent plan for Walter to guardianship with a relative, and granted guardianship of Walter to his paternal aunt and uncle. Respondent appeals from both orders.

II. Discussion

Respondent first argues that the trial court erred by holding a permanency planning review hearing without providing her with the statutorily required notice that the court intended to conduct such a hearing. We agree.

"In any [juvenile] case where custody is removed from a parent, guardian, or custodian, the court shall conduct a review hearing within 90 days from the date of the dispositional hearing and shall conduct a review hearing within six months thereafter." N.C. Gen. Stat. § 7B-906.1(a) (2015). In addition, "a review hearing designated as a permanency planning hearing" must be held "[w]ithin 12 months of the date of the initial order removing custody." *Id.* " 'The purpose of a permanency planning hearing shall be to develop a plan to achieve a safe, permanent home for the juvenile within a reasonable period of time.' " *In re D.C.*, 183 N.C. App. 344, 355, 644 S.E.2d 640, 646 (2007) (citing former N.C. Gen. Stat. § 7B-907(a) (2005)). By statute, a parent is entitled to fifteen days' notice of a permanency planning hearing. N.C. Gen. Stat. § 7B-906.1(b) (2015).[2]

In this case, after the dispositional hearings the trial court scheduled a "Custody Review" for Karen and Walter on 6 August 2015. The same "Review" hearings were continued to 1 October 2015. DSS notified respondent on 23 September 2015 that a "Permanency Planning hearing" for Karen and Walter would be conducted on 1 October 2015. At the beginning of the hearing, respondent's counsel objected to the holding of the permanency planning review hearing. Counsel argued that she had received "no notice that this was changed to a permanency planning hearing," she had not received reports from DSS or the guardian *ad litem*, and therefore, she was not prepared to proceed. The trial court responded as follows:

> THE COURT: What I'm gonna [sic] do is I'm going to hear it, but I'm not going to commit today to anything regarding a permanent plan. I'm just saying that now. You know—

2. The former N.C. Gen. Stat. § 7B-907(a) also required fifteen days' notice of a permanency planning hearing.

> [RESPONDENT'S COUNSEL]: Thank you. That would be sufficient.
>
> THE COURT: —I don't know what I'm going to feel once I read it. But right now, I'm not making any commitment. Okay.

At the conclusion of the hearing, however, the trial court found that "it's in the best interest of the minor children for this hearing to be a permanency planning hearing."

The record shows that respondent received only eight days' notice that the 1 October 2015 hearing would be a permanency planning review hearing. Counsel objected to the hearing on the basis of the lack of notice, and thus respondent did not waive the lack of notice. *See In re J.S.*, 165 N.C. App. 509, 514, 598 S.E.2d 658, 662 (2004) (stating that a party waives its right to notice under section 7B-907(a) by attending the hearing in which the permanent plan is created, participating in the hearing, and failing to object to the lack of notice). Therefore, respondent was not afforded adequate notice of the 1 October 2015 hearing and its purpose.

III. Conclusion

We must vacate the 26 October 2015 permanency planning review orders and remand the matter for proper permanency planning hearings after providing respondent with the requisite notice. *See In re D.C.*, 183 N.C. App. at 356, 644 S.E.2d at 646–47 (reversing a permanency planning review order where, among other reasons, respondent was not provided with "statutorily required notice that the trial court would consider a permanent plan for [the juvenile]"). Because we vacate the orders, it is not necessary for us to address the additional issues presented by respondent on appeal.

VACATED AND REMANDED.

Judges HUNTER, JR. and McCULLOUGH concur.

IN THE MATTER OF W.R.D., III

No. COA15-1316

Filed 2 August 2016

1. Appeal and Error—mootness—involuntary commitment

An appeal from an involuntary commitment order was not moot where the commitment period had lapsed. The commitment might form the basis for a future commitment, along with other legal consequences.

2. Mental Illness—involuntary commitment—danger to self or others—findings

The trial court erred in an involuntary commitment by determining that respondent was a danger to himself and others. The record did not support the findings that respondent was a danger to himself or others; the involuntary commitment statute expressly requires the trial court to record the facts upon which its ultimate findings are based.

Appeal by respondent from order entered 11 June 2015 by Judge Andrea Dray in Buncombe County District Court. Heard in the Court of Appeals 25 May 2016.

Attorney General Roy Cooper, by Assistant Attorney General Elizabeth Guzman, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for respondent.

DIETZ, Judge.

Respondent appeals from the trial court's order of involuntary commitment. Following a hearing, the trial court found that Respondent was a danger to himself and others and ordered him to be institutionalized for 30 days.

As explained below, we reverse the commitment order. The record indicates that Respondent suffers from schizophrenia; that he refused to take his prescription medication both for his mental illness and an unrelated heart condition; that he lost some "unknown amount" of weight but remained at a healthy weight; that he warned his guardian to stay

away from him or he would sue him; and that he was angry and rude to hospital staff after being involuntarily committed.

This evidence cannot support the trial court's ultimate findings that Respondent posed a danger to himself or others. Our holding today does not mean that Respondent is competent, or that he cannot properly be committed at some future hearing. We simply hold that the evidence in the record on appeal is insufficient to satisfy the statutory criteria for involuntary commitment. Accordingly, we reverse the trial court's order.

Facts and Procedural History

In 2003, Respondent was diagnosed with schizophrenia. Respondent always has disputed this diagnosis and continues to do so today.

Because of Respondent's health issues and his failure to attend to his basic needs, Respondent's mother was appointed as his guardian and Social Security payee. She continued in that capacity until 2015, when Hope for the Future, an organization that offers guardianship services, began working with Respondent and ultimately assigned Kevin Connor to serve as his guardian.

Respondent refused to meet with Connor, who was a complete stranger to him. Connor tried to arrange an in-person meeting with Respondent on four different occasions with no success. Respondent spoke to Connor several times on the phone. During those calls, Respondent denied having a mental illness and denied needing any assistance from Connor. According to Connor, Respondent also left him voice messages, which included statements such as "You'd better back off, Jack," and "Don't you come around me. I will sue you into the ground."

On 29 May 2015, Connor filed an affidavit and petition to have Respondent involuntarily committed. Respondent was hospitalized at Mission Hospital Copestone in Asheville. Dr. Martha Moore examined Respondent upon admission to the hospital and recommended he receive inpatient treatment for 30 days. Dr. Trace Fender performed a second examination on 1 June 2015 and also concluded that Respondent was in need of inpatient treatment for 30 days. Three days later, on 4 June 2015, Connor had his first and only in-person meeting with Respondent.

The trial court held a hearing on the involuntary commitment petition on 11 June 2015. Three witnesses testified at the hearing. First, the Court heard from Connor, Respondent's guardian. Connor testified that Respondent had acted in a "menacing" way towards representatives from Hope for the Future, although he conceded Respondent was never

violent and never threatened violence. He also testified that Respondent had allegedly written and left a letter for his ex-wife at her home despite not being permitted onto his ex-wife's property. Finally, Connor testified that Respondent was not taking his medications to treat his schizophrenia and a serious heart condition. Connor conceded on cross-examination that Respondent had never shown any indications of physical violence and had never engaged in any self-harming behavior.

Respondent also testified. He expressed confusion regarding his hospitalization. He claimed that he had "not broken any law or anything," and he thought that his hospitalization stemmed from an issue with his Social Security payments. He testified that he was no longer in need of a guardian; that he had plenty of food in his house; that he was able to work odd jobs to earn additional money; that he had purchased his own vehicle; and that he was willing to take his heart medication but would not take any medication prescribed to treat mental illness.

Finally, Dr. Frederick Weigel, a staff psychiatrist at Copestone, testified as an expert witness in general psychiatry. He testified that in his opinion Respondent was schizophrenic and that he was unable to "maintain his own nourishment and medical care." Dr. Weigel's opinion concerning Respondent's nourishment was based solely on his understanding that Respondent had lost some "unknown amount" of weight before his involuntary commitment. Dr. Weigel acknowledged that Respondent's current weight was not unsafe. Dr. Weigel's opinion that Respondent could not maintain his own medical care was based on Respondent's refusal to take his prescription medications for schizophrenia and his heart condition.

At the conclusion of the hearing, the trial court found that Respondent "is mentally ill, poses a threat to himself and others, is unable to take [sic] maintain his nutrition, that it is not medically safe for Respondent to live outside of an inpatient commitment setting, and that no less restrictive treatment measure than inpatient treatment would be medically appropriate." As a result, the trial court ordered Respondent to undergo 30 days of involuntary commitment at Mission Hospital Copestone. Respondent timely appealed.

Analysis

[1] Respondent argues that the trial court's determination that he is a danger to himself or others is not supported by competent record evidence. As explained below, we agree and therefore reverse the trial court's commitment order.

As an initial matter, we note that Respondent's appeal is not moot although his 30-day commitment period has lapsed. The possibility that Respondent's commitment might "form the basis for a future commitment, along with other obvious collateral legal consequences," preserves his right to appellate review despite the expiration of his commitment period. *In re Hatley*, 291 N.C. 693, 695, 231 S.E.2d 633, 635 (1977).

[2] To support an involuntary commitment order, the trial court is required to "find two distinct facts by clear, cogent, and convincing evidence: first that the respondent is mentally ill, and second, that he is dangerous to himself or others." *In re Lowery*, 110 N.C. App. 67, 71, 428 S.E.2d 861, 863–64 (1993); N.C. Gen. Stat. § 122C–268(j). These two distinct facts are the "ultimate findings" on which we focus our review. *See In re Moore*, 234 N.C. App. 37, 43, 758 S.E.2d 33, 37–38 (2014). But unlike many other orders from the trial court, these "ultimate findings," standing alone, are insufficient to support the order; the involuntary commitment statute expressly requires the trial court also to "record the facts upon which its ultimate findings are based." *In re Collins*, 49 N.C. App. 243, 246, 271 S.E.2d 72, 74 (1980); N.C. Gen. Stat. § 122C–268(j).

We review the trial court's commitment order to determine whether the ultimate finding concerning the respondent's danger to self or others is supported by the court's underlying findings, and whether those underlying findings, in turn, are supported by competent evidence. *See In re Booker*, 193 N.C. App. 433, 437, 667 S.E.2d 302, 305 (2008).

I. Danger to Self

Respondent first challenges the trial court's ultimate finding that he was "dangerous to himself." To find danger to self in these circumstances, the trial court must find that Respondent "would be unable, without care, supervision, and the continued assistance of others not otherwise available, to exercise self-control, judgment, and discretion in the conduct of his daily responsibilities and social relations, or to satisfy his need for nourishment, personal or medical care, shelter, or self-protection and safety" and that "there is a reasonable probability of his suffering serious physical debilitation within the near future" without involuntary commitment. N.C. Gen. Stat. § 122C–3(11).

The trial court's commitment order contains only two findings of fact that could be construed to support these statutory criteria. First, the trial court found that "it is not medically safe for Respondent to live outside of an inpatient commitment setting" because "Respondent maintains a belief that another doctor is his treating physician and will not be treated by Dr. Weigel"; "Respondent is diagnosed with paranoid

schizophrenia, for which Respondent has refused treatment"; and "Respondent has heart health related issues, for which he is not compliant with prescribed medical treatment." Second, the trial court found that Respondent was "unable to take [sic] maintain his nutrition." The trial court did not include any additional findings of fact concerning Respondent's nutrition.

Neither of these findings is sufficient to support the trial court's ruling. With respect to Respondent's refusal to acknowledge his mental illness, and refusal to take his prescription medication, the record does not demonstrate a "reasonable probability of his suffering serious physical debilitation within the near future" without immediate, involuntary commitment. To be sure, Dr. Weigel testified that Respondent's refusal to take his heart medication "could be deadly," but he did not testify that ceasing that medication would create this serious risk "within the near future." In similar cases, this Court has held that the evidence must demonstrate "a reasonable probability" that the health risk will occur in the "near future," not simply that it could place the respondent at risk at some future time. *See*, *e.g.*, *In re Whatley*, 224 N.C. App. 267, 273, 736 S.E.2d 527, 531 (2012). Here, there is no evidence that Respondent's refusal to take his medication creates a serious health risk in the near future.

Second, the trial court's finding that Respondent was unable to "maintain his nutrition" is not supported by competent evidence. It is apparently based solely on the following opinion testimony of Dr. Weigel:

> Q: Have you reached a conclusion, to a degree of medical certainty, as to the respondent's ability to maintain his own nourishment and medical care?
>
> A: I do not think he can maintain that independently.

In an involuntary commitment proceeding like this one, "the premises underlying an expert's opinion must be made known to the trier of fact in order that the trier of fact may properly evaluate the opinion." *In re Collins*, 49 N.C. App. at 247, 271 S.E.2d at 75. In the record, Dr. Weigel's only testimony concerning Respondent's "nourishment" is that he lost some "unknown amount" of weight but that his current weight was safe. That testimony is not sufficient to support a finding that Respondent could not "satisfy his need for nourishment" and faced a "reasonable probability of his suffering serious physical debilitation" without involuntary commitment. Accordingly, the trial court's findings concerning Respondent's inability to "maintain his nutrition" are not supported by competent evidence.

II. Danger to Others

We next turn to the trial court's finding that Respondent posed a danger to others. Under N.C. Gen. Stat. § 122C–3(11)(b), an individual is "dangerous to others" if "within the relevant past, the individual has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another, or has acted in such a way as to create a substantial risk of serious bodily harm to another, or has engaged in extreme destruction of property" and "there is a reasonable probability that this conduct will be repeated."

The trial court's commitment order contains only two findings of fact that could be construed to support these statutory criteria. First, the trial court found that "Respondent made a threat, although not of physical violence, towards Mr. Connor." Second, the trial court found that "Respondent displayed hostile, aggressive behaviors in interviews" at the hospital. But, importantly, neither of these findings of fact indicates that Respondent "inflicted," "attempted to inflict," "threatened to inflict," or "acted in such a way as to create a risk of serious bodily harm" to another. Indeed, the first finding expressly acknowledges that the "threat" Respondent made to Connor was *not* a threat of "physical violence," much less "serious bodily harm." Rather, Respondent warned Connor to stay away or "I'll sue you into the ground." While one might experience some emotional (or metaphorical) pain from being sued, the threat to sue someone simply cannot be viewed as a threat to inflict "serious bodily harm."

Likewise, Dr. Weigel's testimony concerning Respondent's "intrusive" and "aggressive" behavior does not support the trial court's finding that he is a danger to others. Dr. Weigel testified, in essence, that Respondent was angry and rude after being institutionalized, and refused to cooperate with the hospital staff:

> [Respondent] has been persistently hostile and intrusive and aggressive with [hospital] staff. He has been refusing treatment or medications. He has largely refused to be interviewed . . . . He was very hostile repeatedly sticking his finger in our face yelling paranoid thoughts that his guardian—well, that he had no guardian; that his guardian was sent by the government to take pictures of his house and steal his money; was very forcefully insistent that he would refuse treatment and fight it if it was given to him.

Nothing in this testimony indicates that Respondent "has inflicted or attempted to inflict or threatened to inflict serious bodily harm on another." *See* N.C. Gen. Stat. § 122C–3(11)(b).

Simply put, the record does not support the trial court's findings that Respondent was a danger to himself or others. Accordingly, we reverse the trial court's commitment order. We note that our holding today does not mean that Respondent is competent, or that he cannot properly be committed at some future hearing. We hold only that, on the record in this appeal, the trial court's findings are insufficient to satisfy the statutory criteria for involuntary commitment. Accordingly, we reverse the trial court's order.

Conclusion

The trial court's involuntary commitment order is

REVERSED.

Judges ELMORE and DAVIS concur.

KAY I. KIMLER, CARY F. KIMLER, LOIS K. ADAMS, LAURA R. NOTTINGHAM, AS TRUSTEE OF THE NOTTINGHAM JOINT TRUST OF OCTOBER 25, 2005, RONALD E. MACK, JUSTAMONA MACK, JAMES C. DAVIDSON, POLLY P. DAVIDSON, ALMOND E. SHEW, ELISABETH A. SHEW, JAMES C. HORNE, SR., HELEN A. HORNE, LANCE COTTRELL, NORIKA COTTRELL, TOMMY R. PENSON, EDNA S. PENSON, KENNETH F. HODGE, DONNA B. BENTLEY, BARBRA M. BUTLER, MARK S. WILSON, AND EUGENIA L. SEXTON, PETITIONERS

v.

THE CROSSINGS AT SUGAR HILL PROPERTY OWNER'S ASSOCIATION, INC., DONALD F. ASKEY, JR., SHELLY C. ASKEY, WILLIAM B. LYNN, JAMES R. FRAMPTON, ELIZABETH A. FRAMPTON, GORDON L. JOHNSON, JANINA F. JOHNSON, HASKELL S. DAWSON, CARNEY N. DAWSON, A/K/A HELEN CARNEY DAWSON LIVING TRUST, DENNIS E. BROWN, PATRICIA A. BROWN, BARRY E. HOUGH, ANNE S. HOUGH, THOMAS P. STIVES, NORMA P. STIVES, JANE F. HUMPHREYS, PHILLIP W. TATLER, JR., SALLY L. TATLER, RONNIE MANGUM, MELODY MANGUM, CAROL C. THOMAS, GINA R. DICICCO, WENDY D. RHODES, DAVID W. VERMILYEA, JOYCE A. VERMILYEA, JOSHUA DELL OLIVER, KRISTEN GREEN OLIVER, ANTOINETTE WILLIAMS, PEYTON A. FOSTER, CAROLYN D. FOSTER, DENISE C. AMMONS, RICHARD G. KOHLER, DAVID M. VINTON, ELIZABETH D. VINTON, BLAND WAGERS, JANET W. COUNTS, GEARY B. MILLS, DEBORAH A. MILLS, LARRY K. BRADHAM, KATHY G. BRADHAM, RANDY GREER, RALPH S. TEAL, BETTY W. TEAL, ROBERT R. TYLER, JR., ROBERT KELLEY, LESLIE KELLEY, ALAN C. NEDRICH, SUZETTE R. NEDRICH, LYLE D. MALZAHN, CHRISTINE L. MALZAHN, LAWRENCE M. LOMONACO, STEVEN COPE, OLGA CADILLA-SAYRES, ROLANDO PRIETO-SOLIS, JEANETTE GONZALEZ, WILLIAM L. LITTLE, BARBARA B. LITTLE, FRANK GODZIK, SANDRA GODZIK, CARL D. KICKERT, KATHY P. KICKERT, JOHN G. MASSARO, CRAIG E. METZ, PAMELA A. METZ, FREDDIE M. SETTLEMYRE, ELIZABETH O. SETTLEMYRE, RICHARD E. LEE, CAROL L. LEE, JON A. MAZEY, ELENA V. MAZEY, ERNEST SANTIUSTE, ANTONIA SANTIUSTE AND RICHARD M. GETTY, RESPONDENTS

KIMLER v. CROSSINGS AT SUGAR HILL PROP. OWNER'S ASS'N, INC.

[248 N.C. App. 518 (2016)]

No. COA15-1301

Filed 2 August 2016

1. Associations—homeowners'—declaration/covenants—amendment

A homeowners' association that was formed prior to 1999 was authorized to amend the declaration/covenants where there was nothing in the declaration or the articles of incorporation which expressly prohibited the application of N.C.G.S. § 47F-2-117. N.C.G.S. § 47F-2-117 applies to pre-1999 planned communities where either the terms of the declaration or articles of incorporation do not provide to the contrary or the association has adopted the terms of the Planned Community Act.

2. Associations—homeowners'—declarations/covenants—amendment—reasonable

An amendment to declarations/covenants by the homeowners' association (HOA) was not unreasonable where the intent of the amendment was to clarify a paragraph of the covenants as originally written. The issue involved a clause allowing the purchasers of contiguous lots from the developer to pay dues based on only one lot; the deeds from the developer in most instances did not describe the exempt lots, as the declaration required, and the practice of the HOA had been to exempt all of the owners of multiple lots from paying dues on more than one lot, whether they purchased the lots from the developer or not.

Appeal by Petitioners from orders entered 3 February 2015 and 6 May 2015 by Judge Alan Z. Thornburg in McDowell County Superior Court. Heard in the Court of Appeals 12 May 2016.

Johnson Law Firm, P.A., by Gene B. Johnson, for the Petitioners-Appellants.

Roberts & Stephens, P.A., by Ann-Patton Hornthal and Phillip T. Jackson, for Respondent-Appellee, The Crossings at Sugar Hill Property Owners' Association, Inc.

DILLON, Judge.

The Crossings at Sugar Hill ("Sugar Hill") is a residential subdivision in McDowell County. The Respondent-Appellee is Sugar Hill's

homeowners' association ("Sugar Hill HOA"). The Petitioners-Appellants are owners of lots within Sugar Hill.

Sugar Hill was developed in the 1990's by Mountain Creek Land Company, Inc. ("Developer"). Prior to development, the Developer recorded declarations/covenants (the "Declaration"), which provided for the formation of the Sugar Hill HOA and stipulated that certain owners of multiple lots would only be required to pay dues on one lot. This civil action involves a dispute concerning whether the Sugar Hill HOA acted within its authority when it amended the Declaration in 2012 (the "2012 Amendment"). The Declaration originally provided that any individual purchasing more than one contiguous lot *from the Developer* would only be obligated to pay dues on a single lot so long as the "exempt" lot was not sold or occupied by a dwelling or camping unit. For the first fifteen years, from 1997-2012, the Sugar Hill HOA, not only billed those purchasing multiple contiguous lots *from the Developer* for one lot, but also only billed multiple lot owners *who did not purchase all their lots from the Developer* for one lot. In 2012, the Sugar Hill HOA began billing the second group on a per-lot basis, and some in that group strongly objected. These objections prompted the Sugar Hill HOA to enact the 2012 Amendment to the Declaration to clarify that it was authorized to bill those who owned multiple contiguous lots *not purchased from the Developer* on a per-lot basis (rather than only for a single lot), as it should have been doing all along. The trial court concluded that the Sugar Hill HOA acted within its authority in enacting the 2012 Amendment. For the following reasons, we affirm.

I. Factual Background

In 1996, the Developer recorded the Declaration which provided, in part, the following: (1) that any one person/entity purchasing more than one contiguous lot from the Developer be initially required to pay dues on only one lot; (2) that the Developer could modify, change, or amend any provision in the Declaration at any time while the Declaration remained in effect; and (3) that the Declaration would remain in effect until 2021 and would continue beyond 2021, "unless prior [to the 2021 renewal date] an instrument signed by the owners of a majority of lots subject to this Declaration agreeing to terminate, amend, or modify the Declaration shall have been recorded[.]"

The Declaration provided that the Sugar Hill HOA would be set up with "the power to enforce" the collection of dues and compliance with covenants and restrictions. The Declaration, however, did *not* contain any provision conferring on the Sugar Hill HOA the authority to amend

the Declaration. The Declaration further provided that the Sugar Hill HOA would be initially controlled by the Developer until *either* the Developer decided to turn governing power over to the lot owners *or* when 75% of the lots were sold, at which time control of the Sugar Hill HOA would automatically vest in the lot owners.

In February 1997, the Developer signed the Articles of Incorporation for the Sugar Hill HOA. The Articles did *not* contain any provision conferring authority on the Sugar Hill HOA to amend the Declaration.

In September 1997, the Developer recorded a document turning over control of the Sugar Hill HOA to the lot owners. This document, however, did not contain any provision transferring to the Sugar Hill HOA the Developer's authority to amend the Declaration. Shortly after the document was filed, the Sugar Hill HOA held its first meeting. The minutes from the meeting reflect that a statement was made that more burdensome restrictions could not be placed on the property except by agreement of 100% of the lot owners. However, there was no motion made or vote recorded as to this "statement."

In 1999, the General Assembly enacted the Planned Community Act (the "PCA"), which applies to some planned communities. The PCA provides in part that, except in certain situations, the declaration of a planned community covered by the PCA could be amended by the vote of 67% of the owners.

In January 2012, with 71% of lot-owner approval, the Sugar Hill HOA passed the 2012 Amendment, which stated that only those owners of contiguous lots *who purchased their contiguous lots directly from the Developer* would be allowed to pay dues on a single lot, while those multiple-lot owners who did not purchase all their contiguous lots from the Developer would be required to pay dues for each lot owned.

II. Procedural Background

In August 2012, Petitioners-Appellants commenced this action seeking (1) declaratory relief to the effect that *all* individuals owning contiguous lots were exempt from paying dues on more than one lot by virtue of the Declaration, and (2) injunctive relief to enjoin the Sugar Hill HOA from collecting dues on a per-lot basis from owners of contiguous lots not purchased from the Developer.

On 3 February 2015, after a bench trial on the matter, the trial court entered an order which declared, in relevant part, that the statement made at the initial Sugar Hill HOA meeting in 1997 regarding a

requirement unanimity to amend the Declaration was not legally binding; and that the 2012 Amendment (authorizing the Sugar Hill HOA to bill on a per-lot basis those contiguous lots who did not purchase their lots from the Developer) was valid and enforceable. On 6 May 2015, the trial court denied Petitioners-Appellants' motion to amend the first order. Petitioners-Appellants timely appealed from both orders.

III. Analysis

A. The PCA Authorizes the Sugar Hill HOA To Amend the Declaration

[1] The PCA was enacted in 1999 by our General Assembly. It applies to most "planned communities"[1] created within North Carolina *after* 1999. N.C. Gen. Stat. § 47F-1-102(a) (2015).

Additionally, certain provisions of the PCA apply to planned communities created *prior* to 1999, "unless the articles of incorporation or the declaration expressly provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (2015). Two such provisions of the PCA which apply to pre-1999 created planned communities are found in N.C. Gen. Stat. § 47F-2-103 (2015), which deals with the construction and validity of a declaration, and in N.C. Gen. Stat. § 47F-2-117 (2015), which deals with the process of amending a declaration. Based on these two provisions and the language in the Declaration, we conclude that the Sugar Hill HOA – though formed prior to 1999 – is authorized to amend the Declaration, as otherwise allowed by law, by agreement of lot owners representing 67% of the votes.

N.C. Gen. Stat § 47F-2-103(a) states that "[t]o the extent not inconsistent with the provisions of this Chapter, the declaration, bylaws, and articles of incorporation form the basis for the legal authority for the planned community to act as provided in [those documents], and [those documents] are enforceable by their terms." The interpretation of the Declaration in the present case is one for the courts, and not for a jury, *see Runyon v. Paley*, 331 N.C. 293, 305, 416 S.E.2d 177, 186 (1992), and therefore is reviewable *de novo* on appeal.

Here, the Declaration provides that it may be amended by the Developer. The Declaration does not provide that it may be amended by

---

1. "Planned community" is defined by the PCA in N.C. Gen. Stat. § 47F-1-103(23) as real estate whereby a person's ownership of a lot expressly obligates that person by a declaration "to pay real property taxes, insurance premiums, or other expenses to maintain, improve, or benefit other lots or other real estate described in the declaration." Sugar Hill falls within this definition. For instance, the Declaration provides that lot owners are obligated to pay dues for the "maintenance of roads, common areas," etc.

the Sugar Hill HOA, but only that the Declaration may expire in 2021 by vote of the Sugar Hill HOA.

However, we must read N.C. Gen. Stat. § 47F-2-103 in conjunction with N.C. Gen. Stat. § 47F-2-117, which provides for the process by which a declaration may be amended. Specifically, subsection (a) provides, in pertinent part, as follows:

> Except in cases of amendments that may be executed by a declarant under the terms of the declaration . . . , the declaration may be amended only by affirmative vote or written agreement signed by lot owners of lots to which at least sixty-seven percent (67%) of the votes in the association are allocated, or any larger majority the declaration specifies or by the declarant if necessary for the exercise of any development right.

N.C. Gen. Stat. § 47F-2-117(a) (2015). For those planned communities to which this statutory provision applies, even if not authorized by the declaration, an owners' association may amend the declaration by a sixty-seven percent (67%) vote[2] and a declarant may amend the declaration if necessary to exercise a development right.[3] This grant of authority to an owners' association to amend the declaration applies to the Sugar Hill HOA in the present case, though the HOA was formed prior to 1999, because there is nothing in the Declaration or articles of incorporation which "*expressly* provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (2015) (emphasis added) (providing for the application of N.C. Gen. Stat. § 47F-2-117 to pre-1999 formed planned communities). Specifically, there is nothing in the Declaration which *expressly* states that the Sugar Hill HOA is not authorized to amend the Declaration.[4]

---

2. We note that N.C. Gen. Stat § 47F-2-117(a) provides that the declaration may provide that a larger supermajority than 67% be required to amend. Here, however, the Declaration does not contain any provision which even addresses the Sugar Hill HOA's authority to amend the Declaration. There is evidence that a statement was made at the Sugar Hill HOA's 1997 initial meeting that a 100% vote would be required. However, this statement is not part of the Declaration, and we affirm the trial court's conclusion that this "statement" is unenforceable.

3. Under N.C. Gen. Stat. § 47F-2-117, a developer's authority to amend the declaration is limited to those amendments deemed necessary for the exercise of any development right unless the declaration itself authorizes the developer to amend the declaration affecting other matters.

4. We note that even if the declaration of a planned community formed prior to 1999, expressly prohibits the owners' association from amending the declaration, the PCA allows the owners' association to amend the declaration to make all of the provisions of

Therefore, in conclusion, N.C. Gen. Stat. § 47F-2-117 applies to pre-1999 formed planned communities where (1) *either* the terms of the declaration or articles of incorporation do not expressly provide to the contrary pursuant to N.C. Gen. Stat. § 47F-1-102(c), *or* (2) the association has adopted the terms of the PCA pursuant to N.C. Gen. Stat. § 47F-1-102(d). Here, although the Sugar Hill HOA has not adopted the PCA pursuant to N.C. Gen. Stat. § 47F-1-102(d), there is nothing in the Declaration or the Articles of Incorporation which expressly prohibit the application of N.C. Gen. Stat. § 47F-2-117. Accordingly, the Sugar Hill HOA is authorized to amend the Declaration by a vote of at least 67%.

B. The 2012 Amendment Is Valid

[2] Sugar Hill HOA's authority to amend the Declaration is not unlimited. Rather, our Supreme Court has held that an owners' association's authority to amend a declaration is limited to those amendments which are "reasonable[.]" *Armstrong v. Ledges Homeowners Ass'n*, 360 N.C. 547, 548, 633 S.E.2d 78, 81 (2006). "Reasonableness may be ascertained from the language of the declaration, deeds, and plats, together with the other objective circumstances surrounding the parties' bargain, including the nature and character of the community." *Id.*

Here, the Sugar Hill HOA enacted an amendment by 71% vote that amended paragraph 8(c) of the Declaration, which dealt with the assessment of dues when one owns multiple contiguous lots. The original provision stated as follows:

> Any one person(s), or entity purchasing and owning two (2) or more contiguous lots in [Sugar Hill] (whether in a single deed, or in separate deeds, and whether such purchases are simultaneous or otherwise) will be required to pay Association dues on only one lot per year, as provided in this Declaration; provided, however, that the deed from the [Developer] shall designate which lot or lots in excess of one are the exempt lot or lots, and such exempt lot or lots will maintain an exempt status unless or until (a) the

---

the PCA applicable to its planned community by affirmative vote of 67%. This rules applies even if the declaration prohibits the association from making any amendments to the declaration. N.C. Gen. Stat. § 47F-1-102(d). Therefore, where a declaration in a planned community formed prior to 1999 expressly prohibits its owners' association from amending the declaration, the association may still vote to amend the declaration to adopt the provisions of the PCA. *Id.* And once the provisions of the PCA are so adopted, the association may then amend the declaration in other ways pursuant to its authority under N.C. Gen. Stat. § 47F-2-117.

> lot is sold, or (b) a living or camping unit is placed upon it, and in the event of either (a) or (b) above the exemption will be lost forever.

As stated above, it is the duty of the courts to construe the terms of the Declaration. *See Runyon*, 331 N.C. at 305, 416 S.E.2d at 186. Our Supreme Court has further instructed that we are to construe the declaration based on the intent of the parties. *Id.* We conclude that paragraph 8(c) was intended to provide that anyone buying contiguous lots *from the Developer* would only be initially obligated to pay dues based on one of the lots and that the other lots would be exempt until sold or occupied by a living or camping unit. We also conclude that it was not intended that the exemption be lost simply because the Developer failed to state in the conveyance which lots were to be exempt, but that in such case the lot on which the buyer initially built would be the lot to be assessed.

In practice, in most instances where a buyer purchased more than one contiguous lot from the Developer, the Developer failed to designate which lot(s) would initially be exempt from dues. Further, the evidence shows and the trial court found that for the first fifteen years (until 2012), the Sugar Hill HOA billed *all* owners of contiguous lots for only a single lot, even those who did not acquire their lots directly from the Developer. Beginning in 2012, the Sugar Hill HOA began collecting dues on a per-lot basis from those multi-lot owners whose contiguous lots were *not* conveyed to them by the Developer. Several such owners refused to comply, which prompted the Sugar Hill HOA to amend paragraph 8(c) to provide as follows:

> Any one person(s) or entity purchasing two or more contiguous lots originally conveyed from [the Developer] (whether in a single deed, or separate deeds, and whether such purchases are simultaneous or otherwise) will be required to pay Association dues on only one lot per year as provided for in this Declaration and such exempt lot or lots will remain exempt unless and until (a) the lot is sold, or (b) a living or camping unit is placed upon it, and in the event of either (a) or (b) the above exemption will be lost permanently.
>
> All contiguous lots that were not conveyed by [the Developer] shall not be designated as exempt from association dues henceforth.

We conclude that the intent of the 2012 Amendment was largely to clarify paragraph 8(c) as originally written, but without the requirement that

the deed from the Developer recite *which lot(s)* would be exempt. We do not believe that the change is unreasonable based on our Supreme Court's decision in *Armstrong*. Accordingly, the 2012 Amendment is valid and enforceable.

We do not believe that the Sugar Hill HOA is barred by estoppel or laches from enacting the 2012 Amendment to collect dues on a per-lot basis from owners of multiple contiguous lots that were not conveyed by the Developer. It is of no consequence that the Sugar Hill HOA did not collect dues from these owners on a per-lot basis prior to the passage of the 2012 Amendment. The Sugar Hill HOA is not currently collecting dues in accordance with the original 1997 provision that it failed to enforce, but rather in accordance with the more recent 2012 Amendment, which we have held the Sugar Hill HOA was empowered to enact.

IV. Conclusion

We affirm the trial court's conclusion that the statement recorded in the minutes of the 1997 Sugar Hill HOA meeting, requiring a 100% vote to amend the Declaration, is unenforceable. We affirm the trial court's conclusion that the provisions of N.C. Gen. Stat. § 47F-2-117 apply to the Sugar Hill HOA, empowering the Sugar Hill HOA to amend the Declaration by a 67% vote. And we affirm the trial court's conclusion that the 2012 Amendment is valid and enforceable.

AFFIRMED.

Judges DAVIS and ZACHARY concur.

LOVIN v. CHEROKEE CTY.

[248 N.C. App. 527 (2016)]

RONALD KEITH LOVIN, PLAINTIFF
v.
CHEROKEE COUNTY, RANDY WIGGINS, COUNTY MANAGER, IN HIS OFFICIAL CAPACITY, CANDY R. ANDERSON, CHEROKEE COUNTY FINANCE DIRECTOR, IN HER OFFICIAL CAPACITY, MELODY JOHNSON, CHEROKEE COUNTY HUMAN RESOURCES DIRECTOR, IN HER OFFICIAL CAPACITY, AND ROY G. DICKEY; DANIEL M. EICHENBAUM; DAVID F. MCKINNON (C.B. MCKINNON); CALVIN H. STILES; GARY W. WESTMORELAND, CHEROKEE COUNTY-COUNTY COMMISSIONERS, EACH IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS, DEFENDANTS

No. COA15-1350

Filed 2 August 2016

Police Officers—retirement—service with multiple agencies

The trial court erred by granting partial summary judgment to plaintiff law enforcement officer in an action to determine the amount of his retirement where he had served in different agencies. Plaintiff was an elected Sheriff when he retired but had been a local police officer and state trooper, and as such, had been a member of the Teachers' and State Employees Retirement System (TSERS). However, he began a beneficiary of TSERS, and thus not a member, before he retired as sheriff. His special separation allowance from the County was therefore based only on his service with the County.

Appeal by defendants from order entered 14 October 2015 by Judge Jeff Hunt in Cherokee County Superior Court. Heard in the Court of Appeals 25 May 2016.

Frank G. Queen, PLLC, by Frank G. Queen, and David A. Wijewickrama for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, LLP, by Sean F. Perrin, for defendants-appellants.

ELMORE, Judge.

Defendants appeal from the trial court's order of partial summary judgment awarding plaintiff a special separation allowance for 36 years of creditable service through two North Carolina retirement systems: TSERS and LGERS. On appeal, defendants argue that because plaintiff was not a member of TSERS when he retired, he was not entitled to receive a special separation allowance for his service under TSERS. We agree and reverse the trial court's order.

I. Background

Ronald Keith Lovin (plaintiff) served as a Hickory police officer for 14 months and a North Carolina state trooper for 22 years and 10 months. During this time, plaintiff was a member of the Teachers' and State Employees' Retirement System (TSERS). In 2009, however, he began drawing his retirement benefits from TSERS.

In 2002, plaintiff was elected sheriff of Cherokee County where he served for approximately 12 years. As sheriff, plaintiff was a member of the Local Government Employment Retirement System (LGERS). His term ended on 1 December 2014, and he retired in January 2015. Upon plaintiff's retirement, the Cherokee County human resources director, Melody Johnson, determined that he was eligible for a special separation allowance under N.C. Gen. Stat. § 143-166.42. The County paid plaintiff based on his 12 years of LGERS service, but excluded his nearly 24 years of TSERS service because he was not a member of TSERS when he retired.[1]

Plaintiff sued the County and various County officials (defendants), alleging that defendants miscalculated the correct amount of his special separation allowance. Plaintiff argued that his special separation allowance should be based on 36 years of creditable service, representing the 12 years of LGERS service and the 24 years of TSERS service. The parties moved for partial summary judgment on plaintiff's claim for declaratory relief. The trial court granted plaintiff's motion, concluding that plaintiff's special separation allowance should be based on his 36 years of total service and not merely his 12 years of service as a member of LGERS.

Defendants appealed, arguing that the trial court erred in granting plaintiff's motion for partial summary judgment and denying defendants' motion for the same. The court certified the order for immediate appeal pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. Because the judgment was final as to plaintiff's claim for declaratory relief, we have jurisdiction to review the merits. N.C. Gen. Stat. § 1A-1, Rule 54(b) (2015); *Tridyn Indus., Inc. v. Am. Mut. Ins. Co.*, 296 N.C. 486, 491, 251 S.E.2d 443, 447 (1979).

II. Discussion

The sole issue is whether plaintiff's special separation allowance should be based on 36 years of service, which includes 24 years of state

1. Plaintiff had 23.6667 years of service with TSERS and 12.0833 years of service with LGERS. We have rounded these numbers to 24 and 12, respectively, for ease of reading.

service through TSERS and 12 years of local government service through LGERS, or just 12 years of service through LGERS.

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

This case begins and ends with the statutory language. "When the language of a statute is clear and unambiguous, there is no room for judicial construction, and the courts must give it its plain and definite meaning." *Lemons v. Old Hickory Council, Boy Scouts of Am., Inc.*, 322 N.C. 271, 276, 367 S.E.2d 655, 658 (1988) (citations omitted). "[A] statute clear on its face must be enforced as written." *Bowers v. City of High Point*, 339 N.C. 413, 419–20, 451 S.E.2d 284, 289 (1994) (citation omitted). If a statute "contains a definition of a word used therein, that definition controls." *In re Appeal of Clayton-Marcus Co., Inc.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974) (citation omitted).

Chapter 143, Article 12D grants a special separation allowance for qualifying law enforcement officers upon their retirement. N.C. Gen. Stat. § 143-166.40–42 (2015). An eligible officer is entitled to receive, beginning in the month he retires, "an annual separation allowance equal to eighty-five hundredths percent (0.85%) of the annual equivalent of the base rate of compensation most recently applicable to him *for each year of creditable service*." N.C. Gen. Stat. § 143-166.42(a) (2015) (emphasis added). "Creditable service" is defined as "the service for which credit is allowed *under the retirement system of which the officer is a member*." N.C. Gen. Stat. § 143-166.42(b) (2015) (emphasis added). The two retirement systems in issue are TSERS and LGERS.

A. Teachers' and State Employees' Retirement System (TSERS)

Defendants argue that because plaintiff was not a "member" of TSERS when he retired, he was not entitled to receive a special separation allowance for his service through TSERS as a police officer and a state trooper.

A TSERS "member" is "any teacher or State employee included in the membership of the System." N.C. Gen. Stat. § 135-1(13) (2015). "System," as that term is used in Chapter 135, refers specifically to TSERS. N.C. Gen. Stat. § 135-1(22) (2015). If a member withdraws his accumulated contributions or becomes a beneficiary, he is no longer a

member of TSERS. N.C. Gen. Stat. § 135-3(3) (2015). "Beneficiary" is defined as "any person in receipt of a pension, an annuity, a retirement allowance or other benefit as provided by this Chapter." N.C. Gen. Stat. § 135-1(6) (2015).

In 2009, prior to his retirement from the sheriff's department, plaintiff began receiving retirement benefits from TSERS. At that point, he became a "beneficiary" and ceased to be a "member" of TSERS. Plaintiff essentially concedes that he was not a member of TSERS when he retired, but argues that "creditable service," as defined in section 143-166.42(b), should be interpreted as "service for which credit is allowed under the retirement system of which the officer is a member *when the credit is accumulated*." But that is not how the statute is written.

Based on its definition, membership in TSERS is not perpetual. Instead, it may terminate upon the happening of some event, e.g., withdrawing contributions or receiving retirement benefits. Subsections 143-166.42(a) and (b) couch creditable service in terms of *current membership* in the system at the time of retirement. The legislature could have easily defined creditable service under Chapter 143 in the manner urged by plaintiff, but it did not. In computing plaintiff's creditable service, therefore, his 24 years of service under TSERS should have been excluded.

B. Local Government Employees' Retirement System (LGERS)

Defendants do not dispute that plaintiff is a member of LGERS. Accordingly, for the purpose of calculating the special separation allowance, we must determine plaintiff's creditable service under LGERS.

In LGERS, "creditable service" means the sum of three things: (1) "prior service"; (2) "membership service"; and (3) "service, both noncontributory and purchased, for which credit is allowable as provided in G.S. 128-26." N.C. Gen. Stat. § 128-21(8) (2015). "Prior service" means "the service of a member rendered before the date he becomes a member of the [LGERS], certified on his prior service certificate and allowable as provided by G.S. 128-26." N.C. Gen. Stat. § 128-21(17), (21) (2015). "Membership service" means "service as an employee rendered while a member of the [LGERS] or membership service in a North Carolina Retirement System that has been transferred into [LGERS]." N.C. Gen. Stat. § 128-21(14), (21) (2015). Section 128-26 gives participating employers the option to "allow prior service credit to any of its employees" for "earlier service to the aforesaid employer; or their earlier service to any other employer as . . . defined in G.S. 128-21(11); or, their earlier service to any state, territory, or other governmental subdivision of the United

States other than this State." N.C. Gen. Stat. § 128-26(a) (2015). The statute also allows members to transfer to LGERS their credits for membership and prior service in TSERS, N.C. Gen. Stat. § 128-34(b) (2015), and provides for situations in which an employee may purchase creditable service, *see e.g.*, N.C. Gen. Stat. § 128-26(h1) (2015).

Plaintiff has 12 years of membership service in LGERS, calculated from the time he became sheriff in December 2002 until his retirement in January 2015. According to the undisputed statements in Ms. Johnson's affidavit, however, the County never issued plaintiff a prior service certificate pursuant to section 128-26(e), plaintiff never transferred membership of his TSERS service to LGERS pursuant to section 128-34, and the County never gave plaintiff credit for prior service pursuant to section 128-26(a). Plaintiff does not dispute these facts or otherwise claim any prior service or service allowable under section 128-26. Therefore, plaintiff's creditable service under LGERS is limited to his 12 years of membership service as sheriff.

III. Conclusion

The trial court erred in granting partial summary judgment in favor of plaintiff. His special separation allowance should have been based on 12.0833 years of creditable service because plaintiff was not a member of TSERS when he retired. The trial court's order is reversed.

REVERSED.

Judges DAVIS and DIETZ concur.

OCRACOMAX, LLC, PLAINTIFF-APPELLEE
v.
CHRISTOPHER M. DAVIS AND WIFE, JENNIFER L. DAVIS, OCRACOKE HORIZONS UNIT OWNERS ASSOCIATION, INC., DEFENDANTS-APPELLANTS

No. COA15-1171

Filed 2 August 2016

Declaratory Judgments—judgment on pleadings—standing—statute of limitations—estoppel—laches—waiver

The trial court did not err in a declaratory judgment action by granting plaintiff's motion for judgment on the pleadings and denying defendants' motion to dismiss. Plaintiff had standing to sue defendant homeowners' association, and plaintiff's complaint was not barred by the statute of limitations. Defendant's affirmative defenses of estoppel, laches, and waiver were inapplicable.

Appeal by defendants from Order entered 18 June 2015 by Judge Wayland J. Sermons, Jr. in Hyde County Superior Court. Heard in the Court of Appeals 28 April 2016.

L. Phillip Hornthal III for plaintiff-appellee.

Vandeventer Black LLP, by Kevin A. Rust and Wyatt M. Booth, for defendants-appellants.

ELMORE, Judge.

Ocracomax, LLC (plaintiff) filed a complaint on 26 February 2015 against Christopher M. Davis and wife, Jennifer L. Davis, and Ocracoke Horizons Unit Owners Association, Inc. (defendants) seeking a declaratory judgment and a mandatory injunction. Defendants appeal from the trial court's order granting plaintiff's motion for judgment on the pleadings and denying defendants' motion to dismiss. After careful review, we affirm.

I. Background

The issue in this case involves two condominium unit owners at Ocracoke Horizons Condominiums who were unable to reach an agreement regarding two parking spaces in the covered garage in their shared building. Ocracoke Horizons Condominiums is a condominium complex on Ocracoke Island and was created pursuant to Chapter 47C of the

North Carolina General Statutes (The North Carolina Condominium Act) and by virtue of a Condominium Declaration (Declaration), recorded 30 July 1991 in the Hyde County Register of Deeds.

Plaintiff recorded its deed for unit 1B on 20 May 2011, and the Davises recorded their deed for unit 1A on 19 January 2012. Both deeds contain the following language: "Each Unit is conveyed subject to that 'Condominium Declaration' and all the terms and provisions thereof as recorded in Book 140, beginning at page 834, Hyde County Registry[.]" The Declaration lists "Limited Common Elements" in Article III, Section 1, including "one parking space large enough for two average-sized (10' x 20' each) passenger cars per Unit[.]" The shared, covered garage for units 1A and 1B contains two adjacent parking spaces, as described above. There is no specific allocation or assignment of a particular parking space as between units 1A and 1B.

In plaintiff's complaint, it alleged the following: The Davises' predecessor, who originally owned both units, built a shed on part of one of the parking spaces. The Davises maintain ownership of the shed and claim they are entitled to both the full parking space and the portion of the second parking space that contains the shed. The Davises' concurrent use of the shed and full parking space is contrary to plaintiff's property rights afforded in the limited common elements as defined by Article III of the Declaration. The Association, through its President John D. Wooton, the law partner of Christopher Davis, has declined to enforce plaintiff's right to parking or take action against the Davises.

Accordingly, plaintiff alleged it "is entitled to a judgment declaring that the nonconforming shed is a change in the appearance of the Common Elements or the exterior appearance of a Unit . . . as prohibited by the Declaration." Additionally, "plaintiff is entitled to a judgment declaring its right to a parking space appurtenant to plaintiff's unit . . . and/or requiring defendants Davis to remove the non-conforming structure, the shed." In its second claim, plaintiff alternatively requests a mandatory injunction ordering the Davises or the Association to remove the shed.

In defendants' answer and motion to dismiss, they argue that plaintiff lacks standing to sue the Association and that plaintiff's complaint is barred by the statute of limitations. Defendants also assert the affirmative defenses of estoppel, the doctrine of laches, and waiver. Plaintiff moved for judgment on the pleadings, and after a hearing on the motions, the Hyde County Superior Court entered an order on 18 June 2015 as follows:

(1) Defendant's Motion to dismiss is DENIED;

(2) Plaintiff's Motion for Judgment on the Pleadings is GRANTED;

(3) The Court declares that the prior built shed referencedin the pleadings in the garage serving Units 1A and 1B of Ocracoke Horizons Condominiums was a change in the appearance and use of the limited common areas as set forth in Article III of Section 1 of the Condominium Declaration recorded July 30, 1992[1] in Volume 140, Page 834 of the Hyde County Registry.

(4) The Court further declares and orders that the plaintiff is entitled to one parking place large enough for two averaged-sized (ten feet by twenty feet) passenger cars, and that plaintiff is entitled to that parking within the confines of that limited common area denominated as "Garage" for Units 1A and 1B as shown on sheet three of the plat for Ocracoke Horizon Condominiums, as recorded in Condominium Cabinet C, page 383-C, which has not been altered by the erection of a shed.

(5) Costs are taxed to the defendants.

(6) Defendant's oral motion for stay of this Order pending appeal is DENIED.

Defendants appeal.

II. Analysis

Pursuant to Rule 12(c) of our Rules of Civil Procedure, "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." N.C. Gen. Stat. § 1A-1, Rule 12(c) (2015). "Judgments on the pleadings are disfavored in law, and the trial court must view the facts and permissible inferences in the light most favorable to the non-moving party." *Groves v. Cmty. Hous. Corp.*, 144 N.C. App. 79, 87, 548 S.E.2d 535, 540 (2001) (citing *Flexolite Elec. v. Gilliam*, 55 N.C. App. 86, 88, 284 S.E.2d 523, 524 (1981)). Therefore, the motion " 'should only be granted when the movant clearly establishes that no material issue of fact remains to be resolved and that the

1. The record reveals the Declaration was recorded 30 July 1991.

movant is entitled to judgment as a matter of law.' " *New Bar P'ship v. Martin*, 221 N.C. App. 302, 306, 729 S.E.2d 675, 680 (2012) (quoting *Cash v. State Farm Mut. Auto. Ins. Co.*, 137 N.C. App. 192, 201–02, 528 S.E.2d 372, 378, *aff'd per curiam*, 353 N.C. 257, 538 S.E.2d 569 (2000)). We review a trial court's order granting a motion for judgment on the pleadings *de novo*. *Id.* at 307, 729 S.E.2d at 680.

The authority of a court to enter a declaratory judgment is provided for in N.C. Gen. Stat. § 1-253 (2015), which provides,

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Furthermore,

> [a]ny person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity . . . and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2015).

Our General Assembly has provided that Article 26, governing declaratory judgments, "is to be liberally construed and administered." N.C. Gen. Stat. § 1-264 (2015). "[I]ts purpose is to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" *Id.* Our Supreme Court has stated, "While the statute does not expressly so provide, this Court has held on a number of occasions that courts have jurisdiction to render declaratory judgments only when the pleadings and evidence disclose the existence of an actual controversy between parties having adverse interests in the matter in dispute." *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 234, 316 S.E.2d 59, 61 (1984) (citations omitted).

As stated above, pursuant to Article III of the Declaration, the limited common elements consist of, *inter alia*, "one parking space large enough for two average-sized (10' x 20' each) passenger cars per Unit . . . . The above listed Common Elements are located outside the Unit's boundaries, designed to serve a single Unit and allocated exclusively

to that Unit." Article V, entitled "Regulations and Restrictions," provides, "A unit owner may not change the appearance of the Common Elements or the exterior appearance of a Unit or any other portion of the Condominium without permission of the Association as provided in the Bylaws."

The Bylaws provide, "The failure of . . . a Unit Owner to enforce any right, provision, covenant or condition which may be granted by the Condominium Instruments or the Condominium Act shall not constitute a waiver of the right of the . . . Unit Owner to enforce such right, provision, covenant or condition in the future." The Bylaws further state,

> Failure to comply with any of the Condominium Instruments and the Rules and Regulations shall be grounds for relief, including without limitation, an action to recover any sum due for money damages, injunctive relief, . . . any other relief provided for in these Bylaws or any combination thereof and any other relief afforded by a court of competent jurisdiction, all of which relief may be sought . . . by any aggrieved Unit Owner[.]"

A. Waiver

Defendants argue that plaintiff waived its right to enforce the Declaration because it had actual knowledge of the shed prior to purchasing unit 1B, utilized the shed for a number of years, and made no objection to the shed's existence until over three years after its purchase. Defendants claim that any right not illegal or contrary to public policy may be waived. Plaintiff responds by citing the "No Waiver of Rights" clause in the Bylaws and by noting that its primary relief sought was "its right to parking."

Defendants' argument relies on two restrictive covenants cases. In *Medearis v. Trustees of Myers Park Baptist Church*, 148 N.C. App. 1, 13–14, 558 S.E.2d 199, 207–08 (2001), the plaintiffs were deemed to have waived their rights to enforce residential restrictions, which would have imposed an undue hardship on the defendants, who already spent over $1.5 million in acquiring property and with whom the plaintiffs negotiated repeatedly to redesign the construction plans. In *Rodgerson v. Davis*, 27 N.C. App. 173, 179, 218 S.E.2d 471, 475 (1975), this Court stated, "Where restrictions have been imposed according to a general plan, one of the grantees of lots subject thereto, who has himself violated such restrictions, will not be allowed in equity to complain against similar violations by other grantees."

Here, in contrast, plaintiff is not attempting to enforce a restrictive covenant. The trial court granted plaintiff's primary relief requested, that is, a declaratory judgment acknowledging its right to one parking space large enough to fit two passenger cars. Per the Bylaws listed above, plaintiff's alleged failure to immediately enforce its delineated right shall not constitute a waiver of its right to enforce it in the future. As defendants point out, plaintiff's purchase agreement states, "[T]he storage shed immediately adjacent to unit 1A is the property of unit 1A." Plaintiff's failure to object to the shed, however, did not waive plaintiff's separate right to one parking space, which remained available in the covered garage despite the shed.

In defendants' reply brief, they assert that plaintiff "had actual or constructive notice of the shed and parking issues prior to purchase." As plaintiff's counsel stated at the hearing, though, "the notice that [plaintiff] had was that there was a shed that the Davises claimed they owned that sat in the middle of a parking place, so what does that tell [plaintiff]? 'Oh, we're good. We've got the other side, so we got what we want, no problem[.]' " Regardless of whether plaintiff had notice of "parking issues," such fact does not waive plaintiff's right, under the Declaration, to one full parking space.

B. Quasi-Estoppel

Defendants argue that plaintiff's complaint is barred by the doctrine of quasi-estoppel or estoppel by benefit because plaintiff has used the shed and is now taking an inconsistent position after accepting a benefit.

Under a quasi-estoppel or estoppel by benefit theory, "a party who accepts a transaction or instrument and then accepts benefits under it may be estopped to take a later position inconsistent with the prior acceptance of that same transaction or instrument." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 18, 591 S.E.2d 870, 881–82 (2004) (citations omitted).

Here, it is undisputed that the Davises, as owners of Unit 1A, own the shed. There is no evidence, however, that plaintiff accepted a benefit under a transaction or an instrument. The record reveals only that plaintiff's purchase agreement stated that "the storage shed immediately adjacent to unit 1A is the property of unit 1A." The record does not reveal that plaintiff received a benefit under the purchase agreement or that plaintiff is taking a position inconsistent with a prior acceptance of that or any other instrument. Accordingly, plaintiff is not estopped from seeking a declaration of its right to one parking space.

C. Standing

Defendants claim that plaintiff lacks standing to sue the Association, citing N.C. Gen. Stat. § 55A-7-40(a). Plaintiff responds by citing the Declaration, which provides that relief may be brought by any aggrieved unit owner.

Chapter 55A of our General Statutes contains the North Carolina Nonprofit Corporation Act, and N.C. Gen. Stat. § 55A-7-40 covers derivative proceedings. "A derivative proceeding is a civil action brought by a shareholder in the right of a corporation, . . . while an individual action is one a shareholder brings to enforce a right which belongs to him personally." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 395, 537 S.E.2d 248, 253 (2000) (citations and quotations omitted). As this is not a derivative proceeding, N.C. Gen. Stat. § 55A-7-40 does not apply. As stated above, the Bylaws specifically provide that any aggrieved unit owner may seek relief for failure to comply with any of the condominium instruments, rules, and regulations, including injunctive relief and any other relief afforded by a court of competent jurisdiction. Accordingly, defendants' argument fails.

D. Doctrine of Laches

Defendants argue that the doctrine of laches bars plaintiff's claims because plaintiff waited nearly four years after purchasing the unit to bring suit.

This Court has previously stated,

> To establish the affirmative defense of laches, our case law recognizes that 1) the doctrine applies where a delay of time has resulted in some change in the condition of the property or in the relations of the parties; 2) the delay necessary to constitute laches depends upon the facts and circumstances of each case; however, the mere passage of time is insufficient to support a finding of laches; 3) the delay must be shown to be unreasonable and must have worked to the disadvantage, injury or prejudice of the person seeking to invoke the doctrine of laches; and 4) the defense of laches will only work as a bar when the claimant knew of the existence of the grounds for the claim.

MMR Holdings, LLC v. City of Charlotte, 148 N.C. App. 208, 209–10, 558 S.E.2d 197, 198 (2001) (citations omitted).

Here, defendants argue, "Plaintiff could have easily raised this issue at the time of their purchase, or at any time shortly thereafter. Instead, Plaintiff waited until nearly four (4) years after the Davis Defendants purchased their unit to bring this action." Defendants focus only on the passage of time. It is well established, however, that "the mere passage of time is insufficient to support a finding of laches." *MMR Holdings, LLC*, 148 N.C. App. at 209, 558 S.E.2d at 198. Defendants fail to allege that plaintiff's delay worked to their disadvantage, injury, or prejudice. Rather, as counsel for defendants conceded at the hearing, the shed was built "fifteen years ago before [the Davises] ever owned it." Accordingly, defendants' defense fails.

E. Statute of Limitations

Lastly, defendants claim that the trial court erred in granting plaintiff's motion because its complaint is barred by the statute of limitations. Defendants state that the statute of limitations for an action for injury to any incorporeal hereditament under N.C. Gen. Stat. § 1-50(a)(3) is six years. Defendants reason that, because the shed has existed for more than six years, the statute of limitations has run, citing *Duke Energy Carolinas, LLC v. Gray*, ___ N.C. App. ___, 766 S.E.2d 354 (COA 14-283) (Dec. 2, 2014), *review allowed*, 772 S.E.2d 857 (2015) and 773 S.E.2d 57 (2015). Plaintiff argues that an incorporeal hereditament is a restriction on use and does not apply here. Further, plaintiff claims that even if it did apply, plaintiff brought suit within six years of purchasing unit 1B.

"The application of any statutory or contractual time limit requires an initial determination of when that limitations period begins to run. A cause of action generally accrues when the right to institute and maintain a suit arises." *Duke Energy Carolinas, LLC*, ___ N.C. App. at ___, 766 S.E.2d at 358 (quoting *Register v. White*, 358 N.C. 691, 697, 599 S.E.2d 549, 554 (2004)) (quotations omitted).

The term "incorporeal hereditament" has been defined as:

> Anything, the subject of property, which is inheritable and not tangible or visible. A right issuing out of a thing corporate (whether real or personal) or concerning or annexed to or exercisable within the same. A right growing out of, or concerning, or annexed to, a corporeal thing, but not the substance of the thing itself.

Karner v. Roy White Flowers, Inc., 134 N.C. App. 645, 649, 518 S.E.2d 563, 567 (1999) (quoting Black's Law Dictionary 726 (6th ed. 1990)), *rev'd in part on other grounds*, 351 N.C. 433, 527 S.E.2d 40 (2000).

In *Duke Energy Carolinas, LLC v. Gray*, the plaintiff was granted a 200-foot easement in 1951. ___ N.C. App. at ___, 766 S.E.2d at 356. In 2006, Wieland Homes built a house on a lot, which included a strip of land located within the plaintiff's easement. *Id.* The house was complete by 11 October 2006, the date the County issued a Certificate of Occupancy for the house, and the defendant purchased the house in 2007. *Id.* The plaintiff wrote to the defendant in 2010, informing him of the encroachment, however, the plaintiff did not file suit until 12 December 2012. *Id.* at ___, 766 S.E.2d at 356–57. This Court affirmed the trial court's grant of summary judgment in favor of the defendant, holding "that the statute of limitations for a claim based on injury to an easement runs from the time that the claim accrues, even if a plaintiff is not aware of the injury at that time." *Id.* at ___, 766 S.E.2d at 359. Accordingly, we rejected the plaintiff's argument that "the statute of limitations does not begin to run until the encroachment on an easement is known or should reasonably be known." *Id.*

Relying on that holding, defendants claim "the Shed has been in existence at its current location for more than six (6) years. In fact, the Shed has existed for some fifteen (15) year period prior to Plaintiff's purchase of its unit. As such, the statute of limitations on Plaintiff's Complaint has run." (Internal citations omitted). We acknowledge that plaintiff's primary relief requested was its right to one full parking space. A significant distinction between the facts of *Duke Energy Carolinas, LLC* and the facts of this case is that here, plaintiff did not own its unit when the shed was built. Unlike in *Duke Energy Carolinas, LLC* where the plaintiff had continuously maintained the easement when the encroachment occurred, here plaintiff did not acquire an ownership interest in its unit until roughly fifteen years after the shed was built.

We agree with plaintiff that, assuming the six year statute of limitations applies, it could not begin to run until plaintiff purchased unit 1B, which was in May 2011. As counsel for plaintiff stated, when the shed was built, "[t]here was unity of ownership, so there was no damage to anybody. The same guy owned both places." Accordingly, because plaintiff filed its complaint within six years of purchasing unit 1B, its claim is not barred by the statute of limitations.

F. Motion to Dismiss

Defendants briefly argue that the trial court erred in denying their motion to dismiss. An order denying a motion to dismiss, however, is generally not appealable. *Thompson v. Norfolk S. Ry. Co.*, 140 N.C. App. 115, 121, 535 S.E.2d 397, 401 (2000) (citing *Country Club of Johnston*

County, Inc. v. U.S. Fidelity and Guar. Co., 135 N.C. App. 159, 519 S.E.2d 540 (1999)). Accordingly, this portion of defendants' appeal is not properly before us, and we are precluded from reviewing the merits.

III. Conclusion

For the reasons stated throughout, the trial court did not err in granting plaintiff's motion for judgment on the pleadings.

AFFIRMED.

Judges DILLON and ZACHARY concur.

VIRGINIA RADCLIFFE, PLAINTIFF
v.
AVENEL HOMEOWNERS ASSOCIATION, INC., CARMELO (TONY) BUCCAFURRI, STEPHEN MURRAY, THOMAS DINERO, DAVID HULL, RICHARD PROGELHOF, AND RON ZANZARELLA, DEFENDANTS

No. COA15-884

Filed 2 August 2016

1. Appeal and Error—interlocutory orders—common factual nexus—possibility of inconsistent verdicts

The Court of Appeals had jurisdiction over plaintiff's appeal and defendants' cross-appeal even though they were both from an interlocutory order. Plaintiff sufficiently alleged a common factual nexus between all her claims such that there existed a possibility of inconsistent verdicts absent immediate appeal of the trial court's orders.

2. Tort Claims Act—discrimination based on race, religion, ethnicity, or gender—collateral estoppel

The trial court did not err by dismissing plaintiff's claim under N.C.G.S. § 99D-1 involving motivation by either a racial, religious, ethnic, or gender-based discriminatory animus. Plaintiff was collaterally estopped from asserting this claim because this issue was already fully determined in the federal action.

3. Emotional Distress—intentional infliction of emotional distress—statute of limitations—tolled claims

The trial court did not err by dismissing plaintiff's claims for intentional infliction of emotional distress (IIED) against defendant

homeowners' association based on expiration of the pertinent statute of limitations. However, the trial court erred by dismissing IIED claims against defendant individuals because those actions were tolled during the pendency of the federal action.

4. Assault—dismissal of claims—expiration of statute of limitations

The trial court did not err by dismissing plaintiff's assault claims against defendants Zanzarella, Progelhof, Buccafurri, and Hull, and all but one of her assault claims against defendant Murray based on expiration of the pertinent statute of limitations.

5. Wrongful Interference—tortious interference with economic advantage—statute of limitations—tolled claims

The trial court did not err by dismissing plaintiff's tortious interference with prospective economic advantage (TIPEA) claims against defendant homeowners' association and defendant Dinero as time barred. However, the trial court erred by dismissing plaintiff's TIPEA claims against defendants Hull, Progelhof, Zanzarella, Murray, and Buccafurri because those actions were tolled during the pendency of the federal action.

6. Wrongful Interference—tortious interference with economic advantage—prospective employment

The trial court erred by dismissing plaintiff's tortious interference with prospective economic advantage claims against defendants Hull, Progelhof, Zanzarella, and Murray based on plaintiff's prospective employment with the United Methodist Church.

7. Wrongful Interference—tortious interference with economic advantage—prospective employment—failure to make specific factual allegations

The trial court did not err by dismissing plaintiff's tortious interference with prospective economic advantage (TIPEA) claims against defendants Hull, Progelhof, Zanzarella, and Murray based on plaintiff's prospective employment with the Boys and Girls Home. Plaintiff failed to make specific factual allegations.

8. Emotional Distress—negligent infliction of emotional distress—motion to dismiss—intentional conduct

The trial court did not err by dismissing plaintiff's negligent infliction of emotional distress claims. Plaintiff's allegations in her second amended complaint repeatedly referenced a pattern of intentional conduct by defendants.

9. Parties—necessary party—personal claims—trust

The trial court did not err by denying defendants' Rule 12(b)(7) motions to dismiss based on an alleged failure to join a necessary party. Plaintiff's claims were personal and unique to her, and thus, the trust could not be characterized as a necessary party.

Appeal by plaintiff and cross-appeal by defendants from orders entered 21 August 2014 and 4 February 2015 by Judge D. Jack Hooks, Jr. in New Hanover County Superior Court. Heard in the Court of Appeals 13 January 2016.

Hester, Grady & Hester, P.L.L.C., by H. Clifton Hester, for Virginia Radcliffe.

StephensonLaw, LLP, by James B. Stephenson II and Philip T. Gray, for Avenel Homeowners Association, Inc.

Ennis, Baynard, Morton, & Medlin, PA, by Donald W. Ennis, for Carmelo Buccafurri and Stephen Murray.

Crossley, McIntosh, Collier, Hanley & Edes, PLLC, by Clay Allen Collier, for Thomas Dinero.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Reid Russell, and Brown, Crump, Vanore & Tierney, L.L.P., by Derek M. Crump, for David Hull.

Anderson, Johnson, Lawrence, & Butler, LLP, by Stacey E. Tally, for Richard Progelhof.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Jeffrey H. Blackwell, for Ron Zanzarella.

DAVIS, Judge.

Virginia Radcliffe ("Plaintiff") initiated this action alleging a violation of her civil rights and the infliction of various types of tortious conduct against her by the Avenel Homeowners Association, Inc. ("the Association"), Carmelo Buccafurri ("Buccafurri"), Stephen Murray ("Murray"), Thomas Dinero ("Dinero"), David Hull ("Hull"), Richard Progelhof ("Progelhof"), and Ron Zanzarella ("Zanzarella") (collectively "Defendants"). Plaintiff appeals from two orders of the trial court

dismissing a number of the claims asserted by her in this action pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. After careful review, we (1) affirm the trial court's 21 August 2014 order; (2) reverse the portions of the trial court's 4 February 2015 order dismissing (a) Plaintiff's claims for intentional infliction of emotional distress against Buccafurri, Hull, Dinero, Progelhof, Zanzarella, and Murray; and (b) Plaintiff's tortious interference with prospective economic advantage claims (related to her prospective employment with the United Methodist Church) against Hull, Murray, Progelhof, and Zanzarella; and (3) remand for further proceedings.

Factual and Procedural Background

I. Allegations of Plaintiff's Second Amended Complaint

We have summarized below the allegations of Plaintiff's second amended complaint,[1] which we take as true in reviewing the trial court's Rule 12(b)(6) orders. *Feltman v. City of Wilson*, __ N.C. App. __, __, 767 S.E.2d 615, 617 (2014).

In March of 2001, Plaintiff moved to the Avenel subdivision ("Avenel") in New Hanover County, North Carolina in order to pursue a career with the United Methodist Church ("the UMC"). Plaintiff had prospects for employment with a local chapter of the UMC and was a certified candidate for ordination as a minister, having recently graduated from Yale Divinity School.

As a resident of Avenel, Plaintiff was required to join the Association and be subject to its covenants and restrictions. In return, Plaintiff was entitled to utilize certain common areas within Avenel, including a pier, a floating dock, a gazebo, an entrance driveway, and several parking lots.

During the time period in which Plaintiff lived in Avenel, the individual Defendants held various positions on the Association's board of directors. Three of the individual Defendants — Buccafurri, Murray, and Hull — were also Plaintiff's neighbors. Beginning in the spring of 2003, Defendants allegedly embarked on a campaign to force Plaintiff to leave Avenel and "engaged in a systemic pattern of harassment, threats, violence, and intimidation" designed to induce Plaintiff to move out of the subdivision.

---

1. Because of the numerous incidents of harassment described throughout Plaintiff's second amended complaint, we reference only a portion of them here as representative samples of her allegations. At various times throughout this opinion, we discuss other incidents alleged by Plaintiff.

On 27 March 2003, Plaintiff was walking on the street in front of her house when Zanzarella drove an SUV directly at her while Progelhof sat in the front passenger seat. Buccafurri and Murray confronted Plaintiff at the Avenel gazebo on or about 25 May 2003. They verbally berated her, stating that they (1) "had a plan to get rid of [her] or to cause her to leave Avenel"; (2) "were going to ruin [her] reputation and her career in Christian ministry"; (3) "would turn all of [her] friends against her"; (4) "would fix it so [she] could not walk the streets of Avenel unmolested"; (5) "would drive [her] into a depression so deep that she would commit suicide"; and (6) "would kill [her] to get her out of her house."

Hull and Progelhof on several occasions told Plaintiff that "they did not want a 'helpless female' living in the neighborhood." On 20 December 2003, Zanzarella yelled at her: "Hey you fat pig, you better get out of the neighborhood." On another occasion, Zanzarella, Dinero, Murray, and Buccafurri told Plaintiff to " '[e]at s*** and die[.]' " At one point, Hull also said to Plaintiff that "he could fix it so he could legally take her house away from her and there would be nothing she could do to stop him[.]" In addition, he uttered racial epithets towards her.

At one point in December of 2003, Buccafurri and Dinero shouted disparaging remarks at Plaintiff based on her religious beliefs while she was washing her car in her driveway. That same day, Buccafurri, Dinero, and Murray strung Christmas lights on the bushes outside of Murray's and Buccafurri's home (facing Plaintiff's house) that "[w]hen illuminated . . . [were] about 20 feet long and 8 feet high and read WWJD (standing for What Would Jesus Do)." On one or more occasions, Plaintiff was told by various Defendants that "she was one of those 'born again' Christians who would bring other undesirable people into the Avenel community."

On 31 December 2003, Buccafurri accosted Plaintiff while she was walking in Avenel and chased her, yelling "I'm gonna kill you, you Christian B****." Plaintiff ran to a nearby neighbor's house and called the police.

On 24 February 2004, the Association held a meeting, which Plaintiff and some or all of the individual Defendants attended. During the meeting, Zanzarella shouted that "[Plaintiff] doesn't deserve to live in Avenel[.]" He and Murray then both yelled "[e]veryone thinks you are crazy" at Plaintiff. Murray shouted "[l]et's get rid of her" to the other attendees of the meeting. At that point, Zanzarella approached Plaintiff with clenched fists and had to be physically removed from the meeting space and taken to the parking lot.

On 8 April 2004, Murray cornered Plaintiff as she was walking on the pier by the Avenel boat facility. He made "crude, sexual, and violent gestures toward [her] while making threats." Murray proceeded to "beat [Plaintiff and] then shouted at [her] 'You'll never be a minister now' after he battered [her]." Murray threw Plaintiff to the ground, kicked her, and jumped on her. Plaintiff was transported to a local hospital via ambulance where she was informed she needed surgery for broken ribs, torn knee ligaments, deep bruising, bone contusions, and other related injuries. That same day, Murray filed a lawsuit against her in which he falsely claimed she had assaulted and battered him.

On 29 May 2004, Buccafurri and Zanzarella accosted Plaintiff and a friend of hers at the Avenel gazebo, shouting obscenities and threats. They followed Plaintiff and her friend as they were walking back to her house, continuing to shout at and threaten her along the way.

On 23 June 2004, while Plaintiff was at the Avenel gazebo, Hull, Zanzarella, and Progelhof surrounded her and "physically prevented" her from leaving while shouting disparaging and threatening remarks at her. Plaintiff called 911 and received an escort home from law enforcement officers. The following day, Progelhof and Zanzarella instituted criminal proceedings against Plaintiff in which they falsely accused her of communicating threats. That same day, Buccafurri filed false charges against Plaintiff for trespass.

On 18 October 2004, Buccafurri and Murray shouted loudly at Plaintiff and her friend as they stood in Plaintiff's driveway. They "began waving their arms wildly and chased [Plaintiff] and her friend from [her] yard."

At some point in time, Buccafurri sent a packet of documents to UMC representatives containing false information about Plaintiff that was damaging to her reputation "in order to prevent [Plaintiff's] ordination[.]" The UMC did, in fact, revoke Plaintiff's ordination candidate certification on 2 February 2005.[2]

Plaintiff was also denied employment by the Boys and Girls Home of North Carolina ("Boys and Girls Home") — an organization that was a "local Christian ministry." Plaintiff had sought a position as a "mentor supervisor" at the Boys and Girls Home but was denied a job offer on 1 July 2005 due to the false criminal charges previously filed against her

2. An ordination certification is a prerequisite to becoming an ordained minister in the UMC.

by Buccafurri, Progelhof, and Zanzarella. On 18 July 2005, Buccafurri accosted Plaintiff at a local grocery store and stated "that he would make sure she never got a job anywhere."

II. Prior Lawsuits Brought by Plaintiff or on Her Behalf

On 14 June 2006, the North Carolina Human Relations Commission ("the NCHRC") brought a lawsuit ("the NCHRC Lawsuit") on Plaintiff's behalf in Wake County Superior Court asserting a cause of action against Defendants for interference with Plaintiff's civil rights in violation of N.C. Gen. Stat. § 99D-1. On 4 January 2007, the NCHRC lawsuit was voluntarily dismissed.

On 26 March 2007, Plaintiff filed a complaint in the United States District Court for the Eastern District of North Carolina ("the Federal Action") against all of the same individuals and entities named as Defendants in the present action. In her federal complaint, Plaintiff alleged claims for (1) violation of the Fair Housing Act ("FHA") against all Defendants; (2) interference with Plaintiff's civil rights pursuant to N.C. Gen. Stat. § 99D-1 against all Defendants; (3) assault and battery against Murray relating to the 8 April 2004 incident at the pier in which he physically beat her; (4) false imprisonment against Hull, Zanzarella, and Progelhof; (5) malicious prosecution against Murray, Progelhof, Zanzarella, and Buccafurri; (6) intentional infliction of emotional distress ("IIED") against the individual Defendants; (7) negligent infliction of emotional distress ("NIED") against all Defendants; and (8) tortious interference with a prospective economic advantage against Buccafurri, Murray, Hull, Progelhof, and Zanzarella.

All of the defendants filed motions for summary judgment, and on 12 February 2013, the Honorable James C. Fox entered an order granting summary judgment in favor of Defendants on Plaintiff's FHA claim. Having disposed of the only claim asserted by Plaintiff arising under federal law, Judge Fox expressly declined to rule on Plaintiff's supplemental state law claims and dismissed these claims without prejudice.

III. The Present Lawsuit

On 14 March 2013, Plaintiff initiated the present action in New Hanover County Superior Court. On 10 May 2013, Plaintiff filed her first amended complaint, and she amended her complaint once more on 5 August 2013. In her second amended complaint, Plaintiff alleged the following causes of action: (1) IIED claims against all Defendants; (2) assault claims against Progelhof and Zanzarella related to the SUV incident occurring on 27 March 2003 in which Zanzarella drove his

SUV directly at Plaintiff, causing her to run away ("the First SUV Incident"); (3) an assault claim against Zanzarella regarding the incident occurring on 2 June 2004 in which Zanzarella once again drove his SUV toward Plaintiff ("the Second SUV incident"); (4) an assault claim against Buccafurri based on the incident in which he chased her on 31 December 2003 ("the First Chasing Incident"); (5) assault claims against Buccafurri and Murray in connection with the incident in which they chased her on 18 October 2004 ("the Second Chasing Incident"); (6) assault claims against Buccafurri and Zanzarella for the incident occurring at the gazebo on 29 May 2004 where they yelled obscenities at Plaintiff and her friend and followed them home while continuing to verbally berate them ("the First Gazebo Incident"); (7) an assault claim against Murray regarding the incident at the pier on 8 April 2004 during which he physically beat her while simultaneously verbally berating her ("the Pier Incident"); (8) a battery claim against Murray for the Pier Incident; (9) assault claims against Hull, Zanzarella, and Progelhof for the incident at the gazebo on 23 June 2004 during which they prevented her from leaving, requiring her to call 911 for assistance ("the Second Gazebo Incident"); (10) false imprisonment claims against Hull, Zanzarella, and Progelhof for the Second Gazebo Incident; (11) tortious interference with prospective economic advantage claims against all Defendants for interfering with her potential employment contract with the UMC; (12) tortious interference with prospective economic advantage claims against the Association, Buccafurri, Hull, Progelhof, and Zanzarella based on their interference with her potential employment with the Boys and Girls Home; (13) a malicious prosecution claim against Murray due to his filing of criminal charges against Plaintiff for assault and battery shortly after the Pier Incident; (14) a malicious prosecution claim against Progelhof based on his filing of a communicating threats charge against her on 24 June 2004; (15) a malicious prosecution claim against Zanzarella in connection with his filing on 24 June 2004 of a communicating threats charge against her; (16) a malicious prosecution claim against Buccafurri due to his filing of a trespass claim against her on 24 June 2004; (17) NIED claims against all Defendants; and (18) a claim under N.C. Gen. Stat. § 99D-1 against all Defendants alleging a violation of her civil rights.

On 6 September 2013, the Association filed an answer and motion to dismiss Plaintiff's second amended complaint pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted and Rule 12(b)(7) based on Plaintiff's alleged failure to join a necessary party. The individual Defendants subsequently filed answers containing similar motions.

On 16 June 2014, a hearing was held before the Honorable D. Jack Hooks, Jr. On 21 August 2014, Judge Hooks entered an order denying Defendants' Rule 12(b)(7) motions and granting Defendants' motions to dismiss Plaintiff's claims under N.C. Gen. Stat. § 99D-1 pursuant to Rule 12(b)(6).

A second hearing was held before Judge Hooks on 25 September 2014. On 4 February 2015, Judge Hooks entered an order dismissing (1) Plaintiff's IIED claims; (2) all of her assault claims against Progelhof, Zanzarella, Buccafurri, and Hull and all but one of her assault claims against Murray; (3) Plaintiff's tortious interference with prospective economic advantage claims against all Defendants except for Buccafurri with regard to Plaintiff's potential employment with the UMC; (4) her tortious interference with prospective economic advantage claims in connection with her potential employment with the Boys and Girls Home; and (5) Plaintiff's NIED claims.

Plaintiff filed a notice of appeal as to both of Judge Hooks' orders on 5 March 2015. On 18 March 2015, Defendants filed a notice of cross-appeal as to the 21 August 2014 order.

Analysis

I. Appellate Jurisdiction

[1] Initially, we must determine whether we have jurisdiction over Plaintiff's appeal and Defendants' cross-appeal. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("As an initial matter, we must address the extent, if any, to which Defendant's appeal is properly before us. An appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." (citation, quotation marks, and brackets omitted)).

On 15 October 2015, Defendants filed a joint motion to dismiss Plaintiff's appeal on the ground that it is an impermissible interlocutory appeal from orders that are not final judgments. For the reasons set out below, we deny Defendant's motion.

It is undisputed that the present appeal is interlocutory. *See Mecklenburg Cty. v. Simply Fashion Stores, Ltd.*, 208 N.C. App. 664, 667, 704 S.E.2d 48, 51 (2010) ("An order is interlocutory when it does not dispose of the entire case but instead, leaves outstanding issues for further action at the trial level."), *appeal dismissed and disc. review denied*, 365 N.C. 187, 707 S.E.2d 231 (2011). Generally, there is no right of immediate appeal from an interlocutory order. *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990). "An interlocutory

order may be appealed, however, if the order implicates a substantial right of the appellant that would be lost if the order was not reviewed prior to the issuance of a final judgment."[3] *Keesee v. Hamilton*, __ N.C. App. __, __, 762 S.E.2d 246, 249 (2014). It is the appealing party's burden to establish that a substantial right would be jeopardized unless an immediate appeal is allowed. *Embler v. Embler*, 143 N.C. App. 162, 166, 545 S.E.2d 259, 262 (2001).

Our caselaw makes clear that a substantial right is affected "where a possibility of inconsistent verdicts exists if the case proceeds to trial." *Heritage Operating, L.P. v. N.C. Propane Exch., LLC*, __ N.C. App. __, __, 727 S.E.2d 311, 314 (2012) (citation and quotation marks omitted).

> To demonstrate that a second trial will affect a substantial right, [the appellant] must show not only that one claim has been finally determined and others remain which have not yet been determined, but that (1) the same factual issues would be present in both trials *and* (2) the possibility of inconsistent verdicts on those issues exists.

Id. at __, 727 S.E.2d at 314-15 (citation, quotation marks, and brackets omitted).

We have further held that "so long as a claim has been finally determined, delaying the appeal of that final determination will ordinarily affect a substantial right *if* there are overlapping factual issues between the claim determined and any claims which have not yet been determined." *Carcano v. JBSS, LLC*, 200 N.C. App. 162, 168, 684 S.E.2d 41, 47 (2009) (citation and quotation marks omitted). "Issues are the 'same' if facts relevant to their resolution overlap in such a way as to create a risk that separate litigation of those issues might result in inconsistent verdicts." *Hamilton v. Mortg. Info. Serv., Inc.*, 212 N.C. App. 73, 79, 711 S.E.2d 185, 190 (2011).

We are satisfied that Plaintiff has sufficiently alleged a common factual nexus between all of her claims such that there exists a possibility of inconsistent verdicts absent immediate appeal of the trial court's

---

3. An interlocutory order may also be appealed where the trial court certifies the order for immediate appeal pursuant to Rule 54(b). *See Tands, Inc. v. Coastal Plains Realty, Inc.*, 201 N.C. App. 139, 142, 686 S.E.2d 164, 166 (2009) ("[A]n interlocutory order can be immediately appealed if the order is final as to some but not all of the claims and the trial court certifies there is no just reason to delay the appeal pursuant to North Carolina Rules of Civil Procedure, Rule 54(b)." (citation, brackets, and ellipses omitted)). However, in the present case, neither of the trial court's orders contain any such certification.

orders. *See Carcano*, 200 N.C. App. at 168, 684 S.E.2d at 47 ("Because there are overlapping factual issues, inconsistent verdicts could result. We hold, thus, that . . . plaintiff's appeal is properly before us.").

Defendants also argue that Plaintiff's appeal from the trial court's 21 August 2014 order is time-barred. As a result, Defendants contend, the portion of her appeal arising from that order must be dismissed.

Plaintiff filed a notice of appeal on 5 March 2015 that referenced both of the trial court's orders. Therefore, while her appeal of the 4 February 2015 order was timely, her notice of appeal as to the 21 August 2014 order was filed well beyond the applicable thirty-day deadline. *See* N.C.R. App. P. 3(c) ("In civil actions and special proceedings, a party must file and serve a notice of appeal . . . within thirty days after entry of judgment if the party has been served with a copy of the judgment within the three day period prescribed by Rule 58 of the Rules of Civil Procedure[.]").

However, because of the factually overlapping nature of Plaintiff's claims, we elect in the interest of judicial economy to exercise our discretion under Rule 21 of the North Carolina Rules of Appellate Procedure and treat Plaintiff's appeal of the trial court's 21 August 2014 order as a petition for *certiorari*. *See Carolina Bank v. Chatham Station, Inc.*, 186 N.C. App. 424, 428, 651 S.E.2d 386, 389 (2007) ("[B]ecause the case *sub judice* is one of those exceptional cases where judicial economy will be served by reviewing the interlocutory order, we will treat the appeal as a petition for a writ of certiorari and consider the order on its merits."); *In re I.S.*, 170 N.C. App. 78, 84, 611 S.E.2d 467, 471 (2005) ("Failure to comply with the requirements of Rule 3 of our Rules of Appellate Procedure requires the dismissal of the appeal as this rule is jurisdictional. However, under appropriate circumstances this Court is authorized to issue a writ of certiorari to review the orders of a trial tribunal when the right of appeal has been lost due to failure to take timely action. This Court can exercise its discretion and treat an appellant's appeal as a petition for a writ of certiorari." (internal citations omitted)).

Defendant's cross-appeal — which is based entirely on the trial court's 21 August 2014 order denying their motions to dismiss under Rule 12(b)(7) — is also interlocutory. The trial court's order was not certified for immediate appeal pursuant to Rule 54(b), and Defendants have failed to show a substantial right that would be lost if they had to wait until entry of a final judgment to appeal the denial of their Rule 12(b)(7) motions.

Nevertheless, in furtherance of the principles of equity and fairness to the parties, we elect to similarly treat Defendant's cross-appeal as a petition for *certiorari* and consider the merits of the cross-appeal. Therefore, we proceed to address the merits of both Plaintiff's appeal and Defendants' cross-appeal.

II. Plaintiff's Appeal

The only claims left undisturbed by the trial court's 21 August 2014 and 4 February 2015 orders are Plaintiff's (1) assault claim against Murray in connection with the Pier Incident; (2) battery claim against Murray in connection with the Pier Incident; (3) false imprisonment claims against Progelhof, Hull and Zanzarella related to the Second Gazebo Incident; (4) tortious interference with prospective economic advantage claim against Buccafurri relating to her potential employment with the UMC; and (5) malicious prosecution claims against Murray, Progelhof, Zanzarella, and Buccafurri.[4] On appeal, Plaintiff contends that the trial court's dismissal of her remaining claims constituted error.

> The standard of review of an order granting a Rule 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On appeal, we review the pleadings *de novo* to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct.

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

A. Applicability of Statute of Limitations to Plaintiff's Claims

Before we discuss Plaintiff's specific claims for relief, it is necessary to address the threshold issue of whether the running of the statute

4. The question of whether the trial court properly denied Defendants' motions to dismiss these claims pursuant to Rule 12(b)(6) is not before us in this appeal.

of limitations has been tolled or otherwise rendered inapplicable to Plaintiff's claims. The specific incidents set out in Plaintiff's second amended complaint all occurred approximately nine years before the present action was filed. Defendants contend on appeal that many of Plaintiff's claims were properly dismissed as time barred.

All Defendants asserted the statute of limitations as an affirmative defense in their answers. It is well established that

> [o]nce a defendant has properly [pled] the statute of limitations, the burden is then placed upon the plaintiff to offer a forecast of evidence showing that the action was instituted within the permissible period after the accrual of the cause of action.

Waddle v. Sparks, 331 N.C. 73, 85-86, 414 S.E.2d 22, 28-29 (1992) (citation and quotation marks omitted).

Plaintiff asserts that the statute of limitations defense is inapplicable in this case based on two theories. First, she attempts to invoke the continuing wrong doctrine. Second, she contends that the running of the applicable limitations periods for her claims was tolled by virtue of her filing the Federal Action. We discuss each of these arguments in turn.

With regard to the continuing wrong doctrine, our Supreme Court has recognized this

> doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises. For the continuing wrong doctrine to apply, the plaintiff must show a continuing violation by the defendant that is occasioned by continual unlawful acts, not by continual ill effects from an original violation. Courts view continuing violations as falling into two narrow categories. One category arises when there has been a long-standing policy of discrimination. In the second continuing violation category, there is a continually recurring violation.

Birtha v. Stonemor, N.C., LLC, 220 N.C. App. 286, 292, 727 S.E.2d 1, 7 (2012) (internal citations, quotation marks, and ellipses omitted), *disc. review denied*, 366 N.C. 570, 738 S.E.2d 373 (2013).[5] We do not believe that either of these categories applies here.

---

5. "Under the continuing wrong doctrine, the statute of limitations does not start running until the violative act ceases." *Marzec v. Nye*, 203 N.C. App. 88, 94, 690 S.E.2d 537, 542 (2010) (citation and quotation marks omitted).

First, Plaintiff was not subjected to a longstanding policy of discrimination for purposes of the doctrine. While her second amended complaint alleges insulting language and threats referencing her religion and gender that were made by Defendants, Judge Fox's order in the Federal Action — as discussed below — expressly rejected Plaintiff's argument that the tortious conduct she alleged was motivated by discrimination based on her gender or religious beliefs. While Plaintiff contends that the wrongful acts giving rise to this action all derive from Defendants' common scheme to force her to leave Avenel, we do not believe this allegation is sufficient to invoke the continuing wrong doctrine.

Nor does the second category of conduct referred to in *Birtha* apply here. Plaintiff has alleged the commission of various intentional torts by Defendants as opposed to a series of separate obligations all stemming from the same original contractual — or other — legal obligation. *See Marzec v. Nye*, 203 N.C. App. 88, 94-95, 690 S.E.2d 537, 542 (2010) (failure to make each successive monthly salary payment as it became due following defendant's breach of original payment obligation constituted new continuing wrong); *Babb v. Graham*, 190 N.C. App. 463, 481, 660 S.E.2d 626, 637 (2008) (trustee's recurring refusal to make distributions under trust constituted continuing wrong), *disc. review denied*, 363 N.C. 257, 676 S.E.2d 900 (2009).

Therefore, the continuing wrong doctrine is inapplicable to the present case. *See Morrison-Tiffin v. Hampton*, 117 N.C. App. 494, 499-500, 451 S.E.2d 650, 655 (finding "no evidence to support the application of the continuing wrong doctrine" where plaintiffs alleged violation of constitutional rights under 42 U.S.C. § 1983 based on several years of sexual harassment and discrimination by defendant (internal citations and quotation marks omitted)), *appeal dismissed and disc. review denied*, 339 N.C. 739, 454 S.E.2d 654 (1995).

With regard to Plaintiff's tolling argument, this Court has recently addressed the application of tolling principles to situations where a plaintiff's state court action is filed following a federal court's dismissal without prejudice of the plaintiff's state law claims in a federal lawsuit arising out of the same nucleus of facts.

> According to 28 U.S.C. § 1367(d), the period of limitations for any supplemental state law claim asserted in a federal action . . . shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period. As a result of the fact that North Carolina does not provide for a longer tolling

> period than the thirty day interval specified in 28 U.S.C. § 1367(d), this Court has interpreted 28 U.S.C. § 1367(d) to provide that, in the event that the statute of limitations applicable to a plaintiff's state law claim expires while a federal action in which that claim has been asserted is pending, the plaintiff has thirty days following the dismissal of the federal action to reassert his or her state law claims in the General Court of Justice.

Glynne v. Wilson Med. Ctr., __ N.C. App. __, __, 762 S.E.2d 645, 649 (2014) (internal citations, quotation marks, brackets, and ellipses omitted).[6]

The tolling provision of 28 U.S.C. § 1367(d), however, applies only to state law claims that were actually asserted in a federal lawsuit. It does *not* apply to claims arising out of the same set of facts that could have been brought in the federal lawsuit but were not. Instead, the statute of limitations for such claims continues to run during the pendency of the federal action.

Our decision in *Renegar v. R.J. Reynolds Tobacco Co.*, 145 N.C. App. 78, 549 S.E.2d 227, *disc. review denied*, 354 N.C. 220, 554 S.E.2d 344 (2001) is instructive. In *Renegar*, the plaintiff was fired from his job with the defendant. He brought several federal claims against the defendant in federal court as a result of the termination of his employment. *Id.* at 78-79, 549 S.E.2d at 229. He later voluntarily dismissed the federal action without prejudice and then filed a lawsuit in North Carolina superior court for wrongful discharge in violation of public policy — a claim arising under State law. The trial court granted summary judgment in favor of the defendant on statute of limitations grounds. The court reasoned that because the plaintiff had failed to assert his wrongful discharge claim as a supplemental claim in his federal action, the limitations period for that claim had not been tolled during the pendency of the federal action. *Id.* at 79, 549 S.E.2d at 229.

On appeal, we affirmed the trial court's ruling, holding that

> the claims set forth in plaintiff's federal and state actions arose from the same event, his discharge by [the defendant]. However, the claim of wrongful discharge alleged in the state action and the federal statutory and constitutional claims alleged in the federal action each constitute

6. Here, Judge Fox dismissed Plaintiff's state law claims without prejudice on 12 February 2013 and Plaintiff filed her initial complaint in the present action on 14 March 2013 — exactly 30 days later.

> independent causes of action with unique elements which must be proven by plaintiff, and [the defendant] thus was not placed on notice by plaintiff's federal action that it would be asked to defend plaintiff's state wrongful discharge claim within the time required by the statute of limitations. In short, plaintiff's state action thus was not based on the same claims alleged in his federal action. . . . [Therefore, the p]laintiff's state action . . . was not timely filed, and the trial court properly granted summary judgment in favor of [the defendant].

Id. at 85, 549 S.E.2d at 232-33 (internal citations, quotation marks, and brackets omitted).

Thus, the limitations period for any claim that Plaintiff is asserting in the present action against a particular Defendant that she also asserted against that Defendant in the Federal Action was tolled until thirty days after the Federal Action was dismissed. However, such tolling would *not* apply to any claims asserted by Plaintiff in the present action against a particular Defendant that were not brought in the Federal Action. Furthermore, because (1) the Federal Action was not filed until 26 March 2007; and (2) all of Plaintiff's tort claims are governed by a three-year statute of limitations, only claims for relief based on acts that occurred on or after 26 March 2004 would not be time barred.[7]

B. Plaintiff's Claims

With these principles in mind, we next consider whether those claims in Plaintiff's second amended complaint dismissed by the trial court were properly subject to dismissal.

1. Claims under N.C. Gen. Stat. § 99D-1

[2] We first address Plaintiff's argument that the trial court erred in dismissing her claim under N.C. Gen. Stat. § 99D-1. Defendants contend that the dismissal of this claim was proper based on collateral estoppel. We agree.

The doctrine of collateral estoppel prevents issues that were actually litigated and necessary to the outcome of a prior suit from being relitigated in a later action between the original parties or their privies.

---

7. As discussed throughout the remainder of this opinion, we conclude that the statute of limitations does, in fact, bar a number of the claims Plaintiff has asserted in this action.

Hedgepeth v. Parker's Landing Prop. Owners Ass'n, Inc., __ N.C. App. __, __, 762 S.E.2d 865, 871 (2014). The party alleging collateral estoppel must demonstrate

> that the earlier suit resulted in a final judgment on the merits, that the issue in question was identical to an issue actually litigated and necessary to the judgment, and that both the party asserting collateral estoppel and the party against whom collateral estoppel is asserted were either parties to the earlier suit or were in privity with parties.

Tucker v. Frinzi, 344 N.C. 411, 414, 474 S.E.2d 127, 128-29 (1996) (citation and brackets omitted). Collateral estoppel only applies to "matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008) (citation, quotation marks, and emphasis omitted), *appeal dismissed and disc. review denied*, 363 N.C. 123, 672 S.E.2d 685 (2009).

N.C. Gen. Stat. § 99D-1 provides, in pertinent part, as follows:

> (a) It is a violation of this Chapter if:
>
> (1) Two or more persons, motivated by race, religion, ethnicity, or gender, but whether or not acting under color of law, conspire to interfere with the exercise or enjoyment by any other person or persons of a right secured by the Constitutions of the United States or North Carolina, or of a right secured by a law of the United States or North Carolina that enforces, interprets, or impacts on a constitutional right; and
>
> (2) One or more persons engaged in such a conspiracy use force, repeated harassment, violence, physical harm to persons or property, or direct or indirect threats of physical harm to persons or property to commit an act in furtherance of the object of the conspiracy; and
>
> (3) The commission of an act described in subdivision (2) interferes, or is an attempt to interfere, with the exercise or enjoyment of a right, described in subdivision (1), of another person.

N.C. Gen. Stat. § 99D-1(a) (2015). Therefore, § 99D-1 expressly provides that in order for a claim to arise thereunder, the defendant's conduct

must be motivated by either a racial, religious, ethnic, or gender-based discriminatory animus.

In the Federal Action, Judge Fox dismissed Plaintiff's FHA claim based on the following reasoning:

> In this case, Plaintiff asserts direct evidence of discrimination. However, for over a year before any of the complained of behavior occurred, Plaintiff and her neighbors tolerated, and in some instances were friendly with, one another. Then, on or after December 2, 2002, the relationships soured and the above-described feud ensued. It is abundantly clear that much animosity existed between Plaintiff and Defendants. Further, it may well be that, because of their quarrel with Plaintiff, some derogatory gender-specific, religious-specific, and disability-specific comments were made by one or more Defendants. However, the evidence contained in the record demonstrates that these comments were made, not because Defendants were intentionally discriminating against women, Christians, or disabled persons, or retaliating against Plaintiff for filing a discrimination claim, but rather because they knew such comments would personally offend Plaintiff. In this case, the prior amicable relationships, the several individuals in Avenel similarly situated to Plaintiff but not harassed, and the fact that some Defendants, rather than Plaintiff, have since moved from their homes, belie the contention of Plaintiff that the actions of Defendants were motivated by illegal discrimination or retaliation. As such, the Court finds that Plaintiff's evidence is insufficient for a reasonable jury to conclude that the hostility was a product of genuine discriminatory or retaliatory animus rather than the kind of personality conflict that exists in neighborhoods across the country. Accordingly, Plaintiff cannot prove the third and fourth elements of her FHA claim. The Court will therefore grant Defendants' motions for summary judgment with regard to Plaintiff's claim under the FHA.

In *McCallum v. N.C. Co-op. Extension Serv. of N.C. State Univ.*, 142 N.C. App. 48, 542 S.E.2d 227, *appeal dismissed and disc. review denied*, 353 N.C. 452, 548 S.E.2d 527 (2001), the plaintiff brought retaliatory discharge and equal protection claims against the defendants based on the United States Constitution, claims for racial discrimination and

retaliation in violation of Title VII of the Civil Rights Act of 1964, and a claim alleging violation of his rights under several provisions of the North Carolina Constitution. The defendants removed the case to federal court and later moved for summary judgment. *Id.* at 49, 542 S.E.2d at 230.

The federal court granted summary judgment on all claims arising under federal law and dismissed without prejudice the claims alleging violations of the North Carolina Constitution. In its order, the federal court ruled that the plaintiff had failed to show any discriminatory intent by the defendants. *Id.* at 49-50, 542 S.E.2d at 230.

Approximately one month later, the plaintiff filed a new complaint in North Carolina superior court in which he once again alleged that his discharge had been based on discrimination and retaliation in violation of the North Carolina Constitution. The defendants moved for summary judgment, contending that these claims were barred by collateral estoppel because of the federal court's ruling. The trial court denied the motion and defendants appealed. *Id.* at 50, 542 S.E.2d at 230.

In reversing the trial court, we held as follows:

> In the instant case, the issue of whether defendants intentionally discriminated against plaintiff was fully litigated in the federal court. After reviewing all of the evidence, the federal court found that plaintiff failed to present any direct evidence of a purpose by defendants to discriminate against plaintiff or circumstantial evidence of sufficiently probative force to raise a genuine issue of material fact. The federal court then granted defendants' motion for summary judgment on plaintiff's claim for racial discrimination. We hold that the issue of discriminatory intent by defendants was conclusively determined in the federal court, and thus plaintiff is collaterally estopped from relitigating that issue in this action.
>
> Plaintiff's failure in federal court to establish discriminatory intent by defendants also bars litigation of his equal protection violation claim in state court. In order to prevail upon an equal protection violation claim under the North Carolina Constitution, the burden is upon the complainant to show the intentional, purposeful discrimination upon which he relies. As the federal court has already conclusively ruled against plaintiff upon the issue of discriminatory intent by defendants, collateral estoppel prevents the plaintiff from proceeding on this claim.

. . . .

> [T]he federal court ruled against plaintiff on the exact issue that plaintiff now raises in state court. Plaintiff is therefore collaterally estopped from seeking a state court resolution on the issue of a causal connection between plaintiff's constitutionally protected activities and the adverse employment action taken by defendants. Because the lack of a causal connection is fatal to plaintiff's claim for retaliatory discharge, defendants are entitled to summary judgment on this claim.
>
> The issues of defendants' discriminatory intent and improper motivation were tried in the federal court after full discovery; resolution of those issues was material and necessary to the judgment in that court. The doctrine of collateral estoppel therefore bars the re-litigation of these issues in our state trial courts. Because plaintiff cannot, as a matter of law, succeed on his claims, the trial court erred when it refused to grant defendants' motion for summary judgment on plaintiff's claims of racial discrimination, equal protection violations, and retaliatory discharge.

Id. at 54-56, 542 S.E.2d at 233-34 (internal citation, quotation marks, and brackets omitted).

Plaintiff's § 99D-1 claims in the present case are based upon the same facts and circumstances that were before the federal court in its consideration of her FHA claims. Therefore, we conclude that the issue of whether Plaintiff was discriminated against by Defendants based upon her religious beliefs or gender has already been fully determined in the Federal Action and decided adversely to her. Accordingly, we hold that Plaintiff is collaterally estopped from asserting her § 99D-1 claims in the present action and that the trial court correctly dismissed these claims.

2. IIED Claims

[3] Plaintiff next contends that the trial court erred in dismissing her claims for IIED against all Defendants. "The elements of intentional infliction of emotional distress are: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress." *Holleman v. Aiken*, 193 N.C. App. 484, 501, 668 S.E.2d 579, 590 (2008) (citation and quotation marks omitted). "The tort may also exist where defendant's actions indicate a reckless indifference to

the likelihood that they will cause severe emotional distress." *Dickens v. Puryear*, 302 N.C. 437, 452, 276 S.E.2d 325, 335 (1981).

"Conduct is extreme and outrageous when it is so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. The determination of whether conduct rises to the level of extreme and outrageous is a question of law." *Johnson v. Colonial Life & Acc. Ins. Co.*, 173 N.C. App. 365, 373, 618 S.E.2d 867, 872-73 (2005) (internal citations and quotation marks omitted), *disc. review denied*, 360 N.C. 290, 627 S.E.2d 620 (2006).

a. The Association

In the Federal Action, Plaintiff did not assert an IIED claim against the Association and, therefore, based on the tolling principles discussed above, her deadline for asserting this claim against the Association was not tolled. "The statute of limitations for [an] intentional infliction of [emotional] distress [claim] is three years." *Waddle*, 331 N.C. at 85, 414 S.E.2d at 28. Accordingly, because the present action was not filed until 2013, her IIED claim against the Association is barred by the statute of limitations. *See Renegar*, 145 N.C. App. at 85, 549 S.E.2d at 232-33.

b. Buccafurri, Dinero, Hull, Progelhof, Zanzarella, and Murray

Plaintiff's IIED claims against Buccafurri, Dinero, Hull, Progelhof, Murray, and Zanzarella were, conversely, tolled during the pendency of the Federal Action because these claims were asserted by Plaintiff in that lawsuit. As a result, we must determine whether Plaintiff has stated viable IIED claims against these individual Defendants based on acts alleged by her to have been committed on or after 26 March 2004.

After carefully reviewing the allegations contained in her pleadings, we conclude that Plaintiff has, in fact, pled valid claims for IIED against each of the individual Defendants. Even excluding from our consideration her references to conduct by these Defendants occurring prior to 26 March 2004, she has alleged a virtually unending barrage of abuse, harassment, threats, scorn, and derision heaped upon her by these Defendants — acts that at times spilled over into physical confrontation and attack — lasting until June 2006. Her allegations in support of her IIED claims include the following:

- Buccafurri, Murray, Dinero, Hull, Progelhof and Zanzarella habitually threatened, harassed, and intimidated Plaintiff. Murray,

Buccafurri, Zanzarella, and Dinero shouted at Plaintiff that "she was a Christian B**** and a Christian C***" and "threatened [her] by saying [w]hat would Jesus do if we screwed your Christian C***" and "what would Jesus do if we sodomized you[?]"

- Murray, Buccafurri, Zanzarella, Dinero, Progelhof, and Hull told Plaintiff she "was one of those 'born again' Christians who would bring other undesirable people into the Avenel community[.]"
- Murray, Buccafurri, Zanzarella, Dinero, Progelhof, and Hull "threatened [Plaintiff] not to bring her African-Americans or low-income friends and associates from Christian Ministries into Avenel because they did not want those kind of people in Avenel[.]"
- Zanzarella, Dinero, Murray, and Buccafurri shouted at her to "[e]at s*** and die[.]"
- On one occasion while Plaintiff was walking her dog, Zanzarella and Hull shouted: "Look there is a pig walking a dog[.]"
- Murray and Buccafurri told her "she better lose weight in a hurry and marry an already married white male friend of hers or else[.]"
- At one point, Hull told Plaintiff "he could fix it so he could legally take her house away from her and there would be nothing she could do to stop him[.]" On another occasion, he uttered racial epithets at Plaintiff and "asked if she was going to marry an African-American male who was at that time a guest at [her] home[.]"
- Buccafurri mocked Plaintiff at one point by asking her "if she would still have large breasts if she lost weight[.]" On another occasion he "followed [Plaintiff] inside a grocery store yelling loudly, 'I'll keep on making sure you never get a job anywhere!' "
- Defendants charged Plaintiff with false crimes five times over a two year period.
- On or about April 8, 2004 Murray physically beat Plaintiff and then shouted at her "[y]ou'll never be a minister now[.]" Plaintiff was then transported to the hospital via ambulance where she was informed her injuries would require surgery.
- On 23 June 2004, while Plaintiff was sitting at the Avenel gazebo, Hull, Zanzarella, and Progelhof surrounded her, thereby

physically preventing her from leaving, while simultaneously shouting insults and threats at her. Plaintiff was forced to call 911 as a result and be escorted home by law enforcement officers.

- On 18 October 2004, Defendants saw Plaintiff meeting a friend for coffee. While they were having coffee, Defendants "placed a dismembered doll on the car belonging to Plaintiff's friend. [Plaintiff] and her friend were standing in [her] driveway discussing the dismembered doll when Defendants Buccafurri and Murray shouted at them. Defendants Buccafurri and Murray taunted and chased [Plaintiff] and her friend from [Plaintiff's] yard. [Plaintiff] and her friend were forced to drive away."
- On 13 February 2005, Plaintiff returned home from church to find her back door — which had been bolted and locked — open. Upon inspection, she observed that "[s]omeone had written inside of her large picture window by the open door, the letters 'MUR.' [Her] private detective showed her a videotape that shows Defendant Murray running across her back property on this same day[.]"
- On 18 July 2005, Buccafurri accosted Plaintiff at a local grocery store, threatened her, and told her that he would make sure she never got a job anywhere.
- Zanzarella drove by Plaintiff on another occasion and "called [her] a b**** and shouted at her to '[g]et out of the neighborhood.' "
- At one point "Hull accosted [her] at her home and told her she should move because he did not want a 'helpless female' with medical problems living alone next door to him."
- Murray contacted Plaintiff's former husband and requested any information he possessed regarding her that could be used to blackmail her into leaving Avenel.
- On 2 April 2006, while Plaintiff was sitting at the gazebo, Zanzarella accosted Plaintiff and screamed at her. Hull subsequently told Plaintiff that "the authorities would not help [her] because he was a close personal friend of the New Hanover County district attorney and sheriff."
- Buccafurri sent a package of documents to UMC officials containing false information about her in order to prevent her ordination.

In analyzing the validity of her IIED claims, we are guided by our decision in *Wilson v. Pearce*, 105 N.C. App. 107, 412 S.E.2d 148, *disc. review denied*, 331 N.C. 291, 417 S.E.2d 72 (1992). In *Wilson*, the plaintiffs brought an IIED claim against their next door neighbors, Carl and Wanda Pearce. The defendants, who believed that the plaintiffs' fence was impermissibly encroaching on their property, engaged in a campaign of harassment for several years in an attempt to cause the plaintiffs to move the fence. *Id.* at 110-11, 412 S.E.2d at 149-50.

The plaintiffs presented evidence at trial of the following acts by the defendants: (1) Mr. Pearce would stand in his yard and raise his fists at Plaintiffs while making obscene gestures and loudly cursing at them; (2) Mr. Pearce frequently stood in front of his window in full view of Mrs. Wilson and "made obscene gestures with his 'private parts' at her and then laughed at her reaction" while simultaneously mouthing obscene words; (3) "[the d]efendants have for several years piled firewood against the Wilsons' fence to the point that the firewood is taller than the fence and bulges the fence into the Wilsons' yard" despite the fact that the defendants did not own a fireplace; (4) Mr. Pearce threw broken glass into the plaintiffs' yard; (5) the defendants filed false police reports against the plaintiffs; (6) Mr. Pearce threatened to kill Mr. Wilson by "knock[ing] his god damned brains out" with a rock; (7) Mr. Pearce fired his handgun past Mr. Wilson into his yard; and (8) the defendants regularly left their lawnmower running outside of the plaintiffs' bedroom window at 6:00 a.m. in the morning. *Id.* at 115-16, 412 S.E.2d at 152-53.

On appeal, we summarized the plaintiffs' evidence as follows: "Generally, defendants . . . cursed and threatened plaintiffs, reported them to the City of Durham for untrue and alleged violations of city ordinances, threw items into plaintiffs' yard, made obscene gestures to plaintiffs and their children and generally disturbed their peace." *Id.* at 111, 412 S.E.2d at 150. We proceeded to

> hold that the above behaviors by the Pearces are extreme and outrageous conduct which intentionally or recklessly caused severe emotional distress to Mr. (and Mrs.) Wilson. . . . No one in a civilized society should be expected to take the kind of harassment the evidence shows the Pearces have forced upon the Wilsons . . . .

Id. at 117, 412 S.E.2d at 153.

We believe the alleged acts of Buccafurri, Dinero, Hull, Progelhof, Murray, and Zanzarella in the present case are analogous to the

defendants' conduct in *Wilson*. Plaintiff has alleged that the individual Defendants perpetuated a prolonged multi-year campaign of harassment, threats, and abuse that grossly exceeded the bounds of propriety.

We find Plaintiff's allegations distinguishable from the cases relied upon by Defendants in which this Court rejected IIED claims. *See Smith-Price v. Charter Behavioral Health Sys.*, 164 N.C. App. 349, 355, 595 S.E.2d 778, 783 (2004) (affirming summary judgment on IIED claim by supervisor against former employee where "[the supervisor] confronted [the employee], [and] he [responded by] threaten[ing] to make accusations against her, yelled at her, walked off his assignment and then, when he returned, threw a package of papers at [the supervisor]" and "[t]he next day [the employee] filed a complaint of sexual harassment against [the supervisor]"); *Guthrie v. Conroy*, 152 N.C. App. 15, 24, 567 S.E.2d 403, 410 (2002) (affirming summary judgment in favor of defendant on plaintiff's IIED claim where defendant "(1) held plaintiff from behind, and touched or rubbed her neck and shoulders; (2) 'irritated' her by placing a lampshade on her head when she fell asleep with her head on her desk; (3) threw potting soil and water on plaintiff while she was planting flowers at work, remarking when he threw a cup of water on plaintiff that he'd 'always wanted to see [her] in a wet T shirt'; and (4) placed a Styrofoam 'peanut' and other small objects between the legs of a 'naked man' statuette that plaintiff displayed on her windowsill at work and asked her 'how she liked it' with the addition"); *Johnson v. Bollinger*, 86 N.C. App. 1, 5-6, 356 S.E.2d 378, 381-82 (1987) (IIED claim properly dismissed where defendant approached plaintiff in angry and threatening manner while carrying pistol, shook his hand in plaintiff's face, and said in loud voice, "I will get you"); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 493-94, 340 S.E.2d 116, 122-23 (affirming summary judgment for defendants as to IIED claims where allegations involved screaming and shouting, name-calling, throwing menus, and various hostile acts toward pregnant employee), *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

We cannot agree with Defendants that *Smith-Price*, *Guthrie*, *Johnson*, or *Hogan* compel the dismissal of Plaintiff's IIED claims in the present case. In none of these cases was the conduct of the defendants akin to the multi-year systematic pattern of harassment, intimidation, and abuse alleged to have been inflicted upon Plaintiff by the individual Defendants here. While Defendants are correct that isolated incidents of insults, threats, and similar conduct are insufficient to support a claim for IIED under North Carolina law, *see Chidnese v. Chidnese*, 210 N.C. App. 299, 316, 708 S.E.2d 725, 738 (2011), Plaintiff has alleged far more

here. Although some of her allegations of insults and indignities would not by themselves rise to the level of extreme and outrageous conduct necessary for an IIED claim, her allegations — when considered in their entirety — assert not merely isolated insults but rather unrelenting abuse that involved her being beaten, physically restrained, threatened, and subjected to extraordinarily vulgar and offensive comments. For these reasons, Plaintiff has satisfied the pleading requirements for this tort. Her allegations describe a prolonged exposure to intolerable conduct that no human being should be forced to endure.[8]

Consequently, we hold that the acts of Buccafurri, Murray, Hull, Dinero, Progelhof, and Zanzarella as alleged by Plaintiff are sufficient to form the basis for IIED claims against them.[9] Therefore, we reverse the trial court's dismissal of Plaintiff's IIED claims as to these Defendants.

3. Assault Claims

[4] Plaintiff also argues that the trial court erred by dismissing her assault claims against Zanzarella, Progelhof, Buccafurri, and Hull and all but one of her assault claims against Murray.[10] The statute of limitations for an assault claim is three years. N.C. Gen. Stat. § 1-52(19) (2015). The most recent incident she alleges in support of these assault claims occurred in 2004. In the Federal Action, Plaintiff did not assert any assault claims except for the one brought against Murray in relation to the Pier Incident, and, for this reason, her deadline for asserting the remaining assault claims was not tolled. Consequently, since the present action was not filed until 2013, these assault claims are barred by the statute of limitations and were correctly dismissed by the trial court. *See Renegar*, 145 N.C. App. at 85, 549 S.E.2d at 232-33.

---

8. In her second amended complaint, Plaintiff alleges that "[she] is now disabled, in pain, suffers from post-traumatic stress disorder and major depression from the attacks and harassment against her, and is unemployable in her field. . . ." Defendants do not argue that Plaintiff has failed to sufficiently plead the third element of an IIED claim.

9. It remains to be seen, of course, whether Plaintiff will be able to offer admissible evidence in support of these allegations at the summary judgment stage or at trial.

10. Multiple assault claims were asserted by Plaintiff against Murray, but the only one left undisturbed by the trial court's 4 February 2015 Order was the assault claim related to the Pier Incident.

4. Claims for Tortious Interference with Potential Economic Advantage

[5] Plaintiff next contends that the trial court erred in dismissing her two claims for tortious interference with prospective economic advantage ("TIPEA"). Plaintiff asserted these claims based on two separate theories.

Her first claim was brought against all Defendants and was based on their alleged interference with Plaintiff's job opportunity with the UMC. The trial court dismissed this claim as to all Defendants except Buccafurri. Plaintiff's second TIPEA claim was brought only against the Association, Buccafurri, Hull, Progelhof, and Zanzarella and concerned her potential employment with the Boys and Girls Home as a mentor supervisor.

"An action for tortious interference with prospective economic advantage is based on conduct by the defendants which prevents the plaintiffs from entering into a contract with a third party." *Walker v. Sloan*, 137 N.C. App. 387, 392-93, 529 S.E.2d 236, 241 (2000). In order "to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference." *Id.* at 393, 529 S.E.2d at 242 (citation and quotation marks omitted).

a. The Association and Dinero

The statute of limitations for TIPEA claims is three years. *See* N.C. Gen. Stat. § 1-52. The allegations in the second amended complaint relevant to these claims concern actions taken sometime prior to 1 July 2005. In the Federal Action, Plaintiff did not assert a TIPEA claim against either the Association or Dinero and, therefore, no tolling of the limitations period occurred as to these claims. *See Renegar*, 145 N.C. App. at 85, 549 S.E.2d at 232-33. Therefore, the trial court correctly dismissed her TIPEA claims against the Association and Dinero as time barred.

b. Hull, Progelhof, Zanzarella, Murray, and Buccafurri

Plaintiff's TIPEA claims against Hull, Progelhof, Zanzarella, Murray, and Buccafurri were brought in the Federal Action. Therefore, unlike her claims against the Association and Dinero, the statute of limitations was tolled as to her TIPEA claims brought against these Defendants.

We address separately each of Plaintiff's two theories supporting her TIPEA claims against these Defendants.

i. Potential Employment with the UMC

[6] Plaintiff's TIPEA claims against Hull, Progelhof, Zanzarella, Murray, and Buccafurri[11] related to her potential employment with the UMC alleged, in pertinent part, the following:

> 42. Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella knew that [Plaintiff] was a graduate of the Yale Divinity School, that she had achieved official certification as a candidate for ordained ministry in the United Methodist Church, and that she was an active participant in several local Christian ministries.
>
> . . . .
>
> 159. Upon information and belief, the Church officials revoked [Plaintiff's] certification because Defendant Buccafurri collected libelous materials previously written by Hull, Dinero, Progelhof, Zanzarella and Murray *exactly for this purpose* and sent false information about [her] to Church officials.
>
> 160. Upon information and belief, the decision to revoke [Plaintiff's] certification was also based upon the false criminal charges filed against [her] by Defendants Murray, Buccafurri, Hull, Progelhof, and Zanzarella.
>
> . . . .
>
> 162. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella had knowledge of the facts and circumstances associated with [Plaintiff's] prospective entry into a contract with the United Methodist Church.
>
> 163. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella instituted false criminal charges against [Plaintiff], and deliberately caus[ed her] to suffer emotional distress severe enough to preclude her ordination in the United Methodist Church.
>
> 164. Upon information and belief, Defendants Buccafurri, Dinero, Hull, Progelhof, Murray, and Zanzarella compiled

---

11. As noted above, the trial court denied Buccafurri's motion to dismiss the TIPEA claim alleging interference with Plaintiff's potential employment with the UMC. Therefore, we must address the validity of Plaintiff's TIPEA claim regarding her employment opportunity with the UMC only as to Hull, Progelhof, Zanzarella, and Murray.

documents containing false and misleading statements that besmirched [Plaintiff's] reputation.

165. This package of documents contained false statements that Defendants Buccafurri, Dinero, Hull, Progelhof, Murray and Zanzarella knew to be false.

166. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella maliciously induced [the] United Methodist Church not to enter into the prospective contract with [Plainitff].

167. But for the tortious interference of Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella [Plaintiff] and the United Methodist Church would have entered into a valid contract.

168. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella made false statements about [Plaintiff] to the United Methodist Church.

169. Defendants Buccafurri's, Murray's, Dinero's, Hull's, Progelhof's, and Zanzarella's actions were not done in the legitimate exercise of their own rights, but with a malicious design to injure [Plaintiff].

170. Defendants Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella acted without justification.

171. Defendants Buccafurri's, Murray's, Dinero's, Hull's, Progelhof's, and Zanzarella's actions resulted in actual damages to [Plaintiff].

172. On or about February 2, 2005, United Methodist Church officials revoked [Plaintiff's] ordination candidate certification.

173. An ordination certificate is a prerequisite to becoming an ordained minister in the United Methodist Church.

174. Defendant's [sic] caused [Plaintiff] to lose substantial economic benefits in the form of salary and fringe benefits.

(Emphasis added).

In *Walker*, we elaborated on the pleading requirements applicable to TIPEA claims:

> We think the general rule prevails that unlawful interference with the freedom of contract is actionable, whether it consists in maliciously procuring breach of a contract, or in preventing the making of a contract when this is done, not in the legitimate exercise of the defendants' own rights, but with design to injure the plaintiffs, or gaining some advantage at their expense. . . . Maliciously inducing a person not to enter into a contract with another, which he would otherwise have entered into, is actionable if damage results. The word "malicious" used in referring to malicious interference with formation of a contract does not import ill will, but refers to an interference with design of injury to plaintiffs or gaining some advantage at their expense. Thus, to state a claim for wrongful interference with prospective advantage, the plaintiffs must allege facts to show that the defendants acted without justification in inducing a third party to refrain from entering into a contract with them which contract would have ensued but for the interference.

Walker, 137 N.C. App. at 393, 529 S.E.2d at 241-42 (internal citations, quotation marks, brackets, and ellipses omitted). *See Owens v. Pepsi Cola Bottling Co. of Hickory, N.C. Inc.*, 330 N.C. 666, 680, 412 S.E.2d 636, 644 (1992) (a claim for "tortious interference with prospective economic advantage may be based on conduct which prevents the making of contracts").

Here, Plaintiff has alleged sufficient facts tending to show that Hull, Progelhof, Zanzarella, and Murray knowingly wrote false and misleading statements about her for the purpose of preventing her from being hired by the UMC and that but for their actions she would have entered into a valid employment contract with the UMC. Moreover, she alleges these actions were taken by Defendants with full knowledge that she was pursuing a position with the UMC and that their intention was to undermine — without justification — her job prospects with the UMC. Finally, she has alleged that as a result of these actions she suffered actual damages in the form of loss of employment opportunity, salary, and fringe benefits.

We believe these allegations satisfy the pleading requirements for a TIPEA claim. It is well settled that

> [a] pleading adequately sets forth a claim for relief if it contains: (1) A short and plain statement of the claim

> sufficiently particular to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. The general standard for civil pleadings in North Carolina is notice pleading. Pleadings should be construed liberally and are sufficient if they give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial.

Haynie v. Cobb, 207 N.C. App. 143, 148-49, 698 S.E.2d 194, 198 (2010) (internal citations and quotation marks omitted); *see also Fournier v. Haywood Cty. Hosp.*, 95 N.C. App. 652, 654, 383 S.E.2d 227, 228 (1989) ("Pleadings must be liberally construed to do substantial justice, and must be fatally defective before they may be rejected as insufficient.").

In applying this liberal standard to Plaintiff's allegations, we conclude the trial court erred in dismissing her TIPEA claims against Hull, Progelhof, Zanzarella, and Murray based on her prospective employment with the UMC, and we therefore reverse this portion of the trial court's 4 February 2015 order.

ii. Potential Employment with Boys and Girls Home

[7] We reach a contrary result with regard to Plaintiff's TIPEA claims relating to her potential employment with the Boys and Girls Home. It is well established that "[w]hile we treat plaintiffs' factual allegations as true, we may ignore plaintiffs' legal conclusions." *Skinner v. Reynolds*, __ N.C. App. __, __, 764 S.E.2d 652, 655 (2014) (citation and quotation marks omitted).

Plaintiff has failed to make specific factual allegations as to acts by Defendants Hull, Progelhof, Zanzarella, and Buccafurri that would give rise to a valid TIPEA claim based on her failure to obtain employment with the Boys and Girls Home. As discussed above, Plaintiff expressly alleged that these Defendants were aware that she had achieved official certification as a candidate for ordained ministry within the UMC and were responsible for a packet containing false information about her being sent to the UMC that resulted in the UMC's decision to revoke her ordination candidate certification.

No comparable allegations exist with regard to her TIPEA theory relating to the Boys and Girls Home. Instead, Plaintiff essentially argues that the Boys and Girls Home declined to hire her because of the fact that

criminal charges had been previously filed against her. While her second amended complaint does contend that these Defendants were responsible for the filing of the false charges, she has failed to adequately allege that the charges were taken out against her for the specific purpose of thwarting her chances of obtaining employment with the Boys and Girls Home.

Moreover, although the section of Plaintiff's second amended complaint addressing this cause of action contains a number of conclusory allegations that track the elements of a TIPEA claim, such conclusions alone are insufficient to state a legally sufficient claim for TIPEA. *See Walker*, 137 N.C. App. at 392, 529 S.E.2d at 241 ("In ruling on a Rule 12(b)(6) motion to dismiss [a TIPEA claim], the trial court regards all factual allegations of the complaint as true. Legal conclusions, however, are not entitled to a presumption of truth." (internal citation omitted)). For these reasons, we affirm the trial court's dismissal of Plaintiff's TIPEA claims against Hull, Progelhof, Zanzarella and Buccafurri arising out of her failure to obtain employment with the Boys and Girls Home.

5. NIED Claims

[8] Plaintiff next challenges the trial court's dismissal of her claims for NIED against all Defendants. "In order to state a claim for negligent infliction of emotional distress, a plaintiff must allege that (1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause plaintiff severe emotional distress, and (3) the conduct did in fact cause plaintiff severe emotional distress." *Fields v. Dery*, 131 N.C. App. 525, 526-27, 509 S.E.2d 790, 791 (1998) (citation, quotation marks, and ellipses omitted), *disc. review denied*, 350 N.C. 308, 534 S.E.2d 590 (1999).

The fatal flaw with Plaintiff's NIED claims is that the allegations in her second amended complaint repeatedly reference a pattern of *intentional* conduct by Defendants. Moreover, the NIED section of her pleadings states, in pertinent part, as follows:

> 210. Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella were negligent in that they failed to use ordinary care not to inflict emotional distress on [Plaintiff].
>
> 211. Defendants Association, Buccafurri, Murray, Dinero, Hull, Progelhof, and Zanzarella breached this duty by participating in a *systematic pattern of harassment*, *threats*, *violence*, *and intimidation* against [Plaintiff].

(Emphasis added).

These allegations demonstrate the invalidity of Plaintiff's NIED claims. It is nonsensical to assert that one or more of the Defendants were *negligent* by engaging in a purposeful scheme to harass, threaten, and intimidate her. Therefore, Plaintiff's NIED claims fail as a matter of law and were properly dismissed by the trial court. *See Horne v. Cumberland Cty. Hosp. Sys., Inc.*, 228 N.C. App. 142, 149, 746 S.E.2d 13, 19 (2013) (affirming dismissal of NIED claim where "plaintiff's NIED claim is premised on allegations of intentional — rather than negligent — conduct").

III. Defendants' Cross-Appeal

[9] The only remaining issue for resolution by this Court concerns Defendants' cross-appeal. In their cross-appeal, Defendants contend that the trial court erred in failing to dismiss Plaintiff's complaint in its entirety under Rule 12(b)(7) because Plaintiff failed to join a necessary party — the V. Duncan Radcliffe Trust (the "Trust"). We disagree.

Pursuant to Rule 12(b)(7), a defendant may move to dismiss an action for "[f]ailure to join a necessary party." N.C.R. Civ. P. 12(b)(7). "When faced with a motion under Rule 12(b)(7), the court will decide if the absent party should be joined as a party. If it decides in the affirmative, the court will order him brought into the action." *Fairfield Mountain Prop. Owners Ass'n, Inc. v. Doolittle*, 149 N.C. App. 486, 487, 560 S.E.2d 604, 605 (2002) (citation and quotation marks omitted).

It is well settled that "[a] 'necessary' party is one whose presence is required for a complete determination of the claim, and is one whose interest is such that no decree can be rendered without affecting the party." *Godette v. Godette*, 146 N.C. App. 737, 739, 554 S.E.2d 8, 9 (2001) (citation and quotation marks omitted). Defendants contend that "the V. Duncan Radcliffe Trust [was] the true owner of the residence located at 1421 Avenel Drive, Wilmington, NC 28411 at all relevant times and [Plaintiff], Trustee of the V. Duncan Radcliffe Trust was the acting trustee at all relevant times." They therefore argue that Plaintiff's failure to join the Trust as a party mandates the dismissal of this action under Rule 12(b)(7). This argument is meritless.

This lawsuit involves intentional tort claims asserted by Plaintiff for acts allegedly inflicted upon her that caused her to personally suffer emotional distress, physical injuries, and financial harm. Therefore, because Plaintiff's claims are personal and unique to her, the Trust cannot be characterized as a necessary party. Accordingly, the trial court did not err in denying Defendants' Rule 12(b)(7) motions.

Conclusion

For the reasons stated above, we reverse the portions of the trial court's 4 February 2015 order dismissing Plaintiff's (1) IIED claims against Buccafurri, Dinero, Hull, Progelhof, Zanzarella, and Murray; and (2) TIPEA claims concerning her potential employment with the UMC against Murray, Hull, Progelhof and Zanzarella. We affirm the trial court's 21 August 2014 order.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

Judges CALABRIA and TYSON concur.

RAYMOND JAMES CAPITAL PARTNERS, L.P., PLAINTIFF
v.
HAZEL HAYES, DEFENDANT

No. COA15-746

Filed 2 August 2016

Corporations—shareholder action—wrongdoing by minority shareholder—failure to allege individualized or special duty

The trial court did not err in a shareholder action by granting defendant's (minority shareholder's) motion to dismiss claims regarding defendant recording false transactions in the company's ledger and misappropriating corporate funds for personal gain. Plaintiff majority shareholder failed to allege any duty that was individualized or otherwise special. Thus, plaintiff lacked standing to maintain a direct action seeking individual recovery against defendant.

Appeal by plaintiff from order entered 23 February 2015 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 2 December 2015.

Sigmon, Clark, Mackie, Hanvey & Ferrell, P.A., by Forrest A. Ferrell and Amber Reinhardt Mueggenburg, for plaintiff-appellant.

Tin, Fulton, Walker & Owen, PLLC, by Sam McGee, for defendant-appellee.

CALABRIA, Judge.

Raymond James Capital Partners, L.P. ("plaintiff") appeals from an order granting Hazel Hayes' ("defendant") motion to dismiss all claims asserted against her. We affirm.

I. *Background*

Plaintiff was a majority shareholder of Albion Medical Holdings, Inc. ("Albion"), a closely held corporation. Defendant was a minority shareholder of Albion. Greer Laboratories, Inc. ("Greer")—a North Carolina corporation and wholly-owned subsidiary of Albion—employed defendant for approximately forty-five years. In 2005, defendant became Assistant Controller of Greer. Her job responsibilities included "performing monthly bank reconciliations, maintaining the general ledger, reviewing accounting entries and maintaining physical possession over Greer's manual checks."

In 2013, Albion, and by extension, Greer, were sold pursuant to a Stock Purchase Agreement. A business valuation method known as EBIDTA (Earnings Before Interest, Taxes, Depreciation, and Amortization) was used to calculate the purchase price. Albion was sold for 13.5 times the trailing twelve-month EBITDA. In addition, any excess cash of Albion was to be allocated to shareholders in the form of dividends or a pre-closing distribution. After the sale occurred, defendant continued to work as Greer's Assistant Controller until she retired in September 2014.

Soon after defendant's retirement, Greer uncovered evidence that indicated she had issued manual checks to herself and falsely recorded the funds as payments to banks and vendors in the general corporate ledger. After being confronted with this evidence, defendant allegedly admitted to embezzling funds from Greer beginning in May 2013; however, the results of an internal investigation suggested that the fraudulent check scheme dated back to 2004.

Consequently, on 7 November 2014, plaintiff filed a verified complaint[1] against defendant in Caldwell County Superior Court. Plaintiff alleged claims of embezzlement, conversion, fraud, breach of fiduciary duty, constructive fraud, unfair and deceptive trade practices,

1. Greer also filed an action against defendant in Caldwell County but a settlement was eventually reached in that case. For reasons not contained in the record, none of Albion's shareholders were parties to that action.

and a violation of North Carolina's Racketeer Influenced and Corrupt Organizations Act ("RICO"). According to plaintiff's allegations, defendant embezzled approximately $839,878.00 from Greer. The verified complaint also contained a motion for a temporary restraining order and a preliminary injunction. The trial court subsequently entered a preliminary injunction against defendant prohibiting her from, *inter alia*, selling, conveying, or liquidating her assets in order to protect plaintiff's "ability to collect upon any judgment it obtain[ed] in th[e] case." Defendant responded by filing an answer and motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure to state a claim based, in part, on plaintiff's lack of standing to bring individual claims against defendant. After a hearing on the Rule 12(b)(6) motion, the trial court entered an order on 23 February 2015 granting defendant's motion to dismiss as to all claims. Plaintiff appeals.

II. *Standard of Review*

Plaintiff contends the trial court erred in granting defendant's motion to dismiss under Rule 12(b)(6) for failure to state any claim upon which relief could be granted. We disagree.

> The standard of review of an order granting a 12(b)(6) motion is whether the complaint states a claim for which relief can be granted under some legal theory when the complaint is liberally construed and all the allegations included therein are taken as true. On a motion to dismiss, the complaint's material factual allegations are taken as true. Legal conclusions, however, are not entitled to a presumption of validity. Dismissal is proper when one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.

Wells Fargo Bank, N.A. v. Corneal, __ N.C. App. __, __, 767 S.E.2d 374, 377 (2014) (citation omitted). Ultimately, this Court "conducts a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Page v. Lexington Ins. Co.*, 177 N.C. App. 246, 248, 628 S.E.2d 427, 428 (2006) (citation, quotation marks, and brackets omitted).

III. *Shareholder Actions*

Plaintiff, as a shareholder of Albion, seeks to bring individual causes of action against defendant, a former officer of Greer,[2] to recover for losses related to plaintiff's investment and the reduction of certain dividends as well as pre-distribution payments to which it was purportedly entitled.

Under North Carolina law, corporate officers with discretionary authority must discharge their duties in good faith, with due care, and in a manner they believe to be in the corporation's best interests. N.C. Gen. Stat. § 55-8-42(a) (2015); *see also id.* § 55-8-30(a) (2015) (same with respect to corporate directors). When these fiduciary duties are breached, the issue of whether the resulting injuries should be litigated in an individual or a derivative action arises. "A derivative proceeding is a civil action brought . . . in the right of a corporation, . . . while an individual action is . . . [brought] to enforce a right which belongs to [a plaintiff] personally." *Morris v. Thomas*, 161 N.C. App. 680, 684, 589 S.E.2d 419, 422 (2003) (citation and internal quotation marks omitted). "Shareholders . . . of corporations generally may not bring individual actions to recover what they consider their share of the damages suffered by the corporation." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 660, 488 S.E.2d 215, 220-21 (1997) (citations and quotation marks omitted). A similar, "well-established general rule is that shareholders cannot pursue individual causes of action against third parties for wrongs or injuries to the corporation that result in the diminution or destruction of the value of their stock." *Id.* at 658, 488 S.E.2d at 219 (citations omitted). Since the loss of an investment " 'is [typically] identical to the injury suffered by' the corporate entity as a whole[,]" claims arising from injuries to the corporation are properly asserted in derivative suits. *Green v. Freeman*, 367 N.C. 136, 144, 749 S.E.2d 262, 269 (2013) (citation omitted); Russell M. Robinson, II, *Robinson on North Carolina Corporation Law* § 17.01 *et seq.* (7th ed. 2015) (explaining that corporate shareholders may normally enforce a claim that belongs to the corporation only through a derivative suit brought on behalf of the corporation).

---

2. We note that defendant does not concede that she was actually an officer of Greer. The trial court also questioned plaintiff's characterization of defendant as a corporate officer. In any event, since the essence of the verified complaint is that defendant was an officer and that she owed specific fiduciary duties to plaintiff, we assume for purposes of this appeal that defendant was an officer.

A suit against corporate officers or directors for breach of fiduciary duty is "[o]ne of the clearest examples of a derivative action. . . ." *Id.* at § 17.02[1]. As explained by the United States Supreme Court, shareholder derivative suits exist to remedy "those situations where the management through fraud, neglect of duty or other cause declines to take the proper and necessary steps to assert the rights which the corporation has." *Meyer v. Fleming*, 327 U.S. 161, 167, 90 L. Ed. 595, 600 (1946).

The general prohibition against individual shareholder suits is understandable, for "the duties, the breaches of which constitute the ground of action, are duties to the corporation, considered as a legal entity, and not duties to any particular [share]holder." *Coble v. Beall*, 130 N.C. 533, 536, 41 S.E. 793, 794 (1902). Thus, "any damages [recovered from derivative suits] flow back to the corporation, not to the individual shareholders bringing the action." *Green*, 367 N.C. at 142, 749 S.E.2d at 268. Furthermore, the procedural requirements for derivative suits protect shareholders and the corporation itself by avoiding a "multiplicity of lawsuits," by limiting "who should properly speak for the corporation[,]" and by preventing "self-selected advocate[s] pursuing individual gain rather than the interests of the corporation or the shareholders as a group, [from] bringing costly and potentially meritless strike suits." *Norman v. Nash Johnson & Sons' Farms, Inc.*, 140 N.C. App. 390, 396, 537 S.E.2d 248, 253 (2000) (citation and internal quotation marks omitted). Given these principles, a shareholder generally has no standing to bring individual actions against a corporation. Standing, which "is a necessary prerequisite to a court's proper exercise of subject matter jurisdiction[,]" generally refers "to a party's right to have . . . the merits of [its] dispute" decided by a judicial tribunal. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 113, 574 S.E.2d 48, 51-52 (2002) (citations omitted).

Nevertheless, a "shareholder may maintain an individual action against a third party for an injury that directly affects the shareholder, even if the corporation also has a cause of action arising from the same wrong," under two circumstances: (1) where "the wrongdoer owed [the shareholder] a special duty[,]" and (2) where the shareholder suffered a personal injury—one that is "separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Barger*, 346 N.C. at 659, 488 S.E.2d at 219 (citation omitted). Accordingly, an evaluation of [plaintiff's] standing in this matter requires an analysis of: (1) [plaintiff's] alleged injury, and (2) the relationship between [plaintiff] and defendant[] with respect to each claim." *Energy Investors Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 335, 525 S.E.2d 441, 444 (2000).

A. Special Duty

All of plaintiff's claims for relief are based on the same core of operative facts, to wit: that defendant recorded false transactions in Greer's ledger and misappropriated corporate funds for her own personal gain. However, plaintiff insists that Albion existed merely as a holding company for its subsidiaries, which included Greer.[3] Based on this characterization, plaintiff argues that defendant owed it a "special duty" individually. Specifically, plaintiff contends that "[d]ue to [d]efendant's position, authority[,] and familiarity with the financial affairs of Greer, [she] owed a heightened duty to shareholders [of Albion] to act in good faith and with due care with regards to said financial affairs." We disagree.

In *Barger*, our Supreme Court explained and illustrated the special duty exception as follows:

> The special duty may arise from contract or otherwise. To support the right to an individual lawsuit, the duty must be one that the alleged wrongdoer owed directly to the shareholder as an individual. The existence of a special duty thus would be established by facts showing that defendants owed a duty to plaintiffs that was personal to plaintiffs as shareholders and was separate and distinct from the duty defendants owed the corporation. A special duty therefore has been found when the wrongful actions of a party induced an individual to become a shareholder; when a party violated its fiduciary duty to the shareholder; when the party performed individualized services directly for the shareholder; and when a party undertook to advise shareholders independently of the corporation.

Id. at 659, 488 S.E.2d at 220 (citations omitted). The *Barger* Court then explained: "This list is illustrative; it is not an exclusive list of all factual

3. We note that plaintiff asks us to ignore the corporate form relevant to this case. As the trial court pointed out, the duties that defendant allegedly owed would run to the shareholders of Greer, which was Albion itself. According to the trial court, the duties would not run to defendants as shareholders of Albion. Plaintiff has not cited any case law supporting the general proposition that North Carolina courts disregard the separate existence of a parent corporation and its wholly-owned subsidiary. Apart from cases presenting circumstances that would justify veil piercing or a conclusion that a wholly-owned subsidiary was its parent's agent, the trial court's analysis appears to be sound. In any event, for purposes of this appeal, we assume that any duties defendant may have owed to Greer flowed directly to the shareholders of Albion.

situations in which a special duty may be found." *Id.* Despite this qualification, the special duty exception clearly requires an articulation of some duty owed to a plaintiff that is distinct from the general fiduciary duties directors and officers owe to the corporation.

In the instant case, the special, or heightened, duties identified by plaintiff do not support its purported right to seek individual recovery in a direct action against defendant. The verified complaint alleges that (1) shareholders in a closely held corporation owe a fiduciary duty to one another, and (2) officers owe a fiduciary duty to shareholders. Unfortunately for plaintiff, the former is a misstatement of North Carolina corporation law and the latter fails to meet the threshold set out in *Barger*.

"As a general rule, shareholders do not owe a fiduciary duty to each other or to the corporation." *Freese v. Smith*, 110 N.C. App. 28, 37, 428 S.E.2d 841, 847 (1993) (citation omitted). However, "[a]n exception to this rule is that a controlling shareholder owes a fiduciary duty to minority shareholders." *Kaplan v. O.K. Techs., L.L.C.*, 196 N.C. App. 469, 473, 675 S.E.2d 133, 137 (2009). To that end, our courts have extended special protections to minority shareholders in closely held corporations. *See, e.g.*, *Norman*, 140 N.C. App. at 407, 537 S.E.2d at 260 (noting that North Carolina's "cases have consistently held that majority shareholders in a close corporation owe a 'special duty' and obligation of good faith to minority shareholders"). However, plaintiff was not a minority shareholder of Greer; it was a *majority* shareholder in Albion.

Furthermore, while corporate officers generally "owe a fiduciary duty to the corporation and [its] shareholders[,]" *T-WOL Acquisition Co. v. ECDG South, LLC*, 220 N.C. App. 189, 208, 725 S.E.2d 605, 617 (2012) (emphasis added), the breach of that duty rarely creates an individual cause of action. *See Keener Lumber Co. v. Perry*, 149 N.C. App. 19, 26, 560 S.E.2d 817, 822 (2002) ("Under North Carolina law, directors of a corporation generally owe a fiduciary duty to the corporation, and where it is alleged that directors have breached this duty, the action is properly maintained by the corporation rather than any individual creditor or stockholder.") (citation omitted). As the commentary to section 55-8-30 explains, the prior version of the law "provided that officers and directors stand in a fiduciary relation 'to the corporation and its shareholders,' " but the amended version does not reference a fiduciary duty to shareholders. Our Supreme Court has recognized that this amendment was intended " 'to avoid an interpretation [of section 55-8-30] . . . that would give shareholders a direct right of action on claims that should be asserted derivatively[.]' " *Green*, 367 N.C. at 141, 749 S.E.2d at

268 (quoting N.C. Gen. Stat. § 55-8-30 (2011)). When the fiduciary duties of due care, loyalty, and good faith are breached, a shareholder may sue the offending director or officer in a derivative action. N.C. Gen. Stat. § 55-7-41 (2015).

Here, all of plaintiff's causes of action are based upon defendant's violation of her core fiduciary duties to the corporation (Greer). As a result, plaintiff has failed to allege any duty that was individualized or otherwise "special." Absent from the verified complaint is any allegation that plaintiff was a party to a contract with defendant that created distinct duties personal to plaintiff, or that defendant induced plaintiff to become a shareholder. There is also no allegation that defendant advised or dealt with plaintiff outside of the officer-shareholder relationship. In fact, there is no indication that plaintiff and defendant had particular dealings with each other in any context. *Green*, 367 N.C. at 143-44, 749 S.E.2d at 269 (holding that the special duty exception did not apply where "the most contact plaintiffs had with [the defendant] was seeing her a handful of times and saying nothing more than " 'hello' "). Although the *Barger* scenarios are not exclusive, this case does not present a situation where the recognition of a special duty would be proper or justified.

In sum, plaintiff has not "set forth any allegations which, even taken as true, support a special duty between it and defendant[]." *Energy Investors*, 351 N.C. at 336, 525 S.E.2d at 444.

B. Separate and Distinct Injury

Plaintiff next argues that its injuries were "separate and distinct" from those suffered by Greer and that, therefore, its individual claims fall under the second *Barger* exception. Once again, we disagree.

To proceed under the second, special injury exception to the general rule against individual actions, a plaintiff must allege an injury "peculiar and personal" to itself as a shareholder. *Barger*, 346 N.C. at 659, 488 S.E.2d at 220. Specifically, a plaintiff must show that its particular injury was "separate and distinct from the injury sustained by the other shareholders or the corporation itself." *Id.* at 659, 488 S.E.2d at 219.

As to plaintiff's claim for embezzlement, the verified complaint contains the following statements of injury and damages:

> 28. [Defendant's] actions as set forth herein resulted in the diminution in value of Albion's stock and the decrease in the purchase price of Albion.

> 29. [Defendant's] actions as set forth herein further resulted in the decrease in the value of excess cash available for distribution either as dividends or a pre-closing distribution to [plaintiff] *and the other shareholders* of Albion.

(Emphasis added). The verified complaint is replete with virtually identical allegations as to each of plaintiff's additional causes of action. Plaintiff's arguments on appeal are also consistently couched in terms of injuries sustained by it and "the shareholders." Thus, by plaintiff's own account, it has not suffered a unique, personal injury. Given the nature of its allegations at the trial level and its arguments on appeal, plaintiff has failed to show that its injury is separate and distinct from that suffered by other shareholders.

Furthermore, the heart of plaintiff's verified complaint is that it and Albion's other shareholders received inadequate—or more precisely, reduced—payments based upon the diminution of the value of their shares. Yet the alleged reduction in distributions or dividends is directly tied to a decrease in Albion's shares: plaintiff ultimately lost the full benefit of its investment only because Albion's shares in Greer lost value. Consequently, any reduced payments received by plaintiff were likewise received by all other shareholders.

Nevertheless, plaintiff contends that its injury is separate and distinct from that suffered by Greer because Greer was never entitled to "(1) the multiplied amount constituting the purchase price pursuant to the Stock Purchase Agreement, (2) the pre-closing distribution amount, or (3) yearly dividends." This argument ignores that the allegedly embezzled funds were taken directly from Greer's corporate coffers. As a result, plaintiff is simply positing a distinction without a difference: plaintiff's claims for reduced payments are based upon its ownership of shares, and these claims derive from the same underlying injury suffered by the corporation itself. Since plaintiff's losses are inextricably linked to the value of its investment, the appropriate reasoning is as follows: (1) defendant's embezzlement of Greer's funds reduced the value of all shares held in Albion and (2) caused Greer and Albion to be purchased for a reduced price, which (3) resulted in plaintiff's and the other shareholders' diminished compensation after the sale. Consequently, plaintiff's injury for reduced payments is the functional equivalent of a claim for diminution of the value of shares held by all of Albion's shareholders. *See*, *e.g.*, *Energy Investors*, 351 N.C. at 336, 525 S.E.2d at 444 (finding no individualized injury where the plaintiff's "injury [was] the loss of its investment, which is identical to

the injury suffered by other limited partners and by the partnership as a whole"); *Barger*, 346 N.C. at 659, 488 S.E.2d at 220 ("The only injury plaintiffs as shareholders allege is the diminution or destruction of the value of their shares as the result of defendants' negligent or fraudulent misrepresentations of TFH's financial status. This is precisely the injury suffered by the corporation itself."). Thus, plaintiff has failed to allege any injury that is separate and distinct from the harm suffered by Greer or all of Albion's shareholders collectively.

IV. *Conclusion*

Plaintiff's individual claims, derivative in nature, do not fall under either one of the *Barger* exceptions to the general rule prohibiting individual shareholder suits. Therefore, plaintiff lacks standing to maintain a direct action seeking individual recovery against defendant. Accordingly, the trial court properly granted defendant's motion to dismiss all claims against her.

AFFIRMED.

Judges ELMORE and ZACHARY concur.

JAMES K. SANDERFORD, Plaintiff
v.
DUPLIN LAND DEVELOPMENT, INC., Defendant

No. COA15-1214

Filed 2 August 2016

Appeal and Error—interlocutory orders—no substantial right—no inconsistent verdicts—separate and distinct injury

Defendant's appeal from an interlocutory order was denied. There was no possibility of inconsistent verdicts, and the interlocutory order did not affect a substantial right. Further, plaintiff was seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury.

Appeal by defendant from Order entered 29 June 2015 by Judge Jay D. Hockenbury in New Hanover County Superior Court. Heard in the Court of Appeals 11 May 2016.

Law Offices of G. Grady Richardson, Jr., P.C., by G. Grady Richardson, Jr., for plaintiff-appellee.

Bill Faison Attorney, PLLC, by Bill Faison, and Fletcher, Toll & Ray, LLP, by George L. Fletcher, for defendant-appellant.

ELMORE, Judge.

Duplin Land Development, Inc. (defendant) appeals from the trial court's 29 June 2015 order, which denied defendant's motion for summary judgment. Defendant claims that the trial court's order affects a substantial right and is immediately appealable because *res judicata* bars this action. James K. Sanderford (plaintiff) filed a motion to dismiss the appeal. Pursuant to plaintiff's motion, we dismiss the appeal.

I. Background

After closing on a lot in the Bluffs at River Landing in September 2007, plaintiff filed a complaint against defendant in the United States District Court for the Eastern District of North Carolina on 10 November 2010 seeking specific enforcement of Addendum B to his lot purchase agreement, liability under the Interstate Land Sales Full Disclosure Act (ILSFDA) and the Unfair and Deceptive Trade Practices Act (UDTPA), and a claim for fraud. The federal district court entered an order on 15 February 2012 granting summary judgment in favor of defendant, and the United States Court of Appeals for the Fourth Circuit affirmed on 2 July 2013. *Sanderford v. Duplin Land Dev., Inc.*, No. 7:10-CV-230 H(2), 2012 WL 506667 (E.D.N.C. Feb. 15, 2012), *aff'd*, 531 F. App'x 358 (4th Cir. July 2, 2013).

Plaintiff filed the instant action on 21 January 2014 in New Hanover County Superior Court, alleging breach of implied warranty and breach of fiduciary duty, contending that the lot was not suitable for construction of a single-family residence. Plaintiff and defendant both moved for summary judgment. On 3 February 2015, the trial court granted defendant's motion on plaintiff's breach of implied warranty claim, and on 29 June 2015, it denied defendant's motion on plaintiff's breach of fiduciary duty claim. Defendant appeals, claiming that the trial court's order affects a substantial right and is immediately appealable due to the affirmative defense of *res judicata*. Plaintiff filed a motion to dismiss defendant's appeal, arguing defendant has not shown that the order affects a substantial right entitling it to an immediate appeal.

II. Analysis

At the outset, we must address this Court's jurisdiction to hear this appeal. In defendant's statement of the grounds for appellate review, it claims,

> [T]he trial court's summary judgment order affects a substantial right of [defendant] as described in N.C.G.S. 1-277 and N.C.G.S. 7A-27(d)(1) in that [plaintiff] and [defendant] have already litigated the facts surrounding the purchase and sale of Lot 60 to a final judgment in favor of [defendant]. Continuing the current litigation could lead to a verdict inconsistent with summary judgment in the Federal action. Thus, this interlocutory appeal involves a "substantial right". *Country Club of Johnston County, Inc. v. U.S. Fid. & Guar. Co.*, 135 [N].C. App. 159, 167, 519 S.E.2d 540, 546 (1999).

In plaintiff's motion to dismiss, he argues that "the present action does not involve the same facts or claims as the previous actions, does not affect any substantial right, and no manifest injustice will result from failing to consider the interlocutory appeal of the Order." To support his current claim of breach of fiduciary duty, plaintiff alleges that defendant "knew or should have known there were unsuitable buried materials on the Lot such that a single family residence could not be built thereon, and [defendant] concealed this information from Plaintiff despite its duty as a fiduciary to disclose material facts regarding the Lot." Plaintiff states, however, that in the federal lawsuit, he claimed

> (1) [defendant] misrepresented that the Clark Group would do the sampling and testing provided for in Addendum B when another group actually took the samples and sent them to the Clark Group only for testing; and, (2) [defendant] wrongfully omitted from its notice to Plaintiff concerning its receipt of a confirmatory report indicating acceptable levels of fecal coliform that one monitoring well showed readings above the accepted standards.

"As a general rule, a moving party may not appeal the denial of a motion for summary judgment because ordinarily such an order does not affect a 'substantial right.' " *Bockweg v. Anderson*, 333 N.C. 486, 490, 428 S.E.2d 157, 160 (1993) (citing *Waters v. Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 344 (1978)). In *Bockweg*, however, our Supreme Court concluded that "the denial of a motion for summary judgment based on the defense of *res judicata may* affect a substantial right,

making the order immediately appealable." *Id.* at 491, 428 S.E.2d at 161 (citing N.C. Gen. Stat. § 1-277 (1983) (emphasis added); N.C. Gen. Stat. § 7A-27(d) (1989); and *Kleibor v. Rogers*, 265 N.C. 304, 306, 144 S.E.2d 27, 29 (1965)). Since that decision, this Court has concluded, "[W]e do not read *Bockweg* as mandating in every instance immediate appeal of the denial of a summary judgment motion based upon the defense of *res judicata*." *Country Club of Johnston Cnty., Inc. v. U.S. Fid. & Guar. Co.*, 135 N.C. App. 159, 166, 519 S.E.2d 540, 545 (1999) (noting that "[t]he opinion pointedly states reliance upon res judicata '*may* affect a substantial right' "). Because the current case presents no possibility of inconsistent verdicts, we dismiss the appeal.

"Under the doctrine of res judicata or 'claim preclusion,' a final judgment on the merits in one action precludes a second suit based on the same cause of action between the same parties or their privies." *Whitacre P'ship v. Biosignia, Inc.*, 358 N.C. 1, 15, 591 S.E.2d 870, 880 (2004) (citations omitted). "*Res judicata* not only bars the relitigation of matters determined in the prior proceeding but also 'all material and relevant matters within the scope of the pleadings, which the parties, in the exercise of reasonable diligence could and should have brought forward.' " *Holly Farm Foods v. Kuykendall*, 114 N.C. App. 412, 416, 442 S.E.2d 94, 97 (1994) (quoting *Ballance v. Dunn*, 96 N.C. App. 286, 290, 385 S.E.2d 522, 524 (1989)). Furthermore, "[t]he defense of res judicata may not be avoided by shifting legal theories or asserting a new or different ground for relief[.]" *Rodgers Builders v. McQueen*, 76 N.C. App. 16, 30, 331 S.E.2d 726, 735 (1985) (citations omitted).

Our Supreme Court observed that "the common law rule against claim-splitting is based on the principle that all damages incurred as the result of a *single wrong* must be recovered in one lawsuit." *Bockweg*, 333 N.C. at 492, 428 S.E.2d at 161 (citing *Smith v. Pate*, 246 N.C. 63, 67, 97 S.E.2d 457, 460 (1957)). However, "[w]here a plaintiff has suffered multiple wrongs at the hands of a defendant, a plaintiff may normally bring successive actions, or, at his option, may join several claims together in one lawsuit." *Id.* (internal citations omitted). Although "there has been a strong movement on the part of some litigants for the courts of this State to adopt the Restatement's 'transactional approach' to res judicata for determining whether two causes of action are part of the same claim[,]" neither appellate court has adopted it. *Nw. Fin. Grp., Inc. v. Cnty. of Gaston*, 110 N.C. App. 531, 537, 430 S.E.2d 689, 693 (1993) ("Under the transactional approach all issues arising out of a transaction or series of transactions must be tried together as one claim.") (citation and quotations omitted); *see also Bockweg*, 333 N.C. at 498, 428 S.E.2d at 165

(Meyer, J., dissenting) ("Under the modern, transactional approach, a claim is defined as 'a single core of operative facts.' ").

Here, it is undisputed that the parties are identical and that they litigated a prior action resulting in a final judgment on the merits. The only issues are whether the current claim was previously litigated in the federal suit and, if not, whether it should have been. As stated above, in plaintiff's federal suit, he sought specific enforcement of Addendum B, relief for violations of ILSFDA and UDTPA, and a claim for fraud. These claims surrounded plaintiff's dissatisfaction with how defendant handled the testing and reporting of the fecal coliform issue.

The federal district court held that defendant provided plaintiff with timely notice of the confirmatory report, foreclosing plaintiff's claim for specific enforcement of the remedies in Addendum B. *Sanderford*, 2012 WL 506667, at *3. Moreover, the court found that although defendant used another company to take samples of the soil, defendant did not breach its contract in light of the Clark Group's oversight of the process. *Id.* at *4. The court also determined that defendant did not misrepresent that it received a confirmatory report. *Id.* Lastly, it concluded that Addendum B to the purchase agreement was an unenforceable contract. *Id.* The Fourth Circuit affirmed. *Sanderford*, 531 F. App'x 358.

In the instant action, the only allegation remaining is breach of fiduciary duty based on defendant's failure, through its agent Mac Rogerson, who plaintiff claimed was also his realtor and "stood in a fiduciary relationship to [p]laintiff," "to disclose all material facts known to [d]efendant regarding the Lot." Plaintiff alleged that "[d]efendant failed to meet its obligations by not disclosing the Buried Unsuitable Materials[.]" Additionally, plaintiff claimed that a "Soil Bearing Test uncovered buried organic material beginning approximately three feet below the surface" indicating that "the Lot is unsuitable for construction." Moreover, "[t]he Unsuitable Buried Material is approximately eighteen (18) to twenty four (24) inches thick across the Lot[,]" and "[u]pon information and belief, . . . [d]efendant[ ] covered the Unsuitable Buried Material with fill dirt, in order to cover and obscure" it, rather than remove it. Based on the breach of fiduciary duty claim, plaintiff is seeking damages in excess of $25,000.

Although defendant argues that "[t]he instant action like the Federal action is dependent upon a soils issue as it relates to the lot sale[,]" there was not a final judgment on the merits in the prior action on the current claim of breach of fiduciary duty based on the alleged unsuitable buried material affecting the suitability of the lot for construction. Moreover,

the current claim is not a "material and relevant matter[ ] within the scope of the pleadings" of the federal suit, which focused solely on Addendum B. *Holly Farm Foods*, 114 N.C. App. at 416, 442 S.E.2d at 97. In *Skinner v. Quintiles Transnational Corporation*, 167 N.C. App. 478, 480–81, 606 S.E.2d 191, 192 (2004), cited by defendant, the plaintiff filed a lawsuit under the Americans with Disabilities Act in 2001, and the plaintiff filed a second lawsuit under North Carolina's Retaliatory Employment Discrimination Act in 2003. In concluding that the claims in plaintiff's second lawsuit were barred by *res judicata*, we explained that "each of plaintiff's two claims [were] based upon her termination by defendant and that the instant action merely present[ed] a new legal theory as to why plaintiff was terminated by defendant." *Id.* at 483–84, 606 S.E.2d at 194. *Contra Tong v. Dunn*, 231 N.C. App. 491, 501, 752 S.E.2d 669, 676 (2013) ("[Although] claims of (1) fraudulent and negligent misrepresentations to an employee, and (2) a breach of fiduciary duty to a common shareholder, arose out of a common set of facts[,]" the plaintiff "is seeking, in this case, a remedy for a 'separate and distinct [tortious] act leading to a separate and distinct injury.' ").

Here, unlike in *Skinner*, plaintiff has not merely presented a new legal theory regarding specific enforcement of Addendum B or misrepresentations regarding the confirmatory report. Rather, plaintiff has asserted a separate cause of action for damages for breach of fiduciary duty regarding defendant's alleged duty, and breach of such duty, to disclose that the lot was unsuitable for a single-family residence.

As was the case in *Bockweg*, here, "[p]laintiff[ ] did not merely change [his] legal theory or seek a different remedy. Rather, plaintiff[ ] [is] seeking a remedy for a separate and distinct negligent act leading to a separate and distinct injury." *Bockweg*, 333 N.C. at 494, 428 S.E.2d at 163. Although "all damages incurred as the result of a *single wrong* must be recovered in one lawsuit," here, where plaintiff "has suffered multiple wrongs[,] . . . plaintiff may normally bring successive actions[.]" *Id.* at 492, 428 S.E.2d at 161.

Defendant also asks us, pursuant to Rule 2 of the Rules of Appellate Procedure, to exercise our plenary power to avoid manifest injustice and consider its argument based on the affirmative defense of the statute of limitations. While Rule 2 "permits the appellate courts to excuse a party's default in both civil and criminal appeals when necessary to 'prevent manifest injustice to a party' or to 'expedite decision in the public interest[,]' " *Dogwood Dev. & Mgmt. Co., LLC v. White Oak Transp. Co.*, 362 N.C. 191, 196, 657 S.E.2d 361, 364 (2008) (citing N.C. R. App. P. 2), invoking it here is not appropriate.

III. Conclusion

For the foregoing reasons and pursuant to plaintiff's motion, because the current case presents no possibility of inconsistent verdicts, we dismiss defendant's appeal from the trial court's interlocutory order as it does not affect a substantial right.

DISMISSED.

Judges McCULLOUGH and INMAN concur.

ZARMINA SERAJ, Plaintiff
v.
ERIC DUBERMAN, M.D. and WESTERN WAKE SURGICAL, P.C., Defendants

No. COA15-873

Filed 2 August 2016

Medical Malpractice—proximate cause—summary judgment—inappropriate

Summary subject should not have been granted for defendants in a medical practice action that arose from a surgery to remove a mass in an arm that was deeper and more entangled with nerves than expected. While there were differences in the expert testimony regarding the cause of plaintiff's nerve damage, those differences showed a genuine issue of material fact.

Appeal by Plaintiff from order entered 13 January 2015 by Judge Paul G. Gessner in Wake County Superior Court. Heard in the Court of Appeals 14 January 2016.

Anglin Law Firm, PLLC, by Christopher J. Anglin, for Plaintiff-Appellant.

Yates, McLamb & Weyher, L.L.P., by John W. Minier and Andrew C. Buckner, for Defendants-Appellees.

HUNTER, JR., Robert N., Judge.

Plaintiff appeals from a trial court order granting summary judgment in favor of Defendants. The trial court stated Plaintiff failed to introduce

evidence showing proximate causation, an element of medical malpractice. We reverse the trial court's grant of summary judgment.

I. Factual and Procedural Background

On 18 March 2013, Plaintiff filed an unverified complaint alleging Dr. Duberman committed medical malpractice during an operation on Plaintiff's arm. Plaintiff alleged the following acts of negligence: failure to perform tests to determine the nature of Plaintiff's benign tumor, failure to perform tests to rule out any nerve or vascular involvement, failure to identify and protect Plaintiff's right median nerve, and negligent injury to Plaintiff's right median nerve. In failing to perform these tests and in these actions, Plaintiff alleges, Dr. Duberman failed to provide medical care in accordance with the training and experience of a physician practicing in the same or a similar community. Plaintiff alleges that her injuries were a "direct and proximate result of [Dr. Duberman's] negligence[.]" The complaint also names Western Wake Surgical as a defendant, asserting Dr. Duberman's negligence occurred within the scope of his duties as an employee. To comply with Rule 9(j) of the North Carolina Rule of Civil Procedure, Plaintiff stated the following:

> [T]he medical care rendered by the defendants and/or their employees and agents and all medical records pertaining to the alleged negligence that are available to the plaintiff after reasonable inquiry have been reviewed by persons who are reasonably expected to qualify as expert witnesses under Rule 702 of the Rules of Evidence and who are prepared and willing to testify that the medical care provided to [Plaintiff] did not comply with the applicable standards of care.

On 17 May 2013, Defendants Duberman and Western Wake Surgical filed an unverified answer generally denying Plaintiff's allegations. In addition, Defendants asserted the defenses of contributory negligence and failure to comply with Rule 9(j) as well as a statutory cap on damages.

Defendants filed a motion for summary judgment on 17 October 2014. In their motion, Defendants argued no genuine issue of material fact existed as to "whether any act or omission by defendants was a proximate cause of Plaintiff's alleged injury." In support of their motion, Defendants filed the transcripts of five depositions, which we summarize below.

A. Plaintiff's Deposition

First, Defendants attached the transcript of Plaintiff's deposition taken 27 September 2013. Plaintiff, born in Kabul, Afghanistan, moved to California in 1980. When she moved to North Carolina around the year 2000, she had no ongoing medical problems other than dry eyes. Around 2006, she began to experience a pressure on her head. Following an MRI, doctors found a tumor in her head, and she had to undergo surgery. After the surgery, Plaintiff no longer felt the pressure in her head.

Subsequently, she noticed a swelling on her right arm. Approximately a month after noticing the swelling, she made an appointment with Dr. Newman. He told her the swelling was a "fatty lump" which could be removed by surgery. Dr. Newman referred Plaintiff to a surgeon, Dr. Duberman. Plaintiff made an appointment with Dr. Duberman, and went to his office where he examined her arm. He also diagnosed the swelling on Plaintiff's arm as a fatty tumor or lipoma. Dr. Duberman then discussed surgery options with Plaintiff. He explained she could undergo the procedure while awake, with local anesthesia, or she could be put to sleep for the procedure. He said the procedure would be "simple" so Plaintiff chose local anesthesia.

On the day of the procedure, Dr. Duberman administered a local anesthetic. Plaintiff said the procedure hurt "[a] lot," explaining she started screaming "[a]s soon as he start[ed] cutting [my] arm." She believed the procedure lasted approximately one hour, during which time Dr. Duberman gave her additional local anesthesia. The second dose of local anesthesia was not enough to quell the pain, so Dr. Duberman stopped and decided to schedule a time to conclude the procedure under sedation because she was unable to miss work.

Plaintiff scheduled the second surgery for 13 April 2012, approximately six months after the first attempted procedure. She did not undergo any tests or scans before the second surgery. Before the operation, Dr. Duberman estimated it would take him one-and-a-half hours to remove the mass. The surgery took three hours because the tumor was too deep and there was bleeding.

On 14 April 2012, Plaintiff called Dr. Duberman because she experienced pain and numbness in her fingers. He assured her the pain and numbness was normal. The next day, Plaintiff's pain and numbness increased and she could not hold things. She called Dr. Duberman again, and he said, "I didn't do anything wrong." She told him she thought a nerve may be cut. They discussed scheduling an MRI. The

MRI showed a "very complicated" tumor with nerves surrounding it. Following the MRI, Dr. Duberman referred Plaintiff to a specialist at UNC-Chapel Hill. Plaintiff went to see a doctor at UNC but did not remember any further details.

Plaintiff sought a second opinion at Duke. After seeing multiple doctors from multiple specialties, they told her she had nerve damage resulting from surgery. Due to the complicated nature of the tumor, doctors at Duke refused to perform surgery on Plaintiff to remove the remainder of the tumor.

Plaintiff next went to Houston, Texas to seek treatment from Dr. Jimmy F. Howell, M.D. He successfully removed the remainder of the tumor. Following the surgery in Texas, Dr. Howell told Plaintiff one of her nerves had previously been cut.

At the time of the deposition, Plaintiff took prescription medications foranxiety, depression, and thyroid problems as well as ibuprofen daily for pain relief. Prior to the surgeries, Plaintiff worked five days a week for eight to nine hours per day teaching the Dari language to special forces units deploying to Afghanistan. In June 2012, when her contract ended, she did not actively seek to renew her contract or seek another job because of her hand. She explained teaching requires writing on the blackboard and typing, things she is no longer able to do. Now, Plaintiff collects Social Security disability in the amount of $1,700.00 per month. She explained the pain and loss of use of her hand also caused her to discontinue cooking, gardening, and exercising. It also affected her relationship with her husband, and she began to sleep in a different room because the pain caused her to toss and turn in her sleep. Since the second surgery, Plaintiff's depression worsened.

B. Mahamoud Seraj Deposition

Plaintiff's husband, Mahamoud Seraj ("Mahamoud"), gave a deposition on 9 April 2014. He was born in Afghanistan, and moved to France during high school. As a design engineer, he moved to California and later to Apex, North Carolina. He and Plaintiff married in 1994. Together, they have one daughter and both Plaintiff and her husband have one child each from previous marriages.

Mahamoud estimated Plaintiff went to the doctor approximately two or three weeks after she showed him the lump on her arm. When Plaintiff returned from seeing Dr. Newman for the first time, Plaintiff told him the lump was "fatty tissue." Dr. Newman sent Plaintiff to a

surgeon, Dr. Duberman. Regarding the first surgery using local anesthesia, Mahamoud said, "She just said it was very painful, and Dr. Duberman said, 'We have to do that under general anesthesia because,' from his opinion, [the lump] was deeper than what he was thinking." Following the first surgery, his wife did not experience continuing pain.

Following the second surgery, "Dr. Duberman told her the tumor was very deep. He couldn't extract it. All he could do is stop [the] bleeding." Immediately after the surgery, she complained of "pulsing" in her fingers, with no feeling in two fingers. The weekend after the surgery, she described pain, numbness, pulsing, and burning in her hand. Mahamoud remembers Plaintiff calling Dr. Duberman two times after the surgery. She also had problems holding things.

Mahamoud accompanied Plaintiff to doctors' appointments at UNC and Duke following the second surgery. A doctor at UNC "said that it's very risky to do surgery on this, and they said that, from the symptoms that they are seeing, some nerves are cut." The doctors at Duke were "shocked" Dr. Duberman did not have an MRI taken before the first surgery. The doctors at Duke diagnosed Plaintiff as having a Masson's tumor. It is a rare, benign tumor which would be risky to remove. As Mahamoud understood it, the tumor was "tangled around nerves" and it was touching an artery.

Following the second surgery, Plaintiff had approximately one week remaining on her contract to teach the Dari language to special forces troops and had to administer their final exam. Due to her arm, Plaintiff was unable to drive. Mahamoud drove Plaintiff to class every day that week, and stayed in the classroom with her during class. Plaintiff no longer teaches, in part because she cannot drive and Mahamoud cannot miss work to drive her to work every day. Since Plaintiff lost the full use of her right hand, Mahamoud explained, she's been suffering from anxiety and depression. She takes multiple medications, which have helped, but they make her act "like a zombie."

C. Dr. Duberman Deposition

Dr. Duberman gave a deposition on 11 March 2014. Dr. Duberman attended undergraduate and medical school at Columbia University. He completed his residency at Tufts New England Medical Center. He also completed a fellowship in colon and rectal surgery at the Robert Wood Johnson School of Medicine. Currently, Dr. Duberman is an employee and an owner of Western Wake Surgical. He performs both general and colon and rectal surgeries.

Dr. Duberman operated on approximately 100 upper extremity masses prior to Plaintiff's surgery. About 80 percent of those were lipomas. Generally, he could tell whether a mass was a lipoma or something else based on the texture and feel of the mass. He did not generally perform an MRI before operating on an upper extremity mass.

Discussing Plaintiff, Dr. Duberman recalled "her presenting to the office with this soft tissue mass in her arm. And I remember examining her arm. It was mobile, non-tender, soft – soft tissue mass. And I recall asking her if she wanted it removed and her stating that she would like it removed." Prior to Plaintiff's first surgery, Dr. Duberman did not perform or order an MRI on Plaintiff because he does not believe imaging is needed for "soft tissue masses." Based on his physical examination of Plaintiff, he diagnosed her with a lipoma. During Plaintiff's first visit to Dr. Duberman's office, he identified the lump on her right arm as a lipoma. He was concerned about the rapid enlargement of the mass, but still believed the mass to be a lipoma.

During the first procedure, performed at WakeMed Cary Hospital, he remembered using local anesthesia and Plaintiff being uncomfortable during the procedure. The mass was completely within Plaintiff's muscle. When he made the incision, he could only see muscle, with the tumor bulging from within the muscle. He could not see the tumor itself during the first surgery, only the muscle surrounding the tumor. Following the first surgery on 11 November 2011, Dr. Duberman still believed the mass to be a lipoma.

During the second surgery, Dr. Duberman opened the previous incision. He opened the fascia of the muscle and spread the muscles crosswise. At this time, "copious bleeding ensued." Dr. Duberman applied pressure to the area with a sponge for approximately five minutes. After controlling the bleeding, he continued to dissect into the muscle. He noted seeing a superficial nerve. Below the surface of the muscle belly, he saw a "vascular mass." He identified it as a vascular mass because it was bleeding. Dr. Duberman then conducted a biopsy from the surface of the mass. Then, he closed the incision layer by layer. He then scheduled a follow-up MRI and referred her to a surgical oncologist, Dr. Doug Tyler at Duke.

During the two surgeries on Plaintiff, Dr. Duberman did not see the median nerve, a large nerve in the arm. He also did not notice any neural dysfunction following the second surgery. He did not conduct a neurological examination because it was not his practice to do so on patients with soft tissue tumors. He explained the median nerve is a visible structure, and "had it been encountered it would've been protected."

The biopsy identified Plaintiff's tumor as a Masson's tumor. Before Plaintiff's surgery, Dr. Duberman had never heard of a Masson's tumor.

D. Dr. Williamson Deposition

Dr. Barry Williamson, an expert witness for Plaintiff and a board certified general surgeon, also gave a deposition on 30 May 2014. In Dr. Williamson's professional opinion, Dr. Duberman should have ordered diagnostic tests following the first surgery when he did not find what he expected to find. He should not have conducted the second operation without performing tests first. "The patient should have been worked up fully for what this mass was. Seeing that it encompassed the artery and the nerve, [she] should have been worked up completely for any kind of neurologic dysfunction prior to surgery."

During the second surgery, Dr. Duberman "injured the median nerve." Dr. Williamson found no evidence Dr. Duberman had cut the nerve, only evidence the nerve was damaged.

> Q: [D]o you have an opinion as to the mechanism of that injury? Did he – was it a direct injury? Was it a compression injury?
>
> A: I don't know. I mean, based on his operative note, there's no way to tell. . . .
>
> Q: Do you have an opinion as to whether that tumor could have been removed without damage to the median nerve?
>
> A: I don't know that. That's not my area of expertise.
>
> Q: Do you know whether if the tumor had just been left alone and no further surgery took place at all whether there would have been any injury to the median nerve.
>
> A: Impossible to know. Again, Masson's tumors are fairly rare, so I don't know that anybody has a lot of experience with leaving those behind and seeing what happens. . . .
>
> Q: Tell me about your – you said you had reviewed the deposition of Dr. Duberman. Tell me, was there anything in his testimony that you disagreed with?
>
> A: No. No. Again, you know, like I said, the first surgery that he did, I don't have a problem with. We see people here in the office all the time and take lumps and bumps off, and 95 percent of the time or more you come back with exactly what you think. But occasionally, you find

> something that you're not expecting. And the decision then is do you proceed with that or do you stop and do further workup. And I think that's where the problem came in, is he stopped, but he didn't do any further workup to see why he didn't find what he expected. . . .
>
> Q: Dr. Williamson, more likely than not, to a reasonable degree of medical probability, did Dr. Duberman's negligence cause [Plaintiff's] injury and the sequelae thereof?
>
> A: Yes.
>
> Q: Dr. Williamson, more likely than not, to a reasonable degree of medical probability, had Dr. Duberman treated [Plaintiff] within the standards of care, would she have experienced median nerve damage and the sequelae thereof?
>
> A: No.

He continued by explaining the standard of care of surgeons in Cary would require testing following the first surgery.

E. Dr. Brigman Deposition

Finally, Defendants attached the deposition of Dr. Brian Brigman to their motion for summary judgment. A physician in the field of orthopedic oncology, Dr. Brigman is employed at Duke University Medical Center and is certified in orthopedic surgery. He is also a member of the Vascular Malformation Team at Duke, a multi-disciplinary team. Plaintiff came to see Dr. Brigman because of a mass in her arm. Dr. Tyler, another physician at Duke University Medical Center, referred Plaintiff to Dr. Brigman.

Dr. Brigman examined Plaintiff and noted she had the symptoms of a median nerve injury, including numbness and weakness. Potential causes of the nerve injury included compression from the mass, a traction injury from the surgery, the nerve losing blood supply, or a direct injury from cutting the nerve. At that time, Dr. Brigman recommended scheduling another MRI, and suggested surgery may be an option.

Plaintiff returned approximately six weeks later for a second appointment. At that time, Plaintiff complained she was stressed and losing weight due to the tumor. At the conclusion of the second assessment, Dr. Brigman wrote in his notes: "There is likely injury to her median nerve, however it is unclear whether it's from the previous surgical intervention or if it may be related to compression of the malformation on the

median nerve itself." Dr. Brigman scheduled a surgery during Plaintiff's second visit, but Plaintiff later cancelled the appointment.

On 27 October 2014, Plaintiff filed a cross-motion for summary judgment. Plaintiff argued there was no genuine issue of material fact as to Dr. Duberman's liability for medical negligence, Plaintiff's claim of respondeat superior against Western Wake Surgical, and the affirmative defense of contributory negligence. Attached to the motion, Plaintiff provided affidavits of Plaintiff and Dr. Williamson.

Plaintiff's affidavit stated Dr. Duberman performed a surgery on Plaintiff's arm on 11 November 2011. Before the first surgery, he did not order an MRI or other imaging of her arm. The second surgery occurred 13 April 2012. Before the second surgery, Dr. Duberman did not tell Plaintiff she needed an MRI.

Dr. Williamson's affidavit stated he is a licensed physician in the field of general surgery. Dr. Duberman should have ordered an MRI prior to the second surgery on plaintiff. "Without ordering these, Dr. Duberman could not be certain what type of mass he was operating on." As a general surgeon, Dr. Duberman is not qualified to operate on a Masson's tumor.

On 13 January 2015, the trial court entered an order granting Plaintiff's motion for summary judgment on Plaintiff's respondeat superior claim. The trial court also granted Defendant's motion for summary judgment, noting, "[T]he Plaintiff has failed to offer sufficient evidence establishing the necessary element of proximate causation." The trial court denied Plaintiff's motion for summary judgment as it relates to contributory negligence and determined Plaintiff's constitutional claims related to the economic damages cap were not ripe for consideration. Plaintiff timely filed a notice of appeal.

II. Jurisdiction

As an appeal from a final judgment of a superior court, jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b) (2015).

III. Standard of Review

An order granting summary judgment is reviewed *de novo*. *N.C. State Bar v. Scott*, __ N.C. App. __, __, 773 S.E.2d 520, 522 (2015), *appeal dismissed and disc. review denied*, ___ N.C. ___, 781 S.E.2d 621 (2016). Summary judgment is appropriate only when there is no genuine issue of material fact and any party is entitled to judgment as a matter of law. *In re Will of Jones*, 362 N.C. 569, 573, 669 S.E.2d 572, 576 (2008).

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. §1A-1, Rule 56(c) (2015). When reviewing the evidence on a motion for summary judgment, we review evidence presented in the light most favorable to the non-moving party. *Summey v. Barker*, 357 N.C. 492, 496, 586 S.E.2d 247, 249 (2003).

IV. Analysis

To bring a medical malpractice action, the plaintiff bears the burden of establishing "'(1) the applicable standard of care; (2) a breach of such standard of care by the defendant; (3) the injuries suffered by the plaintiff were proximately caused by such breach; and (4) the damages resulting to the plaintiff.' " *Purvis v. Moses H. Cone Memorial Hosp. Service Corp.*, 175 N.C. App. 474, 477, 624 S.E.2d 380, 383 (2006) (quoting *Weatherford v. Glassman*, 129 N.C. App. 618, 621, 500 S.E.2d 466, 468 (1998)). An actor's negligence is the proximate cause of harm to another if "(a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm." Restatement (Second) of Torts § 431 (2016). The North Carolina Supreme Court defines proximate cause as follows:

> [A] cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed.

Hairston v. Alexander Tank & Equip. Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984) (citations omitted). A court should determine whether the evidence presents an issue where a "jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to the plaintiff[.]" Restatement (Second) of Torts § 434 (2016). It is then a question for the jury whether the defendant's conduct was a substantial factor in causing harm to the plaintiff. *Id.*

To forecast evidence of proximate causation in a medical malpractice action, expert testimony is needed. *Cousart v. Charlotte-Mecklenburg Hops. Auth.*, 209 N.C. App. 299, 303, 704 S.E.2d 540, 543 (2011).

> Due to the complexities of medical science, particularly with respect to diagnosis, methodology and determinations of causation, this Court has held that where the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury. However, when such expert opinion testimony is based merely upon speculation and conjecture, it can be of no more value than that of a layman's opinion. As such, it is not sufficiently reliable to qualify as competent evidence on issues of medical causation. Indeed, this Court has specifically held that an expert is not competent to testify as to a causal relation which rests upon mere speculation or possibility.

Young v. Hickory Bus. Furniture, 353 N.C. 227, 230, 538 S.E.2d 912, 915 (2000) (internal citation and quotations marks omitted).

To survive a motion for summary judgment in a medical malpractice action, the plaintiff must "forecast evidence demonstrating that the treatment administered by [the] defendant was in negligent violation of the accepted standard of medical care in the community[,] and that [the] defendant's treatment proximately caused the injury." *Lord v. Beerman*, 191 N.C. App. 290, 293–294, 664 S.E.2d 331, 334 (2008) (internal citations and quotation marks omitted). "Our Court's prior decisions demonstrate that where a plaintiff alleges that he or she was injured due to a physician's negligent failure to diagnose or treat the plaintiff's medical condition sooner, the plaintiff must present at least some evidence of a causal connection between the defendant's failure to intervene and the plaintiff's inability to achieve a better ultimate medical outcome." *Id.* at 294, 664 S.E.2d at 334.

In *Turner v. Duke Univ.*, 325 N.C. 152, 155–56, 381 S.E.2d 706, 708–09 (1989), for example, Duke University Medical Center admitted decedent to the hospital for constipation, cramping, nausea, and vomiting. *Id.* Defendant, a physician, treated her for constipation, unable to determine the cause of plaintiff's symptoms. *Id.* Decedent's condition worsened, but doctors failed to examine her for a number of hours, during which time she became unresponsive. *Id.* at 156, 381 S.E.2d at 709. Surgery revealed decedent's colon was perforated, and she died of an infection the following day. *Id.* at 156–57, 381 S.E.2d at 709. Plaintiff's expert testified that the defendant should have examined decedent sooner, and his failure to conduct an earlier examination proximately

caused her death. *Id.* at 159–60, 381 S.E.2d at 711. Had the physician discovered decedent's perforated colon sooner, plaintiff's expert testified, decedent's life could have been saved. *Id.* at 160, 381 S.E.2d at 711. "Such evidence is the essence of proximate cause." *Id.* The Court held a question of fact existed as to whether decedent's death was caused by defendant's negligent failure to diagnose decedent's condition. *Id.*

Defendants assert the threshold needed to surmount summary judgment and proceed to a jury on the issue of proximate cause is that plaintiff *probably* would have been better off if not for defendant's negligence. *See Lord*, 191 N.C. App. at 300, 664 S.E.2d at 338. Defendants further contend experts must establish "'[t]he connection or causation between [Defendant's alleged] negligence and [Plaintiff's injury was] *probable*, not merely a remote possibility.' " *Id.* (quoting *White v. Hunsinger*, 88 N.C. App. 382, 387, 363 S.E.2d 203, 206 (1988)) (emphasis in original).

However, the rule that proximate causation requires a showing plaintiff probably would have been better off is not applicable in this case. The rule applies when there is a negligent delay in treatment or diagnosis. *See id.* at 296–300, 664 S.E.2d at 336–38. As explained in *Katy v. Capriola*, 226 N.C. App. 470, 481, 742 S.E.2d 247, 255 (2013), the rule is part of a special jury instruction when the question for the jury to consider is whether the injury is proximately caused by the delay in treatment or diagnosis. *See Id.*; *see also* N.C.P.I., Civ. 809.00A (gen. civ. vol. 2014).

Defendants argue *Campbell v. Duke Univ. Health Sys., Inc.*, 203 N.C. App. 37, 45, 691 S.E.2d 31, 36 (2010), prevents "mere speculation" to establish proximate cause. In *Campbell*, the plaintiff underwent surgery on his right shoulder. *Id.* at 38, 691 S.E.2d at 33. One hour after the surgery, plaintiff began to experience pain in his left arm. *Id.* at 39, 691 S.E.2d at 33. Plaintiff did not assert the doctrine of *res ipsa loquitur*. *Id.* at 40, 691 S.E.2d at 34. We distinguish *Campbell* from this case on its facts. In *Campbell*, plaintiff's injury was outside the scope of the surgery whereas here the injury occurred within the scope of the surgery.

Here, Plaintiff argues Dr. Duberman's failure to perform testing prior to the second surgery proximately caused her injuries. Had he ordered an MRI or other imaging of the lump, she asserts he would have discovered the mass was not a lipoma and he would not have operated a second time. Not ordering imaging after the first attempted surgery violated the standard of care. The evidence is sufficient to raise a factual issue of whether this violation of the standard of care proximately caused Plaintiff's injuries. Plaintiff emphasizes Dr. Williamson's testimony that it is more likely than not that had Dr. Duberman followed the standard of care, she would

not have experienced nerve damage. Viewing the evidence in the light most favorable to Plaintiff, the non-moving party, Plaintiff contends she presented evidence sufficient to disprove Defendants' claim that no question of material fact exists. We agree.

Plaintiff met her burden to establish Dr. Duberman's failure to perform testing prior to the second surgery was in negligent violation of the accepted standard of medical care in the community. The question before us is whether Dr. Duberman presented sufficient evidence that failure to perform testing prior to the second surgery proximately caused Plaintiff's injury.

Dr. Brigman's expert testimony, which is necessary to forecast evidence of proximate causation in a medical malpractice action, established Dr. Duberman should not have conducted the second surgery on Plaintiff. Dr. Duberman, as a general surgeon, is not qualified to operate on a Masson's tumor. "Without ordering [tests], Dr. Duberman could not be certain what type of mass he was operating on." Had Dr. Duberman ordered the MRI, he would have identified the mass as something other than a lipoma, and would not have conducted the operation. Dr. Williamson agreed Dr. Duberman should not have performed the second surgery without conducting testing first. Dr. Williamson stated: "The patient should have been worked up fully for what this mass was. Seeing that it encompassed the artery and the nerve, [she] should have been worked up completely for any kind of neurologic dysfunction prior to surgery."

Viewed in the light most favorable to Plaintiff, the evidence presents disputed issues of fact so a "jury may reasonably differ as to whether the conduct of the defendant has been a substantial factor in causing the harm to [P]laintiff." *See* Restatement (Second) of Torts § 434. Plaintiff experienced numbness and pain in her fingers and hand following the second surgery. There is no evidence she experienced any numbness or pain in her hand prior to the surgery. According to Dr. Williamson, the tumor Dr. Duberman attempted to remove "encompassed the artery and the nerve." In his professional opinion, Dr. Williamson said Dr. Duberman "injured the median nerve." Although Dr. Williamson did not testify conclusively as to whether Dr. Duberman cut the nerve, his testimony sufficiently established Dr. Duberman injured Plaintiff's nerve. We therefore hold the evidence, when viewed in the light most favorable to the non-moving party, shows a genuine issue of material fact exists.

We recognize that Defendants' expert disputes Plaintiff's evidence of proximate causation and posits differing possibilities explaining the results obtained in this medical procedure. These differences are jury

matters going to the weight and credibility of the witnesses or which of several events was more likely than not to be a proximate cause of the injury. Summary judgment is inappropriate where such factual debates are raised by the evidence and experts differ.

V. Conclusion

For the foregoing reasons, we reverse the trial court's summary judgment order.

REVERSED.

Judges STEPHENS and INMAN concur.

STATE OF NORTH CAROLINA EX REL. COMMISSIONER OF INSURANCE, Appellee

v.

NORTH CAROLINA RATE BUREAU, Appellant

IN THE MATTER OF THE FILING DATED JANUARY 3, 2014 BY THE NORTH CAROLINA RATE BUREAU FOR REVISED HOMEOWNERS' INSURANCE RATES & HOMEOWNERS' INSURANCE TERRITORY DEFINITIONS

No. COA15-402

Filed 2 August 2016

1. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—underwriting profit

Where the N.C. Commissioner of Insurance rejected the N.C. Rate Bureau's filed rate increases and imposed alternative rate changes, the Court of Appeals held that the Commissioner did not violate any constitutionally mandated standard by refusing to accept the Bureau's cost of equity profit methodology and by adopting an underwriting profit provision that did not return a profit within the range identified by the Bureau's expert witness. The Commissioner's profit methodology was in accord with a methodology upheld by the Court of Appeals in a previous case.

2. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—net cost of reinsurance

The N.C. Commissioner of Insurance did not err by rejecting the N.C. Rate Bureau's filed net cost of reinsurance of 17.5% of premium and ordering a net cost of reinsurance of 10% of premium.

3. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—modeled hurricane losses

The N.C. Commissioner of Insurance did not err by reducing the modeled hurricane losses in the N.C. Rate Bureau's filing. The Commissioner performed a careful review of the evidence and did not arbitrarily reduce the modeled hurricane losses to be used in ratemaking.

4. Insurance—N.C. Rate Bureau—filing—revised homeowners' insurance rates and territory definition—allocation to zones

The N.C. Commissioner of Insurance did not err by rejecting the N.C. Rate Bureau's filed allocation of the net cost of reinsurance and underwriting profit to zones. The Commissioner's decision was supported by the findings, which cast doubt upon the credibility of the model developed by the Bureau's witness.

Appeal by the North Carolina Rate Bureau from order entered 18 December 2014 and amended 22 December 2014 and 13 January 2015 by the North Carolina Commissioner of Insurance. Heard in the Court of Appeals 5 November 2015.

North Carolina Department of Insurance, by Sherri L. Hubbard, for appellee.

Young Moore and Henderson, P.A., by Marvin M. Spivey, Jr., and Glenn C. Raynor, for appellant.

McCULLOUGH, Judge.

The North Carolina Rate Bureau ("Bureau") appeals from order entered by the North Carolina Commissioner of Insurance ("Commissioner") that rejected the Bureau's filed rate increases and imposed alternative rate changes. For the following reasons, we affirm the Commissioner's order.

I. Background

On 3 January 2014, the North Carolina Department of Insurance ("Department") received the Bureau's filing for revised homeowners' insurance rates and revised homeowners' insurance territory definitions (the "filing"). In the filing, the Bureau sought approval of an overall statewide average rate level change of +25.6%, with the filed rates

varying between the newly defined territories.[1] Broken down into categories, the filing included the following statewide rate increases: 24.8% for owners, 54.9% for tenants, and 50.0% for condominiums. The Bureau requested that the filed rates be applied to all new and renewal policies becoming effective on or after 1 August 2014.

The same day the Department received the filing, the Commissioner issued a press release in which he noted that new homeowners' insurance rates went into effect just six months prior in July 2013, expressed his displeasure with the filing, and indicated that the insurance companies should expect a full hearing on the matter because he would not entertain settlement negotiations.

On 19 February 2014, the Commissioner issued a notice of hearing in which he set the matter for hearing to begin 6 August 2014, scheduled a prehearing conference for 24 July 2014, and identified issues with the filing. The Bureau responded to the notice by submitting amendments to the filing. In addition to a slight increase in the overall statewide average rate level change, those amendments included changes to the filed territory definitions in order to address concerns of the Department. On 11 July 2014, the Commissioner granted a continuance pushing the commencement of the hearing back to 20 October 2014. Pursuant to the continuance, the Commissioner also issued amendments to the notice of hearing on 14 July 2014. Those amendments noted the change in the hearing date and rescheduled the prehearing conference for 10 October 2014.

Following the prehearing conference on 10 October 2014, the Commissioner entered a prehearing order with the consent of the Bureau and the Department. The matter came on for public hearing in Raleigh before Commissioner Wayne Goodwin on 20 October 2014. The hearing continued on 21, 27, 28, 29, 30, and 31 October 2014 and 3, 5, 6, 11, and 12 November 2014. During the hearing, over fifty exhibits of prefiled testimony and documentary evidence and over two thousand pages of live testimony were offered for consideration.

The Commissioner issued his order in the matter on 18 December 2014. The Commissioner subsequently amended the order on

1. As indicated in a letter from the Bureau to the Commissioner accompanying the filing on 3 January 2014, the overall statewide average rate level change initially sought in the filing was +25.3%. Yet, as indicated in a letter from the Bureau to the Commissioner accompanying amendments by the Bureau to the filing on 9 June 2014, noted *supra*, the overall statewide average rate level change slightly increased to +25.6% as a result of amendments. To avoid confusion, we refer only to the rate changes identified in the Bureau's amendments to the filing.

22 December 2014 and 13 January 2015 to correct non-substantive typographical errors, miscalculations in exhibits, and an incorrect citation to an exhibit. In the order, the Commissioner accepted the Bureau's amended revisions to the territory definitions, noting the Department had not objected to the amended revisions. The Commissioner, however, determined the Bureau failed to meet its burden of proof regarding its filed rate increases and, therefore, disapproved the filed rates. Instead of the Bureau's filed rates that resulted in an overall statewide average rate level change of +25.6%, the Commissioner ordered rates that resulted in an overall statewide average rate level change of 0%. In reaching the 0% change, the Commissioner ordered rate increases for tenants and condominiums and decreases for owners. The ordered rates were to be effective 1 June 2015.

The Bureau filed notice of appeal from the Commissioner's order on 16 January 2015.

II. Discussion

On appeal, the Bureau seeks to have the Commissioner's order declared null and void so that its filed rates and territory definitions become effective by operation of law. Yet, because the filed territory definitions were approved, the Bureau's arguments on appeal focus on the rates and the allocation of those rates.

Throughout the Bureau's arguments on appeal, the Bureau directs this Court's attention to the press release issued by the Commissioner on the day the Department received the filing. The Bureau contends "[t]he defining theme of the [o]rder is that every decision announced within it was consistent with [the Commissioner's] rejection of the [f]iling the day it was filed." Specifically, the Bureau claims

> [t]he Commissioner rejected overwhelming and sometimes undisputed evidence of the Bureau. He repeatedly accepted as credible testimony of Department witnesses unsupported by competent or material evidence and chose factors based on matters outside the record, all of which in the aggregate led to the result foretold by his press release – that homeowners insurers are not entitled to and should not have requested a rate increase regardless of the evidence of rate inadequacy.

The Bureau further asserts that there are too many issues with the Commissioner's order to address each issue on appeal; therefore, the Bureau asserts the following arguments challenging specific

components of the ordered rates: (1) the Commissioner erred as a matter of law by ordering an underwriting profit provision that fails to meet legal and constitutional standards; (2) the Commissioner erred by rejecting the reinsurance provision filed by the Bureau and by selecting a provision that is unsupported by material and substantial evidence; (3) the Commissioner erred by reducing the filed value for modeled hurricane losses; and (4) the Commissioner erred by rejecting the filed allocation of the net cost of reinsurance and underwriting profit to geographic zones.

Before reaching the merits of the issues, we dispel the Bureau's suggestion that the Commissioner rejected the filing on the day the Department received it. The Commissioner's review of a Bureau filing is governed by statute.

> At any time within 50 days after the date of any filing, the Commissioner may give written notice to the Bureau specifying in what respect and to what extent the Commissioner contends the filing fails to comply with the requirements of this Article and fixing a date for hearing not less than 30 days from the date of mailing of such notice. Once begun, hearings must proceed without undue delay. At the hearing the burden of proving that the proposed rates are not excessive, inadequate, or unfairly discriminatory is on the Bureau. At the hearing the factors specified in [N.C. Gen. Stat. §] 58-36-10 shall be considered. If the Commissioner after hearing finds that the filing does not comply with the provisions of this Article, he may issue his order determining wherein and to what extent such filing is deemed to be improper and fixing a date thereafter, within a reasonable time, after which the filing shall no longer be effective. In the event the Commissioner finds that the proposed rates are excessive, the Commissioner shall specify the overall rates, between the existing rates and the rates proposed by the Bureau filing, that may be used by the members of the Bureau instead of the rates proposed by the Bureau filing. In any such order, the Commissioner shall make findings of fact based on the evidence presented in the filing and at the hearing. Any order issued after a hearing shall be issued within 45 days after the completion of the hearing. If no order is issued within 45 days after the completion of the hearing, the filing shall be deemed to be approved.

N.C. Gen. Stat. § 58-36-20(a) (2015). Although the Commissioner voiced his displeasure with the filing in the press release issued on the day the

Department received the filing, it is clear the Commissioner did not reject the filing outright. The record shows the Commissioner followed the statutory procedure for reviewing the filing, which in the present case included a lengthy hearing and the consideration of extensive evidence. Even more telling, the Commissioner's review resulted in the approval of the filed territory definitions and changes to homeowners' insurance rates, although not the filed rates sought by the Bureau. Consequently, this Court's review is not influenced by the Commissioner's press release.

Standard of Review

Just as the Commissioner's review of the Bureau's filing is governed by statute, so is this Court's review of the Commissioner's order. Concerning judicial review of rates and classifications,

> [a]ny order or decision of the Commissioner . . . may be appealed to the North Carolina Court of Appeals by any party aggrieved thereby. Any such order shall be based on findings of fact, and if applicable, findings as to trends related to the matter under investigation, and conclusions of law based thereon. Any order or decision of the Commissioner, if supported by substantial evidence, shall be presumed to be correct and proper. . . .

N.C. Gen. Stat. § 58-2-80 (2015). After an order or decision of the Commissioner is appealed to this Court,

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

(4) Affected by other errors of law, or

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

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 58-2-90(b) (2015). This Court has further explained that,

> [w]hen reviewing an order by the Commission, this Court must examine the whole record and determine whether the Commissioner's conclusions of law are supported by material and substantial evidence. The whole record test requires the reviewing court to consider the record evidence supporting the Commissioner's order, to also consider the record evidence contradicting the Commissioner's findings, and to determine if the Commissioner's decision had a rational basis in the material and substantial evidence offered. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It is more than a scintilla or a permissible inference.
>
> The Commissioner determines the weight and sufficiency of the evidence presented during the hearing, including the credibility of any witnesses. It is not our function to substitute our judgment for that of the Commissioner when the evidence is conflicting. Instead, the Commissioner's order is presumed correct if it is supported by substantial evidence. The order must conform to the guidelines set out in [N.C. Gen. Stat.] § 58-36-10[.]
>
> . . . .
>
> As long as the Commissioner's order meets the criteria of [N.C. Gen. Stat.] § 58-36-10 and is supported by material and substantial evidence, the order should be upheld.

State ex rel. Comm'r of Ins. v. N.C. Rate Bureau, 160 N.C. App. 416, 420-21, 586 S.E.2d 470, 472-73 (2003) ("*2001 Auto*") (internal quotation marks, citations, and alterations omitted), *aff'd per curiam on those issues raised in the dissent*, 358 N.C. 539, 597 S.E.2d 128 (2004). Relevant to this appeal, the following standards apply to the making and use of property insurance rates:

(1) Rates or loss costs shall not be excessive, inadequate or unfairly discriminatory.

(2) Due consideration shall be given to actual loss and expense experience within this State for the most recent three-year period for which that information is available; to prospective loss and expense experience within this State; to the hazards of conflagration and catastrophe; to a reasonable margin for underwriting profit and to contingencies; to dividends, savings, or unabsorbed premium deposits allowed or returned by insurers to their policyholders, members, or subscribers; to investment income earned or realized by insurers from their unearned premium, loss, and loss expense reserve funds generated from business within this State; to past and prospective expenses specially applicable to this State; and to all other relevant factors within this State: Provided, however, that countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available.

(3) In the case of property insurance rates under this Article, consideration may be given to the experience of property insurance business during the most recent five-year period for which that experience is available. . . .

(4) Risks may be grouped by classifications and lines of insurance for establishment of rates, loss costs, and base premiums. Classification rates may be modified to produce rates for individual risks in accordance with rating plans that establish standards for measuring variations in hazards or expense provisions or both. Those standards may measure any differences among risks that can be demonstrated to have a probable effect upon losses or expenses. . . .

. . . .

(6) To ensure that policyholders in the beach and coastal areas of the North Carolina Insurance Underwriting Association whose risks are of the same class and essentially the same hazard are charged premiums that are commensurate with the risk of loss and premiums that are actuarially correct, the North Carolina Rate Bureau shall revise, monitor, and review the

existing territorial boundaries used by the Bureau when appropriate to establish geographic territories in the beach and coastal areas of the Association for rating purposes. In revising these territories, the Bureau shall use statistical data sources available to define such territories to represent relative risk factors that are actuarially sound and not unfairly discriminatory. The new territories and any subsequent amendments proposed by the North Carolina Rate Bureau or Association shall be subject to the Commissioner's approval and shall appear on the Bureau's Web site, the Association's Web site, and the Department's Web site once approved.

(7) Property insurance rates established under this Article may include a provision to reflect the cost of reinsurance to protect against catastrophic exposure within this State. Amounts to be paid to reinsurers, ceding commissions paid or to be paid to insurers by reinsurers, expected reinsurance recoveries, North Carolina exposure to catastrophic events relative to other states' exposure, and any other relevant information may be considered when determining the provision to reflect the cost of reinsurance.

N.C. Gen. Stat. § 58-36-10 (2015).

1. Underwriting Profit

[1] In the Bureau's first challenge to the Commissioner's order, the Bureau claims the underwriting profit provision adopted by the Commissioner violates applicable legal and constitutional standards. We disagree.

Our courts have long recognized the requirement that the Commissioner set rates to allow insurers to earn "a fair and reasonable profit" after the payment of losses and operating expenses. *See In re N.C. Fire Ins. Rating Bureau*, 275 N.C. 15, 34, 165 S.E.2d 207, 220 (1969) ("*1967 Fire*") (explaining "that the premium [must] be fixed at a level which will enable the insuring company . . . (1) to pay the losses which will be incurred during the life of the policies to be issued under such rates, (2) to pay other operating expenses, and (3) to retain a 'fair and reasonable profit' and no more"). "An insurance company's total profit is derived from two distinct parts of the insurance business – (1) profit earned by the insurance operations and (2) profits earned by investing

capital and surplus funds." *2001 Auto*, 160 N.C. App. at 421, 586 S.E.2d at 473. Yet, in North Carolina, the total profit is not considered in determining whether rates allow insurers to earn a fair and reasonable profit; only the profit from the insurance operations is considered. *See State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 444, 269 S.E.2d 547, 586 (1980) ("In determining whether an insurer has made a reasonable profit, the amount of business done rather than its capital should be considered, and profits should be determined by subtracting losses and expenses from the total of premiums actually received, *to the exclusion of profit on capital and surplus*, and excess commissions paid to agents *but considering interest on unearned premiums and related elements.*") (emphasis in original) (quotation marks and citation omitted).

> The profit from insurance operations includes both the underwriting profit and investment income from policyholder-supplied funds. The underwriting profit can be defined as the difference between insurance premiums collected and the amount the company pays out for losses and expenses. Policyholder-supplied funds are the amount of premiums paid to the insurance company. Policyholder-supplied funds are usually invested during the insurance coverage period.

2001 Auto, 160 N.C. App. at 421-22, 586 S.E.2d at 473. Although underwriting profit is a component of the profit earned by the insurance operations, which must be sufficient to allow insurers to earn fair and reasonable profit, there are no requirements specific to underwriting profit. "[A] reasonable margin for underwriting profit and to contingencies[]" is, however, among the factors that "shall" be considered in the making and use of rates. N.C. Gen. Stat. § 58-36-10(2).

In this case, the filing included an underwriting profit of 10.5% of premium. Upon review, the Commissioner rejected the Bureau's underwriting profit provision in favor of an underwriting profit of 5.2% of premium. As stated above, the Bureau now claims this was error.

The Bureau's argument that the Commissioner's underwriting profit provision violates legal and constitutional standards is founded on its assertion that a "fair and reasonable profit" must be equal to and determined using the cost of equity (also known as the "cost of capital" or the "cost of equity capital"). The Bureau claims the only evidence of the cost of equity in this case was in the prefiled testimony of James H. Vander Weide, a Bureau witness whom the parties stipulated was an expert in "economics and finance and profit as regards to the property/casualty

insurance industry." Vander Weide testified the cost of equity for the average company writing homeowners' insurance in North Carolina is in the range of +9.1% to +12.8%. Therefore, the Bureau contends the Commissioner erred by rejecting the filed underwriting profit provision and by choosing an underwriting profit provision that did not produce a profit within the cost of equity range identified by Vander Weide.

Upon review of the cases cited by the Bureau, we are not convinced the cost of equity is a constitutionally mandated standard, as the Bureau asserts. Thus, we affirm the Commissioner's rejection of the filed underwriting profit provision.

The Bureau argues North Carolina law has long defined a "fair and reasonable profit" as the level of profit demanded by the investment market on business ventures of comparable risk, which the Bureau equates to the cost of equity. The Bureau then relies on *1967 Fire* and the older *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591, 88 L. Ed. 333 (1944) ("*Hope Natural Gas*"), and *Bluefield Waterworks and Improvement Co. v. Pub. Serv. Comm'n of W.V.*, 262 U.S. 679, 67 L. Ed. 1176 (1923) ("*Bluefield Waterworks*"), cases to support its assertion that a cost of equity analysis is compelled by the United States Constitution. Upon review of *1967 Fire*, we find no such requirement, nor mention, of the cost of equity. In that case, our Supreme Court explained that whether an amount is "a fair and reasonable profit, an excessive profit[,] or an insufficient profit must be determined by the Commissioner from evidence[, which] involves a projection into the future of past experience and present conditions." *1967 Fire*, 275 N.C. at 39, 165 S.E.2d at 224. The Court then stated, "[i]t involves consideration of profits accepted by the investment market as reasonable in business ventures of comparable risk." *Id.* The Court never mandated that a fair and reasonable profit be determined solely using a cost of equity analysis. Similarly, there is no mandate in *Hope Natural Gas* or *Bluefield Waterworks*. The Commissioner offered the following explanation for the absence of any references to the cost of equity in those decision:

> 255. These two early U.S. Supreme Court cases indicate that the proper rate of return for regulated industries is a return commensurate with the returns that could be earned by industries of comparable risk.
>
> 256. Both Vander Weide and Appel claim that *Hope Natural Gas* and *Bluefield Waterworks* require a cost of capital analysis. However, this cannot possibly be true because *Hope Natural Gas* was decided in 1944 and

> *Bluefield Waterworks* was decided in 1923. Vander Weide and Appel acknowledge that in the early days of regulation a comparable earning analysis, like the analyses proffered by Department witnesses Schwartz and O'Neil, was an accepted methodology until comparable earnings was abandoned in favor of market-based concepts like the cost of capital. O'Neil notes that from 1921 through approximately the mid-1960's, The 1921 NAIC Profit Formula, which allowed a pre-tax 5% of premium without consideration of investment income, was in use. That 5% of premium has also been mentioned in an older North Carolina case as an amount "generally approved in the industry." 278 N.C. 302[,] 315[,] 180 S.E.2d 155, 164 (1971). A cost of capital analysis, then, was not even utilized in regulatory matters when *Hope Natural Gas and Bluefield Waterworks* were decided.

(Citations to transcripts and exhibits in the present case omitted; emphasis in original). We find the Commissioner's analysis supported by the evidence and case law and hold it persuasive. Furthermore, our Supreme Court has acknowledged that, "[i]n North Carolina, there is no prescribed methodology for calculating the return on profits (profit methodology), and [it] has specifically recognized that creativity is acceptable within the parameters of the applicable statutes." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 350 N.C. 539, 542, 516 S.E.2d 150, 152 (1999) ("*1996 Auto*"). "The Commissioner is considered an expert in the field of insurance and his reliance on various methods of analysis of the profit to which the insurance companies are entitled lies entirely within his discretion." *State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 124 N.C. App. 674, 687, 478 S.E.2d 794, 803 (1996) ("*1994 Auto*") (internal quotation marks and citation omitted), *disc. rev. denied*, 346 N.C. 184, 486 S.E.2d 217 (1997). Accordingly, we hold the Commissioner did not violate any constitutionally mandated standard in refusing to accept the Bureau's cost of equity profit methodology and in adopting an underwriting profit provision that did not return a profit within the range identified by Vander Weide.

The Bureau also challenges the legality of the profit methodology used by the Commissioner to reach his chosen underwriting profit provision. The Commissioner explained his selection of a comparable earnings profit methodology to determine the appropriate underwriting profit provision in findings 261 to 297. The Bureau claims the profit methodology used in the present case is erroneous as a matter of law because it is identical to the methodology rejected in *1996 Auto*.

In *1996 Auto*, our Supreme Court reviewed this Court's determination that the profit methodology used by the Commissioner in setting rates following the Bureau's 1996 auto filing was identical to the profit methodology previously rejected by this Court in *1994 Auto*. *1996 Auto*, 350 N.C. at 542-43, 516 S.E.2d at 152. For a complete understanding of our precedent, we briefly review those cases.

In *1994 Auto*, this Court remanded the Commissioner's order for recalculation of the underwriting profit provision upon concluding the Commissioner erred as a matter of law in considering investment income from capital and surplus in his ratemaking calculations. 124 N.C. App. at 684-86, 478 S.E.2d at 801-802. In that case, the error was evident because the Commissioner's "formula included a line item and calculation for 'Income from Capital and Surplus.' " *Id.* at 685, 478 S.E.2d at 802.

In *1996 Auto*, the Commissioner attempted to distinguish his profit methodology and ratemaking calculations following the Bureau's 1996 auto filing from those rejected in *1994 Auto*. 350 N.C. at 543, 516 S.E.2d at 152. The Court summarized the Commissioner's calculations in *1994 Auto* in its *1996 Auto* decision as follows:

> he calculated the target total return of the insurance industry based on the total returns of industries of comparable risk. He then subtracted the investment income on capital and surplus from this total return and arrived at a total return on insurance operations.

Id. The Court then explained the Commissioner's calculations being challenged in *1996 Auto* as follows:

> the Commissioner began with a direct estimate and justification of the return on operations, rather than a total return, and derived his profit provisions from this estimated return on operations without explicitly including in his calculations investment income from capital or surplus. The Commissioner reasons that this method keeps the two calculations distinct, whereas the rejected method in the prior case combined the investment income from capital and surplus into the actual ratemaking calculation.

Id. Upon review in *1996 Auto*, this Court agreed with the Bureau's argument that "the Commissioner simply 'repackaged' his calculations by starting with a return on operations as his target in order to avoid the appearance of explicitly considering investment income on capital and surplus, but in essence accomplished exactly what we have previously

disallowed." 129 N.C. App. 662, 666, 501 S.E.2d 681, 685 (1998). This was evident by the Commissioner's admission that the " 'return on operations may be tested to ensure it will result in a "total return" commensurate with the "total return" of businesses of comparable risk by adding the income from capital and surplus to the return on operations.' " *Id.* Thus, this Court, bound by *1994 Auto*, held "the Commissioner improperly considered income from capital and surplus in arriving at his total return[.]" *Id.* On further appeal to our Supreme Court based on a dissent from this Court's majority decision, our Supreme Court affirmed. 350 N.C. at 545, 516 S.E.2d at 153-54.

As stated above, the Bureau now claims the profit methodology in the instant case is identical to the methodology rejected in *1996 Auto*. In support of its argument the Bureau points to the following exchange during the testimony of Allan I. Schwartz, a Department witness whose underwriting profit provision the Commissioner adopted:

> Q. Is it correct that your underwriting profit provision began with a direct estimate of a return on operations, rather than a total return, and you derive your underwriting profit provision from this estimated return on operations without explicitly including in your calculations investment income from capital and surplus?
>
> A. Yes.

Because Schwartz answered affirmatively in response to the question framed in the precise language used to describe the profit methodology rejected by both this Court and our Supreme Court in *1996 Auto*, the Bureau claims we are bound by *1996 Auto*. *See In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 36-37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.")

Upon review of the Commissioner's findings, we do not think the profit methodology used in the instant case was the same as that rejected in *1996 Auto*. First, there is no indication that either Schwartz or the Commissioner tested their underwriting profit provisions by adding the profit earned from investing capital and surplus to the profit earned by the insurance operations to compare total returns, as was held to be error in *1996 Auto*. Second, the Commissioner clearly indicates in the order that his profit methodology is in keeping with the Commissioner's order following the Bureau's 2001 auto filing, which this Court upheld in *2001 Auto*.

In *2001 Auto*, this Court recognized that "[t]he disagreement between the Bureau and the Commissioner regarding the legal significance of the [*1994 Auto* and *1996 Auto*] appeals forms the basis of the current appeal." 160 N.C. App. at 419, 586 S.E.2d at 472. This Court then reviewed those prior cases and addressed whether the Commissioner improperly considered investment income from capital and surplus funds while calculating the ordered insurance rates. 160 N.C. App. at 421, 586 S.E.2d at 473. This Court explained that in *1994 Auto* and *1996 Auto*, "the Commissioner defined 'business ventures of comparable risk' as the total profit of the insurance industry[]" and then, "[i]n order to set a rate equal to comparable businesses . . . , the Commissioner subtracted capital investment income and investment income from policyholder-supplied funds from total returns to reach the underwriting profit[.]" 160 N.C. App. at 422, 586 S.E.2d at 474. This Court distinguished the Commissioner's ratemaking formula in *2001 Auto* in that, "[r]ather than attempting to find a total return, the Commissioner set the return on insurance operations as his target." 160 N.C. App. at 423, 586 S.E.2d at 474. This Court then identified the pertinent findings by the Commissioner, in which the Commissioner rejected the Bureau's cost of equity methodology on the basis that it considered the total return of businesses of comparable risk in violation of North Carolina law prohibiting consideration of investment on capital and surplus, and instead adopted the comparable earnings methodology of Department witness Schwartz, the same witness relied on by the Commissioner in the present case, on the basis that Schwartz's profit methodology only took the profit from insurance operations into account. 160 N.C. App. at 423-26, 586 S.E.2d at 474-76. Upon review, this Court affirmed the Commissioner's order because "the Commissioner focused on the return on insurance operations as the appropriate target for his calculations." 160 N.C. App. at 426, 586 S.E.2d at 476.

In further support of our holding that the cost of equity is not mandated, this Court explained as follows:

> In addition, we find the Bureau's argument that the Commissioner must set his target as the total rate of return to be unpersuasive. No statute or any case has required the Commissioner to focus on the total rate of return for the insurance industry. Instead, previous appellate court opinions have declared that the return on operations is the only portion of income the Commissioner can consider during the ratemaking process. If the Commissioner had compared total returns here, as he did in previous ratemaking

> orders, the Commissioner would have been required to add capital and surplus funds somehow. By using insurance operations as the comparable industry, the Commissioner did not need to consider investment income on capital and surplus funds. Accordingly, the investment income on capital and surplus funds has not been used in the 2001 ratemaking calculation. The Commissioner's underwriting profit provision comports with the requirements of [N.C. Gen. Stat.] § 58-36-10 as well as the holdings of *1994 Auto* and *1996 Auto*.

160 N.C. App. at 426-27, 586 S.E.2d at 476.

The comparable earnings profit methodology employed by the Commissioner in the present case appears the same as that which was upheld in *2001 Auto*. And, in the present case, the Commissioner issued findings and conclusions, all of which are supported by evidence in the record, that are similar to those issued in *2001 Auto*. Those findings and conclusions are to the effect that, first, the Bureau's underwriting profit provision, which sets the target return equal to the cost of equity, violates this State's prohibition on the consideration of investment income from capital and surplus in ratemaking and, second, the comparable earnings profit methodology used by the Department's witnesses to determine an appropriate underwriting profit provision adheres to North Carolina's legal requirements because it only takes into account the profit from the insurance operations.

The Bureau acknowledges the Commissioner's reliance on *2001 Auto*, but dismisses that reliance as error on the basis that *2001 Auto* is directly contrary to this Court's decisions in *1994 Auto* and *1996 Auto*. Therefore, the Bureau contends we are bound by those earlier cases. *See Graham v. Deutsche Bank Nat'l Trust Co.*, __ N.C. App. __, __, 768 S.Ed.2d 614, 617 (2015) ("[W]here there is a conflicting line of cases, a panel of this Court should follow the older of those two lines.") (quotation marks and citation omitted). It is clear, however, from this Court's discussion in *2001 Auto* that the decisions are not contradictory.

Because the Commissioner's profit methodology in the present case is in accord with that upheld by this Court in *2001 Auto*, we overrule the Bureau's argument that the underwriting profit provision adopted by the Commissioner is legally erroneous.

As an aside, we note the filed underwriting profit provision championed by the Bureau fails by their own calculations to meet the cost of equity that the Bureau claims is a minimum standard. The Bureau's calculations

show that the filed 10.5% of premium underwriting profit results in a post-tax total return from underwriting of 6.87% of premium. When the underwriting profit is considered with the net investment gain on insurance transactions, the Bureau's calculations show post-tax total returns of 7.67% of premium and 7.06% of net worth, which the Bureau acknowledges is below the cost of equity. Thus, even if we were to accept the Bureau's assertion that cost of equity is a mandatory requirement, the Bureau's underwriting profit provision fails to meet that mandate.

2. Net Cost of Reinsurance

[2] The Bureau next argues the Commissioner erred in determining the net cost of reinsurance to be included in rates, which the Commissioner addressed in findings 375 through 454.

Reinsurance is insurance purchased by primary insurers from other insurance companies, or reinsurers, to mitigate the risk of large payouts in excess of what a primary insurer could bear in the event of catastrophic losses. It does so by spreading the risk between primary insurers and reinsurers. Reinsurers are willing to accept portions of the risk associated with potential catastrophic losses in exchange for a share of the premiums paid by the insureds. Primary insurers, in turn, pass the expense of reinsurance to the insureds by including the net cost of reinsurance in the rates. A large portion of the exposure to catastrophic losses in North Carolina is due to hurricanes.

In this case, the Bureau's filing included a provision for a net cost of reinsurance of 17.5% of premium. The Bureau based its provision on an analysis performed by David Appel, who was stipulated as an expert in "economics and finance and profit as regards the property/casualty insurance industry." As he explained in his prefiled testimony, Appel "developed a procedure to include the 'net cost of reinsurance' as an expense in the direct homeowners rates in North Carolina." Appel likened his "procedure" to what is used in Florida, "where insurers make rates using direct losses and expenses, but then add in a provision which covers the cost (to the primary insurer) of the reinsurer's profit and expense." Appel then explained his "procedure" in detail and expressed his beliefs that his calculations accurately reflected the net cost of reinsurance in North Carolina and that the net cost of reinsurance was appropriately included in homeowners' insurances rates in North Carolina.

The substance of Appel's prefiled testimony as it relates to determining the net cost of reinsurance can be summarized as follows: Appel adopted the ratemaking assumption "that there is a single aggregate company that is the composite of all carriers in the state." Appel assumed

the hypothetical company maintains a reinsurance program with specific provisions that Appel believed "reflect the types of reinsurance programs that insurers typically purchase to protect against the potentially catastrophic losses that are attendant to the hurricane risk to which the state is exposed." Appel then used statewide aggregate loss distributions produced and provided by AIR Worldwide Corporation ("AIR"), a provider or risk modeling software and consulting services, which were based on AIR's loss estimates from AIR's warm sea surface temperature ("WSST") model, as opposed to AIR's standard ("STD") model, and included the phenomenon of demand surge, to determine the amount of losses that would be subject to reinsurance coverage as a share of the total hurricane losses in the state. Based on the projected reinsured losses, Appel then developed a "competitive market" reinsurance premium. Appel testified that he calculated "the reinsurance premium is 23.9% of statewide direct premium, while the net cost of reinsurance is 17.5% of premium."

To counter Appel's testimony, the Department cross-examined Appel and put on its own evidence tending to show that the Bureau's net cost of reinsurance provision was overstated and not reflective of the reinsurance market in North Carolina. Department witnesses Schwartz and Mary Lou O'Neil, both of whom were stipulated as "expert property/casualty insurance actuaries[,]" and Evan D. Bennett, who the Bureau stipulated was an expert in reinsurance, expressed concern that the Bureau's provision was based on a hypothetical model and no documentation or data was presented to support the assumptions and methodologies underlying the model or Appel's calculations.

Upon review of the evidence concerning net cost of reinsurance in this case, the Commissioner rejected the Bureau's filed net cost of reinsurance of 17.5% of premium and ordered a net cost of reinsurance of 10% of premium. The Bureau now contends the Commissioner erred in doing so.

At the outset, it is apparent from the Commissioner's order that the Commissioner fully considered the evidence on the net cost of reinsurance, as the Commissioner summarized both the Bureau's and the Department's cases and explained his reasons for rejecting the Bureau's filed net cost of reinsurance provision and adopting the 10% provision. Despite the Commissioner's detailed order, the Bureau claims the Commissioner erred.

The Bureau first challenges the Commissioner's rejection of the filed net cost of reinsurance provision. The Bureau contends the filed net cost

of reinsurance provision based on the "procedure" developed by Appel, which the Bureau now refers to as an "economic model," was reasonable and supported by the evidence.

The Commissioner's rejection is concisely explained in the following findings:

> 446. . . . Basically what the Commissioner was presented with in regards to the net cost of reinsurance was a hypothetical model, poorly documented, that was developed by an economist with no discernible background in reinsurance other than vague associations with other professionals who may have some reinsurance experience. Although market information was produced on rebuttal to support model input, the model does not reflect the significant price decreases in the market over the past couple of years because the model is not market-based. Moreover, the reinsurance model utilizes the AIR WSST model to estimate losses; however, the scientific underpinnings of the WSST are debatable and the WSST results in significantly higher losses than the STD model, which produced losses in this filing that the Commissioner has already found excessive.
>
> 447. Given all of the issues . . ., and the fact that the proposed net cost of reinsurance represents 22.1% of the base rate for Owners, the Commissioner can only conclude that the Bureau has not met its burden of proof with regards to the reinsurance component of the indicated rates. . . .
>
> . . . .
>
> 453. Thus, based on the foregoing, the Commissioner finds that the Bureau's proposed net cost of reinsurance is excessive and will result in excessive rates.

Although the Bureau acknowledges that the Commissioner has discretion in weighing the evidence, the Bureau contends the Commissioner abused his discretion in this case by disregarding evidence – both Appel's testimony and "real world" evidence that reinsurance costs actually incurred are consistent with the model results – that the Bureau claims supports its filed net cost of reinsurance provision.

Regarding Appel's testimony, the Bureau points to the Commissioner's finding number 446 and contends the evidence does not support the finding that Appel "had no discernable background in reinsurance."

In support of its challenge, the Bureau highlights portions of Appel's testimony at the hearing which it claims demonstrate that Appel possessed the necessary experience in reinsurance to offer testimony on the subject; namely, that Appel developed the reinsurance model that was first used in a 2002 rate filing and, since that time, has been involved in other rate cases, has given presentations and lectures on the model, has rendered opinions in rate cases in which the net cost of reinsurance was included, has served as an arbitrator in rate cases, and has worked with various insurance companies. Because of these experiences, the Bureau claims "[t]he Commissioner's disregard of Dr. Appel's testimony and the Bureau's reinsurance model is arbitrary and capricious and an abuse of discretion."

Upon review of the Commissioner's findings and the evidence, we hold the Commissioner did not abuse his discretion. First, upon review of finding 446, we disagree with the Bureau's characterization of the Commissioner's finding. When the finding is read in its entirety, it is clear the Commissioner was critiquing Appel's development of the reinsurance model. The evidence in the record supports the finding that Appel had no discernable background in reinsurance when he developed his reinsurance model, as all of the experiences highlighted by the Bureau appear to have occurred since the model was developed and first used in 2002. Appel's prefiled testimony was that he has had the opportunity to become aware of property reinsurance programs over the past several years because a substantial amount of his consulting work over the last dozen to 15 years involved property insurance matters. Appel also indicated it did not appear he gave any presentations or lectures on reinsurance or property-related matters before 2003 and, when he began doing so, they concerned the development of his model.

While it is clear Appel has increasingly gained experienced in reinsurance since the early 2000s, that experience does not refute the Commissioner's finding that the "hypothetical model . . . was developed by an economist with no discernible background in reinsurance . . . ." Nor does Appel's subsequent experience in reinsurance show the Commissioner erred by placing greater weight on the testimony of the Department's witnesses, one of which was an expert in reinsurance; especially where there was evidence that Appel lacked the experience to develop a reinsurance model, the model lacked documentation, and the hypothetical model did not reflect reinsurance in North Carolina.

Regarding the "real world" evidence that the Bureau claims was improperly disregarded, the Bureau points to Exhibit RB-33, which was compiled by Appel and presented during the Bureau's rebuttal case.

Appel explained that RB-33 included the North Carolina Farm Bureau's ("Farm Bureau") insurance expenses for each of the years between 2001 and 2013 and showed the percent of Farm Bureau's direct premium ceded to reinsurance. Appel used Farm Bureau's data to test the reasonableness of his reinsurance model and concluded that the filed net cost of reinsurance was well below that of Farm Bureau.

The Commissioner addressed this "real world" evidence in finding 450 and determined its usefulness for comparison purposes was "nil" because the data included "quota share" reinsurance, or non-catastrophe reinsurance, in all but one of the years. The Bureau now contends the Commissioner's disregard of the Farm Bureau data was in error because, although Appel acknowledged that, "[i]n some years, there's quota share reinsurance in addition to catastrophe excess of loss reinsurance[]" and, therefore, the "percent ceded likely overstates to some extent the amount that is strictly catastrophe excess of loss[,]" Appel's testimony was that in catastrophe prone areas such as North Carolina, "the quota share . . . is going to be priced much closer to catastrophe reinsurance than quota share would be in an environment which was not catastrophe prone because it bears a fair bit of the catastrophe exposure." Thus, the Bureau claims Appel's testimony shows the Farm Bureau data is relevant evidence of the cost of reinsurance in North Carolina.

While the Commissioner may have understated the relevance of the Farm Bureau data by assigning it zero usefulness for comparison purposes, we are hesitant to say that the Commissioner erred in disregarding the data where, on appeal, the Bureau has failed to direct this Court to any concrete evidence indicating what portion of the Farm Bureau data was not reinsurance to guard against the risk of catastrophe losses. Moreover, as found by the Commissioner in finding 451 and argued by the Department on appeal, our Supreme Court has recognized that "the loss experience data of a single carrier in this State does not establish the 'composite' of loss experience of all the carriers, which the establishment of the Bureau was intended to create." *Foremost Ins. Co., Inc. v. Ingram*, 292 N.C. 244, 249, 232 S.E.2d 414, 418 (1977). This seems to hold particularly true where the single carrier, Farm Bureau in the present case, offers homeowners' insurance extensively, but exclusively, in North Carolina. While the Bureau claims this makes Farm Bureau "uniquely reflective" of a single hypothetical company operating in North Carolina, both Bureau and Department witnesses acknowledged that many insurers in North Carolina are multi-state and multi-line carriers. Department witness Schwartz explained that he did not believe the Bureau's calculation took into account that "the aggregate company

in North Carolina . . . writes other lines of insurance in North Carolina, and writes business in other states, and has a substantial premium base and surplus amount which would allow for a higher retention." Based on this evidence, we cannot hold the Commissioner abused his discretion in disregarding the Farm Bureau data as illustrative of reinsurance for the entire state.

In addition to arguing the Commissioner erred in rejecting its filed net cost of reinsurance provision, the Bureau also argues the Commissioner erred in selecting a 10% net cost of reinsurance provision. The Bureau claims the selected provision is unsupported by material and substantial evidence.

The Commissioner's adoption of the 10% net cost of reinsurance is best explained in the following findings:

> 447. . . . Schwartz recommended that, in light of the Bureau's failure to support its net cost of reinsurance provision, it would be appropriate to use a net cost of reinsurance of $0 (zero). The Commissioner does agree that $0 might be appropriate, *however*, *North Carolina is exposed to hurricanes* and, without a doubt, insurers have sought to protect themselves from hurricane claims in North Carolina by purchasing reinsurance, a fiscally prudent decision and sound business practice. Thus the Commissioner considers it reasonable to include some factor above $0 in the rate for the net cost of reinsurance.
>
> . . . .
>
> 448. Schwartz has proposed a factor of 10% of premium, based upon an analysis of historical countrywide data of the entire homeowners insurance industry over the last 28 years. . . .
>
> 449. Schwartz . . . testified that pursuant to [N.C. Gen. Stat.] § 58-36-10(2) countrywide data may be used where North Carolina experience is unavailable. . . .
>
> . . . .
>
> 452. Schwartz provides a reasonable measure to set the net cost of reinsurance at 10% of premium given that we do not have actual composite North Carolina data available, and that the countrywide data . . . provides a reasonable benchmark to North Carolina because of similar measures of risk. . . .

. . . .

> 454. The Commissioner, taking into account the above and the undisputed fact that North Carolina is a coastal state prone (like its sister states in the southeastern United States) to hurricanes and tropical storms, finds that a net cost of reinsurance of 10% of premium is reasonable and will result in rates that are not excessive or inadequate.

The Bureau now contends the Commissioner erred in the above findings because Schwartz was not an expert on reinsurance and, therefore, not competent to provide testimony on the subject. The Bureau also contends the Commissioner erred in relying on countrywide reinsurance data.

Regarding the testimony by Schwartz, the Bureau claims that Schwartz did not meet the requirements of Rule 702(a) of the North Carolina Rules of Evidence and *Daubert* for admissibility of expert testimony. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993). Specifically, the Bureau contends that because Schwartz testified that he has never been engaged on a professional basis by a reinsurer, reinsurance broker, or primary insurer to price a reinsurance policy, has not individually been involved in a transaction for the purchase of reinsurance, and has never in a professional capacity recommended or calculated hurricane average annual losses for use by a reinsurer or reinsurance broker, Schwartz "lacks the 'knowledge, skill, experience, training or education' in the field of reinsurance to be competent to testify on the cost of reinsurance . . . ." We disagree.

The Bureau ignores that Schwartz, an actuarial consultant, received the professional designation of Associate in Reinsurance from the Insurance Institute of America in 1998 (received the Reinsurance Association of America Award for Academic Excellence) after completing qualifying examinations and has been involved in numerous insurance rate cases in various states in recent years. Although Schwartz may not have been qualified to develop a reinsurance model, there is a significant difference between developing a model to project reinsurance costs and comparing modeled results to actual reinsurance data. Based on Schwartz's reinsurance designation and experience as an actuary having participated in numerous rate cases, we hold Schwartz was competent to testify on the subject of reinsurance and the Commissioner did not abuse his discretion in considering or giving weight to Schwartz's testimony.

Regarding the Commissioner's consideration of the countrywide reinsurance data presented by Schwartz and included in Schwartz's prefiled testimony, the Bureau asserts the Commissioner's reliance on the data was error because the data does not reflect the hurricane risks in North Carolina and the costs that insurers will incur to purchase reinsurance in North Carolina. The Bureau specifically points to Schwartz's testimony and claims Schwartz acknowledged the data did not reflect catastrophe risks in North Carolina.

A review of the portion of Schwartz's testimony identified by the Bureau shows that Schwartz never acknowledged that the data was not reflective of North Carolina, but that the data is not that of North Carolina. To be exact, in response to the question, "Now, is it correct, Mr. Schwartz, that you cannot tell from the data . . . what the net cost of reinsurance is for catastrophe reinsurance in a state like North Carolina?" Schwartz responded, "Yeah[, the data] doesn't give catastrophe reinsurance data for North Carolina." We think testimony that data is not for North Carolina and testimony that data is not reflective of North Carolina are very different responses. Moreover, Schwartz went on to testify that he was "not aware of where to obtain [catastrophe reinsurance data for North Carolina]." Schwartz stated that he believed the Department requested such information from the Bureau for use in analyzing the filing, but the Bureau indicated they did not have such information. In setting forth the standards and factors in the making and use of rates, N.C. Gen. Stat. § 58-36-10(2) provides that "countrywide expense and loss experience and other countrywide data may be considered only where credible North Carolina experience or data is not available." N.C. Gen. Stat. § 58-36-10(2). As found by the Commissioner in finding 449, Schwartz acknowledged N.C. Gen. Stat. § 58-36-10(2). Finding 449, together with the Commissioner's finding that "it is not appropriate to set a provision for net cost of reinsurance . . . based upon data presented for only one company[]" in finding 451, supports the Commissioner's consideration of countrywide data. Thus, the Commissioner did not err.

Even if the countrywide data was properly considered, the Bureau contends the Commissioner acted arbitrarily in selecting the 10% net cost of reinsurance provision from the data. Again, we disagree. While 10% may not be an exact calculation, Schwartz's recommendation and the Commissioner's selection of 10% for the net cost of reinsurance was based on a reasoned analysis with a rational basis in the evidence. Specifically, the data relied on by Schwartz shows that, for the years included, the net cost of reinsurance as a percent of direct earned premium ranges from an average of 4.6% on a calendar year basis to a

maximum of 10.1% on a calendar year basis, and from an average of 7.8% on an accident year basis and to a maximum of 15.9% on an accident year basis. Schwartz used that data to recommend a range of 5% to 16%, considering both the accident year and calendar year bases. Schwartz then selected a 10% net cost of reinsurance from the middle of the range. Upon review, it is clear that Schwartz's analysis was well reasoned and constitutes material and substantial evidence. Furthermore, it supports the Commissioner's findings and conclusions. Thus, the Commissioner's selection of the 10% net cost of reinsurance was not arbitrary.

The Bureau looks to the same countrywide data and references numbers from the column providing the percent of "ceded/direct earned premium" and points out that the average and maximum on an accident year basis are higher than the percentages used by Schwartz – respectively 9.7% and 22.5%. The Bureau then asserts that Schwartz and the Bureau arbitrarily picked the lower percentages for net cost of reinsurance. To support its assertion, the Bureau contends that when Schwartz was asked on cross-examination which was the appropriate number for the Commissioner to use, Schwartz testified that "both provide information[]" and did not explain why he choose 10%. Upon review of both the countrywide data used by Schwartz and the testimony of Schwartz cited by the Bureau, it is clear the Bureau misconstrues the data and Schwartz's testimony. First, the percentages referenced by the Bureau are the result of a different calculation, "ceded/direct earned premium," than the net cost of reinsurance as a percent of direct earned premium relied on in Schwartz's analysis. Second, the portion of Schwartz's testimony cited by the Bureau was not in reference to the difference between the figures identified by the Bureau and the figures relied on by Schwartz. Schwartz's testimony was in reference to the inclusion of net cost of reinsurance analysis on both an accident year basis and a calendar year basis. Schwartz explained the difference between the two bases and stated they provide different information. In determining the range for net cost of reinsurance, Schwartz considered both bases.

3. Modeled Hurricane Losses

[3] In the third issue raised on appeal, the Bureau argues the Commissioner erred in reducing the modeled hurricane losses in the filing. The Commissioner addressed the modeled hurricane losses in findings 153 through 225.

The Bureaus' filed rates were based, in part, on long-term average annual hurricane losses of $316.1 million. These hurricane losses included in the Bureau's filing were based on a report that was provided to the

Bureau by AIR and entered into evidence as Exhibit RB-6A. The report includes an analysis of prospective hurricane losses based on AIR's STD model, which incorporates AIR's standard view of hurricane risk. In prefiled testimony, Bureau witness Robert Newbold, an expert in catastrophe modeling and Senior Vice President of AIR, explained that for the analysis requested by the Bureau, AIR ran 100,000 simulations or iterations of what could happen in the following year in order to derive average loss costs. Although Newbold admitted that, "[a]s with all models, [the] representation are not exact," Newbold opined that "simulation methodology is the best available technique for estimating potential hurricane losses . . . ." Bureau witness Robert J. Curry, an expert property/casualty actuary who is responsible for managing and overseeing the operations of the Personal Property Actuarial Division of Insurance Services Office ("ISO"), echoed Newbold's opinion and explained that using a simulated model to determine long-term average losses is a more accurate way of including the exposure than using actual hurricane losses.

In the order, the Commissioner accepted the use of simulation modeling, explaining in finding 153 that "[t]he purpose in utilizing . . . the hurricane loss model is to avoid inordinate shifts, both upward and downward, in indicated rate levels which would result from reflecting large hurricane and other wind loss events only in the year in which they occur." The Commissioner, however, refused to blindly accept the modeled hurricane losses included in the Bureau's filing and considered the testimony of Bureau and Department witnesses to determine the credibility of the model. Based on the evidence presented, the Commissioner found it necessary to reduce the modeled hurricane losses, finding as follows:

> 223. . . . The model provides useful information and certainly should be considered. However, models aren't perfect; the problems and uncertainties of the model should be considered as well. The Commissioner finds herein that it is both necessary and appropriate to reduce the Bureau's value for the modeled hurricane loss costs to a level that recognizes the bias and inherent uncertainty in modeling in general and catastrophe modeling, specifically.
>
> 224. . . . The Commissioner finds that the average annual modeled hurricane losses of $316.1 million used in support of the filed rates is excessive based on the evidence. He finds that a reduction in the modeled hurricane losses of 13.9% to 272.3 million is supported in the evidence.

> 225. Thus, the Commissioner finds herein that the modeled hurricane losses utilized in the Bureau's indicated rate calculation are excessive and will result in excessive rates. The +13.9% reduction in hurricane losses . . . will result in rates that are neither excessive nor inadequate.

The Bureau now claims the Commissioner's reduction of the modeled hurricane losses was arbitrary and capricious for several reasons.

First, the Bureau contends the Commissioner erred in reducing the modeled hurricane losses because there is no evidence that uncertainty in the model results in an overstatement of the losses. The Bureau claims the Commissioner "effectively assumed that 'uncertainty' in modeling equates to 'excessive losses[]' " without material and substantial evidence and contrary to the Commissioner's findings regarding the validity of the model. We disagree that the Commissioner made such an unfounded assumption.

While the Bureau is accurate in stating the Commissioner issued findings on the general acceptance of simulation modeling within the insurance industry to predict hurricane losses and noted verification procedures used to ensure that AIR's models are as up-to-date and accurate as possible, it is clear from the evidence of both the Bureau and the Department that modeling is not infallible. In fact, the Commissioner issued findings identifying specific testimony that modeling was not precise, had limitations, and that "glitches" had been discovered in the past. The Commissioner also devoted entire subsections of findings to the credibility of AIR's models and both the Bureau's and the Department's cases, in which the Commissioner identified biases on all sides. The Bureau does not attack any particular finding and, upon review of the record, the findings appear to be supported by the record evidence. Because of the admitted uncertainty in modeling, it was not inconsistent for the Commissioner to scrutinize the modeled losses despite his recognition that AIR's models are widely used and accepted.

Moreover, the Commissioner's reduction of the modeled hurricane losses was not based on an unfounded assumption, it was based on the evidence, or the lack thereof, in the record. While the Bureau is correct in asserting that any uncertainty in the STD model may result in the understatement of losses as opposed to an overstatement of losses, the Bureau has not directed this Court to any evidence in the record that the modeled hurricane losses were understated; nor have we been able to find such evidence. Based on the evidence of record, it was well within the Commissioner's discretion to weigh the competent evidence in the record and make adjustments as he deemed necessary.

The Bureau, however, also takes issue with the evidence considered by the Commissioner in reducing the modeled hurricane losses. Specifically, the Bureau contends the Commissioner erred in relying on the testimony of O'Neil and Schwartz. The Bureau also contends the Commissioner erred in using benchmarks that are not based on material and substantial evidence. We are not convinced that the Commissioner erred in either respect. Nevertheless, it is important to note that, while the Commissioner did rely on the testimony of O'Neil and Schwartz and the benchmarks as evidence that the modeled hurricane losses included in the filing were overstated, "the Commissioner [did] not rely[] upon the specific numerical values of their calculations to set a rate[,]" as the Commissioner explained in finding 215.

The Bureau first contends the Commissioner erred in relying on testimony by O'Neil and Schwartz because they were neither offered nor qualified by knowledge, skill, experience, training, or education as experts in hurricane modeling. *See* N.C. Gen. Stat. § 8C-1, Rule 702(a); *Daubert*, 509 U.S. at 588, 125 L. Ed. 2d at 480. In support of its argument, the Bureau directs this Court's attention to finding 218a, in which the Commissioner found that "neither he nor any of the consultants hired by the Department nor anyone on his staff has the expertise to evaluate the inner workings of the model." While we acknowledge the Commissioner's finding, we are not convinced the finding supports the Bureau's argument. A review of finding 218a and the subsequent findings indicate the Commissioner was not commenting on the qualifications of O'Neil and Schwartz to provide testimony regarding the results of AIR's STD model, but regarding the "inner workings of the model[,]" to which neither O'Neil nor Schwartz offered testimony. The Commissioner's subsequent finding describing the type of review he was required to undertake because he lacked the expertise to analyze the inner-workings of the model adds perspective to finding 218a. The Commissioner explained that review as follows:

> 218b. The Commissioner instead must rely on benchmarks that are offered in sworn evidentiary testimony. These benchmarks can be against results from other models, or against actual history. Each of the various benchmarks in the record has different evidentiary force that must be weighed.

O'Neil and Schwartz, both of whom were stipulated as expert property/casualty insurance actuaries, were certainly qualified by knowledge, skill, and experience to review the results of the STD model and compare those results to the results of other models or historical losses. Thus, the Commissioner did not err in relying on their testimony.

The Bureau next takes issue with the Commissioner's use of "benchmarks" to validate the STD model. The Commissioner recognized four benchmarks which he used to estimate that modeled hurricane losses should be 13.1% to 21.5% lower than filed. The Bureau contends three of those benchmarks are not supported by material and substantial evidence in the record and, therefore, the Commissioner's reliance thereon was arbitrary and capricious.

At the outset, we re-emphasize that the Commissioner specifically noted the actual reduction of the modeled hurricane losses was not based on the benchmarks.

In the first challenged benchmark, which the Commissioner explained in finding 218c, the Commissioner compared actual hurricane losses to modeled hurricane losses. That comparison was based off of AIR's own validation in Exhibit RB-6C, which used bar graphs to compare observed and modeled losses for seventeen hurricanes dating back to 1989. Because AIR was comparing observed losses from past years to current model losses, AIR adjusted the actual losses by a 7% annual trend factor to account for inflation and exposure growth. The Commissioner noted in finding 218c that the adjusted actual losses for hurricanes Hugo, Fran, and Isabel, three hurricanes that caused significant losses in North Carolina, are 7.9% higher that the modeled hurricane losses. The Commissioner, however, also tested a 5% annual trend factor and found the adjusted actual losses are 21% lower than the modeled hurricane losses when the 5% factor is used. The Commissioner then found in finding 218c that an annual trend factor of below 5% is shown from inflation and home price indices, which the Commissioner acknowledged were not discussed at the hearing.

The Bureau now contends the Commissioner's analysis using the 5% annual trend factor was in error because the 5% factor was not based on evidence in the record and because the 5% factor does not include the exposure growth component to AIR's validation. The Bureau claims the Commissioner picked the 5% factor because AIR's validation did not support his desired reduction of the modeled hurricane losses and, therefore, the Commissioner "rewrote the evidence to generate another 'benchmark' in his result-oriented effort to reduce modeled losses and ensure that there would be no rate increase." The Bureau is correct that the Commissioner's use of the 5% annual trend factor and the Commissioner's assertion that the annual trend factor is less than 5% are not based on evidence in the record. Thus, the portion of finding 218c indicating an annual trend factor between 3.5% and 4% is proper is error. We hold it was not error, however, for the Commissioner to test the 5% factor.

In response to the Bureau, the Commissioner contends the 5% annual trend factor was just a number selected by the Commissioner to test the sensitivity of AIR's 7% factor. Assuming that was the purpose of the Commissioner's calculations, it was useful and relevant for determining the sensitivity of the STD model. But even if that was not the intended purpose of testing the 5% factor, the Commissioner's analysis and the portion of finding 218c that the annual trend factor was below 5% were harmless because the Commissioner's ultimate reduction of the modeled hurricane losses was not based on the 5% factor.

The second challenged benchmark, described by the Commissioner in finding 218e, was based on the testimony of Department witness O'Neil. For the "O'Neil benchmark," O'Neil conducted a comparison of modeled hurricane losses of AIR and Risk Management Solutions (RMS), a competitor of AIR. O'Neil's comparison was of the WSST modeled hurricane losses of "Beach Plan"[2] properties that had been projected for reinsurance purposes. O'Neil found that AIR projected losses of $247.4 million and RMS projected losses of $141.0 million. O'Neil then determined that AIR's modeled losses were roughly 27.4% higher than the average of the two models. Based on O'Neil's testimony, the Commissioner found modeled hurricane losses could be 21.5% lower than filed. In rebuttal, Bureau witness Newbold took exception to usefulness of O'Neil's comparison, but offered the results if the STD versions of AIR's and RMS's models were considered. Newbold testified that using STD versions of their respective models, AIR projected losses of $226.8 million and RMS projected losses of $167.5 million; thus, AIR's modeled losses were roughly 14% higher than the average of the two models. Based on Newbold's testimony, the Commissioner found modeled hurricane losses could be 13.1% lower than filed.

The Bureau now contends O'Neil's analysis was not material and substantial evidence because the models she compared were different from the model used in the filing and because the comparison was based only on the Beach Plan's exposure, which makes up only a small portion of the entire state. Although the modeled hurricane losses compared by O'Neil were projected using WSST versions of AIR's and RMS's models and, therefore, different from the models used to project modeled hurricane losses in the filing, Newbold's testimony regarding the results of the STD versions of the models adds credence to O'Neil's testimony

---

2. The Beach Plan is a residual market created by the legislature to provide insurance to homeowners in beach and coastal counties at a surcharge because insurers are not willing to write insurance policies.

that AIR's estimates were significantly higher than the estimates of RMS. Although such comparison may not be relevant to the actual reduction of the modeled hurricane losses, it is relevant to show that other models produce more modest loss projections. Additionally, although the Beach Plan only includes those territories nearest the coast and is not representative of the entire state, the evidence from AIR was that those coastal territories in the Beach Plan are most vulnerable to hurricane losses and account for much higher shares of the loss than exposure. Thus, we do not entirely dismiss the consideration of the Beach Plan modeled losses. Lastly, and most importantly, while the Commissioner may have used the benchmark to set the outer bounds for a reduction of the modeled hurricane losses, the benchmark was not used by the Commissioner to calculate his reduction of the modeled hurricane losses.

The third benchmark challenged by the Bureau was based on the testimony of Department witness Schwartz. The Commissioner described his review of the "Schwartz benchmark" in finding 218f. The Schwartz benchmark was based on a comparison of modeled hurricane losses and actual hurricane losses from filings dating back to 1998. Schwartz's analysis showed that from 1992 to 2011 the ratio of actual to modeled hurricane losses was 53%. In finding 211, the Commissioner found that "Schwartz corrected for his perceived problems with the AIR model by judgmentally reducing the value of the projected losses in the filing by +10%."

The Bureau contends the Schwartz benchmark is not material and substantial evidence. While we agree that Schwartz's 10% reduction in the modeled losses is not material and substantial evidence, the Schwartz analysis is relevant, material, and substantial evidence to show the comparison between observed losses and modeled losses for purposes of demonstrating AIR's STD model overstated modeled hurricane losses in the recent past.

The Bureau's arguments against each of these benchmarks is that they are not material and substantial evidence. We disagree and hold the benchmarks were material and substantial evidence of the purpose for which they were recognized – to show that AIR's modeled hurricane losses were not exact and were overestimated.

While the Commissioner may have considered the benchmarks for determining the modeled losses were not entirely reliable, the Commissioner indicated his eventual reduction of the modeled hurricane losses was not based on the benchmarks. In fact, the Commissioner noted deficiencies in the benchmarks by stating in finding 218g that

"none of [the four benchmarks] on its own is completely reliable." The Commissioner also recognized in finding 215 that O'Neil's and Schwartz's testimony may have contained some documentation issues and unsupported assumptions, but as we recognized above, the Commissioner overlooked those deficiencies because he was "not relying upon the specific numerical values of their calculations to set a rate." The Commissioner correctly recognized in finding 215 that his duty was to determine "whether the Bureau met its burden of proof for this filing." The Commissioner ultimately determined the Bureau failed to meet its burden of proof regarding three components of the modeled hurricane losses and determined it was proper to exclude those components from consideration, thereby reducing the modeled hurricane losses to be used in ratemaking. The Commissioner described his reduction as follows:

> 218i. The Commissioner finds it helpful to tabulate the STD model output in the following format. From here, it can be seen that eliminating three sources of losses that were disputed by the Department witnesses: 1) the demand surge component ($17.0 million), 2) the losses arising from modeled CAT 5 events in North Carolina ($14.0 million), and 3) the losses ($12.8 million) arising from modeled hurricanes that make landfall somewhere other than the Carolinas, but which are presumed by the AIR model to continue into North Carolina with wind speeds below hurricane force, one would end up with an indicated average annual loss due to hurricanes of $272.3 million, which is 13.9% below the filed amount, and within the range cited above. . . .

The Bureau's last argument regarding the Commissioner's review of the modeled hurricane losses is that the Commissioner's 13.9% reduction removes losses that insurers are required to pay. The Bureau contends the removal of the three components was arbitrary and suggests that the only reason for their removal is because the combined effect caused the modeled hurricane losses to fall within the range of the benchmarks. We disagree with the Bureau's assertion that the Commissioner's decisions to exclude CAT 5 hurricanes, demand surge, and losses incurred from winds below 74 miles per hour were arbitrary and capricious.

Concerning CAT 5 hurricanes, the Bureau asserts that the decision to remove the CAT 5 hurricanes from the modeled losses was arbitrary because the evidence was undisputed that it was statistically and meteorologically possible that a CAT 5 hurricane could impact North Carolina. Although the Bureau recognizes that there has never been a CAT 5 hurricane impact in North Carolina in the period of time for which consistent

historical data has been collected, the Bureau's model hurricane losses include the admittedly extremely low probability events. In response, the Commissioner points to testimony from Newbold that there is less than a .1% probability a CAT 5 hurricane will strike North Carolina and indicating it is a very unlikely event. The Commissioner further points to prefiled testimony of Schwartz explaining that "[p]rojected hurricane events from the AIR model that have a probability of 0.1% or less . . . comprise about 7.7% of the overall projected modeled hurricane losses[,]" "projected hurricane events from the AIR model that have a probability of 0.5% or less . . . comprise about 22.7% of the overall projected modeled hurricane losses[,]" and "[m]ore than ½ of all the projected hurricane losses from the AIR model come from hurricane events that have a probability of 2.5% or less . . . ." After noting Schwartz's testimony, the Commissioner found in finding 209 that "[w]hile the very low probability events have a large impact on projected losses, these very low probability events have the most uncertainty about whether the results are accurate." In finding 193, the Commissioner also recalled O'Neil's testimony that "[al]though . . . Newbold may be correct from a technical modeling viewpoint that a Category 5 storm is possible, it does not follow that it is appropriate to generate losses from such an event for inclusion in North Carolina Homeowners' rates. Homeowners should not be required to pay for losses from a hypothetical event which has no basis in actual historical observation." We hold the Commissioner's findings concerning CAT 5 hurricanes are supported by the evidence and demonstrate a reasoned decision to exclude the losses from those storms due to the very low probability and high comparative costs included in the modeled hurricane losses.

Concerning demand surge, the Commissioner recognized in finding 185 that "[d]emand surge accounts for the sudden and usually temporary increase in the cost of material, services, and labor due to increased demand following a catastrophe." The Commissioner further noted in a footnote to that finding that, "[d]emand surge, *at best*, is a function of supply and demand . . . [and] *at worst*, is a function of price gouging." The Commissioner then found in finding 187 that "[t]he analysis showed that there is an increase of 5.7% in gross losses when demand surge is applied." In summarizing the testimony of O'Neil, the Commissioner indicated that O'Neil took issue with the inclusion of demand surge because the validation for demand surge was based on other states and there had not been an analysis for North Carolina events. O'Neil also contemplated that the North Carolina price gouging statute could limit demand surge. We find it significant that the Commissioner did not completely reject the possibility of demand surge, but instead disagreed with the Bureau's analysis as follows:

> 198a. The Commissioner agrees with O'Neil that the Demand Surge surcharge averaging 5.7% is not adequately supported by the Rate Bureau. He was able to review the demand surge impact on each of the 57,754 modeled losses. The Commissioner was surprised to find that nearly 40% of the modeled losses included additional losses due to demand surge. He finds that modeled events with loss amounts as low as $6 statewide loss included demand surge.
>
> 198b. The Commissioner finds that nearly half of the total demand surge dollars . . . arise from modeled events that make landfall in states other than North Carolina. Presumably the North Carolina portion of losses excluding demand surge from events that make landfall elsewhere are only a fraction of the total, and yet, the formula provides the same percentage load in each state's losses. It is not clear to the Commissioner why a major event in Florida that tracks into North Carolina doing relatively minor damage there should entail supply and demand problems in North Carolina.
>
> 198c. Whatever study was done to develop the model, no details other than a table of factors were presented into evidence by the Rate Bureau.
>
> 198d. AIR testified that it commonly runs the model either with or without demand surge, implying that it is not regarded by its end users as a necessary component of the model.

It is clear from these findings that the Commissioner's exclusion of demand surge was a result of the Bureau's failure to meet its burden of proof. We hold these findings are supported by the evidence and demonstrate a coherent analysis by the Commissioner.

Concerning losses from winds below 74 miles per hour, the Bureau contends the exclusion of those losses from modeled hurricane losses is arbitrary because "[t]he actual hurricane losses removed from the ratemaking data to prevent any duplication include all losses caused by winds of 40 mph or higher." We are not convinced. It is undisputed that hurricanes are classified as storms with sustained winds at least 74 miles per hour. As a result, O'Neil testified that "[she] didn't think it appropriate to consider [losses caused by winds below 74 miles per hour] as hurricane losses in the model." The Commissioner reflected

O'Neil's opinion in his findings and adopted it, resulting in the exclusion of losses incurred from non-hurricane force winds from modeled hurricane losses. While there may be reasons for the inclusion of such winds, the Commissioner's determination is rationally based on the evidence presented and, therefore, was not arbitrary.

Upon full review of the Commissioner's analysis of the modeled hurricane losses, the Order shows the Commissioner performed a careful review of the evidence and did not arbitrarily reduce the modeled hurricane losses to be used in ratemaking. The Commissioner removed those sources of the modeled hurricane losses that he determined were questionable and not fully supported by the Bureau.

4. Allocation to Zones

[4] Lastly, the Bureau argues the Commissioner erred in rejecting its filed allocation of the net cost of reinsurance and underwriting profit to zones. The Commissioner addressed the Bureau's allocation in findings 455 to 469.

The Bureau's filed allocation was based on a simulation model developed by Bureau witness Appel. Appel explained that he used his model to calculate the risks faced by different regions in North Carolina and, instead of using the revised territories in the filing, allocated the net cost of reinsurance and underwriting profit between four zones: beach, coast, central, and mountains. The Bureau now claims the filed allocation "did not change the overall filed rate level; it simply accomplished the fundamental goal of allocating the reinsurance costs across the state proportional to the risk and thereby collecting a greater portion of the premium from the exposures which present a correspondingly greater risk."

The Commissioner took exception to the Bureau's allocation; particularly regarding the inclusion of certain counties that are not afforded coverage under the Beach Plan in the "coast" zone, which is burdened by a greater share of the net cost of reinsurance and underwriting profit. The Commissioner also considered testimony of Department witness O'Neil, who took exception to Appel's allocation. O'Neil testified that she disagreed with the allocation of the net cost of reinsurance and underwriting profit to zones on the conceptual level because, "[f]rom an overall level, the Rate Bureau relates the amount of profit to the willingness of investors to supply capital. In that regard investors are only concerned with overall company profit, not the specific areas from which it may arise." O'Neil also took exception to the inclusion of another level of simulation modeling to the Bureau's filing and challenged the

documentation and results of Appel's model, noting that "the allocation of more than 40% of the nearly $1 billion of underwriting profit, contingencies and Net Cost of Reinsurance to Zone 1a [was] unreasonable on its face." In place of Appel's model, O'Neil calculated the indicated rate level changes by territory.

It is clear from the Commissioner's findings that the Commissioner did not find Appel's model and the resulting allocation of the net cost of reinsurance and underwriting profit reliable. The Commissioner then rejected the Bureau's allocation, finding as follows:

> 468a. The Commissioner finds that the filed distribution of the net cost is discriminatory in that it is based on a Monte Carlo simulation of losses that appears to understate significantly the loss variance in the less hurricane prone areas by means of significantly understating the assumed annual variance in non-hurricane losses. According to the simulation file that was provided to the Department by the Rate Bureau (*DOI-5*, *D.R 1.181-192*), the arbitrarily assumed ratio of the standard deviation to the mean (known in statistics as the coefficient of variation (C.V.)) is approximately 1% for non-hurricane losses. Data provided on *DOI-9*, *Schwartz prefiled testimony*, *AIS-18*, shows that the state with the smallest annual coefficient of variation in its loss ratio among the 50 states has a C.V. of approximately 12%. The Commissioner finds that a Monte Carlo simulation that assumes a standard deviation relative to the mean for non-hurricane losses of 1% produces results that cannot be relied upon in determining overall risk by zone.
>
> 469. Given Appel's lack of credibility on this particular issue and the Bureau's failure to recognize or address the fairness issue, the Commissioner herein orders that the net cost of reinsurance and underwriting profit will <u>not</u> be allocated to zones. Allocating the net cost and profit to zones as Appel recommends will result in rates that are unfairly discriminatory.

The Bureau now challenges the Commissioner's rejection of its allocation of the net cost of reinsurance and underwriting profit to zones because the Commissioner's analysis went outside the record. Specifically, the Bureau contends the Commissioner's comparison of the coefficients of variation in finding 468a was not based on evidence

in the record. Upon review of Exhibit DOI-9, AIS-18, to which the Commissioner specifically referred in finding 468a, we agree with the Bureau that the finding is not supported by evidence in the record. In response, the Commissioner does not direct this Court to any evidence supporting finding 468a, but instead contends that the Commissioner "used his expertise to analyze the data provided through discovery to determine that Appel's simulation of losses cannot be relied upon." While that may be the case, without further findings regarding the Commissioner's analysis and where the data relied upon may be found, this Court cannot determine whether finding 468a is supported by evidence in the record and must hold that it is not.

We do, however, agree with the Commissioner's further assertion that even if finding 468a is not supported by the record evidence, the Commissioner's rejection of the Bureau's allocation of the net cost of reinsurance and underwriting profit to zones is supported by the Commissioner's other findings, which cast doubt upon the credibility of Appel's model. The concerns raised in those findings concerning Appel's credibility are supported by material and substantial evidence in the record. Thus, we affirm the Commissioner's rejection of the Bureau's filed allocation of the net cost of reinsurance and underwriting profit to zones.

III. Conclusion

Upon a full review of the Commissioner's order, we hold the order reflects a careful, thoughtful, and thorough consideration of the evidence. The evidence in the record supports the Commissioner's critical findings and ultimate conclusions. This Court will not second guess the Commissioner's determinations as to the credibility of the witnesses or the weight to be given their testimony. Therefore, the order of the Commissioner is affirmed.

AFFIRMED.

Judges DIETZ and TYSON concur.

STATE v. ABRAMS

[248 N.C. App. 639 (2016)]

STATE OF NORTH CAROLINA
v.
LARRY WILLIAM ABRAMS

No. COA15-1144

Filed 2 August 2016

Evidence—marijuana—expert testimony—reliability analysis

The trial court did not abuse its discretion in a drug case by admitting expert testimony identifying the substance recovered from defendant's home as marijuana. The agent's testimony was the product of reliable principles and methods applied reliably to the facts of the case, which satisfied the two challenged prongs of the reliability analysis under Rule 702(a).

Judge HUNTER, JR. concurring.

Appeal by defendant from judgments entered 27 May 2015 by Judge Robert C. Ervin in Caldwell County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Deborah M. Greene, for the State.

Leslie Rawls for defendant-appellant.

CALABRIA, Judge.

Larry William Abrams ("defendant") appeals from judgments entered upon jury verdicts finding him guilty of possession with intent to sell or deliver marijuana, intentionally maintaining a building to keep controlled substances, and possession of drug paraphernalia. We conclude defendant received a fair trial, free from error.

I. Background

During a traffic stop on 13 February 2012, Willie Cloninger ("Cloninger") consented to deputies of the Caldwell County Sheriff's Department ("CCSD") searching his vehicle. He told CCSD that he had four ounces of marijuana under his seat and agreed to make undercover buys for them. Cloninger made three buys at defendant's home. After each buy, Cloninger met with the officers and returned the purchased substances to them.

James Ferguson also cooperated with the CCSD. When his home was raided, he admitted to purchasing marijuana from defendant for the past nine months. Subsequently, CCSD executed a search warrant on defendant's home and recovered, *inter alia*, "[f]ive Ziploc bags of green vegetable plant matter" and various other containers of plant material. Georgiana Baxter ("Agent Baxter"), a special agent with the North Carolina State Bureau of Investigation ("SBI") and a forensic scientist with the North Carolina State Crime Lab ("NC Lab") in the Western Regional Laboratory ("WRL") in Asheville, tested the plant matter recovered from defendant's home and concluded that it was marijuana. Defendant was charged with, *inter alia*, possession with intent to sell or deliver marijuana, intentionally maintaining a building to keep controlled substances, and possession of drug paraphernalia.

At trial, the State tendered Agent Baxter as an expert witness. Agent Baxter currently serves as a forensic scientist supervisor in the chemistry section of the NC Lab in WRL, where she has worked for nearly fourteen years. She has completed the specialized "in-house training program through the [NC Lab] dealing with all aspects of forensic drug analysis" and was certified by the American Board of Criminalistics in the area of forensic drug analysis. As of the date she testified, Agent Baxter had been previously tendered and admitted as an expert approximately eighty-seven times to give her opinion as to whether a substance was a controlled substance.

Agent Baxter testified that she examined the plant material recovered from defendant's residence pursuant to the procedures set forth by NC Lab for analyzing and identifying marijuana. Those procedures called for an analyst to separate the vegetable material from its packaging and record its weight; conduct a visual inspection of the material with the naked eye; conduct an inspection of the material under a microscope; and then conduct a chemical test to determine the presence of tetrahydrocannabinol ("THC"), the active component of marijuana. After conducting this analysis on the vegetable material recovered from defendant's home, Agent Baxter concluded that it was marijuana.

On 27 May 2015, a Caldwell County jury returned verdicts finding defendant guilty of possession with intent to sell or deliver marijuana, intentionally maintaining a building to keep controlled substances, and possession of drug paraphernalia. The trial court sentenced defendant to a 60-day active sentence to be served in the custody of the Sherriff of Caldwell County, as well as a minimum of 6 months and a maximum of 17 months to be served in the North Carolina Division of Adult

Correction, where he was placed on supervised probation for 30 months with monetary and special conditions of probation. Defendant appeals.

II. Identification of Marijuana

Defendant argues the trial court abused its discretion by admitting expert testimony identifying the substance recovered from his home as marijuana, in violation of the new reliability inquiry imposed by amended Rule 702(a) of the North Carolina Rules of Evidence. We disagree.

A. Expert Testimony, the *Daubert* Standard

As an initial matter, "North Carolina is now a *Daubert* state." *State v. McGrady*, __ N.C. __, __, __ S.E.2d __, __, 2016 N.C. LEXIS 442, at *13 (2016). Rule 702(a) governs the admission of expert witness testimony. In 2011, our General Assembly amended Rule 702(a) to reflect its federal counterpart, which itself was amended in 2000 in response to the standard articulated in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469, 113 S.Ct. 2786 (1993) and later clarified in *General Electric Co. v. Joiner*, 522 U.S. 136, 139 L.Ed.2d 508, 118 S.Ct. 512 (1997) and *Kumho Tire. Co. v. Carmichael*, 526 U.S. 137, 143 L.Ed.2d 238, 119 S.Ct. 1167 (1999). *McGrady*, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *7.

Our Supreme Court recently interpreted the 2011 amendment to Rule 702(a) to "adopt[] the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases[,]" and held that "the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule." *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *6.

B. Standard of Review

We review a trial court's ruling on the admissibility of expert testimony pursuant to Rule 702(a) for an abuse of discretion. *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22. " '[A] trial court may be reversed for abuse of discretion only upon a showing that its ruling was manifestly unsupported by reason and could not have been the result of a reasoned decision.' " *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22 (quoting *State v. Riddick*, 315 N.C. 749, 756, 340 S.E.2d 55, 59 (1986)).

In reviewing a trial court's application of Rule 702(a), our Supreme Court instructed:

> To determine the proper application of North Carolina's Rule 702(a) . . . [the reviewing court] must look to the text

> of the rule, to [*Daubert*, *Joiner*, and *Kumho*], and also to our existing precedents, as long as those precedents do not conflict with the rule's amended text or with *Daubert*, *Joiner*, and *Kumho*.

Id. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *14.

C. Discussion

Rule 702(a) provides in pertinent part:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Inquiry under the amended Rule 702(a) still involves a "three-step framework—namely, evaluating qualifications, relevance, and reliability[,]" *McGrady*, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *20, and "expert testimony must satisfy each to be admissible." *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *14. In the instant case, defendant does not dispute Agent Baxter's credentials nor the relevance of her testimony, but challenges its reliability.

1. Reliable Principles and Methods

Defendant contends Agent Baxter's testimony was not "the product of reliable principles and methods[,]" in violation of Rule 702(a)(2), on the basis that "the State did not present any testimony relating to [*Daubert*'s] five factors. Nor did it present any other support for the reliability of the test Baxter used to determine the nature of the vegetable matter." We disagree.

Regarding *Daubert*'s and other particular factors a trial court may consider when determining reliability, our Supreme Court explained:

In the context of scientific testimony, *Daubert* articulated five factors from a nonexhaustive list that can have a bearing on reliability: (1) "whether a theory or technique . . . can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the theory or technique's "known or potential rate of error"; (4) "the existence and maintenance of standards controlling the technique's operation"; and (5) whether the theory or technique has achieved "general acceptance" in its field. *Daubert*, 509 U.S. at 593-94. When a trial court considers testimony based on "technical or other specialized knowledge," N.C. R. Evid. 702(a), it should likewise focus on the reliability of that testimony, *Kumho*, 526 U.S. at 147-49. The trial court should consider the factors articulated in *Daubert* when "they are reasonable measures of the reliability of expert testimony." *Id.* at 152. Those factors are part of a "flexible" inquiry, *Daubert*, 509 U.S. at 594, so they do not form "a definitive checklist or test," *id.* at 593. And the trial court is free to consider other factors that may help assess reliability given "the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150.

The federal courts have articulated additional reliability factors that may be helpful in certain cases, including:

> (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.
>
> (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.
>
> (3) Whether the expert has adequately accounted for obvious alternative explanations.
>
> (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting.
>
> (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

> Fed. R. Evid. 702 advisory committee's note to 2000 amendment (citations and quotation marks omitted). In some cases, one or more of the factors that we listed in *Howerton* may be useful as well. *See Howerton* [*v. Arai Helmet, Ltd.*], 358 N.C. [440,] 460, 597 S.E.2d [674,] 687 [(2004)] (listing four factors: use of established techniques, expert's professional background in the field, use of visual aids to help the jury evaluate the expert's opinions, and independent research conducted by the expert).
>
> Whatever the type of expert testimony, the trial court must assess the reliability of the testimony to ensure that it complies with the three-pronged test in Rule 702(a)(1) to (a)(3). The court has discretion to consider any of the particular factors articulated in previous cases, or other factors it may identify, that are reasonable measures of whether the expert's testimony is based on sufficient facts or data, whether the testimony is the product of reliable principles and methods, and whether the expert has reliably applied those principles and methods in that case. *See Kumho*, 526 U.S. at 150-53.

McGrady, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *18-20 (footnotes omitted). In addition, our Supreme Court emphasized that "Rule 702(a), as amended in 2011, does not mandate particular 'procedural requirements for exercising the trial court's gatekeeping function over expert testimony.' " *Id.* at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22 (quoting Fed. R. Evid. 702).

In the instant case, Agent Baxter's testimony established that she analyzed the vegetable matter recovered from defendant's home in accordance with the procedures for identifying marijuana employed by NC Lab at the time. Regarding Rule 702(a)(2), the reliability of the "principles and methods" employed, Agent Baxter explained that when identifying a substance as marijuana:

> The first thing that I'm going to do . . . is . . . separate any weighable material from its packaging that I receive it in. So I want the weight of just the material itself. I'm going to record that weight. At that point, I'm going to proceed with my analysis, conducting some type of preliminary analysis, whether that be a color test. In this particular case, with plant material, it's going to include a microscopic examination as well. After that, I'm going to do some type of chemical analysis to confirm the identification.

Regarding the microscopic exam, Agent Baxter explained in greater detail:

> There's basically four characteristics that we're looking for with marijuana. They have unique characteristics about their leaves. They have particular types of hairs that grow on those leaves. The stems of marijuana plants aren't rounded like a lot of tree, or you know, other types of plant material. They're fluted so . . . they're almost square, with concave edges. The seeds of the marijuana plant are very unique in that they are mottled, which means they look like little turtles' backs. So those are the kinds of things that we're looking for when we look under the microscope.

Regarding the chemical analysis, Agent Baxter explained that she conducted

> what is referred to as a Duquenois-Levine color test [, which is] a chemical test that reacts with certain compounds. In this case, it reacts with certain cannabinoids, such as THC, which is the active component in marijuana.

Based on her detailed explanation of the systematic procedure she employed to identify the substance recovered from defendant's home, a procedure adopted by the NC Lab specifically to analyze and identify marijuana, her testimony was clearly the "product of reliable principles and methods" sufficient to satisfy the second prong of Rule 702(a), and the trial court did not abuse its discretion in admitting this testimony. We overrule defendant's challenge.

2. Application of Reliable Principles and Methods

Defendant next contends Agent Baxter's testimony did not establish that she "applied the principles and methods reliably to the facts of the case[,]" in violation of Rule 702(a)(3). We disagree.

Agent Baxter testified that "we handle every case the same. We only work one item of evidence at a time, so as to prevent any type of cross-contamination during analysis." Agent Baxter received five bags of vegetable matter for testing, and explained:

> Based on our sampling procedures at that time, . . . I was required to randomly select three of those plastic bags and do a complete chemical analysis.

After selecting the first bag, Agent Baxter "separated it from the packaging material, [and measured the] weight o[f] that material[,]" which

was "379.21 grams." Next, she performed "a macroscopic [examination] . . . for particular characteristics. [She] then did a microscopic examination of the material[.]" Subsequently, she performed "a Duquenois-Levine color test" and "receive[d] a positive indication[.]" Based on her analysis, Agent Baxter concluded that the substance was marijuana.

Regarding analyzing the two other samples, Agent Baxter testified that she applied the same procedures she used to analyze the first sample:

> Once again, I separated it from its packaging material to obtain that net weight. I visually observed the material, did a microscopic examination as well as the chemical test that I performed[.]

Agent Baxter concluded that, based on her analysis, the substance tested in each of the bags was marijuana.

Agent Baxter's testimony established that the principles and methods she employed were "applied . . . reliably to the facts of the case[,]" per Rule 702(a)(3). Therefore, the trial court did not abuse its discretion by admitting her testimony.

III. Conclusion

Agent Baxter's testimony was "the product of reliable principles and methods" "applied . . . reliably to the facts of the case[,]" which satisfied the two challenged prongs of the reliability analysis under Rule 702(a). Defendant has failed to show the trial court abused its discretion in admitting Agent Baxter's expert testimony identifying the substance as marijuana. *McGrady*, __ N.C. at __, __ S.E.2d at __, 2016 N.C. LEXIS 442, at *22. Therefore, we conclude defendant received a fair trial, free from error.

NO ERROR.

Judge TYSON concurs.

Judge HUNTER, JR. concurs in a separate opinion.

HUNTER, JR., Robert N., Judge, concurs in a separate opinion.

I concur in holding the trial court did not commit error, but write separately to briefly discuss difficulties this Court faces in reviewing *Daubert* challenges on appeal.

Our Supreme Court and legislature have held North Carolina is a *Daubert* state. *See State v. McGrady*, ___ N.C. ___, ___, ___ S.E.2d ___, ___ (72PA14 2016). Our trial courts are bound to follow *Daubert* and its related guidance. At the present, trial courts are not required to make findings of fact or conclusions of law when they accept or reject an expert witness. With the advent of *Daubert*, this is problematic to appellant review. *See State v. Walston*, __ N.C. App. __, __, 780 S.E.2d 846, 862 (2015).

To utilize an expert witness in North Carolina, the moving party must show the witness's expertise puts the expert in a better position to have an opinion on a given subject than the trier of fact. *See State v. Goode*, 341 N.C. 513, 529, 461 S.E.2d 631, 640 (1995). The movant must show the witness is "qualified as an expert by knowledge, skill, experience, training, or education . . . ." N.C. Gen. Stat. § 8C-1, Rule 702(a) (2015). Then, the movant must follow the three-part framework of Rule 702 and show the testimony is based up sufficient facts or data, is the product of reliable principles and methods, and the expert witness applied the principle and methods reliably to the facts of the case. *Id.* At issue in the case *sub judice*, the reliability prong poses procedural challenges for this Court's appellate review.

Because the substantive rule has an extensive history in federal law, our courts would adopt the federal procedure found in federal courts. However, the United States Circuit Courts of Appeal do not agree on the issue of whether a trial court must conduct a formal *Daubert* hearing when it applies the sufficiency and reliability factors in Rule 702. Circuits that allow a trial court to forego a *Daubert* hearing suggest a trial court can conduct a voir dire examination of the witness or allow the movant to establish a foundation on direct examination or through affidavits and expert reports. *See In re Hanford Nuclear Reservation Litigation*, 292 F.3d 1124, 1138–39, (9th Cir. 2002); *United States v. Glover*, 479 F.3d 511, 517 (7th Cir. 2007); *Hoult v. Hoult*, 57 F.3d 1, 5 (1st Cir. 1995) ("[W]e assume that the [trial] court performs [the *Daubert*] analysis *sub silentio* throughout the trial with respect to all expert testimony."); *United States v. Lacascio*, 6 F.3d 924 (2d Cir. 1993); *United States v. Johnson*, 488 F.3d 690, 697 (6th Cir. 2007). The other circuits that require a formal *Daubert* hearing face a nuanced procedural challenge—whether an *in limine* hearing is required when there is a material dispute as to the expert's reliability. *See Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1302 (Fed. Cir. 2002); *see also Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999). Of the two lines of cases, the United States Supreme Court generally supports a trial

court's procedural discretion in conducting a *Daubert* inquiry. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999) ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony. The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable.").

However, parties may wish to build a record to contest specific findings when an expert is accepted or rejected. In civil trials parties may move to amend a trial court's findings of fact pursuant to N.C. R. Civ. P. 52(b), request specific findings on a witness's qualifications through an objection pursuant to N.C. R. Civ. P. 46(a)(1), or provide an offer of proof outside of the presence of the jury when their witness is excluded as an expert, pursuant to N.C. R. Evid. 103(a)(2). However, this leaves parties in criminal trials with no procedural mechanism to compel the trial court to make findings of fact or conclusions of law regarding its acceptance or rejection of an expert witness. This also creates the possibility of a silent record when parties stipulate to an expert's qualifications and/or reliability, and the movant fails to provide an offer of proof for the record to show its witness meets the *Daubert* requirements.

Given these federal distinctions, one model for procedure is to import the Rule 404(b) procedure in Rule 702. Under Rule 404(b), if a party fails to challenge the admissibility of evidence through a motion *in limine*, but does raise the issue at trial, the trial court holds a *voir dire* hearing. *See*, *e.g.*, *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 160–61 (2012). At this hearing, the trial court conducts a five part analysis: (1) whether there is sufficient evidence the party committed the act; (2) whether the evidence serves a proper purpose; (3) whether the evidence is sufficiently similar to the act in question; (4) whether the evidence and act in question are temporally proximate; and (5) whether the evidence survives the Rule 403 balancing test. *See Id.*; *see also State v. Oliver*, 210 N.C. App. 609, 613, 709 S.E.2d 503, 506 (2011). Then the trial court must make formal findings and note its findings for the record. *See State v. Smith*, 152 N.C. App. 514, 528, 568 S.E.2d 289, 298 (2002) (presumed error when the trial court does not note Rule 403 analysis on the record); *State v. Washington*, 141 N.C. App. 354, 540 S.E.2d 388 (2000) (no error when the trial court demonstrates a Rule 403 analysis in

its ruling); *State v. Rowland*, 89 N.C. App. 372, 383, 366 S.E.2d 550, 556 (1988) (holding 404(b) evidence is inadmissible when a trial court fails to make findings of admissibility under Rule 404(b)).

Accordingly, best practice dictates parties should challenge an expert's admissibility through a motion *in limine*. In the event a trial court delays its ruling on the matter, or in the event a party fails to raise the challenge until the expert is called upon at trial, our trial courts should afford parties a *voir dire* hearing to examine the witness and submit evidence into the record, which this Court can review on appeal. Lastly, in ruling on the expert's admissibility, the trial court should identify the *Daubert* factors and make findings of fact and conclusions of law, either orally or in writing, as to the expert's admissibility.

Here, the State provided sufficient evidence to show Agent Baxter met all the *Daubert* requirements. I concur in holding the trial court did not commit error.

STATE OF NORTH CAROLINA
v.
ROBERT WILLIAM ASHWORTH

No. COA15-1279

Filed 2 August 2016

1. Motor Vehicles—impaired driving—checkpoint—trial court findings—not supported by evidence

In an impaired driving prosecution arising from operation of a checkpoint, the evidence did not support a portion of a finding that a trooper was operating a marked patrol car with a light bar or that the trooper had communicated to his sergeant details of the checkpoint such as the start and end time.

2. Motor Vehicles—impaired driving—finding—not sufficient

In a prosecution for impaired driving arising from a operation of a checkpoint, the trial court's findings did not permit the judge to meaningfully weigh whether the seizure was appropriately tailored and advanced the public interest, and the severity of the checkpoint's interference with individual liberty.

Appeal by Defendant from judgment entered 25 March 2015 by Judge Reuben F. Young in Superior Court, Orange County. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kathryne E. Hathcock, for the State.

Coleman, Gledhill, Hargrave, Merritt & Rainsford, P.C., by James Rainsford, for Defendant.

McGEE, Chief Judge.

Robert William Ashworth ("Defendant") appeals from judgment after a jury found him guilty of driving while impaired. We vacate the judgment and the trial court's denial of Defendant's motion to suppress, and remand for further proceedings.

I. Background

In the evening hours of 31 July 2013, North Carolina State Troopers Matthew Morrison ("Trooper Morrison") and Ray Fort ("Trooper Fort") were on duty in Orange County, North Carolina. They decided to operate a checking station, or checkpoint, at the intersection of Smith Level Road and Damascus Church Road in Chapel Hill, that was to begin at 8:00 p.m. and continue for approximately two hours. Prior to initiating the checking station, Trooper Morrison contacted his superior, Sergeant Michael Stuart ("Sergeant Stuart"), to request authorization. Sergeant Stuart gave his authorization, and later completed a "checking station authorization" form ("the form"). At the hearing, Sergeant Stuart testified he was unsure of when he filled out the form, but that it was likely the next day, 1 August 2013. The form noted that the primary purpose of the checking station was to ask for driver's licenses, and that the station would operate from 8:00 p.m. to 10:00 p.m.

At approximately 9:45 p.m., a vehicle driven by Defendant approached on Damascus Church Road and stopped at the checking station. Trooper Morrison did not notice any violation of the law as Defendant approached. Trooper Morrison requested Defendant's driver's license, which Defendant produced. Detecting the odor of alcohol coming from the vehicle, Trooper Morrison asked Defendant whether he had been drinking. Defendant responded: "You got me. I had about five beers back to back, drank them real quick." Trooper Morrison conducted field sobriety tests on Defendant and, after determining that Defendant was impaired, arrested him for driving while impaired. A chemical analysis

later revealed that Defendant's blood-alcohol concentration at the time of his arrest was 0.08.

Prior to trial, Defendant filed a motion to suppress all evidence obtained as a result of the stop. Defendant argued that the checking station violated his rights under the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, and Article I, Sections 19, 20 and 23 of the North Carolina Constitution. Defendant's motion was heard on 17 November 2014. The State presented the testimony of Trooper Morrison and Sergeant Stuart. Following witness testimony and arguments of counsel, the trial court took the matter under advisement. The trial court entered a written order on 19 November 2014 denying Defendant's motion to suppress. The case proceeded to trial. At trial, Defendant failed to timely object to the admission of evidence obtained as a result of the checkpoint stop. Defendant was convicted by a jury on 25 March 2015 of driving while impaired. Defendant appeals.

II. Analysis

[1] In his sole argument, Defendant contends the trial court plainly erred in denying his motion to suppress. The scope of review of a suppression order is "strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982) (citations omitted). Findings of fact that are not challenged on appeal are binding and deemed to be supported by competent evidence. *State v. Biber*, 365 N.C. 162, 168, 712 S.E.2d 874, 878 (2011). For findings that are challenged, this Court's review is "limited to determining whether competent evidence supports the trial court's findings of fact[.]" *State v. Granger*, ___ N.C. App. ___, ___, 761 S.E.2d 923, 926 (2014) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Chukwu*, 230 N.C. App. 553, 561, 749 S.E.2d 910, 916 (2013) (citation omitted). If there is competent evidence to support the trial court's finding, then it is binding on appeal, "even if the evidence is conflicting." *State v. Barden*, 356 N.C. 316, 332, 572 S.E.2d 108, 120-21 (2002) (citation omitted).

As Defendant concedes, he failed to lodge a timely objection at trial to the introduction of the evidence recovered as a result of Defendant being stopped at the checking station. Our Supreme Court has held that a pretrial motion to suppress is a type of motion *in limine*, *State v. Golphin*, 352 N.C. 364, 405, 533 S.E.2d 168, 198 (2000), and a "motion

in limine is insufficient to preserve for appeal the question of the admissibility of evidence if the defendant fails to further object to that evidence at the time it is offered at trial." *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (per curiam) (citations omitted). Therefore, we consider whether the trial court plainly erred in denying Defendant's motion to suppress.[1]

The plain error rule

> is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has "'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the . . . mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Cummings, 352 N.C. 600, 616, 536 S.E.2d 36, 49 (2000) (alterations in original) (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)); *see also State v. Waring*, 364 N.C. 443, 468, 701 S.E.2d 615, 631 (2010) (holding that when a defendant "fail[s] to preserve issues relating to [a] motion to suppress, we review for plain error"). To prevail, a defendant must show "not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Haselden*, 357 N.C. 1, 13, 577 S.E.2d 594, 602 (2003) (internal quotation marks and citation omitted).

A. Sufficiency of the Findings of Fact

In its order denying Defendant's motion to suppress, the trial court entered the following findings of fact:

> 1. Trooper Matthew Morrison has been working as a Trooper for the State of North Carolina, Department of Public Safety for the N.C. State Highway Patrol for

1. To be entitled to plain error review, a defendant must "specifically and distinctly contend that the alleged error constituted plain error." *State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012). Here, Defendant has done so; therefore, we proceed to a plain error analysis.

two years. Prior to working for the N.C. State Highway Patrol, Trooper Morrison worked for the Chatham County Sheriffs' Office for the previous seven years.

2. Sergeant Michael Stewart [sic] is employed and working as a Trooper for the State of North Carolina in the N.C. Department of Public Safety for the N.C. State Highway Patrol for over seven years. He has been a Sergeant for two years.

3. On 31 July 2013 at or about 9:45 p.m., Trooper Morrison was working a checking station (hereafter referred to as "checkpoint") on Smith Level Road (1919) at the intersection with Damascus Church Road (1939) in Orange County with Trooper Fort. He was wearing his duty uniform, a safety vest, carrying a flash light and operating a marked patrol car with a light bar. The purpose of the checkpoint was to check driver's licenses and look for traffic violations. Trooper Morrison's vehicle was parked to the side of the road next to a private driveway with his lights operating.

4. Two officers are required by Highway Patrol Policy for a checkpoint, so if one of them got tied up with a driver, they had to stop the checkpoint until they were both available to work the checkpoint.

5. Prior to setting up the checkpoint, Trooper Morrison called Sergeant Stewart, one of his supervising officers, indicated that he and Trooper Fort wanted to set a checkpoint on 31 July 2013 to check for drivers/operator's license and other traffic violations of the traffic law at the intersection of Smith Level Road (1919) and Damascus Church Road (1939) from 8:00 p.m. until 10:00 p.m. by stopping every vehicle in every direction. Because Highway Patrol Policy for a checkpoint required two officers present at the checkpoint, if one of the two officer[s] got tied up with a driver, they had to stop the checkpoint until they were both available to work the checkpoint.

6. Sergeant Stewart does not know when he filled out and signed the Checking Station Authorization Form (Form HP-14), but it was not that night, probably the next morning. He could have made a mistake in filling out the Checking Station Authorization Form. The Checking

> Station Authorization Form (HP-14) prepared and signed by Sergeant Stewart was marked and entered into evidence as State's Exhibit Number Two.
>
> 7. The Checking Station Authorization Form later completed after the checkpoint had been conducted indicates the checking station was located on the western end of Damascus Church Road (1940) (near the intersection of Jones Ferry Road) and Smith Level Road (1919) checking only southbound traffic.
>
> 8. The defendant was stopped on Damascus Church Road near Smith Level Road. Trooper Morrison saw a truck driven by the defendant pulled up to the checkpoint.

Defendant only challenges findings of fact three and five. Thus, all other findings of fact are deemed to be supported by competent evidence and are binding on this Court. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878.

Defendant asserts the portion of finding of fact three that states Trooper Morrison was "operating a marked patrol car with a light bar" is unsupported by competent evidence. We agree. At the hearing on Defendant's motion to suppress, the following colloquy occurred between the State and Trooper Morrison:

> [State:] Were you using any other lights other than what was on the patrol vehicles?
>
> [Trooper Morrison:] We had our flashlights.

In addition, Trooper Morrison testified that both his vehicle and Trooper Fort's vehicle "had their lights on." However, Trooper Morrison himself never testified he was operating a patrol vehicle, and did not mention whether his vehicle, even if it was a patrol vehicle, was marked. Further, Trooper Morrison did not testify regarding whether his vehicle was equipped with a light bar. We hold that the evidence and testimony presented at the hearing on Defendant's motion to suppress does not support the challenged portion of finding of fact three, which is therefore not binding on appeal. *See State v. Otto*, 366 N.C. 134, 136, 726 S.E.2d 824, 827 (2012) (holding that when the "evidence does not support the trial court's finding," the finding "is not binding on this Court.").

Defendant also challenges a portion of finding of fact five as unsupported by competence evidence. The challenged portion of finding of fact five states:

> Prior to setting up the checkpoint, Trooper Morrison called Sergeant Stewart, one of his supervising officers, [and] indicated that he and Trooper Fort wanted to set a checkpoint on 31 July 2013 to check for drivers/operator's license and other traffic violations of the traffic law at the intersection of Smith Level Road (1919) and Damascus Church Road (1939) from 8:00 p.m. until 10:00 p.m. by stopping every vehicle in every direction.

Defendant contends that no competent evidence established that Trooper Morrison communicated to Sergeant Stuart: (1) a dedicated start and end time for the checking station; (2) which directions of traffic would be stopped; or (3) whether every vehicle would be stopped. We agree.

At the hearing on Defendant's motion to suppress, Trooper Morrison testified about his conversation with Sergeant Stuart regarding authorization for the checking station:

> [State:] So tell us as best as you recall: What did you talk to Sergeant Stuart about or what did you say to him to get authorization.
>
> [Trooper Morrison:] I believe when we contacted him we just told him we wanted to do a checking station at Damascus -- excuse me at Smith Level and Damascus, right there at that intersection. I think we told him we were going to start -- I don't recall exactly if we told him what time we were going to start it or not, but we just told him we had two troopers there and wanted to do a checking station. And he just gave us his authorization. And he said, "Okay. Just let me know –" I think he said, "Let me know what time you start it, and let me know what time you end it."
>
> [State:] Did you discuss what directions of traffic you would be stopping at this intersection?
>
> [Trooper Morrison:] We were going to stop all three, coming off -- going down Smith Level north and south, and coming off of Damascus.
>
> [State:] Do you recall whether or not you told Sergeant Stuart that specific information?

> [Trooper Morrison:] I don't. I don't think I told him that. I just told him – I am pretty sure we just told him we were going to do it right there at Damascus and Smith Level.

Trooper Morrison admitted there was "no exact ending time" set for the checking station.

Sergeant Stuart testified he did not recall whether he asked Trooper Morrison what time the checking station was to begin, but said as a general rule he asked for that information because he "need[ed] that information . . . to fill out the authorization form."

Sergeant Stuart further testified that as a general rule troopers checked cars in every direction, but he did not recall whether Trooper Morrison stated which directions would be checked at that particular checking station.

After reviewing the record and transcript, we agree with Defendant that the challenged portion of finding of fact five is unsupported by competent evidence. No evidence or testimony presented at the hearing on Defendant's motion to suppress established that Trooper Morrison informed Sergeant Stuart of a dedicated start or end time for the checking station, which directions of traffic would be stopped, or whether every car would be stopped. The challenged portion of finding of fact five, being unsupported by competent evidence, is not binding on appeal. *See Otto*, 366 N.C. at 136, 726 S.E.2d at 827.

B. Constitutionality of the Checking Station

[2] In the present case, all findings of fact, except for the challenged portions of findings of fact three and five, are binding on appeal. *Biber*, 365 N.C. at 168, 712 S.E.2d at 878. We next determine whether, as Defendant argues, the trial court's conclusion of law that the checking station was operated within federal constitutional limitations,[2] was plain error. In its order denying Defendant's motion to suppress, the trial court reached the following pertinent conclusions of law based on its findings of fact:

> 3. Checkpoints for driver's licenses and other traffic violations advance an "important purpose" and the public has a "vital interest" in "ensuring compliance with these and other types of motor vehicle laws that promote public

2. While Defendant's motion to suppress argued the checking station violated his state and federal constitutional rights, Defendant's brief to this Court only argues the checking station was unconstitutional on Fourth Amendment grounds. Any argument on state constitutional grounds is deemed abandoned. N.C.R. App. P. Rule 28(b)(6).

safety on the roads." Clearly, ensuring that drivers are properly licensed as required by law is of "vital interest" to the public and "the gravity of the public concerns are much greater than and were well-served by the minimal seizure" by temporarily stopping vehicles at this checkpoint.

4. Although the officers in this case decided somewhat whimsically to set up this checkpoint, the officers did request approval and a Checking Station Authorization Form (HP-14) completed and signed by Sergeant Stewart, their Sergeant, as required for a checkpoint prior to conducting the checkpoint. The checkpoint had a "predetermined starting and ending time." In accordance with the Highway Patrol Policy, a minimum of two officers were assigned to the checkpoint, two vehicles were located at the checkpoint with their blue lights and emergency flashers operating, the officers were wearing uniforms and reflective safety vests, the officers were carrying flashlights, the checkpoint was visible for a distance in either direction, officers were to stop every vehicle that approached the checkpoint from every direction and officers were to ask for the same information—driver's license from every driver. However, no reason was stated for the selection of this particular location on this particular highway for this checkpoint, nor was any reason stated for the selection of this particular time span.

5. Although, according to the Checking Station Authorization Form, the road number on which the checkpoint was to be conducted was "Road Number" 1940, which is west Damascus Church Road; the "Nearest Road Number" on the form was "1919", which is Smith Level Road. Since only 1939, which is east Damascus Church Road is near and intersects 1919; which is Smith Level Road, the reference to 1940 as the location for the checkpoint was clearly a typographical error.

6. Although conducting a checkpoint at an intersection, rather than a designated stretch of a street or highway, is less supportive of an identified, particular problem on either road, and more supportive of a "fishing expedition"; the fact that east Damascus Church ends at its intersection with Smith Level Road, rather than continuing on through the intersection, makes the "designated purpose"

> of the checkpoint appear more logical to drivers traveling on Smith Level Road that all of the drivers in the vicinity are being treated equally. If drivers on Smith Level Road were being stopped and those on Damascus Church Road were not being stopped, it might appear that the former were being unfairly singled out for detention while the latter were receiving unwarranted favor.
>
> 7. A applying [sic] the three-prong inquiry set out in *Brown* [*v. Texas*, 443 U.S. 47, 61 L. Ed. 2d 357 (1979)], the primary programmatic purpose of this checkpoint was lawful, the officers "appropriately tailored their checkpoint stops" to fit their primary programmatic purpose, and "the public interest in the checkpoint was NOT outweighed by the intrusion on the Defendant's protected liberty interest."
>
> 8. For the foregoing reasons, the stop of the Defendant was constitutional and did not violate N.C.G.S. §15A-16.3A.

As noted, we review a motion to suppress to determine whether the trial court's "factual findings . . . support the judge's ultimate conclusions of law." *Cooke*, 306 N.C. at 134, 291 S.E.2d at 619. A trial court's conclusions of law on a motion to suppress are reviewed *de novo* and are subject to a full review, under which this Court considers the matter anew and freely substitutes its own judgment for that of the trial court. *See Biber*, 365 N.C. at 168, 712 S.E.2d at 878. The conclusions of law "must be legally correct, reflecting a correct application of applicable legal principles to the facts found." *State v. Fernandez*, 346 N.C. 1, 11, 484 S.E.2d 350, 357 (1997) (citation omitted). In the present case, we hold that the binding findings of fact are insufficient to support the trial court's conclusions of law regarding the constitutionality of the checking station.

The Fourth Amendment protects individuals "against unreasonable searches and seizures." U.S. Const. amend. IV. "A traffic stop is a seizure even though the purpose of the stop is limited and the resulting detention quite brief." *State v. Barnard*, 362 N.C. 244, 246, 658 S.E.2d 643, 645 (2008) (quotation omitted). As the United States Supreme Court has held, "[t]he principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop." *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-567, 49 L. Ed. 2d 1116 (1976) (citation omitted). Checkpoint seizures are consistent with the Fourth Amendment if they are "carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers." *Brown v. Texas*, 443 U.S. 47, 51, 61 L. Ed. 2d 357 (1979) (citation omitted).

When considering a constitutional challenge to a checkpoint, a reviewing court "must undertake a two-part inquiry to determine whether the checkpoint meets constitutional requirements." *State v. Veazey*, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008). First, the court must determine the primary programmatic purpose of the checkpoint. *Id.* (citing *City of Indianapolis v. Edmond*, 531 U.S. 32, 40-42, 148 L. Ed. 2d 333, 343 (2000)). Second, if a legitimate primary programmatic purpose is found, "'[t]hat does not mean the stop is automatically, or even presumptively, constitutional. It simply means that [the court] must judge its reasonableness, hence, its constitutionality, on the basis of the individual circumstances.' " *Id.* (quoting *Illinois v. Lidster*, 540 U.S. 419, 426, 157 L. Ed. 2d 843, 852 (2004)).

In the present case, the trial court concluded that the checking station had a proper programmatic purpose of checking for driver's licenses and other traffic violations. Defendant does not challenge the primary programmatic purpose of the checking station; therefore, we consider whether the trial court plainly erred in concluding that the checkpoint was "reasonable," given the findings of fact in this case.

To determine whether a checkpoint was "reasonable" under the Fourth Amendment, a court must weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest. *See*, *e.g.*, *Martinez-Fuerte*, 428 U.S. at 555, 49 L. Ed. 2d at 1126. In *Brown v. Texas*, the United States Supreme Court developed a three-part test when conducting this balancing inquiry, and held a reviewing court must consider: "[(1)] the gravity of the public concerns served by the seizure, [(2)] the degree to which the seizure advances the public interest, and [(3)] the severity of the interference with individual liberty." 443 U.S. at 51, 61 L. Ed. 2d at 362 (citation omitted). If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional. *Veazey*, 191 N.C. App. at 186, 662 S.E.2d at 687 (citing *Lidster*, 540 U.S. at 427-28, 157 L. Ed. 2d at 852-53).

Under *Brown*'s first prong, the trial court was to consider "the gravity of the public concerns served by the seizure." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. Both this Court and the United States Supreme Court have held that "license and registration checkpoints advance an important purpose[.]" *Veazey*, 191 N.C. App. at 191, 662 S.E.2d at 690 (citation omitted); *see also Delaware v. Prouse*, 440 U.S. 648, 658, 59 L. Ed. 2d 660, 670-71 (1979) ("States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed.").

In the present case, the trial court found as fact that the purpose of the checking station was to "check driver's licenses and look for traffic violations," and concluded as a matter of law that "ensuring that drivers are properly licensed . . . [was] of 'vital interest' " and that interest outweighed the "minimal seizure" of this checkpoint stop. This finding of fact and conclusion of law reflect a sufficient consideration of Brown's first prong. *See State v. McDonald*, ___ N.C. App. ___, ___, 768 S.E.2d 913, 921 (2015) ("While . . . checking for driver's license and vehicle registration violations is a permissible purpose for the operation of a checkpoint, the identification of such a purpose does not exempt the trial court from determining the gravity of the public concern actually furthered under the circumstances surrounding the specific checkpoint being challenged."). Accordingly, the trial court did not err, nor plainly err, in concluding that the first prong of *Brown* was satisfied.

Under *Brown*'s second prong, the trial court was required to consider "the degree to which the seizure advance[d] the public interest." *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362. This Court has previously identified a number of non-exclusive factors that courts should consider when determining whether a checkpoint is appropriately tailored, including:

> whether police spontaneously decided to set up the checkpoint on a whim; whether police offered any reason why a particular road or stretch of road was chosen for the checkpoint; whether the checkpoint had a predetermined starting or ending time; and whether police offered any reason why that particular time span was selected.

Veazey, 191 N.C. App. at 191, 662 S.E.2d at 690 (citation omitted). In its order denying Defendant's motion to suppress, the trial court made no findings of fact regarding whether the checkpoint was spontaneously set up on a whim,[3] whether the police offered a reason why the intersection of Damascus Church and Smith Level Road was chosen, why the time span for the checking station was chosen, or any other reason why the checking station advanced the public interest. Although the trial court did find as fact that Trooper Morrison informed Sergeant Stuart that the checking station had a predetermined start and end time – 8:00 p.m. and 10:00 p.m., respectively – as we have held, that finding of fact is unsupported by competent evidence. *See supra*, at 8-9. We hold that the trial court's findings of fact do not support its conclusion of law

3. The trial court did conclude as a matter of law, however, that "the officers in this case decided somewhat whimsically to set up this checkpoint[.]"

that the seizure was appropriately tailored and advanced the public interest and, given the lack of findings to support such a conclusion, the trial court plainly erred in holding that the second *Brown* prong was satisfied. *Brown*, 443 U.S. at 51, 61 L. Ed. 2d at 362.

Finally, *Brown*'s third prong required the trial court to consider "the severity of the [checking station's] interference with individual liberty." *Id.* In general, "[t]he circumstances surrounding a checkpoint stop and search are far less intrusive than those attending a roving-patrol stop." *Martinez-Fuerte*, 428 U.S. at 558, 49 L. Ed. 2d at 1128 (quotation omitted). However, "courts have consistently required restrictions on the discretion of the officers conducting the checkpoint to ensure that the intrusion on individual liberty is no greater than is necessary to achieve the checkpoint's objectives." *Veazey*, 191 N.C. App. at 192, 662 S.E.2d at 690-91. As this Court noted in *Veazey*,

> [c]ourts have previously identified a number of non-exclusive factors relevant to officer discretion and individual privacy, including: the checkpoint's potential interference with legitimate traffic; whether police took steps to put drivers on notice of an approaching checkpoint; whether the location of the checkpoint was selected by a supervising official, rather than by officers in the field; whether police stopped every vehicle that passed through the checkpoint, or stopped vehicles pursuant to a set pattern; whether drivers could see visible signs of the officers' authority; whether police operated the checkpoint pursuant to any oral or written guidelines; whether the officers were subject to any form of supervision; and whether the officers received permission from their supervising officer to conduct the checkpoint. Our Court has held that these and other factors are not "lynchpins," but instead are circumstances to be considered as part of the totality of the circumstances in examining the reasonableness of a checkpoint.

Id. at 193, 662 S.E.2d at 691 (internal citations and quotation marks omitted).

In the present case, the trial court did make several findings of fact regarding *Brown*'s third prong, including: (1) Sergeant Stuart, a supervising officer, authorized the checking station; (2) the lights on Trooper Morrison's vehicle were operating; and (3) the troopers were wearing duty uniforms and safety vests, and were carrying flashlights. While

these findings demonstrate that the trial court did consider some of the relevant factors under *Brown*'s third prong, the lack of any findings to support the trial court's conclusion that the checking station "advanced the public interest" under *Brown*'s second prong provided no basis upon which the court could "weigh the public's interest in the checkpoint against the individual's Fourth Amendment privacy interest." *Veazey*, 191 N.C. App. at 186, 662 S.E.2d at 687. As our Court held in *McDonald*,

> [w]e do not mean to imply that the factors discussed above are exclusive or that trial courts must mechanically engage in a rote application of them in every order ruling upon a motion to suppress in the checkpoint context. Rather, our holding today simply reiterates our rulings in *Veazey* and its progeny that in order to pass constitutional muster, such orders must contain findings and conclusions sufficient to demonstrate that the trial court has meaningfully applied the three prongs of the test articulated in *Brown*.

McDonald, ___ N.C. App. at ___, 768 S.E.2d at 921.

III. Conclusion

The findings of fact in the trial court's order denying Defendant's motion to suppress do not support the trial court's conclusions of law that the checking station was conducted consistent with the Fourth Amendment. The trial court's findings of fact did not permit the judge to meaningfully weigh the considerations required under the second and third prongs of *Brown*. We hold the error amounted to plain error, as it likely affected the jury's verdict – the evidence obtained at the checking station was the only evidence presented by the State at trial. The trial court's judgment and the order denying Defendant's motion to suppress are vacated, and this case is remanded for further findings of fact and conclusions of law regarding the reasonableness of the checkpoint stop.

JUDGMENT VACATED; VACATED AND REMANDED.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANDREW BURROW, DEFENDANT

No. COA16-68

Filed 2 August 2016

1. Criminal Law—defenses—duress—evidence insufficient

The trial court did not err in a prosecution for attempted felonious breaking or entering by refusing to instruct the jury on duress. Defendant did not present substantial evidence of each element of the defense, in that he failed to show that his actions were caused by a reasonable fear of death or serious bodily harm and he had at least two opportunities to seek help and escape.

2. Constitutional Law—inadequate representation of counsel—evidence insufficient

Defendant received adequate representation of counsel where his trial counsel did not attempt to introduce into evidence items that would have corroborated his version of events. Defense counsel made a tactical decision not to attempt to introduce the evidence, and defendant could neither show that trial counsel's performance was deficient or that there was prejudice that deprived him of a fair trial. Defendant entered a stipulation of the underlying offense and was able to present testimony about duress.

3. Contempt—criminal—not a misdemeanor—consecutive sentences

A finding of criminal contempt is not a Class 3 misdemeanor (for which consecutive sentences may not be imposed), and the trial court's orders sentencing defendant to six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt was affirmed.

Appeal by defendant from Judgments entered 13 May 2015 by Judge R. Stuart Albright in Surry County Superior Court. Heard in the Court of Appeals 8 June 2016.

Attorney General Roy Cooper, by Assistant Attorney General Joseph L. Hyde, for the State.

Gilda C. Rodriguez for defendant.

ELMORE, Judge.

Michael Andrew Burrow (defendant) appeals from judgments entered after he was found guilty of attempted felonious breaking or entering and attaining habitual felon status. He argues that the trial court erred in denying his request to instruct the jury on duress and that he received ineffective assistance of counsel (IAC). Defendant also appeals from orders entered finding him in direct criminal contempt and sentencing him to six consecutive thirty-day terms of imprisonment. After careful review, we find no error in the jury instructions, we conclude that defendant did not receive IAC, and we affirm the contempt orders.

I. Background

Defendant's evidence tended to show that around 21 April 2014, after he and his wife had an argument, defendant left their home and went to stay with his father in Lexington for around three days. Defendant testified that he later met with old friends in Winston-Salem where he rented a motel room, bought and used cocaine, and found a woman to smoke it with and talk to. Around 25 April 2014, defendant's wife reported defendant missing and posted flyers in "the bad areas of Winston-Salem," which she called "crack town." Defendant and the other woman met with two of her acquaintances, Detroit and Gabriel. The next couple of days were spent between staying at a "crack house," going to buy more drugs, going to dumpsters to retrieve discarded items and trade them for crack, and going to motels to use the drugs.

The State's evidence tended to show that on 28 April 2014, Mitsy Johnson was home alone around 2 p.m. when she saw two men trying to pry open the back door. Ms. Johnson later identified defendant as one of the men, and she testified that he had a tool that looked like a screwdriver. She also stated that defendant told the other man (Gabriel) to get another tool. Ms. Johnson called her husband and asked him to call the police. In the meantime, she took pictures of defendant and Gabriel while they were trying to pry open the door. After one or two minutes, defendant looked up and saw Ms. Johnson taking pictures. Gabriel immediately fled toward the driveway while defendant stood there for a moment before following. The frame and edge of the door were bent and left with pry marks.

Defendant testified that when he, Gabriel, and Detroit arrived at Ms. Johnson's house on 28 April 2014, Gabriel told defendant, "Get out, you're going to help do this." Afterward, when they left her house, Detroit drove defendant's vehicle, which ran out of gas on two occasions. They

received assistance from a man outside in his yard, and later defendant walked to a diner where a patron gave him five dollars. Within thirty minutes to one hour after leaving Ms. Johnson's house, defendant contacted his wife, and he returned to their home later that night. The following day, defendant surrendered to the Surry County Sheriff's Office.

On 8 December 2014, defendant was indicted for attempted felonious breaking or entering under N.C. Gen. Stat. § 14-54. The matter came on for trial during the 11 May 2015 Criminal Session of Superior Court in Surry County, the Honorable R. Stuart Albright presiding. At trial, defendant entered a stipulation in which he admitted that he contacted the Surry County Sheriff's Office on 29 April 2014 and stated that he had seen his photograph on the news, that he was the one who had attempted to break into the home, and that he was on his way to the Sheriff's Office to turn himself in.

After he turned himself in, defendant informed Detective Sergeant J.D. Bryles that over the course of the last several days, he had been held against his will. Detective Bryles testified that defendant "just stated that they were forcing him to go out and do these break-ins so that they could generate more money and they could all purchase more crack cocaine." When Detective Bryles asked about weapons or threats, defendant did not indicate that any threats were made against him. Later in the conversation after Detective Bryles questioned why he did not request help when he came into contact with two different law enforcement agencies, defendant "acknowledged that he was not being held against his will."

On 12 May 2015, the jury found defendant guilty as charged, and the following day, the jury found defendant guilty of attaining habitual felon status. The trial court sentenced defendant to a term of sixty-three to eighty-eight months imprisonment. Also on 12 May 2015, the trial court convened a contempt proceeding and found defendant guilty of six counts of direct criminal contempt for conduct prohibited by N.C. Gen. Stat. § 5A-11(a)(1) and (2). The trial court sentenced defendant to six consecutive terms of thirty-days imprisonment for the six findings of contempt. Defendant appeals.

II. Analysis

A. Jury Instruction

[1] Defendant argues that the trial court erred in denying his request to instruct the jury on duress because he presented substantial evidence of the defense.

"[T]he question of whether a defendant is entitled to an instruction on the defense of duress or necessity presents a question of law, and is reviewed *de novo*." *State v. Edwards*, ___ N.C. App. ___, ___, 768 S.E.2d 619, 621 (Feb. 17, 2015) (COA14-710). "A trial court must give a requested instruction if it is a correct statement of the law and is supported by the evidence." *State v. Haywood*, 144 N.C. App. 223, 234, 550 S.E.2d 38, 45 (2001) (citation omitted). "For a particular defense to result in a required instruction, there must be substantial evidence of each element of the defense when viewing the evidence in a light most favorable to the defendant." *State v. Brown*, 182 N.C. App. 115, 118, 646 S.E.2d 775, 777 (2007) (citing *State v. Ferguson*, 140 N.C. App. 699, 706, 538 S.E.2d 217, 222 (2000)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *Id.* (quoting *Ferguson*, 140 N.C. App. at 706, 538 S.E.2d at 222).

"In order to be entitled to an instruction on duress, a defendant must present evidence that he feared he would 'suffer immediate death or serious bodily injury if he did not so act.' " *Haywood*, 144 N.C. App. at 234, 550 S.E.2d at 45 (quoting *State v. Cheek*, 351 N.C. 48, 73, 520 S.E.2d 545, 560 (1999)). Moreover, "a defense of duress 'cannot be invoked as an excuse by one who had a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily harm.' " *State v. Smarr*, 146 N.C. App. 44, 55, 551 S.E.2d 881, 888 (2001) (quoting *State v. Kearns*, 27 N.C. App. 354, 357, 219 S.E.2d 228, 231 (1975)) (quotations omitted).

Here, the evidence showed that Gabriel drove defendant's vehicle to Ms. Johnson's house while defendant was in the passenger seat drinking and smoking crack cocaine and marijuana. Gabriel, carrying a knife, and defendant, carrying a lug wrench, eventually walked to the back door. After realizing Ms. Johnson was taking their pictures, Gabriel fled first, and after a few moments, defendant followed Gabriel. When asked if he attempted to get away from Detroit or Gabriel at any point in time, defendant testified, "Yes. But they pretty much had control of my car. . . . Either Gabriel would drive or Detroit would drive. I was sitting in the passenger seat smoking crack." After testifying that both Gabriel and Detroit had knives, he stated, "At a point I did get scared of them . . . [b]ecause they talked about stealing my truck." He admitted that they never "pull[ed] a knife" on him.

Viewing the evidence in the light most favorable to defendant, defendant did not present substantial evidence of each element of the defense, requiring a jury instruction. Defendant failed to show that his actions were caused by a reasonable fear that he would suffer immediate death or serious bodily injury if he did not act. Although defendant

argues that over the course of several days Detroit and Gabriel were holding him against his will, defendant had at least two opportunities to seek help and escape. Officer William Widener stopped to assist defendant and Gabriel when they ran out of gas, and moments later, Officer Widener followed them to the gas station after he realized a missing person report was filed for defendant. Even though defendant was alone with Officer Widener at the gas station and Gabriel was with at least four other officers around twenty-five feet away, defendant never stated he was being held against his will. Rather, he stated that he was in good health, that he was going through a separation with his wife, that he did not want to be around her, that he took the battery out of his phone so that she could not call him, and that he did not need to be listed as a missing person.

In declining to instruct the jury on duress, the trial court noted that "defendant testified himself that these other participants in the crimes never pulled a knife on [defendant] specifically. And he said that he was scared of the other two individuals because they talked about stealing his truck." Moreover, the trial court stated, "By the defendant's own admission, when he was at the gas station where Officer Widener was located, the Court finds that there's nothing in the record to suggest that the defendant would have exposed himself to harm of any kind if he had surrendered to or asked Officer Widener for help at the gas station."

Because the trial court found, *inter alia*, that defendant had the opportunity to avoid doing the act in question, it concluded that defendant was not entitled to an instruction on duress. Based on the evidence discussed above and the record in this case, the trial court properly denied defendant's request for an instruction on duress.

B. Ineffective Assistance of Counsel

[2] Next, defendant claims that he received IAC because his trial counsel did not attempt to introduce into evidence the missing person report or photo, a money transfer receipt, a motel receipt, and his wife's cell phone which contained text messages that he sent her in April 2014. Defendant argues that he was prejudiced by his trial counsel's decision not to attempt to introduce any of the listed evidence because the items would have corroborated his version of the events.

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001). However,

"should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

"When a defendant attacks his conviction on the basis that counsel was ineffective, he must show that his counsel's conduct fell below an objective standard of reasonableness." *State v. Fletcher*, 354 N.C. 455, 481, 555 S.E.2d 534, 550 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 687–88 (1984)). Under the two-part test, "the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (quoting *Strickland*, 466 U.S. at 687). "Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* (quoting *Strickland*, 466 U.S. at 687). Our Supreme Court has previously stated that "[c]ounsel is given wide latitude in matters of strategy, and the burden to show that counsel's performance fell short of the required standard is a heavy one for defendant to bear." *Id.* at 482, 555 S.E.2d at 551.

Here, the trial court engaged in a colloquy with defendant about his decision to testify and present evidence. When the trial court asked what his other evidence would be, generally, defendant replied, stating the missing person report and photo, a money wire receipt, and a motel receipt. Later in the trial, the trial court asked defendant off the record about whether a cell phone on the desk in front of him was turned on, and defendant stated, "No, sir. This is just evidence, sir. I'm sorry." Again, the trial court told defendant that the cell phone must be turned off, and defendant stated, "I was trying to present text messages to you, Your Honor, so you could see. But it ain't coming into evidence[.]"

Although defendant's trial counsel decided not to introduce any of the physical evidence above, defendant's wife was permitted to testify about the money order, which she sent on 29 April 2014 *after* defendant returned to their home, as well as the content of the missing person report. Moreover, defendant's wife testified about the text messages that she received from defendant while he was with Detroit and Gabriel as follows:

> Q: How many would you say he was sending you?
>
> A: In those, in the three days from the time he was—I found him to the time—over a thousand, or close to it.

Q: Did he ever tell you that he felt threatened?

A: He—not, not during the text messages.

On appeal, defendant argues that because "trial counsel made no attempt to introduce any of the text messages or the other evidence [defendant] listed to the trial court, and, thereby, waived any appellate review of the evidence, trial counsel's performance fell below an objective standard of professional reasonableness." We disagree.

Under these facts, defendant's trial counsel made a tactical decision not to attempt to introduce allegedly corroborative evidence. Although defendant now argues that he wanted his trial counsel to admit his wife's physical cell phone so that the jury could use the phone to read text messages between the two, defendant cannot show that his trial counsel's performance was deficient. Second, even if defendant could show deficient performance, he cannot establish prejudice such that he was deprived of a fair trial. Defendant entered a stipulation as to the underlying offense, and he was able to present testimony on his theory of duress. Defendant cannot establish that his trial counsel's decision not to attempt to admit the physical evidence prejudiced his defense.

C. Contempt

[3] Lastly, defendant claims that the trial court erred in sentencing him to six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt. Defendant argues that criminal contempt should be classified as a Class 3 misdemeanor, and consecutive sentences may not be imposed for Class 3 misdemeanors.

While trial courts in this State have sentenced contemnors to consecutive sentences, this Court has never been asked to decide if such practice is permissible. Subject to the listed statutory exceptions, N.C. Gen. Stat. § 5A-12(a) (2015) provides that a "person who commits criminal contempt, whether direct or indirect, is subject to censure, imprisonment up to 30 days, fine not to exceed five hundred dollars ($500.00), or any combination of the three[.]" Under N.C. Gen. Stat. § 5A-12(c) (2015), "[t]he judicial official who finds a person in contempt may at any time withdraw a censure, terminate or reduce a sentence of imprisonment, or remit or reduce a fine imposed as punishment for contempt if warranted by the conduct of the contemnor and the ends of justice."

Defendant argues that a finding of criminal contempt must be a misdemeanor because N.C. Gen. Stat. § 14-1 (2015) defines a felony and then provides, "Any other crime is a misdemeanor." Further, N.C. Gen. Stat. § 14-3(a)(2) (2015) states that unclassified misdemeanors with a

maximum punishment of thirty days or less or only a fine are Class 3 misdemeanors. Thus, because consecutive sentences may not be imposed if all convictions are for Class 3 misdemeanors, *see* N.C. Gen. Stat. § 15A-1340.22(a) (2015), defendant claims that consecutive sentences may not be imposed for multiple findings of contempt.

Defendant's argument fails to take into account the entirety of N.C. Gen. Stat. § 14-3, which dictates that the offense actually be a misdemeanor before labeling it a Class 3 misdemeanor. Our Supreme Court, however, has described criminal contempt as "*sui generis*," meaning "[o]f its own kind or class," Black's Law Dictionary 1475 (8th ed. 2004), and as "a petty offense with no constitutional right to a jury trial." *Blue Jeans Corp. v. Clothing Workers*, 275 N.C. 503, 508, 511, 169 S.E.2d 867, 870, 872 (1969). Moreover, in *State v. Reaves*, this Court held that a criminal contempt adjudication does not constitute a "prior conviction" for purposes of the North Carolina Structured Sentencing Act. 142 N.C. App. 629, 633, 544 S.E.2d 253, 256 (2001). We stated, "Had the General Assembly intended that criminal contempt adjudications as well as misdemeanors be considered 'crimes,' so as to qualify as 'prior conviction' under G.S. § 15A-1340.11(7), it would have been a simple matter [for it] to [have] include[d] th[at] explicit phrase within the statutory amendment." *Id.* at 636, 544 S.E.2d at 257–58 (internal citations and quotations omitted). More recently, in *State v. Luke*, 2010 WL 4292027, at *4 (Nov. 2, 2010) (COA10-169),[1] this Court stated, "[A] criminal contempt adjudication is not a misdemeanor in North Carolina."

In N.C. Gen. Stat. § 5A-12, the General Assembly provided the possible punishments for contempt, including imprisonment up to thirty days. Nothing in that statute or in Chapter 5A prohibits consecutive sentences for multiple findings of contempt. *Compare* N.C. Gen. Stat. § 15A-1354(a) (2015) ("When multiple sentences of imprisonment are imposed on a person at the same time or when a term of imprisonment is imposed on a person who is already subject to an undischarged term of imprisonment, . . . the sentences may run either concurrently or consecutively, as determined by the court. If not specified or not required by statute to run consecutively, sentences shall run concurrently."), *with* N.C. Gen. Stat. § 15A-1340.22(a) ("Consecutive sentences shall not be imposed if all convictions are for Class 3 misdemeanors.").

---

1. While "[a]n unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority[,]" N.C. R. App. P. 30(e)(3), we find the Court's analysis persuasive and adopt it here.

Defendant does not challenge the underlying findings in the contempt orders and presents no other argument as to why the trial court erred. Because a finding of contempt is not a Class 3 misdemeanor, the trial court did not err in sentencing defendant to six consecutive thirty-day terms of imprisonment.

III. Conclusion

The trial court did not err in denying defendant's request to instruct the jury on duress, and defendant did not receive IAC. Additionally, we affirm the trial court's orders sentencing defendant to six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt.

NO ERROR and AFFIRMED.

Judges DAVIS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
DREW THOMAS CHARLESTON

No. COA15-1306

Filed 2 August 2016

1. Appeal and Error—preservation of issue—erroneous instruction

There was no error in a prosecution for discharging a firearm into occupied property where defendant contended that the State did not present substantial evidence that met the trial court's instruction (which raised a higher evidentiary bar for the State than ordinarily used). Defendant did not present the trial court with specific reasoning, and it was not clear that defendant had preserved the issue for appeal.

2. Firearms and Other Weapons—discharging a weapon into an occupied building—sufficiency of evidence

In a prosecution for discharging a firearm into an occupied building, there was no merit to Defendant's contention that the trial court erred by denying his motion to dismiss where defendant argued that the State should have had to prove the crime as the

jury was instructed at trial (the instruction erroneously raised the evidentiary bar for the State). Although the logical inference that Defendant had reasonable grounds to believe that the home *was* occupied was less strong than the inference than that it *might* have been occupied, the State nonetheless presented sufficient evidence for a jury to find accordingly.

3 Firearms and Other Weapons—discharging a weapon into occupied property—instructions—not disjunctive

The trial court did not give a disjunctive instruction on discharging a firearm into occupied property, expressly or functionally, where defendant fired at one house but hit another.

4. Firearms and Other Weapons—discharging firearm into occupied dwelling—no variance between indictment and evidence

There was no plain error in a prosecution for discharging a firearm into occupied property where defendant contended that the trial court's instruction created the risk of a variance between the evidence and the proof. Defendant apparently fired at one house and hit another. Defendant was indicted only for firing into the neighboring house, the trial court informed the jury pool that defendant was charged only with firing into that house, and the evidence supported that charge.

5. Evidence—victim impact—no plain error

The trial court erroneously permitted victim impact evidence in a prosecution for discharging a firearm into an occupied dwelling, but there was no plain error because the State presented extensive evidence of Defendant's guilt.

6. Sentencing—two felonies—appointed counsel

When sentencing defendant for discharging a firearm into an occupied dwelling and possession of a firearm by a felon, the trial court did not err by making payment of all of the costs of appointed counsel a condition of defendant's probation for possession of a firearm by a felon. Although defendant argued that the costs would have been a civil lien had the attorney's fees been assigned to the judgment for discharging a firearm into an occupied building, the lien judgment was already ordered to be entered by statute. The only change resulting from defendant's being given probation for possession of a firearm by a felon was that payment became a condition of probation. There was only one fee which covered both charges because defendant was convicted of both felonies on the same day before the same judge.

7. Sentencing—right to be present—appointed counsel costs

Defendant's right to be present during his sentencing was not violated where the trial court assigned attorney fees to a Class G felony judgment in open court and in defendant's presence. When the written judgments were entered, the trial court merely made sure the fines were properly calculated at Class D rates.

Appeal by Defendant from judgments entered 30 April 2015 by Judge W. David Lee in Superior Court, Rowan County. Heard in the Court of Appeals 28 April 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Thomas D. Henry, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel L. Spiegel, for Defendant.

McGEE, Chief Judge.

Drew Thomas Charleston ("Defendant") appeals from his convictions of discharging a firearm into occupied property and possession of a firearm by a felon. We find no error in part and no plain error in part.

I. Background

The evidence presented at trial tended to show that, on the evening of 11 January 2014, Trevacyia Scales ("Ms. Scales") and her five-year-old daughter were at home. Sandra Knox ("Ms. Knox") lived next door to Ms. Scales and also was at home. Ms. Scales testified that Defendant, Ms. Scales's ex-boyfriend, came by her home that evening, unannounced. Defendant's cousin had driven Defendant to Ms. Scales's home in a gray Jeep Cherokee. Defendant told Ms. Scales that he wanted to collect his clothes, and Ms. Scales gave him a bag with some clothes inside. Defendant also said he wanted to retrieve a shotgun that he believed was under the mattress in Ms. Scales's bedroom. Ms. Scales refused to let Defendant go into her bedroom. When Defendant went out to signal his cousin to get out of the Jeep, Ms. Scales closed her front door and locked it. Defendant and his cousin then left in the Jeep. Ms. Scales testified she went to her bedroom and checked under the mattress and the bed for a shotgun that she did not find.

Shortly thereafter, Defendant called Ms. Scales and they argued about the shotgun. Ms. Scales testified Defendant told her: "Well, I'm going to show you. I'm going to show you. I'm going to let it ride for

now, but I'm going to show you better than I can tell you." After the phone call, Ms. Scales sat on her couch, located at the front of her home and under a window. She noticed a Jeep driving down her street that "looked like the same Jeep Cherokee" Defendant had arrived in earlier. Ms. Scales testified the Jeep came to a brief stop in front of a neighbor's home and then started rolling again towards her home. As the Jeep approached, the rear driver's side window rolled down, and Ms. Scales saw Defendant sitting in the back seat. Ms. Scales heard gun shots and crawled to her daughter's room that was also at the front of her home. Ms. Scales immediately called law enforcement.

While the police were searching Ms. Scales's home, Defendant called Ms. Scales again. The police asked Ms. Scales to put the call on speakerphone so they could hear the conversation. Ms. Scales testified she called Defendant by name and he responded. Defendant again demanded the shotgun. A female voice said to Ms. Scales: "Just give him the gun, and it will all go away." Ms. Scales testified that another man then got on the phone and said the gun belonged to him and he wanted it back. Defendant then returned to the line and allegedly stated: "Next time, they'll come through the window."

Ms. Scales and Officer Frederick D. West ("Officer West"), with the Salisbury Police Department, testified that none of the bullets fired that evening actually entered into Ms. Scales's home. Ms. Knox and Sergeant Adam Bouk ("Sergeant Bouk") testified that all the bullets entered into the home of Ms. Knox. When the shots were fired, Ms. Knox was lying on her couch watching television. Ms. Knox estimated there were at least six or seven bullet holes in her home. Officer Joe Wilson ("Officer Wilson") testified there were seven shell casings in the street near where the Jeep had been located.

Defendant was indicted on 10 March 2014 for one count of discharging a firearm into occupied property and one count of possession of a firearm by a convicted felon. The jury found Defendant guilty of one count of discharging a firearm into occupied property and one count of possession of a firearm by a convicted felon. He was sentenced to 84–113 months of imprisonment for discharging a firearm into occupied property and 36 months of supervised probation for possession of a firearm by a convicted felon. Defendant appeals.

II. Motion to Dismiss

[1] Defendant contends the trial court erred by denying his motion to dismiss the charge of discharging a firearm into occupied property. Specifically, after Defendant's motion to dismiss was denied, the trial

court instructed the jury, in part, that it could convict Defendant of the charge of discharging a firearm into occupied property if it believed beyond a reasonable doubt that Defendant "knew or had reasonable grounds to believe that the dwelling *was* occupied[.]" (emphasis added). Defendant argues, and the State agrees, the instruction raised a higher evidentiary bar for the State —ordinarily the State would need to prove only that a defendant had "reasonable grounds to believe that the building *might be* occupied[.]" *See State v. James*, 342 N.C. 589, 596, 466 S.E.2d 710, 715 (1996) (emphasis added). Defendant contends that the trial court should have granted his motion to dismiss on the ground that the State did not present substantial evidence that Defendant "knew or had reasonable grounds to believe that the dwelling *was* occupied[.]" (emphasis added).

As a preliminary matter, it is not clear whether Defendant has preserved this argument for appeal. Generally, "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C.R. App. P. 10(a)(1); *see State v. Person*, 187 N.C. App. 512, 519, 653 S.E.2d 560, 565 (2007) ("Although defendant provided no specific reasoning to support the motion to dismiss, he was not required to do so, since it was apparent from the context that he was moving to dismiss all the charges based on the insufficiency of the evidence."), *rev'd in part on other grounds*, 362 N.C. 340, 663 S.E.2d 311 (2008). At trial, Defendant did not present the trial court with "specific reasoning" to support his motion to dismiss. *See Person*, 187 N.C. App. at 519, 653 S.E.2d at 565. We also do not see how it could be "apparent from the context" of Defendant's motion to dismiss that he was arguing the State did not meet an evidentiary burden higher than would have been necessary to convict him, based on an erroneous jury instruction that had not yet been given. Similarly, we do not see how the trial court could have erred in denying Defendant's motion to dismiss, *solely* based on a jury instruction that had not yet been given.[1]

[2] Defendant also attempts to re-frame this issue in his reply brief. Rather than arguing the trial court erred at the time it denied his motion to dismiss, Defendant instead "merely contends that the State

1. Defendant does not contend on appeal that the State failed to present substantial evidence that Defendant had reasonable grounds to believe that the building "might be" occupied.

[should have had to] prove the crime as the jury was instructed at trial." Notwithstanding the fact that "[a] reply brief does not serve as a way to correct deficiencies in the principal brief[,]" *Larsen v. Black Diamond French Truffles, Inc.*, __ N.C. App. __, __, 772 S.E.2d 93, 96 (2015) (quotation marks omitted), Defendant's argument is without merit.

"When reviewing a sufficiency of the evidence claim, this Court considers whether the evidence, taken in the light most favorable to the [S]tate and allowing every reasonable inference to be drawn therefrom, constitutes substantial evidence of each element of the crime charged." *State v. Taylor*, 362 N.C. 514, 538, 669 S.E.2d 239, 261 (2008) (quotation marks omitted). At trial, the State established that the shooting occurred in a residential neighborhood in the evening. Ms. Knox also testified that her car was parked outside her home. Although the logical inference that Defendant had reasonable grounds to believe Ms. Knox's home "was" occupied is less strong than the inference that it "might" have been occupied, the State nonetheless presented sufficient evidence for a jury to find accordingly. *See id.*; *see also State v. Stone*, 323 N.C. 447, 452, 373 S.E.2d 430, 433 (1988) ("Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. The evidence need only give rise to a reasonable inference of guilt[.]" (citation omitted)).

III. Disjunctive Jury Instruction

[3] Defendant contends the trial court erred in instructing the jury on discharging a firearm into occupied property. Before trial, Defendant was indicted for firing only into the home of Ms. Knox, but the jury instruction on that charge was stated in terms of Defendant's allegedly "discharg[ing] a firearm into *a* dwelling[.]" (emphasis added). Because the jury instruction did not expressly name the home of Ms. Knox as the dwelling that was fired into, Defendant contends the instruction was "disjunctive" and "violated his right to a unanimous verdict" because the instruction "permitted jurors to convict [Defendant] of either of two possible offenses: shooting into Ms. Scales's house or shooting into Ms. Knox's house."[2] We are unpersuaded.

Generally, the North Carolina Constitution requires that "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury

2. Defendant did not object to any of the jury instructions given at trial. However, "[a] defendant's failure to object at trial to a possible violation of his right to a unanimous jury verdict does not waive his right to appeal on the issue, and it may be raised for the first time on appeal." *State v. Davis*, 188 N.C. App. 735, 739, 656 S.E.2d 632, 635 (2008) (quotation marks omitted).

in open court[.]" N.C. Const. art. I, § 24. As explained by our Supreme Court in *State v. Lyons*, 330 N.C. 298, 302–03, 412 S.E.2d 308, 311–12 (1991), "a disjunctive instruction, which allows the jury to find a defendant guilty if he commits either of two underlying acts, either of which is in itself a separate offense, is fatally ambiguous because it is impossible to determine whether the jury unanimously found that the defendant committed one particular offense." (emphasis omitted).

Defendant concedes in his brief that the jury instruction at issue was "not explicitly phrased in the disjunctive[.]" *Cf. id.* (holding that a jury instruction was disjunctive where it allowed the jury to convict the defendant if it believed he "committed [an] assault and battery upon Douglas Jones *and/or* Preston Jones"). Instead, Defendant contends the instruction "had the practical effect of a disjunctive instruction[.]" *Cf. Davis*, 188 N.C. App. at 737–42, 656 S.E.2d at 634–37 (holding that a jury instruction was not expressly disjunctive but conducting a *Lyons* analysis, *assuming arguendo* "the instruction could be viewed as being disjunctive"). However, in the present case, we do not believe the jury was presented with either an expressly or functionally disjunctive instruction on the charge of discharging a firearm into occupied property.

Defendant was indicted for firing only into the home of Ms. Knox. During jury selection, the trial court informed the prospective jurors that "[t]he discharge of a firearm into occupied property is alleged to have occurred on the property being then occupied by one Sandra Knox." At trial, the State presented evidence only suggesting that the home that was fired into was Ms. Knox's home. Specifically, when the State asked Ms. Scales whether any of the bullets "actually went into [Ms. Scales's] home[,]" she responded: "No." By contrast, Ms. Knox testified at length about the bullet holes and damage done to her home. Sergeant Bouk testified in great detail about bullet holes in Ms. Knox's home. Officer West expressly testified that there were no bullet holes in Ms. Scales's home. While it may have been a better practice for the trial court to specifically state that Ms. Knox's home was the property involved in its instruction to the jury, based on the record, the trial court did not give a disjunctive instruction on the charge of discharging a firearm into occupied property.

IV. Variance

[4] Defendant also argues that the trial court's instruction on the charge of discharging a firearm into occupied property "created an impermissible risk of variance between the indictment and the proof supporting

conviction." Because Defendant did not object to the jury instructions at trial, we review this argument for plain error. *See State v. Turner*, 98 N.C. App. 442, 446–48, 391 S.E.2d 524, 526–27 (1990) (reviewing for plain error an unpreserved argument that there was an impermissible variance between an indictment and jury instruction).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity[,] or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and quotation marks omitted).

Generally, an impermissible variance has occurred when, although "the State's evidence [might] support the trial court's instruction[,] . . . the indictment does not." *Turner*, 98 N.C. App. at 448, 391 S.E.2d at 527. For instance, in *State v. Tucker*, 317 N.C. 532, 537, 346 S.E.2d 417, 420 (1986), the defendant was indicted for kidnapping. "The kidnapping indictment charge[d] that [the] defendant committed kidnapping only by unlawfully *removing* the victim 'from one place to another.' " *Id.* at 538, 346 S.E.2d at 421. However, the trial court "repeatedly instructed the jury that [the] defendant could be convicted if he simply unlawfully *restrained* the victim, 'that is, restricted [her] freedom of movement by force and threat of force.' " *Id.* Although the State's evidence supported the judge's instructions to the jury, the indictment did not. *Id.* at 537, 346 S.E.2d at 420. Accordingly, the Court held that the trial court committed plain error "[i]nsofar as the instructions given allowed the jury to convict on grounds other than those charged in the indictment[.]" *Id.* at 536, 346 S.E.2d at 420.

In the present case, and similar to Defendant's argument above, Defendant contends the trial court's instruction on the charge of discharging a firearm into occupied property was too broad because it did not specifically state that Ms. Knox's home was the property involved. However, as discussed above, Defendant was indicted for firing only into Ms. Knox's home; the trial court informed the jury pool that Defendant was charged with firing only into Ms. Knox's home; and the evidence

at trial supported only this theory of the charge. Therefore, it was clear the trial court's instruction on this charge applied only to Defendant allegedly firing into Ms. Knox's home. Defendant's argument is without merit.

V. Victim Impact Evidence

[5] Defendant also contends the trial court erred by allowing the introduction of victim impact evidence during the guilt-innocence phase of trial. Generally, "the effect of a crime on a victim's family often has no tendency to prove whether a particular defendant committed a particular criminal act against a particular victim; therefore victim impact evidence is usually irrelevant during the guilt-innocence phase of a trial and must be excluded." *State v. Graham*, 186 N.C. App. 182, 190, 650 S.E.2d 639, 645 (2007). Defendant also concedes that he did not object at trial to the victim impact evidence he challenges on appeal. Accordingly, "we must limit our review to whether admission of [the] victim[ ]impact evidence constitutes plain error." *State v. Bowman*, 349 N.C. 459, 477, 509 S.E.2d 428, 439 (1998).

Defendant challenges the following testimony the State elicited from Ms. Scales during the guilt-innocence phase of trial:

> Q. How has this impacted your daughter?
>
> A. She is -- is very shaken still. If she hears a loud noise or anything that sounds like a shot, it could even be like a car backfiring, she gets shaky. She runs to me and she clings to me.
>
> And, you know, she -- she has talked about it. She'll just talk about it or whatever, but we have considered counseling for her because this has affected her. Even though she was five then, she's seven now it's still with her, and I have to get her through that each time something happens. And she relives it all over again.
>
> . . .
>
> Q. How has this impacted you?
>
> A. Well, it -- definitely emotionally. I've been afraid. When they text[ed] me and told me that he had been released, someone had posted his bond, I immediately called the police because I was in fear of my life for him -- retaliation for him having to be in jail all of that time.

> So it's, like, I would dream about him. I moved to a bigger house so I would -- every time I would go around a dark corner, I would think I would see him. Or he would be in the back of the house.
>
> He could possibly be hiding, so it's, like, now to the point where because he was out, I would have to go home, turn on all my lights, inspect my entire house before I can even take a shower or lay down. I have to stick butter knives in my windows because at this point, I just didn't know what he was capable of doing.

The State further elicited testimony from Ms. Scales that she was evicted as a result of the incident because her "neighbors did not feel safe[.]" Ms. Knox also testified:

> Q. Did you remain at your home that evening?
>
> A. No, I left.
>
> Q. Did you return the next day?
>
> A. Yes, to get some items of clothing.
>
> Q. Did you -- did you stay at your house the next night?
>
> A. No, I left and went to my daughter's house.
>
> Q. When was the next time that you actually were able to stay at your own home?
>
> A. About three weeks -- I -- let's see. I left for three weeks.
>
> Q. And why did you leave for three weeks?
>
> A. Because I was just frightened. I was -- I was -- I was -- every time I would hear a door or somebody knock on the door or somebody would call me, I would just jump. I was just -- I was just scared.

In *Graham*, 186 N.C. App. at 187–92, 650 S.E.2d at 644–47, this Court held that a trial court erred when it allowed similar victim impact evidence at trial. However, after "[e]xamining the entire record," the *Graham* Court also found there was "considerable evidence of [the] defendant's guilt[.]" *Id.* at 192, 650 S.E.2d at 647. Specifically, "the State presented extensive evidence from two eyewitness who were well-acquainted with [the] defendant and who positively identified him at trial, and [it presented] evidence that [the] defendant fled to Alabama shortly after hearing that the crime had been publicized." *Id.* Based on

that evidence, the *Graham* court concluded there was not "a reasonable possibility that the jury's verdict would have been different" absent the erroneous evidence, and this Court held that there was no prejudicial error in that case. *Id.*

In the present case, it also appears that the trial court impermissibly admitted victim impact evidence at trial. However, the State presented extensive evidence from Ms. Scales of Defendant's guilt, including (1) her confrontations with Defendant shortly before the shooting over a shotgun Defendant believed was in her home; (2) her positive identification of Defendant in the Jeep just before shots were fired; and (3) the incriminating phone conversation between Ms. Scales and Defendant shortly after the shooting. That phone conversation was overheard by the police, who also found seven shell casings in the street near where the Jeep had been when shots were fired. Moreover, unlike *Graham*, in which this Court conducted a prejudicial error analysis, we review Defendant's argument on appeal for plain error because he did not object to the challenged testimony at trial. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334. This imposes a higher burden for Defendant to overcome. *See id.* After examining the entire record, we do not find plain error in the present case.

VI. Attorney's Fees

[6] In Defendant's final argument, he contends that the trial court "violated N.C. Gen. Stat. § 15A-1343(b)(10), committed clerical error, or violated [Defendant's] right to be present at sentencing by assigning attorney's fees to the judgment for possession of a firearm by a felon rather than the judgment for discharging a weapon into an occupied dwelling." We disagree.

Specifically, Defendant argues that had the attorney's fees been assigned to the judgment for discharging a weapon into an occupied dwelling, for which Defendant received a jail sentence, those fees would have been docketed as a civil lien against Defendant. *See* N.C. Gen. Stat. § 7A-455(b) (2015) ("[T]he court shall direct that a judgment be entered . . . for the money value of services rendered by assigned counsel, the public defender, or the appellate defender, . . . which shall constitute a lien as prescribed by the general law of the State applicable to judgments."). Instead, the trial court assigned the attorney's fees to the judgment for possession of a firearm by a felon, the payment of which was a condition of Defendant's probation for that conviction. N.C. Gen. Stat. § 15A-1343(b)(10) states: "As [a] regular condition[ ] of probation, a defendant must: . . . [p]ay the State of North Carolina for the costs of

appointed counsel . . . to represent him in the case(s) for which he was placed on probation." N.C. Gen. Stat. § 15A-1343(b)(10) (2015).

Initially, N.C. Gen. Stat. § 15A-1343(b)(10) refers to the "case(s) for which [a defendant] was placed on probation." N.C. Gen. Stat. § 15A-1343(b)(10) does not state that this monetary condition is limited to the judgment(s) in "which [a defendant] was placed on probation," nor does it state that this condition is limited to the charge(s) "for which [a defendant] was placed on probation."[3]

Assuming *arguendo* "case" effectively means "charge" for the purposes of N.C. Gen. Stat. § 15A-1343(b)(10), Defendant's argument still fails. At trial, after the trial court had rendered a sentence for Defendant's conviction of discharging a weapon into an occupied dwelling, a Class D felony, the trial court rendered a sentence for Defendant's conviction of possession of a firearm by a felon, a Class G felony. While the trial court was making this determination, the following exchange occurred between the trial court and Defendant's counsel:

> THE COURT: . . . . With respect to the jury verdict of guilty with respect to possession of a firearm by a felon, upon that verdict being recorded, it's the judgment according to that case that this defendant be imprisoned for a minimum of 17 months and a maximum of 30 months. That sentence to run at the expiration of the sentence imposed in the first case [discharging a firearm into an occupied dwelling]. That sentence[,] however, is suspended and the defendant upon his release from incarceration in the first matter is to report to his probation officer within 72 hours of that release.
>
> At which time he is to be on supervised probation for a term of 36 months under the following terms and [conditions]: First, that he provide a DNA sample, if he has not previously done so at that time; that he pay the Court costs; that he reimburse the state for the cost of his attorney.
>
> [Counsel], do you know your hours in these matters?
>
> [COUNSEL]: Exactly, it is 51.73. And Your Honor, I have -- the spread sheet has calculated that amount to be $3,621.10.

---

3. Black's Law Dictionary defines case in relevant part as "[a] . . . criminal proceeding[.]" Black's Law Dictionary 243 (9th ed. 2009). Black's defines charge in relevant part as "[a] formal accusation of an offense[.]" *Id.* at 265.

> THE COURT: And you're calculating that on the Class D?
>
> [COUNSEL]: I am, Your Honor.
>
> THE COURT: All right. I am going to award an attorney's fee in the amount of $3,621.10; that to be paid under -- as a monetary condition of that judgment.

Defendant argues that, because the trial court asked Defendant's attorney if he was calculating his fees based upon the Class D felony, which in this case was the conviction for discharging a weapon into an occupied dwelling, the trial court meant to attach the attorney's fees to that charge. However, in context, it is clear that the trial court was discussing the attorney's fees in relation to the conviction for possession of a firearm, which sentence was suspended. It is also clear that the trial court *did* intend for the amount of the attorney's fees to be based upon the Class D felony instead of the Class G felony. This is because the relevant statutes and rules of the Office of Indigent Defense Services ("IDS") required the attorney's fees to be based upon the Class D felony charge in this case.

N.C. Gen. Stat. § 7A-458 states in relevant part:

> The fee to which an attorney who represents an indigent person is entitled shall be fixed in accordance with rules adopted by the Office of Indigent Defense Services. Fees shall be based on the factors normally considered in fixing attorneys' fees, such as the nature of the case, and the time, effort and responsibility involved.

N.C. Gen. Stat. § 7A-458 (2015). N.C. Gen. Stat. § 15A-1343(e) states in relevant part:

> Unless the court finds there are extenuating circumstances, any person placed upon supervised or unsupervised probation under the terms set forth by the court shall, as a condition of probation, be required to pay all court costs and all fees and costs for appointed counsel . . . in the case in which the person was convicted. The fees and costs for appointed counsel . . . shall be determined in accordance with rules adopted by the Office of Indigent Defense Services. The court shall determine the amount of those costs and fees to be repaid and the method of payment.

N.C. Gen. Stat. § 15A-1343(e). Pursuant to the mandates of N.C. Gen. Stat. §§ 7A-458 and 15A-1343(e), IDS has established rules and procedures for compensating appointed counsel. When an attorney represents a defendant on multiple charges heard before the same judge and decided on the same day, that attorney submits a single fee application. *See* Office of Indigent Defense Services, *Memorandum*, p. 4, December 3, 2015, at http://www.ncids.org/Rules%20&%20Procedures/Fee%20and%20Expense%20Policies/Atty%20Fee%20policies,%20non-capital.pdf. The rates for appointed counsel in superior court depend on the class of the charged offenses. "For all cases finally disposed in Superior Court where the most serious original charge was a Class A through D felony, the . . . rate will be $70 per hour. For all other cases finally disposed in Superior Court, including misdemeanor appeals, the . . . rate will be $60 per hour." *Id.* at 7. As noted above, when counsel defends a defendant on multiple charges, the rate is based upon the most serious offense charged. *Id.* The Administrative Office of the Courts has produced official fee application forms corresponding with the rules and procedures of IDS, including AOC-CR-225, which is the fee application form for non-capital criminal trials. AOC-CR-225 directs the attorney to indicate only the "most serious original charge" on the form to serve as the basis for calculating the appropriate attorney fee. AOC-CR-225.

In this case, Defendant was charged and convicted of two crimes: (1) discharging a weapon into an occupied dwelling, which is a Class D felony, and (2) possession of a firearm by a felon, which is a Class G felony. Pursuant to IDS rules and procedures, the appropriate attorney's fee, to be assessed as a single fee for representation services for both the charges, was properly based upon the most serious charge – the Class D felony. Defendant was given an active sentence for the Class D felony, and given a suspended sentence with probation for the Class G felony, to start at the expiration of Defendant's active sentence. N.C. Gen. Stat. § 7A-455 directs in part:

> (b) *In all cases* the court shall direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, . . . which shall constitute a lien as prescribed by the general law of the State applicable to judgments. [A]ny funds collected by reason of such judgment shall be deposited in the State treasury and credited against the judgment. The value of services shall be determined in accordance with rules adopted by the Office of Indigent Defense Services.
>
> . . . .

> (c) No . . . judgment under subsection (b) of this section shall be entered unless the indigent person is convicted. If the indigent person is convicted, the . . . judgment shall become effective and the judgment shall be docketed and indexed pursuant to G.S. 1-233 et seq., in the amount then owing, upon the later of (i) the date upon which the conviction becomes final *if the indigent person is not ordered, as a condition of probation*, to pay the State of North Carolina for the costs of his representation in the case or (ii) the *date upon which the indigent person's probation is terminated, is revoked, or expires* if the indigent person is so ordered.

N.C. Gen. Stat. § 7A-455 (2015) (emphasis added).

Because Defendant was convicted, the trial court was required to "direct that a judgment be entered in the office of the clerk of superior court for the money value of services rendered by assigned counsel, . . . constitut[ing] a lien[.]" N.C. Gen. Stat. § 7A-455(b). In the present case, the appropriate attorney's fee for this judgment was required to have been calculated pursuant to the $70.00 per hour rate applicable for the Class D felony, even though some of the time spent on the case was dedicated to defense of the Class G felony. *Memorandum*, pp. 4, 7. It seems clear that this requirement is why the trial court, when discussing the applicable attorney's fee in connection with the Class G felony of possession of a firearm by a felon, asked if Defendant's attorney was calculating the rate based on the Class D felony of discharging a weapon into an occupied dwelling.

Defendant argues that the language of N.C. Gen. Stat. § 15A-1343(b)(10): "As [a] regular condition[ ] of probation, a defendant must: . . . [p]ay the State of North Carolina for the costs of appointed counsel . . . to represent him in the case(s) for which he was placed on probation[,]" prohibited the trial court from requiring Defendant to pay the costs of his appointed counsel at the Class D rate, because "the case[ ] for which he was placed on probation" was only a Class G felony. However, even assuming *arguendo* that "case" in this instance is equivalent to "charge," Defendant ignores the fact that pursuant to IDS rules and regulations, because he was convicted of both the Class G and Class D felonies on the same day and before the same judge, there was only one fee which covered both charges; the costs of his appointed counsel for both the Class G felony and the Class D felony are the same, and are calculated at the same rate – the $70.00 per hour rate for Class D felonies. IDS rules and regulations do not allow for separating the hours spent by appointed

counsel for individual charges – all work done for each individual charge is considered work done for every charge, as part of the same case. Therefore, for the purposes of N.C. Gen. Stat. § 15A-1343(b)(10), the appropriate cost of appointed counsel for the Class G charge was 51.73 hours at the $70.00 Class D felony rate.

The lien judgment for this full amount was already ordered to be entered pursuant to N.C. Gen. Stat. § 7A-455. The only change resulting from Defendant's being given probation on the Class G felony was that payment of the attorney's fee became a condition of his probation pursuant to N.C. Gen. Stat. § 15A-1343(b)(10). This is contemplated in N.C. Gen. Stat. § 7A-455:

> [The] judgment [creating the lien] shall become effective . . . in the amount then owing, upon the later of (i) the date upon which the conviction becomes final *if the indigent person is not ordered, as a condition of probation, to pay the State of North Carolina for the costs of his representation in the case or (ii) the date upon which the indigent person's probation is terminated, is revoked, or expires*[.]

N.C. Gen. Stat. § 7A-455(c) (emphasis added). The trial court did not err in making payment of all the costs of appointed counsel, based upon the rate for Class D felonies, a condition of Defendant's probation for the charge of possession of a firearm by a felon.

[7] Defendant further argues that his right to be present during his sentencing was violated because "[t]he trial court orally assigned the fees to the Class D judgment, but assigned the fees to the Class G judgment when the written judgments were entered." As we have discussed above, the trial court assigned the fees to the Class G felony judgment in open court and in Defendant's presence. The trial court merely made sure the fees were properly calculated at the Class D rate. This argument is without merit.

NO ERROR IN PART; NO PLAIN ERROR IN PART.

Judges DILLON and ZACHARY concur.

STATE v. COBB

[248 N.C. App. 687 (2016)]

STATE OF NORTH CAROLINA
v.
TIMOTHY LAMONT COBB

No. COA15-1337

Filed 2 August 2016

1. Appeal and Error—untimely pretrial motion—trial court's discretion—not revisited

Although defendant's pretrial motion to suppress was untimely, the trial court's discretionary decision to consider the motion was not revisited on appeal.

2. Judgments—findings and conclusions—mislabeled—nearly identical

The trial court did not err when ruling on a pretrial motion to suppress where defendant contended that findings were mislabeled as conclusions and vice versa. The findings and conclusions were nearly identical.

3. Search and Seizure—consent to search—defendant not in custody

Defendant was not in custody and his consent to search his house was voluntary, considering the totality of the circumstances, where officers came to defendant's rooming house to investigate another crime, defendant was sitting on the porch and went inside for his identification and motioned an officer to come with him, the officer smelled marijuana and asked permission to search defendant and then the room, and defendant consented. Defendant's movements were not restricted and defendant chose to stay while officers searched the room. The officers' guns were holstered, and they did not make physical contact with defendant until after cocaine was found, and they did not make threats, use harsh language, or raise their voices at any time.

4. Sentencing—habitual felon—not cruel and unusual punishment

Defendant's sentence under the Habitual Felon Act did not deny defendant his right to be free of cruel and unusual punishment.

Appeal by defendant from judgment entered 18 March 2015 by Judge R. Stuart Albright in Forsyth County Superior Court. Heard in the Court of Appeals 9 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Anne Bleyman for defendant-appellant.

McCULLOUGH, Judge.

Timothy Lamont Cobb ("defendant") appeals from his convictions of possession of marijuana, possession of drug paraphernalia, possession with intent to sell and deliver cocaine, and attaining habitual felon status. For the reasons stated herein, we hold no error.

I. Background

On 8 May 2014, defendant was arrested for one count of possession of marijuana in violation of N.C. Gen. Stat. § 90-95(d)(4), one count of possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a), and one of count possession with intent to sell and deliver cocaine in violation of N.C. Gen. Stat. § 90-95(a). On 8 September 2014, defendant was indicted by the Forsyth County Grand Jury on all counts. On the same date, a separate indictment was issued charging defendant with attaining habitual felon status based on three prior felony convictions.

On 10 September 2014, the State notified defendant of its intention to introduce evidence obtained by virtue of a search without a search warrant. On 4 March 2015, defendant filed a motion to suppress this evidence. A *voir dire* hearing on defendant's motion to suppress was held during the 16 March 2015 criminal session of Forsyth County Superior Court.

In regards to defendant's motion to suppress, the State offered the testimony of Officer F. J. Resendes, Officer B. K. Ayers, and Sergeant Edward David Branshaw of the Winston-Salem Police Department. The State's evidence indicated that on 8 May 2014, Officers Resendes and Ayers were stationed outside of defendant's residence, located at 518 Fifteenth Street. Officer Resendes described the residence as a "rooming house," consisting of multiple people living inside and renting out different rooms. The officers were conducting surveillance based on information that there was narcotics activity occurring at this residence. While the officers were stationed outside 518 Fifteenth Street, an unknown black male exited the residence and got into a black Cadillac that had been parked on the curb in front of the home. Officers Resendes and Ayers followed the Cadillac and observed the car fail to properly use a turn signal and illegally park in front of another residence. The

officers parked their car in front of the Cadillac and exited their vehicle. As the officers began to approach the Cadillac, the unknown driver accelerated, struck Officer Ayers in the leg, and quickly sped away from the scene.

Officer Ayers notified his superior, Sergeant Branshaw, of the incident and returned to the 518 Fifteenth Street residence in an effort to obtain information regarding the identity of the driver of the Cadillac. When the officers arrived at the residence, defendant and another tenant, Mr. Rice, were sitting on the front porch. The officers asked defendant and Mr. Rice if they knew the identity of the driver of the black Cadillac, to which both men responded that they did not know his name. Officer Ayers then asked Mr. Rice for his name. Officer Ayers testified that Mr. Rice stated his work identification was inside, stood up from the porch, and motioned for Officer Ayers to come inside with him.

Upon following Mr. Rice into the hallway of the residence, Officer Ayers detected a strong odor of marijuana. Officer Ayers then returned to the porch and asked defendant for consent to search his person. Officer Ayers testified that defendant verbally consented to a search of his person, but that he ultimately did not locate anything illegal on defendant. Officer Ayers testified that he then asked defendant for consent to search his room inside the house, to which defendant again provided verbal consent.

Officer Resendes testified that upon entering defendant's room, he smelled the odor of burnt marijuana. Officer Resendes asked defendant for a second time for consent to search his room, and defendant "stated it was fine." As Officer Resendes began searching the room, defendant handed him remnants of marijuana cigarettes and stated, "All I got is this." Defendant was not in handcuffs or placed under arrest at this time.

Officer Ayers testified that while he was searching defendant's room, he noticed a ceiling panel that was darker in color and not tightly seated against the other tiles, "like it had been removed several times." After removing this tile, Officer Ayers located a bag of what appeared to contain a large amount of crack cocaine. The officers then placed defendant in handcuffs. As the officers continued searching the room, they located a bag of marijuana and approximately $2,000.00 in a coat pocket.

Officer Ayers notified Sergeant Branshaw of what he had located during the search of defendant's room. Sergeant Branshaw testified that upon receipt of this information, he entered defendant's room and asked once again if he was still consenting to the search, to which defendant

replied, "[y]ou already found everything you are going to find. Go ahead and do whatever."

Defendant did not present any evidence on his own behalf.

Following this hearing, the trial court denied defendant's motion to suppress. On 18 March 2015, the trial court orally entered an order denying defendant's motion to suppress, making the following pertinent findings of fact:

> 17. Officer Ayers did not threaten or coerce Defendant into giving consent to search his bedroom at 518 Fifteenth Street.
>
> 18. Defendant freely, intelligently and voluntarily gave consent to search his bedroom at 518 Fifteenth Street without any coercion, duress or fraud.
>
> . . . .
>
> 20. Defendant gave valid consent to search his bedroom at 518 Fifteenth Street.
>
> . . . .
>
> 23. Officer Resendes did not threaten or coerce Defendant into giving consent to search his bedroom at 518 Fifteenth Street.
>
> 24. Defendant again freely, intelligently and voluntarily gave consent to search his bedroom at 518 Fifteenth Street without any coercion, duress or fraud.
>
> 25. Defendant never revoked or limited his consent to search his bedroom at 518 Fifteenth Street.
>
> 26. Defendant gave valid consent to search his bedroom at 518 Fifteenth Street for a second time.
>
> . . . .
>
> 29. Defendant said, "All I got is this" . . . freely, spontaneously, and voluntarily without any compelling influences.
>
> . . . .
>
> 34. Up until the moment he was handcuffed and detained . . . Defendant was free to leave, not in custody, not under arrest and his freedom of movement had not been restrained or restricted in any significant way.

35. Up until the moment he was handcuffed and detained as set forth above, a reasonable person in Defendant's position would not have believed he was under arrest or restrained in any significant way.

. . . .

37. Sergeant Branshaw did not threaten or coerce Defendant into giving consent to search his bedroom at 518 Fifteenth Street.

38. Defendant, for the third time, freely intelligently and voluntarily gave consent to search his bedroom at 518 Fifteenth Street without any coercion, duress or fraud.

39. Defendant never revoked or limited his consent to search his bedroom at 518 Fifteenth Street.

40. Defendant gave valid consent to search his bedroom at 518 Fifteenth Street for a third time.

Based on these findings of fact, the trial court concluded that:

1. Based on the totality of the circumstances . . . Officers F. J. Resendes and B. K. Ayers and Sergeant Edward David Branshaw requested and received knowing and voluntary consent from Defendant without any coercion, duress or fraud to search his bedroom . . . and that anything seized from Defendant's bedroom as a result of the search was obtained lawfully.

2. Based on the totality of the circumstances . . . Defendant had not been taken into custody or otherwise deprived of his freedom of movement in any significant way when he said, "All I got is this," as set forth above.

3. Based on the totality of the circumstances . . . there had been no formal arrest or restraint on the freedom of Defendant's movement of the degree associated with a formal arrest when he said, "All I got is this," as set forth above.

4. Based on the totality of the circumstances . . . Defendant was not in custody when he said, "All I got is this," as set forth above.

5. Based on the totality of the circumstances . . . a reasonable person in Defendant's position would not believe that

> he had been taken into custody or otherwise deprived of his freedom of movement in any significant way when he said, "All I got is this," as set forth above.
>
> 6. Based on the totality of the circumstances . . . Defendant freely made a knowing and voluntary statement when he said, "All I got is this," as set forth above.

On 18 March 2015, a jury returned verdicts of guilty on all substantive counts. On that same date, defendant pled guilty to attaining habitual felon status. In accordance with this plea, defendant was sentenced to prison for a term of 52 to 75 months. On that same date, defendant entered notice of appeal in open court.

II. Standard of Review

When reviewing a trial judge's ruling on a motion to suppress, the appellate court "determine[s] only whether the trial court's findings of fact are supported by competent evidence, and whether these findings of fact support the court's conclusions of law." *State v. Pulliam*, 139 N.C. App. 437, 439-40, 533 S.E.2d 280, 282 (2000). The trial court's findings of fact are binding if such findings are supported by competent evidence in the record, but the trial court's conclusions of law are fully reviewable on appeal. *State v. Smith*, 346 N.C. 794, 797, 488 S.E.2d 210, 212 (1997).

III. Discussion

Defendant presents two issues on appeal. Defendant asserts that the trial court erred by: (A) denying defendant's motion to suppress evidence obtained from the search of defendant's room because the defendant's consent to search was not given voluntarily and (B) sentencing defendant as a habitual felon in violation of defendant's right to be free of cruel and unusual punishment.

However, we must first address a preliminary issue.

Timeliness of Motion to Suppress

[1] For the first time on appeal, the State asserts that defendant violated N.C. Gen. Stat. § 15A-976 by failing to file its motion to suppress within the allotted statutory time period.

According to N.C. Gen. Stat § 15A-976(b):

> If the State gives notice not later than 20 working days before trial of its intention to use [evidence obtained by virtue of a search without a search warrant], the defendant may move to suppress the evidence only if its motion

> is made not later than 10 working days following receipt of the notice from the State.

N.C. Gen. Stat. § 15A-976(b) (2015).

In the present instance, the State put defendant on notice that it intended to offer evidence seized without a warrant on 10 September 2014, but defendant did not file his motion to suppress until 4 March 2014. The State now asserts that because this far exceeds the 10 days within which a motion to suppress must be filed in order to comply with N.C. Gen. Stat. § 15A-976, this issue has not been preserved for appellate review. The State argues that although this issue was not raised at trial, our Court has held that the requirements of Chapter 15A, Article 53 must be met or the motion is a nullity.

In the unpublished opinion *State v. Harrison*, __ N.C. App. __, __,772 S.E.2d 873, __, 2015 WL 1800443 (April 2015) (unpub.), our Court addressed this exact issue. In *Harrison*, we held:

> Although defendant's motions to suppress were untimely and could have been summarily dismissed, the trial court exercised its discretion to consider the motions and denied the motions on the merits. We will not now second[-]guess the trial court's discretion to consider the motion after it has ruled on the merits.

Id. at __, 772 S.E.2d at __.

Although unpublished decisions do not constitute controlling legal authority upon this Court, *see Lifestore Bank v. Mingo Tribal Pres. Tr.*, 235 N.C. App. 573, 583 n.2, 763 S.E.2d 6, 13 n.2 (2014) (citing N.C. R. App. P. 30(e)(3) (2014)), we find the reasoning in *Harrison* persuasive.

Our decision in *Harrison* is further supported by *United States v. Johnson*, in which the Fourth Circuit was asked to review the trial court's dismissal of an untimely motion to suppress. *See United States v. Johnson*, 953 F.2d 110, 115-16 (4th Cir. 1991), *superseded by statute on other grounds as stated in United States v. Riggs*, 370 F.3d 382, 385 n.2 (4th Cir. 2004). Although the trial court in *Johnson* chose to dismiss the motion rather than ruling on the merits, the Fourth Circuit opinion noted, "Motions filed out of time are accepted at the discretion of the trial court, and this court will not entertain challenges to the proper use of this discretion." *Id.* at 116.

Accordingly, although defendant's motion to suppress was untimely, we hold that the decision of the trial court to nonetheless consider the

motion should not be revisited. Thus, we review the merits of defendant's arguments on appeal.

A. Motion to Suppress

In his first issue on appeal, defendant claims that the trial court erred by denying his motion to suppress because defendant did not give voluntary consent to search his room.

Labeling Conclusions of Law as Findings of Fact

[2] On this issue, defendant first contends that the trial court erroneously labeled certain conclusions of law as findings of fact. Defendant specifically challenges findings of fact numbers 17, 18, 20, 23, 24, 25, 26, 34, 35, 37, 38, 39, and 40.

"As a general rule, . . . any determination requiring the exercise of judgment or the application of legal principles is more properly classified a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (internal citations omitted). However, this Court has also held, "What is designated by the trial court as a finding of fact [] will be treated on review as a conclusion of law if essentially of that character. The label of fact put upon a conclusion of law will not defeat appellate review." *Wachacha v. Wachacha*, 38 N.C. App. 504, 507, 248 S.E.2d 375, 377 (1978) (citations omitted). When a trial court erroneously designates certain conclusions of law as findings of fact, no prejudicial error is committed when the trial court later makes conclusions of law almost identical to the findings of fact. *See State v. Rogers*, 52 N.C. App. 676, 682, 279 S.E.2d 881, 885-86 (1981). Such errors are, at most, technical errors and are clearly not prejudicial. *Id.*

On this issue, defendant first argues that findings of fact numbers 17, 18, 20, 23, 24, 26, 37, 38, and 40, concerning the question of whether defendant voluntarily gave consent to search his room, were improperly labeled as findings of fact because the question of voluntariness or coercion is one of law not fact. While defendant correctly asserts that the general issue of "voluntariness" is considered to be one of law, *see State v. Hardy*, 339 N.C. 207, 222, 451 S.E.2d 600, 608 (1994) ("The conclusion of voluntariness [of a defendant's statement] is a legal question which is fully reviewable"); *State v. Barlow*, 330 N.C. 133, 139, 409 S.E.2d 906, 910 (1991) ("[T]he question of the voluntariness of a confession is one of law, not of fact."), defendant's objection to the labeling of these findings is without merit. The trial court's factual findings numbered 17, 18, 20, 23, 24, 26, 37, and 40 are nearly identical to its conclusions of law numbered 1 and 6, which conclude that defendant's consent was voluntary, without

any coercion, duress, or fraud. Therefore, we find that the errors cited by defendant are not prejudicial, and we treat the question of voluntariness as a conclusion of law.

Next, defendant asserts that findings of fact numbers 34 and 35, concerning the question of whether defendant was "in custody" at the time his room was searched, were improperly labeled as findings of fact because the question of custody is one of law not fact. For the same reason stated above, we find that defendant's objection to these findings is without merit. Findings of fact numbers 34 and 35 are reiterated, nearly verbatim, in the trial court's conclusions of law numbers 2, 3, 4, and 5. Thus, we again find that the alleged errors cited by defendant are not prejudicial, and we treat the question of custody as a conclusion of law.

Finally, defendant asserts that findings of fact numbers 25 and 39 were improperly labeled as findings of fact because they concern the scope or limit of consent, which defendant contends is a question of law not fact. However, these technical errors appear to be defendant's sole grievance with findings 25 and 39; nowhere on appeal does defendant claim that these findings are not supported by competent evidence. Thus, we reject defendant's challenges to the trial court's designation of findings of fact numbers 25 and 39.

Sufficiency of the Trial Court's Conclusions of Law

[3] Next, defendant contends that the trial court's findings of fact are insufficient to support its legal conclusion that defendant gave voluntary consent to search. Specifically, defendant claims that since he had been informed that there was a narcotics investigation in progress at the time it was contended he gave consent and was kept under "constant police supervision by at least one and often more of the officers" at all times after he was told there was a narcotics investigation, his consent was not voluntary because he was "in custody" at the time it was given. Defendant argues that a reasonable person in the place of defendant would not have felt at liberty to ignore the police presence and go about his business, and thus defendant was seized for purposes of the Fourth Amendment of the United States Constitution. We disagree.

> An individual is seized by a police officer and is thus within the protection of the Fourth Amendment when the officer's conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. A reviewing court determines whether a reasonable person would feel free

> to decline the officer's request or otherwise terminate the encounter by examining the totality of circumstances.

State v. Icard, 363 N.C. 303, 308-309, 677 S.E.2d 822, 826 (2009) (internal citations and quotation marks omitted). Relevant considerations under the totality of the circumstances test include, but are not limited to: the number of officers present, whether the officers displayed a weapon, the words and tone of voice used by the officers, any physical contact between the officer and the defendant, the location of the encounter, and whether the officer blocked the individual's path. *Id.* at 309, 677 S.E.2d at 827.

Defendant relies on *State v. Dukes*, 110 N.C. App. 695, 431 S.E.2d 209 (1993), as support for his argument that a person who is kept under constant police supervision in the persons own home and is aware that the police are there investigating a specific crime can be considered "in custody." In *Dukes*, this Court held:

> We believe that a reasonable person, knowing that his wife had just been killed, kept under constant police supervision [including trips to the restroom], told not to wash or change his clothing and never informed that he was free to leave albeit his own home, would not feel free to get up and go. On the contrary, a reasonable person in defendant's position would feel compelled to stay. We hold therefore that the defendant was "in custody" when he made the statement at issue . . . .

Id. at 702-703, 431 S.E.2d at 213.

The facts of the present case are distinguishable from those in *Dukes*. Unlike the defendant in *Dukes*, there is no evidence that defendant's movements were limited by any of the officers at any point in time during the encounter. The officers did not "supervise" defendant while they were in his home. They simply followed defendant to his room after he gave them consent and defendant chose to stay in the room while the officers searched it. Absent any other indication that "the officers restricted defendant's movements in any way, the only evidence that supports defendant's claim that he was "in custody" is the mere presence of four uniformed police officers at defendant's house. This, alone, does not equate to "constant police supervision." Therefore, we find that the trial court was correct to conclude that defendant was not "in custody" at the time he gave consent to search his room.

Considering the totality of the circumstances, we conclude that a reasonable person in the place of defendant would not have felt compelled to consent to the officer's request to search. According to the uncontradicted evidence presented by the State, the officers' guns were holstered throughout the entire encounter, and never drawn. Until the officers found the cocaine and placed defendant under arrest, the officers did not restrain defendant in any way. There is no evidence indicating that any of the officers ever made physical contact with defendant, aside from placing him in handcuffs. There is also no showing that the officers ever made threats, used harsh language, or raised their voices at any time during the encounter. Although there were four officers present at defendant's residence, only two, Officers Ayers and Resendes, were speaking with defendant when he initially gave consent to search his room. At that time, the other two officers at the residence were in the street investigating the hit and run incident, which defendant knew to be the primary reason for the police presence at his home. Additionally, Sergeant Branshaw only entered defendant's room *after* the crack cocaine had been located and defendant had been handcuffed. Accordingly, we hold that defendant's consent was given voluntarily and conclude that the trial court did not err in denying defendant's motion to suppress.

B. Habitual Felon Status

[4] In his second argument, defendant contends that his sentencing under the Habitual Felon Act violates his constitutional right under the 8th and 14th amendments of the United States Constitution and Article I Sections 19 and 21 of the North Carolina Constitution to be free of cruel and unusual punishment. Defendant urges this Court to re-examine its prior holdings and find that his sentencing under the Habitual Felon Act are excessive and grossly disproportionate to those under Structured Sentencing alone.

This exact issue has already been addressed by this Court in *State v. Mason*, 126 N.C. App. 318, 484 S.E.2d 818 (1997), *cert. denied*, 354 N.C. 72, 553 S.E.2d 208 (2001). In *Mason*, the defendant argued that the violent habitual felon laws were unconstitutional because they denied the defendant freedom from cruel and unusual punishment. Our Court held that:

> [O]ur Supreme Court has addressed these same issues in regard to the habitual felon statute and determined that the General Assembly acted within constitutionally permissible bounds in enacting legislation designed to identify

> habitual criminals and to authorize enhanced punishment as provided. Therefore, the violent habitual felon statute is not unconstitutional on its face.

Id. at 321, 484 S.E.2d at 820 (internal citations and quotation marks omitted). "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we reject defendant's argument that his sentence under the Habitual Felon Act denied his right to be free of cruel and unusual punishment.

IV. Conclusion

For the foregoing reasons, we hold that the trial court did not err in denying defendant's motion to suppress. We further hold that defendant was not denied his constitutional right to be free of cruel and unusual punishment.

NO ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
RISA COVINGTON

No. COA15-1240

Filed 2 August 2016

1. Burglary and Unlawful Breaking or Entering—motor vehicle—instruction on lesser-included offense—no supporting evidence

There was no error in a prosecution for breaking or entering into a motor vehicle where defendant contended that the trial court should have instructed the jury on the lesser-included offense of first-degree trespass because he lacked the felonious intent necessary for breaking or entering into a motor vehicle. Defendant conceded that there was sufficient evidence to submit breaking or entering into a motor vehicle to the jury and unambiguously testified at trial that he had no memory of the events surrounding his entry into the vehicle because he was drunk. There were no witnesses,

and defendant was unable to offer an alternative explanation for entering the vehicle beyond conjecture.

2. Constitutional Law—ineffective assistance of counsel—failure to request instruction

Defendant did not receive ineffective assistance of counsel in a prosecution for breaking or entering into a motor vehicle where his counsel did not request an instruction on the lesser-included offense of first-degree trespass. Defendant was not entitled to such an instruction, and it would have been futile for his counsel to request it.

Appeal by defendant from judgment entered 5 March 2014 by Judge Reuben F. Young in Alamance County Superior Court. Heard in the Court of Appeals 11 April 2016.

Roy Cooper, *Attorney General*, *by Anne Goco Kirby*, *Assistant Attorney General*, *for the State.*

Cheshire Parker Schneider & Bryan, *PLLC*, *by John Keating Wiles*, *for defendant-appellant.*

DAVIS, Judge.

Risa Covington ("Defendant") appeals from his convictions for breaking or entering into a motor vehicle, misdemeanor larceny, injury to personal property, and attaining the status of an habitual felon. On appeal, he contends that (1) the trial court plainly erred by failing to instruct the jury on the lesser-included offense of first-degree trespass; and (2) he received ineffective assistance of counsel. After careful review, we conclude that Defendant received a fair trial free from error.

Factual Background

The State presented evidence at trial tending to establish the following facts: On the morning of 27 September 2012, Samuel King ("King"), the owner of King's Wheels and Tires ("King's Tires") located at 1625 North Church Street in Burlington, North Carolina, arrived at his business and noticed trash strewn on the ground near three cars parked in the parking lot behind the building. King walked toward the vehicles in order to investigate further.

As he approached, he saw Defendant sitting in the driver's seat of a blue Honda Civic (the "Civic"), which was later established as the property of Catherine Woods ("Woods"). He observed Defendant "prying on

the dash" with what appeared to be a screwdriver. King asked Defendant if the Civic belonged to him, and Defendant responded by inaudibly mumbling under his breath. King told Defendant he was calling the police at which point Defendant got out of the Civic and began walking away from King down North Church Street.

King called 911 and informed the dispatcher of the events that had just transpired. He also reported that Defendant was walking down North Church Street. Officer Johnathan Khan ("Officer Khan") with the Burlington Police Department ("BPD") was dispatched to North Church Street. Shortly thereafter, Officer Khan located Defendant walking along Cobb Avenue one block away from North Church Street.

Officer Khan honked his patrol vehicle's horn twice at which point Defendant stopped, looked back in the direction of Officer Khan, and began walking towards him. Upon seeing Defendant, Officer Khan recognized him from past encounters between them. When Defendant reached the patrol vehicle, Officer Khan asked Defendant if he had been "messing around [with] any cars over here by King's Tire." Defendant denied having done so. Officer Khan detected an odor of alcohol on Defendant's breath and noticed that he was unsteady on his feet.

Officer Khan exited his vehicle and frisked Defendant for weapons. He felt a large object in Defendant's left sleeve as well as metal objects in his left front pockets that he believed could be knives. He searched Defendant's pockets and discovered a pair of vice grip pliers, a ratchet socket, a vehicle oxygen sensor, an electronic device with an attached USB cord, a library card issued in the name of Tiffany Neal, a lighter, three boxes of cologne, lottery tickets, three silver earrings, and other miscellaneous items.

While Officer Khan was in the process of searching Defendant, Officer Justin Jolly ("Officer Jolly") of the BPD went to King's Tires. After speaking with King and checking King's Tires' records, he determined that the owner of the Civic was Woods. He then called her and informed her about the break-in, asking her to come to King's Tires. While Woods was en route, Officer Jolly drove to Officer Khan's location and collected the items Officer Khan had recovered from Defendant. Officer Jolly then returned to King's Tires.

Woods subsequently arrived at King's Tires, and upon speaking with Officer Jolly she identified several of the items recovered from Defendant as her personal property that she had left in her Civic when she dropped it off at King's Tires overnight for maintenance work. Officer Jolly radioed Officer Khan and instructed him to arrest Defendant.

On 28 January 2013, Defendant was indicted on charges of breaking and entering into a motor vehicle, misdemeanor larceny, injury to personal property, and attaining the status of an habitual felon. Beginning on 3 March 2014, a jury trial was held before the Honorable Reuben F. Young in Alamance County Superior Court.

The jury found Defendant guilty of breaking or entering into a motor vehicle, misdemeanor larceny, and injury to personal property. He subsequently pled guilty to attaining the status of an habitual felon. The trial court consolidated Defendant's convictions and sentenced him to 50-72 months imprisonment.

On 3 March 2015, Defendant filed a petition for writ of *certiorari* with this Court seeking review of his convictions despite the fact that he failed to properly enter notice of appeal. On 20 March 2015, we granted Defendant's petition.

Analysis

I. Instruction on Lesser-Included Offense

[1] Defendant's first argument on appeal is that the trial court committed plain error by failing to instruct the jury on the lesser-included offense of first-degree trespass. Specifically, Defendant contends that he presented evidence at trial showing that he lacked the felonious intent necessary to commit the offense of breaking or entering into a motor vehicle, thereby entitling him to a jury instruction on the lesser-included offense. We disagree.

Defendant failed to object at trial to the absence of an instruction on first-degree trespass. Therefore, our review is limited to plain error. *See* N.C.R. App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

> It is well settled that a defendant is entitled to have a lesser-included offense submitted to the jury only when there is evidence to support it. The test in every case involving the propriety of an instruction on a lesser grade of an offense is not whether the jury could convict defendant of the lesser crime, but whether the State's evidence is positive as to each element of the crime charged and whether there is any conflicting evidence relating to any of these elements.

State v. Chaves, __ N.C. App. __, __, 782 S.E.2d 540, 542-43 (2016) (citation and brackets omitted).

"The trial court is not obligated to give a lesser included instruction if there is no evidence giving rise to a reasonable inference to dispute the State's contention." *State v. Lucas*, 234 N.C. App. 247, 256, 758 S.E.2d 672, 679 (2014) (citation, quotation marks, and ellipses omitted). "Where no lesser included offense exists, a lesser included offense instruction detracts from, rather than enhances, the rationality of the process." *State v. Leazer*, 353 N.C. 234, 237, 539 S.E.2d 922, 924 (2000) (citation and quotation marks omitted).

The elements of breaking or entering into a motor vehicle are "(1) there was a breaking or entering by the defendant; (2) without consent; (3) into a motor vehicle; (4) containing goods, wares, freight, or anything of value; and (5) with the intent to commit any felony or larceny therein." *State v. Jackson*, 162 N.C. App. 695, 698, 592 S.E.2d 575, 577 (2004) (citation and emphasis omitted). "First-degree trespass is a lesser-included offense of felonious breaking or entering. Unlike felonious breaking or entering, first-degree trespass does not include the element of felonious intent but rather merely requires evidence that the defendant entered or remained on the premises or in a building of another without authorization." *Lucas*, 234 N.C. App. at 256, 758 S.E.2d at 678-79 (internal citation omitted).

Defendant concedes that there was sufficient evidence to submit the offense of breaking or entering into a motor vehicle to the jury. He argues, however, that conflicting evidence existed as to his intentions for entering the Civic. In support of this argument, Defendant speculates that he *may* have entered the Civic for the purpose of sleeping because he was drunk, had been kicked out of his sister's house the previous night, and had occasionally broken into other vehicles and buildings in the past when similarly intoxicated in order to find a place to sleep.

The fatal flaw with Defendant's argument is that he unambiguously testified at trial that he had no memory at all of the events surrounding his forced entry into the Civic. Defendant testified as follows on direct examination:

> Q. Okay. Risa, do you remember this night in question?
>
> A. I don't.
>
> Q. Do you remember any of it at all?
>
> A. None of it.
>
> Q. Okay. Why don't you remember, if you know?
>
> A. I was drunk.
>
> . . . .
>
> Q. Do you remember speaking to Officer Kahn [sic]?
>
> A. No. No, sir.
>
> Q. Okay. Do you remember walking down Church Street?
>
> A. No.
>
> Q. Do you remember where you were coming from before 8:30 that morning?
>
> A. No, sir.
>
> Q. What's the first thing that you remember?
>
> A. Nothing really. When I got down here, I got in the holding cell, went to sleep. When I woke up I realized I was in jail.
>
> Q. Didn't know how you got there?
>
> A. No.
>
> . . . .
>
> Q. . . . So you don't remember going to King's that day?
>
> A. No, sir.

Because (1) Defendant was unable to remember how or why he entered the Civic; and (2) no witnesses observed him actually sleeping in the vehicle, no evidence was presented at trial tending to support Defendant's hypothesis that he may have broken into the Civic in order to sleep. Indeed, the *only* evidence relating to Defendant's actions while

in the vehicle came from King, who testified that when he first noticed Defendant inside the Civic, Defendant was attempting to pry open the vehicle's front dashboard with a screwdriver.

Thus, the only support for Defendant's argument on this issue is his own pure conjecture, which is insufficient to entitle him to a lesser-included instruction on first-degree trespass. *See Leazer*, 353 N.C. at 240, 539 S.E.2d at 926 ("A defendant is not entitled to an instruction on a lesser included offense merely because the jury could possibly believe some of the state's evidence but not all of it. Further, mere speculation as to the rationales for defendant's behavior is not sufficient to negate evidence of premeditation and deliberation." (internal citations, quotation marks, and brackets omitted)).

While Defendant attempts to rely on *State v. Worthey*, 270 N.C. 444, 154 S.E.2d 515 (1967), and *State v. Peacock*, 313 N.C. 554, 330 S.E.2d 190 (1985), on this issue, his reliance on these cases is misplaced. In *Worthey*, the defendant was charged with felonious breaking and entering into a building, and on appeal he argued that the trial court erred by failing to give a jury instruction on the lesser-included offense of non-felonious breaking or entering. He testified that upon being discovered by police officers exiting a manufacturing plant he was not authorized to enter, he had told the officers that he went "inside to meet an employee of [the plant] named 'Robert' who was going to give him a ride, and that he used the toilet facilities while inside." *Worthey*, 270 N.C. at 445-46, 154 S.E.2d at 515-16. Our Supreme Court awarded the defendant a new trial based on the above-referenced testimony, holding that "[t]he evidence as to defendant's intent was circumstantial and did not point unerringly to an intent to commit a felony; the jury might have found defendant guilty of a misdemeanor upon the evidence." *Id.* at 446, 154 S.E.2d at 516.

Similarly, in *Peacock*, the defendant was charged with, among other offenses, first-degree burglary and requested an instruction on the lesser-included offense of breaking and entering. His request was denied by the trial court. *Peacock*, 313 N.C. at 557, 330 S.E.2d at 192-93. The defendant had told officers that he broke into his landlady's apartment at his boarding house while he was "trip[ping] on . . . acid" so that he could talk to her about his rent. He further related that only after breaking into the apartment did he consider robbing her. He then killed the landlady, stole a "money pouch" from her, and left the premises. *Id.* at 556, 330 S.E.2d at 192.

Our Supreme Court held that

> Defendant's statement that he "was standing there [in the living room] thinking about robbing Mrs. Frye" is at

> best ambiguous with regard to the question of when he formed an intent to commit larceny. We note, however, that Detective Hill, who transcribed defendant's oral statement, testified on cross-examination that defendant told him that it was *after* he was inside that he decided to rob Mrs. Frye. Detective Hill's interpretation of what defendant said lends credence to defendant's argument that a juror might also infer that he broke and entered without an intent to commit larceny.

Id. at 559-60, 330 S.E.2d at 194. The Court then held that the defendant was entitled to a new trial based on the trial court's failure to instruct the jury on the lesser-included offense of breaking and entering. *Id.* at 561-62, 330 S.E.2d at 195.

Because here, conversely, Defendant's total lack of memory rendered him unable to offer *any* alternative explanation beyond utter conjecture as to why he entered the Civic, *Worthey* and *Peacock* are inapposite. Thus, in light of his inability at trial to present evidence indicating that he lacked the intent to commit larceny at the time he broke into the Civic, we hold that the trial court did not err at all — much less commit plain error — by failing to instruct the jury on the lesser-included offense of first-degree trespass. *See Lucas*, 234 N.C. App. at 257, 758 S.E.2d at 679 ("Thus, in the absence of any evidence disputing the State's theory that Defendants 'cased' the neighborhood and shattered the Merediths' window in the hope of stealing from the home, Defendants have not demonstrated that the trial court's failure to instruct the jury regarding first-degree trespass was error much less plain error.").[1]

II. Ineffective Assistance of Counsel

[2] Defendant's final argument on appeal is that he received ineffective assistance of counsel. Specifically, he contends that his trial counsel's failure to request an instruction on the lesser-included offense of first-degree trespass constituted ineffective assistance of counsel. We disagree.

---

1. The versions of *Lucas* available online through Westlaw and LexisNexis contain the full sentence quoted above. The South Eastern Reporter, 2d Series also contains this full sentence. The slip opinion available online likewise contains the full sentence. However, a portion of the sentence is missing from the North Carolina Court of Appeals Reports. The North Carolina Court of Appeals Reports contains only the following incomplete sentence: "Thus, in the absence of any evidence disputing the State's theory that Defendants 'cased' the neighborhood and shattered the Merediths' window in the hope of stealing from the home." *Lucas*, 234 N.C. App. at 257.

"In order to prevail on an ineffective assistance of counsel claim, a defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense. Deficient performance may be established by showing that counsel's representation fell below an objective standard of reasonableness. Generally, to establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *State v. Edgar*, __ N.C. App. __, __, 777 S.E.2d 766, 770-71 (2015) (internal citations and quotation marks omitted).

> In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal. It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing. Thus, when this Court reviews ineffective assistance of counsel claims on direct appeal and determines that they have been brought prematurely, we dismiss those claims without prejudice, allowing defendants to bring them pursuant to a subsequent motion for appropriate relief in the trial court.

State v. Turner, __ N.C. App. __, __, 765 S.E.2d 77, 83 (2014) (internal citations, quotation marks, and brackets omitted), *disc. review denied*, __ N.C. __, 768 S.E.2d 563 (2015). However, "[i]n considering ineffective assistance of counsel claims, if a reviewing court can determine at the outset that there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient." *Id.* at __, 765 S.E.2d at 84 (citation and brackets omitted).

Here, as discussed above, Defendant was not entitled to a jury instruction on first-degree trespass. Therefore, it would have been futile for his trial counsel to request one. Accordingly, we hold that Defendant has failed to establish an ineffective assistance of counsel claim. *See Lucas*, 234 N.C. App. at 258-59, 758 S.E.2d at 680 ("A successful ineffective assistance of counsel claim based on a failure to request a jury instruction

requires the defendant to prove that without the requested jury instruction there was plain error in the charge. Here, we have already determined that the trial court did not commit plain error in its instructions to the jury . . . . Accordingly, we cannot conclude that their trial counsel's failure to request these instructions constituted ineffective assistance of counsel." (internal citation and quotation marks omitted)).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from error.

NO ERROR.

Chief Judge McGEE and Judge STEPHENS concur.

STATE OF NORTH CAROLINA
v.
TRAVIS LAMONT DAUGHTRIDGE

No. COA15-1160

Filed 2 August 2016

1. Appeal and Error—notice of appeal—sufficient

Defendant's oral notice of appeal was sufficient to confer jurisdiction on the Court of Appeals where defendant's exchange with the trial court manifested his intention to enter a notice of appeal. The State did not contend that it was misled or prejudiced in any way.

2. Evidence—officer's perception of defendant's demeanor—investigative process

The trial court did not err in a prosecution for first-degree murder and possession of a firearm by a felon by allowing an investigator to testify about his perception of defendant's demeanor during questioning. The testimony served to assist the jury in understanding the investigative process and why the officer continued the investigation instead of accepting defendant's explanation of events. It did not speak to the ultimate issue of guilt or innocence.

3. Evidence—text messages from victim's cell phone—context for decisionmaking

There was no plain error in a prosecution for first-degree murder and possession of a firearm by a felon where the trial court admitted an investigator's testimony concerning text messages from the victim's cellphone. The text messages were examined for the purpose of determining whether the death was a suicide and provided context for the investigator's decisionmaking.

4. Evidence—invited error—cross-examination—investigator's opinion of defendant

In a prosecution for first-degree murder and possession of a firearm by a felon, testimony by an investigator on cross-examination that defendant was deceptive was admissible as invited error and did not constitute plain error.

5. Evidence—expert testimony—forensic pathologist—opinion based on non-medical information

There was error in a first-degree murder prosecution, but not plain error, where a forensic pathologist testified to his opinion that the victim's death was a homicide rather than a suicide based on non-medical information provided by law enforcement officers. However, given the entire record, the error did not have a probable impact on the jury's verdict.

Appeal by defendant from judgments entered 31 October 2014 by Judge Henry W. Hight, Jr. in Durham County Superior Court. Heard in the Court of Appeals 24 February 2016.

Roy Cooper, *Attorney General*, *by Sonya Calloway-Durham*, *Special Deputy Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Kathryn L. VandenBerg*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Travis Lamont Daughtridge ("Defendant") appeals from his convictions for first-degree murder and possession of a firearm by a felon. On appeal, he contends that the trial court plainly erred by allowing the admission of (1) an investigator's testimony concerning Defendant's demeanor; and (2) opinion testimony from a medical examiner that the victim's death was a homicide rather than a suicide. After careful

review, we conclude that Defendant received a fair trial free from prejudicial error.

Factual Background

The State presented evidence at trial tending to establish the following facts: In 2011, Simeka Daughtridge ("Simeka") lived with her three children at her mother's house on Spruce Street in Durham, North Carolina. Her mother, Linda Sanders ("Linda"), and her brother, Kevin Surratt ("Kevin"), also lived at the Spruce Street address along with Kevin's girlfriend and their infant son.

On 26 August 2011, Simeka married Defendant, who periodically stayed with Simeka at Linda's residence. However, their relationship began to deteriorate soon after their marriage.

On 30 October 2011, while Defendant was at Linda's house, Defendant and Simeka began arguing in Simeka's bedroom. The door was shut, and they were alone together in the room. Linda was at church and Kevin, his girlfriend, and their son were in Kevin's bedroom. Simeka's children were watching television in the living room.

Approximately 10-15 minutes after Defendant and Simeka began arguing, Simeka's eldest daughter heard a gunshot from the direction of Simeka's room and observed Defendant run out of the room a few seconds later. Simeka's son also heard a "loud noise" and the sound of shattering glass coming from Simeka's bedroom. He too saw Defendant run out of the room several seconds later.

Defendant, upon seeing the children, yelled: "[Y]our mom shot herself." He then shouted in the direction of Kevin's room: "Your sister shot herself." Kevin immediately ran into Simeka's room while his girlfriend called 911. Kevin discovered Simeka laying on her bed on her left side with an apparent bullet wound to her chest. He attempted to perform first aid by rolling Simeka onto her back and applying pressure to the wound with a towel. Defendant stood in the doorway for several seconds and then fled from the house.

Officers with the Durham Police Department ("DPD") responded to the scene at approximately 2:00 p.m., and emergency medical personnel arrived shortly thereafter. Simeka was transported via ambulance to Duke University Medical Center. Upon arrival, she was pronounced dead.

Upon examining Simeka's bedroom, law enforcement officers discovered a .9 millimeter Kel-Tec semi-automatic handgun laying on the floor roughly three feet from Simeka's body. They also discovered a

bullet inside a washing machine in the bedroom that had passed through the glass door of the machine and shattered it.

Approximately one hour after the shooting had occurred, Defendant returned to Linda's house. He then told one of the officers that Simeka had shot herself.

Detective David Anthony ("Detective Anthony") with the DPD spoke with Defendant in his patrol car parked outside of the residence. Detective Anthony told Defendant that he was not under arrest but asked him if he would be willing to come to the police station to be interviewed. Defendant agreed, and while at the police station he voluntarily surrendered his clothing for gunshot residue ("GSR") analysis.

Defendant provided a written statement in which he stated that he and Simeka had been talking in her bedroom and that he had then left the bedroom and gone to the living room when he heard a gunshot. He shouted to Kevin that Simeka had shot herself and did not thereafter reenter Simeka's room because "[he] just couldn't do it." Instead, he ran to a neighbor's house.

Investigator Charles Sole ("Investigator Sole") was assigned as the lead investigator of the case. Upon reviewing the written statement Defendant had given to Detective Anthony, Investigator Sole decided to schedule a follow-up interview with Defendant because based on his training and experience certain parts of Defendant's account of the incident "were just not adding up."

Prior to the follow-up interview with Defendant, Investigator Sole received the results of the GSR analysis that had been performed on Defendant and his clothing. The analysis revealed that particles of GSR were present on Defendant's t-shirt, jeans, and hooded jacket. Investigator Sole interviewed Defendant once more on 9 November 2011. He ultimately arrested Defendant on 7 December 2011 for the murder of Simeka.

On 12 December 2011, Defendant was indicted on charges of first-degree murder and possession of a firearm by a felon. Beginning on 27 September 2014, a jury trial was held before the Honorable Henry W. Hight, Jr. in Durham County Superior Court.

At trial, the State introduced the testimony of Dr. Eric Duval ("Dr. Duval"), a forensic pathologist and medical examiner. Dr. Duval testified as an expert in the field of forensic pathology. He opined that the cause of death was a bullet wound to Simeka's chest. He further stated his opinion that "the manner of death [was] homicide."

The State also offered the testimony of David Freehling ("Freehling"), an expert in the field of GSR testing, who testified that while Simeka's hands and clothing had tested negative for GSR, Defendant's t-shirt, hooded jacket, and jeans all tested positive for GSR with one particle of GSR found on each of these three articles of clothing.

While Defendant did not testify, he attempted to establish during his case-in-chief that Simeka's death was a suicide. In support of this theory, defense counsel re-called Detective Anthony as a witness and examined him on the subject of why law enforcement officers had not investigated more extensively the theory that Simeka killed herself.

Defendant also called Kevin as a witness, who testified that Simeka had exhibited suicidal tendencies prior to her death and had threatened to kill herself on at least one prior occasion. Kevin further stated that Simeka was depressed and unhappy as a result of her deteriorating relationship with Defendant.

In addition, Defendant introduced testimony from his own GSR expert, Robert White, who testified that he would typically expect more than three particles of GSR to be present on the clothing of an individual who had fired a gun. Finally, Defendant presented the testimony of Dr. Christina Roberts, an expert in forensic pathology, who stated that she was unable to determine whether Simeka's manner of death was homicide or suicide.

The jury found Defendant guilty of both charges. The trial court sentenced Defendant to consecutive sentences of life imprisonment without parole for his first-degree murder conviction and 19-23 months imprisonment for his conviction of possession of a firearm by a felon.

Analysis

I. Appellate Jurisdiction

[1] Initially, we must determine whether we have jurisdiction over Defendant's appeal. *See Hous. Auth. of City of Wilmington v. Sparks Eng'g, PLLC*, 212 N.C. App. 184, 187, 711 S.E.2d 180, 182 (2011) ("As an initial matter, we must address the extent, if any, to which Defendant's appeal is properly before us. An appellate court has the power to inquire into jurisdiction in a case before it at any time, even *sua sponte*." (citation, quotation marks, and brackets omitted)). The State challenges the sufficiency of Defendant's notice of appeal and argues that his appeal should be dismissed. Defendant contends that notice of appeal was properly given, but, out of an abundance of caution, he also filed a

petition for writ of *certiorari* with this Court in the event we determine that his purported notice was, in fact, defective.

At the conclusion of trial, the following colloquy took place between Defendant's trial counsel and the trial court:

> MR. MEIER: Yeah, Your Honor, just motion to dismiss JNOV [sic] as well as request and [sic] an appellate public defender to be appointed.
>
> THE COURT: Motion [to] set aside the verdict is denied.
>
> MR. MEIER: Yes, sir.
>
> THE COURT: Motion of appeal is noted to the -- I guess to the Supreme Court of North Carolina to the Appellate Division, State of North Carolina. I will appoint[ ] the appellate defender to represent the Defendant. He's in your custody, Mr. Sheriff.

While this exchange is admittedly not a model of clarity, we nevertheless interpret it as manifesting Defendant's intention to enter a notice of appeal to this Court. In response to Defendant's trial counsel's request, the trial court ordered that the Office of the Appellate Defender be appointed to represent Defendant before this Court. Moreover, the State does not contend that it was misled or prejudiced in any way by any defect in Defendant's notice of appeal.

We therefore hold that Defendant's oral notice of appeal was sufficient to confer jurisdiction upon this Court. *See State v. Williams*, __ N.C. App. __, __, 761 S.E.2d 662, 664 (2014) ("Accordingly, as defendant's intent to appeal can be fairly inferred and the State provides no indication it was misled by the defendant's mistake, we do not dismiss defendant's appeal on the basis of a defect in the notice of appeal."), *appeal dismissed and disc. review denied*, __ N.C. __, 768 S.E.2d 857 (2015). Consequently, we deny the State's motion to dismiss the appeal, dismiss Defendant's petition for writ of *certiorari* as moot, and proceed to address the merits of Defendant's arguments.

II. Testimony of Investigator Sole Regarding Defendant's Demeanor

[2] Defendant's first argument on appeal is that the trial court committed plain error by allowing Investigator Sole to testify as to his perception of Defendant's demeanor. We disagree.

Defendant failed to object at trial to the testimony he now challenges on appeal. Therefore, our review is limited to plain error. *See* N.C.R.

App. P. 10(a)(4) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice — that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal citations, quotation marks, and brackets omitted).

Defendant's argument on this issue is based primarily on the following portions of Investigator Sole's testimony on direct examination:

> Q. Please explain the circumstances under which you scheduled that interview?
>
> A. Like I said in an investigation like this we're objective. And I had contacted Mr. Daughtridge to followup [sic] on his initial statement with Detective Anthony and also I had some questions myself that we had developed since his conversation with Anthony.
>
> Q. Now, you had reviewed his statement. Were there things that concerned you that you wanted to followup [sic] on?
>
> A. Yes.
>
> Q. What were the things that concerned you?
>
> A. I mean, initially the day of the incident, having responded to other death investigations and now an allegation of being a suicide, things were just not adding up.
>
> Q. So you had investigated other death investigations where it was determined it had been a suicide?

A. I've been on numerous [sic] throughout my career. But as the lead investigator, yes, I had been involved in several of them as an assisting [sic] to the lead investigator.

Q. Specifically, when you said things didn't add up, what drew your concerns?

A. I mean, the initial thing was is [sic] that his demeanor and his -- the statements that he had left the scene. I mean, that's just not consistent with a suicide particularly of your wife. I mean, generally, we have to remove the persons from the scene and try to keep them out. I mean, he was very disengaged. That was really odd to me.

Q. Was there anything else that concerned you at that time since taking his statement?

A. Again, a lot of it was based on just his demeanor. There was no, you know, emotion that he was upset. It appeared there was -- it was more of supporting his theory of what had happened and him not being in a room than what had happened to his wife.

Q. Now, at that time were you aware of -- had the children spoken to you at that time?

A. There was comments brought back to me from the victim's mother that [sic] what the children were saying. I mean, technically in our unit we usually defer child interviews to folks that have that expertise. So I contacted a couple of the juvenile investigators to try to make that process happen. But there were comments from coming [sic] from the family and the victim's mother about the children regarding what they had seen.

. . . .

Q. Prior to this recorded statement, did he provide that information to any other law enforcement during any questioning about this physical altercation between himself and Ms. Daughtridge?

A. Not to my knowledge. I mean, looking at the interview [sic] Detective Anthony and again with me, I had to pull it out of him. I didn't understand why he would -- he wouldn't

be just forthright with it. Everything that had occurred were [sic], you know, concerning his wife.

. . . .

Q. And although he did not state it during the beginning portion, was there -- at the end did he indicate in fact there had been other contact with his body with a gun that was being handled by Ms. Daughtridge?

A. Yes. I mean, on several occasions he was contradicting what he was confronted with.

. . . .

Q. Once you had talked to David Freehling at the State Crime Lab, what was the next step in the investigation?

A. Obviously, we waited to get all of his reports back and any information regarding the gunshot residue. You know, by that time we had conducted some other interviews that, again, it just didn't add up to -- it wasn't adding up that she had shot herself, when those -- with the totality of those things.

Defendant specifically challenges the following statements from the above-quoted testimony: (1) "things were just not adding up"; (2) "the initial thing was is [sic] that his demeanor and his -- the statements that he had left the scene. I mean, that's just not consistent with a suicide particularly of your wife. I mean, generally, we have to remove the persons from the scene and try to keep them out. I mean, he was very disengaged. That was really odd to me"; (3) "a lot of it was based on just his demeanor. There was no, you know, emotion that he was upset. It appeared there was -- it was more of supporting his theory of what had happened and him not being in a room than what had happened to his wife"; (4) "I mean, on several occasions he was contradicting what he was confronted with"; (5) "I mean, looking at the interview [sic] Detective Anthony and again with me, I had to pull it out of him. I didn't understand why he would -- he wouldn't be just forthright with it. Everything that had occurred were, you know, concerning his wife"; and (6) "[b]y that time we had conducted some other interviews that, again, it just didn't add up to -- it wasn't adding up that she had shot herself, when those -- with the totality of those things." Defendant asserts that these statements constituted impermissible lay opinions in violation of Rule 701 of the North Carolina Rules of Evidence.

Defendant is correct as a general proposition that "when one witness vouches for the veracity of another witness, such testimony is an opinion which is not helpful to the jury's determination of a fact in issue and is therefore excluded by Rule 701 [of the North Carolina Rules of Evidence]." *State v. Gobal*, 186 N.C. App. 308, 318, 651 S.E.2d 279, 286 (2007) (citation, quotation marks, and brackets omitted), *aff'd per curriam*, 362 N.C. 342, 661 S.E.2d 732 (2008); *see also State v. White*, 154 N.C. App. 598, 605, 572 S.E.2d 825, 831 (2002) ("The jury is charged with drawing its own conclusions from the evidence, and without being influenced by the conclusion of [a law enforcement officer].").

However, it is apparent from the context of Investigator Sole's testimony on direct examination that he was simply explaining the steps he took in furtherance of his ongoing investigation. His statements expressing skepticism over Defendant's account of these events served merely to provide context and explain his rationale for continuing to subject Defendant to additional scrutiny.

Such testimony does not run afoul of Rule 701. Indeed, we have expressly held that "[t]estimony elicited to assist the jury in understanding a law enforcement officer's investigative process is admissible under Rule 701." *State v. Bishop*, __ N.C. App. __, __, 774 S.E.2d 337, 347, *rev'd on other grounds*, __ N.C. __, __ S.E.2d __ (filed Jun. 10, 2016) (No. 223PA15).

We find instructive our opinion in *State v. Lawson*, 159 N.C. App. 534, 583 S.E.2d 354 (2003), in which the defendant was charged with robbery with a firearm and possession of a firearm by a felon. The defendant robbed a convenience store at gunpoint and then fled. The store clerk called the police, and descriptions of the defendant and his accomplice were provided by the clerk and another witness. *Id.* at 535-36, 583 S.E.2d at 355-56.

Approximately two hours later, an officer pulled over a car driven by the defendant for running a stoplight. When the officer asked the defendant for his driver's license, he was unable to produce any identification but told the officer his name was Antonio Lawson. The officer ran a DMV identification check for the name "Antonio Lawson," but the search returned no record of any such individual. *Id.* at 536, 583 S.E.2d at 356.

At trial, the officer testified that "'[a]t that point I knew that he was lying to me because if you've ever had a North Carolina ID whether it be three days ago, three years ago, thirty years ago, your information is in DMV files. With that name and that DOB there was no information. He

had already stated to me that he had a North Carolina ID so I knew at that point he was lying.' " *Id.* at 541, 583 S.E.2d at 359.

On appeal, the defendant argued that the trial court committed plain error in admitting this portion of the officer's testimony because it "intimated defendant was a liar." *Id.* at 540, 583 S.E.2d at 359. We rejected this argument, noting that

> in contrast to defendant's contentions on appeal, Officer Wilson did not characterize defendant as "a liar." In reviewing the testimony, it appears instead that Officer Wilson's testimony as to defendant's lying dealt with: (1) the special circumstances of asking for defendant's identification during a traffic stop, (2) *why defendant's responses aroused Officer Wilson's suspicion*, and (3) explaining why Officer Wilson initially arrested defendant for providing fictitious information.

Id. at 542, 583 S.E.2d at 359 (emphasis added).

We held that "[i]n the present case, Officer Wilson's testimony was not that of an expert as to credibility; further, he was not invading the province of the jury as he was not commenting on the credibility of a witness. As noted above, Officer Wilson was testifying to the circumstances of the traffic stop and the reason for defendant's detention. The above testimony by Officer Wilson does not rise to the level of plain error." *Id.* at 542, 583 S.E.2d at 360.

As in *Lawson*, we believe the testimony offered by Investigator Sole during direct examination served to assist the jury in understanding his investigative process and why he chose to continue investigating Defendant instead of accepting Defendant's explanation of the events of 30 October 2011 at face value. Such testimony does not speak to the ultimate issue of Defendant's guilt or innocence and was therefore admissible under Rule 701. *See State v. Houser*, __ N.C. App. __, __, 768 S.E.2d 626, 631-32 ("[The officer] was not invading the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, he was explaining the investigative process. . . . [S]tatements were rationally based on [the officer's] experience as a detective and were helpful to the jury in understanding the investigative process in this case. . . . [W]e hold that the trial court's admission of this testimony was not error, let alone plain error."), *disc. review denied*, __ N.C. __, 775 S.E.2d 869 (2015).

[3] Defendant contends that Investigator Sole's testimony concerning certain text messages sent from Simeka's cellphone also constituted improper lay opinion testimony in violation of Rule 701. The text messages at issue were examined by Investigator Sole for the purpose of determining whether Simeka's death was a suicide. Specifically, Defendant points to the following exchange during his direct examination:

> Q. Now, the text messaging was that of any importance to you?
>
> A. I mean, it's again a standard procedure during a death investigation to look at those type of records. When I looked at them in this case predominantly what I was looking at it is as we said you're trying to be objective it being a death investigation. And there being this allegation of suicide that if there was any type of messaging that would be consistent with her being upset, you know, making -- maybe telling someone else in a text message, this type of stuff.
>
> And it wasn't present so it didn't appear to have anything in that direction. The text messaging seemed to be fairly normal and not what I would consider -- she was holding a conversation with someone about I think things getting better or there were other options for her based on her -- what things were with her current relationship.

We believe these statements likewise provided context for Investigator Sole's decision-making with regard to his investigation. This portion of Investigator Sole's testimony further explains why he conducted a homicide investigation rather than concluding that Simeka's death was a suicide. Defendant has failed to offer any persuasive argument that the admission of this evidence constituted plain error.

[4] Finally, Defendant challenges the following testimony offered by Investigator Sole on cross-examination as violative of Rule 701:

> Q. Okay. But as an investigator you're ascribing motives and thoughts to everybody. You assumed my client was deceptive, correct?
>
> A. He was deceptive.
>
> . . . .
>
> Q. But so when [Linda] makes mistaken statements of fairly significant facts, maybe she was mistaken, maybe

> she was wrong. [Defendant] is deceitful, correct, that's your opinion?
>
> A. The things that [Defendant] was not truthful about were significant to a death investigation. That's why I define it as deception.

However, while Defendant argues that Investigator Sole's characterization of him as "deceptive" was improper, the above-quoted exchange falls squarely within the invited error doctrine. "Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law." *Gobal*, 186 N.C. App. at 319, 651 S.E.2d at 287; *State v. Steen*, 226 N.C. App. 568, 575, 739 S.E.2d 869, 875 (2013) ("Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law, and a defendant who invites error has waived his right to all appellate review concerning the invited error, *including plain error review*." (internal citations, quotation marks, and alterations omitted and emphasis added)).

Investigator Sole's statements on cross-examination were direct responses to the questions of Defendant's trial counsel. Consequently, based on the invited error doctrine, the challenged testimony cannot constitute plain error.

III. Dr. Duval's Testimony

[5] Defendant's final argument on appeal is that the trial court erred in allowing Dr. Duval to testify as to his opinion that Simeka's death was a homicide. Specifically, Defendant contends that because Dr. Duval's opinion on this issue was based not on medical findings within his area of expertise but rather on non-medical information relayed to him by law enforcement officers, the trial court erred by allowing its admission. While acknowledging that prior cases from North Carolina courts have allowed analogous expert testimony from medical examiners, *see State v. Annadale*, 329 N.C. 557, 406 S.E.2d 837 (1991); *State v. Borders*, 236 N.C. App. 149, 762 S.E.2d 490 (2014), *disc. review denied*, __ N.C. __, 772 S.E.2d 726 (2015), he argues that the General Assembly's 2011 amendment to Rule 702 of the North Carolina Rules of Evidence now requires trial courts to serve in a stricter "gatekeeper" capacity when considering the admissibility of expert testimony. Because Defendant failed to object to this portion of Dr. Duval's testimony at trial, our review is — once again — limited to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Our Supreme Court has very recently confirmed that the General Assembly's amendment to Rule 702 adopted the federal standard for the admission of expert witness testimony set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 125 L.Ed.2d 469 (1993), and its progeny. *See State v. McGrady*, __ N.C. __, __, __ S.E.2d __, __, slip op. at 5 (filed Jun. 10, 2016) (No. 72PA14) ("We hold that the 2011 amendment adopts the federal standard for the admission of expert witness testimony articulated in the *Daubert* line of cases. The General Assembly amended North Carolina's rule in 2011 in virtually the same way that the corresponding federal rule was amended in 2000. It follows that the meaning of North Carolina's Rule 702(a) now mirrors that of the amended federal rule.").

Rule 702 now provides, in pertinent part, as follows:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C.R. Evid. 702(a).

In *McGrady*, the Supreme Court discussed in detail the implications stemming from the amendment to Rule 702.

> Rule 702(a) has three main parts, and expert testimony *must satisfy each to be admissible*. First, the area of proposed testimony must be based on scientific, technical or other specialized knowledge that will assist the trier of fact to understand the evidence or to determine a fact in issue. This is the relevance inquiry discussed in both *Daubert* and *Howerton*. As with any evidence, the testimony must meet the minimum standard for logical relevance that Rule 401 establishes. In other words, the testimony must relate to an issue in the case. But relevance means something more for expert testimony. *In*

order to assist the trier of fact, expert testimony must provide insight beyond the conclusions that jurors can readily draw from their ordinary experience. An area of inquiry need not be completely incomprehensible to lay jurors without expert assistance before expert testimony becomes admissible. To be helpful, though, that testimony must do more than invite the jury to substitute the expert's judgment of the meaning of the facts of the case for its own.

Second, the witness must be qualified as an expert by knowledge, skill, experience, training, or education. This portion of the rule focuses on the witness's competence to testify as an expert in the field of his or her proposed testimony. Expertise can come from practical experience as much as from academic training. Whatever the source of the witness's knowledge, the question remains the same: Does the witness have enough expertise to be in a better position than the trier of fact to have an opinion on the subject? The rule does not mandate that the witness always have a particular degree or certification, or practice a particular profession. But this does not mean that the trial court cannot screen the evidence based on the expert's qualifications. In some cases, degrees or certifications may play a role in determining the witness's qualifications, depending on the content of the witness's testimony and the field of the witness's purported expertise. As is true with respect to other aspects of Rule 702(a), the trial court has the discretion to determine whether the witness is sufficiently qualified to testify in that field.

Third, the testimony must meet the three-pronged reliability test that is new to the amended rule: (1) The testimony must be based upon sufficient facts or data. (2) The testimony must be the product of reliable principles and methods. (3) The witness must have applied the principles and methods reliably to the facts of the case. These three prongs together constitute the reliability inquiry discussed in *Daubert*, *Joiner*, and *Kumho*. The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate. However, conclusions and methodology are not entirely distinct from one another, and when a trial court

> concludes that there is simply too great an analytical gap between the data and the opinion proffered, the court is not required to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

McGrady, __ N.C. at __, __ S.E.2d at __, slip op. at 12-15. (internal citations, quotation marks, and brackets omitted and emphasis added).

The Supreme Court's analysis in *McGrady* — which the trial court did not have the benefit of at the time of Defendant's trial — makes clear that trial courts must now perform a more rigorous gatekeeping function when determining the admissibility of opinion testimony by expert witnesses than was the case under the prior version of Rule 702. Here, Dr. Duval's opinion that Simeka's death was a homicide as opposed to a suicide appears to have been largely —if not entirely — based on his interpretation of *non-medical* information conveyed to him by law enforcement officers who were involved in the investigation of Simeka's death.

> Q. Did you take into consideration statements made by witnesses at the scene as far as the circumstances related to the moments before and after Simeka Daughtridge was shot?
>
> A. Yes.
>
> Q. And could you please tell the jury the information that you considered as far as the circumstances of the moments before and after she was shot?
>
> A. It was relayed to me by law enforcement that eyewitnesses stated that there was some sort of verbal altercation occurring in the bedroom in which the decedent was in. A loud sound or a pop or something analogous to a gunshot was heard and then a person was seen to emerge from the room.
>
> Q. And the person that was seen to emerge from the room, do you know who that was?
>
> A. I believe it was described as the decedent's boyfriend.
>
> Q. And were you informed as to what he had told the police as far as whether or not that was consistent [sic] what other witnesses observed?
>
> A. I believe that again, according to information provided to me from law enforcement, was [sic] that the decedent's

boyfriend claimed that he was not in the room with the decedent at the time that the gunshot was heard.

Q. As a result of all of the information that you took into consideration, did you form an opinion as to whether or not Simeka Daughtridge was the victim of homicide?

A. Yes.

Q. And based on all the information that you were provided as well as the testing that you performed yourself, what was your expert opinion as to whether or not she was the victim of homicide?

A. In my opinion the manner of death is homicide.

Dr. Duval further testified during cross-examination as follows:

Q. Okay. A few other questions. The information you had received was from law enforcement only, correct, as far as what the --

A. To my recollection.

Q. -- as to the cause and manner of death?

A. Yes.

. . . .

Q. Okay. Outside of what law enforcement told you, is there anything about the wound itself that would indicate that it could not have been self-inflicted?

A. No.

We believe Defendant has raised legitimate concerns about the admissibility of Dr. Duval's opinion testimony on the issue of whether Simeka's death was a homicide. Clearly, Dr. Duval would have been qualified to provide an opinion that Simeka's death was a homicide — rather than a suicide — if that opinion was based on the type of evidence that was within his area of expertise as an expert witness in the field of forensic pathology. However, based on our review of the trial transcript, it is difficult to escape the conclusion that his opinion on this specific issue was based not on such medical evidence but instead on statements from law enforcement officers about the results of their investigation — information that bore little, if any, connection to his own observations stemming from his autopsy of Simeka.

The State has failed to adequately explain how Dr. Duval was in a better position than the jurors to evaluate whether the results of the officers' investigation were more suggestive of a homicide than a suicide. Therefore, based on the principles set out in *McGrady*, his opinion failed to pass muster under the new test governing the admissibility of expert witness opinion testimony that is now required in light of the 2011 amendment to Rule 702.

However, we are not convinced that the trial court's error in allowing Dr. Duval to give this opinion rose to the level of plain error. This is so for several reasons.

First, the results of the GSR testing are inconsistent with the theory that Simeka committed suicide. The State's evidence established that had Simeka, in fact, shot herself, GSR would have been present on her hands. However, no GSR was discovered on her hands during forensic testing. During direct examination, Freehling offered the following testimony:

> Q. And if somebody was to have shot themselves and died as a result of that gunshot wound shortly after shooting themselves, would you expect there to be gunshot residue on their hands?
>
> A. It's depending on the caliber of the weapon and if the body was touched or the hands were touched or anything that could lead to the lost [sic] of particles. You would expect to find particles on the hands of someone that shot themselves if it was as is. But then there's factors that lead to particle loss which could be the caliber of the weapon, if EMTs touched the body or while transferring to the hospital, anything [sic] of those factors could lead to particle loss.
>
> Q. Now, you talked about caliber. A .9 millimeter would you consider that a small caliber?
>
> A. That's higher caliber. The smaller calibers were [sic] little to no gunshot residue submitted are typically .22 caliber and .25 caliber.
>
> Q. And as far as you had talked about medical personnel, if there's no medical intervention as far as cleaning of the hands or medical procedures on the hands, that would not then affect a loss of gunshot residue; is that correct?

A. That's correct.

Freehling also testified that "[GSR] expands up to a few feet from the weapon. So the further away you get from the weapon, the less likely you are to have gunshot residue on you." He further testified as follows:

> Q. And as far as if there's gunshot residue mixed in with, say, blood can you still detect that gunshot residue?
>
> A. Yes.

Significantly, Simeka's blood-stained hands were not disturbed following the shooting as reflected by a Duke University Medical Center report prepared by Dr. Catherine Lynch, who stated therein that "[Simeka] was prepped for autopsy/police investigation with bags placed on her hands and was not wiped clean per my request." Moreover, when Simeka's body was delivered to Dr. Duval for autopsy, he observed that "I saw what appeared to be dried blood stains on [her] hands."

Consequently, the preservation of Simeka's hands in an undisturbed state for forensic testing and the total lack of *any* GSR on them forecloses the possibility that she shot herself. Furthermore, Simeka was shot with a .9 millimeter high caliber handgun as opposed to a smaller caliber handgun that — as Freehling noted — might not leave appreciable traces of GSR.

Defendant's clothing, conversely, tested positive for the presence of GSR despite his assertion during his interview with Investigator Sole that he had not been in Simeka's room at the time of the shooting. Given Freehling's testimony that GSR only travels "three to four feet . . .maximum" from a fired .9 millimeter gun and that the "cloud is only in the air for a matter of seconds" before the particles fall to the ground, the fact that three separate pieces of Defendant's clothing — his t-shirt, jeans, and hooded jacket — all tested positive for GSR clearly indicates that he was, in fact, present in Simeka's bedroom within several feet of the Kel-Tec .9 millimeter weapon at the time she was shot.[1]

Second, both of Simeka's children who testified at trial stated that Defendant exited Simeka's room *after* they heard the gunshot. No witness at trial who was present in the house at the time of the shooting testified to the contrary.

---

1. While no GSR was found on Defendant's hands, his absence from the residence for approximately one hour after the shooting would have afforded him the opportunity to take steps to remove the residue from his skin.

Third, the fact that Defendant made no effort to tend to Simeka and actually left the residence prior to the arrival of law enforcement officers or emergency medical personnel serves as circumstantial evidence of Defendant's guilt. *See State v. Bagley*, 183 N.C. App. 514, 521, 644 S.E.2d 615, 620 (2007) ("[E]vidence of flight is admissible if offered for the purpose of showing defendant's guilty conscience as circumstantial evidence of guilt of the crime for which he is being tried[.]"); *State v. Page*, 169 N.C. App. 127, 137, 609 S.E.2d 432, 438 (2005) ("The State presented evidence that defendant did not render assistance in reviving [the victim] or contact emergency personnel regarding the shooting. Defendant's hands were shown to contain gunshot residue. . . . Additionally, defendant's inconsistent statements regarding his location during the shooting is circumstantial evidence of defendant's guilt.").

Finally, any prejudicial effect from the erroneous admission of Dr. Duval's opinion on the manner of Simeka's death was mitigated during cross-examination by Defendant's trial counsel:

> Q. If you had been told that a victim, that a deceased person was suicidal, had attempted suicide, and in fact had the day before told her children, mom, was not going to be with you much longer, would you have considered that in determining whether something was a homicide or suicide?
>
> A. Sure.
>
> Q. But if you're not told that, you can't consider it in making your determination?
>
> A. Yes.
>
> Q. Were you told any of that in this case?
>
> A. Not to my recollection.
>
> . . . .
>
> Q. Do you know if the victim in this case ever expressed thoughts of killing herself?
>
> A. I have no idea.
>
> Q. Did you talk to the family and ask them about that?
>
> A. No.
>
> Q. Did you ask the police if she had any of that?

A. I don't know.

. . . .

Q. But at the time, you never even considered the self inflicted angle because it was never communicated to you?

A. No.

Q. And there's nothing about the autopsy itself per her wound that would tell you there's no way she could have done this herself?

A. That is the shortcoming of an autopsy.

Q. But that wound, and that type, where it was, and everything else, you've seen wounds like that that are self-inflicted?

A. Yes.

Furthermore, as noted earlier, the jury heard Dr. Duval explicitly admit during cross-examination that his opinion that Simeka did not commit suicide was based entirely on non-medical information he received from law enforcement officers.

Q. Okay. A few other questions. The information you had received was from law enforcement only, correct, as far as what the --

A. To my recollection.

Q. -- as to the cause and manner of death?

A. Yes.

. . . .

Q. Okay. Outside of what law enforcement told you, is there anything about the wound itself that would indicate that it could not have been self-inflicted?

A. No.

Thus, as a result of defense counsel's cross-examination of Dr. Duval, the jury was expressly told that in forming his opinion as to Simeka's manner of death (1) he had not been made aware of any of Defendant's evidence suggesting Simeka had a motive to commit suicide; (2) he instead relied exclusively on the information the officers had

related to him about their investigation; and (3) nothing from his analysis of Simeka's body during the autopsy shed light on whether the death was a homicide rather than a suicide. These admissions would have led a reasonable juror to place Dr. Duval's stated opinion on the manner of death in its proper context.

For these reasons, we conclude that the admission of Dr. Duval's opinion testimony did not amount to plain error. *See*, *e.g.*, *State v. Turbyfill*, __ N.C. App. __, __, 776 S.E.2d 249, 259 ("[The expert witness'] testimony appears to have violated Rule 702(a1) on the issue of defendant's specific alcohol concentration level as it related to the results of the Horizontal Gaze Nystagmus (HGN) Test defendant performed. However, we do not believe that, given an examination of the entire record, the error had a probable impact on the jury's [verdict]."), *disc. review denied*, __ N.C. __ 780 S.E.2d 560 (2015); *State v. Blizzard*, 169 N.C. App. 285, 294-95, 610 S.E.2d 245, 252 (2005) (medical expert's testimony that when he saw victim shortly after rape allegedly occurred, victim "truly was believable" to him was error but did not rise to level of plain error in light of overwhelming evidence of defendant's guilt).

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from prejudicial error.

NO PREJUDICIAL ERROR.

Judges ELMORE and HUNTER, JR. concur.

STATE OF NORTH CAROLINA
v.
DAMON J. GARRISON, DEFENDANT

No. COA15-1293

Filed 2 August 2016

Constitutional Law—right to counsel—defendant pro se—inquiry insufficient—comprehension of range of punishments

A defendant who proceeded pro se was entitled to a new trial where the trial court did not make an inquiry sufficient to satisfy itself that defendant comprehended the range of permissible punishments.

Appeal by defendant from Judgment entered 8 May 2015 by Judge Linwood O. Foust in Mecklenburg County Superior Court. Heard in the Court of Appeals 8 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant.

ELMORE, Judge.

Damon Garrison (defendant) appeals from his convictions, arguing that the trial court did not engage in the proper inquiry under N.C. Gen. Stat. § 15A-1242 (2015) before permitting him to proceed *pro se*. After careful review, we agree and conclude that defendant is entitled to a new trial.

I. Background

On 3 February 2014, defendant was indicted for possession of drug paraphernalia, felony possession of a schedule VI controlled substance,[1] maintaining a place to keep controlled substances, and manufacturing a controlled substance. Defendant was initially provided with court-appointed counsel. On 17 July 2014, however, defendant's counsel filed a motion to withdraw, stating that defendant "would like to present the strategy." After a hearing, the Honorable Lisa C. Bell allowed the motion.

1. Prior to trial, the trial court granted the State's motion to amend this charge to misdemeanor possession.

The case came on for trial at the 6 May 2015 Criminal Session of the Superior Court of Mecklenburg County, the Honorable Linwood O. Foust presiding. Defendant was not represented by counsel. On 8 May 2015, the jury returned verdicts finding defendant guilty of all charges. The trial court suspended defendant's sentence of four to fourteen months' imprisonment and placed him on twelve months' supervised probation. Defendant timely appeals.

II. Analysis

Defendant argues that the trial court did not comply with the requirements of N.C. Gen. Stat. § 15A-1242 before permitting him to proceed *pro se*.

We review a trial court's decision to permit a defendant to represent himself *de novo*. *State v. Watlington*, 216 N.C. App. 388, 393–94, 716 S.E.2d 671, 675 (2011). "A criminal defendant's right to representation by counsel in serious criminal matters is guaranteed by the Sixth Amendment to the United States Constitution and Article I, §§ 19, 23 of the North Carolina Constitution." *State v. Hyatt*, 132 N.C. App. 697, 702, 513 S.E.2d 90, 94 (1999) (citing *Gideon v. Wainwright*, 372 U.S. 335 (1963)). A criminal defendant also " 'has a right to handle his own case without interference by, or the assistance of, counsel forced upon him against his wishes.' " *Id.* (quoting *State v. Mems*, 281 N.C. 658, 670–71, 190 S.E.2d 164, 172 (1972)). "The trial court, however, must insure that constitutional and statutory standards are satisfied before allowing a criminal defendant to waive in-court representation." *Id.* (citing *State v. Thomas*, 331 N.C. 671, 673, 417 S.E.2d 473, 475 (1992)).

Relevant here, N.C. Gen. Stat. § 15A-1242 (2015) states,

> A defendant may be permitted at his election to proceed in the trial of his case without the assistance of counsel only after the trial judge makes thorough inquiry and is satisfied that the defendant:
>
> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

This Court has previously held that "[t]he inquiry is a mandatory one, and failure to conduct it is prejudicial error." *State v. Godwin*, 95 N.C. App. 565, 572, 383 S.E.2d 234, 238 (1989) (citing *State v. Bullock*, 316 N.C. 180, 185–86, 340 S.E.2d 106, 108–09 (1986)); *see also State v. Stanback*, 137 N.C. App. 583, 586, 529 S.E.2d 229, 231 (2000) (holding that "because it is prejudicial error to allow a criminal defendant to proceed *pro se* without making the inquiry required by section 15A-1242, Defendant must be granted a new trial").

Defendant argues that the trial court did not conduct any of the three required inquiries under N.C. Gen. Stat. § 15A-1242(1)–(3). The State concedes error under N.C. Gen. Stat. § 15A-1242(3), noting that defendant was not advised of the range of permissible punishments and admitting that a new trial is warranted. After a thorough review of the transcripts, we agree and conclude that the trial court failed to make an inquiry sufficient to satisfy itself that defendant comprehended the range of permissible punishments under N.C. Gen. Stat. § 15A-1242(3). Accordingly, as the inquiry is a mandatory one, the trial court's failure to satisfy the statutory requirements before permitting defendant to proceed pro se constitutes prejudicial error. *See Godwin*, 95 N.C. App. at 572, 383 S.E.2d at 238. Because we conclude that defendant is entitled to a new trial, we do not reach his second argument on a challenged jury instruction.

III. Conclusion

The trial court failed to comply with N.C. Gen. Stat. § 15A-1242 before permitting defendant to proceed *pro se*. As a result, defendant is entitled to a new trial.

NEW TRIAL.

Judges DAVIS and DIETZ concur.

STATE OF NORTH CAROLINA
v.
CURTIS RAY GATES, JR., DEFENDANT

No. COA15-626

Filed 2 August 2016

1. Sexual Offenses—second-degree—indictment—only attempt charged—only verdict for attempted offense supported

The trial court erred by accepting the jury's verdict of guilty of second-degree sexual offense when the indictment charged attempted second-degree sexual offense. The indictment failed to allege that defendant actually committed a sex offense, so it was ineffective to confer jurisdiction upon the trial court to convict defendant of second-degree sexual offense; however, the indictment sufficiently alleged attempted second-degree sexual offense and the verdict supported a conviction for that offense.

2. Appeal and Error—constitutional law—effective assistance of counsel—claim based on record evidence—appellate review available

Appellate review of a claim of ineffective assistance of counsel was available where the merits of the claim could be reviewed based on the appellate review.

3. Evidence—other crimes—inadmissible to prove defendant's propensity—admissible for other purposes—identifying defendant—natural development of facts

Defendant's claim of ineffective assistance of counsel was overruled where counsel did not object to evidence of another crime that was used to show the process of identifying defendant and to present the narrative of the facts.

Appeal by Defendant from judgment and commitment entered 18 December 2014 by Judge Charles H. Henry in Onslow County Superior Court. Heard in the Court of Appeals 16 December 2015.

Attorney General Roy Cooper, by Assistant Attorney General Torrey D. Dixon, for the State.

Paul F. Herzog, for Defendant-appellant.

INMAN, Judge.

Curtis Ray Gates, Jr. ("Defendant") appeals his convictions for second-degree sex offense and breaking or entering. We vacate and remand for entry of judgment convicting him of attempted sexual offense and breaking or entering because the indictment charging Defendant alleged only an attempted and not a completed sex offense. We also overrule Defendant's claim that he received ineffective assistance of counsel.

I. Background

The State's evidence at trial was as follows:

Around 7:30 a.m. on 10 May 2013, KL[1] was sexually assaulted by a man in her home. She had first met her attacker about two months earlier, when he knocked on the door of her residence and asked if a "Corporal So-and-so" lived there. KL told the man "no," and he left. KL did not see the man again until the attack on 10 May 2013.

The morning she was attacked, KL's husband had left their home for work before 5:00 a.m. and did not lock the exterior doors. KL had not heard her husband leave, and thought it was her husband's footsteps she heard when her attacker entered the house. When she awoke more fully, she saw a man standing in the doorway of her bedroom wearing a green T-shirt, dark pants, and gray shoes. The man asked KL where her husband was and she responded "at work." KL then asked the man, "why are you here?" The man responded that he wanted to have sex with her. When she tried to get up from her bed, the man pushed her back down. He told her to be quiet and that he did not want to hurt her.

KL testified that she was afraid for herself and for her children, who were elsewhere in the house, so she did not attempt to resist. KL told the man she was sick, attempting to dissuade him, but the man did not stop. He removed her bra and put on a condom. He tried to penetrate her vaginally but was not successful. He then removed the condom and began to put a blanket over KL's face but stopped when she begged him not to. He forced KL to perform fellatio on him. After about two minutes, the man ejaculated and demanded that KL rinse out her mouth. KL spit some of the semen out, but tried to retain some behind in the back of her throat. The man then told KL he was sorry, asked for a hug, hugged KL, and walked out the back door of the home.

KL then called her husband, told him what had happened, and locked all the doors. She swabbed the inside of her mouth with a Q-tip and cotton balls and placed those items in a Ziploc bag. Officer Bryan Stitz

1. We use initials for the victim KL to protect her privacy.

("Officer Stitz") of the Jacksonville Police Department arrived about five or ten minutes later. KL told Officer Stitz what had happened. A second police officer swabbed KL's mouth to collect evidence.

Officer William Woolfolk ("Officer Woolfolk") of the Jacksonville Police Department testified that he arrived at the victim's residence around 8:44 a.m. on 10 May 2013. He spoke with Officer Stitz and a detective on the scene who advised him that a sexual assault had occurred and there was "some biological evidence in a sandwich bag inside the foyer." While wearing latex gloves, Officer Woolfolk collected a sandwich bag containing two cotton balls and one Q-tip. He then placed the evidence in his car. He changed gloves and collected more Q-tip samples from the sink. Once he had gathered the evidence, he transported the samples to the police department. The samples were later sent to the United States Army Criminal Investigation Laboratory ("USACIL") for analysis. A forensic biologist employed by USACIL, found three separate DNA profiles in the samples: KL, her husband, and Defendant.

KL saw the man who attacked her two weeks later when she was walking home from a shopping trip to Walmart around 9:00 p.m. He was wearing a khaki-green trainer shirt, dark colored knee-length pants, and black shoes with red lines. The man asked her if she remembered him, and KL answered "yes." He asked KL if she had told her husband about the incident and asked about meeting again. KL walked home immediately and told her husband. Her husband quickly got dressed and chased after the man, but was unable to find him.

On 3 June 2013, KL met with a special agent trained as a sketch artist at the police department. KL provided a rough sketch of her attacker she had drawn herself. After the sketch artist met and spoke with her at length about the incident, he drew a composite of KL's attacker.

The warrant for Defendant's arrest alleged that he "unlawfully, willfully, and feloniously did engage in a sex offense with [KL] by force and against that victim's will." It also alleged that he committed a crime against nature with KL and alleged that Defendant entered KL's residence with the intent to commit a felony.

Defendant was charged in a three-count bill of indictment. The second and third counts were for "Crime Against Nature" and "Breaking and Entering," respectively, stating charges consistent with the arrest warrant. But count one in the indictment, labeled "Second Degree Sexual Offense," did not match the arrest warrant. It stated that Defendant "willfully and feloniously did *attempt* to engage in a sex offense with [KL] by force and against that victim's will." (Emphasis added.)

The word "attempt" in the indictment apparently escaped the notice of the trial court, who instructed jurors that "[t]he defendant has been charged with second-degree sexual offense." The trial judge provided no instruction regarding attempt. The jury returned a guilty verdict for Defendant for second-degree sex offense and felonious breaking or entering.[2] The trial court consolidated the offenses into one judgment. Defendant was sentenced in the presumptive range to 96 to 176 months in prison. Defendant gave oral notice of appeal.

II. Analysis

A. Validity of the Indictment

[1] Defendant first argues that the trial court erred in accepting the jury's verdict of guilty of second-degree sex offense, when count one of the indictment charged *attempted* second-degree sex offense. We agree.

"[W]here an indictment is alleged to be invalid on its face, thereby depriving the trial court of its jurisdiction, a challenge to that indictment may be made at any time, even if it was not contested in the trial court." *State v. Wallace*, 351 N.C. 481, 503, 528 S.E.2d 326, 341, *cert. denied*, 531 U.S. 1018, 148 L. Ed. 2d 498 (2000). "This Court reviews the sufficiency of an indictment *de novo*. An indictment must set forth each of the essential elements of the offense . . . . To require dismissal any variance must be material and substantial and involve an essential element." *State v. Hooks*, __ N.C. App. __, __, 777 S.E.2d 133, 138 (2015) (internal quotation marks and citation omitted).

North Carolina permits "short-form" indictments in murder, sex offense, and rape cases. *Wallace*, 351 N.C. at 508, 528 S.E.2d at 343. N.C. Gen. Stat. § 15-144.2(a) (2015) provides, in pertinent part:

> In indictments for sex offense it is not necessary to allege every matter required to be proved on the trial; but in the body of the indictment, after naming the person accused, the date of the offense, the county in which the sex offense was allegedly committed, and the averment "with force and arms," as is now usual, it is sufficient in describing a sex offense to allege that the accused person unlawfully, willfully, and feloniously did engage in a sex offense with the victim, naming the victim, by force and against the will of such victim and concluding as is now required by law.

---

2. Before the case was submitted to the jury, the State dismissed the charge of crime against nature.

"[T]he trial court lacks subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense." *State v. Scott*, 150 N.C. App. 442, 453–54, 564 S.E.2d 285, 294 (2002). "While it is permissible to convict a defendant of a lesser degree of the crime charged in the indictment, . . . an indictment will not support a conviction for an offense more serious than that charged." *Id.* at 454, 564 S.E.2d at 294.

In this case, count one of the indictment does not set forth each element of second-degree sex offense, as required to confer jurisdiction upon the trial court to convict for that offense. *See Hooks*, __ N.C. App. at __, 777 S.E.2d at 138. Because an attempted sex offense, as described in this indictment, is not a completed sex offense, the statutory essential element that Defendant "engage in a sexual act" is absent.

The State argues that the indictment is valid because the word "attempt" is simply "used in its common meaning, to describe the defendant's unsuccessful attempt to engage in vaginal intercourse with the victim." This argument is without merit because the North Carolina statute provides a definition of "sexual act" which does not include vaginal intercourse. N.C. Gen. Stat. § 14-27.20(4); 14-27.5 (2013). Further, "[w]ords [(in a statutorily prescribed form of criminal pleading)] having technical meanings must be construed according to such meanings." *State v. Coker*, 312 N.C. 432, 434, 323 S.E.2d 343, 346 (1984). The word "attempt" in the indictment must be construed according to its technical meaning—an attempted second-degree sex offense.

The State further argues that count one and count two (crime against nature), when considered together, satisfy all the elements of a valid short-form indictment for completed second-degree sexual offense. This argument is without merit. Although count one contains the phrase "by force and against the victim's will," count two does not. The indictment does not allege that the crime against nature was by force and against the victim's will. Even if we assume the words "crime against nature" in count two of the indictment refer to a sexual act, the indictment does not show that the crime against nature it alleges is the sexual act referenced in count one. Without the specific allegation that the crime against nature was committed by force and against the person's will, the indictment is devoid of an essential element of second-degree sex offense. Also, because the State dismissed the crime against nature charge, the jury had no opportunity to determine Defendant's guilt to that count of the indictment.

The facts of this case are similar to those in *State v. Pettis*, COA11-1438, 2012 N.C. App. LEXIS 734, *1, 221 N.C. App. 435, 727 S.E.2d

25 (2012) (unpublished). In *Pettis*, both the heading and the body of the indictment at issue contained language pertaining to attempted sex offense by a person assuming a parental role. During trial, the prosecutor misspoke and stated that the body of the indictment did not contain the word "attempt" and that the State was proceeding on the principle charge. *Id.* at *3–5. The trial court, relying on the prosecutor's misstatement, instructed the jury on completed sexual offense by a person assuming a parental role. *Id.* at *5–6. Because the trial court did not have " 'subject matter jurisdiction to try, or enter judgment on, an offense based on an indictment that only charges a lesser-included offense[,]' " this Court vacated the defendant's conviction. *Id.* at *7 (quoting Scott, 150 N.C. App. at 453–54, 564 S.E.2d at 294).

The indictment charging Defendant with second-degree sexual offense failed to allege that Defendant actually committed a sex offense, so it was ineffective to confer jurisdiction upon the trial court to convict Defendant of second-degree sexual offense. However, the indictment sufficiently alleged attempted second-degree sexual offense and the jury's verdict supports a conviction for that offense. *See* N.C. Gen. Stat. § 15-144.2 (2015) ("Any bill of indictment containing [the short-form] averments and allegations . . . will support a verdict of guilty of . . . an attempt to commit a sex offense or an assault."); N.C. Gen. Stat. § 15-170 (2015) ("Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."); *State v. Stokes*, 367 N.C. 474, 482, 756 S.E.2d 32, 38 (2014) ("By finding defendant guilty of second-degree kidnapping, the jury necessarily found beyond a reasonable doubt all the elements of the lesser included offense of attempted second-degree kidnapping."). We vacate the judgment and remand this case to the trial court for entry of judgment of conviction for attempted second-degree sexual offense and breaking or entering and for resentencing. *See Lineberger v. N.C. Dep't of Corr.*, 189 N.C. App. 1, 18, 657 S.E.2d 673, 684 (2008) ("Under a consolidated sentence, if one of the counts upon which the conviction is based is set aside, the entire judgment must be remanded for resentencing even if the remaining counts would have been sufficient, standing alone, to justify the consolidated sentence.").

The trial court must determine Defendant's sentences for attempted second-degree sexual offense and breaking or entering. *State v. Wortham*, 318 N.C. 669, 674, 351 S.E.2d 294, 297 (1987) ("[W]e think the better procedure is to remand for resentencing when one or more but not all of the convictions consolidated for judgment has been vacated."); *see Scott*,

150 N.C. App. at 453–54, 564 S.E.2d at 294 (vacating the defendant's conviction for first-degree arson and remanding to the trial court for entry of judgment and resentencing for second-degree arson because the indictment failed to allege all the essential elements of first-degree arson).

On remand, the trial court is not bound by its earlier decision to consolidate Defendant's convictions for sentencing. N.C. Gen. Stat. § 15A-1335 (2015) provides, in pertinent part:

> When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

N.C. Gen. Stat. § 15A-1335 "does not prohibit the trial court's replacement of concurrent sentences with consecutive sentences upon resentencing, provided neither the individual sentences, nor the aggregate sentence, exceeds that imposed at the original sentencing hearing." *State v. Oliver*, 155 N.C. App. 209, 211, 573 S.E.2d 257, 258 (2002).

B. Ineffective Assistance of Counsel

Defendant next argues that he received ineffective assistance of counsel because his counsel at trial failed to object to evidence of Defendant's involvement in another sexual assault of a different female victim. After careful review of the record, we disagree.

1. Standard of Review

[2] "In order to obtain relief on the basis of an ineffective assistance of counsel claim, Defendant is required to demonstrate that his trial counsel's performance was deficient and that this deficient performance prejudiced the defense." *State v. Pemberton*, 228 N.C. App. 234, 240, 743 S.E.2d 719, 724 (2013) (internal citations omitted). The United States Supreme Court has provided a two-part test to use in deciding whether a defendant has a valid claim for ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as

> to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). The North Carolina Supreme Court adopted this test in *State v. Braswell*, 312 N.C. 553, 562, 324 S.E.2d 241, 248 (1985). To establish that counsel was ineffective, "the defendant must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. "[E]ven if counsel made an unreasonable error, [a defendant must show that] there is a reasonable probability that, but for counsel's errors, there would have been a different result in the proceedings." *State v. Banks*, 210 N.C. App. 30, 49, 706 S.E.2d 807, 821 (2011) (internal quotation marks omitted).

"In general, claims of ineffective assistance of counsel should be considered through motions for appropriate relief and not on direct appeal." *State v. Stroud*, 147 N.C. App. 549, 553, 557 S.E.2d 544, 547 (2001). However, when the appellate court can adequately review the merits of an ineffective assistance of counsel claim based on the appellate record, we will do so in the interest of judicial economy.

> It is well established that ineffective assistance of counsel claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing.

State v. Thompson, 359 N.C. 77, 122–23, 604 S.E.2d 850, 881 (2004) (internal quotation marks and citation omitted).

Defendant's ineffective assistance of counsel claim is based upon evidence introduced at trial and does not rely upon information outside the record. Accordingly, we address it.

2. Evidence of Another Crime

[3] During a criminal trial, evidence of other crimes committed by the defendant—crimes for which he is not on trial—is not admissible to prove the defendant's propensity to commit the crime charged. N.C. Gen. Stat. §8C-1, N.C. R. Evid. 404(b) (2015). But evidence of other crimes is admissible for other purposes, including to identify the defendant as the perpetrator of the crime for which he is on trial. *Id.* In this case, the State introduced evidence of Defendant's involvement in another sexual assault because a sample of Defendant's DNA collected in the

investigation of that assault matched DNA found at the scene of the assault on KL.

Defendant argues his counsel should have objected to testimony by two Jacksonville Police Department officers who investigated a sexual assault on 14 July 2013 ("the July assault"), two months after the assault on KL.

In a *voir dire* hearing outside the jury's presence, the State offered transcribed testimony by Officer Chris Funcke ("Officer Funcke") given in Defendant's trial following the July assault.[3] The State argued that the evidence was probative to show Defendant's identity as KL's attacker and to tell jurors the complete story of how law enforcement officers had matched Defendant's DNA with DNA found at the crime scene in the present case. The prosecutor explained that Defendant was not a suspect in the present case until officers investigated him in the July assault case. The prosecutor noted similarities between the two incidents in that each: (1) involved an alleged assault on a stranger, (2) involved the demand of oral sex in a "forced situation," (3) happened in the early morning hours, and (4) occurred within three miles of one another. Defense counsel objected to testimony relaying a hearsay statement by the victim in the July assault and asked the trial court to tell the jury that evidence about the July assault "is being offered for these particular purposes and these purposes only." Defense counsel acknowledged that the State was offering the evidence "to link up how they ended up with Mr. Gates and his DNA and brought it into here." The trial court allowed the testimony, including the July assault victim's hearsay statement, for the purposes of proving Defendant's identity as KL's attacker, "enhanc[ing] the natural development of the facts," and "describ[ing] a chain of circumstances which the [S]tate needs to show, in order to introduce testimony as to a subsequent search warrant of [D]efendant's home, as well as the acquisition of the DNA sample." Following the *voir dire* hearing, and prior to Officer Funcke's testimony, the trial court gave the jury a limiting instruction:

> Ladies and gentlemen, this testimony is not being admitted to show or prove the character of the defendant, or

3. Defendant was convicted on charges of first-degree sexual offense, first-degree kidnapping, and crime against nature in the other case, which this Court reviewed and held was free from error. *State v. Gates*, __ N.C. App. __, __, 781 S.E.2d 883, 886 (2016). Jurors in the present case were not told about Defendant's conviction in that case.

> any propensity of the defendant to commit any offense. Mr. Funcke's testimony is being received solely for the purpose of showing the identity of the person who committed the alleged offense on May 10, 2013. It is also being admitted to explain the development of the facts of the case and the chain of circumstances that led to further law enforcement actions, which will be described by additional witnesses offered by the state. If you believe this testimony or evidence, you may consider it, but only for the limited purposes for which it was received.

The trial court reiterated this limiting instruction during the jury instructions at the end of the trial.

Officer Funcke testified at trial for the present case as follows:

While patrolling the parking lot of Hooligans nightclub in the early morning of 14 July 2013, Officer Funcke noticed a car parked behind an adjacent building. When he pulled his vehicle next to the parked car, he saw Defendant, whom he identified in court, lying on the ground and a woman performing fellatio on him. When the woman saw Officer Funcke, she stood up and ran toward him, "crying hysterically," thanking him and saying "he [(Defendant)] was going to rape me." She told Officer Funcke that she had been trying to get into her car when Defendant punched her and forced her to the location where Officer Funcke had found them. Officer Funcke then examined Defendant's car at the scene and saw a green, military-style shirt, like that identified by KL in the present case. Another officer who arrived on the scene mentioned the sketch of KL's attacker and Officer Funcke recognized that Defendant resembled that sketch.

The trial court also allowed testimony by Detective Karen Scott ("Detective Scott") as follows: Detective Scott was the lead investigator of the July assault and was also assigned to KL's case, which remained open as officers had not identified a suspect. While searching Defendant's house in connection with the July assault, Detective Scott found shoes consistent with those KL had described were worn by her attacker. Detective Scott collected a sample of Defendant's DNA and discovered that it matched the DNA on the swab samples taken from KL's residence.

The trial court did not give jurors a limiting instruction regarding Detective Scott's testimony. Defense counsel did not object before the jury to testimony by either Officer Funcke or Detective Scott.

N.C. Gen. Stat. §8C-1, N.C. R. Evid. 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

Rule 404(b) is "a clear general rule of inclusion of relevant evidence of other crimes, wrongs or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *State v. Coffey*, 326 N.C. 268, 278–79, 389 S.E.2d 48, 54 (1990) (emphasis removed).

> [A]dmission of evidence of a criminal defendant's prior bad acts, received to establish the circumstances of the crime on trial by describing its immediate context, has been approved in many other jurisdictions following adoption of the Rules of Evidence. This exception is known variously as the "same transaction" rule, the "complete story" exception, and the "course of conduct" exception. Such evidence is admissible if it forms part of the history of the event or serves to enhance the natural development of the facts.

State v. Agee, 326 N.C. 542, 547, 391 S.E.2d 171, 174 (1990) (internal quotation marks and citations omitted). "Our Supreme Court has ruled that the list of exceptions contained in Rule 404(b) is not exclusive and that extrinsic evidence of conduct is admissible if relevant for some purpose other than to show that defendant has the propensity for the type of conduct for which he is being tried." *State v. Pruitt*, 94 N.C. App. 261, 266, 380 S.E.2d 383, 385 (1989) (internal quotation marks omitted). "Moreover, in cases involving prior sex offenses, including rape, our courts have been markedly liberal in the admission of 404(b) evidence." *State v. Harris*, 140 N.C. App. 208, 211, 535 S.E.2d 614, 617 (2000). "The burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted." *State v. Moseley*, 338 N.C. 1, 32, 449 S.E.2d 412, 431 (1994).

Our review of the record, summarized above, reveals that Defendant could not have met his burden to show there was no proper purpose for the testimony by Officer Funcke and Detective Scott. It was relevant to prove Defendant's identity as KL's attacker, as the trial court stated. The

testimony explained why law enforcement officers identified Defendant as a suspect in the assault on KL and how they obtained his DNA, which matched DNA samples collected following KL's assault. It "serve[d] to enhance the natural development of the facts." *Agee*, 326 N.C. at 547, 391 S.E.2d at 174. Because of these legitimate purposes, the testimony was admissible. Defense counsel's failure to object to the introduction of the evidence was not deficient. Defendant's ineffective assistance of counsel claim is therefore overruled.[4]

III. Conclusion

For the foregoing reasons, we vacate the conviction for second-degree sexual offense and remand for entry of judgment and resentencing for attempted second-degree sexual offense and breaking or entering. We overrule Defendant's claim for ineffective assistance of counsel.

VACATED AND REMANDED.

Judges STEPHENS and HUNTER, JR. concur.

4. We also deny Defendant's Motion Requesting This Court to Take Judicial Notice That the Sun Rose at 6:10 A.M. on Friday, May 10, 2013, at Jacksonville, Onslow County, North Carolina Based on the Records of the US Naval Observatory. Knowledge of the time the sun rose on that particular day may pertain to whether the evidence of the other crime showed Defendant had a common plan or scheme, but it is not necessary with regard to identity or showing the complete story.

STATE OF NORTH CAROLINA
v.
BRIAN HANCOCK, DEFENDANT

No. COA15-1311

Filed 2 August 2016

Probation and Parole—revocation—grounds—independent determination by trial court

Defendant did not show that the trial court's decision to revoke his probation was legally erroneous, unsupported by the evidence, or manifestly unreasonable. Even though the State conceded error, the Court of Appeals was not bound by that concession. Due to the timing of the underlying offense, defendant was not subject to the Justice Reinvestment Act of 2011 (JRA) and its absconding condition, and his probation could only be revoked upon a finding that he committed a new criminal offense. Although defendant argued that the mere fact of being charged was insufficient to support a finding of commission of an offense, a defendant need not be convicted for the trial court to find that defendant violated N.C.G.S. § 15A-1343(b)(1) by committing an offense.

Appeal by defendant from judgment entered 7 August 2015 by Judge W. David Lee in Union County Superior Court. Heard in the Court of Appeals 11 May 2016.

Attorney General Roy Cooper, by Assistant Attorney General Kimberly S. Murrell, for the State.

Joseph P. Lattimore for defendant-appellant.

ELMORE, Judge.

Brian Hancock (defendant) appeals from the judgment and commitment entered upon revocation of his probation. Because the evidence and the trial court's findings support revocation based on defendant's violation of the regular condition of probation in N.C. Gen. Stat. § 15A-1343(b)(1), we affirm.

I. Background

On 12 September 2012, defendant pleaded guilty to possession with intent to sell or deliver (PWISD) cocaine, an offense he committed on

18 January 2011, prior to the 1 December 2011 effective date of the Justice Reinvestment Act of 2011 (JRA). *See* N.C. Sess. Laws 2011-192, §§ 1, 4 (June 23, 2011); *see also* N.C. Sess. Laws 2011-412, § 2.5 (Oct. 15, 2011) (amending effective date in N.C. Sess. Laws 2011-192, § 4(d)). The trial court suspended defendant's sentence of fifteen to eighteen months' imprisonment and placed defendant on supervised probation for sixty months.

On 8 February 2013, a probation officer filed a violation report, alleging that defendant had willfully violated the conditions of his probation as follows:

> 1. Condition of Probation "Not use, possess or control any illegal drug or controlled substance . . ." in that
>
> ON 02/07/2013, DURING A WARRANTLESS SEARCH OF [DEFENDANT'S] RESIDENCE, THREE ROCKS OF COCAINE, A SMALL AMOUNT OF MARIJUANA AND DRUG PARAPHERNALIA WERE FOUND.

A subsequent violation report, filed 27 March 2013,[1] charged defendant with eleven willful violations, including the following:

> 10. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> THE DEFENDANT WAS CHARGED ON 02/07/2013 IN UNION COUNTY ON CASE 13CR 050542 FOR THE MISDEMEANOR POSSESSION OF DRUG PARAPHERNALIA AND OF POSSESSION OF MARIJUANA OF UP TO 1/2 OZ. . . .
>
> 11. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> ON 02/07/2013 IN UNION COUNTY THE DEFENDANT WAS CHARGED ON 13CR 050542 WITH PWISD COCAINE. . . .

1. It appears that a third violation report was filed 27 May 2015, alleging that defendant had "failed to notify probation officer of his location, therefore making himself unavailable and has absconded." The record on appeal does not contain this document. Defendant represents to this Court that the 27 May 2015 violation "report could not be located in the trial court's file" and notes that the trial court "did not find a violation based on that allegation." The hearing transcript reflects that the trial court expressly declined to find the violation alleged in the 27 May 2015 report.

The trial court held a violation hearing on 7 August 2015. The probation officer who filed the 8 February 2013 and 27 March 2013 violation reports retired prior to the hearing and did not attend. Defendant's then-current probation officer read each report's allegations into the record. The officer further testified that defendant had failed to report to him or contact the probation office at any time since defendant had been assigned to the officer's caseload. Counsel for defendant cross-examined the officer but offered no evidence. After hearing from the parties, the trial court revoked defendant's probation and activated his suspended sentence. Defendant appeals.

II. Analysis

On appeal, defendant claims the trial court abused its discretion by revoking his probation without a legal basis. The State concedes the error and asks this Court to remand to the trial court for entry of an appropriate sanction short of revocation pursuant to our holding in *State v. Nolen*, 228 N.C. App. 203, 206, 743 S.E.2d 729, 731 (2013). "This Court, however, is not bound by the State's concession. The general rule is that stipulations as to the law are of no validity." *State v. Phifer*, 297 N.C. 216, 226, 254 S.E.2d 586, 591 (1979) (citations omitted). Rather, it is the role of the reviewing court to determine whether "a particular legal conclusion follows from a given state of facts[.]" *Id.* (citations omitted). Therefore, notwithstanding the State's concession, we must review the record to determine whether the parties correctly ascribe error to the trial court.

The following principles govern our review of a judgment revoking probation:

> [A] proceeding to revoke probation is not a criminal prosecution and is often regarded as informal or summary. Thus, the alleged violation of a valid condition of probation need not be proven beyond a reasonable doubt. Instead, all that is required in a hearing of this character is that the evidence be such as to reasonably satisfy the judge in the exercise of his sound discretion that the defendant has willfully violated a valid condition of probation. Accordingly, the decision of the trial court is reviewed for abuse of discretion.

State v. Murchison, 367 N.C. 461, 464, 758 S.E.2d 356, 358 (2014) (citations, quotation marks, and alterations omitted). A trial court abuses its discretion if its decision is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision."

State v. Maness, 363 N.C. 261, 279, 677 S.E.2d 796, 808 (2009). Moreover, erroneous findings may be disregarded as harmless if the trial court's decision to revoke probation is supported by at least one properly-found violation. *See State v. Belcher*, 173 N.C. App. 620, 625, 619 S.E.2d 567, 570 (2005).

As the parties observe, this case is governed by the JRA, to wit:

> [F]or probation violations occurring on or after 1 December 2011, the JRA limited trial courts' authority to revoke probation to those circumstances in which the probationer: (1) commits a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1); (2) absconds supervision in violation of N.C. Gen. Stat. § 15A-1343(b)(3a); or (3) violates any condition of probation after serving two prior periods of [confinement in response to violation (CRV)] under N.C. Gen. Stat. § 15A-1344(d2).

Nolen, 228 N.C. App. at 205, 743 S.E.2d at 730 (citing N.C. Gen. Stat. § 15A-1344(a)).

Here, because defendant committed his underlying offense prior to 1 December 2011, he was not subject to the JRA's "absconding" condition of probation enacted in N.C. Gen. Stat. § 15A-1343(b)(3a). *Id.* at 206, 743 S.E.2d at 731; *see also State v. Hunnicutt*, 226 N.C. App. 348, 354–55, 740 S.E.2d 906, 911 (2013) (noting that the JRA initially made this provision "effective for probation *violations* occurring on or after 1 December 2011[,]" but the "effective date clause was later amended, however, to make the new absconding condition applicable only to *offenses* committed on or after 1 December 2011") (emphasis added). The record on appeal further shows that defendant has served no prior CRVs under N.C. Gen. Stat. § 15A-1344(d2). Therefore, the trial court was authorized to revoke defendant's probation only upon a finding that he committed a new criminal offense in violation of N.C. Gen. Stat. § 15A-1343(b)(1).

In announcing its ruling in open court, the trial court stated that "the revocation is based on absconding," and it explicitly found certain violations alleged in the report filed 27 March 2013 as follows:

> I am reasonably satisfied in my discretion that this probationer has willfully and without lawful excuse violated the terms and conditions of his probationary sentence by testing positive for cocaine and marijuana, by failing to complete any of his community service, by failing to report to his probation officers as directed. That as of March 11,

> 2013, the defendant had willfully avoided supervision and was therefore an absconder; that again as of March 26th, 2013, the defendant had willfully avoided supervision as of that date and was an absconder. That he has failed to obtain his substance abuse assessment, that he has otherwise failed to report as directed. . . .

These findings correspond to paragraphs one, two, three, eight, and nine in the 27 March 2013 report.

In its written judgment, however, the trial court found additional violations not included in its oral findings. Specifically, the court found that defendant willfully violated his probation as alleged in the report filed 8 February 2013 and as alleged in paragraphs ten and eleven of the report filed 27 March 2013.[2] The written judgment includes an additional finding that each violation found by the court was, "in and of itself, a sufficient basis upon which [the court] should revoke probation and activate the suspended sentence." Moreover, it includes a finding that the court was authorized to "revoke defendant's probation . . . for the willful violation of the condition(s) that he[ ] not commit any criminal offense, G.S. 15A-1343(b)(1), or abscond from supervision, G.S. 15A-1343(b)(3a), as set out above."

As previously stated, because defendant was a pre-JRA probationer he was not subject to the "absconding" condition in N.C. Gen. Stat. § 15A-1343(b)(3a). Insofar as the trial court purported to revoke defendant's probation on this basis, its ruling was in error. However, "a trial court's ruling must be upheld if it is correct upon any theory of law[,] and thus it should not be set aside merely because the court gives a wrong or insufficient reason for [it]." *Opsahl v. Pinehurst Inc.*, 81 N.C. App. 56, 63, 344 S.E.2d 68, 73 (1986) (citation and internal quotation marks omitted).

Here, the court made findings in its written judgment that support its decision to revoke defendant's probation. In this circumstance, the written judgment is controlling. *See State v. Kerrin*, 209 N.C. App. 72, 75, 703 S.E.2d 816, 818 (2011) (concluding that "the trial court was not required to announce all of the findings and details of its judgment in open court"); *State v. Williamson*, 61 N.C. App. 531, 533–34, 301 S.E.2d 423, 425 (1983) ("The minimum requirements of due process in a final probation revocation hearing" require "a written judgment by the judge

2. The court also found that defendant committed the violations alleged in paragraphs one through five and seven through eleven of the 27 March 2013 report.

which shall contain (a) findings of fact as to the evidence relied on, [and] (b) reasons for revoking probation.").

Of the several violations found by the trial court, defendant was subject to revocation only for committing a new crime in violation of N.C. Gen. Stat. § 15A-1343(b)(1). The court found that defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) as alleged in paragraphs ten and eleven of the 27 March 2013 report. Defendant contests this finding, arguing that the State failed to present any evidence that he committed the criminal offenses alleged in paragraphs ten and eleven. Yet, the 27 March 2013 violation report alleged the following probation violations:

> 10. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> THE DEFENDANT WAS CHARGED ON 02/07/2013 IN UNION COUNTY ON CASE 13CR 050542 FOR THE MISDEMEANOR POSSESSION OF DRUG PARAPHERNALIA AND OF POSSESSION OF MARIJUANA OF UP TO 1/2 OZ. . . .
>
> 11. Condition of Probation "Commit no criminal offense in any jurisdiction" in that
>
> ON 02/07/2013 IN UNION COUNTY THE DEFENDANT WAS CHARGED ON 13CR 050542 WITH PWISD COCAINE. . . .

See N.C. Gen. Stat. § 15A-1343(b)(1) (2015); *see also* N.C. Gen. Stat. §§ 90-95(a)(1), (3), (b)(1), (d)(4), 90-113.22 (2015).

As defendant observes, the mere fact that he was charged with certain criminal offenses is insufficient to support a finding that he committed them. *State v. Lee*, 232 N.C. App. 256, 260, 753 S.E.2d 721, 723 (2014). However, a defendant need not be convicted of a criminal offense in order for the trial court to find that a defendant violated N.C. Gen. Stat. § 15A-1343(b)(1) by committing a criminal offense. We have previously stated,

> Under the Justice Reinvestment Act, a defendant's probation is subject to revocation if he violates the normal condition of probation that he "[c]ommit no criminal offense in any jurisdiction." N.C. Gen. Stat. § 15A-1343(b)(1) (2011). A conviction by jury trial or guilty plea is one way for the State to prove that a defendant committed a new criminal offense. The State may also introduce evidence

> from which the trial court can independently find that the defendant committed a new offense.

Lee, 232 N.C. App. at 259, 753 S.E.2d at 723 (internal citations omitted). Moreover, by alleging a violation of the condition requiring him to "[c]ommit no criminal offense in any jurisdiction[,]" paragraphs ten and eleven of the 27 March 2013 report "put defendant on notice that the State was alleging a revocation-eligible violation[.]" *Id.* at 260, 753 S.E.2d at 723.

We conclude that the trial court made an independent determination that defendant committed the three offenses he was charged with on 7 February 2013 in 13 CR 050542, as alleged in paragraphs ten and eleven of the 27 March 2013 violation report. The court made this determination by finding that defendant committed the violation alleged in the 8 February 2013 report. The 8 February 2013 report alleged that defendant willfully violated the condition of probation in N.C. Gen. Stat. § 15A-1343(b)(15) based on the following facts:

> ON 02/07/2013, DURING A WARRANTLESS SEARCH OF [DEFENDANT'S] RESIDENCE, THREE ROCKS OF COCAINE, A SMALL AMOUNT OF MARIJUANA AND DRUG PARAPHERNALIA WERE FOUND.

The sworn violation report constitutes competent evidence sufficient to support the trial court's finding that defendant committed this violation. *See State v. High*, 183 N.C. App. 443, 449, 645 S.E.2d 394, 397–98 (2007)).

Given the informal nature of a probation revocation proceeding, *Murchison*, 367 N.C. at 464, 758 S.E.2d at 358, the trial court was entitled to infer that the discovery of the "three rocks of cocaine, a small amount of marijuana and drug paraphernalia" during the warrantless search of defendant's residence on 7 February 2013 gave rise to the criminal charges "for the misdemeanor possession of drug paraphernalia and of [sic] possession of marijuana up to 1/2 oz"[3] and "PWISD cocaine" filed against defendant the same day. (All caps omitted.)

III. Conclusion

Accordingly, the trial court's finding that defendant committed the violation alleged in the 8 February 2013 report supports its finding that he committed three of the criminal offenses alleged in paragraphs ten

---

3. Because possession of one-half ounce or less of marijuana is a Class 3 misdemeanor, see N.C. Gen. Stat. § 90-95(a)(3), (d)(4) (2015), defendant's probation could not be revoked "solely" for committing this offense. N.C. Gen. Stat. § 15A-1344(d) (2015).

and eleven of the 27 March 2013 report. As defendant does not contest the finding that he willfully violated his probation as alleged in the 8 February 2013 report, he cannot show that the trial court's decision to revoke his probation was legally erroneous, unsupported by the evidence, or manifestly unreasonable.

AFFIRMED.

Judges McCULLOUGH and INMAN concur.

STATE OF NORTH CAROLINA
v.
CLAYTON JAMES, DEFENDANT

No. COA15-853

Filed 2 August 2016

1. Kidnapping—restraint—separate from assault

There was sufficient separate evidence of restraint to support kidnapping in a prosecution for assault and kidnapping where defendant restrained the victim and strangled her until she was unconscious and then dragged her across the street. Defendant restrained her at two separate times; the assault by strangulation was complete prior to the additional restraint and movement.

2. Kidnapping—purpose—terrorizing victim—evidence sufficient

There was sufficient evidence to support the State's theory that defendant's motive in kidnapping the victim was to terrorize her where multiple witnesses heard defendant telling the victim that he was going to kill her and he demonstrated that his threat was real by assaulting, placing her in a headlock, and choking her. The evidence showed that the victim was in a state of intense fright and apprehension.

3. Kidnapping—first-degree—victim not released in safe place—victim seriously injured

The evidence in a first-degree kidnapping prosecution was sufficient to support the element that the victim was not left in a safe place or was seriously injured where she was strangled until she was unconscious and dragged down the road by her hair to a gravel driveway. An unconscious person lying on the side of a road or in a

driveway where a car may hit her is not safe; moreover, the victim suffered serious injuries.

4. False Imprisonment—lesser offense of kidnapping—evidence of defendant's purpose

There was no plain error in not instructing the jury on the lesser-included offense of false imprisonment in a kidnapping and assault prosecution where the evidence showed that defendant had the purpose of seriously harming or terrorizing the victim. Whatever purpose defendant may have had in his own mind, his words and actions spoke quite clearly. Moreover, the jury had ample evidence of defendant's guilt, and the jury probably would not have reached the same result absent any error.

Appeal by defendant from judgments entered on 22 January 2015 by Judge Stanley L. Allen in Superior Court, Guilford County. Heard in the Court of Appeals on 17 December 2015.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General James M. Stanley, Jr., for the State.

James W. Carter for defendant-appellant.

STROUD, Judge.

Defendant Clayton James appeals his conviction of first degree kidnapping, injury to personal property, and assault by strangulation. On appeal, defendant argues primarily that the trial court erred by denying his motion to dismiss the first degree kidnapping charge because the evidence was insufficient to submit the charge to the jury. Because there was sufficient evidence to establish each essential element of the charge, the trial court did not err in denying defendant's motion.

I. Background

The State's evidence at trial tended to show the following facts. On 12 July 2014, Susan[1] was staying at her mother's house because defendant had been harassing her. Susan previously had a romantic relationship with defendant for about five and one-half years, until they broke up in February 2013 because defendant "started getting very aggressive." Susan was on her way to Food Lion on 12 July 2014 when she

1. We have used a pseudonym to protect the privacy of the victim.

encountered defendant while walking at the intersection of Grove Street and Aycock Street. As Susan proceeded to walk across the street, defendant cut her off and confronted her, asking why she had not been answering his text messages or talking to him. Susan told him: " 'Well, you know I got a lot going on' ". . . and " 'Plus, we not together anyway.' "

Unsatisfied with her response, defendant became aggravated and told Susan " 'You gonna talk to me.' " Since they were out in public, it was daytime, and she had seen some kids nearby on a porch, Susan felt safe enough to tell defendant that if they were going to talk, it would be right there. Defendant told her she was going to go with him and grabbed Susan by the collar. As she struggled to get away, he punched her in the face. Defendant continued to grab Susan while in the middle of the street and eventually grabbed her by the throat and she "could feel the life leaving out of [her]." During the struggle with defendant, Susan suffered a mark on her face, bruises, abrasions on her arms and knees, a tear in her clothes, and broken glasses.

Susan could feel herself blacking out. Defendant threatened to kill her "in broad daylight." Susan believed defendant meant it when he said he would kill her. She was afraid at the time and still afraid when testifying at his trial. Susan then lost consciousness, and when she woke up, she was no longer in the street, but rather was lying in a driveway on the side of the road, and she saw defendant running away. Susan also saw "the babies" (referring to the three young individuals who witnessed the incident and testified at defendant's trial) and a police officer. She had no idea how long she lost consciousness. Susan did not know how she got from the street to the driveway, but she woke up in a different place than she remembered being before losing consciousness.

Jeremy was at his friend Destiny's house near the intersection where the incident occurred with Destiny and their friend Karlee when they heard Susan, a stranger, yell " 'Help' " and saw defendant use his fist to punch her in the face. He then watched defendant, also a stranger, choke Susan, and she fell to the ground. Destiny noted that defendant "had her in a headlock. He had his arm -- one of his hands on her neck and also one of his arms wrapped around her neck, choking her." Jeremy heard defendant say to Susan, " 'I will kill you in the broad daylight, bitch.' " He then observed defendant punch and drag Susan "to the gravel." Destiny noted that defendant dragged Susan "by her hair, also with his arm around her neck" onto the gravel "about one house down, so about ten feet." She noted further that Susan appeared to be unconscious "because she wasn't at that point really moving." After seeing all this, Jeremy called 911 and spoke with dispatch. As the three witnesses got

closer, defendant ran up the hill and left. Jeremy, Destiny, and Karlee spoke with Susan and asked if she was okay. Karlee noted that Susan "was very shaken up, she was bleeding on her face, her pants were ripped, she was bleeding from her elbow and her knees and crying[.]"

Shortly after, Greensboro Police Officer Peter Abraham Witmer arrived on the scene. He saw Susan standing in a gravel driveway with Jeremy, Destiny, and Karlee. Susan "was crying, concerned about her safety. She kept asking where is the gentleman that assaulted her, very emotionally distraught." Susan told Officer Witmer what had happened, and he observed various items in the roadway including one of Susan's earrings and her glasses. He estimated that those items were about "100, 120 feet" from where he observed Susan on the gravel driveway when he arrived.

Susan had two cell phones, but she lost one during the assault. About 10 minutes after the incident, Susan received a call from the missing phone. She told one of the paramedics she thought it was defendant calling from her other phone, and she told her not to answer. Susan was taken to the hospital, where she had a CAT scan. The hospital personnel asked if she wanted to stay overnight, but she declined and was released. The following Monday, July 14, Susan went to the District Attorney's office to have pictures taken of her injuries. She also visited Family Services of the Piedmont and saw a counselor for trauma and was still in a counseling program at the time of defendant's trial.

On 8 September 2014, defendant was indicted for kidnapping, injury to personal property, assault by strangulation, and common law robbery. Defendant was tried by a jury beginning on 12 January 2015. At the close of the State's evidence on 15 January 2015, defense counsel moved to dismiss all of the charges "on the grounds that the evidence is insufficient as a matter of law to support a conviction." Defendant's trial counsel then stated: "With respect to the kidnapping, I do not wish to be heard further. With respect to the assault by strangulation, I do not wish to be heard further." Defendant then proceeded to raise arguments regarding common law robbery and injury to personal property.

The State then had an opportunity to respond, and noted first that it was "not going to address the assault by strangulation, kidnapping, since [defense counsel] didn't raise any issues." After hearing the State's response to defendant's arguments regarding the other two charges, the trial court denied the motion. Defendant's motion to dismiss was renewed at the close of all the evidence, and again denied.

On 15 January 2015, at the close of all the evidence, the jury returned verdicts finding defendant not guilty on the common law robbery charge but guilty on the remaining charges of first degree kidnapping, injury to personal property, and assault by strangulation. The trial court arrested judgment on the assault by strangulation and consolidated defendant's convictions for first degree kidnapping and injury to personal property. Defendant was sentenced in the presumptive range to a minimum term of 90 months and a maximum term of 120 months imprisonment in the North Carolina Department of Adult Corrections. Defendant timely appealed to this Court.

II. Motion to Dismiss

A. Standard of Review

Defendant's first argument on appeal is that the trial court erred by denying his motion to dismiss. Specifically, defendant argues that the trial court erred by denying his motion to dismiss the first degree kidnapping charge because the evidence was insufficient as a matter of law to submit the charge to the jury.

> A defendant may move to dismiss a criminal charge when the evidence is not sufficient to sustain a conviction. Evidence is sufficient to sustain a conviction when, viewed in the light most favorable to the State and giving the State every reasonable inference therefrom, there is substantial evidence to support a jury finding of each essential element of the offense charged, and of defendant's being the perpetrator of such offense.
>
> Evidence is substantial if it is relevant and adequate to convince a reasonable mind to accept a conclusion. In considering a motion to dismiss, the trial court does not weigh the evidence, consider evidence unfavorable to the State, or determine any witness' credibility. Evidence is not substantial if it is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, and the motion to dismiss should be allowed even though the suspicion so aroused by the evidence is strong. This Court reviews the denial of a motion to dismiss for insufficient evidence *de novo*.

State v. Robledo, 193 N.C. App. 521, 524-25, 668 S.E.2d 91, 94 (2008) (citations, quotation marks, brackets, and ellipses omitted). "In deciding

whether the trial court's denial of [a] defendant's motion to dismiss violated [the] defendant's due process rights, this Court must determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Penland*, 343 N.C. 634, 648, 472 S.E.2d 734, 741 (1996) (quotation marks omitted).

B. Analysis

Defendant argues that there was insufficient evidence presented at trial to show that (1) the restraint of the victim, Susan, was not inherent to the assault by strangulation; (2) defendant removed Susan for the purpose of terrorizing her; and (3) defendant did not leave her in a safe place or seriously injured her.

N.C. Gen. Stat. § 14-39(a) (2015) defines the offense of kidnapping and provides in pertinent part:

> Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> . . .
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person[.]

Subsection (b) of the same statute provides that the offense is first-degree kidnapping "[i]f the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted[.]" N.C. Gen. Stat. § 14-39(b).

i. Restraint

[1] First, defendant contends that the State presented insufficient evidence to show that the restraint of the victim was separate and distinct from the removal required for assault by strangulation. Defendant argues that any restraint "was inherent to the assault by strangulation." Our Supreme Court has previously explained:

> It is self-evident that certain felonies (*e.g.*, forcible rape and armed robbery) cannot be committed without some restraint of the victim. We are of the opinion, and so hold, that G.S. 14-39 was not intended by the legislature to make a restraint, which is an inherent, inevitable

> feature of such other felony, also kidnapping so as to permit the conviction and punishment of the defendant for both crimes. To hold otherwise would violate the constitutional prohibition against double jeopardy. Pursuant to the above mentioned principle of statutory construction, we construe the word "restrain," as used in G.S. 14-39, to connote a restraint separate and apart from that which is inherent in the commission of the other felony.
>
> On the other hand, it is well established that two or more criminal offenses may grow out of the same course of action, as where one offense is committed with the intent thereafter to commit the other and is actually followed by the commission of the other (*e.g.*, a breaking and entering, with intent to commit larceny, which is followed by the actual commission of such larceny). In such a case, the perpetrator may be convicted of and punished for both crimes. Thus, there is no constitutional barrier to the conviction of a defendant for kidnapping, by restraining his victim, and also of another felony to facilitate which such restraint was committed, provided the restraint, which constitutes the kidnapping, is a separate, complete act, independent of and apart from the other felony. Such independent and separate restraint need not be, itself, substantial in time, under G.S. 14-39 as now written.

State v. Fulcher, 294 N.C. 503, 523-24, 243 S.E.2d 338, 351-52 (1978).

While defendant argues that the restraint in this case did not end until Susan was on the driveway, we agree with the State that the evidence presented at trial shows two separate, distinct restraints sufficient to support convictions for both kidnapping and assault by strangulation. After the initial restraint when defendant choked Susan into unconsciousness, leaving her unresponsive on the ground, defendant then continued to restrain her by holding her hair, wrapping one of his arms around her neck, and dragging her to a new location -- a gravel driveway -- 100 to 120 feet away. The assault by strangulation was complete prior to the additional restraint and movement. Indeed, defendant would have been guilty of that crime even if he had left Susan at the spot where the initial assault took place. Dragging her an additional distance to the driveway added an additional restraint sufficient to support the crime of kidnapping.

Defendant cites to *State v. Simmons*, 191 N.C. App. 224, 662 S.E.2d 559 (2008) in support of his argument that there was no evidence of

restraint other than that which is inherent to the crime of assault by strangulation. In *Simmons*, the defendant was charged with first degree sex offense, first degree kidnapping, and burglary. *Id.* at 227, 662 S.E.2d at 561. This Court vacated the kidnapping conviction because the defendant raped the victim in one room, the guest bedroom, and "[t]here was no evidence of confinement, restraint, or removal, other than that which is inherent to the offense of rape itself." *Id.* at 232, 662 S.E.2d at 564. Here, by contrast, defendant was charged not with a sex offense but rather with assault by strangulation, followed by kidnapping. Defendant first strangled Susan, and then dragged her to another location, which is evidence of additional "confinement, restraint, or removal," unlike the *Simmons* case. *Id.*

Defendant also cites to *State v. Braxton*, 183 N.C. App. 36, 643 S.E.2d 637 (2007) and contends that the evidence in the present case, unlike *Braxton*, supported only the offense of assault by strangulation. We disagree. This Court concluded in *Braxton* that the evidence supported a conviction for both kidnapping and assault by strangulation where "there was sufficient evidence of defendant's restraint of [the victim] to satisfy the elements of first degree kidnapping[]" and the defendant's "act of pinning [the victim] on the bed by pushing his knee into her chest, his grabbing of her hair, and his preventing her from leaving the motel room were separate and independent acts from his assaulting her by means of strangulation." *Id.* at 41, 643 S.E.2d at 641.

We conclude that the same result from *Braxton* stands here. The State presented substantial evidence indicating that after restraining Susan while strangling her, defendant took the additional step after she was unconscious to restrain her further by dragging her across the street. Accordingly, we conclude that the State's evidence at trial showed that defendant restrained Susan at two separate and distinct points in time, sufficient to support a conviction for both assault by strangulation and kidnapping.

ii. Purpose

[2] Next, defendant contends that the evidence presented at trial was insufficient to support the State's theory that defendant's purpose was to terrorize Susan by restraining or removing her. Defendant points out that "the test is not whether subjectively the victim was in fact terrorized, but whether the evidence supports a finding that the defendant's purpose was to terrorize her." *State v. Moore*, 315 N.C. 738, 745, 340 S.E.2d 401, 405 (1986). Thus, defendant claims the State's chosen theory was that defendant's purpose was to terrorize the victim, but the evidence was

insufficient to support such theory. Specifically, defendant claims that "there was no statement by [defendant] which would tend to support an argument that he had the specific intent to terrorize [Ms.] Goolsby." Yet the State's evidence showed that defendant did have such specific intent. Multiple witnesses heard defendant saying to Susan something along the lines of: "I'm gonna kill you, bitch. I'm gonna kill you in broad daylight, bitch. I'm gonna kill you."

Defendant cites to multiple cases where this Court has found that the restraint, confinement, or movement of a person has been done for the sole purpose of terrorizing a victim, and argues that this case does not rise to the level of those cases. *See, e.g.*, *State v. Bonilla*, 209 N.C. App. 576, 580, 706 S.E.2d 288, 292 (2011) (defendant beat and kicked victim, "bound [his] hands and feet and placed a rag in his mouth[,]" threatened to kill him, and "forced a bottle into his rectum."); *State v. Rodriguez*, 192 N.C. App. 178, 188, 664 S.E.2d 654, 660 (2008) (defendant physically abused victims by dunking under water, burning, and dripping candle wax, and emotionally abused others by making them listen to the screams and smells of other victims); *State v. Jacobs*, 172 N.C. App. 220, 226, 616 S.E.2d 306, 311 (2005) (defendant, among other things, approached victim with rifle, grabbed by her hair, forced into vehicle, placed in headlock and choked her, then hit her with his fists).

But even if defendant's actions were arguably less horrific than some of the acts of defendants in the cases noted above, defendant's argument ignores the evidence of his clear, direct intent in this case to terrorize Susan. Defendant unequivocally threatened her life and his actions demonstrated that his threat was very real and immediate. Like the defendant in Jacobs, defendant assaulted Susan, placed her in a headlock, and choked her. Defendant claims that "[t]errorizing is defined as 'more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." The evidence shows that Susan was in a state of intense fright and apprehension. Several witnesses heard her yelling for help and saw defendant punching and choking her, rendering her unconscious, and then dragging her across the street. Accordingly, we find that the State presented sufficient evidence supporting its theory that defendant's purpose was to terrorize his victim.

iii. Safe Place or Serious Injury

[3] Finally, defendant claims that the evidence at trial was insufficient to support the element that elevated this kidnapping to first degree: that the victim was not left in a safe place or was not seriously injured.

Defendant points out that "safe place" is not defined by N.C. Gen. Stat. § 14-39(b) and that "our case law in North Carolina has not set out any test or rule for determining whether a release was in a 'safe place.' " *State v. Sakobie*, 157 N.C. App. 275, 282, 579 S.E.2d 125, 130 (2003). Instead, "the cases that have focused on whether or not the release of a victim was in a safe place have been decided by our Courts on a case-by-case approach, relying on the particular facts of each case." *Id.* at 280, 579 S.E.2d at 129.

Defendant argues that leaving a victim in a safe place requires a "conscious, willful action on the part of the defendant to assure that his victim is released in a place of safety." *State v. Jerrett*, 309 N.C. 239, 262, 362 S.E.2d 339, 351 (1983). According to defendant, "[t]he cases indicate that a place will be considered safe if it is familiar to the victim, or protects the victim, or affords the victim ready access to rescue." Defendant's argument is based upon drawing rather far-fetched inferences favorable to his position from the evidence. He claims that he left Susan "on the side of Grove Street, out of the roadway, a little after 5 p.m."; "there were three witnesses in close proximity";' "Susan was familiar with the street"; and "Susan also had a cell phone[,]" so she was left in a safe place. We disagree. The reasonable inferences from the evidence are contrary to those urged by defendant. Whether she was familiar with the street or not, an unconscious person lying on the side of a roadway or in the middle of a driveway where a car may hit her is not safe. Defendant dragged Susan to the middle of a gravel driveway, where he left her, unconscious and injured. He was not leaving her there for the purpose of consigning her to the care of the three witnesses who happened to be nearby; he was running away because they saw him. If they had not, he may have finished carrying out his threat. Even if defendant left her with one cell phone, she had started with two, and defendant took one, perhaps not realizing that she had another he missed. He did not leave her in a place of safety or protection.

Furthermore, even if we were to accept defendant's interpretation of a safe place, defendant's argument would still fail since the statute requires finding *either* that the victim was not left in a safe place *or* that the victim suffered serious bodily injuries (or was sexually assaulted, which is not at issue here). N.C. Gen. Stat. § 14-39(b). Although defendant attempts on appeal to classify Susan's injuries as not serious, the evidence shows otherwise. The State presented photographs and testimony showing that the victim suffered serious injuries, including cuts and bruises to her face, abrasions to her elbows and knees, thumbprints, fingerprints, and scratches to her throat, which required treatment and

evaluation in the emergency room. She also suffered from serious emotional trauma which required therapy for many months, even continuing through the time of the trial.

We conclude, therefore, that the State presented more than sufficient evidence to support all of the essential elements of the first degree kidnapping charge. Accordingly, the trial court did not err when it denied defendant's motion to dismiss.

III. Jury Instruction

A. Plain Error

iv. Standard of Review

[4] Next, defendant argues that the trial court erred by failing to instruct the jury on false imprisonment. Since defendant did not raise an objection to the instructions with the court below, the issue was not preserved for appeal. Accordingly, defendant asks that we review for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

v. Analysis

Defendant claims that the trial court should have instructed the jury on the lesser-included offense of false imprisonment. As defendant points out, while false imprisonment is a lesser-included offense of kidnapping, the difference between the offenses is whether the act was committed with the intent to accomplish one of the purposes enumerated in N.C. Gen. Stat. § 14-39(a). Here, that purpose was "[d]oing serious bodily harm to or terrorizing the person so confined, restrained or removed . . . ." N.C. Gen. Stat. § 14-39(a)(3).

In support of this argument, defendant claims that he did not restrain and/or remove the victim "for the purpose of terrorizing her." In addition, defendant argues that even if this Court found that

he did so restrain Susan, defendant's purpose was "unclear" and "the jury could have found that the restraint and/or removal was for a purpose *other than to terrorize* [Susan.]" (Emphasis added). Whatever purpose defendant may have had in his own mind at that moment, his words and actions spoke quite clearly. Several witnesses heard defendant threaten to kill Susan. Specifically, defendant was heard saying: "I'm gonna kill you in broad daylight, bitch." His actions showed this was not an idle threat. The evidence clearly supported a conclusion that defendant had the purpose as described in N.C. Gen. Stat. § 14-39(a)(3) to seriously harm or terrorize Susan.

Moreover, defendant has failed to show that the trial court's instructions amounted to plain error. We are not convinced that this is such "exceptional case" where absent the lack of instruction on false imprisonment, the jury probably would have reached a different result. The jury had ample evidence of defendant's guilt, through the victim and multiple unbiased eyewitnesses. We conclude, therefore, that defendant has failed to show the lack of instruction on false imprisonment amounted to plain error.

B. Ineffective Assistance of Counsel

Finally, defendant argues that he received ineffective assistance of counsel ("IAC") because his trial counsel failed to request a jury instruction on false imprisonment.

> To prevail in a claim for IAC, a defendant must show that his (1) counsel's performance was deficient, meaning it fell below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense, meaning counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. As to the first prong of the IAC test, a strong presumption exists that a counsel's conduct falls within the range of reasonable professional assistance. Further, if there is no reasonable probability that in the absence of counsel's alleged errors the result of the proceeding would have been different, then the court need not determine whether counsel's performance was actually deficient.

State v. Smith, 230 N.C. App. 387, 390, 749 S.E.2d 507, 509 (2013) (citations, quotation marks, and brackets omitted), *cert. denied*, 367 N.C. 532, 762 S.E.2d 221 (2014).

Since we have found that the trial court did not err in failing to instruct on false imprisonment, we need not address this final argument

in more detail, as defendant cannot show either that his counsel's performance was deficient or that he was prejudiced. Accordingly, we find defendant was not denied effective assistance of counsel.

IV. Conclusion

In sum, we conclude that the trial court did not err when it denied defendant's motion to dismiss for insufficient evidence, as the State's evidence at trial presented ample evidence to establish each element of first degree kidnapping. We also find that the trial court did not commit plain error by not *sua sponte* instructing the jury on false imprisonment where substantial evidence showed that defendant threatened and terrorized her. Since the trial court did not err by not instructing the jury on false imprisonment, we further find that defendant was not denied effective assistance of counsel for failing to raise such grounds below. Accordingly, we hold that the trial court committed no error.

NO ERROR.

Judges DIETZ and TYSON concur.

STATE OF NORTH CAROLINA
v.
GYRELL SHAVONTA LEE

No. COA 15-1352

Filed 2 August 2016

1. Homicide—second-degree murder—jury instructions—no duty to retreat—shooting in public street

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error in the trial court's omission of a no duty to retreat jury instruction because the shooting occurred in a public street several houses from defendant's residence, and the evidence was such that a jury could reasonably find a defender was justified in the use of self-defense in any other setting.

2. Homicide—second-degree murder—jury instructions—self-defense

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error in the trial court's instruction to the jury that defendant was not entitled to self-defense

if he was the aggressor because there was conflicting evidence as to which party was the aggressor.

3. Homicide—second-degree murder—jury instructions—lawful defense of another—omitted—threat of harm concluded

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error in the trial court's omission of a jury instruction on lawful defense of another because when defendant shot the victim, he was aware that the threat of harm to his companion had concluded.

4. Homicide—second-degree murder—exclusion of testimony—independent evidence of aggression

On appeal from defendant's conviction for second-degree murder, the Court of Appeals found no plain error where the trial court excluded a statement made on the witness stand by defendant's uncle that he overheard defendant saying, "[W]ell, why can't you-all just get along?" There was independent evidence upon which the jury could have based a finding that defendant acted as an aggressor in the moments before he shot the victim.

5. Appeal and Error—length of jury deliberations—plain error review not applicable

On appeal from defendant's conviction for second-degree murder, the Court of Appeals rejected defendant's argument that there was plain error when trial court required the jury to deliberate for an unreasonable length of time. There was no plain error because that standard of review is limited to jury instructions and evidentiary matters, neither of which applied to the trial court's decision to order further deliberation.

6. Homicide—second-degree murder—mitigating factors—sentence in presumptive range

On appeal from defendant's conviction for second-degree murder, the Court of Appeals rejected defendant's argument that the trial court erroneously failed to consider mitigating factors at his sentencing. The trial court sentenced defendant within the presumptive range and was not required to make any findings regarding mitigation.

Appeal by Defendant from judgment dated 12 July 2015 by Judge J. Carlton Cole in Superior Court, Pasquotank County. Heard in the Court of Appeals 6 June 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Kimberly D. Potter, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Paul M. Green, for Defendant.

McGEE, Chief Judge.

Gyrell Shavonta Lee ("Defendant") appeals his conviction for second-degree murder. Defendant contends that the trial court erred by: (1) omitting a no duty to retreat instruction from its jury instructions; (2) instructing the jury it could find Defendant was the initial aggressor despite a lack of evidence to support that theory; (3) not instructing the jury on the lawful defense of a third person; (4) excluding a non-hearsay statement made by Defendant; (5) violating a statutory mandate by requiring the jury to deliberate for an unreasonable length of time; and (6) not considering evidence of aggravating or mitigating factors in sentencing Defendant as mandated by statute. We find no error.

I. Background

Defendant celebrated New Year's Eve on 31 December 2012 in Elizabeth City, where Defendant lived with his brother. Shortly after midnight, Defendant exited a home across the street from his residence and encountered several individuals, including Quinton Epps ("Epps") and Defendant's cousin, Jamieal Walker ("Walker"), congregated around a blue 1993 Grand Marquis automobile. Epps and Walker were engaged in a heated verbal dispute. Walker seemed "very agitated" and told Defendant that Epps "felt verbally disrespected." Epps left in the Grand Marquis, and Defendant went inside his residence.

About twenty minutes later, a black Cadillac STS vehicle ("the Cadillac") approached Defendant's residence. Defendant and Walker were standing "beside the house . . . in the front yard." Defendant saw Epps get out of the Cadillac's back passenger side. Walker and Epps began arguing, and Defendant observed that Epps was "verbally disrespectful [and] verbally aggressive." Epps got back into the Cadillac and it sped away.

Approximately twenty minutes later, a burgundy Mitsubishi Galant ("the Mitsubishi") drove up alongside Defendant's backyard, stopping briefly. Defendant retrieved a .45 caliber handgun from his car and concealed it on his person, "[out of] instinct," although Defendant believed "Epps . . . wasn't a threat at th[at] time." The Mitsubishi pulled off, circled

the block, and parked two or three houses down from Defendant's residence in front of a cemetery across the street, at the intersection of Shepard Street and Herrington Road. Epps and several other individuals exited the Mitsubishi.

Defendant and Walker walked down the street to talk to Epps. Epps and Walker began arguing. Defendant saw Epps had a gun behind his back. The argument escalated, and Walker punched Epps in the face. After being punched, Epps leaned back, grabbed the hood of Walker's jacket, and shot Walker in the stomach. When Epps shot Walker a second time, Defendant withdrew his handgun. Walker was able to get up, and Epps continued shooting at Walker as he attempted to flee. After Epps fired a final shot at Walker, Epps turned and pointed his gun at Defendant. Before Epps could fire, Defendant shot Epps several times. Epps died as a result of a gunshot wound to his torso inflicted by Defendant.

Police Chief Eddie Buffaloe ("Chief Buffaloe") and other officers from the Elizabeth City Police Department ("ECPD") arrived at the scene of the shooting at approximately 2:30 a.m., after noticing a crowd gathered at the intersection of Shepard Street and Herrington Road. Chief Buffaloe observed an individual, later identified as Epps, lying in the road with apparent gunshot wounds. After Epps was transported from the scene, ECPD K-9 Officer David Sutton performed a search of the area and discovered Defendant's .45 caliber handgun, its magazine empty, beneath a trash can located behind Defendant's residence.

ECPD Crime Scene Investigator Leroy Owen ("Investigator Owen") was also called to the scene. Investigator Owen did a walk-through, marking potential evidence and taking photographs. Among other things, Investigator Owen collected a spent, bloodied bullet from the spot where Epps had been lying on the ground; five 9 millimeter shell casings; and eight .45 caliber shell casings. Investigator Owen noticed a "divot" in the ground where he found the spent bullet. Subsequent ballistics testing matched the spent bullet, the .45 caliber bullet casings, and the bullets removed from Epps's body during an autopsy, with Defendant's handgun. Walker's body was discovered several hours later approximately 120 yards from where Epps's body was found. Defendant was indicted for first-degree murder on 7 January 2013.

At trial, the State's sole eyewitness, Quentin Jackson ("Jackson"), testified that, shortly after leaving work at 2:00 a.m. on 1 January 2013, he drove up to a stoplight on Shepard Street and saw Epps and Walker running nearby and then simultaneously fall to the ground. Jackson

testified he saw "one guy reach over on the guy that was falling and shoot [him], and then . . . one get up and run and one continuously get shot." According to Jackson, Walker was able to run away and Epps remained on the ground, at which point Defendant "came out of nowhere," stood over Epps, and began repeatedly shooting Epps at close range. Jackson also testified that another unidentified individual was shooting at Defendant, but that Epps never aimed at, or shot, Defendant.

ECPD Officer Joseph Felton ("Officer Felton") interviewed Jackson at the scene on the night of the shooting, and Jackson described seeing "five black guys run up to the victim and shoot[] him point blank." When asked by Officer Felton to describe the shooter, Jackson said it was "a big dude with long dreads wearing an orange sweater" who had taken off running after the shooting. Defendant did not have dreadlocks at the time of the shooting. Jackson later denied ever having given this account. Defendant maintained that he shot Epps only after Epps pointed a gun at Defendant, and Defendant denied continuing to shoot after seeing Epps fall to the ground. Defendant was found guilty of second-degree murder and sentenced to a term of 192 to 243 months' imprisonment. Defendant appeals.

II. Omission of No Duty to Retreat Jury Instruction

A. Standard of Review

[1] Defendant first argues the trial court erroneously omitted a no duty to retreat instruction from its jury instructions. The "[d]efendant did not object to the . . . instruction given by the trial court, and our review is therefore limited to plain error." *State v. Withers*, 179 N.C. App. 249, 257, 633 S.E.2d 863, 868 (2006). To show plain error,

> a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citing *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983)) (internal quotation marks omitted). We apply plain error "cautiously and only in the exceptional case." *Id.*

Defendant cites *Withers* for the proposition that "[a]lthough there was no objection, the omission of part of [the pattern instruction] is preserved for *de novo* review because the trial court stated it would instruct according to the pattern." Defendant misapplies *Withers*. The portion of that opinion Defendant relies upon addressed the trial court's failure to

"instruct [the jury] on not guilty by reason of self-defense *as a possible verdict* in its final mandate to the jury." 179 N.C. App. at 255, 633 S.E.2d at 867 (emphasis added). In the present case, the trial court properly instructed the jury that "if the State has failed to satisfy you beyond a reasonable doubt that the defendant did not act in self-defense, . . . it will be your duty to return a verdict of not guilty." The *Withers* defendant also alleged the trial court erred by failing to instruct the jury, as part of its self-defense instruction, that the defendant did not have a duty to retreat. *Id.*, 179 N.C. App. at 256, 633 S.E.2d at 868. On that issue, this Court concluded that because the defendant did not object to the self-defense instruction, review was limited to plain error. *See also State v. Davis*, 177 N.C. App. 98, 102, 627 S.E.2d 474, 477 (2006) (holding that "[s]ince defendant neither requested the [no duty to retreat] instruction nor objected to the court's failure to give the instruction, we review the assignment of error under the plain error standard.").

More recently, in *State v. Eaton*, ___ N.C. App. ___, 781 S.E.2d 532, 2016 WL 47973 (2016) (unpublished), this Court rejected a similar argument, *i.e.*, that an instructional issue was preserved despite the defendant's lack of objection because the trial court indicated it would give a specific pattern instruction and then omitted a portion of the pattern instruction from its instructions to the jury. In the present case, as in *Eaton*,

> the trial court did not merely indicate that it would instruct pursuant to [the pattern instruction] and then fail to instruct as indicated, as [D]efendant insinuates. . . . The trial court . . . repeated the instructions it intended to offer. The trial court never indicated it would give the portion of [the pattern instruction] which [D]efendant now contends was erroneously omitted and [D]efendant did not take issue with the proposed instruction. . . . [T]he trial court instructed the jury precisely as proposed, [and] . . . the trial court's reference to the pattern instruction did not preserve the issue for appeal absent an objection by defendant.

Id., 2016 WL 47973 at *11.

B. Analysis

Defendant contends the omission of a no duty to retreat instruction amounted to plain error because, if the jury had been instructed on the right to stand one's ground in a place where one has a lawful right to be,

Defendant "probably would not have been convicted of second-degree murder." We disagree.

"[W]here supported by the evidence in a claim of self-defense, an instruction negating [a] defendant's *duty to retreat* in his home or premises must be given even in the absence of a request by [the] defendant." *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (emphasis in original); *see also Davis*, 177 N.C. App. at 102, 627 S.E.2d at 477 (finding that "[a] comprehensive self-defense instruction requires instructions that a defendant is under no duty to retreat *if the facts warrant it*[.]" (emphasis added)). "When determining whether the evidence is sufficient to entitle a defendant to jury instructions on a defense or mitigating factor, courts must consider the evidence in the light most favorable to [the] defendant." *Withers*, 179 N.C. App. at 257, 633 S.E.2d at 868 (quoting *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (alteration in original)).

The trial court in this case instructed the jury, pursuant to N.C.P.I.—Crim. 206.10[1] and as agreed upon by the parties, that Defendant "would be not guilty of any murder or manslaughter if [he] acted in self-defense and . . . was not the aggressor in provoking the fight and did not use excessive force under the circumstances." The court omitted the following sentence found in N.C.P.I.—Crim. 206.10: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." That sentence in the pattern instructions includes the following footnote: "See N.C.P.I.—Crim. 308.10."[2] In turn, N.C.P.I.—Crim. 308.10, the pattern instruction for self-defense where retreat is at issue, "is to be used if the evidence shows that the defendant was at a place where the defendant had a lawful right to be . . . when the assault on the defendant occurred" and that the defendant was not the aggressor. Defendant argues that, having undertaken to instruct the jury according to N.C.P.I.—Crim. 206.10, the trial court erroneously omitted the disputed sentence of the pattern instruction, and was further required to read N.C.P.I.—Crim. 308.10 in its entirety. These arguments are without merit.

Both the omitted sentence from N.C.P.I.—Crim. 206.10, and N.C.P.I.—Crim. 308.10 generally, refer specifically to "a place where the

---

1. N.C.P.I.—Crim. 206.10 (2014) is the pattern instruction for "First degree murder where a deadly weapon is used, covering all lesser included homicide offenses and self-defense."

2. We note that a previous version of the footnote read, "*Where the evidence raises the issue of retreat*, see alternative paragraph set forth in N.C.P.I.—Crim. 308.10." (emphasis added). *See Morgan*, 315 N.C. at 643, 340 S.E.2d at 94-95.

defendant has a lawful right to be." *See also* N.C. Gen. Stat. § 14-51.2(f) (2015) ("A *lawful occupant within his or her home*, *motor vehicle*, *or workplace* does not have a duty to retreat from an intruder in the circumstances described in this section." (emphasis added)); N.C. Gen. Stat. § 14-51.3(a) (2015) ("[A] person is justified in the use of deadly force and does not have a duty to retreat *in any place he or she has the lawful right to be* if either of the following applies . . . ." (emphasis added)). Thus, Defendant's argument, that a different verdict probably would have been reached but for the omission of a no duty to retreat jury instruction, presumes Defendant was in a place where he had a lawful right to be, for purposes of a no duty to retreat defense, when he shot Epps.

Defendant contends he "was where he had a right to be—the street by his home—when he was confronted by Epps, who had a pistol in his hand and had just fatally wounded [Walker]." However, the right to stand one's ground is more limited than Defendant suggests. Our Supreme Court has stressed that "where the person attacked is not in *his own dwelling*, *home*, *place of business*, *or on his own premises*, then the degree of force he may employ in self-defense is conditioned by the type of force used by his assailant." *State v. Pearson*, 288 N.C. 34, 43, 215 S.E.2d 598, 605 (1975) (emphasis added). *Compare with State v. Johnson*, 261 N.C. 727, 729–30, 136 S.E.2d 84, 86 (1964) (holding that "when a person . . . is attacked *in his own home or on his own premises*, the law imposes on him no duty to retreat before he can justify his fighting in self defense [sic], regardless of the character of the assault, but is entitled to stand his ground, to repel force with force, and to increase his force, so as not only to resist, but also to overcome the assault and secure himself from all harm." (emphasis added)); *Withers*, 179 N.C. App. at 259, 633 S.E.2d at 870 (finding trial court erred by failing to instruct the jury on duty to retreat where, in light of the facts in evidence, "the jury could have found that defendant . . . *was attacked in his home or on his premises*." (emphasis added)); *State v. Everett*, 163 N.C. App. 95, 102, 592 S.E.2d 582, 587 (2004) (concluding defendant was entitled to a no duty to retreat instruction where "[t]he evidence . . . [was] legally sufficient to support a conclusion that defendant was attacked by her husband in her own home[.]").

The unqualified no duty to retreat defense is also limited by statute to "[a] lawful occupant *within his or her home*, *motor vehicle*, *or workplace*[.]" N.C.G.S. § 14-51.2(f) (emphasis added). "Home" is defined as

> [a] building or conveyance of any kind, to include its curtilage, whether the building or conveyance is temporary or

> permanent, mobile or immobile, which has a roof over it, including a tent, and is designed as a temporary or permanent residence.

N.C. Gen. Stat. § 14-51.2(a)(1) (2015). *See also State v. Rhodes*, 151 N.C. App. 208, 214, 565 S.E.2d 266, 270 (2002) (quoting *State v. Frizzelle*, 243 N.C. 49, 51, 89 S.E.2d 725, 726 (1955)) (noting that "[i]n North Carolina, 'curtilage of the home will ordinarily be construed to include at least the yard around the dwelling house as well as the area occupied by barns, cribs, and other outbuildings.' "); *and see State v. Williams*, ___ N.C. App. ___, ___, 784 S.E.2d 232, 234 (2016) (concluding that "the term 'property' [as used in statute addressing violations of domestic violence protective orders] is not limited to buildings or other structures affixed to land but also encompasses the land itself.").

We recognize that N.C. Gen. Stat. § 14-51.3(a)(1) provides in part that

> a person is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be if . . . [h]e or she reasonably believes that [deadly] force is necessary to prevent imminent death or great bodily harm to himself or herself or another.

N.C. Gen. Stat. § 14-51.3(a)(1) (2015). However, to the extent this language can be characterized as extending the no duty to retreat defense to *any* public place, it is conditioned upon the reasonableness of a person's belief that the use of deadly force was necessary under the circumstances. In other words, the right to stand one's ground in "any public place" is conditioned as an initial matter upon whether the defender was justified in the use of self-defense without regard to the physical setting in which the confrontation occurred. This is consistent with case law predating N.C.G.S. § 14-51.3(a)(1), which the General Assembly enacted in 2011. *See, e.g.*, *State v. Beal*, 181 N.C. App. 100, 102, 638 S.E.2d 541, 543 (2007) (observing that in order to "determine whether the evidence presented supported defendant's proposed instruction that he had no duty to retreat[,] . . . [we must] first define the law of self-defense . . . [.]"). he statutory presumption of reasonableness remains limited to the use of defensive (including deadly) force in defending one's home, motor vehicle, or workplace. *See* N.C. Gen. Stat. § 14-51.3(a)(2) (2015); N.C. Gen. Stat. § 14-51.2 (2015).

In the present case, Defendant received a self-defense instruction consistent with the language in N.C.G.S. § 14-51.3(a)(1). The jury was instructed that Defendant

> would be excused of first degree murder and second degree murder on the ground of self-defense if, first, [Defendant] believed it was necessary to kill the victim in order to save [Defendant] from death or great bodily harm. Second, [if] the circumstances as they appeared to [Defendant] at the time were sufficient to create such a belief in the mind [of] a person of ordinary firmness.

The statutory reference to "any place [one] has a lawful right to be" does not change our essential analysis regarding Defendant's duty to retreat, since the right to use self-defense is not limited spatially, and the statutory presumption favoring a no duty to retreat instruction remains limited to one's home, motor vehicle, or workplace. Because Defendant was not within his home or premises, motor vehicle, or workplace, any right to "stand his ground" stemmed from the two above-described elements of self-defense, and Defendant received instructions to that effect.

Defendant was not entitled to a presumption that his use of deadly force was reasonable under the circumstances. There was no evidence that Epps ever entered Defendant's home or yard. It is undisputed that when Defendant shot Epps, Defendant was standing in the intersection of a public street several houses down from his residence, not within his home, motor vehicle, or workplace. Where the evidence is such that a jury could reasonably find a defender was justified in the use of self-defense in any other setting, a no duty to retreat instruction does not change the analysis. Accordingly, even considering the evidence in the light most favorable to Defendant, we are unable to conclude that, if the trial court's instruction on self-defense had included a no duty to retreat instruction, Defendant "probably would not have been convicted of second-degree murder." This argument is overruled.

III. "Aggressor" Jury Instruction

A. Standard of Review

[2] Defendant next challenges the trial court's instruction to the jury that "[D]efendant [was] not entitled to the benefit of self-defense if . . . [D]efendant was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased." Because Defendant failed to raise this objection below, we review for plain error.

B. Analysis

Defendant contends the trial court erroneously instructed the jury that it could find Defendant was the aggressor because, Defendant argues, there was no evidence to support such a finding. Specifically,

Defendant challenges the following portion of the trial court's aggressor instructions:

> One enters a fight voluntarily if one uses towards one's opponent abusive language which, considering all of the circumstances, is calculated and intended to provoke a fight. If the defendant voluntarily and without provocation entered a fight the defendant would be considered the aggressor unless the defendant thereafter attempted to abandon the fight and gave notice to the deceased that the defendant was doing so.
>
> In other words, a person who uses defensive force is justified if the person withdraws in good faith from physical contact with the person who was provoked and indicates clearly that he intends to withdraw and terminate the use of force but the person who was provoked continues or resumes the use of force. A person is also justified in using defensive force when the force used by the person who was provoked is so serious that the person using the defensive force reasonably believes that he was in imminent danger of death or serious bodily harm. The person using defensive force had no reasonable means to retreat and the use of force likely caused the -- [sic] and the use of force likely to cause death or serious bodily harm was the only way to escape danger.
>
> The defendant is not entitled to the benefit of self-defense if the defendant was the aggressor with the intent to kill or inflict serious bodily injury upon the deceased.

According to Defendant, his actions of "arming [himself] in anticipation of a possible conflict then declining to withdraw from a place [he had] a right to be" (1) were the only possible bases for a finding that he was the aggressor in his confrontation with Epps, and (2) did not constitute "*any* evidence that [Defendant] was the aggressor within the law of self-defense." (emphasis in original)). We disagree, based on our conclusion that there was other evidence from which a reasonable jury could find Defendant acted as the aggressor. S*ee State v. Effler*, 207 N.C. App. 91, 97-98, 698 S.E.2d 547, 551-52 (2010) (concluding aggressor instruction was not plain error where sufficient evidence was presented for a reasonable jury to conclude defendant was the aggressor).

"Broadly speaking, [a] defendant can be considered the aggressor when [the defendant] 'aggressively and willingly enters into a fight

without legal excuse or provocation.' " *State v. Vaughn*, 227 N.C. App. 198, 202, 742 S.E.2d 276, 279 (2013) (quoting *State v. Wynn*, 278 N.C. 513, 519, 180 S.E.2d 135, 139 (1971)). Here, there was no evidence that, prior to the fatal shootings, Defendant was directly provoked by Epps. At most, Defendant testified, Epps was generally "verbally . . . disrespectful." *See State v. Mize*, 316 N.C. 48, 54, 340 S.E.2d 439, 443 (1986) (holding defendant was not entitled to a jury instruction on self-defense in part because, "although defendant heard indirectly of threats from the victim, the latter had neither assaulted nor threatened [defendant] directly.").

Defendant conceded that when Defendant armed himself with a gun, Epps "wasn't a threat at the time." Defendant voluntarily accompanied Walker down the street to confront Epps. Defendant did not retreat[3] despite immediately noticing that Epps had a gun, observing an escalating confrontation between Epps and Walker, and witnessing Epps shoot Walker. Defendant testified he "withdrew" his gun while Epps was still shooting Walker. Defendant also testified that "right after [Epps] shot [Walker], [Epps] looked at me and pointed [his] gun and [then] I shot him." Thus, it was unclear from Defendant's testimony whether Defendant was already aiming his gun at Epps when Epps pointed a gun at Defendant. Further, the State's witness, Quentin Jackson, testified that he observed Defendant "[come] out of nowhere" and shoot Epps while Epps was on the ground and before Epps ever had an opportunity to aim a gun at Defendant. *See State v. Locklear*, 165 N.C. App. 905, 602 S.E.2d 728, 2004 WL 1824322 at *3 (2004) (unpublished) (noting that "[i]t is a well established [sic] rule in this State that a jury is the sole judge of a witness' credibility, and it may believe some, all, or none of what a witness says.").

"When there is conflicting evidence as to which party was the aggressor, the jury, as the finders of fact, are [sic] entitled to determine which of the parties, if either, is the aggressor." *State v. Norris*, ___ N.C. App. ___, 768 S.E.2d 650, 2015 WL 67197 at *3 (2015) (unpublished) (citing *State v. Cannon*, 341 N.C. 79, 82-83, 459 S.E.2d 238, 241 (1995)); *see also State v. Brewer*, 328 N.C. 515, 522, 402 S.E.2d 380, 385 (1991) (noting that "[c]ontradictions in the evidence are for the jury to decide.").

In cases cited by Defendant, "'[t]here [was] no conflict in evidence as to which of the parties was the aggressor. [The d]efendant did not

3. As discussed in Part II of this opinion, Defendant was not entitled to a no duty to retreat instruction, because he was not within his home or curtilage when he fatally shot Epps.

start the fight.' " *Vaughn*, 227 N.C. App. at 202, 742 S.E.2d at 279 (quoting *State v. Tann*, 57 N.C. App. 527, 530, 291 S.E.2d 824, 827 (1982) (alterations in original)). *See also State v. Temples*, 74 N.C. App. 106, 109, 327 S.E.2d 266, 268 (1985); *State v. Ward*, 26 N.C. App. 159, 163, 215 S.E.2d 394, 396-97 (1975). In the present case, by contrast, there was conflicting evidence about the sequence of events culminating in Epps's death, and the extent of Defendant's role in precipitating the shooting. Accordingly, the trial court's aggressor instructions were not plain error.

IV. Jury Instruction on Lawful Defense of a Third Person

A. Standard of Review

[3] Defendant next contends the trial court erred by omitting a jury instruction on lawful defense of another. Because Defendant failed to request such a jury instruction, we review for plain error.

B. Analysis

> In general one may kill in defense of another if one [reasonably] believes it to be necessary to prevent death or great bodily harm to the other . . . to be judged by the jury in light of the facts and circumstances as they appeared to the defender at the time of the killing.

State v. Perry, 338 N.C. 457, 466, 450 S.E.2d 471, 476 (1994) (quoting *State v. Terry*, 337 N.C. 615, 623, 447 S.E.2d 720, 724 (1994)). However,

> [i]f there is no evidence from which a jury reasonably could find that the defendant in fact believed that it was necessary to kill to protect another from death or great bodily harm, the defendant is not entitled to have the jury instructed on either perfect or imperfect defense of another.

Id., 338 N.C. at 467, 450 S.E.2d at 477; *see also State v. McKoy*, 332 N.C. 639, 644, 422 S.E.2d 713, 716 (1992) (stating that "[i]n order to have either perfect or imperfect self-defense, the evidence must show that it appeared to defendant and he believed it to be necessary to kill the deceased in order to save himself or another from death or great bodily harm. It must also appear that the defendant's belief was reasonable in that the circumstances as they appeared to him at the time were sufficient to create such a belief in the mind of a person of ordinary firmness.").

Defendant's testimony and other custodial statements established that Epps was no longer shooting at Walker when Defendant shot Epps, and Walker was already fatally wounded. Defendant testified that

"[a]s soon as [Epps] got done shooting Walker[,] [Epps] looked at me and he drew his gun and I shot him." Defendant later told police he "was scared, and [Epps] pointed that gun [at me]. He had already shot my cousin, and then he was trying to shoot me." Defendant also said he "didn't have a clear shot" until Epps "fired at [Walker] one last time" and Walker "snatched away." In telephone conversations from jail, Defendant indicated he shot Epps in his own defense, not to protect Walker from death or great bodily harm, and "to make sure [Epps] couldn't shoot [any]body else." Notwithstanding Defendant's contention that he "drew" his gun while Epps was still shooting Walker, Defendant's claim that he shot Epps in Walker's defense fails as a matter of law because when Defendant actually shot Epps, Defendant was aware that the threat of harm to Walker had concluded.

The cases Defendant cites, in which defendants were entitled to defense of another instructions, are unavailing. In each of those cases, the defendant committed the defensive act(s) when the perceived harm to another was either imminent or in progress. *See*, *e.g.*, *State v. Moore*, 363 N.C. 793, 797-98, 688 S.E.2d 447, 450 (2010); *State v. Jones*, 299 N.C. 103, 105-06, 261 S.E.2d 1, 4 (1980); *State v. Hornbuckle*, 265 N.C. 312, 313-14, 144 S.E.2d 12, 13 (1965); *State v. Clark*, 134 N.C. 698, 47 S.E. 36, 37 (1904), *overruled on other grounds by State v. Phillips*, 264 N.C. 508, 142 S.E.2d 337 (1965); *State v. Patterson*, 50 N.C. App. 280, 282-83, 272 S.E.2d 924, 925-26 (1981); *State v. Graves*, 18 N.C. App. 177, 178-80, 196 S.E.2d 582, 583-85 (1973). *See also State v. Norman*, 324 N.C. 253, 261, 378 S.E.2d 8, 13 (1989) (observing that our Supreme Court "ha[s] sometimes used the phrase 'about to suffer' interchangeably with 'imminent' to describe the immediacy of the threat that is required to justify killing in self-defense." (citing *State v. Holland*, 193 N.C. 713, 718, 138 S.E. 8, 10 (1927))).

Further, evidence that "[e]verybody [was] running, ducking and screaming and scared" did not entitle Defendant to an instruction on defense of another (or others). *See State v. Ramseur*, 226 N.C. App. 363, 376, 739 S.E.2d 599, 607-08 (2013) (concluding evidence that a group of individuals had been "afraid" and subjected to verbal threats by the deceased was insufficient to "support a reasonable belief by [the] [d]efendant that . . . the people . . . were in *imminent* danger of death or great bodily harm unless [the] [d]efendant fired on [the deceased]." (emphasis in original)).

In sum, the evidence failed to demonstrate that Defendant shot Epps "to prevent death or great bodily harm" to Walker, and did not support a reasonable belief by Defendant that it was necessary to shoot Epps to

prevent imminent death or harm to others. Accordingly, Defendant was not prejudiced by the omission of a jury instruction on defense of others.

V. Exclusion of Witness Testimony

[4] Defendant next argues the trial court erroneously excluded a statement made on the witness stand by Defendant's uncle, Charles Bowser ("Bowser").

A. Standard of Review

Our Supreme Court has held that

> [i]n order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence is obvious from the record. . . . [Additionally,] the essential content or substance of the witness' testimony must be shown before we can ascertain whether prejudicial error occurred.

State v. Jacobs, 363 N.C. 815, 818, 689 S.E.2d 859, 861 (2010) (quoting *State v. Raines*, 362 N.C. 1, 20, 653 S.E.2d 126, 138 (2007)).

When Bowser was asked to recount Epps's and Walker's second confrontation on the night they were killed, Bowser testified he overheard Defendant say to Epps and Walker, "[W]ell, why can't you-all just get along?" The State's objection to this statement was sustained. Defense counsel made no attempt to establish the significance or admissibility of the excluded statement, "or request that the witness be allowed to answer outside the presence of the jury."[4] *Id.*, 363 N.C. at 819, 689 S.E.2d at 862. Thus, Defendant failed to preserve this argument for appellate review. *See, e.g.*, *Raines*, 362 N.C. at 20, 653 S.E.2d at 138 (concluding exclusion of evidence was not preserved for appellate review where "the trial court sustained the prosecution's objection [and] [d]efense counsel then proceeded to other questions without making an offer of proof or requesting that the witness be allowed to answer outside the presence of the jury."); N.C. R. App. P. 10(a)(1) (2015) (providing that "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if . . . not

4. By contrast, when the State objected to a similar line of questioning during the direct examination of defense witness Michael Gregory, defense counsel did request a voir dire hearing outside the presence of the jury.

apparent from the context."). Further, even if reviewable, "'the failure of a trial court to admit or exclude . . . evidence will not result in the granting of a new trial absent a showing by defendant that a reasonable possibility exists that a different result would have been reached absent the error.' " *State v. Hernandez*, 202 N.C. App. 359, 363, 688 S.E.2d 522, 525 (2010) (quoting *State v. Weeks*, 322 N.C. 152, 170, 367 S.E.2d 895, 906 (1988)).

B. Analysis

Defendant contends the excluded testimony was "the only evidence of the actual words spoken by [Defendant] that night [of the shootings]" and showed Defendant was "trying to calm the hostilities, not [acting as] an aggressor." Excluding Bowser's statement, Defendant argues, was prejudicial because it permitted the jury "to convict [him] on the theory that he was the aggressor[.]" We disagree.

As discussed in Section III, there was independent evidence upon which the jury could have based a finding that Defendant acted as an aggressor in the moments before shooting Epps. *See*, *e.g.*, *State v. Cook*, ___ N.C. App. ___, ___, 782 S.E.2d 569, 579 (2016) (citing N.C. Gen. Stat. §15A-1443(a) (2013)) (finding defendant failed to show prejudicial error from admission of alleged hearsay, where "the State proffered overwhelming evidence supporting defendant's conviction[.]"); *State v. Bass*, 190 N.C. App. 339, 348, 660 S.E.2d 123, 129 (2008) (concluding admission of alleged hearsay did not prejudice defendant where other witness testimony established the fact for which it was offered). Additionally, Defendant testified on his own behalf and was permitted to describe to the jury his efforts to "calm the hostilities" between Walker and Epps, including that Defendant "tried to eradicate the verbal disagreement . . . [between them]." Defendant has not demonstrated he was prejudiced by the exclusion of Bowser's testimony.

VI. Length of Jury Deliberations

A. Standard of Review

[5] Defendant next argues the trial court committed plain error by requiring the jury to deliberate for an unreasonable length of time in violation of N.C. Gen. Stat. § 15A-1235(c), which sets forth procedures a trial court may follow at its discretion in the event of jury deadlock. Our Supreme Court has explicitly characterized N.C.G.S. § 15A-1235(c) as "permissive" rather than mandatory, *see State v. May*, 368 N.C. 112, 119, 772 S.E.2d 458, 463 (2015), and held that "when a trial court is alleged to have violated a permissive statute, we review for plain error if the issue

has not been preserved." *Id.* (citing *State v. Aikens*, 342 N.C. 567, 577-78, 467 S.E.2d 99, 106 (1996)). Defendant did not object to the trial court's jury instructions, comments to the jury, or the length of jury deliberations. This argument was therefore not properly preserved. *See* N.C.R. App. P. 10(b)(1) (2015). Accordingly, our review is limited to plain error.

We further note that "plain error analysis applies only to jury instructions and evidentiary matters[.]" *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39-40 (2002), *cert. denied*, 537 U.S. 1117, 154 L.Ed.2d 795 (2003). Thus, we consider whether Defendant's argument in fact challenges "jury instructions" given by the trial court. We conclude it does not.

B. Analysis

Jury deliberations in this case began at approximately 2:15 p.m. on 11 July 2015. At 4:00 p.m., the jury sent a note requesting printed copies of the instructions on the possible verdicts and asking to view an exhibit. Deliberations resumed at 4:08 p.m. Shortly before 7:00 p.m., the trial court returned the jury to the courtroom, expressing concern that the jurors "ha[d] been working very, very hard and ha[d] not taken a break." The jury, with defense counsel's consent, was told it could either "take a dinner recess," or "continue deliberating . . . [and] have dinner brought in." The jurors chose the latter.

At 7:33 p.m., the jury sent a note requesting to see another exhibit. At 8:43 p.m., the jury sent a note indicating it was deadlocked. At 8:50 p.m., again with defense counsel's consent, the trial court exercised its discretion to give the jury instruction set forth in N.C. Gen. Stat. § 15A-1235(b)[5] (often referred to as an *Allen* instruction, *see Allen v. United States*, 164 U.S. 492, 41 L. Ed. 528 (1896)). *See State v. Streeter*, 191 N.C. App. 496, 505, 663 S.E.2d 879, 885 (2008) (citing *State v. Adams*,

---

5. N.C. Gen. Stat. § 15A-1235(b) (2015) provides that "[b]efore the jury retires for deliberation, the judge may give an instruction which informs the jury that:

> (1) Jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (2) Each juror must decide the case for himself, but only after an impartial consideration of the evidence with his fellow jurors;
>
> (3) In the course of deliberations, a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous; and
>
> (4) No juror should surrender his honest conviction as to the weight or effect of the evidence solely because of the opinion of his fellow jurors, or for the mere purpose of returning a verdict.

85 N.C. App. 200, 210, 354 S.E.2d 338, 344 (1987)) (noting that "[t]he decision to give an *Allen* instruction is within the sound discretion of the trial court."). Defendant does not challenge the trial court's *Allen* instruction.

At the conclusion of the *Allen* instruction, the trial court directed the jury to "resume [its] deliberations and continue [its] efforts to reach a verdict." At 10:50 p.m., the trial court returned the jury to the courtroom and requested an update on the deliberations. The following exchange ensued:

> COURT: Have you-all gotten any closer to reaching a unanimous verdict? Without saying what the numbers are?
>
> FOREMAN: We're getting there, Your Honor, a lot closer than the first time.
>
> COURT: At this time do you believe there is a reasonable possibility that you all will reach a unanimous verdict?
>
> FOREMAN: It will take a little time but I think it's possible.
>
> COURT: Thank you. . . . Again I gave you those [*Allen*] instructions earlier, keep working at it.
>
> [. . .]
>
> COURT: What says the State after hearing the response of the jury foreperson?
>
> STATE: Let them continue to deliberate, Your Honor.
>
> COURT: What says the defendant?
>
> DEFENSE: Same, thank you, Your Honor.

The jury resumed its deliberations and returned to the courtroom with a verdict at 11:34 p.m.

Defendant now contends that by "requiring the jury to deliberate until almost midnight on a Saturday with no end in sight and no prospect of an evening recess[,]" the trial court violated N.C. Gen. Stat. § 15A-1235(c), which provides,

> [i]f it appears to the judge that the jury has been unable to agree, the judge may require the jury to continue its deliberations and may give or repeat the instructions provided in subsections (a) and (b). The judge may not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.

N.C. Gen. Stat. § 15A-1235(c) (2015).[6] According to Defendant, this subsection (which Defendant mischaracterizes as a "statutory mandate," *see May*, 368 N.C. at 119, 772 S.E.2d at 463), "required . . . [the trial court] to declare a recess well before midnight . . . and have the jurors continue their deliberations Monday morning during regular business hours." Beyond this general contention, Defendant does not identify specific comments by the trial court that he interprets as "requir[ing] or threaten[ing] to require the jury to deliberate for an unreasonable length of time."

As noted above, plain error analysis applies only to unpreserved arguments involving jury instructions or evidentiary issues. In the present case, the trial court gave *no* further instructions after the *Allen* instruction, read to the jury with defense counsel's express consent at 8:50 p.m. That instruction, which was given virtually verbatim in accordance with N.C.G.S. § 15A-1235(b), is not challenged on appeal. The trial court concluded its *Allen* instruction by directing the jury to "resume [its] deliberations and continue [its] efforts to reach a verdict."

A trial court's decision to order further jury deliberations is not a "jury instruction;" rather, it is a discretionary ruling permitted by N.C.G.S. § 15A-1235(c). *See State v. Ross*, 207 N.C. App. 379, 387-88, 700 S.E.2d 412, 418 (2010). In the present case, when the trial court requested an update from the jury at 10:50 p.m., the court gave no new instructions and did not repeat the *Allen* instruction. It merely asked whether there appeared to be "a reasonable possibility" that the jury would reach a verdict. *See, e.g.*, *Streeter*, 191 N.C. App. at 504, 663 S.E.2d at 885 (finding trial court's inquiry into status of jury deliberations did not "coerce or intimidate the jury into reaching a verdict[,]" where court "did not ask whether the split [vote] was for conviction or acquittal . . . [and] was not impatient towards the jury nor did it indicate that it would hold the jury until a verdict was reached."). The trial judge then acted within his statutory discretion to "require the jury to continue its deliberations," based on the foreman's assurances that the jury was making progress toward a unanimous verdict. Arguably, N.C.G.S. § 15A-1235(c) was not even implicated at this point in the proceedings, because it no longer

6. "N.C.G.S. § 15A-1235(c) does not require an affirmative indication from the jury that it is having difficulty reaching a verdict, nor does it require that the jury deliberate for a lengthy period of time before the trial court may give the *Allen* instruction." *State v. Boston*, 191 N.C. App. 637, 643, 663 S.E.2d 886, 891 (2008). Additionally, the trial court is not required to repeat the instruction every time a jury indicates it is deadlocked. *See State v. Summey*, 228 N.C. App. 730, 740-41, 746 S.E.2d 403, 410-11 (2013).

"appear[ed] . . . that the jury [was] unable to agree." *See State v. Smith*, 188 N.C. App. 207, 217, 654 S.E.2d 730, 738 (2008) (concluding N.C.G.S. § 15A-1235(c) was inapplicable because jury was not deadlocked when, "[o]n more than one occasion, the [trial] court asked the jury foreman whether the jury was making progress towards a verdict [and] [e]ach time he was asked, the foreman indicated that the jury was making progress."). Defendant has failed to identify an "instruction" by the trial court that "require[d] or threaten[ed] to require the jury to deliberate for an unreasonable length of time," a prerequisite for plain error review of this argument. *See Ross*, 207 N.C. App. at 387-88, 700 S.E.2d at 418.

Even assuming *arguendo* that plain error review is appropriate, Defendant has not shown he was prejudiced by the trial court's instructions or comments to the jury regarding its deliberations. This Court has suggested that a trial court "require[s] or threaten[s] to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals" if, "[under the totality of] the circumstances surrounding jury deliberations[,] [the trial court's actions] might reasonably be construed by . . . the jury . . . as coercive." *State v. Dexter*, 151 N.C. App. 430, 433, 566 S.E.2d 493, 496 (2002) (citation and internal quotation marks omitted). A trial court's decisions regarding the length of jury deliberations are coercive if they

> suggest[] to [a member of the jury] that he should surrender his well-founded convictions conscientiously held or his own free will and judgment in deference to the views of the majority and concur in what is really a majority verdict rather than a unanimous verdict.

State v. Roberts, 270 N.C. 449, 451, 154 S.E.2d 536, 538 (1967). *See also May*, 368 N.C. at 119, 772 S.E.2d at 463 (quoting *State v. Patterson*, 332 N.C. 409, 416, 420 S.E.2d 98, 101 (1992)) (holding that "as part of our plain error analysis, in determining whether a trial court's instructions led to a coerced jury verdict . . . 'we must analyze the trial court's actions in light of the totality of the circumstances facing the trial court at the time it acted.' "); *State v. Peek*, 313 N.C. 266, 271, 328 S.E.2d 249, 253 (1985) (holding that "in deciding whether a court's instructions force a verdict or merely serve as a catalyst for further deliberations, an appellate court must consider the circumstances under which the instructions were made and the probable impact of the instructions on the jury.").

Considering the record as a whole, we find no suggestion that permitting the jury to continue deliberations, without editorialization by the trial court, when a unanimous verdict appeared imminent, "tilted

the scales and [coerced] the jury to reach its verdict convicting [Defendant]." *See State v. Walker*, 316 N.C. 33, 39, 340 S.E.2d 80, 83 (1986) (internal quotation marks and citation omitted). The trial court gave a proper and complete *Allen* instruction after being informed the jury was deadlocked and, without further comment, asked the jury to resume deliberations. In its final colloquy with the jury, the trial court explicitly avoided inquiring into the jury's numerical split. Moreover, "the trial court did not communicate with less than all of the jurors . . . [or] rush[] the jury to reach a verdict[.]" *Summey*, 228 N.C. App. at 742, 746 S.E.2d at 411-12. It did not "convey[] the impression that it was irritated with the jury for not reaching a verdict, . . . [or] intimate[] that it would hold the jury until it reached a verdict[.]" *State v. Nobles*, 350 N.C. 483, 510, 515 S.E.2d 885, 901-02 (1999). *See also Smith*, 188 N.C. App. at 218, 654 S.E.2d at 738 (holding trial court's instructions were not coercive where "[a]t no time did the trial court inform the jurors that they would not be able to go home until they reached a unanimous verdict or that they would remain together until they reconciled their differences."); *State v. Rasmussen*, 158 N.C. App. 544, 560-61, 582 S.E.2d 44, 56 (2003) (finding no coercion notwithstanding "(1) the trial court's statement to the jury that it wanted 'to get the case done if we can do it today[]'; [and] (2) the fact that the jury was asked to deliberate after normal hours on a Friday evening."). Contrary to Defendant's contention that the trial court required the jury to deliberate "with no end in sight and no prospect of an evening recess," the trial court's comments to the jury at 10:50 p.m. reflected an attempt to ascertain whether continuing deliberations would be futile.

In *State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986), our Supreme Court found a trial court did not coerce a verdict, despite inquiring into the jury's numerical division and giving an incomplete *Allen* instruction, where

> [t]he jury was not required to deliberate for an inordinate amount of time, and at no point did the jurors indicate that they were hopelessly deadlocked. The trial judge also granted the jury's requests to review exhibits introduced at trial. The record also reveals that the trial judge was polite, considerate, and accommodating toward the jury.

Id., 315 N.C. at 329, 338 S.E.2d at 86. In the present case, as in *Williams*, Defendant "has failed to point to any statement, act, or omission by the [trial] court which could remotely be interpreted as coercive." *Id.*, 315 N.C. at 329, 338 S.E.2d at 86-87. This argument is overruled.

VII. Consideration of Mitigating Factors at Sentencing

A. Standard of Review

[6] Defendant lastly contends the trial court erroneously failed to consider "mitigating factors present in the offense" at Defendant's sentencing. "The standard of review for application of mitigating factors is an abuse of discretion." *State v. Hagans*, 177 N.C. App. 17, 31, 628 S.E.2d 776, 785 (2006) (citing *State v. Butler*, 341 N.C. 686, 694–95, 462 S.E.2d 485, 489–90 (1995)). *See also State v. Garnett*, 209 N.C. App. 537, 549, 706 S.E.2d 280, 288 (2011) (quoting *State v. Rogers*, 157 N.C. App. 127, 129, 577 S.E.2d 666, 668 (2003)) (stating that "'[a] trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion.' "). "Abuse of discretion results where the trial 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. Thomsen*, ___ N.C. ___, ___, 776 S.E.2d 41, 48 (2015) (quoting *State v. Rollins*, 224 N.C. App. 197, 199, 734 S.E.2d 634, 635 (2012)).

In North Carolina, "'[a] trial judge is given wide latitude in determining the existence of mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence.' " *State v. Bacon*, 228 N.C. App. 432, 436, 745 S.E.2d 905, 908-09 (2013) (quoting *State v. Mabry*, 217 N.C. App. 465, 471, 720 S.E.2d 697, 702 (2011)). On appeal, a trial court may be reversed for failure to find a mitigating factor "only when the evidence offered in support of that factor 'is both uncontradicted and manifestly credible.' " *Mabry*, 217 N.C. App. at 471, 720 S.E.2d at 702 (quoting *State v. Jones*, 309 N.C. 214, 220, 306 S.E.2d 451, 456 (1983)).

B. Analysis

The trial court sentenced Defendant within the presumptive range for a Class B1 felony, prior record level I. *See* N.C. Gen. Stat. §§ 15A-1340.17(c)(2), (e) (2015). It is well-established that a trial court is not required to make findings of mitigation or aggravation if, in its discretion, it does not depart from the presumptive sentencing range, "even if evidence of mitigating factors is presented at sentencing." *State v. Kelly*, 221 N.C. App. 643, 648, 727 S.E.2d 912, 915 (2012) (citing *Hagans*, 177 N.C. App. at 31, 628 S.E.2d at 785–86 (2006)); *see also State v. Norris*, 360 N.C. 507, 512, 630 S.E.2d 915, 918 (2006) (holding that "the trial court is free to choose a sentence from anywhere in the presumptive range without findings other than those in the jury's verdict."); N.C. Gen. Stat. § 15A-1340.16(a) (2015) (providing in part that "[t]he court

shall consider evidence of aggravating or mitigating factors present in the offense that make aggravated or mitigated sentences appropriate, but the decision to depart from the presumptive range is in the discretion of the court."); N.C. Gen. Stat. § 15A-1340.16(c) (2015) (providing in part that "[t]he court shall 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 specified in G.S. 15A-1340.17(c)(2)."). Accordingly, because the trial court did not depart from the presumptive range in sentencing Defendant, it was not required to make any findings regarding mitigation. *See State v. Caldwell*, 125 N.C. App. 161, 162-63, 479 S.E.2d 282, 283 (1997) (concluding that "[our] Legislature [clearly] intended to provide the trial court with a window of discretion to be exercised when sentencing a criminal defendant within the presumptive range. It is not the province of this Court to impose the additional requirement that the trial court justify its decision by making findings of aggravation and mitigation subject to appellate review.").

Defendant argues that, even if not required to make findings, the trial court erroneously failed to "consider" evidence of mitigating factors that were "proved by the State's own evidence." This argument is without merit. A sentence that falls within the presumptive range but is imposed "without comment . . . does not mean the trial court failed to consider the mitigating factors presented." *Hagans*, 177 N.C. App. at 31, 628 S.E.2d at 786. *See also State v. Chavis*, 141 N.C. App. 553, 568, 540 S.E.2d 404, 415 (2000) (concluding that, "[a]s the trial court imposed the presumptive sentence . . ., it was not required to take into account any evidence offered in mitigation.").

We note that, at sentencing, Defendant did not assert the specific statutory factors he now argues the trial court erroneously failed to consider.[7] Where a defendant

> fails to request that a trial court find a factor in mitigation, the trial court has a duty to find the factor only when the evidence offered at the sentencing hearing supports the existence of a [statutory] mitigating factor . . . [and] defendant [proves] by a preponderance of the evidence that the evidence so clearly establishes the fact in issue

7. Specifically, Defendant cites N.C. Gen. Stat. § 15A-1340.16(e)(1) (2015) ("The defendant committed the offense under . . . threat . . . [that] significantly reduced the defendant's culpability.") and N.C. Gen. Stat. § 15A-1340.16(e)(8) (2015) ("The defendant acted under strong provocation . . . .").

> that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law.

See State v. Davis, 206 N.C. App. 545, 549, 696 S.E.2d 917, 920 (2010) (internal quotation marks and citations omitted). During Defendant's sentencing hearing, in requesting a sentence at the lowest end of the mitigated range, defense counsel told the trial court only that Defendant had committed "an unintentional act." Our Supreme Court has held that, absent a stipulation by the State, "statements made by defense counsel during argument at the sentencing hearing do not constitute evidence which would support a finding of [either] nonstatutory [or statutory] mitigating factors." *State v. Swimm*, 316 N.C. 24, 32, 340 S.E.2d 65, 71 (1986).

Defendant addressed the trial court prior to sentencing, reasserting his claim of self-defense and expressing remorse for the "tragic situation." Even if this could be characterized as evidence of mitigating factors, the trial court acted "squarely [with]in its discretion . . . by sentencing Defendant in the presumptive range after considering Defendant's evidence of mitigating factors." *Garnett*, 209 N.C. App. at 550, 706 S.E.2d at 288.

VIII. Conclusion

For the reasons stated in this opinion, we find Defendant's trial was free from error.

NO ERROR.

Judges HUNTER, JR., and DILLON concur.

STATE OF NORTH CAROLINA
v.
ROLANDO MARRERO, DEFENDANT

No. COA15-908

Filed 2 August 2016

1. Search and Seizure—knock and talk—totality of circumstances—defendant not seized

Based on the totality of the circumstances, the trial court correctly concluded that officers did not act in a physically or verbally abusive manner during a knock and talk approach to defendant in his house and that no seizure of defendant occurred.

2. Search and Seizure—protective sweep of house—exigent circumstances

Exigent circumstances existed for a protective sweep of defendant's residence and to ensure that evidence was not destroyed where, under the totality of the circumstances, a dangerous and emergent situation existed.

Appeal by defendant from judgment entered 12 January 2015 by Judge Beecher R. Gray in Superior Court, Mecklenburg County. Heard in the Court of Appeals on 27 January 2016.

Attorney General Roy A. Cooper III, by Special Deputy Attorney General Richard E. Slipsky, for the State.

Allegra Collins Law, by Allegra Collins, for defendant-appellant.

STROUD, Judge.

Defendant Rolando Marrero appeals from the trial court's denial of his motion to suppress. On appeal, defendant argues that the trial court erred and should have granted his motion because officers violated his Fourth Amendment rights when they entered his home. After review, we affirm the decision of the lower court, because defendant was not illegally seized and exigent circumstances justified the officers' warrantless entry into defendant's home.

I. Background

The trial court's findings of fact are not challenged on appeal. On 2 March 2014, at 7:52 p.m., Sergeant Robert Wise of the Charlotte

Mecklenburg Police Department ("CMPD") received a message from a confidential informant of a "home invasion" robbery to take place at 9:00 p.m. that night "at a residence near Milton Road." The informant claimed that he had turned down an offer to join the robbery and that there was a red pickup truck in the driveway of the targeted residence. The informant also alleged that the two suspects had attempted to obtain an AK-47 assault rifle and would be in a small red Hyundai vehicle.

Sergeant Wise was able to confirm that the informant's information was reliable and dispatched officers to monitor the location. Officers identified a particular house on Bell Plaine Drive as the location of the targeted residence. While monitoring, the officers observed a small red Hyundai drive past the house twice. Thereafter, the officers were informed that detectives and other patrol officers were en route to the house to conduct a "knock and talk" to investigate drug activity. The officers on scene were instructed to watch the back of the house and positioned themselves near the intersection of the end of the driveway, the backyard, and back right corner of the residence to ensure no one attempted to enter from the back. At least two officers were in the front of the residence with shotguns pointed downward in "low ready position."

At 9:15 p.m., CMPD detectives Brett Riggs and Messer[1] arrived wearing tactical vests with "POLICE" written across them. The other six officers were in full uniform at various locations surrounding the residence, facing away from the house in anticipation of robbery suspects armed with an AK-47. Detective Riggs did not know whether a robbery had already occurred, was in progress, or had not yet occurred. With Detective Messer at his side, Detective Riggs approached defendant's front porch, shined his flashlight into the windows on either side of the front door, and then knocked. In response to a muffled voice, Detective Riggs loudly stated, "Charlotte-Mecklenburg Police Department." After receiving no response, Detective Riggs knocked on the door once more and, after a few moments, defendant opened the door. Only two or three minutes elapsed from the initial knock to the moment defendant opened the door. During the encounter, Detective Riggs did not see any blue lights emitting from any of the patrol vehicles.

When the door was opened, Detective Riggs immediately smelled unburned, or "green," marijuana from inside the house. Detective

1. Detective Messer is never identified by his first name in the record on appeal.

Riggs attempted to explain to defendant that the officers were there to investigate potential drug activity and protect against a potential home invasion, but quickly realized defendant did not speak or understand English. Based on the odor of marijuana, Detective Riggs decided to detain defendant, perform a protective sweep of the residence, and apply for a search warrant.

Two officers conducted a protective sweep of the house to ensure there was no one else inside who could harm them. Soon after, Detectives Riggs and Messer obtained a search warrant and a Spanish-speaking CMPD officer read the warrant to defendant. During the execution of the search warrant, 149 living marijuana plants and 20 pounds of vacuum-sealed marijuana were found in defendant's basement. About 30 pounds of marijuana were seized as a result of the search.

Defendant was indicted on 10 March 2014 for (1) Trafficking in Drugs; (2) Manufacture of a Controlled Substance; (3) Maintaining a Place to Keep Controlled Substances; and (4) Possession of Drug Paraphernalia. Defendant filed a motion to suppress evidence seized at his residence on 24 July 2014, arguing that the evidence was obtained as a result of a non-consensual knock and talk, which amounted to a seizure of defendant in violation of the Fourth Amendment.

Defendant's motion came on for hearing on 12 January 2015. Three of the CMPD officers who were involved in the encounter testified, including Detective Brett Riggs, who was in charge of the operation. After a three-hour evidentiary hearing, the trial court denied defendant's motion. The court's written order included findings that the CMPD were onsite in response to information from a reliable informant that an armed robbery of 30 or more pounds of marijuana was to take place at defendant's residence; Detective Riggs and Detective Messer approached defendant's front door to conduct a "knock and talk"; before knocking Detective Riggs used a flashlight to locate the house number and to determine if anyone inside the house was peering out; "[i]t took the Defendant two to three minutes to answer the door" after Detective Riggs first knocked; as soon as defendant opened the door Detective Riggs smelled a strong odor of marijuana; and "[b]ased upon the odor of marijuana, and the Defendant's inability to understand English," Detective Riggs made the decision to enter and secure the residence. Based on these and other findings, the trial court concluded that no illegal seizure of the defendant occurred during the course of the knock and talk and that exigent circumstances justified CMPD's warrantless entry into defendant's home.

Following the trial court's ruling, defendant pled guilty to the charges against him. Defendant timely reserved his right to appeal and now appeals the denial of his motion to suppress.

II. Motion to Suppress

Defendant's lone issue on appeal is whether the trial court erred in denying his motion to suppress. Defendant claims his Fourth Amendment rights were violated (1) because he was illegally seized inside his home as a result of police coercing him to open his front door, (2) because he did not consent to the police entering his home, and (3) because no exigent circumstances existed to justify a warrantless entry. Therefore, defendant asks this Court to reverse the lower court's order and suppress all evidence obtained as a result of his interaction with CMPD officers.

The standard of review for determining whether a defendant's motion to suppress was properly denied is " 'whether the trial court's findings of fact are supported by the evidence and whether the findings of fact support the conclusions of law.' " *State v. Isenhour*, 194 N.C. App. 539, 541, 670 S.E.2d 264, 266-67 (2008) (quoting *State v. Cockerham*, 155 N.C. App. 729, 736, 574 S.E.2d 694, 699 (2003)). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Blackstock*, 165 N.C. App. 50, 55, 598 S.E.2d 412, 416 (2004). Conclusions of law, on the other hand, are fully reviewable on appeal. *Isenhour*, 194 N.C. App. at 541, 670 S.E.2d at 267. In carrying out this analysis deference is given to the trial judge as he is in the best position to weigh the evidence. *Blackstock*, 165 N.C. App. at 56, 598 S.E.2d at 416.

1. Seizure

[1] Defendant first contends that he was illegally seized as a result of being coerced into opening the front door of his house during a knock and talk carried out by the CMPD. Whether defendant was coerced to open the door for a knock and talk encounter is a novel question for this Court. While there is no case law directly on point, there are many cases involving illegal seizures which guide this decision.

A "knock and talk" is a procedure by which police officers approach a residence and knock on the door to question the occupant, often in an attempt to gain consent to search when no probable cause exists to obtain a warrant. *State v. Smith*, 346 N.C. 794, 800, 488 S.E.2d 210, 214 (1997). This Court and the North Carolina Supreme Court have recognized the right of police officers to conduct knock and talk investigations,

so long as they do not rise to the level of Fourth Amendment searches. *State v. Wallace*, 111 N.C. App. 581, 585, 433 S.E.2d 238, 241 (1993) ("Law enforcement officers have the right to approach a person's residence to inquire whether the person is willing to answer questions."); *State v. Grice*, 367 N.C. 753, 762, 767 S.E.2d 312, 319 (discussing the limiting principle of knock and talk investigations), *cert. denied*, __ U.S. __, 192 L. Ed. 2d 882 (2015). The Fourth Amendment ensures "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures[.]" U.S. Const. amend. IV. " 'The touchstone of the Fourth Amendment is reasonableness.' " *Grice*, 367 N.C. at 756, 767 S.E.2d at 315 (quoting *Florida v. Jimeno*, 500 U.S. 248, 250, 114 L. Ed. 2d 297, 302 (1991).

The seizure of an individual can take place through the application of physical force or without the officer ever laying his hands on the person seized. *Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 267. An individual is seized by an officer and falls within the protection of the Fourth Amendment when officer conduct " 'would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business.' " *State v. Icard*, 363 N.C. 303, 308, 677 S.E.2d 822, 826 (2009) (quoting *Florida v. Bostick*, 501 U.S. 429, 437, 115 L. Ed. 2d 389, 400 (1991)) (quotation marks omitted). In determining whether a reasonable person would feel free to decline an officer's request to communicate, a reviewing court must examine the totality of the circumstances. *Id.* at 308-09, 677 S.E.2d at 826. This test focuses on the coercive effect of police conduct, taken as a whole. *Id.* at 309, 677 S.E.2d at 826. Circumstances which might indicate a seizure include, but are not limited to, "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554, 64 L. Ed. 2d 497, 509 (1980).

Defendant's argument relies on a 7th Circuit case, *United States v. Jerez*, 108 F.3d 684 (7th Cir. 1997), and a comparison between the police conduct in *Jerez* and the conduct of the officers in this case. In *Jerez*, the 7th Circuit held that a Fourth Amendment seizure occurred based upon a knock and talk carried out by police officers at a Wisconsin motel. *Id.* at 692-93. The officers in *Jerez* performed a knock and talk after 11:00 p.m. at night and persistently knocked on the defendants' motel door for 3 minutes straight. *Id.* at 687. The officers made verbal demands encouraging the occupants to open the door, knocked on the window of the motel room, and even shined a flashlight through

the window illuminating one of the defendants as he lay in his bed. *Id.* Based on the totality of the circumstances, the 7th Circuit concluded the police conduct during the knock and talk compelled the defendants to open the door and amounted to a Fourth Amendment seizure. *Id.* at 692-93.

Defendant's reliance on *Jerez* is misplaced. Not only are 7th Circuit opinions not binding on this Court, but the facts of *Jerez* are distinguishable from the facts of the present case. Unlike *Jerez*, neither officer banged on windows, demanded the door be opened, or looked for alternative methods of ensuring defendant was aware of their presence. Here, the officers simply knocked on defendant's front door a few times and stated they were with the CMPD once over the course of the two to three minutes it took defendant to answer the door. Detective Riggs did use a flashlight before knocking, but only to identify the house number and for officer safety, not in an attempt to rouse defendant as the officers in *Jerez*.

North Carolina case law regarding "illegal seizures" offers the best instruction for the present case. In *Isenhour*, the defendant appealed the denial of his motion to suppress, claiming he was illegally seized and that the consent he gave officers to search his vehicle was given involuntarily, due to the coercive conduct of those officers. 194 N.C. App. at 541, 670 S.E.2d at 266. The police officers in *Isenhour* parked eight feet behind the defendant's car, approached the defendant while armed and in full uniform, and stood on either side of his car as they spoke with him. *Id.* at 540, 670 S.E.2d at 266. The defendant eventually consented to a search of his car and was subsequently arrested. *Id.* at 541, 670 S.E.2d at 266. After conducting a totality of the circumstances review, this Court affirmed the lower court's denial of the defendant's motion to suppress, noting that the defendant's consent was voluntary and that the officers did not create any psychological or physical barriers which would have led a reasonable person to believe that they were not free to leave or terminate the encounter. *Id.* at 544, 670 S.E.2d at 268.

In contrast, in *Icard*, a police officer pulled behind a parked vehicle, in which the defendant was a passenger, and activated his blue lights. 363 N.C. at 304, 677 S.E.2d at 824. The officer called for back-up and a fellow officer arrived in his patrol car and activated his takedown lights, illuminating the passenger side of the truck. *Id.* at 305, 677 S.E.2d at 824. During the encounter, one officer rapped on the passenger door of the vehicle. *Id.* After receiving no response the officer opened the door himself and proceeded to ask for the defendant's license and to search her purse. *Id.* The North Carolina Supreme Court concluded the interaction

between the defendant and the officers was non-consensual. *Id.* at 310-11, 677 S.E.2d at 827-28. The Court noted that the actions of the officers amounted to a show of authority and that a reasonable person in the defendant's position would not have felt free to leave or terminate the encounter. *Id.*

Defendant's argument here mirrors the argument made by the defendant in *Isenhour*. Although defendant seemingly consented to the knock and talk by opening his door, he claims his response was involuntary and compelled by coercive police conduct. Here, however, while other officers were on the scene outside the house, there was no evidence that defendant was aware of their presence while he was in the house and before he opened the door. During the knock and talk, Detective Riggs could not see any blue lights from the police cars nearby. Detective Riggs and Detective Messer were the only officers on the defendant's porch during the knock and talk. Unlike in *Icard*, Detective Riggs and Detective Messer did not perform the knock and talk with takedown lights shining into defendant's home. Detective Riggs did use a flashlight, but only to identify the house number and ensure that no one was looking out from inside defendant's house. As in *Icard*, Detective Riggs' first few knocks were ignored, but neither Detective Riggs nor Detective Messer reacted like the officer in *Icard*. They did not attempt to open the front door themselves or demand that the door be opened in an effort to engage with defendant. Instead, they knocked once more and defendant eventually opened the door himself. Similar to *Isenhour*, the officers here did not mount a show of authority or engage in intrusive conduct.

Based on the totality of the circumstances, the trial court correctly concluded that the officers in this case did not act in a physically or verbally threatening manner and that no seizure of defendant occurred during the course of the knock and talk. This conclusion is supported by the findings of fact in the record. Therefore, the trial court did not err in concluding that the defendant was not illegally seized during the knock and talk procedure carried out by CMPD officers.

2. Exigent Circumstances

[2] Defendant next contends he did not consent to the search of his home by CMPD officers and that no exigent circumstances existed to justify a warrantless entry of his home after he opened the door. The trial court made no findings or conclusions of law regarding a consent theory, as it concluded that probable cause and exigent circumstances were present. When probable cause and exigent circumstances exist, consent is not necessary. Therefore, this Court's review focuses only on

whether exigent circumstances existed to justify the CMPD's warrantless entry of defendant's home.

We note that defendant's only specific argument to any of the trial court's findings of fact is that "the evidence does not support the findings of fact" as to exigent circumstances, but there is no such finding of fact. Defendant argues that the "finding" of exigent circumstances is in error based only upon testimony by Detective Riggs that on the paperwork he completed after the search, he had answered "no" to a question about "whether this raid and search was for exigent circumstances." The trial court made only conclusions of law regarding exigent circumstances. Although Detective Riggs did testify as defendant notes, a witness's statement about a question of law is not binding upon the trial court. In addition, Detective Riggs and the other officers did testify about their safety concerns, particularly in light of the report of a potential armed robbery, and the need to secure any evidence which may be readily disposed during any delay while they obtained a warrant. Defendant does not raise any objection to any of the findings of fact as unsupported by the evidence. We therefore review this argument only to determine if the unchallenged findings of fact support the trial court's conclusion of law.

The Fourth Amendment dictates that "a governmental search and seizure of private property unaccompanied by prior judicial approval in the form of a warrant is *per se* unreasonable unless the search falls within a well-delineated exception to the warrant requirement . . . ." *State v. Cooke*, 306 N.C. 132, 135, 291 S.E.2d 618, 620 (1982). The existence of probable cause and exigent circumstances is one such exception. *See State v. Harper*, 158 N.C. App. 595, 602, 582 S.E.2d 62, 67 (2003) ("Generally, warrantless searches are not allowed absent probable cause and exigent circumstances[.]"). Here, defendant does not challenge the existence of probable cause, so our review focuses solely on whether exigent circumstances were present.

" '[A]n exigent circumstance is found to exist in the presence of an emergency or dangerous situation.' " *State v. Stover*, 200 N.C. App. 506, 511, 685 S.E.2d 127, 131 (2009) (quoting *State v. Frazier*, 142 N.C. App. 361, 368-69, 542 S.E.2d 682, 688 (2001)) (quotation marks omitted). The State has the burden of proving that exigent circumstances necessitated the warrantless entry. *Cooke*, 306 N.C. at 135, 291 S.E.2d at 620. Determining whether exigent circumstances exist depends on the totality of the circumstances. *State v. Nowell*, 144 N.C. App. 636, 643, 550 S.E.2d 807, 812 (2001), *aff'd per curiam*, 355 N.C. 273, 559 S.E.2d 787 (2002). Factors considered in determining whether exigent circumstances exist include, but are not limited to:

> (1) the degree of urgency involved and the time necessary to obtain a warrant; (2) the officer's reasonably objective belief that the contraband is about to be removed or destroyed; (3) the possibility of danger to police guarding the site; (4) information indicating the possessors of the contraband are aware that the police are on their trail; and (5) the ready destructibility of the contraband.

State v. Wallace, 111 N.C. App. at 586, 433 S.E.2d at 241-42 (1993). In conducting this analysis, the United States Supreme Court has instructed courts to look to objective factors, rather than subjective intent. *Kentucky v. King*, 563 U.S. 452, 464, 131 S. Ct. 1849, 1859 (2011) (quotations, citations, and italics omitted).

When there is a possibility of danger to police, officers "may conduct a protective sweep of a residence in order to ensure that their safety is not in jeopardy." *Stover*, 200 N.C. App. at 511, 685 S.E.2d at 132. A protective sweep is reasonable if based on " 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.' " *State v. Dial*, 228 N.C. App. 83, 87, 744 S.E.2d 144, 148 (2013) (quoting *State v. Bullin*, 150 N.C. App. 631, 640, 564 S.E.2d 576, 583 (2002)). Furthermore, the North Carolina Supreme Court has acknowledged, "[t]he immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance which makes it reasonable for the officer to conduct a limited, warrantless, protective sweep of the dwelling." *State v. Taylor*, 298 N.C. 405, 417, 259 S.E.2d 502, 509 (1979).

Here, the trial court found that officers arrived at defendant's residence because of a tip from a reliable informant that "suspects were going to rob a marijuana plantation that was inside a residence house off of Milton Road[.]" The informant explained that "at least one of the suspects would be armed with an AK-47 rifle." The court also found that during the knock and talk Detective Riggs was "unaware as to whether a robbery had occurred, was in progress, or was imminent". In addition, as soon as defendant opened his door Detective Riggs smelled a strong odor of marijuana. Based on the detection of a strong odor of marijuana, and defendant's inability to understand English, Detective Riggs made the decision to enter defendant's home and secure it in preparation for obtaining a search warrant. Given these findings, and the rational inferences which can be drawn from them, an officer in Detective Riggs' position could have reasonably believed that there was an undiscovered dangerous individual within defendant's home with an AK-47. The

CMPD's need to ensure that no one remained in the residence carrying an AK-47 constituted an exigent circumstance. *See Taylor*, 298 N.C. at 417, 259 S.E.2d at 509 ("The immediate need to ensure that no one remains in the dwelling preparing to fire a yet unfound weapon . . . constitutes an exigent circumstance"). Therefore, Detective Riggs' decision to initiate a protective sweep for officer safety was reasonable.

Furthermore, the ready destructibility of contraband and the belief that contraband might be destroyed have long been recognized as exigencies which justify warrantless seizures/entries. *Grice*, 367 N.C. at 763, 767 S.E.2d at 320. In the present case, the trial court found that officers were advised that defendant's residence contained "a marijuana plantation" with "at least 30 pounds of marijuana inside[.]" Additionally, the trial court found that when defendant opened the door the officers immediately smelled a strong odor of marijuana. Given these findings, it is objectively reasonable to conclude that an officer in Detective Riggs' position would have worried that defendant would destroy evidence when he and Detective Messer left the scene to obtain a search warrant, especially given the ready destructibility of marijuana.

Based on the totality of the circumstances, a dangerous and emergent situation existed at the time Detective Riggs initiated a protective sweep of defendant's residence. Therefore, the trial court did not err in concluding that exigent circumstances warranted a protective sweep for officer safety and to ensure defendant or others would not destroy evidence.

III. Conclusion

The lower court did not err in concluding that the knock and talk carried out by CMPD officers did not rise to the level of a Fourth Amendment seizure and that exigent circumstances justified the CMPD's warrantless entry into defendant's home. Its conclusions on these matters were supported by findings of fact in the record and those findings were based on competent evidence, namely the testimony of CMPD officers at the hearing on defendant's motion to suppress. Therefore, we affirm the trial court's denial of defendant's motion to suppress.

AFFIRMED.

Judges ELMORE and DIETZ concur.

STATE v. PIGFORD

[248 N.C. App. 797 (2016)]

STATE OF NORTH CAROLINA
v.
MICHAEL RAY PIGFORD, DEFENDANT

No. COA15-1047

Filed 2 August 2016

Search and Seizure—vehicle checkpoint—odor of marijuana inside car—no link to defendant

The trial court erred by denying defendant's motion to suppress evidence of cocaine found during a search of his person at a vehicle checkpoint where the deputy had probable cause to search the vehicle but not defendant's person. There was nothing linking the odor of marijuana in the vehicle to defendant. The inevitable discovery doctrine was not raised below.

Judge McCULLOUGH concurring.

Appeal by defendant from judgments entered 18 March 2015 by Judge Paul L. Jones in Lenoir County Superior Court. Heard in the Court of Appeals 27 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Martin T. McCracken, for the State.

W. Michael Spivey for defendant.

ELMORE, Judge.

Defendant moved to suppress the evidence of cocaine found during a search of his person at a vehicle checkpoint. The trial court denied the motion, and the jury found defendant guilty of possession of cocaine and possession of a firearm by a felon. The issue on appeal is whether an odor of marijuana emanating from "inside a vehicle" provides an officer with probable cause to conduct an immediate warrantless search of the driver. On these facts, we hold that it does not. We reverse the trial court's order and grant defendant a new trial for possession of cocaine in 14 CRS 050859.

I. Background

On 5 April 2014, Michael Ray Pigford (defendant) was stopped at a driver's license checkpoint. Defendant was driving the vehicle and Annie

Dudley was riding in the front passenger seat. At the checkpoint, Deputy Sherriff Dwight Curington approached the vehicle and noticed an odor of marijuana emanating from the open driver-side window. Based on his training and experience, Deputy Curington was familiar with the smell of marijuana. He was "unable to establish the exact location" of the odor but "was able to determine it was coming from inside the vehicle."

Upon smelling the odor, Deputy Curington ordered defendant out of the vehicle and searched him. He found cocaine residue on a dollar bill and straw located in defendant's back pocket. Deputy Curington arrested defendant, placed him in a patrol car, and proceeded to search the vehicle where he found a bag of marijuana under the driver seat and a handgun in the pouch on the back of the passenger seat. The handgun was stolen.

Prior to trial, defendant moved to suppress the evidence of cocaine found on his person. The court denied the motion, concluding that "the odor of marijuana emitting from the front driver side window of the vehicle that defendant was driving established probable cause for Deputy Curington to remove the defendant from the vehicle and conduct a search of defendant's person."

The jury acquitted defendant of possession of a stolen firearm, but found him guilty of possession of cocaine and possession of a firearm by a felon. He also pleaded guilty to attaining habitual felon status. The trial court sentenced defendant to 36 to 56 months of imprisonment for possession of cocaine, and imposed a consecutive sentence of 100 to 132 months for possession of a firearm by a felon. Defendant appeals.

II. Discussion

Defendant argues that the trial court erred in denying his motion to suppress the cocaine found on the dollar bill and straw. He maintains that Deputy Curington lacked probable cause to conduct a warrantless search of defendant's person because there was no individualized suspicion. More specifically, although the deputy smelled marijuana emanating from the vehicle, there was no evidence that the odor was attributable to defendant personally. The State responds by arguing that the odor of marijuana establishes exigent circumstances justifying an immediate search of not only the vehicle, but of the person, as well. Whether the smell of marijuana emanating from the driver-side window of a vehicle constitutes probable cause to search the driver appears to be an issue of first impression in North Carolina.

Our review of a trial court's denial of a motion to suppress is "strictly limited to determining whether the trial judge's underlying findings of

fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law." *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). "The trial court's conclusions of law . . . are fully reviewable on appeal." *State v. Hughes*, 353 N.C. 200, 208, 539 S.E.2d 625, 631 (2000).

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend IV. Contemporaneously, "[t]he Fourth Amendment 'protects people from unreasonable government intrusions into their legitimate expectations of privacy.' " *United States v. Place*, 462 U.S. 696, 706–07 (1983) (citing *United States v. Chadwick*, 433 U.S. 1, 7 (1977)).

The Supreme Court has stressed its preference for warrant-based searches: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted).

One such exception, the "automobile exception," allows an officer to conduct a warrantless search of a lawfully stopped vehicle if probable cause exists to believe it contains contraband or evidence of a crime. *Maryland v. Dyson*, 527 U.S. 465, 466–67 (1999); *Carroll v. United States*, 267 U.S. 132, 153 (1925). Where such probable cause exists, an officer may also search "any containers found inside [the vehicle] that may conceal the object of the search." *United States v. Johns*, 469 U.S. 478, 479–80 (1985) (describing the holding from *United States v. Ross*, 456 U.S. 798, 825 (1982)). The exception is based on the "ready mobility" of a vehicle and the reduced expectation of privacy derived "from the pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 390–92 (1985).

"Exigent circumstances" form the basis of another recognized exception to the warrant requirement. The exception applies where " 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment." *Mincey v. Arizona*, 437 U.S. 385, 394 (1978) (citations omitted). Exigent circumstances include the need to "prevent

the imminent destruction of evidence," *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006) (citation omitted), whereby officers may "conduct an otherwise permissible search without first obtaining a warrant," *Kentucky v. King*, 563 U.S. 452, 455 (2011).

To be sure, "the scope of the warrantless search . . . is no broader and no narrower than a magistrate could legitimately authorize by warrant." *Ross*, 456 U.S. at 825. It must be supported by probable cause. *Id.*; *King*, 563 U.S. at 455.

> "Probable cause exists where 'the facts and circumstances within [an officer's] knowledge, and of which [he] had reasonably trustworthy information, [are] sufficient in themselves to warrant a man of reasonable caution in the belief' that an offense has been or is being committed," and that evidence bearing on that offense will be found in the place to be searched.

Safford Unified Sch. Dist. No. 1 v. Redding, 557 U.S. 364, 370 (2009) (alterations in original) (citations omitted) (quoting *Brinegar v. United States*, 338 U.S. 160, 175–176 (1949)); *see also Illinois v. Gates*, 462 U.S. 213, 238 (1983) (describing "probable cause" as "a fair probability that contraband or evidence of a crime will be found in a particular place" (citation omitted)). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *see also Chandler v. Miller*, 520 U.S. 305, 313 (1997) ("To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." (citation omitted)).

It is not contested that Deputy Curington had probable cause to search defendant's vehicle. In *United States v. Di Re*, 332 U.S. 581 (1948), however, the Supreme Court of the United States rejected the government's claim that "officers have the right, without a warrant, to search any car which they have reasonable cause to believe carries contraband, and incidentally may search any occupant of such car when the contraband sought is of a character that might be concealed on the person." *Id.* at 584. The Court held instead that probable cause to search a vehicle does not justify a search of a passenger: "We are not convinced that a person, by mere presence in a suspected car, loses immunities from search of his person to which he would otherwise be entitled." *Id.* at 587.

The Court later clarified that *Di Re* "turned on the unique, significantly heightened protection afforded against searches of one's person."

Wyoming v. Houghton, 526 U.S. 295, 303 (1999). Its holding was not based on a "distinction between drivers and passengers," *id.* at 303 n.1, because probable cause to search a car also justifies a search of "passengers' *belongings* found in the car that are capable of concealing the object of the search," *id.* at 307 (emphasis added). Rather, it was based on the distinction "between search of the person and search of property." *Id.* at 303 n.1.

We relied on *Di Re* to reach a similar conclusion in *State v. Malunda*, 230 N.C. App. 355, 749 S.E.2d 280, *writ denied*, *review denied*, 367 N.C. 283, 752 S.E.2d 476 (2013). In *Malunda*, after conducting a lawful traffic stop, officers ordered the defendant-passenger out of the car and detained him on the curb. *Id.* at 356–57, 749 S.E.2d at 282. The officers proceeded toward the driver side of the vehicle and "noticed a strong odor of marijuana" which they had not smelled on the passenger side. *Id.* at 357, 749 S.E.2d at 282. They removed the driver and searched the vehicle, finding marijuana in the driver-side door. *Id.* Officers then searched the defendant and found crack cocaine on his person. *Id.* We held that the odor of marijuana gave the officers probable cause to search the vehicle but not the defendant: "Probable cause to search a vehicle does not . . . amount to probable cause to search a passenger in the vehicle." *Id.* at 359, 749 S.E.2d at 283 (citing Di Re, 332 U.S. at 587). Because "there was nothing linking the marijuana to defendant besides his presence in the vehicle," the search of the defendant's person was not supported by probable cause particularized to the defendant. *Id.* at 360, 749 S.E.2d at 284.

Nevertheless, the State attempts to justify the search, as did the trial court, based on our holding in *State v. Yates*, 162 N.C. App. 118, 589 S.E.2d 902 (2004), where the odor of marijuana on the defendant gave rise to a warrantless search of his person. *Id.* at 120–21, 589 S.E.2d at 903. In that case, an officer formed probable cause that the defendant possessed marijuana after the "defendant walked by him twice, once going in, the other time out" of a restaurant, "emanating a strong odor of marijuana, and each time defendant was alone." *Id.* at 123, 589 S.E.2d at 905. Because "narcotics can be easily and quickly hidden or destroyed," especially after a suspect learns of an officer's suspicions, we concluded that the warrantless search was reasonable based on the exigency of the situation. *Id.*

We fail to see how *Yates* could justify the challenged search *sub judice* because the State offered no evidence—and the trial court did not find—that the marijuana odor was attributable to defendant. Deputy

Curington testified that as he stood next to the driver-side window, he smelled marijuana "inside the car," though his description of the source of the odor was no more precise. He could not recall whether the other windows of the vehicle were rolled down, nor did he approach the passenger-side window where the odor could have been just as potent. He offered no testimony as to whether he smelled marijuana on defendant after ordering him out of the car. To the extent the odor could have been attributed to defendant, it could have been equally attributable to Ms. Dudley or somewhere else inside the car. Deputy Curington may have had probable cause to search the vehicle, but he did not have probable cause to search defendant.

The State did not argue that the discovery of the cocaine was inevitable. Our North Carolina Supreme Court adopted the "inevitable discovery" doctrine established in *Nix v. Williams*, 467 U.S. 431 (1984), as an exception to the exclusionary rule, whereby unlawfully obtained evidence may nevertheless be admitted at trial if the State proves by a preponderance that the evidence ultimately would have been discovered through lawful means. *State v. Garner*, 331 N.C. 491, 500, 417 S.E.2d 502, 507 (1992); *State v. Pope* (*Pope I*), 333 N.C. 106, 114, 423 S.E.2d 740, 744 (1992). Given that Deputy Curington had probable cause to search the vehicle, which contained marijuana and a stolen gun, we might wonder whether the cocaine inevitably would have been discovered through a search incident to a lawful arrest. Whether this doctrine applies in a particular case, however, "is initially a question to be addressed by the trial court." *State v. Pope* (*Pope II*), 333 N.C. 116, 117, 423 S.E.2d 746, 746 (1992). And since it was neither raised nor considered at defendant's motion hearing, we express no opinion on its applicability *sub judice*. *State v. Phelps*, 156 N.C. App. 119, 128, 575 S.E.2d 818, 824–25 (2003) (Hunter, J., dissenting in part), *rev'd for the reasons stated in the dissent*, 358 N.C. 142, 592 S.E.2d 687 (2004).

We are mindful that law enforcement, to be effective, must have "the ability to find and seize contraband and evidence of a crime." *Houghton*, 526 U.S. at 305. We also acknowledge, however, that "[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). Where "[e]ven a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security," *Terry v. Ohio*, 392 U.S. 1, 24–25 (1968), it is certainly not too onerous to require an officer to take some additional step to establish

individualized suspicion before intruding upon a reasonable expectation of privacy.[1]

III. Conclusion

The deputy lacked probable cause to remove defendant from the vehicle and search his person. The search violated defendant's Fourth Amendment rights, and the trial court erred in denying his motion to suppress. N.C. Gen. Stat. § 15A-974(a)(1) (2015); *Pope I*, 333 N.C. at 113–14, 423 S.E.2d at 744 (citing *Wong Sun v. United States*, 371 U.S. 471 (1963)). We reverse the trial court's order and grant defendant a new trial for possession of cocaine.

REVERSED; NEW TRIAL.

Judge INMAN concurs.

Judge McCULLOUGH concurs with a separate opinion.

McCULLOUGH, Judge, concurrence.

I write separately in concurring with the majority opinion that the search of the defendant's person was improper under the record we have before us. I also write separately to make it clear that at the new trial the State is not precluded from relying on the doctrine of inevitable discovery. In so doing the State must make a record that demonstrates that the cocaine at issue would have been inevitably discovered. As the majority opinion notes, *State v. Phelps* 156 N.C. App 119, 128, 575 S.E.2d 818, 824-25 (2003), *rev'd in part for reasons stated in the dissent*, 358 N.C. 142, 592 S.E.2d 687 (2004), seems to stand for the proposition that this doctrine cannot be relied upon without a factual record establishing its applicability, thus this court cannot make a finding of inevitable discovery without a proper record. An order of new trial does not bar either party from making a new argument or introducing evidence that it never needed to resort to, given the trial court's initial erroneous ruling.

---

1. Our appellate case law suggests that officers are capable of determining the source of a marijuana odor. In *State v. Johnson*, 225 N.C. App. 440, 442, 737 S.E.2d 442, 444 (2013), for example, an officer noticed a "strong odor of marijuana coming from [the] defendant's vehicle," prompting the officer to ask the defendant to sit in the patrol car while he checked the defendant's license information. In the patrol car, the officer "still smelled a strong odor of marijuana coming from [the] defendant." *Id.*

STATE OF NORTH CAROLINA
v.
ROBERT MORGAN SMITH

No. COA 15-1364

Filed 2 August 2016

1. Evidence—pretrial motion to suppress—not timely—merits not addressed—right to object at trial preserved

The trial court did not err by summarily dismissing defendant's pretrial motion to suppress hospital medical records in an impaired driving prosecution where defendant's motion was not timely. Moreover, any error was not prejudicial because the trial court stressed that it was not addressing the merits of the motion and was preserving defendant's right to raise any objections during the trial.

2. Evidence—medical records—release—statutory authority

N.C.G.S. § 8-53 (physician-patient privilege) is not the only statute under which patient medical records may be requested and released. N.C.G.S. § 90-21.20B allows law enforcement to obtain medical records through a search warrant for criminal investigative purposes.

3. Evidence—medical records—federal regulations—search warrant

Defendant did not demonstrate that his medical records were obtained in violation of 45 C.F.R. § 164.512(f) (and thus N.C.G.S. § 90-21.20B(a)). By its plain language, 45 C.F.R. 164.512(f) permits disclosure of health information to law enforcement as required by a search warrant if certain conditions are met.

4. Evidence—medical information—disclosure—vehicle crash

The information listed in N.C.G.S. § 90-21.20B(a1) may be disclosed, at the request of law enforcement officials investigating a vehicle crash, while disclosure of additional identifiable health information in the same context is possible with a warrant or judicial order that specifies the information sought. Under N.C.G.S. § 90-21.20B(1a)(3), identifiable health information obtainable by warrant is not strictly limited to name, current location, and perceived state of impairment.

Appeal by Defendant from order and judgment dated 27 August 2014 by Judge Joseph N. Crosswhite in Superior Court, Wayne County. Heard in the Court of Appeals 25 April 2016.

Attorney General Roy Cooper, by Assistant Attorney General Whitney Hendrix Belich, for the State.

Strickland, Agner & Associates, by Dustin B. Pittman, for Defendant.

McGEE, Chief Judge.

Robert Morgan Smith ("Defendant") appeals from order of the trial court summarily denying his motion to suppress his medical records pursuant to a search warrant after he was charged with driving while impaired. Defendant contends the trial court erred in denying his motion to suppress as untimely under N.C. Gen. Stat. § 15A-971 *et seq*. Defendant further argues the trial court erroneously admitted the medical records in violation of the physician-patient privilege, N.C. Gen. Stat. § 8-53, and certain health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B. We find no error.

I. Background

Sergeant Karl Rabun ("Sgt. Rabun") of the Goldsboro Police Department responded to an early morning call on 5 September 2013 reporting a motorcycle crash at a traffic circle in downtown Goldsboro, North Carolina. Upon arriving at the scene, Sgt. Rabun found Defendant lying on the ground on the east side of the intersection, with one arm pinned beneath a "badly damaged" motorcycle. Sgt. Rabun recognized Defendant as a local attorney who had previously worked in Wayne County law enforcement. As Sgt. Rabun approached Defendant, he noticed "the strong odor of alcoholic beverage . . . emanating from [Defendant's] breath as he was trying to speak and breathe." Defendant was "complaining of pain . . . from obviously being involved in [an] impact." Sgt. Rabun directed Defendant to lie still until emergency medical responders arrived. Rescue personnel and additional law enforcement officers arrived and helped lift the motorcycle off Defendant.

Officer Matthew Marino ("Officer Marino") of the Goldsboro Police Department assumed responsibility as lead investigator of the crash. Officer Marino immediately noticed the "very strong" odor of alcohol on Defendant's breath. He observed that the engine of Defendant's motorcycle was still hot. Defendant was transported by medical responders

to the Emergency Room at Wayne Memorial Hospital ("the hospital"), where he was treated for injuries.

Approximately forty-five minutes after Defendant arrived at the hospital, Officer Marino spoke with Defendant again. Officer Marino continued to detect a strong odor of alcohol on Defendant's breath and observed that Defendant had bloodshot eyes and slurred speech. Officer Marino formed the opinion that Defendant's faculties were "appreciably impaired" and that "it was more probable rather than not that [Defendant] [had been] driving under the influence of alcohol." After advising Defendant of his implied-consent rights, Officer Marino asked Defendant to submit to a blood test. Defendant refused a blood test, telling Officer Marino to "go get a warrant." Later that morning, Officer Marino charged Defendant with driving while impaired.

Officer Marino applied for a search warrant on 9 September 2013 to obtain Defendant's medical records from Wayne Memorial Hospital related to the motorcycle crash, which was granted. Officer Marino received a total of twenty pages of medical records. Defendant's medical records noted that Defendant had an elevated blood alcohol level at the time of treatment on 5 September 2013. The State filed a notice of intent to use evidence on 6 March 2014, pursuant to N.C. Gen. Stat. § 15A-975(b), including "any . . . oral, written, recorded, and otherwise memorialized statements of the defendant" and "[a]ny and all laboratory analyses provided to the Defendant."

Defendant filed a motion to suppress his medical records on 22 August 2014, alleging that the search warrant had "illegally authorized the seizure of [Defendant's] hospital records pertaining to [his] . . . medical treatment beginning 5 September 2013." In a memorandum of law filed with Defendant's motion to suppress, Defendant alleged that the search warrant violated North Carolina's physician-patient privilege, certain health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B, and the federal Health Insurance Portability and Accountability Act (HIPAA). Defendant also alleged that the warrant was not supported by probable cause as required by N.C. Gen. Stat. § 15A-244.

The State moved to summarily dismiss Defendant's motion to suppress, alleging that Defendant's motion was untimely and accompanied by an insufficient affidavit. Prior to trial, the trial court heard and summarily denied Defendant's motion to suppress, finding that Defendant's motion was untimely under N.C. Gen. Stat. § 15A-976, and that Defendant had not offered any newly discovered facts or extraordinary circumstances that would justify a late filing. In denying Defendant's

motion to suppress, the trial court noted it "[did] not address the merits of [Defendant's] motion, and . . . intentionally preserve[d] the right of the Defendant to raise any objections during the course of th[e] trial at the appropriate time."

The trial court then heard pre-trial arguments regarding the admissibility of Defendant's medical records. After considering the text of N.C.G.S. § 90-21.20B, relevant HIPAA provisions, and case law cited by the State, the trial court held it would

> allow [Defendant's] records to be introduced for the limited purposes indicated; specifically to establish [Defendant's] blood alcohol level, and any statements made by . . . Defendant concerning the motor vehicle accident. Again, this is all subject to the proper identifications and authentications of these [medical] records at the appropriate time [during trial].

The State was instructed to redact "all remaining information" based on the trial court's conclusion that it would have no probative value and that such redaction was necessary to protect Defendant's privacy. Defendant's medical records were subsequently admitted into evidence and published to the jury. The jury found Defendant guilty on 27 August 2014 of driving while impaired. Defendant was sentenced to a level two impaired driving sentence of twelve months, suspended for a probationary term of twenty-four months. Defendant gave notice of appeal in open court.

The State filed a motion to dismiss the appeal on 21 July 2015, based on Defendant's failure to timely serve the record on appeal. The motion was heard and allowed by Judge Arnold O. Jones, II on 10 September 2015. Defendant petitioned this Court on 15 September 2015 to issue a writ of certiorari to review the decision of the trial court. The petition for writ of certiorari was allowed on 1 October 2015. Defendant appeals the trial court order summarily denying his motion to suppress and the admission of his medical records into evidence.

II. Standard of Review

A trial court's conclusions of law in ruling on a motion to suppress evidence are reviewable *de novo*. *See State v. Barnhill*, 166 N.C. App. 228, 230, 601 S.E.2d 215, 217 (2004). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment" for that of the trial court. *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)). We review *de novo* the trial court's conclusion that Defendant's motion to suppress was untimely filed under N.C. Gen. Stat. § 15A-976.

Defendant also argues that his medical records were improperly admitted because they were obtained in violation of the physician-patient privilege, N.C. Gen. Stat. § 8-53, as well as certain health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B. "Resolution of issues involving statutory construction is ultimately a question of law for the courts. Where an appeal presents a question of statutory interpretation, full review is appropriate, and we review a trial court's conclusions of law *de novo*[.]" *In re Hamilton*, 220 N.C. App. 350, 352, 725 S.E.2d 393, 395 (2012) (citation omitted).

III. Analysis

A. *Timeliness of Defendant's Motion to Suppress*

[1] Defendant first argues the trial court erred by summarily dismissing his motion to suppress as untimely, pursuant to N.C. Gen. Stat. § 15A-976. Defendant contends that, because the motion to suppress was not based on any of the grounds specified in N.C. Gen. Stat. § 15A-974, it was not subject to the time constraints set forth in N.C.G.S. § 15A-976. Under § 15A-974, evidence must be suppressed if "(1) [i]ts exclusion is required by the Constitution of the United States or the Constitution of the State of North Carolina; or (2) [i]t [was] obtained as a result of a substantial violation of the provisions of this Chapter." N.C. Gen. Stat. §§ 15A-974(a)(1)-(2) (2015). *See State v. Simpson*, 320 N.C. 313, 322, 357 S.E.2d 332, 337 (1987) ("In determining whether [N.C.G.S. § 15A-974(a)(2)] requires suppression, the reviewing court must consider the importance of the interest violated, the extent of the deviation from lawful conduct and whether the violation was willful, as well as the extent to which suppression will deter future violations."); *State v. Wilson*, 293 N.C. 47, 50, 235 S.E.2d 219, 221 (1977) ("G.S. 15A-974[(a)](1) . . . mandates the suppression of evidence *only* when the evidence sought to be suppressed is obtained in violation of defendant's constitutional rights." (emphasis in original)). Defendant explicitly cited the North Carolina and United States constitutions, as well as N.C.G.S. § 15A-971 *et seq.*, in support of his motion to suppress. As our Supreme Court has noted,

> [a] defendant who seeks to suppress evidence upon a ground specified in G.S. 15A-974 must comply with the procedural requirements outlined in G.S. 15A-971, *et seq.* Moreover, such defendant has the burden of establishing that his motion to suppress is timely and proper in form.

State v. Satterfield, 300 N.C. 621, 624-25, 268 S.E.2d 510, 513-14 (1980) (internal citation omitted)).

N.C. Gen. Stat. § 15A-976(b) provides that

> [i]f the State gives notice not later than 20 working days before trial of its intention to use evidence and if the evidence is of a type listed in G.S. 15A-975(b), the defendant may move to suppress the evidence only if [the] motion is made not later than 10 working days following receipt of the notice from the State.

N.C. Gen. Stat. § 15A-976(b) (2015). In turn, the "type[s] of evidence listed in G.S. § 975(b)" are

> (1) [e]vidence of a statement made by a defendant;
>
> (2) [e]vidence obtained by virtue of a search without a search warrant; or
>
> (3) [e]vidence obtained as a result of [a] search with a search warrant when the defendant was not present at the time of the execution of the search warrant.

N.C. Gen. Stat. §§ 15A-975(b)(1)-(3) (2015). Defendant concedes that his medical records were obtained "with a search warrant when [he] was not present at the time of the execution of the search warrant." N.C.G.S. § 15A-976(b)(3). Accordingly, Defendant's motion to suppress fell squarely within the language of N.C.G.S. § 15A-975(b)(3), and thus was subject to N.C.G.S. § 15A-976(b).

The State filed its notice of intent to use certain evidence[1] on 6 March 2014. Defendant filed his motion to suppress all evidence obtained by search warrant on 22 August 2014, a few business hours before his trial was scheduled to begin. As Defendant sought to suppress evidence obtained as a result of a search warrant executed outside his presence, and because Defendant failed to file the motion to suppress "not later than 10 working days following receipt of the notice from the State," N.C.G.S. § 15A-976(b) applies and his motion to suppress was

1. The State's notice of intent identified two specific types of evidence potentially obtainable from Defendant's medical records: statements made by Defendant, and "[a]ny and all laboratory analyses provided to [] Defendant." Additional evidence listed in the notice of intent—"[a]ny and all photographs, physical evidence, and video tapes collected from the Defendant, the Defendant's home or vehicle, the crime scene, and any other location"—was unrelated to Defendant's medical records and is not at issue in this appeal.

untimely filed. The trial court acted within its "statutorily vested [authority] . . . to deny summarily [a] motion to suppress when the defendant fails to comply with the procedural requirements of Article 53." *State v. Holloway*, 311 N.C. 573, 578, 319 S.E.2d 261, 264 (1984).[2]

We note that even if a trial court erroneously summarily denies a motion to suppress, the defendant must show the error was prejudicial. *See*, *e.g.*, *State v. Speight*, 166 N.C. App. 106, 115, 602 S.E.2d 4, 11 (2004) (concluding that although the trial court erroneously denied defendant's motion to suppress for untimeliness, the error was not prejudicial); *State v. Chance*, 130 N.C. App. 107, 112, 502 S.E.2d 22, 25 (1998) (upholding trial court's erroneous denial of motion to suppress where defendant "failed to show a reasonable possibility that a different result would have been reached at trial had such error[] not been committed."). In this case, despite denying Defendant's motion to suppress on procedural grounds, the trial court stressed that it "[did] not address the merits of [the] motion" and "intentionally preserve[d] the right of the Defendant to raise any objections during the course of th[e] trial at the appropriate time." The trial court did, in fact, permit defense counsel to argue at length regarding the admissibility of Defendant's medical records, including discussion of the substantive statutory arguments raised in Defendant's motion to suppress. Even assuming *arguendo* that the trial court erroneously concluded Defendant's motion to suppress was untimely, Defendant has not shown "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *See also* N.C. Gen. Stat. § 15A-1443(a) (2015).

B. *Admissibility of Defendant's Medical Records*

Defendant also contends the trial court erred in admitting his medical records into evidence "without regard for" the physician-patient privilege set forth in N.C. Gen. Stat. § 8-53, and contrary to several health information disclosure provisions in N.C. Gen. Stat. § 90-21.20B. We disagree and address each in turn.

(1) *Physician-Patient Privilege*

[2] Defendant maintains that, by the plain language of the physician-patient privilege statute, N.C. Gen. Stat. § 8-53, disclosure of a patient's medical records may be compelled only by judicial order after determination that such disclosure is "necessary to a proper administration of

2. The General Assembly has indicated that procedural requirements found in Article 53 are intended "to produce in as many cases as possible a summary granting or denial of the motion to suppress." *See* N.C. Gen. Stat. § 15A-977 official cmt. (2015).

justice." *See* N.C. Gen. Stat. § 8-53 (2015). Defendant cites no authority, other than N.C.G.S. § 8-53 itself, to support his argument that this statute provides the exclusive means of obtaining patient medical records. The State asserts that another statute, N.C. Gen. Stat. § 90-21.20B, allows law enforcement to obtain medical records through a search warrant for criminal investigative purposes. It notes that the latter explicitly permits the disclosure of certain protected patient health information to law enforcement "[n]otwithstanding G.S. 8-53 or any other provision of law . . . ." *See* N.C. Gen. Stat. §§ 90-21.20B(a), (a1) (2015). According to the State, this demonstrates that N.C.G.S. § 8-53 is not the only statute under which patient medical records may be requested and released. We agree.

(2) *Disclosure pursuant to search warrant*

[3] We next consider Defendant's argument that N.C.G.S. § 90-21.20B "[did not] permit[] the disclosure to law enforcement and use at trial of the medical records in this case." We disagree.

N.C. Gen. Stat. § 90-21.20B provides in pertinent part:

> (a) Notwithstanding G.S. 8-53 or any other provision of law, a health care provider may disclose to a law enforcement officer protected health information only to the extent that the information may be disclosed under the federal Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. § 164.512(f) and is not specifically prohibited from disclosure by other state or federal law.
>
> (a1) Notwithstanding any other provision of law, if a person is involved in a vehicle crash:
>
> > (1) Any health care provider who is providing medical treatment to the person shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.
> >
> > (2) Law enforcement officers shall be provided access to visit and interview the person upon request, except when the health care provider requests temporary privacy for medical reasons.

> (3) A health care provider shall disclose a certified copy of all identifiable health information related to that person as specified in a search warrant or an order issued by a judicial official.

In interpreting N.C.G.S. § 90-21.20B, we look to the federal regulations referenced in N.C.G.S. §90-21.20B(a), which govern disclosure of "protected health information for a law enforcement purpose[.]" *See* 45 C.F.R. § 164.512(f) (2016). Those regulations define "protected health information" as "individually identifiable health information," which in turn is defined as:

> [I]nformation that is a subset of health information, including demographic information collected from an individual, and:
>
> (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
>
> (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
>
> (i) That identifies the individual; or
>
> (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. § 160.103 (2016).[3] The regulations further provide that a health care provider may disclose protected health information (*i.e.*, "individually identifiable health information") for a law enforcement purpose to a law enforcement official "[i]n compliance with . . . [a] court order or court-ordered warrant" as long as "(1) [t]he information sought is relevant and material to a legitimate law enforcement inquiry; (2) [t]he request is specific and limited in scope to the extent reasonably practicable in light of the purpose for which the information is sought; and

---

3. "Protected health information" explicitly excludes four specific types of "individually identifiable health information," none of which are at issue in this case: (1) education records covered by the federal Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; (2) FERPA records described in 20 U.S.C. § 1232g(a)(4)(B)(iv); (3) employment records held by a covered entity in its role as employer; and (4) records "[r]egarding a person who has been deceased for more than 50 years." *See* 45 C.F.R. § 160.103.

(3) [d]e-identified information[4] could not reasonably be used." 45 C.F.R. § 164.512(f)(1)(ii) (2016).

Defendant argues that "protected health information" obtainable by law enforcement under 45 C.F.R. § 164.512(f) (and thus N.C.G.S. § 90-21.20B(a)) is limited to "demographic information which identifies an individual or upon which there is a reasonable basis to believe that an individual may be identified," and that N.C.G.S. § 90-21.20B(a) does not permit law enforcement to obtain any further information. As an initial matter, we note that Defendant did not contend at trial that certain "demographic information" in his medical records was obtainable by search warrant; he contended that the records were improperly released because the information in the records was "not obtained for a law enforcement purpose or a law enforcement use."[5]

Defendant overlooks the fact that "protected health information" (used synonymously with "individually identifiable health information"), as defined in 45 C.F.R. § 160.103, "includ[es]," rather than is limited to, demographic information about an individual patient. Defendant also reads the phrase out of context: the regulations refer specifically to "demographic information *collected from an individual*" (emphasis added). In our view, this merely recognizes that "health information" encompasses information received directly from the patient, in addition to information created by the provider or received from some other source.

By its plain language, 45 C.F.R. § 164.512(f) permits disclosure of health information to law enforcement as required by search warrant, if certain conditions are met. Defendant has not alleged that the search warrant in this case sought information that was not "relevant and material to a legitimate law enforcement inquiry" or was insufficiently "specific and limited in scope," or that de-identified information could

---

4. "De-identified information" is "[h]ealth information that does not identify an individual and with respect to which there is no reasonable basis to believe that the information can be used to identify an individual . . . ." 45 C.F.R. § 164.514(a) (2016). HIPAA permits covered entities (*i.e.*, health care providers) to disclose limited de-identified health information "for the purposes of research, public health, or health care operations." 45 C.F.R. § 164.514(e)(3)(i) (2016).

5. Defendant argued instead that a different standard altogether, 45 C.F.R. § 164.512(e), applied in this case. That provision governs disclosures of protected health information for judicial and administrative proceedings (as opposed to disclosures for law enforcement purposes, *see* 45 C.F.R. § 164.512(f)), and contains notice and hearing requirements. In his brief before this Court, Defendant does not refer to 45 C.F.R. § 164.512(e).

have reasonably been used instead. *See* 45 C.F.R. § 164.512(f)(1)(ii) (2016). Accordingly, Defendant has not demonstrated that his medical records were obtained in violation of 45 C.F.R. § 164.512(f) or N.C.G.S. § 90-21.20B(a).

(3) *Disclosures Related to a Vehicle Crash*

[4] Finally, N.C. Gen. Stat. § 90-21.20B(a1)(1) specifically addresses disclosure of medical information about a person involved in a vehicle crash. It provides that

> [n]otwithstanding any other provision of law, . . . [a]ny health care provider who is providing medical treatment to the person [involved in a vehicle crash] shall, upon request, disclose to any law enforcement officer investigating the crash the following information about the person: name, current location, and whether the person appears to be impaired by alcohol, drugs, or another substance.

N.C. Gen. Stat. § 90-21.20B(a1)(1) (2015). Defendant argues that this "more narrow provision" permits law enforcement officers investigating a vehicle crash, with or without a search warrant, "to be provided information which informs them of the identity of an individual and whether that person appears to be impaired—nothing more." We disagree.

In N.C.G.S. § 90-21.20B(a1)(1), the General Assembly authorized disclosure "upon request" to law enforcement of the three types of information listed, in the context of a vehicular accident. By contrast, N.C. Gen. Stat. § 90-21.20B(a1)(3) permits disclosure of "*identifiable health information* related to th[e] person [involved in the vehicle crash] *as specified in a search warrant* or other judicial order." N.C. Gen. Stat. § 90-21.20B(a1)(3) (2015) (emphases added). "The rules of statutory construction require presumptions that the legislature inserted every part of a provision for a purpose and that no part is redundant." *Hall v. Simmons*, 329 N.C. 779, 784, 407 S.E.2d 816, 818 (1991) (citing *State v. Williams*, 286 N.C. 422, 432, 212 S.E.2d 113, 120 (1975)). This principle leads us to conclude that the information listed in N.C.G.S. § 90-21.20B(a1)(1) may be disclosed, without a warrant, at the request of law enforcement officials investigating a vehicle crash, while disclosure of additional "identifiable health information" in the same context is possible, but requires a search warrant or judicial order that "specifie[s]" the information sought. As discussed above, under federal law, "identifiable health information" includes information created by a health provider that "[r]elates to the past, present, or future physical or mental health or condition of an individual." 45 C.F.R. § 160.103. Thus,

we conclude that under N.C.G.S. § 90-21.20B(a1)(3), "identifiable health information" obtainable by search warrant is not strictly limited to an individual's name, current location, and perceived state of impairment.

On appeal, Defendant argues his medical records were inadmissible based upon N.C.G.S. § 8-53 and N.C.G.S. § 90-21.20B only. He does not reassert the additional argument raised before the trial court in his motion to suppress, that the search warrant was not supported by sufficient probable cause in violation of N.C. Gen. Stat. § 15A-244, and we do not reach that issue. Defendant also does not allege the records were otherwise inadmissible due to some defect in evidentiary procedure. *See*, *e.g.*, *State v. Drdak*, 330 N.C. 587, 592-93, 411 S.E.2d 604, 607-08 (1992) (holding that the State was required to lay a proper foundation for the admission of blood alcohol test results not controlled by implied-consent statutory procedures). Because Defendant has not shown that his medical records were obtained in violation of either statute he cites, we find no error.

NO ERROR.

Judges STEPHENS and DAVIS concur.

STATE OF NORTH CAROLINA
v.
DIEGO LEANDER YOUNG, DEFENDANT

No. COA15-761

Filed 2 August 2016

1. Conspiracy—sufficiency of evidence—two armed robberies—conviction only for second—actions taken in first

There was sufficient evidence of conspiracy to commit armed robbery where there were two robberies and two charges of conspiracy but convictions on only the second robbery, with actions in the first robbery supporting the conspiracy in the second. Keys for a white car were stolen during the first robbery, in which defendant and others participated, and a white car circled the second victim before defendant emerged from the back seat to commit the robbery.

2. Evidence—photographs—identified as perpetrator—not identified as defendant—defendant present in courtroom—jury able to draw conclusions

There was no plain error in the admission of photo line-up evidence where no one testified that defendant was the person depicted in any photo identified. The jurors were able to look at the photographs identified by the victims as the person who robbed them and then look at defendant in the courtroom and draw their own conclusions.

Appeal by defendant from judgments entered 13 June 2014 by Judge Lisa C. Bell in Superior Court, Mecklenburg County. Heard in the Court of Appeals 17 December 2015.

Attorney General Roy A. Cooper III, by Assistant Attorney General Neal T. McHenry, for the State.

Appellate Defender Staples Hughes, by Assistant Appellate Defender Emily H. Davis, for defendant-appellant.

STROUD, Judge.

Defendant Diego Leander Young appeals from judgments entered upon the jury verdicts finding him guilty of armed robbery and conspiracy to commit armed robbery. Because the State presented sufficient evidence of the existence of a conspiracy to commit armed robbery, and because defendant has failed to demonstrate any error, much less plain error, in the authentication and relevancy of photographs identified by the witnesses as depicting the person who robbed them, we find no error.

Facts

The State's evidence tended to show the following. On 15 March 2011, Patrick Keen got off work and drove a white Hyundai Azera to Nedham Boric's apartment to sell him marijuana. He had visited this same apartment, on Shady Oaks Trail, about five or six times before for the same reason. When he arrived, he saw Mr. Boric walking his dogs out front, and they both went upstairs to Mr. Boric's second floor apartment. When Mr. Keen entered the apartment, he saw three African American men, two of whom he recognized and knew by nicknames. One of the men was defendant, whom Mr. Keen knew as "D." Mr. Keen identified defendant in the courtroom as the man he knew as "D." Mr. Keen had

seen defendant at Mr. Boric's apartment "[o]nce or twice" before. Mr. Keen greeted the men, but they did not respond, which he thought was "a little awkward and strange." He sat down on the couch. Defendant then walked into the hallway and returned with a "white and blue" bandana covering his face under his eyes and holding a shotgun. Defendant pointed the shotgun at Mr. Keen's head while the other two men just stood there and watched.

Mr. Keen asked "why I was getting robbed," and defendant said " 'I'm being serious.' " The other two men then took the keys to Mr. Keen's Hyundai, as well as his wallet, phone, and book bag, which contained the marijuana. Defendant then hit him in the back of the head with the butt of the shotgun and the men walked him to a bedroom in the back of the apartment and told him that if he moved or said anything, they would kill him. They made him lie down on the bed and tied his hands behind his back with duct tape, tied his ankles with duct tape, and put a sheet over him. Mr. Keen estimated that he stayed there for about two hours, although he had no way of telling the time.

Hearing no noises from the apartment, eventually he broke the tape off and checked to make sure no one was in the apartment. He tried to get out the front door of the apartment but it was locked from the outside. He then climbed out the back balcony to the apartment next door, but no one answered when he knocked on the door. He forced the door open and entered the apartment, where he found a couple who then called 911. According to the police records, the call came in at about 9:47 p.m. Mr. Keen tried to explain to them than he was not there to harm them but was trying to escape from the apartment next door. He still had some duct tape on his leg. The police arrived in a few minutes. After the police came, they went out to the parking lot to find the white Hyundai Azera, but it was missing and was never recovered.

Ms. Konnie Krueger estimated that at about 6:00 p.m. that same day, 15 March 2011, she went out to walk her dog. She lived in a condominium on Meadowlark Lane in Charlotte, N.C. Her condominium was very close to Shady Oaks Trail, in a complex which "back[ed] up" to the apartments where Mr. Keen was robbed. While she was walking the dog in the parking lot, two men passed her; she said hello to them and they said hello to her. She then saw a white car with four doors circle around the parking lot twice. While she was getting her dog and holding an umbrella, she saw a man get out of the back seat of the white car. He began to walk toward her and she saw that he was holding something "long and shiny" which she initially thought was an umbrella since it was raining, but then she realized it was a shotgun. The man was African

American, a "big man," and was wearing a hoody and a dark blue or black bandanna covering his lower face. He then put the gun to her head and said " 'Give me all your money, bitch.' " She initially laughed, thinking "this couldn't be happening to me. I was in ducky pajamas and a hoody." But the man then pointed the gun at her knee and said, " 'Bitch, I'll blow your head off. This ain't a joke.' "

From that moment on, she testified that she "stared directly in his eyes." He told her to give him her money, and she at first said she did not have any, but then felt that she had $3.00 in her pocket. He grabbed the $3.00, a pack of cigarettes, and her medication. He then told her to "get in the place" and she said that she did not live there. He turned to walk away, but then turned back and grabbed her cell phone, saying, " 'You effin' bitch, you ain't going to call the cops -- po-pos on me.' " Defendant then got into the back seat on the left-hand side of the white car and it sped off. Police were called to the scene of Ms. Krueger's robbery at about 9:20 p.m.

Later on the same evening, both Mr. Keen and Ms. Krueger were separately shown photo lineups and both ultimately identified the same photo as the man who had held a gun to their heads and robbed them. At trial, Ms. Krueger testified that she was "[a]bsolutely" certain that the man shown in photograph 2 of State's exhibit 8 was the man who robbed her, "[b]ecause I never took my -- once I knew it was for real, I looked into his eyes the whole time, and I would know those eyes today. They haunt me." Mr. Keen identified the man in the photograph with 95% certainty as "the guy that held a shotgun in my face and hit me on the back of the head" and robbed him.

On 13 June 2014, a jury found defendant guilty of one count of armed robbery and one count of conspiracy to commit armed robbery, both regarding victim Konnie Krueger, but was unable to reach a verdict on the three other charges. The trial court declared a mistrial as to the charges of robbery with a firearm, conspiracy to commit robbery with a firearm, and first degree kidnapping, all regarding victim Patrick Keen. The trial court entered judgment upon the one count of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon, both as to the charges involving Ms. Krueger, and defendant properly gave notice of appeal in open court.

Discussion

Defendant raises two issues on appeal, arguing (1) that the trial court erred by denying his motion to dismiss one of the conspiracy charges and (2) that the court plainly erred when it admitted photographic

lineup evidence identifying defendant as the perpetrator of the robberies at issue.

I. Sufficiency of evidence of conspiracy

[1] Defendant first contends that the "trial court erred by denying [defendant's] motion to dismiss conspiracy in 11 CRS 212908 because evidence that a man exited a car wearing a bandana over his face failed to establish [defendant] and another person entered an express agreement or mutually implied understanding to commit robbery with a firearm." Defendant argues that the trial court should have granted his motion to dismiss because the State failed to present sufficient evidence of the existence of a conspiracy between defendant and another person to rob Ms. Krueger.

Our Supreme Court has previously explained that when reviewing a defendant's motion to dismiss:

> 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. If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed. In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences. Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve. The test for sufficiency of the evidence is the same whether the evidence is direct or circumstantial or both. Circumstantial evidence may withstand a motion to dismiss and support a conviction even when the evidence does not rule out every hypothesis of innocence. If the evidence presented is circumstantial, the court must consider whether a reasonable inference of defendant's guilt may be drawn from the circumstances. Once the court decides that a reasonable inference of defendant's guilt may be drawn from the circumstances, then it is for the jury to decide whether

> the facts, *taken singly or in combination*, satisfy it beyond a reasonable doubt that the defendant is actually guilty.
>
> Both competent and incompetent evidence must be considered. In addition, the defendant's evidence should be disregarded unless it is favorable to the State or does not conflict with the State's evidence. The defendant's evidence that does not conflict may be used to explain or clarify the evidence offered by the State. When ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence.

State v. Fritsch, 351 N.C. 373, 378-79, 526 S.E.2d 451, 455-56 (2000) (citations, quotation marks, and brackets omitted).

Defendant argues that since he was charged with two separate counts of conspiracy -- one to commit armed robbery of Mr. Keen and one to commit armed robbery of Ms. Krueger -- the State must present sufficient evidence to establish that defendant entered into two separate agreements to commit the unlawful acts. Defendant claims that "at most, [the] evidence showed [that] one man exited the backseat of a car, robbed Krueger, and returned to the backseat of a car. Nothing suggested [defendant] conspired with [Nedham] Boric as alleged in the indictment. Nothing suggested [defendant] conspired with any other person to commit robbery with a firearm" of Ms. Krueger.

The State responds that "there was circumstantial evidence that tended to show that defendant had agreed with the other individuals at Nedham Boric's apartment to rob Ms. Krueger." The evidence showed that defendant pointed a gun at Mr. Keen while the other two men took his property, including his car keys, taped him up, and then took his white Azera. Just after this robbery, at an adjoining complex parking lot, Ms. Krueger saw a white car circling the lot just before the car stopped and defendant got out of the back seat and robbed her. The State contends that "[t]aken together, this evidence is sufficient to show that defendant knew in advance that a robbery was going to occur, that he participated with at least one other individual, namely the person driving the car, in the robbery with each having preassigned roles and that defendant and at least one other individual conspired to commit the robbery." Defendant's argument on appeal focuses only on the facts of the occurrences in the parking lot, when a man got out of a car and robbed Ms. Krueger. But the evidence presented at trial also encompassed the

incidents which occurred just before, in Mr. Boric's apartment, and all of the evidence taken together supports the State's theory.

We first note that although defendant was charged with two counts of conspiracy, one as to Mr. Keen and one as to Ms. Krueger, he was convicted only of one count, so we need not determine if the State's evidence can support more than one agreement to commit unlawful acts against more than one victim. Even where multiple crimes are committed, there may be only one conspiracy, or agreement to commit a series of acts.

> It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime. It is also clear that where a series of agreements or acts constitutes a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy. Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts. This Court has affirmed multiple conspiracy convictions arising from multiple substantive narcotics offenses involving a single amount of drugs found on a single occasion, apparently on the theory that each conspiracy involved separate elements of proof, and represented a separate agreement. However, under North Carolina law multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies. There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, but factors such as time intervals, participants, objectives, and number of meetings all must be considered.
>
> It is only proper that the State, having elected to charge separate conspiracies, must prove not only the existence of at least two agreements but also that they were separate.

State v. Rozier, 69 N.C. App. 38, 52-53, 316 S.E.2d 893, 902 (1984) (citations omitted).

If defendant had been convicted of both counts of conspiracy, as to the crimes alleged against both Mr. Keen and Ms. Krueger, we would face the "thorny problem" of the scope of the conspiracy. *Id.* at 52, 316 S.E.2d at 902. Did defendant and the other men agree to take Mr. Keen's

car and go out to commit other robberies, which would be one conspiracy to commit multiple crimes, or did they agree to rob Mr. Keen and then separately agree to take his car and go out to rob someone else, thus making two separate agreements? But we need not make that determination, since defendant was convicted of only one count of conspiracy and the evidence supports the existence of at least one agreement to commit unlawful acts.

Defendant draws comparisons from *State v. Wellborn*, 229 N.C. 617, 621, 50 S.E.2d 720, 723 (1948), where our Supreme Court found insufficient evidence of conspiracy and reversed the defendant's conviction. In *Wellborn*, the defendant was charged with conspiring with another individual, Guy Cain, to feloniously assault another man, Hubert Wells, with a deadly weapon with intent to kill. *Id.* at 617, 50 S.E.2d at 720. The State's evidence, however, was "confined to the circumstance of [the defendant] being seen with Cain a few times that night and that he accompanied Cain in the pickup truck when following the Wells car to the place of the fight." *Id.* at 618, 50 S.E.2d at 721. In reversing the conspiracy conviction, the Supreme Court concluded that "there [was] no evidence that Cain had ever communicated to [defendant] his purpose or that prior to the actual fatal encounter [defendant] had any knowledge of the intent." *Id.* But here, the State presented evidence at trial tending to show that defendant acted in concert with other individuals, first to rob Mr. Keen and then, after stealing his car, Ms. Krueger.

Although the evidence is circumstantial, it does support the inference that defendant and the other men in Boric's apartment agreed to take Mr. Keen's car and to go on to commit other unlawful acts, with defendant wielding the shotgun and another person driving the car. The acts against Ms. Krueger occurred within minutes after defendant and the other men tied up Mr. Keen and took his car. Ms. Krueger was in a parking lot very near Mr. Boric's apartment, and the jury could easily infer that defendant pointed the same shotgun at Ms. Krueger and was wearing the same blue bandana over his face, as described by Mr. Keen. Accordingly, we find that the trial court did not err by denying defendant's motion to dismiss.

2. Plain error in admission of photo lineup evidence

[2] Defendant next argues that the "admission of irrelevant photo lineup evidence constituted plain error because without the erroneously admitted evidence, it is probable the jury would have reached a different result on the offenses involving Kruger." Defendant acknowledges that he did not object at trial to the admission of the photographs identified

in the photo lineups by both Mr. Keen and Ms. Krueger as the man who robbed them and that they were admitted as substantive evidence and published to the jury without objection. Defendant argues that the admission is plain error because the photos were "irrelevant and inadmissible as substantive evidence" where "no witness with knowledge testified that [defendant] was in fact the person depicted in photo 2 or 5." Defendant contends that without these photographs, the jury would likely have reached a different decision.

Because defendant did not object to the admission of the photos at trial, we review this issue for plain error.

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice -- that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations, quotation marks, and brackets omitted).

We agree that without the admission of Photographs 2 and 5, it is probable that the jury would have reached a different result, since these photographs were a key piece of evidence identifying defendant as the person who both stole Mr. Keen's car and then robbed Ms. Krueger. Thus, we must consider whether the photos were properly authenticated and relevant.

> We generally review the trial court's decision to admit evidence for abuse of discretion, looking to whether 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. However, with regard to a determination on the relevancy of evidence, a trial court's rulings technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403; nonetheless, such rulings are given great deference on appeal.

State v. Murray, 229 N.C. App. 285, 287-88, 746 S.E.2d 452, 454 (2013) (citations, quotation marks, ellipses, and brackets omitted).

Defendant argues that since no one testified that defendant was "the person depicted in any photo identified by [Mr.] Keen or [Ms.] Krueger, the photos were irrelevant and inadmissible." For a photo to be admissible as substantive evidence, "it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be." *State v. Lee*, 335 N.C. 244, 270, 439 S.E.2d 547, 560 (1994). In addition, it must be "properly authenticated as a correct portrayal of the person depicted." *Id.*

> N.C. Gen. Stat. § 8-97 provides that any party may introduce a photograph as substantive evidence upon laying a proper foundation and meeting other applicable evidentiary requirements. Rule 901 of our Rules of Evidence requires authentication or identification by evidence sufficient to support a finding that the matter in question is what its proponent claims. In order for a photograph to be introduced, it must first be properly authenticated by a witness with knowledge that the evidence is in fact what it purports to be.

Murray, 229 N.C. App. at 288, 746 S.E.2d at 454-55 (citations and quotation marks omitted).

In *Murray*, an informant who purchased drugs from the defendant as part of a controlled buy and the detective conducting the buy testified to authenticate the photographs of the defendant challenged in that case. *Id.*, 746 S.E.2d at 455. Three photos, Exhibits 7, 8, and 9, were admitted, and each depicted a different person. *Id.* The informant testified that he knew the individuals in the photos as "people from whom he had bought drugs in the past" and that he had "picked each of them out of a photo lineup the night before." *Id.* He also testified that one of the photos, Exhibit 9, "was the person from whom he bought drugs on 18 January 2011 [the date of the alleged crime] and that the person was Defendant." *Id.* This Court held that this testimony was sufficient to authenticate all of the photos, and as relevant for our purposes here, to authenticate Exhibit 9 as a photograph of defendant, stating:

> We believe this testimony was sufficient to authenticate Exhibits 7 and 8 as photographs of people from whom Mr. West purchased drugs in the past. We further believe this testimony was sufficient to authenticate Exhibit 9 as Defendant, such that it was properly admitted.

Id. (citation omitted).

In the present case, Mr. Keen testified that he had previously met defendant at Mr. Boric's apartment and knew him as "D." He identified Photograph 5 as the man who held a gun to his head and robbed him when he viewed the photo lineup and he identified defendant in the courtroom at trial as well. Mr. Keen's testimony, like that of the informant in *Murray*, is sufficient to authenticate Photograph 5 as a photograph of defendant.

Photograph 2 was admitted during Ms. Krueger's testimony, and unlike Mr. Keen, she did not know defendant and she did not identify him in court as the person who robbed her. She did testify that Photograph 2 depicted the person who robbed her. Defendant argues that "the State did not call any witness who compiled, administered, or had any knowledge about the source of any photo or the identity of the person depicted in any photo included in any photo lineup. The State wholly failed to elicit testimony from any witness with knowledge that the purported photos of [defendant] actually depicted [defendant.]"

Since our review of this issue is for plain error, we first note that if defendant had objected at trial, the State would have had the opportunity to provide further foundation for the admission of Photographs 5 and 2. In *State v. Howard*, 215 N.C. App. 318, 327, 715 S.E.2d 573, 579 (2011), the defendant claimed that the trial court committed plain error in admitting "Wal-Mart receipts and photos captured from the Wal-Mart surveillance video" because they were not properly authenticated. This Court found no plain error because the State would have been able to provide additional foundation, had defendant made a timely objection at trial. *Id.* at 327-28, 715 S.E.2d at 580.

> North Carolina Rule of Evidence 901(a) states the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims. North Carolina Rule of Evidence 1002, known as the best evidence rule states, to prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute. Rule 1003, Admissibility of Duplicates, provides [that] a duplicate is admissible to the same extent as an original unless (1) a genuine issue is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.

> Based upon our review of the record, it appears that if defendant had made a timely objection, the State could have supplied the necessary foundation. Had defendant objected to the evidence now challenged the State could have properly authenticated it and either provided the originals of the social security card and receipts to comply with the best evidence rule or explained why admission of duplicates was appropriate. Since defendant has made no showing that the foundational prerequisites, upon objection, could not have been supplied and has pointed to nothing suggesting that the evidence in question is inaccurate or otherwise flawed, we decline to conclude the omissions discussed above amount to plain error.

Id. at 327, 715 S.E.2d at 579-80 (citations, quotation marks, ellipses, and brackets omitted).

In addition, we note that Photograph 5 identified by Mr. Keen and Photograph 2 identified by Ms. Krueger are the *same* photograph of the same person. They were given different numbers in the photographic lineups and were identified as separate exhibits for trial, but they are identical photographs. Thus, for purposes of plain error review, the authentication of Photograph 5 is also sufficient to authenticate Photograph 2.

Defendant also argues that the photographs were irrelevant because no witness testified that the person in the photographs was defendant. Defendant notes that "the State did not call any witness who compiled, administered, or had any knowledge about the source of any photo or the identity of the person depicted in any photo included in any photo lineup."[1] Defendant's argument seem to suggest that we should *require* lay opinion testimony to identify the person depicted in the photographs as defendant. This argument is the flip-side of the argument we typically see, which is an objection to lay opinion testimony, often from a law enforcement officer, that the person shown in a photograph or video is

1. N.C. Gen. Stat. § 15A-284.52 (2015) requires that photographic lineups be conducted by an "independent administrator" who is "not participating in the investigation of the criminal offense and is unaware of which person in the lineup is the suspect." Defendant did not raise any argument regarding how the lineup was conducted, and to the extent that we can tell from our record, it appears to have been done generally in accord with the procedure which is now required. In any event, it would seem to be entirely appropriate that the person who compiled or administered the lineups would *not* be able to identify defendant.

the defendant. In those cases, the defendants argue that the jury should be able to determine if the defendant was the person depicted in the photograph. For example, in *State v. Hill*, __ N.C. App. __, __, 785 S.E.2d 178, 181 (2016), the defendant argued on appeal that the law enforcement officers should not have been permitted to "give their lay opinions that the person in the surveillance videos was Hill. Specifically, Hill alleges the officers were no better qualified than the jury to identify the suspect in the videos and, therefore, he was prejudiced by the admission of their testimony."

This Court rejected the defendant's argument in *Hill*, based upon the fact that the officers were familiar with defendant before the incident in question and that his appearance had changed between the time of his arrest and trial. *Id.* at __, 785 S.E.2d at 182. We noted that "[a]dmissible lay opinion testimony is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." *Id.* at __, 785 S.E.2d at 181 (quotation marks omitted). Here, defendant argues that the officers or some other witness should have been required to identify the person depicted in the photographs as defendant. We can find no support for any such requirement. The jury was well able to look at the photographs identified by Mr. Keen and Ms. Krueger as the person who robbed them and to look at the defendant sitting in the courtroom and draw their own conclusions about whether he was the person depicted in the photographs. In fact, we do not have this advantage on appeal, since our record does not show us what the defendant looked like in the courtroom at trial. In any event, defendant has not demonstrated any error in the admission of Photographs 2 and 5, much less any plain error.

For the reasons above, we find no error in the defendant's trial.

NO ERROR.

Judges DIETZ and TYSON concur.

TANNER v. TANNER

[248 N.C. App. 828 (2016)]

JEREMY KYLE TANNER, PLAINTIFF
v.
MARY MARGARET TANNER AND SARA N. TANNER, DEFENDANT

No. COA15-792

Filed 2 August 2016

1. Appeal and Error—appealability—constructive trust—final determination of rights

An appeal in a divorce action was interlocutory but affected a substantial right where a constructive trust on certain funds was imposed in the same order in which the person holding the funds (the husband's mother) was joined as a necessary party. The imposition of the constructive trust and the determination that the monies belonged to the marital estate made a final determination of the final rights of the mother.

2. Parties—necessary—constructive trust—person holding funds—no opportunity to be heard

An order imposing a constructive trust upon funds held by the mother of a party in an equitable distribution system was vacated in the same order in which the mother was joined as a necessary party.

Appeal by defendant from order entered 12 January 2015 by Judge Addie H. Rawls in District Court, Johnston County. Heard in the Court of Appeals 3 December 2015.

No brief filed on behalf of plaintiff-appellee.

The Williams Law Group, PC, by Teresa Y. Davis, for defendant-appellee.

Mary McCullers Reece, for defendant-appellant.

STROUD, Judge.

Appellant Sara Tanner appeals from an order, entered 12 January 2015, imposing a constructive trust upon her funds for the benefit of the marital estate of plaintiff and defendant Mary Margaret Tanner. All parties to the appeal agree that Appellant was properly joined as a necessary party, but because Appellant had not been joined as a party prior to the hearing and order which determined her substantive rights, the trial

court did not have personal jurisdiction over her and we must vacate the order to the extent that it addresses any issue other than joinder of Appellant as a necessary party.

I. Facts

Plaintiff ("Husband") and defendant Mary Tanner ("Wife") were married in 2004 and separated on 15 February 2013. On 15 February 2013, Husband filed a complaint for custody and equitable distribution, including "interim distribution" and "unequal division injunctive relief[.]" (Original in all caps.) On 22 March 2013, Wife filed her answer and counterclaimed for child custody, child support, equitable distribution, post-separation support and alimony, and attorney fees.

On 14 April 2014, Wife filed a "MOTION IN THE CAUSE" in which she requested joinder of Appellant Sara Tanner as a party, imposition of a constructive trust, and a restraining order because she had learned during discovery "that between October and December of 2012 [Husband] removed funds from his business in the approximate amount of $335,569.60 and gave them to his mother Sara N. Tanner." Wife further alleged that Husband had "clearly anticipated his separation" and was attempting to avoid having funds "distributed as marital property." Wife contended that "Sara N. Tanner is a necessary party and should be joined to the equitable distribution action pursuant to Rule 21 of the N.C. Rules of Civil Procedure for further determination of the ownership interest in the funds transferred to her by Plaintiff." Wife also requested imposition of "a restraining order to prohibit the use, movement, depletion, waste, conversion or disappearance of the funds that are the subject of the constructive trust pending further hearings[.]"

On 4 and 6 November 2014, the trial court held a hearing regarding the Wife's motion for joinder, imposition of a constructive trust, and issuance of a restraining order. Husband and Wife each appeared at this hearing with their respective counsel. Appellant was present because she was subpoenaed by Wife to appear and testify, but she was not yet a party to the action and was not represented by counsel. From our record, no summons was ever issued to Appellant nor was she ever served with any other pleadings, motions, or notices. After the hearing, on 6 January 2015, counsel for Appellant filed a notice of appearance.

On 7 January 2015, the case "came on for hearing regarding entry of the order" from the November 2014 hearing. Counsel for Husband had accepted the draft of the order as proposed by Wife's counsel, but Appellant's counsel, who had just made her first appearance in the case

the prior day, objected to entry of the order. Over the objection, the trial court entered the order.

On 12 January 2015, the trial court entered the order for "JOINDER & CONSTRUCTIVE TRUST[.]" The order contained detailed findings of fact and conclusions of law regarding Husband's transfer of funds to Appellant and ultimately determined that a constructive trust should be imposed. The order decreed:

> 1. Sara N. Tanner is hereby joined as a party to the pending claims for equitable distribution in this case.
>
> 2. Sara N. Tanner shall serve as trustee of the remainder of the funds distributed to her by the Plaintiff for the benefit of the Plaintiff and Defendant's marital estate. Those funds are currently in an account managed by UBS. She shall abide by and distribute those funds in accordance with any subsequent Order of this Court equitably distributing the parties' marital estate.
>
> 3. Sara N. Tanner is hereby restrained from taking any action depleting, wasting, moving or otherwise causing the disappearance of the remainder of the funds distributed to her by the Plaintiff. If Sara N. Tanner is advised by the manager of the UBS account in which the funds are located that some action needs to be taken, then she shall immediately advise counsel for both Plaintiff and Defendant. She shall authorize the funds manager to speak with counsel for both Plaintiff and Defendant. No action shall be taken regarding the funds without prior notice, input and agreement of all parties to the equitable distribution claim.

The 12 January 2015 order was the first and only order to join Appellant as a party to the case as a defendant. On 11 February 2015, Appellant gave notice of appeal from the order.

II. Interlocutory Appeal

[1] Appellant acknowledges that her appeal is interlocutory, but argues that we should hear her appeal because "an order determining ownership and control of a substantial amount of money affects a substantial right." Appellant contends that "[t]he order at issue here went well beyond preserving the status quo: the imposition of the constructive trust and the determination that the monies in Sara's account belonged

to the marital estate made a final determination as to Sara's rights." We agree.

In *Estate of Redden v. Redden*, "the trial court entered partial summary judgment in favor of plaintiff[, decedent's estate,] and ordered defendant[, decedent's wife,] to pay plaintiff the sum of $150,000.00 plus costs." 179 N.C. App. 113, 115, 632 S.E.2d 794, 797 (2006), *disc. review allowed in part and remanded on other issues*, 361 N.C. 352, 649 S.E.2d 638 (2007). This Court stated:

> In determining whether a substantial right is affected a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to appellant if not corrected before appeal from final judgment. A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form: a right materially affecting those interests which a man is entitled to have preserved and protected by law: a material right.
>
> Here, defendant asserts in her statement of grounds for appellate review that:
>
> > This appeal is taken from the Order, entered June 27, 2005, granting the Plaintiff partial summary judgment and ordering Defendant Barbara Redden to pay to the Estate of MONROE M. REDDEN, JR., deceased, the sum of one hundred fifty thousand dollars ($150,000.00) and costs. The Order appealed affects a substantial right of Defendant Barbara Redden by ordering her to make immediate payment of a significant amount of money; therefore, this Court has jurisdiction over the Defendant's appeal pursuant to N.C. Gen. Stat. § 1–277 and N.C. Gen. Stat. § 7A–27(d).

Id. at 116-17, 632 S.E.2d at 797-98 (citations, quotation marks, and brackets omitted). In accord with the reasoning in *Estate of Redden*, we consider Appellant's appeal. *See id.*

III. Necessary Party

[2] Appellant argues that the trial court's order imposing a constructive trust over funds in her possession must be vacated because she was a necessary party to the hearing. This case stands in a unique procedural posture since the trial court has already agreed with Appellant's

contention that she is a necessary party. Conclusion of law six of the order states, "Sara N. Tanner is a necessary party as contemplated by Rule 19 of the N.C. Rules of Civil Procedure and the court cannot make a final determination of equitable distribution without her being made a party to that action." Thus, Appellant is not arguing that she is a necessary party and should be joined, since the trial court already determined that and ordered her joinder, but rather she contends that the trial court had no authority to hear the merits of the motion to impose a constructive trust on the funds in her possession as she was not a party at the time that issue was being considered by the trial court.

We note that the only parties who filed briefs on appeal are Appellant and Wife. The trial court determined Appellant was a necessary party, but it did so in the same order which also imposed a constructive trust on funds in her possession. Thus, at the time Appellant became a party, the issue of funds in her possession had already been determined without her having any opportunity to be heard on the matter as a party in the case. Wife essentially concedes that Appellant is a necessary party, as she is the party who moved to join her in the first place.

The trial court made many findings of fact, which we need not recite in detail, since they are unnecessary for the issue on appeal. There is no dispute that Appellant has "funds . . . in an account in her sole name managed by UBS" which the trial court ordered she must hold as constructive trustee for the marital estate, although she was never made a party until the order on appeal joining her and imposing the trust. We have reviewed the entire transcript for some indication that Appellant appeared before the trial court in any capacity other than a witness or that she consented to proceed with hearing the substantive issue of the constructive trust, but she simply did neither.

It is true that counsel for Husband and Wife seemed to implicitly agree to try the entire issue of whether a constructive trust should be imposed along with the issue of joinder, but they did not obtain *Appellant's* consent to try all of the substantive issues. Perhaps a conversation occurred off of the record and all present, including Appellant, understood and agreed to the intended scope of the hearing, but the record before us does not in any way indicate this sort of agreement. The record shows that Husband's counsel appeared only as counsel for Husband, not as counsel for Appellant. Appellant had never been identified as a party in any pleading, but only as a potential party in Wife's motion for joinder. Appellant had not been issued a summons, had not been served with a summons, was not served with any pleadings or motions including the motion for joinder, and was not served with

notice of any proceedings before the trial court. Appellant did not on the record consent to be added as a party or to proceed to hearing on an issue which would determine rights to funds held in her bank account without service or representation; she appeared only as a witness, under subpoena to appear and testify, and she was not represented by counsel.

Wife argues that the "facts and evidence regarding joinder, imposition of constructive trust and ownership are closely intertwined [so] the requirement to have separate hearings on those matters defeats judicial economy and underestimates the ability of the trial court to understand the scope and purpose of evidence presented." Wife also contends that Appellant has failed to cite case law supporting "the proposition that the lower court is required to hold a separate hearing determining whether she is a necessary party and imposing a construct[ive] trust and a second hearing determining ownership of the property in dispute." But whether a separate hearing is required is not the issue. Nor do we doubt in the least the trial court's ability "to understand the scope and purpose of the evidence presented" at a joint hearing upon both the motion for joinder and the substantive issue of the constructive trust, but the trial court was also relying upon counsel for both parties -- Husband and Wife -- to bring the case to the trial court with all of the necessary parties in place, if they wished to proceed on both the issue of joinder as well as the substantive issue raised by the motion to impose a constructive trust upon the funds Husband transferred to Appellant.

Our case law plainly states that "[a] judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void." *Rice v. Randolph*, 96 N.C. App. 112, 113, 384 S.E.2d 295, 297 (1989). Wife seeks to rely upon *Upchurch v. Upchurch*, 122 N.C. App. 172, 468 S.E.2d 61 (1996) to support her argument, stating, "[t]his case is slightly different from *Upchurch* in that the third party in that case, the son of the spouses, was named as a defendant in Wife's original action for equitable distribution." This distinction is no "slight[] differen[ce:]" it is the crucial difference. Had Appellant been named as a party when the complaint was filed and she was served with process, this would be an entirely different case. Appellant would have had notice of all proceedings in the trial court as well as the opportunity to be represented by counsel and to present evidence regarding the issue of the ownership of property in her possession. Here, unlike in *Upchurch*, *contrast id.*, the third party holding the funds in dispute was not an original party to the action nor had she been added as a party when the trial court determined the ownership of the funds. Thus, the order "is null and void" as to imposition of the constructive trust.

Rice, 96 N.C. App. at 113, 384 S.E.2d at 297. As we are vacating the portion of the order imposing a constructive trust, we need not consider Appellant's other issue on appeal.

The trial court's order is void to the extent that it imposes a constructive trust over the UBS account because Appellant is a necessary party, but she was not party to the action at the time of the hearing. Yet the trial court was also hearing Wife's motion for joinder of Appellant as a party, and it was not necessary for Appellant to be a party or to have notice or to participate in the determination of that motion. In fact, where it appears to a trial court that a necessary party is absent, the trial court may refuse to "deal with the merits of the action until the necessary party is brought into the action" and may correct this *ex mero motu*:

> The absence of parties who are necessary parties under Rule 19 of the Rules of Civil Procedure does not merit a dismissal. When the absence of a necessary party is disclosed, the trial court should refuse to deal with the merits of the action until the necessary party is brought into the action. Any such defect should be corrected by the trial court *ex mero motu* in the absence of a proper motion by a competent person.

White v. Pate, 308 N.C. 759, 764, 304 S.E.2d 199, 202-03 (1983) (citations and footnote omitted).

The trial court had both the power and the duty to enter an order for Appellant to be joined as a necessary party, but it could not determine the substantive issues raised by the motion for constructive trust until after she was joined as a party. *See generally id.* Appellant does not challenge the trial court's determination that she is a necessary party. Thus, the trial court had authority to enter its ruling upon the Wife's motion for joinder of Sara as a necessary party, which is expressed in paragraph 1 of the decree: "Sara N. Tanner is hereby joined as a party to the pending claims for equitable distribution in this case." Beyond this, the order is void and must be vacated.

On remand, a summons should be issued to Appellant, to be served upon her along with the pleadings and trial court's order granting the motion for joinder.[1] At any future hearing in this matter, the trial court

---

1. A summons need not be issued if Appellant consents to jurisdiction on remand without issuance of a summons and formal service. *See Grimsley v. Nelson*, 342 N.C. 542, 545, 467 S.E.2d 92, 94 (1996) ("Jurisdiction of the court over the person of a defendant is obtained by service of process, voluntary appearance, or consent.")

shall not rely upon the findings of fact or conclusions of law in the order on appeal, which are vacated, as to the substantive issue of imposition of a constructive trust, since this order is void as to the determination of the substantive issue of imposition of a constructive trust over the funds at issue.

IV. Conclusion

For the foregoing reasons, we affirm the order to the extent that it orders the joinder of Appellant as a necessary party and vacate the remainder of the trial court order addressing the substantive issues and imposing a constructive trust. We remand for a further hearing to address the substantive issues, at which all parties will have proper notice and opportunity to be heard.

AFFIRMED IN PART, VACATED IN PART, and REMANDED.

Judges DIETZ and TYSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 2 AUGUST 2016)

BROWN v. BROWN No. 15-726	Mecklenburg (14CVS2461)	Affirmed
HALE v. BARNES DISTRIB. No. 16-26	N.C. Industrial Commission (X64352)	Affirmed
IN RE A.R. No. 16-183	Union (15JA119)	Vacated and Remanded
IN RE A.R.P. No. 16-50	McDowell (15JA38) (15JA39) (15JA40)	Affirmed
IN RE I.H. No. 15-1373	Surry (14JA92-93)	Affirmed
IN RE J.S.F. No. 16-40	Davidson (11JT90-92)	Affirmed
JOHNSON v. GOODEN No. 15-1259	Bladen (14CVS438)	Affirmed
KHASHMAN v. KHASHMAN No. 15-361	Mecklenburg (14CVS21154)	Affirmed; Remanded with instructions
NESBIT v. NESBIT No. 16-56	Gaston (10CVD658)	Affirmed
PARKER v. ARCARO DRIVE HOMEOWNERS ASS'N No. 15-928	Guilford (14CVS5148)	Reversed and Remanded.
PERQUIMANS CNTY. v. VANHORN No. 15-562	Perquimans (14CVD154)	Vacated and Remanded
SMITH v. TAYLOR No. 15-1226	Mecklenburg (11CVS6383)	Dismissed
STATE v. CARDENAS No. 15-1012	Wake (13CRS223180)	NO PLAIN ERROR
STATE v. COLE No. 15-1291	Alamance (14CRS2565) (14CRS53366)	No Error

STATE v. COXTON No. 15-575-2	Mecklenburg (12CRS248690-99) (12CRS248701)	No Error
STATE v. PAIGE No. 15-1326	Pitt (12CRS53795) (13CRS3949)	AFFIRMED IN PART, REVERSED AND REMANDED IN PART.
STATE v. PHONGSAVANH No. 16-58	Guilford (14CRS70328-29) (14CRS70331)	Dismissed
STATE v. PRITCHARD No. 16-8	Yancey (11CRS304) (11CRS305)	NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART
STATE v. SCOTLAND No. 15-421	Wake (13CRS214119) (14CRS525)	No Error
STATE v. WILLIAMS No. 15-1038	Johnston (09CRS3693) (09CRS6443)	Affirmed
WILLOUGHBY v. JOHNSTON MEM'L HOSP. No. 15-832	Johnston (11CVS3008)	Affirmed
WILLOUGHBY v. JOHNSTON MEM'L HOSP. No. 15-833	Johnston (11CVS3008)	Affirmed
WILLOUGHBY v. JOHNSTON MEM'L HOSP. No. 15-834	Johnston (11CVS3008)	Affirmed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS