249 N.C. App.—No. 2 Pages 236-465

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 18, 2019

MAILING ADDRESS: The Judicial Department
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OF
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[1]Appointed 1 August 2016 [2]Sworn in 1 January 2017 [3]Sworn in 1 January 2017 [4]Appointed 24 April 2017
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COURT OF APPEALS

CASES REPORTED

FILED 6 SEPTEMBER 2016

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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STATUTES OF LIMITATIONS AND REPOSE

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SCHEDULE FOR HEARING APPEALS DURING 2018

NORTH CAROLINA COURT OF APPEALS

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

January 8 and 22

February 5 and 19

March 5 and 19

April 2, 16 and 30

May 14

June 4

July None

August 6 and 20

September 3 and 17

October 1, 15 and 29

November 12 and 26

December 10

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

AZIGE v. HOLY TRINITY ETHIOPIAN ORTHODOX TEWAHDO CHURCH

[249 N.C. App. 236 (2016)]

ANIMAW AZIGE, TEWODROS ABEBE, MESERET TEFERA, ZENASH ABEY, TADESE GEBREGIORGIS, DAWIT GETAHUN, EDOM A. GERU, AZEMERAWU GETANEH, TSIGE KIBRET, TEWODROSE G. TIRFE, HAILU AFRO, MEQUANINT TSEGAW, ZEBENE MESELE, MEAZA JEMBERE, NIGATU KASSA, ALMAZ MEKONEN, ASTER MLES, ADDISU FENTAHUM AYALWE, ASKALE YESHANEW, AND HAIMONOT GEDAMU, PLAINTIFFS

v.

HOLY TRINITY ETHIOPIAN ORTHODOX TEWAHDO CHURCH, SOLOMON GUGSA, LULESEGED DERIBE, TESFA GASHAREBA, SAMUEL AGONAFER, SAMSON KASSAYE, GEDEWON KASSA, YOHANNES ASSEFA, TASSEW KASSAHUN, AND EYOEL MULUGETA, DEFENDANTS

No. COA15-760

Filed 6 September 2016

Churches and Religion—complaint regarding church—bylaws

Where plaintiffs alleged in their amended complaint that they were members of a church and requested a declaratory judgment that numerous violations of the church's bylaws had occurred, the trial court lacked subject matter jurisdiction because plaintiffs' claims raised questions that went far beyond the consideration of neutral principles of law and would require the courts to interpret or weigh church doctrine, in violation of the First Amendment.

Appeal by defendants from order entered 5 January 2015 by Judge Robert C. Ervin Superior Court, Mecklenburg County. Heard in the Court of Appeals on 17 December 2015.

Dickie, McCamey & Chilcote, PC, by Joseph L. Nelson and John T. Holden, for plaintiff-appellees.

Robinson Bradshaw & Hinson, P.A., by Julian H. Wright, Jr. and Matthew F. Tilley, for defendant-appellant Tassew Kassahun.

Essex Richards, P.A., by N. Renee Hughes, and the Lewis Firm, PLLC, by Earl N. "Trey" Mayfield, III pro hac vice, for defendant-appellants.

STROUD, Judge.

Defendants appeal from the trial court's order denying their motion to dismiss for lack of subject matter jurisdiction. On appeal, defendants argue that the trial court lacks subject matter jurisdiction over plaintiffs' claims because exercising jurisdiction would require the court to

address ecclesiastical matters in contravention of the First Amendment of the United States Constitutions and Article 1, Section 13 of the North Carolina Constitution. After review, we reverse the trial court's order because judicial involvement would impermissibly entangle the judicial system in ecclesiastical matters. We remand the case to the trial court with instructions for the court to enter an order granting defendants' motion to dismiss for lack of subject matter jurisdiction.

I. Background

The Holy Trinity Ethiopian Orthodox Tewahdo Church ("Holy Trinity") was founded in Charlotte, North Carolina in 1999. Holy Trinity is a non-profit organization and is governed by a parish council which is responsible for the day-to-day operation of church affairs. In 2007, Holy Trinity amended its constitution and bylaws. The amended bylaws provided:

> 10.6 The term of the members of the Parish Council will be two years. However, in order to ensure continuity and momentum in leadership, for the first Parish Council elected after the adoption of these by-laws only, the five members of the Executive Committee, as elected by the full Parish Council will serve for three years. Following this "bridge" term; all other successive terms will be limited to two years.
>
> 10.7 A Registered Member is eligible to serve two consecutive terms. In order to be eligible to serve again, a full term (two years) must elapse.

Thereafter various disputes arose in Holy Trinity, including disagreements about the termination of a priest, and at a meeting held in March of 2014 it was determined that "the current parish council were granted at least a one year and six months extension" to address "the turmoil situations [(sic)] created by few individuals who support the terminated priest."

In November of 2014, plaintiffs filed an amended complaint against Holy Trinity and defendants, the parish council members. Plaintiffs alleged that they are all registered members of Holy Trinity and requested a declaratory judgment that numerous violations of the bylaws had occurred including: "the 2012 election[,]" improperly extended terms of certain parish council members, the process of adopting "the purported March 16, 2014 amendment[,]" and improperly transferred real property. Furthermore, defendants had excluded plaintiffs as registered members of the church, though again, plaintiffs claim they are registered members of the church. On 1 December 2014, defendants filed a motion to

dismiss for lack of subject matter jurisdiction. On 5 January 2015, the trial court denied defendants' motion. Defendants appeal.

II. Interlocutory Appeal

Defendants concede that this appeal is interlocutory; however, defendants argue that it "affects their substantial First Amendment rights and will cause injury if not corrected prior to final judgment." Our Supreme Court has recognized that

> [t]he United States Supreme Court has found First Amendment rights to be substantial, and has held the First Amendment prevents courts from becoming entangled in internal church governance concerning ecclesiastical matters. When First Amendment rights are asserted, this Court has allowed appeals from interlocutory orders. Accordingly, we reaffirm our stance that First Amendment rights are implicated when a party asserts that a civil court action cannot proceed without impermissibly entangling the court in ecclesiastical matters.
>
> . . . .
>
> . . . The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.

Harris v. Matthews, 361 N.C. 265, 269-70, 643 S.E.2d 566, 569 (2007) (citations and quotation marks omitted). Therefore, we will consider defendants' appeal.

III. Motion to Dismiss

Defendants argue that the trial court's exercise of jurisdiction in this case will impermissibly entangle the court in ecclesiastical matters in contravention of the First Amendment of the United States Constitution and Article 1, Section 13 of the North Carolina Constitution. "We review Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction de novo[.]" *Id.* at 271, 643 S.E.2d at 569.

> The First Amendment of the United States Constitution prohibits a civil court from becoming entangled in ecclesiastical matters. However, not every dispute involving church property implicates ecclesiastical matters. Thus, while circumscribing a court's authority to resolve

> internal church disputes, the First Amendment does not provide religious organizations absolute immunity from civil liability.
>
> As such, our Courts may resolve disputes through neutral principles of law, developed for use in all property disputes. *The dispositive question is whether resolution of the legal claim requires the court to interpret or weigh church doctrine.*

Davis v. Williams, ___ N.C. App. ___, ___, 774 S.E.2d 889, 892 (2015) (emphasis added) (citation and quotation marks omitted); *see also Harris v. Matthews*, 361 N.C. 265, 271–72, 643 S.E.2d 566, 570 (2007) ("First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. Civil court intervention into church property disputes is proper only when relationships involving church property have been structured so as not to require the civil courts to resolve ecclesiastical questions. When a congregational church's internal property dispute cannot be resolved using neutral principles of law, the courts must intrude no further and must instead defer to the decisions by a majority of its members or by such other local organism as it may have instituted for the purpose of ecclesiastical government." (citations, quotation marks, and brackets omitted)).

Plaintiffs contend that "[t]he only issue before this Court is whether the trial court has subject matter jurisdiction to decide whether the Church followed its own bylaws." Although plaintiffs seek to present this dispute as a simple procedural disagreement over the adoption of bylaws in accord with proper procedure, the substance of the complaint belies this claim. The amended complaint alleges that each plaintiff is "a registered member" of the church; defendants dispute their membership. Although defendants moved for dismissal without filing an answer, an affidavit filed by defendants alleges that "Plaintiffs have failed to comply with the requirements for Church membership." Although plaintiffs raise other claims regarding the governance of the church, even they implicitly concede their standing to challenge the defendants' actions depends upon their status as registered members.[1]

While we realize plaintiffs' amended complaint supersedes the original complaint, *see Hyder v. Dergance*, 76 N.C. App. 317, 319, 332 S.E.2d

1. Though standing was not the basis of the motion to dismiss, plaintiffs spend approximately two pages of their thirteen page brief to address that "as registered members, appellants [(sic)] have standing to maintain their suit." (Original in all caps.)

713, 714 (1985) (noting the "general principle that an amended complaint has the effect of superseding the original complaint."), the background of this case in the record before us is still relevant to this jurisdictional inquiry, and in plaintiffs' original complaint they requested "a declaratory judgment pursuant to N.C. Gen. Stat. § 1- 253, *et. seq.* stating that they are all registered members of the Church, can participate in worship at the church, and that the purported attempt to ban them from the premises violates the Church's bylaws and is void." Plaintiffs' amended complaint omits this request and subsumes the membership issue in the following allegation:

> 33. As registered members of the Church, Plaintiffs[] have a cognizable civic, contract, and property interest in the operation of the Church and whether the Parish Council has acted within the scope of its authority and followed the Church's bylaws.

But even considering only the amended complaint, this case does not appear to be primarily a property dispute or a dispute regarding misappropriation of funds, as many of the cases arising out of church disputes are, *see, e.g.*, *Davis*, ___ N.C. App. at___, 774 S.E.2d at 891 (including allegations of "wrongfully converted church funds for personal use, and embezzled from the church"); *Johnson v. Antioch United Holy Church, Inc.*, 214 N.C. App. 507, 508, 714 S.E.2d 806, 809 (2011) (including allegations of "wasted . . . property and . . . transactions prohibited by the Internal Revenue Code"), but instead plaintiffs' allegations are focused upon the actual governance of the church and their right as members to participate fully in the church.[2] Plaintiffs' status as registered members and right as members in good standing to vote are thus central to this action.

Our courts have defined an ecclesiastical matter as:

> one which concerns doctrine, creed, or form of worship of the church, or the adoption and enforcement within a religious association of needful laws and regulations for the government of membership, and the power of excluding from such associations those deemed unworthy of

2. Plaintiffs did object to a real property transaction, but this transaction does not seem to be the primary focus of the complaint. The main focus of this complaint is that the proper percentage of the total registered members did not participate in the vote, but again, the correct number depends on the total number of registered members who are qualified to vote. Defendants do not count plaintiffs as registered members.

> membership by the legally constituted authorities of the church; and all such matters are within the province of church courts and their decisions will be respected by civil tribunals.
>
> Membership in a church is a core ecclesiastical matter. The power to control church membership is ultimately the power to control the church. It is an area where the courts of this State should not become involved. This stricture applies regardless of whether the church is a congregational church, incorporated or unincorporated, or an hierarchical church.
>
> The prohibition on judicial cognizance of ecclesiastical disputes is founded upon both establishment and free exercise clause concerns. By adjudicating religious disputes, civil courts risk affecting associational conduct and thereby chilling the free exercise of religious beliefs. Moreover, by entering into a religious controversy and putting the enforcement power of the state behind a particular religious faction, a civil court risks establishing a religion.

Tubiolo v. Abundant Life Church, Inc., 167 N.C. App. 324, 327–28, 605 S.E.2d 161, 163–64 (2004) (citations and quotation marks omitted).

Plaintiffs rely primarily upon *Johnson* in arguing that this case does not require inquiry into ecclesiastical matters. But the dispute in *Johnson* related to "a number of violations of the North Carolina Nonprofit Corporation Act and intentional infliction of emotional distress[.]" 214 N.C. App. at 508, 714 S.E.2d at 808. As we noted, *Johnson* arose in part, as many church cases do, out of a real property dispute. 214 N.C. App. at 508, 714 S.E.2d at 809. In *Johnson*, this Court specifically noted that in that case "[w]hether Defendants' actions were authorized by the bylaws of the church in no way implicates an impermissible analysis by the court based on religious doctrine or practice." *Id.* at 511, 714 S.E.2d at 810. The Court in *Johnson* ultimately determined that it could address "the very narrow" issues in that case based upon *Tubiolo*:

> In *Tubiolo*, we recognized that membership in a church is a core ecclesiastical matter. However, we also recognized that an individual's membership in a church is a form of a property interest. Accordingly, it was proper

> for a court to address the very narrow issue of whether the plaintiffs' membership was terminated in accordance with the church's bylaws—whether bylaws had been adopted by the church, and whether those individuals who signed a letter revoking the plaintiffs' membership had the authority to do so. In the present case, the trial court is therefore not prohibited by the First Amendment from addressing Plaintiffs' first claim.

Johnson, 214 N.C. App. at 512, 714 S.E.2d at 811 (citations, quotation marks, and brackets omitted).

This case is both factually and legally different from *Johnson*. *See id.*, 214 N.C. App. 507, 714 S.E.2d 806. The issues before us would require interpretation of the bylaws which do impose doctrinal requirements. Even if a declaration of plaintiffs' status as registered members is not specifically the issue before us, in order to determine if plaintiffs even have standing to bring the other issues or to determine if the correct number of members voted for the challenged amendments, the trial court would need to address the contested membership status, which is governed by the bylaws:

> **5.1 Membership**
>
> Without limitation to age, any individual member of a household who believes that our Lord Jesus Christ is the Savior and has been baptized into the Orthodox Tewahdo Church will have the right to be registered as a member of Holy Trinity. Any such member who is 18 years old or older *and meets the following criteria will be eligible to exercise an additional right to vote* on Church matters requiring a vote:
>
> 5.1.1 Unless extenuating circumstances dictate, frequently attends Church services and diligently works to promote the mission of HTEOTC;
>
> 5.1.2 Contributes financially to support the services of the Church according to his/her means;
>
> 5.1.3 Complies with these by-laws and related directives[.]

(Emphasis added.)

The bylaws also impose additional requirements upon members, including specific duties which include the following:

> 6.2.1 Unless extenuating circumstances dictate, Registered Members are expected to fulfill the financial obligation they agreed to.
>
> 6.2.2 Although all functions and roles within the Church are voluntary in nature, members are expected to show their support and participation and support of Church activities when requested.
>
> 6.2.3 Each member will have the duty to accept these by-laws of the Church and to be bound by all provision contained herein.
>
> 6.2.4 When on Church property, each member is strictly prohibited from initiating on [(sic)] taking part in any disruptive or divisive action or language that adversely affects the unity and cohesion of the Church's community.
>
> 6.2.5 Although Registered Members have the right to offer their perspective and participate in discussions during general member meetings, they are required to control their language and mannerisms to ensure that it they are respectful and considerate of the other members present. Accordingly, all listening members should respect any perspective offered by a member and treat them with respect and free from any pressure or intimidation. Member discussions will not be counter to the by-laws of the Church.

Even assuming for purposes of argument that plaintiffs are registered members, Article 5.1 imposes additional requirements even for registered members to have the right to vote "on Church matters requiring a vote" and these requirements raise ecclesiastical questions. Plaintiff requested a declaratory judgment determining that "the Parish Council did not comply with Article 17 of the Church's bylaws." Article 17, regarding elections, requires those who "participate in electing or to be elected" to "meet the eligibility criteria for Registered Member[s,]" which again requires consideration of various requirements of the bylaws, including whether the individual "diligently works to promote the mission of HTEOTC[.]" Plaintiffs also request the trial court to determine that defendants had not complied with Article 18 regarding meetings and Article 20 regarding amendments; again, both these articles include

sections limiting participation to registered members. Plaintiffs also request the trial court to find violations of Article 7 regarding termination of membership and Article 19 regarding a transfer of property. Article 7 addresses whether a Registered Member has "engage[d] in misconduct or immoral behavior" and Article 19 allows for the transfer of property if it "provide[s] service to the growing membership and its needs." The courts cannot determine the "immoral behavior" of plaintiffs for purposes of the bylaws nor can the courts evaluate whether a particular transaction serves the needs of the membership of this church without involvement in ecclesiastical matters. In summary, plaintiffs' claims cannot be adjudicated in the judicial system as they raise questions which go far beyond the consideration of "neutral principles of law" and would "require[] the court to interpret or weigh church doctrine" in contravention of the First Amendment. *Davis*, ___ N.C. App. at___, 774 S.E.2d at 892 (2015).

IV. Conclusion

For the foregoing reasons, we reverse the trial court's denial of defendants' motion to dismiss.

REVERSED.

Judges DIETZ and TYSON concur.

CHRISTOPHER v. COBBLESTONE HOMEOWNERS ASS'N OF CLAYTON, INC.

[249 N.C. App. 245 (2016)]

DENNIS DRAUGHON AND MEGAN DRAUGHON, PLAINTIFFS
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1280

FILED 6 SEPTEMBER 2016

ROBERT SAIN AND JENNIFER SAIN, PLAINTIFFS
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1302

FILED 6 SEPTEMBER 2016

VINCENT FRANKS, JR., PLAINTIFF
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1303

FILED 6 SEPTEMBER 2016

FRANK CHRISTOPHER, PLAINTIFF
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1282

FILED 6 SEPTEMBER 2016

Appeal by Defendant from orders entered 13 May and 4 June 2015 and judgment entered 26 May 2015 by Judge O. Henry Willis, Jr. in District Court, Johnston County. Heard in the Court of Appeals 23 May 2016.

Spence & Spence, P.A., by Robert A. Spence, Jr., for Plaintiff-Appellee Frank Christopher.

No briefs filed for other Plaintiffs-Appellees.

Jordan Price Wall Gray Jones & Carlton, by J. Matthew Waters and Hope Derby Carmichael, for Defendant-Appellant.

McGEE, Chief Judge.

These cases are companion cases to *Sanchez v. Cobblestone*, COA15-1281, filed contemporaneously with these opinions. *Sanchez* includes the facts and analysis relevant to resolution of the cases consolidated in this opinion: COA15-1280, COA15-1282, COA15-1302, and COA15-1303. For the reasons stated in the majority opinion in *Sanchez*, we affirm.

AFFIRMED.

Judge HUNTER, JR. concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

These are companion cases to *Sanchez v. Cobblestone*, COA15-1281. For the reasons fully stated in my dissenting opinion in *Sanchez*, I respectfully dissent.

EMERALD PORTFOLIO, LLC, PLAINTIFF
v.
OUTER BANKS/KINNAKEET ASSOCIATES, LLC, RAY HOLLOWELL INDIVIDUALLY, AND DONNA HOLLOWELL INDIVIDUALLY, DEFENDANTS

No. COA16-31

Filed 6 September 2016

1. Negotiable Instruments—lost note—transfer—right to enforce

The trial court erred by granting summary judgment for Emerald Portfolio, LLC, against Outer Banks/Kinnakeet Associates in an action to enforce a lost note. Where a party who would otherwise have a right to enforce a lost note under N.C.G.S. § 25-3-309 subsequently assigns that note, the assignee does not acquire the right to enforce the note unless the assignee is in actual possession of the note.

2. Guaranty—contractual promise—defenses other than payment waived

The trial court did not err by granting summary judgment in favor of Emerald Portfolio, LLC against Ray Hollowell, a guarantor

of a note, where the note was lost and unenforceable. The execution of the guaranty was a contractual promise, the explicit terms of which waived defenses other than full payment.

Appeal by defendants Outer Banks/Kinnakeet Associates, LLC and Ray Hollowell from orders entered 27 August 2015 by Judge Cy A. Grant in Dare County Superior Court. Heard in the Court of Appeals 26 May 2016.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Robert A. Mays, for plaintiff-appellee.

Phillip H. Hayes for defendants-appellants Outer Banks/Kinnakeet Associates, LLC and Ray Hollowell.

ZACHARY, Judge.

Where the assignee of a note lacked possession of the note and did not satisfy the statutory provisions for enforcement of a lost note, the trial court erred in granting summary judgment in favor of the assignee. Where there was no genuine issue of material fact as to obligor's contractual debt pursuant to the guaranty agreement, and the agreement was not unconscionable, the trial court did not err in granting summary judgment in favor of the assignee-obligee of the guaranty agreement.

I. Factual and Procedural Background

On 30 August 2006, Outer Banks/Kinnakeet Associates, LLC, (OBKA) executed a promissory note in favor of First South Bank (FSB) in the amount of $3,025,500. Ray Hollowell, in his capacity as OBKA's manager, signed the note on behalf of OBKA. On that same day, Ray Hollowell and his spouse, Donna Hollowell (collectively, the Hollowells) each signed separate, but identical, commercial guaranties imposing personal liability on them under contract for OBKA's payment of the note. On 24 December 2008, 23 January 2009, and 18 March 2010, FSB and OBKA entered into agreements modifying the terms of the original note.

In February of 2013, FSB sold the loan to Emerald Portfolio, LLC (Emerald). On 23 June 2014, Emerald, as assignee of FSB, filed a complaint against OBKA and the Hollowells alleging a default pursuant to the terms of the note, as modified, along with the guaranties, and seeking to recover the unpaid balance on the note. Included in an attachment to the complaint was an affidavit, signed by FSB's senior vice president, alleging that FSB was the lawful owner and payee of the note, that the note

could not be located, and that the note had been endorsed to Emerald as of 21 February 2013. This attachment also contained a copy of the note.

On 5 August 2014, the Hollowells filed an answer and counterclaim, raising the defenses of credit and offset and unconscionability, and counterclaiming for unfair and deceptive trade practices. The answer admitted the existence of the note and guaranties. On 11 August 2014, Emerald filed an answer to the Hollowells' counterclaim, together with a motion to dismiss. On 15 September 2014, Emerald also filed a motion for summary judgment or judgment on the pleadings with respect to the Hollowells.

On 18 September 2014, Emerald filed a motion for entry of default against OBKA, alleging that it had failed to answer. Default was entered by the Clerk of Court of Dare County that same day. Also that same day, the Clerk of Court entered default judgment against OBKA. On 3 October 2014, OBKA moved to set aside entry of default and default judgment. This motion was granted in open court on 6 October 2014, and rendered in writing on 27 July 2015.

On 2 October 2014, the Hollowells filed a motion to amend their answer. This motion was granted in open court on 6 October 2014, and rendered in writing on 27 July 2015.

On 3 November 2014, the trial court entered an order on Emerald's motion for summary judgment or judgment on the pleadings and dismissal. The trial court noted that Emerald's motion for summary judgment or judgment on the pleadings was withdrawn without prejudice, and dismissed the Hollowells' counterclaim with prejudice.

On 14 November 2014, OBKA filed its answer, alleging credit and offset, and contending that Emerald was not entitled to enforce the lost note. On 11 May 2015, Emerald moved to strike OBKA's untimely answer and for summary judgment against OBKA and the Hollowells. On 20 July 2015, the Hollowells and OBKA collectively filed a motion for summary judgment.

On 19 August 2015, Emerald filed a motion seeking an order prohibiting the Hollowells and OBKA from participating in any voluntary transfer of the subject property without prior court approval. On 27 August 2015, the trial court granted this motion, ordering that other than payment of ordinary expenses the Hollowells and OBKA were not to participate in any voluntary transfer of the subject property without court approval.

On 3 September 2015, the trial court entered an order granting Emerald's motion for summary judgment as to appellants, and denying the Hollowells' and OBKA's motion for summary judgment. This order also awarded Emerald the monetary relief sought from appellants and certified the order pursuant to Rule 54(b) of the North Carolina Rules of Civil Procedure. The order further found that Donna Hollowell was a guarantor on the commercial guaranty, and was jointly and severally liable to Emerald under the note "unless she can prove an affirmative defense under the Equal Credit Opportunity Act" at trial of this matter.

From, *inter alia*, the order granting Emerald's motion for summary judgment, OBKA and Ray Hollowell (appellants) appeal.

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. Summary Judgment

In their various arguments, appellants contend that the trial court erred in granting summary judgment against appellants in favor of Emerald, and denying summary judgment in favor of appellants. We agree in part and disagree in part.

A. OBKA and the Lost Note

[1] First, appellants maintain that the trial court erred in entering summary judgment in favor of Emerald against OBKA because FSB could not locate the promissory note at the time it was assigned to Emerald.

Our statutes provide an avenue for recovery on a lost instrument. Specifically:

> A person not in possession of an instrument is entitled to enforce the instrument if (i) the person was in possession of the instrument and entitled to enforce it when loss of possession occurred, (ii) the loss of possession was not the result of a transfer by the person or a lawful seizure, and (iii) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a

> person that cannot be found or is not amenable to service of process.

N.C. Gen. Stat. § 25-3-309(a) (2015). In other words, appellants contend that Emerald was entitled to enforce the note only if (i) Emerald possessed and was able to enforce the note at the time that it was lost, (ii) the loss was not the result of a transfer or lawful seizure, and (iii) the note could not reasonably be obtained due to loss, destruction, or wrongful taking. Because FSB possessed the note and had lost it at the time that it was assigned to Emerald, appellants assert that the first prong of this analysis fails.

In construing this statute, we find it helpful to compare it with the language of the Uniform Commercial Code (UCC), and to contrast where the two diverge. A previous version of UCC § 3-309, in effect when N.C. Gen. Stat. § 25-3-309 was enacted, was identical to the North Carolina statute. However, that UCC provision has since been amended, as follows:

> (a) A person not in possession of an instrument is entitled to enforce the instrument if:
>
> (1) the person seeking to enforce the instrument:
>
> (A) was entitled to enforce the instrument when loss of possession occurred; or
>
> (B) has directly or indirectly acquired ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred;
>
> (2) the loss of possession was not the result of a transfer by the person or a lawful seizure; and
>
> (3) the person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of an unknown person or a person that cannot be found or is not amenable to service of process.

UCC § 3-309 (2002). The language in (a)(1)(B) marks a clear distinction between the two, in that the amended UCC provision allows a party not in possession of an instrument to enforce it if ownership was acquired from someone with a right to enforce the instrument.

There is no question in the instant case that FSB had a right to enforce the note under both the North Carolina statute and the UCC.

FSB was in possession of the instrument when it was lost, the loss was not a result of a transfer or lawful taking, and possession could not thereafter reasonably be obtained. Moreover, under the revised UCC provision, Emerald would be able to enforce the note as well, notwithstanding its lack of possession, due to "directly . . . acquir[ing] ownership of the instrument from a person who was entitled to enforce the instrument when loss of possession occurred[.]" UCC § 3-309(a)(1)(B).

However, Emerald's enforcement rights are not determined by the UCC, but by North Carolina statute. Pursuant to the provisions of N.C. Gen. Stat. § 25-3-309, Emerald is not entitled to enforce the note. *See, e.g.*, *In re Patterson*, 2012 WL 5906865 (Bankr. W.D.N.C. Nov. 26, 2012). This statute is current; it has not been revised since 1995. Our legislature could have revised it to coincide with the UCC revision in 2002, but it did not do so. We must conclude from this distinction that our legislature intended to exclude the additional language of the UCC, and as such intended not to provide this avenue of recovery to parties not in possession of the relevant instrument.

Accordingly, we hold that where a party who would otherwise have a right to enforce a lost note under N.C. Gen. Stat. § 25-3-309 subsequently assigns that note, the assignee does not acquire the right to enforce the note unless the assignee is in actual possession of the note. As the note in the instant case remains missing, we hold that Emerald lacked standing to enforce it against OBKA. The trial court erred as a matter of law in granting summary judgment in favor of Emerald against OBKA.

B. The Hollowells and the Guaranty

[2] Next, appellants contend that the trial court erred in entering summary judgment in favor of Emerald against Ray Hollowell because he could not be held liable as a guarantor if the note itself could not be enforced.

This argument is flawed. "North Carolina . . . recognizes that the obligation of the guarantor and that of the maker [of a note], while often coextensive are, nonetheless, separate and distinct." *EAC Credit Corp. v. Wilson*, 12 N.C. App. 481, 485, 183 S.E.2d 859, 862 (1971), *aff'd*, 281 N.C. 140, 187 S.E.2d 752 (1972). "A guarantor's liability depends on the terms of the contract as construed by the general rules of contract construction." *Carolina Place Joint Venture v. Flamers Charburgers, Inc.*, 145 N.C. App. 696, 698, 551 S.E.2d 569, 571 (2001). When a note is transferred, no separate transfer of the guaranty is required; however, this does not mean that a guaranty cannot exist in the absence of a note. A guaranty is an obligation in contract, and irrespective of the status

of the note, may be enforced in contract. *See generally First Am. Sav. Bank, F.S.B., v. Adams*, 87 N.C. App. 226, 360 S.E.2d 490 (1987). In *First American*, the defendants were guarantors on a note held by the plaintiff. The note secured the debt of a corporation wholly owned by the defendants. The defendants contended that they were discharged from their obligations as guarantors by reason of the plaintiff's "unjustified impairment of the collateral securing the loan." *Id.* at 231, 360 S.E.2d at 494. We noted, however, that the defendants enjoyed close ties with the debtor corporation, and that even if the collateral were impaired, the guaranty would remain enforceable. *Id.* at 232, 360 S.E.2d at 494-95.

In the instant case, as in *First American*, the Hollowells are closely tied to the debtor corporation OBKA, being its sole members and owners. Although appellants challenge the note itself rather than the impairment of the collateral, both arguments go to the enforceability of the instrument. We therefore find the reasoning in *First American*, that the guaranty may be enforced even if circumstances render the instrument unenforceable, applicable to this case.

Moreover, under the express terms of the guaranty, Ray Hollowell agreed to waive many defenses to enforcement, in pertinent part as follows:

> Guarantor also waives any and all rights or defenses based on suretyship or impairment of collateral including, but not limited to, any rights or defenses arising by reason of . . . (C) any disability or other defense of Borrower, of any other guarantor, or of any other person, or by reason of the cessation of Borrower's liability from any cause whatsoever, other than payment in full legal tender, of the indebtedness; (D) any right to claim discharge of the indebtedness on the basis of unjustified impairment of any collateral for the indebtedness; . . . or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the indebtedness.

Accordingly, the guaranty executed by Ray Hollowell is enforceable.

" 'A guaranty of payment is an absolute and unconditional promise to pay the debt at maturity if not paid by the principal debtor.' " *Epes v. B.E. Waterhouse, LLC*, 221 N.C. App. 422, 425, 728 S.E.2d 390, 393 (2012) (quoting *Jennings Communications Corp. v. PCG of the Golden Strand, Inc.*, 126 N.C. App. 637, 640, 486 S.E.2d 229, 231 (1997)). " 'Under the general rules of contract construction, where an agreement is clear and unambiguous, no genuine issue of material fact exists and

summary judgment is appropriate. In contrast, an ambiguity exists in a contract if the language of the contract is fairly and reasonably susceptible to either of the constructions asserted by the parties.' " *Id.* (quoting *Carolina Place Joint Venture*, 145 N.C. App. at 699, 551 S.E.2d at 571). Ray Hollowell's execution of the guaranty was a contractual promise to pay outstanding debts if the principal, here OBKA, failed to do so. The explicit terms of said contract, which were clear and unambiguous and must be construed as such, waived any defenses other than full payment of the debt. Accordingly, the unenforceability of the obligation by Emerald against OBKA is no defense for Ray Hollowell as guarantor, and the guaranty may be enforced.

Appellants did not challenge at trial, and do not challenge on appeal, the fact that Ray Hollowell signed a guaranty for the debt secured by the note. This created an obligation in contract in accordance with the terms of the guaranty, enforceable even in the absence of the note. There is no genuine issue of material fact that Ray Hollowell owed the debt pursuant to that contractual obligation. Accordingly, the trial court did not err in granting summary judgment in favor of Emerald against Ray Hollowell.

This argument is without merit.

C. Unconscionability

Lastly, appellants contend that the trial court erred in entering summary judgment in favor of Emerald against Ray Hollowell because the guaranty contained unconscionable provisions.

"Unconscionability is an affirmative defense, and the party asserting it bears the burden of establishing it." *Rite Color Chem. Co. v. Velvet Textile Co.*, 105 N.C. App. 14, 20, 411 S.E.2d 645, 649 (1992).

> For a court to conclude that a contract is unconscionable, the court must determine that the agreement is both substantively and procedurally unconscionable. The question of unconscionability is determined as of the date the contract was executed. Procedural unconscionability involves bargaining naughtiness in the formation of the contract, such as fraud, coercion, undue influence, misrepresentation, [or] inadequate disclosure. Substantive unconscionability involves an inequality of the bargain that is so manifest as to shock the judgment of a person of common sense, and . . . the terms . . . so oppressive that no reasonable person would make them on the one hand, and no honest and fair person would accept them on the other.

Weaver v. Saint Joseph of the Pines, Inc., 187 N.C. App. 198, 212-13, 652 S.E.2d 701, 712 (2007) (citations and quotation marks omitted).

With respect to procedural unconscionability, at trial, appellants argued as follows:

> The courts want to see something called procedural unconscionability, something -- the naughtiness in -- some kind of misbehavior in the formation of a contract, as well as substantive unconscionability, that being the unfairness of the provisions at issue.
>
> I don't know that I can argue to you, outside of requiring Ms. Hollowell to sign, that there was any other misconduct in the formation of the contract, but when you have people as a condition of a loan signing a boilerplate contract that says you waive all acts/omissions of any kind at any time with respect to any matter whatsoever, that it's just so broad that the court should deem such a provision unconscionable.

In essence, at trial, appellants conceded that the only possible evidence of procedural unconscionability was FSB's requirement that Donna Hollowell execute the guaranty as well as Ray Hollowell; the remainder of their argument goes to the substantive unconscionability of the terms of the guaranty, not procedural unconscionability.

We are reluctant to hold, as appellants would have us hold, that it is *per se* procedurally unconscionable for a lender to require that both members of an LLC execute a guaranty of the LLC's loan obligation. In the absence of other evidence of procedural unconscionability, we hold that, on appeal and before the trial court, appellants have failed to demonstrate procedural unconscionability.

We acknowledge that there is no bright-line rule as to just how much procedural or substantive unconscionability must be shown. What our law establishes conclusively, however, is that some of each is necessary to demonstrate unconscionability. In the absence of *any* procedural unconscionability, it cannot be said that the guaranty agreement was unconscionable. As such, we hold that the trial court did not err in rejecting the unconscionability defense asserted by Ray Hollowell.

This argument is without merit.

IV. Conclusion

Because Emerald did not acquire the right to enforce the missing note from FSB, the trial court erred in granting summary judgment in favor of Emerald and denying it to OBKA. Because no genuine issue of material fact existed as to Ray Hollowell's contractual obligation for the debt pursuant to the guaranty agreement, and the agreement was not unconscionable, the trial court did not err in granting summary judgment in favor of Emerald and denying it to Ray Hollowell.

REVERSED IN PART, AFFIRMED IN PART.

Judges STEPHENS and McCULLOUGH concur.

HSBC Bank USA, National Association, as successor trustee to Bank of America, N.A., successor by merger to LaSalle Bank National Association, as Indenture Trustee under that certain Indenture dated as of February 1, 2005, as the same may be amended from time to time, for the benefit of the SBA and the holders of the Business Loan Express SBA Loan-Backed Notes, Series 2005-1, as their interests may appear subject to the Multi-Party Agreement dated February 1, 2005 by Business Loan Center, LLC solely in its capacity as Servicer, Plaintiff

v.

PRMC, Incorporated and Zulfiqar M. Khan, Defendants

No. COA16-96

Filed 6 September 2016

1. Appeal and Error—pro se appearance by corporation—not permitted

An appeal by a corporation was dismissed where the corporation had appeared in the trial court pro se through its president and its pro se appeal was not perfected. A corporation cannot appear pro se in North Carolina and must be represented by an attorney licensed to practice in North Carolina, with certain exceptions not applicable here. The individual appeal of the corporate president was allowed to proceed.

2. Continuances—motion denied—multiple delays

The trial court did not abuse its discretion by denying defendant-Khan's motion to continue where the trial court gave ample consideration to both sides and expressed sympathy for defendants'

position, but noted that the pendency of the case was verging on unacceptable.

3. Fiduciaries—breach of duty—harm to corporation—no claim by president as individual

The trial court did not err by granting summary judgment for plaintiff in a case arising from a loan default where defendant-Khan alleged that a fiduciary duty had been created and breached but Khan, as an individual, had no right to appeal the breach of a fiduciary duty that damaged defendant-PRMC, Inc.

Appeal by defendants from order entered 28 May 2015 by Judge Mary Ann Tally in Robeson County Superior Court. Heard in the Court of Appeals 9 June 2016.

Nexsen Pruet, PLLC, by David S. Pokela, Brooks F. Bossong, and Brian R. Anderson, and Yarborough, Winters & Neville, P.A., by Garris Neil Yarborough, for plaintiff-appellee.

Zulfiqar M. Khan, defendant-appellant pro se.

ZACHARY, Judge.

Where a corporation cannot appear *pro se*, we dismiss the corporation's *pro se* appeal. Where the trial court carefully considered the arguments of both sides, the trial court did not abuse its discretion in denying Khan's motion to continue. Where defendant guarantor did not establish his right to assert claims on behalf of defendant debtor corporation, defendant guarantor could not assert those claims. Where no genuine issue of material fact existed, the trial court did not err in granting plaintiff's motion for summary judgment against defendant guarantor.

I. Factual and Procedural Background

On 2 June 2004, Business Loan Center, LLC (BLC) loaned PRMC, Inc. (PRMC), the amount of $1,950,000.00. Zulfiqar M. Khan (Khan), president and sole shareholder of PRMC, executed an "Unconditional Guarantee" of the amount owed under the note. Khan, in his capacity as president of PRMC, also signed a "Deed of Trust, Assignment of Leases, Rents and Profits, Security Agreement and Fixture Financing Statement," granting BLC a security interest in certain real property, namely a hotel, including all fixtures, and certain personal property, including future personal property to be placed in and connected with the real property. On 20 September 2007, Khan and PRMC

(collectively, defendants), executed with BLC an Allonge to the note, which reduced the monthly payment on the note for four months. The Allonge included the following language:

> WHEREAS, BORROWER AND GUARANTOR EACH, AND ANY COMBINATION AND COLLECTIVELY, HEREBY FULLY AND FOREVER REMISE, RELEASE AND DISCHARGE LENDER, AND THEIR OFFICERS, AGENTS AND EMPLOYEES, OF AND FROM ANY AND ALL CLAIMS AND FROM ANY AND ALL OTHER MANNER OF ACTION AND ACTIONS, CAUSE OR CAUSES OF ACTION, RIGHTS, CLAIMS, COUNTERCLAIMS, DEFENSES, SUITS, SET OFFS, DEBTS, DUES, SUMS OF MONEY, ACCOUNTS, COVENANTS, CONTRACTS, CONTROVERSIES, OBLIGATIONS, LIABILITIES, AGREEMENTS, PROMISES, VARIANCES, TRESPASSES, DAMAGES, JUDGMENTS, LIENS, CLAIMS OF LIEN, LOSSES, COSTS, EXPENSES, JUDGMENT BONDS, EXECUTION AND DEMANDS OF EVERY NATURE AND KIND WHATSOEVER, IN LAW AND IN EQUITY, EITHER NOW ACCRUED OR HEREAFTER MATURING, WHICH ANY OF THEM HAD, MAY HAVE HAD, OR NOW HAVE, OR CAN, SHALL OR MAY HAVE, FOR OR BY REASON OF ANY MATTER, CAUSE OR THING WHATSOEVER, TO AND INCLUDING THE DATE HEREOF, ARISING OUT OF OR CONNECTED IN ANY WAY WITH THE INSTRUMENTS REFERENCED IN THE RECITALS, LENDER'S, AND/OR THEIR AGENTS', CONDUCT AND ACTIONS WITH RESPECT THERETO AND LENDER'S GENERAL BUSINESS RELATIONSHIP WITH ANY OF THEM, INCLUDING, BUT NOT LIMITED TO, THE NEGLIGENCE, OF LENDER; PROVIDED, HOWEVER, LENDER IS NOT RELEASED FROM ITS OBLIGATIONS UNDER THIS AGREEMENT.

On 10 July 2008, defendants and BLC executed a Deferral Agreement in which BLC granted PRMC's request for a two month deferral on payments. This agreement contained another release of claims, counterclaims and defenses, in bold print.

On 30 September 2008, BLC filed for bankruptcy. On 2 September 2010, BLC filed its plan of reorganization, which was confirmed on 12 November 2010 and became effective on 29 November 2010. BLC

served defendants with notice of the case and important bankruptcy proceedings, but neither PRMC nor Khan filed a proof of claim.

Thereafter, PRMC defaulted on the note. BLC instituted foreclosure proceedings under the note, and in order to prevent foreclosure, defendants executed a Forbearance Agreement with BLC on 1 October 2009. In the Forbearance Agreement, there was another release of claims, with similar language and in similarly bold typeface.

On 1 November 2010, PRMC filed for bankruptcy. In its Schedule A filing, PRMC declared the amount of secured interest in its real property to be $2,050,293.81. On the Schedule B filing of personal property, PRMC listed no present or future legal claims as assets. On 21 April 2011, BLC's successor in interest, HSBC Bank USA (HSBC), filed a motion for relief from the automatic stay, noting that the property was worth less than the debt. On 3 June 2011, the bankruptcy court entered a consent order modifying the automatic stay, recognizing that HSBC's security interest was perfected and that the property constituted "cash collateral," and lifting the automatic stay with respect to the property. On 17 October 2011, the bankruptcy court dismissed the bankruptcy case with prejudice.

On 20 October 2011, HSBC brought an action against defendants, alleging default of the agreement by PRMC and default of the guaranty by Khan, and seeking monetary damages.

On 26 October 2011, HSBC brought an action to foreclose on the note and deed, alleging another default. Defendants did not appeal from the resultant findings and order. The property was ultimately sold by the trustee at public auction.

On 3 January 2012, defendants filed answer and counterclaims to HSBC's complaint, seeking dismissal, asserting multiple defenses, alleging breach of fiduciary duty by HSBC, and seeking damages. On 14 May 2014, HSBC filed an amended reply to defendants' counterclaims. On 2 June 2014, defendants filed an amended motion to dismiss, answer, and counterclaim.

On 24 June 2014, HSBC filed a motion for summary judgment, and included copies of the BLC bankruptcy proceeding, the PRMC bankruptcy proceeding, the Allonge, and the PRMC receivership and foreclosure proceedings. On 4 August 2014, hearing on this motion was continued at the request of defense counsel. On 23 February 2015, HSBC filed a notice of hearing on its motion. On 3 March 2015, defendants filed a motion to continue the hearing on HSBC's motion, alleging HSBC's

failure to comply with discovery. On 10 March 2015, the trial court continued the hearing until 20 March 2015.

On 13 March 2015, defense counsel filed a request to withdraw, and moved for a continuance in order for defendants to seek other counsel. On 18 March 2015, the trial court entered an order allowing defense counsel's motion to withdraw, and continuing the case for sixty days.

On 14 May 2015, HSBC filed another notice of hearing on its motion. On 21 May 2015, defendants, now appearing *pro se* through Khan, moved for an additional continuance in order to procure counsel. At the hearing on 27 May 2015, the trial court denied defendants' motion to continue, and heard HSBC's motion for summary judgment. On 28 May 2015, the trial court entered an order granting summary judgment in favor of HSBC.

From the order granting summary judgment in favor of HSBC, defendants appeal.

II. PRMC's Appeal

[1] As a preliminary matter, we note that while an individual may appear *pro se* before the court, a corporation is not an individual under North Carolina law, and must be represented by an agent. *Seawell v. Carolina Motor Club*, 209 N.C. 624, 631 184 S.E. 540, 544 (1936) (holding that "[a] corporation cannot lawfully practice law. It is a personal right of the individual,"). Further, a corporation cannot appear *pro se*; it must be represented by an attorney licensed to practice law in North Carolina, pursuant to certain limited exceptions. *Lexis-Nexis, Div. of Reed Elsevier, Inc. v. Travishan Corp.*, 155 N.C. App. 205, 209, 573 S.E.2d 547, 549 (2002). These exceptions include the drafting by non-lawyer officers of some legal documents, and appearances in small claims courts and administrative proceedings.

The instant case fell within none of these exceptions. The matter now on appeal concerns a trial involving a nearly two million dollar loan. As such, it was error for the trial court to allow PRMC to appear *pro se* through its president, Khan. In addition, we hold that PRMC cannot appear before this Court *pro se*. As such, its appeal to this Court is not perfected. We will hear Khan's own appeal, as he, as an individual, may proceed *pro se*, but dismiss PRMC's appeal.

III. Motion to Continue

[2] In his first argument, Khan contends that the trial court erred in denying defendants' motion to continue. We disagree.

A. Standard of Review

"The standard of review for denial of a motion to continue is generally whether the trial court abused its discretion." *Morin v. Sharp*, 144 N.C. App. 369, 373, 549 S.E.2d 871, 873, *disc. review denied*, 354 N.C. 219, 557 S.E.2d 531 (2001).

"A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason . . . [or] upon a showing that [the trial court's decision] was so arbitrary that it could not have been the result of a reasoned decision." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

B. Analysis

Khan contends that, as of the hearing on the motion of PRMC and Khan for further continuance, discovery was yet incomplete. Khan argues that, as a result, a hearing on summary judgment was premature, and the matter should have been continued until discovery was complete.

We note first that this was not the argument Khan made in the motion to continue. The motion stated, simply, that defendants needed time "in order for defendant to procure counsel and prepare." It was only at the hearing on this motion that Khan raised arguments concerning discovery issues.

At the hearing, Khan stated that he had "spoken with actually a couple of lawyers[,]" and that one had told him that "he is going to look into this case and be able to represent me." Khan went on to explain that he had spoken to multiple attorneys, and that as he was based in Richmond, Virginia, following these proceedings was difficult for him. He also mentioned that his father was suffering from Parkinson's, and that this had kept him preoccupied of late.

In response to the motion, HSBC argued that "this whole series of events is replete with delay by Mr. Khan." HSBC remarked upon the delays resulting from the Forbearance Agreement, the foreclosure, and PRMC's bankruptcy. HSBC then noted that its summary judgment motion had originally been set for 7 July 2014. It was continued, at defendants' request, to 3 March 2015, again to 6 March 2015, and then again to 20 March 2015. HSBC observed further that defendants' attorney handled all appropriate responses, pleadings, and motions before withdrawing. Subsequently, the matter was continued to 27 May 2015. With respect to defense counsel, HSBC noted that the attorney that Khan mentioned was an excellent attorney, but that defendants had

already had five attorneys in this case, and the attorney Khan mentioned would be the sixth. HSBC stated that the case itself, which started with a complaint filed 20 October 2011, had been pending for nearly four years, and had been calendared for five summary judgment hearings. Lastly, HSBC argued that a hearing wasn't even particularly necessary. HSBC maintained:

> But everything that can be done in this case -- because one of the things, if I'm not mistaken, that you said during this -- during these hearings is we're through filing papers in this. There's no more discovery. There's no more motions. There's no more anything because, you know, the deadlines for -- when you have to file your briefs, the deadlines for when you have to file your affidavits, the deadlines when you have to -- discovery was extended additional time to give him additional time. Your Honor, they're -- and that has been completed.
>
> Your Honor, there is nothing of a factual basis that needs to be considered in this case. All of our defenses come straight from the paperwork itself.

Khan responded by challenging the number of attorneys and the cause of the delays. He then challenged the discovery issue, arguing that, "We still have questions and things. Emails -- I have not gotten. I have about thousand [sic] of pages of emails but they are irrelevant emails talking about the reservation systems among themselves and all that. We have not gotten an -- one email that -- I have not seen, ma'am -- if I have missed it, that's -- I'm sorry." Subsequently, the trial court denied defendants' motion for a continuance. The trial court questioned whether defendants actually had an arrangement with the lawyer Khan mentioned, observing that "if [the attorney] was prepared to appear on your behalf, I believe that he would have notified the Court and opposing counsel even if he could not be here today because that's the usual method of communication." The trial court determined that "[t]here just comes a point in time when matters need to be resolved one way or the other."

Upon review of the transcript, records, and briefs, we agree. The trial court gave ample consideration to both sides. It expressed sympathy for defendants' position, but noted that the pendency of the case was verging on an unacceptable length. We hold that the trial court's decision was not "manifestly unsupported by reason" or "so arbitrary that it could not have been the result of a reasoned decision." *White*, 312 NC

at 777, 324 S.E.2d 833. Accordingly, we hold that the trial court did not abuse its discretion in denying Khan's motion to continue.

This argument is without merit.

III. Summary Judgment

[3] In his second argument, Khan contends that the trial court erred in granting HSBC's motion for summary judgment. We disagree.

A. Standard of Review

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

B. Analysis

Khan contends on appeal that BLC, HSBC's predecessor in interest, "acted in such a manner dealing with the Defendants . . . as to constitute intentional wrongdoing and willful misconduct as well as acting in a grossly negligent manner." Khan specifically asserts that an employee of BLC acted as more than a mere lender, creating a fiduciary relationship. As a result, Khan maintains that there was a genuine issue of material fact, and that summary judgment was not appropriate.

Khan's arguments notwithstanding, the issue on summary judgment was not any claim by Khan concerning fraud. In fact, Khan made no counterclaim alleging fraud. Rather, Khan alleged that a fiduciary duty had been created, and was breached. This was, if any, the only factual issue.

More specifically, Khan contended that an employee of BLC had established a fiduciary relationship with PRMC, which was breached, causing injury to PRMC. Khan, as an individual, has not articulated a right to appeal this issue, which we note damages the corporation, not Khan individually.

Ultimately, there is no genuine issue of material fact. PRMC's appeal to this Court has been dismissed; the remaining appellant is Khan, in his individual capacity. Khan, as an individual, has failed to express a right to appeal the issue of a breach of fiduciary duty that damaged PRMC, and therefore has failed to raise a genuine issue of material fact. Accordingly, we hold that there was no genuine issue of material fact as

to whether Khan owed the debt alleged, and the trial court did not err in granting HSBC's motion for summary judgment.

This argument is without merit.

V. Conclusion

PRMC cannot proceed *pro se* on appeal, and as such PRMC's appeal is dismissed. The trial court did not abuse its discretion in denying Khan's motion to continue. Khan, as an individual, has failed to articulate his right to appeal from summary judgment of a claim for breach of fiduciary duty allegedly damaging PRMC. As a result, we hold that the trial court did not err in granting HSBC's motion for summary judgment.

DISMISSED IN PART, AFFIRMED IN PART.

Judges STEPHENS and McCULLOUGH concur.

IN THE MATTER OF K.B. AND L.R.

No. COA16-155

Filed 6 September 2016

Child Custody and Support—adequate resources to care for children—insufficient findings

Where the trial court granted custody to the children's maternal grandmother, the trial court's findings and the evidence were insufficient to verify that the maternal grandmother had adequate resources to care appropriately for the children pursuant to N.C.G.S. § 7B-906.1(j).

Appeal by respondent mother from order entered 25 November 2015 by Judge Rickye McKoy-Mitchell in Mecklenburg County District Court. Heard in the Court of Appeals 15 August 2016.

Christopher C. Peace for petitioner-appellee Mecklenburg County Department of Social Services, Division of Youth and Family Services.

Parker, Poe, Adams & Bernstein L.L.P., by Fern A. Paterson, for guardian ad litem.

Assistant Appellate Defender Annick Lenoir-Peek for respondent-appellant.

DIETZ, Judge.

Respondent is the mother of Karen and Lisa.[1] Respondent appeals from a permanency planning order and guardianship order that granted custody to the children's maternal grandmother, allowed Respondent limited visitation, and ceased further permanency planning hearings.

As explained below, the trial court's findings, and the corresponding evidence in the record, are insufficient to verify that the maternal grandmother had "adequate resources" to care appropriately for the children, as the applicable statute requires. N.C. Gen. Stat. § 7B-906.1(j). We must therefore vacate the trial court's orders and remand for further proceedings consistent with this opinion.

Facts and Procedural History

On 18 October 2013, Mecklenburg County Department of Social Services filed a juvenile petition alleging that eleven-month-old Karen and three-year-old Lisa were neglected and dependent. The petition alleged that Respondent had untreated substance abuse and mental health issues, including bipolar disorder. DSS further alleged that Respondent was unemployed and without stable housing and did not know how to access community resources. The petition described Karen and Lisa as "dirty" and "only eating once per day due to lack of food in the home."

Respondent initially agreed to place the children with their maternal great aunt in South Carolina but the great aunt later notified DSS that she could not care for the children. Neither child's father was willing or able to take custody of his respective child and neither are parties to this appeal. As a result, DSS obtained non-secure custody of the children and placed them in foster care.

In January 2014, the children's maternal grandmother notified DSS that she was interested in being considered as a placement option for her granddaughters. With the trial court's permission, DSS arranged for a home study of the grandmother's residence in New York through the Interstate Compact on the Placement of Children.

The trial court adjudicated Karen and Lisa dependent juveniles on 15 September 2014. The court acknowledged Respondent's progress

1. We use pseudonyms to protect the children's identities.

on her case plan but found that her "[i]ssues of employment, mental health and housing . . . need to be resolved" before the children could be returned to her custody. The court left the children in DSS custody and ordered the agency to pursue a plan of reunification.

The trial court held the initial permanency planning hearing on 1 October 2014. While expressing its concern about Respondent's "lack of progress in her [case plan] and lack of honesty[,]" the court established a permanent plan of reunification with a concurrent plan of guardianship or adoption. The court noted that DSS had received no information regarding the results of the grandmother's home study.

Following a permanency planning hearing on 30 March 2015, the trial court changed the permanent plan for the children to guardianship or adoption with a concurrent goal of reunification with Respondent. The court found that Respondent, who was on bedrest due to a new pregnancy, had not resolved the issues leading to the children's removal from her home and had not been "consistent with visits or calls to the juveniles[.]" The court further found that the grandmother's home study had been approved and that Respondent "does not object" to the children's placement in guardianship with their grandmother.

The trial court suspended reunification efforts and changed the children's permanent plan to guardianship with a relative or other suitable person after a hearing on 15 July 2015. The court found that Respondent was not attending mental health services while on bedrest and that her doctor intended to prescribe medication for her depression once she was thirty-seven weeks into her pregnancy. Respondent remained unemployed and did not have electricity in her home. The children visited their grandmother in New York and returned to foster care with no behavioral problems. Lisa told her therapist that she wished to live with her grandmother.

On 23 November 2015, following a hearing, the trial court entered the permanency planning order and guardianship order that are the subject of this appeal. The court changed the permanent plan for the children to guardianship with their grandmother and, in a separate order, transferred legal custody from DSS to their grandmother as their guardian. Respondent timely appealed the permanency planning order but did not appeal the guardianship order. Respondent later filed a petition for a writ of certiorari seeking appellate review of the guardianship order. We allow the petition and will review the guardianship order together with the permanency planning order.

Analysis

We review the permanency planning order and guardianship order to determine "whether there is competent evidence in the record to support the findings and [whether] the findings support the conclusions of law." *In re C.M.*, 230 N.C. App. 193, 194, 750 S.E.2d 541, 542 (2013).

I. Challenge to Findings Concerning Guardianship

Respondent first claims the trial court failed to properly verify the statutory requirements that the grandmother "understands the legal significance" of guardianship and has the "resources to care appropriately for the juvenile." N.C. Gen. Stat. §§ 7B-600(c), 7B-906.1(j).

When addressing these statutory criteria, the trial court need not "make any specific findings in order to make the verification." *In re J.E.*, 182 N.C. App. 612, 617, 643 S.E.2d 70, 73 (2007). But the record must contain competent evidence demonstrating the guardian's awareness of her legal obligations and her financial means. *See In re P.A.*, __ N.C. App. __, __, 772 S.E.2d 240, 246 (2015). Specifically, the trial court must "make a determination that the guardian has 'adequate resources' and some evidence of the guardian's 'resources' is necessary as a practical matter, since the trial court cannot make any determination of adequacy without evidence." *Id.* at __, 772 S.E.2d at 246.

Here, the only evidence of the guardian's resources is the following testimony by the grandmother:

> Q: [Y]ou also would be financially responsible for the children. So do you and your husband work outside the home?
>
> A: No, I do not work. My husband works.
>
> Q: Do you have other income . . . other than what your husband earns?
>
> A: No, I receive disability myself.
>
> Q: So you do have that income coming in as well?
>
> A: Yes ma'am.

The trial court also noted that a social services agency in New York "conducted a home study on [the grandmother] and found her to be appropriate to provide care for the juveniles." That home study is not in the record. Finally, the record indicates that the grandmother lives in a four-bedroom home, but there was no evidence or testimony

concerning the value of the home or any corresponding mortgage. Based on the testimony and evidence described above, the trial court found that the grandmother "has adequate resources to care appropriately for [the children]."

We agree with Respondent that this evidence is insufficient to verify that the grandmother has "adequate resources" to serve as guardian of the children. The grandmother did not testify to how much her husband was paid, how much she received in disability payments, how much debt she had, or what her monthly expenses were. In a nearly identical case, this Court held that the evidence was insufficient to satisfy the verification requirement. *See In re P.A.*, __ N.C. App. at __, 772 N.C. App. at 245-48. There, the guardian testified that she had "the financial . . . ability to support th[e] child and provide for its needs" and that she lived in a three-bedroom home. *Id.* at __, 772 N.C. App. at 245, 247. This Court found that evidence insufficient because there was "no evidence at all of what [the guardian] considered to be 'adequate resources' or what her resources were." *Id.* at __, 772 N.C. App. at 248. Accordingly, under *In re P.A.*, we must vacate the guardianship order and permanency planning order for failure to satisfy the statutory verification requirement concerning adequate resources.

II. Visitation Plan

Respondent also challenges the visitation plan entered by the trial court, arguing that it improperly delegated the court's decision-making authority to the guardian. Because we vacate the guardianship order, upon which the visitation order is based, we likewise vacate the visitation order.

III. Waiver of Subsequent Permanency Planning Hearings

Finally, Respondent claims the trial court erred in waiving subsequent permanency planning hearings without entering the necessary findings of fact under N.C. Gen. Stat. § 7B-906.1(n).

Section 7B-906.1 requires that a permanency planning hearing be held "at least every six months" after the initial permanency planning hearing "to review the progress made in finalizing the permanent plan . . ., or if necessary, to make a new permanent plan for the juvenile." N.C. Gen. Stat. § 7B-906.1(a). Subsection (n) allows the court to waive further hearings "if the court finds by clear, cogent, and convincing evidence each of the following:"

> (1) The juvenile has resided in the placement for a period of at least one year.

> (2) The placement is stable and continuation of the placement is in the juvenile's best interests.
>
> (3) Neither the juvenile's best interests nor the rights of any party require that review hearings be held every six months.
>
> (4) All parties are aware that the matter may be brought before the court for review at any time by the filing of a motion for review or on the court's own motion.
>
> (5) The court order has designated the relative or other suitable person as the juvenile's permanent custodian or guardian of the person.

N.C. Gen. Stat. § 7B-906.1(n).

We agree with Respondent that not all of the criteria necessary to waive further permanency planning hearings were satisfied at the time the trial court entered its orders. Thus, the trial court was required to schedule permanency planning hearings at least once every six months until finding that the criteria for waiver were satisfied. Because we vacate the trial court's orders and remand for further proceedings, the trial court can address the need for additional scheduled permanency planning hearings on remand.

Conclusion

We vacate the trial court's permanency planning order and guardianship order and remand for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges STEPHENS and DAVIS concur.

JARRETT v. JARRETT

[249 N.C. App. 269 (2016)]

CATRINA JARRETT, PLAINTIFF
v.
WILLIAM ANDREW JARRETT, DEFENDANT

No. COA15-1346

Filed 6 September 2016

1. Pleadings—DVPO—events not alleged in pleading

The trial court did not err in a case involving a Domestic Violence Protection Order by allowing plaintiff to testify about events not alleged in her complaint where the complaint gave defendant sufficient notice of the nature and basis of her claim and defendant did not argue that he was unable to prepare for the hearing.

2. Evidence—hearsay—matters outside witness's knowledge—no prejudice

There was no prejudice in a case involving a Domestic Violence Protection Order in admitting what defendant contended was hearsay or in admitting testimony about which the witnesses did not have personal knowledge. The trial court did not rely on the challenged testimony in making its findings and conclusions.

3. Evidence—relevancy—no prejudice

There was no prejudice in a case involving a Domestic Violence Protection Order by admitting evidence over defense objections based on relevancy. Defendant was unable to show that a different result would have been reached at trial.

4. Domestic Violence—protective order—findings—supported by evidence

Competent evidence supported the trial court's findings of fact in a hearing on a Domestic Violence Protection Order. The trial judge is in the best position to judge the credibility of the witness evidence.

5. Domestic Violence—protective order—findings—sufficient

The trial court's findings supported the trial court's ultimate conclusion that defendant committed acts of domestic violence against plaintiff where the trial court found that on at least three occasions defendant had followed plaintiff on the highway, pulled in front of her car and slammed on his brakes, and that each incident caused plaintiff substantial emotional distress, such that she was admitted to a hospital with heart issues related to the incidents.

6. Domestic Violence—protective order—prohibitions proper

The trial court's Domestic Violence Protection Order (DVPO) properly ordered that defendant not assault, threaten, abuse, follow, harass, or interfere with plaintiff, that defendant be prohibited from purchasing a firearm during the duration of the DVPO, and that defendant stay away from plaintiff's residence.

7. Domestic Violence—protective order—surrender of firearms

The portion of a Domestic Violence Protective Order (DVPO) requiring defendant to surrender certain firearms and ammunition and have his concealed carry permit suspended during the duration of the DVPO was vacated where defendant had not used or threatened to use a deadly weapon against plaintiff or her children and the trial court did not check any of the boxes on the form that contained the statutory findings necessary for such an order.

8. Domestic Violence—protective order—stalking

The trial court properly found in a hearing on a Domestic Violence Protective Order that defendant stalked plaintiff where defendant, on at least three occasions, followed plaintiff on the highway, pulled in front of her car and slammed on his brakes, and that each incident caused plaintiff substantial emotional distress, such that she was admitted to a hospital with heart issues related to the incidents.

9. Appeal and Error—wavier of right to appeal—motion for involuntary dismissal denied—evidence subsequently presented

Defendant waived his right to appeal from the denial of his motion for an involuntary dismissal in a Hearing on a Domestic Violence Prevention Order where he presented evidence after his motion for involuntary dismissal was denied.

10. Judges—remarks about Court of Appeals—inappropriate

A district court judge was cautioned against negative comments about the Court of Appeals that undermined the integrity of the Court.

Appeal by defendant from orders entered 19 and 24 August 2015 by Judge Chester C. Davis in Catawba County District Court. Heard in the Court of Appeals 26 May 2016.

Legal Aid of North Carolina, Inc., by Celia Pistolis, TeAndra Miller, Amy Vukovich, and Emma Smiley, for plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom, III, G. Russell Kornegay, III, and John Paul Tsahakis, for defendant-appellant.

McCULLOUGH, Judge.

William Andrew Jarrett ("defendant") appeals from a domestic violence order of protection entered 24 August 2015. For the reasons stated herein, we affirm in part, vacate in part, and dismiss in part.

I. Background

Catrina Rayfield Jarrett ("plaintiff") and defendant are former spouses, having been married on 25 May 1991, separated on 11 August 2010, and divorced on 7 December 2011. The parties have two children together.

On 20 July 2015, plaintiff filed a "Complaint and Motion for Domestic Violence Protective Order" against defendant. Plaintiff alleged, *inter alia*, that she was in fear of continued harassment that rises to such a level as to inflict substantial emotional distress based on the following reasons: defendant continued to legally harass her; defendant continued to attend their children's events after being asked not to attend and after being told they were afraid of him; defendant continued to cut plaintiff off on the highway and slam on his brakes; defendant continued to videotape plaintiff driving; defendant continued to take photographs; and continued to threaten their child.

On 24 July 2015, plaintiff filed an amendment to the 20 July 2015 complaint that included additional allegations[1].

On 6 August 2015, defendant filed a "Motion to Dismiss; Motion to Strike; Motion for Sanctions; and Affirmative Defenses and Answer." Defendant argued that, pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and *res judicata*, plaintiff's 20 July 2015 complaint failed to state a claim because it requested "relief pursuant to claims, facts, and circumstances which were previously litigated in separate and previously-filed Catawba County District Court domestic violence actions – and in a manner adverse to Plaintiff." Defendant also moved, pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(f), to strike the allegations contained in plaintiff's 20 July 2015 complaint "which have already been fully adjudicated on the merits in prior actions" and argued that

1. This amendment was not served on defendant prior to the hearing held on 19 August 2015. Rather, it was served at the hearing and defendant did not request a continuance.

plaintiff's exhibits constituted hearsay which was inadmissible pursuant to Rule 802 of the North Carolina Rules of Evidence. Defendant moved pursuant to Rule 11 of the North Carolina Rules of Civil Procedure to sanction plaintiff. Finally, defendant argued the affirmative defenses of *res judicata* and collateral estoppel.

A hearing was held on 19 August 2015 at the civil session of Catawba County District Court, the Honorable Chester Davis ("Judge Davis") presiding. At the close of plaintiff's evidence, defendant made a motion for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

On 24 August 2015, the trial court entered a "Domestic Violence Order of Protection" ("DVPO"), effective until 20 August 2016. The DVPO ordered that defendant "shall not commit any further acts of domestic violence or make any threats of domestic violence" and defendant "shall have no contact with the Petitioner/Plaintiff." The DVPO entered a finding that in mid-June 2015, defendant had "placed [plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" by following plaintiff on a highway, pulling in front of plaintiff's vehicle, and applying defendant's brakes. The trial court found that this had occurred on three separate occasions, in March, May and mid-June of 2015 and that "[e]ach of these events caused the [plaintiff] substantial emotional distress." In addition, the trial court found that on 27 July 2015, plaintiff was admitted to a hospital with heart issues related to these events. Each of the three events was found to be "3 acts of stalking as defined – G.S. 14-277.3A was conduct with no legitimate purpose which tormented and terrified the [plaintiff]." Furthermore, the DVPO included findings that defendant "is in possession of, owns or has access to firearms, ammunition, and gun permits[,]" listed descriptions of specific firearms divided by categories entitled "sheriff to take" and "sheriff not to take," but also included a finding that defendant did not use or threaten to use a deadly weapon against plaintiff. The trial court concluded that defendant had committed acts of domestic violence against plaintiff. Accordingly, the trial court ordered as follows:

> 1. the defendant shall not assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace, or other means), or interfere with the plaintiff. . . .
>
> . . . .
>
> 7. the defendant shall stay away from the plaintiff's residence or any place where the plaintiff receives temporary shelter. . . .

. . . .

> 11. the defendant is prohibited from purchasing a firearm for the effective period of this Order . . . and the defendant's concealed handgun permit is suspended for the effective period of this Order. . . .
>
> 12. the defendant surrender to the sheriff serving this order the firearms described [previously].

On 2 October 2015, the trial court entered an "ORDER (Re: Motion to Dismiss, Motion to Strike, and First Affirmative Defense)." The trial court entered the following findings of fact, in pertinent part:

> 5. On October 31, 2014, Plaintiff filed a Complaint and Motion for [DVPO] against Defendant (Catawba County File No. 14-CVD-2722). Defendant was not served with that Complaint and Motion for [DVPO].
>
> 6. On January 9, 2015, Plaintiff filed an Amended Complaint and Motion for [DVPO]. On the same day, the Court entered an Order granting Plaintiff's request for an emergency ex parte [DVPO] against Defendant.
>
> 7. On January 12, 2015, based on Plaintiff's allegation, the Court issued a Warrant for Arrest against Defendant for an alleged violation of the Ex Parte [DVPO] (Catawba County File No. 15-CR-050201).
>
> . . . .
>
> 9. On January 20, 2015, the Court conducted a hearing on Plaintiff's request for a one-year domestic violence protective order.
>
> 10. The Court denied Plaintiff's Amended Complaint and Motion for [DVPO] in open court on January 20, 2015, and filed a written Order to that effect on February 3, 2015 (Catawba County File No. 14-CVD-2722).
>
> 11. The February 3, 2015 Order denying Plaintiff's Amended Complaint and Motion for [DVPO] included specific findings of fact regarding all of Plaintiff's allegations of domestic violence by Defendant through and including January 11, 2015, and concluded that Plaintiff failed to prove grounds for issuance of a domestic violence protective order.

> 12. On June 5, 2015, the Court heard the criminal matter regarding Defendant's alleged violation of the Ex Parte [DVPO]. That same day, the Court dismissed all charges against Defendant and concluded that he had not violated any valid domestic violence protective order.
>
> 13. On July 20, 2015, Plaintiff filed a new Complaint and Motion for [DVPO], alleging certain acts identical to those dismissed by the February 3, 2015 Order.
>
> 14. All allegations of facts and instances of domestic violence occurring on or before January 11, 2015 have been fully litigated and adjudicated on the merits in a manner adverse to Plaintiff.
>
> 15. Allegations of facts and instances of domestic violence occurring after January 11, 2015 have not been litigated or adjudicated in a court of law.

The trial court then entered the following conclusions of law, in pertinent part:

> 2. As all allegations of facts and instances of domestic violence occurring on or before January 11, 2015 have been fully litigated and adjudicated on the merits in a manner adverse to Plaintiff, Plaintiff is barred from re-litigating those issues under the doctrines of *res judicata* and collateral estoppel.
>
> 3. Plaintiff's allegations of facts and instances of domestic violence occurring after January 11, 2015 have not been litigated or adjudicated, and are not barred by the doctrines of *res judicata* and collateral estoppel.
>
> 4. Defendant's Motion to Strike pursuant to Rule 12(f) of the North Carolina Rules of Civil Procedure should be granted as more particularly ordered herein.
>
> 5. Accordingly, Defendant's Affirmative Defenses of *Res Judicata* and Collateral Estoppel should also be granted as to all allegations of domestic violence that occurred on or before January 11, 2015.
>
> 6. Defendant's Motion to Dismiss pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure should be denied.

The trial court reserved ruling on defendant's motion for sanctions.

Defendant appeals.

II. Discussion

On appeal, defendant argues that the trial court erred (A) by concluding that defendant committed domestic violence against plaintiff; (B) by finding that defendant stalked plaintiff; and (C) by denying defendant's motion for involuntary dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(b).

A. Domestic Violence

Defendant argues that the trial court erred by concluding that he had committed acts of domestic violence against plaintiff.

> When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

Hensey v. Hennessy, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citation omitted). Our Court has recognized that

> the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words. The trial court's findings turn in large part on the credibility of the witnesses, [and] must be given great deference by this Court.

Brandon v. Brandon, 132 N.C. App. 646, 651-52, 513 S.E.2d 589, 593 (1999) (internal citations and quotation marks omitted).

N.C. Gen. Stat. § 50B-1 defines "domestic violence" as follows:

> (a) Domestic violence means the commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:

> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
>
> (3) Committing any act defined in G.S. 14-27.21 through G.S. 14-27.33.

N.C. Gen. Stat. § 50B-1 (2015).

Here, in support of its conclusion that defendant committed acts of domestic violence against plaintiff, the trial court found as follows, in pertinent part: defendant had "placed [plaintiff] in fear of continued harassment that rises to such a level as to inflict substantial emotional distress" by following plaintiff on a highway, pulling in front of plaintiff's vehicle, and applying defendant's brakes; these incidents had occurred on three separate occasions, on 31 March 2015, May 2015 and mid-June of 2015 and that "[e]ach of these events caused the [plaintiff] substantial emotional distress;" and, that on 27 July 2015, plaintiff was admitted to a hospital with heart issues related to these events. The DVPO also included findings that defendant "is in possession of, owns or has access to firearms, ammunition, and gun permits[,]" listed descriptions of specific firearms divided by categories entitled "sheriff to take" and "sheriff not to take," and found that defendant did not use or threaten to use a deadly weapon against plaintiff.

Evidentiary Rulings

[1] First, defendant contends that the trial court made several erroneous evidentiary rulings during the 19 August 2015 hearing. We address each argument in turn.

Defendant argues that plaintiff should not have been allowed to testify about events not alleged in her 20 July 2015 complaint. Defendant contends that plaintiff's complaint only alleged that he followed her on the highway, cut her off, and slammed on his brakes in May 2015 and failed to allege that similar incidents occurred in March or June of 2015.

Our Court has held that:

> Under G.S. 1A-1, Rule 8(a), detailed fact-pleading is not required. A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced

> the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and – by using the rules provided for obtaining pretrial discovery – to get any additional information he may need to prepare for trial.

Lewis v. Gastonia Air Service, Inc., 16 N.C. App. 317, 318, 192 S.E.2d 6, 7 (1972) (citations and quotation marks omitted).

In light of these principles, we find that plaintiff's 20 July 2015 complaint gave defendant sufficient notice of the nature and basis of her claim. Plaintiff sought a DVPO based on allegations that defendant had placed her "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress[.]" Plaintiff's complaint provided that in May 2015, defendant had continued to cut her off on the highway and slam on his brakes and in an amendment to her complaint, filed 24 July 2015, plaintiff alleged that defendant had followed her on the highway in March and June 2015. Although the amendment was not served on defendant but was first presented to him at the 19 August 2015 hearing, defendant does not argue that he was unable to prepare a responsive pleading or that he was unable to prepare for the hearing. Rather, at the hearing, defendant unequivocally denied that he had followed plaintiff on the highway since January 2015. Based on the foregoing, we reject defendant's argument.

[2] Next, defendant argues that the trial court erred by admitting the following testimony against his objections: plaintiff's testimony regarding the contents of a piece of paper purporting to move their younger child's bus stop away from her home; plaintiff's testimony that her younger child told her that he enjoyed riding the bus with his friends; plaintiff's testimony regarding the contents of mail that plaintiff claims proves defendant changed her address to prevent her from receiving mail; plaintiff's testimony about the contents of a paper purportedly showing that she was diagnosed with heart palpitations; a witness's testimony that the younger child told the witness that he "did not want to attend matches because he was afraid he would see his father and be reminded what had happened to his family[;]" plaintiff's question to a witness about whether the younger child ever told the witness "since January of this year that there is a problem with the Defendant who is sitting at the end of the table[;]" the younger child's testimony that he wrote a letter regarding defendant's "abuse [of] the court system to bully me and my family[;]" and plaintiff's question to a witness whether plaintiff had told the witness why she "was crying" after the witness testified that plaintiff was "crying and the whole family was broken, but

you were trying to spend some time together. Something major happened." Defendant asserts that the aforementioned testimony amounted to hearsay.

> "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Hearsay evidence is generally inadmissible unless it falls within one of the exceptions recognized in the North Carolina Rules of Evidence or another statute.

Little v. Little, 226 N.C. App. 499, 502, 739 S.E.2d 876, 879 (2013) (citing N.C. Gen. Stat. § 8C-1, Rules 801(c) and 802). However, it is well established that "an appellant alleging improper admission of evidence has the burden of showing that it was unfairly prejudiced . . ., that appellant has been denied some substantial right and that the result of the [hearing] would have been materially more favorable to appellant." *McNabb v. Bryson City*, 82 N.C. App. 385, 389, 346 S.E.2d 285, 288 (1986).

Assuming *arguendo* that the challenged testimony amounted to inadmissible hearsay, we are unable to see any prejudice in its admission. The trial court did not rely on this challenged testimony in making its findings of fact and conclusion of law that defendant committed domestic violence against plaintiff. Rather, the trial court based its conclusion on findings that defendant placed plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress by following her on a highway, pulling in front of her, and applying his brakes on three separate occasions.

Defendant also argues that the trial court erred by allowing plaintiff and her witnesses, over objections, to testify about matters of which they had no personal knowledge. Specifically, defendant directs our attention to the following evidence: plaintiff's testimony about an occasion where one of her sons was served while at school; plaintiff's testimony that defendant had stopped driving an orange Jeep since the January court proceedings; and the older son's testimony that plaintiff received letters and "other legal harassment."

Pursuant to N.C. Gen. Stat. § 8C-1, Rule 602 (2015), "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter." However, even assuming arguendo that the trial court erred by allowing this testimony, defendant must still meet the burden of showing he was prejudiced by its admission. Here, defendant has failed to demonstrate that he was prejudiced by the admission of the challenged testimony, as the challenged testimony did not form the basis of the trial court's DVPO.

[3] Next, defendant argues that the trial court improperly overruled numerous objections by defendant's counsel based on relevancy. Defendant contends that the following evidence should not have been admitted: a witness's testimony regarding whether he believed that the children had experienced substantial emotional distress; plaintiff's testimony that defendant filed a request to move the younger child's bus stop from her home; plaintiff testified that she asked defendant to return two dirt bikes; plaintiff asked a witness about the children's character; plaintiff asked a witness when the last time was that the older child was called to the office for discipline and whether there had been a discipline problem since January of 2015 and since his graduation; testimony regarding a search for tracking devices on plaintiff's car; testimony of plaintiff's witness regarding whether she saw her or her children in distress; plaintiff's testimony that she had taken a special course in child abuse; and the younger child's testimony regarding the amount of money he withdrew from his account to bail plaintiff out of jail for contempt.

"The admissibility of evidence is governed by a threshold inquiry into its relevance. In order to be relevant, the evidence must have a logical tendency to prove any fact that is of consequence in the case being litigated." *State v. Jones*, __ N.C. App. __, __, 772 S.E.2d 470, 475 (2015) (citation omitted). Again, assuming *arguendo* that the foregoing evidence was irrelevant, any error was harmless because defendant is unable to show that a different result would have been reached at trial. Accordingly, we overrule defendant's arguments.

Findings of Fact

[4] Next, defendant contends that the evidence presented at the DVPO hearing was insufficient to support the trial court's findings of fact regarding the three separate incidents where defendant followed plaintiff on the highway. Defendant seems to argue that because he completely denied following plaintiff's vehicle on the highway after 11 January 2015 and because plaintiff presented conflicting evidence regarding these incidents on the highway, the trial court's findings of fact are not supported by competent evidence. Defendant also challenges the trial court's finding that plaintiff was "placed in fear of continued harassment that rises to such a level as to inflict substantial emotional distress." Defendant's arguments have no merit.

Plaintiff's testimony at the DVPO hearing tended to show that in March, May, and June of 2015, defendant would follow her vehicle on the highway, pull in front of her vehicle, and slam on his brakes. Plaintiff would have "to veer out of my lane to avoid an accident." Plaintiff's older

son testified that he observed plaintiff "in distress" following these incidents on the highway. Further, plaintiff testified that in July of 2015, she received emergency medical treatment at Frye Regional Hospital "for a flurry of heart palpitations." Her emotional distress resulted from receiving information that defendant had petitioned to recover his weapons and ammunition that had been seized under an earlier court order.

On the other hand, defendant testified as follows at the DVPO hearing:

> Q. Have you followed a vehicle driven by [plaintiff] since January 11, 2015?
>
> [Defendant:] Absolutely not.

Based on this divergence, the trial court was placed in a position to judge the credibility of the witnesses. The trial court stated that:

> The Defendant has specifically denied that these events occurred. His words, as I recall, were -- just bear with me for a second -- all right, he was emphatic, when asked if he had followed his wife since January, he said absolutely not. He was not equivocal. That was an absolute no. Therefore, the Court is put in a position of deciding bluntly who to believe. Considering the totality of the evidence in this case, the Court decides and believes that the testimony reduced to its lowest level of the Plaintiff and one of her children is accurate.

As we have previously stated, the trial court is in the best position to judge the credibility of the witness testimony and our Court must give great deference to the trial court's determinations. In light of the testimony admitted during the DVPO hearing regarding defendant's conduct, we conclude that competent evidence supported the trial court's findings of fact.

Conclusion of Law

[5] Next, defendant argues that the findings of fact do not support the conclusion of law that he committed domestic violence. We disagree.

"[T]he plain language of [N.C.G.S. §] 50B-1(a)(2) imposes only a subjective test, rather than an object reasonableness test, to determine whether an act of domestic violence has occurred." *Thomas v. Williams*, __ N.C. App. __, __, 773 S.E.2d 900, 905 (2015) (citation omitted). "Domestic violence" means the

> commission of one or more of the following acts upon an aggrieved party . . . by a person with whom the aggrieved party has or has had a personal relationship . . . Placing the aggrieved party . . . in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]

N.C. Gen. Stat. § 50B-1(a) (2015). "Harassment" is defined as "[k]nowing conduct . . . directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3A(b)(2) (2015). "Substantial emotional distress" is defined as "[s]ignificant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A (b)(4).

The trial court found that on at least three separate occasions, defendant had followed plaintiff on the highway, pulled in front of her vehicle, and slammed on his brakes. The trial court further found that each incident caused plaintiff such "substantial emotional distress," that in July 2015, plaintiff was admitted to a hospital with heart issues related to these incidents. These findings support the trial court's ultimate conclusion that defendant committed acts of domestic violence against plaintiff.

Surrender of Weapons

[6] Defendant asserts that the findings of fact and conclusion of law do not support the trial court's legal decree.

Here, defendant challenges the portions of the DVPO ordering that defendant: (1) "shall not assault, threaten, abuse, follow, harass . . ., or interfere with plaintiff[;]" (2) "stay away from the plaintiff's residence[;]" (3) surrender certain firearms; (4) have his concealed handgun permit suspended for the effective period of the DVPO; and (5) be prohibited from purchasing a firearm for the effective period of the DVPO.

Pursuant to N.C. Gen. Stat. § 50B-3,

> (a) If the court . . . finds that an act of domestic violence has occurred, the court shall grant a protective order restraining the defendant from further acts of domestic violence. A protective order may include any of the following types of relief:
>
> . . . .

> (9) Order a party to refrain from doing any or all of the following:
>
> a. Threatening, abusing, or following the other party.
>
> b. Harassing the other party, including by telephone, visiting the home or workplace, or other means. . . .
>
> c. Otherwise interfering with the other party.
>
> . . . .
>
> (11) Prohibit a party from purchasing a firearm for a time fixed in the order.
>
> . . . .
>
> (13) Include any additional prohibitions or requirements the court deems necessary to protect any party or any minor child.

N.C. Gen. Stat. § 50B-3 (2015).

Because we have upheld the trial court's conclusion that defendant committed domestic violence against plaintiff, we also hold that the trial court properly ordered that defendant not assault, threaten, abuse, follow, harass, or interfere with plaintiff, that defendant be prohibited from purchasing a firearm for the duration of the DVPO, and that defendant stay away from plaintiff's residence pursuant to N.C. Gen. Stat. § 50B-3.

[7] However, we vacate the portion of the DVPO ordering that defendant surrender certain firearms and ammunition and have his concealed handgun carrying permit suspended for the duration of the DVPO. Under N.C. Gen. Stat. § 50B-3.1, the trial court

> shall order the defendant to surrender to the sheriff all firearms, machine guns, ammunition, permits to purchase firearms, and permits to carry concealed firearms that are in the care, custody, possession, ownership, or control of the defendant if the court finds any of the following factors:
>
> (1) The use or threatened use of a deadly weapon by the defendant or a pattern of prior conduct involving the use or threatened use of violence with a firearm against persons.
>
> (2) Threats to seriously injure or kill the aggrieved party or minor child by the defendant.

(3) Threats to commit suicide by the defendant.

(4) Serious injuries inflicted upon the aggrieved party or minor child by the defendant.

N.C. Gen. Stat. § 50B-3.1(a) (2015). In the present case, the trial court found that defendant had not used or threatened to use a deadly weapon against plaintiff nor the minor children and failed to check any of the boxes on the form that contained the statutory findings necessary to order the surrender of firearms or suspension of a permit. Consequently, we hold that the trial court erred by ordering defendant to surrender specific firearms and by suspending his concealed handgun permit for the duration of the DVPO, and we vacate those portions of the DVPO. *See Stancill v. Stancill*, __ N.C. App. __, __, 773 S.E.2d 890, 900 (2015) (holding that the trial court erred by failing "to check any of the boxes on the form that contained the statutory findings necessary to order the surrender of firearms" under N.C. Gen. Stat. § 50B-3.1(a)).

B. Stalking

[8] In his second issue on appeal, defendant asserts that the trial court erred by finding that defendant stalked plaintiff as defined in N.C. Gen. Stat. § 14-277.3A. Specifically, defendant contends that there was no competent evidence that he committed the three acts of stalking as found by the trial court. We find defendant's argument meritless.

N.C. Gen. Stat. § 14-277.3A(c), entitled "Stalking," provides as follows:

(c) Offense. -- A defendant is guilty of stalking if the defendant willfully on more than one occasion harasses another person without legal purpose or willfully engages in a course of conduct directed at a specific person without legal purpose and the defendant knows or should know that the harassment or the course of conduct would cause a reasonable person to do any of the following: (1) Fear for the person's safety or the safety of the person's immediate family or close personal associates. (2) Suffer substantial emotional distress by placing that person in fear of death, bodily injury, or continued harassment.

N.C. Gen. Stat. § 14-277.3A(c) (2015).

Testimony at the DVPO hearing from plaintiff and plaintiff's older son supported the finding that on at least three occasions after January

2015, defendant followed plaintiff's vehicle on the highway, pulled in front of her, and slammed on his brakes, causing plaintiff to suddenly veer in order to avoid an accident. Plaintiff also testified that she suffered heart issues that required medical attention due to defendant's conduct on the highway. This testimony supports the trial court's finding that "Each event . . . are 3 acts of stalking as defined – [N.C. Gen. Stat. §] 14-277.3A [and] was conduct with no legitimate purpose which tormented and terrified the [plaintiff]." After carefully reviewing the evidence, we conclude that the trial court did properly find that defendant stalked plaintiff.

C. Rule 41(b) of the North Carolina Rules of Civil Procedure

[9] In his last argument on appeal, defendant maintains that the trial court erred by denying his motion for involuntary dismissal pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure, made at the conclusion of plaintiff's evidence presented at the 19 August 2015 hearing.

N.C. Gen. Stat. § 1A-1, Rule 41(b) provides:

> (b) *Involuntary dismissal; effect thereof.* – For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence.

N.C. Gen. Stat. § 1A-1, Rule 41(b) (2015).

Plaintiff directs our attention to *Hamilton v. Hamilton*, 93 N.C. App. 639, 379 S.E.2d 93 (1989) and we find that the holding in that case controls the outcome here. In *Hamilton*, the plaintiff made a motion for an involuntary dismissal at the conclusion of the defendant's evidence. *Id.* at 642, 379 S.E.2d at 94. Our Court held that because "the plaintiff presented evidence after his motion to dismiss was denied, he has waived any right to appeal from the denial of that motion." *Id.* Accordingly, we hold that because defendant presented evidence after his motion for involuntary dismissal was denied, he has waived his right to appeal from the denial of the motion.

D. Trial Court Judge's Remarks

[10] We are compelled to comment on the conduct and statements of the presiding judge in this case, the Honorable Chester Davis. During the DVPO hearing, Judge Davis stated as follows:

> THE COURT: Because I need to state my admiration for the Court of Appeals, but I've never felt compelled to follow them when I think they're wrong, which is frequently. . . .
>
> . . . .
>
> THE CLERK: Do you want me to leave the recording on, Judge?
>
> THE COURT: Not if you want to. Because if you turn it off, I can talk about the Court of Appeals. Okay. . . .

We find Judge Davis' commentary particularly troubling. His negative comments about our Court are patently inappropriate considering his judicial office and reflect a misunderstanding of this Court's authority. We strongly caution Judge Davis from making any future comments that undermine the integrity of our Court.

AFFIRMED IN PART; VACATED IN PART; DISMISSED IN PART.

Judges STEPHENS and ZACHARY concur.

DESIREE KING, BY AND THROUGH HER GUARDIAN AD LITEM, G. ELVIN SMALL, III; AND AMBER M. CLARK, INDIVIDUALLY, PLAINTIFFS

v.

ALBEMARLE HOSPITAL AUTHORITY D/B/A ALBEMARLE HEALTH/ALBEMARLE HOSPITAL; SENTARA ALBEMARLE REGIONAL MEDICAL CENTER, LLC D/B/A SENTARA ALBEMARLE MEDICAL CENTER; NORTHEASTERN OB/GYN, LTD.; BARBARA ANN CARTER, M.D.; AND ANGELA MCWALTER, CNM, DEFENDANTS

No. COA15-1190

Filed 6 September 2016

Statutes of Limitation and Repose—minor—tolling

The trial court erred by dismissing the minor plaintiff's action on the grounds that it was barred by N.C.G.S. § 1-15(c)'s three-year limitations period, because the plain language of N.C.G.S. § 1-17(b) tolled the limitations period until 4 February, 2024, when plaintiff becomes nineteen years old.

Appeal by plaintiff, by and through her guardian *ad litem*, from order entered 27 July 2015 by Judge Cy A. Grant in Pasquotank County Superior Court. Heard in the Court of Appeals 9 March 2016.

Hammer Law, P.C., by Amberley G. Hammer, and Ashcraft & Gerel, LLC, by Wayne M. Mansulla, for plaintiff-appellant.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, LLP, by Robert E. Desmond and Samuel G. Thompson, for defendant-appellees Northeastern Ob/Gyn, Ltd.; Barbara Ann Carter, M.D.; and Angela McWalter, CNM.

Harris, Creech, Ward & Blackerby, P.A., by Jay C. Salsman and Charles E. Simpson, Jr., for defendant-appellees Albemarle Hospital Authority and Sentara Albemarle Regional Medical Center, LLC.

CALABRIA, Judge.

Desiree King ("plaintiff"), a minor, appeals from an order dismissing her medical malpractice action as barred by the statute of limitations. We reverse and remand.

I. Background

On 4 February 2005, plaintiff was born to Amber Clark ("Ms. Clark") at Albemarle Hospital. Barbara Ann Carter, M.D. ("Dr. Carter"), Ms. Clark's obstetrician, and Angela McWalter, CNM ("CNM McWalter"), Ms. Clark's nurse midwife, managed her care and delivered plaintiff. Shortly after her birth, medical staff discovered that plaintiff had a brain injury.

On 10 January 2008, the trial court entered an order appointing G. Elvin Small, III ("Small"), as plaintiff's guardian *ad litem* for the purpose of bringing a medical malpractice action on plaintiff's behalf. On that same date, plaintiff, by and through Small, filed an action alleging that her brain injury resulted from the medical malpractice and negligence of Albemarle Hospital and Dr. Carter. On 31 October 2008, for reasons unclear from the record or transcript, plaintiff's action was voluntarily dismissed without prejudice pursuant to Rule 41(a)(1) of the North Carolina Rules of Civil Procedure.

On 30 January 2015, the trial court entered another order appointing Small to represent plaintiff "for the purpose of commencing a civil action on her behalf[.]" On that same date, plaintiff, by and through Small, initiated another medical malpractice action, this time alleging that her brain injury resulted from the medical malpractice and negligence of Dr. Carter; CNM McWalter; Dr. Carter and CNM McWalter's employer, Northeastern Ob/Gyn, Ltd.; Albemarle Hospital Authority; and Sentara Albemarle Regional Medical Center, LLC (parties collectively, "defendants"). In response, defendants filed motions to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure on the grounds that the statute of limitations had expired.

After a hearing, the trial court entered an order on 27 July 2015 granting defendants' motions to dismiss plaintiff's claims pursuant to Rule 12(b)(6), "as [her] claims [were] barred by the applicable statute of limitations."[1] Plaintiff appeals.

II. Analysis

Plaintiff contends that the trial court erred by dismissing her action on the grounds that it was barred by N.C. Gen. Stat. § 1-15(c)'s three-year limitations period, because the plain language of N.C. Gen. Stat. § 1-17(b) tolled the limitations period until 4 February 2024 when plaintiff will turn nineteen years old. We agree.

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1. Initially, Ms. Clark was also a party to plaintiff's action against defendants. The trial court dismissed her claims on 27 July 2015, and she did not join this appeal.

The statute of limitations for "a cause of action for malpractice arising out of the performance of or failure to perform professional services" is three years from the date the action accrued, which is "the last act of the defendant giving rise to the cause of action." N.C. Gen. Stat. § 1-15(c) (2015). The parties do not dispute that N.C. Gen. Stat. § 1-15(c)'s three-year limitations period applies to plaintiff's malpractice action and that her action accrued when she was born on 4 February 2005. Therefore, the statute of limitations, absent a tolling provision, expired on 4 February 2008. The issue on appeal is whether the disability tolling provision of N.C. Gen. Stat. § 1-17(b) extended N.C. Gen. Stat. § 1-15(c)'s three-year limitations period.

Where, as here, there are no relevant facts in dispute, the issue of whether a statute of limitations bars an action is a question of law reviewed *de novo* on appeal. *See Taylor v. Hospice of Henderson Cty., Inc.*, 194 N.C. App. 179, 184, 668 S.E.2d 923, 926 (2008). Issues of statutory construction are also questions of law reviewed *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citation omitted). "The primary rule of construction of a statute is to ascertain the intent of the legislature and to carry out such intention to the fullest extent." *Id.* (quoting *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 209, 388 S.E.2d 134, 137 (1990)). "When construing statutes, this Court first determines whether the statutory language is clear and unambiguous. If the statute is clear and unambiguous, we will apply the plain meaning of the words, with no need to resort to judicial construction." *Wiggs v. Edgecombe Cty.*, 361 N.C. 318, 322, 643 S.E.2d 904, 907 (2007) (internal citation omitted); *see also High Rock Lake Partners, LLC v. N.C. Dep't of Transp.*, 366 N.C. 315, 322, 735 S.E.2d 300, 305 (2012) ("[W]hen . . . [a] specific statute is clear and unambiguous, we are not permitted to engage in statutory construction in any form."). Moreover, the "[l]egislature is presumed to know the existing law and to legislate with reference to it." *State v. Davis*, 198 N.C. App. 443, 452, 680 S.E.2d 239, 246 (2009).

N.C. Gen. Stat. § 1-15(c) sets forth limitation periods applicable to actions for professional negligence and provides in pertinent part:

> Except where otherwise provided by statute, a cause of action for malpractice arising out of the performance of or failure to perform professional services shall be deemed to accrue at the time of the occurrence of the last act of the defendant giving rise to the cause of action. . . . Provided nothing herein shall be construed to reduce the statute of

> limitation in any such case below three years. Provided . . . that in no event shall an action be commenced more than four years from the last act of the defendant giving rise to the cause of action. . . .

N.C. Gen. Stat. § 1-17 (2009)[2] tolled certain limitation periods if a claim accrues when a claimant is under a disability, such as infancy, and provided in pertinent part:

> (a) A person entitled to commence an action who is under a disability at the time the cause of action accrued may bring [the] action within the time limited in this Subchapter after the disability is removed . . . when the person must commence his or her action . . . within three years next after the removal of the disability, and at no time thereafter.
>
> (b) Notwithstanding the provision of subsection (a) . . . , an action on behalf of a minor for malpractice arising out of the performance of or failure to perform professional services shall be commenced within the limitations of time specified in G.S. 1-15(c), except that if those time limitations expire before the minor attains the full age of 19 years, the action may be brought before the minor attains the full age of 19 years.

N.C. Gen. Stat. § 1-17(b) "deals exclusively with minors and their rights to commence a malpractice action prior to attaining the full age of 19, when the statute of limitations in G.S. 1-15(c) has nevertheless expired." *Osborne v. Annie Penn Mem'l Hosp., Inc.*, 95 N.C. App. 96, 102, 381 S.E.2d 794, 797 (1989). This Court has interpreted the interplay between N.C. Gen. Stat. § 1-15(c) and N.C. Gen. Stat. § 1-17(b) and has stated:

> Our examination indicates that the language contained in G.S. 1-17(b) is quite clear. First, it refers specifically to malpractice actions brought on behalf of a minor plaintiff- the exact circumstances in the case *sub judice*. Secondly, it requires that the action to be commenced within the time limitations specified in G.S. 1-15(c), but then provides for

2. Effective 1 October 2011 and applicable to claims arising on or after that date, N.C. Gen. Stat. § 1-17(b) was amended to reduce the minor's age requirement from nineteen to ten years. Because plaintiff's action accrued when she was born in 2005, her claims are governed by N.C. Gen. Stat. § 17(b)'s age requirement of nineteen years.

> the exact situation before us. *If* the time limitations (as set forth in G.S. 1-15(c)) expire "before such minor attains the full age of 19 years, the action may be brought *before* said minor attains the full age of 19 years." Here, the time limitation *has* expired and the minor *has not* attained the full age of 19 years. The statute, therefore, expressly allows the minor plaintiff in this case to commence the action. When the language of a statute is clear, such as the language in this case, we are required to give the statute its logical application.

Id. We agree that the plain language of N.C. Gen. Stat. § 1-17(b) is clear and unambiguous. It provides that minors' malpractice actions are subject to N.C. Gen. Stat. § 1-15(c)'s limitations periods, "except that if those time limitations expire before the minor attains the full age of 19 years." N.C. Gen. Stat. § 1-17(b). In such a situation, as here, "the action *may be brought* before the minor attains the full age of 19 years." *Id.* (emphasis added).

Despite this clear statutory language, defendants argue that pursuant to *Rowland v. Beauchamp*, 253 N.C. 231, 116 S.E.2d 720 (1960) (holding that the statute of limitations begins to run against a minor upon the appointment of a guardian charged with the duty of initiating an action on his behalf), N.C. Gen. Stat. § 1-15(c)'s three-year limitations period began running when Small was appointed as plaintiff's guardian *ad litem* on 10 January 2008 and ran uninterrupted until its expiration on 10 January 2011. Therefore, defendants contend, plaintiff's malpractice action, initiated in 2015, was properly barred because the applicable statute of limitations had expired. However, *Rowland* is readily distinguishable and, therefore, its holding is inapplicable to the instant case. *Rowland* involved the tolling of a minor's personal injury action, not the tolling of a minor's professional negligence action. *See* 253 N.C. at 234, 116 S.E.2d at 722. Additionally, the *Rowland* decision was based on the general tolling provision of N.C. Gen. Stat. § 1-17, later codified as § 1-17(a), not the more specific tolling provision of N.C. Gen. Stat. § 1-17(b). *See id.*

As a secondary matter, defendants advance a slippery-slope argument that it would "lead to potentially absurd results" if we hold that the *Rowland* doctrine does not apply to plaintiff's action and that her 2008 voluntary dismissal has no bearing on her ability to refile within the limitation period established by N.C. Gen. Stat. § 1-17(b). Defendants assert that "[t]aking this position to its logical extreme would theoretically permit a minor plaintiff to file, voluntarily dismiss, and refile an

infinite number of suits until the minor reaches" the age specified by the relevant version of N.C. Gen. Stat. § 1-17(b). We disagree.

Plaintiff's action is still subject to the North Carolina Rules of Civil Procedure. Rule 41(a)(1) provides in pertinent part:

> [T]he dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of this or any other state or of the United States, an action based on or including the same claim. If an action commenced within the time prescribed therefor, or any claim therein, is dismissed without prejudice under this subsection, a new action based on the same claim may be commenced within one year after such dismissal . . . .

N.C. Gen. Stat. § 1A-1, Rule 41(a) (2015). " '[T]he effect of a judgment of voluntary [dismissal] is to leave the plaintiff exactly where he [or she] was before the action was commenced.' " *Brisson v. Kathy A. Santoriello, M.D., P.A.*, 351 N.C. 589, 593, 528 S.E.2d 568, 570 (2000) (alterations in original) (quoting *Gibbs v. Carolina Power & Light Co.*, 265 N.C. 459, 464, 144 S.E.2d 393, 398 (1965)). In the instant case, plaintiff filed one voluntary dismissal, without prejudice, pursuant to Rule 41(a)(1). If plaintiff filed a subsequent voluntary dismissal, it would still "operate[] as an adjudication upon the merits" pursuant to Rule 41(a)(1), regardless of N.C. Gen. Stat. § 1-15(c)'s limitations period or the tolling provision of N.C. Gen. Stat. § 1-17(b).

III. Conclusion

Plaintiff's medical malpractice action is not barred by the statute of limitations because she brought her action within the limitation period extended by N.C. Gen. Stat. § 1-17(b). The *Rowland* doctrine does not apply to this case. Additionally, plaintiff's one voluntary dismissal pursuant to Rule 41(a)(1) merely left her in the same position as if she had never commenced the action in 2008; it did not bar her 2015 action. Therefore, the trial court erred by granting defendants' motions to dismiss on the grounds that plaintiff's claims were barred by the statute of limitations. Accordingly, we reverse the trial court's order and remand the case for further proceedings.

REVERSED AND REMANDED.

Judges DILLON and DIETZ concur.

LUEALLEN v. LUEALLEN

[249 N.C. App. 292 (2016)]

MIKE DEWAYNE LUEALLEN, PLAINTIFF
v.
MONICA GEORGETT LUEALLEN, DEFENDANT

No. COA15-890

Filed 6 September 2016

1. Appeal and Error—interlocutory—child custody order—not final—stay by another COA panel—issues addressed

An appeal from a child custody and child support order was interlocutory but was heard on appeal. Although the order was immediately appealable under N.C.G.S. § 50-19.1 because an equitable distribution claim remained unresolved, the order itself was not final as required by statute since future hearings were set to determine the mother's visitation. However, another panel of the COA had stayed the order pending this appeal, and the issues were addressed.

2. Child Custody and Support—order—sufficiently well organized

A mother's challenge to a child custody and support order based on it being written in a "haphazard" style was rejected where the order was reasonably well-organized. Orders are not required to have any particular style or organization, although a well-organized order is easier for everyone to understand.

3. Child Custody and Support—findings—not mere recitations of testimony

A mother's contention that the findings in a child custody and support order were merely recitations of evidence was rejected. Overall, the findings were not simply recitations of testimony but definitively found ultimate facts.

4. Child Custody and Support—findings—supported by the evidence

Findings in a child custody and support order were adequately supported by the evidence. Although there was conflicting evidence, the trial court evaluated the credibility and weight of the evidence and made findings accordingly.

5. Child Custody and Support—order—mental health evaluation and treatment—changing beliefs

The trial court erred in a child custody order by requiring the mother to undergo a mandatory mental health evaluation and therapy

with requirements that she change her beliefs concerning the father's substance abuse and his behavior with the child, and that the child's therapist accept the trial court's determinations in these matters. The trial court must make findings regarding events that have happened and order actions based on those facts, but it cannot order the mother or the therapist to wholeheartedly accept or believe anything. The trial court on remand may take into account the futility of further evaluations or therapy if the mother insists on her version of the facts, which could result in more restricted visitation.

6. Child Custody and Support—order—inferences from evidence—trial court role

There was no abuse of discretion in a child custody action where the mother challenged the award of primary legal custody and primary physical custody to the father. The mother's argument asked the appellate court to re-weigh the voluminous evidence and draw new inferences, but that was the trial court's role.

7. Child Custody and Support—support—calculation—not clear

A child support order was remanded where it lacked sufficient information for the calculation to be reviewed on appeal.

8. Child Custody and Support—support—imputed income—no error

While there was evidence that the mother in a child support action was seeking employment, the evidence supported the trial court's determination that she was acting in disregard of her child support obligation. The findings supported the trial court's conclusions that the mother was willfully suppressing her income in bad faith to avoid her child support obligation, and the trial court properly imputed income to the mother.

9. Child Custody and Support—support—arrearage—upcoming payment included

The findings did not support the arrearage decree in a child support order where the arrearage included an upcoming support payment. The order may address any arrears accrued up to the last day of the trial, based on evidence presented at trial.

10. Child Custody and Support— support—arrearages—calculation unclear

In a child support case remanded on other grounds, it was suggested as a practical matter that the calculation of arrears be set forth in a table where the appellate court could not get the math in the findings to work.

11. Child Custody and Support—support—arrearage—contempt—failure to find job—bad faith

In a contempt proceeding arising from an arrearage in child support, the findings that the mother had the ability to comply with the order but willfully failed to do so were supported by the evidence. The dispute arose from the ending of the mother's temporary job filling in for a teacher out on maternity leave and her failure to find another job.

12. Contempt—child support arrearage—purge conditions—impermissibly vague

A purge condition in a contempt order for a child support arrearage was remanded where the case was remanded on other grounds for recalculation of the support obligation and the arrears. However, the purge conditions were also impermissibly vague in that a monthly payment was required with no ending date specified.

13. Attorneys—fees awarded in domestic action—no finding of reasonableness

An order awarding the father's attorney fees in a domestic action involving child custody and support was remanded where the trial court made no findings regarding the reasonableness of the attorney fees.

Appeal by defendant from order entered 5 December 2014 by Judge Joseph J. Williams in District Court, Union County. Heard in the Court of Appeals 27 January 2016.

No brief filed on behalf of plaintiff-appellee.

James, McElroy & Diehl, P.A., by Preston O. Odom III, for defendant-appellant.

STROUD, Judge.

Defendant Monica Georgett Lueallen ("Mother") appeals from the trial court's order on permanent child support, modification of child support, child custody, attorney fees and contempt entered on 5 December 2014. On appeal, Mother raises numerous arguments regarding multiple aspects of the order. We affirm the order's provisions addressing child custody, with the exception of Decrees 4 and 6, and we must vacate and remand portions of the remainder of the order for recalculation of child support and arrears, establishment of definite purge conditions,

additional findings of fact regarding Mother's ability to comply with purge conditions, and additional findings of fact regarding the award of attorney fees.

I. Factual and Procedural Background

Plaintiff Mike Dewayne Lueallen ("Father") and defendant Monica Georgett Lueallen ("Mother") were married in 2001 and one child, Timothy[1], was born to the marriage. When Timothy was born in 2006, the parties lived in Arkansas, but they moved to North Carolina about six months after his birth, so Timothy spent most of his life in the Union County/Charlotte area. In November of 2011[2], the parties separated and Timothy began to reside primarily with Mother. Both parties had Masters degrees in education and at the time of their separation, both were employed by the Union County Schools.

On 24 May 2012, effective 21 June 2012, Mother resigned from her job in Union County, although she did not yet have another job lined up. She received a job offer from a school in Arkansas on 15 July 2012 and went to Arkansas, taking Timothy with her. In early July, Mother initially told Father that she would be taking Timothy for a "family trip" to Arkansas and that they would return in about a week to 10 days, in time for a camping trip he had planned with Timothy to begin around 20 or 21 July 2012. Father, however, was unable to reach Mother during her Arkansas trip with Timothy, and they had not returned by 21 July 2012. On 21 July 2012, Mother informed Father that there was a job available for her in Arkansas, that she had an apartment, and that " 'our things are in storage.' " He then attempted but was unable to make contact with her or Timothy for about a week. On 25 July 2012, Father filed a complaint in Union County seeking emergency ex parte child custody, child custody, child support, and attorney fees. On the same day, the trial court entered an ex parte custody order granting Father temporary sole custody of Timothy pending further order and requiring Mother to return Timothy to Union County.

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1. This is a pseudonym, to protect the identity of the minor child.

2. We note that Mother's Arkansas complaint alleged that the parties separated on 11 November 2011; her North Carolina answer alleged that the parties separated on 13 September 2011; and the 18 January 2013 visitation order found that the parties separated on 13 September. Mother testified at the 16 January 2013 hearing that they separated on "September 11 through 13th, but officially, permanently, it was in November 11th of 2011." In any event, the exact date of separation is not material for purposes of this appeal.

Father notified Mother that he was coming to Arkansas to get Timothy and arrived on 27 or 28 July 2012. Initially, Arkansas authorities refused to assist him in getting Timothy. He registered the North Carolina ex parte custody order in Cross County, Arkansas, on 30 July 2012, and the order was served on Mother the same day, although it was not filed until 16 October 2012. Mother also filed for and received an "Ex Parte Order of Protection" in Cross County, Arkansas, on the same day. Her domestic violence complaint in Arkansas "described an incident that occurred in October of 2011 in North Carolina" when the "parties [had] decided to separate, with [Father] leaving the home." The Arkansas Court vacated the portions of the Arkansas ex parte order dealing with child custody based upon the previously-issued North Carolina ex parte order, which granted custody of Timothy to Father. Mother later dismissed the Arkansas domestic violence action against Father. Father returned to North Carolina with Timothy.

On or about 3 January 2013, Mother filed her answer and counterclaims for divorce, child custody, child support, post-separation support, equitable distribution, alimony, and attorney fees. On 16 January 2013, the trial court held a hearing on the return of the ex parte custody order. As a result of this hearing, the trial court entered a visitation order on 18 January 2013, pending a hearing on temporary child custody. This order kept the ex parte custody order in effect, scheduled a hearing on temporary custody and support for 11 March 2013, and granted Mother visitation with Timothy in North Carolina every other weekend from 6:00 p.m. on Friday until 6:00 p.m. on Sunday. On 20 February 2013, the trial court entered another interim order as a result of the same hearing. The 20 February order included more detailed findings of fact, conclusions of law, and decretal provisions than the 18 January 2013 order but ultimately granted the same visitation.

On 13 February 2013, Mother filed a motion for psychological and mental health evaluation, to appoint an expert pursuant to Rule 706, and to appoint a Guardian ad Litem ("GAL") for the child. Mother alleged that Father had been diagnosed with bipolar disorder and depression, that he was not taking medications as prescribed, and that he had "extreme mood swings" from being "gregarious and outgoing" to "openly belligerent and hostile." She alleged that Father was mentally unstable and unable to care for the child.

On 11 March and 22 April 2013, the trial court held a hearing on temporary custody, temporary child support, Mother's motion for psychological evaluation and appointment of GAL, and attorney fees. The court entered its order from this hearing on 25 June 2013. The order continued

Mother's alternate weekend visitation, set out a detailed visitation for various holidays, and granted Mother three weeks of summer visitation, but did not allow Mother to remove Timothy from North Carolina. The order set temporary child support, requiring Mother to pay $574.85 per month, beginning 1 June 2013. The order also denied the remaining motions for psychological evaluation, appointment of GAL, and attorney fees.

Over seven days, beginning on 10 February 2014 and ending on 1 August 2014, the trial court heard the matters of permanent custody, permanent child support, attorney fees, and contempt.[3] The trial court entered its order on these issues on 5 December 2014. Mother filed her notice of appeal from this order on 2 January 2015.

Although we will address the details of the order on appeal below, for purposes of addressing the procedural posture and finality of the 5 December 2014 order, we note that the order included the following requirements, which Mother also challenges on appeal:

> 6. Periodic Reviews shall be conducted on the following schedule and for the following purposes:
>
> a. Review One: Shall be conducted within 30 days of the entry of this order, the specific date is yet to be determined, the purpose of which shall be to determine whether therapy for mother, as ordered herein, has begun.
>
> b. Review Two: Shall be conducted within 60 days of the entry of this order, the specific date is yet to be determined, the purpose of which shall be to determine Mother's progress in therapy and to obtain an initial report from the Mother's therapist regarding her rehabilitation in acknowledging that Father has not physically abused the minor child, has not engaged in substance abuse and to access [sic] her progress in taking responsibility for the damage and anxiety that she has caused in the minor child.

3. On 23 May 2014, Father filed a motion to show cause for failure to pay child support, alleging that Mother had paid only a portion of the amount owed for some months and had paid nothing for the months of April and May 2014. The pending motion by Mother to modify the temporary child support order was also addressed.

> c. Review Three: Shall be conducted within 90 days of the entry of this Order, the specific date is yet to be determined, the purpose of which shall be to determine Mother's progress in therapy and to obtain a report from the Mother's therapist regarding her rehabilitation in acknowledging that Father has not physically abused the minor child, has not engaged in substance abuse and to access [sic] her progress in taking responsibility for the damage and anxiety that she has caused in the minor child. All of this will be taken into account to determine at this final review whether to further restrict or expand visitation.

On 9 February 2015, the trial court held the 30 day review hearing, as required by the 5 December order, to review Mother's progress in therapy and compliance with the order. The trial court found that Mother had "failed to produce evidence that she obtained a mental health evaluation from a licensed psychologist" and that she had only consulted with a "Dr. Sydney Langston" but had not produced evidence of Dr. Langston's credentials. The order noted that Mother continued to be under the requirements of the 5 December order and that she would have to appear for the 60 day and 90 day review hearings.

On 9 April 2015, this Court issued an order granting Mother's petition for writ of supersedeas and motion for temporary stay, providing in pertinent part:

> The petition for writ of supersedeas is allowed, and the 5 December 2014 order of Judge Joseph Williams is stayed insofar as it directs defendant and her child to submit to a mental health assessment and achieve certain goals through therapy and as it requires periodic review hearings to determine whether defendant has attained those goals. Therefor, [sic] decrees four and six of the trial court's order are hereby stayed pending the resolution of defendant's appeal from Judge Williams' order.

II. Interlocutory appeal

[1] Mother acknowledges that the 5 December order is interlocutory because her counterclaim for equitable distribution is still pending.[4]

4. Her other pending claims for post-separation support and alimony have been dismissed voluntarily.

However, she argues that her appeal is timely under N.C. Gen. Stat. § 7A-27(b)(3)(e) (2015), and more specifically, N.C. Gen. Stat. § 50-19.1 (2015), which provides that "[n]otwithstanding any other pending claims filed in the same action, a party may appeal from an order or judgment adjudicating a claim for . . . child custody [or] child support . . . if the order or judgment would otherwise be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b), but for the other pending claims in the same action." N.C. Gen. Stat. § 50-19.1.

Mother is correct that this order may be immediately appealable, since it adjudicates claims for custody and child support, even if equitable distribution remains unresolved. Yet she fails to address whether the order on appeal "would *otherwise* be a final order or judgment within the meaning of G.S. 1A-1, Rule 54(b)[.]" N.C. Gen. Stat. § 50-19.1 (emphasis added). The order, by its own terms, was not final as to Mother's visitation and set hearings to be held in 30, 60 and 90 days to address this issue after her mental health evaluation. We note that this Court has held similar orders, which set follow-up or review hearings to address issues of pending therapy or psychological evaluations, to be temporary, even though the order was entitled as a "permanent" custody order. *See Smith v. Barbour*, 195 N.C. App. 244, 249, 671 S.E.2d 578, 582 (2009) ("Although the 20 April 2005 order was entitled 'Permanent Custody' order, the trial court's designation of an order as 'temporary' or 'permanent' is not binding on an appellate court. Instead, whether an order is temporary or permanent in nature is a question of law, reviewed on appeal de novo. As this Court has previously held, 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. In this case, the 20 April 2005 order meets both the second and third prongs of the test. There is no dispute that the trial court did not determine all of the issues before it since it did not decide Ms. Barbour's right to visitation. The order expressly stated that the 'issue of visitation' would be set for hearing only after the ordered psychological evaluations had been completed and specified that the trial court 'retain[ed] jurisdiction to determine the frequency and conditions under which the Defendant and her parents may visit with the minor child. . . .' The order provided for a hearing on 'this issue of visitation to be scheduled not later than July 15, 2005.' This date qualifies as a clear and specific reconvening time after a time interval that was reasonably brief." (citations, quotation marks, and brackets omitted)).

It seems that the order on appeal is quite similar to the order in *Smith*, since it provided for additional hearings, at "clear and specific reconvening time[s]" and did not address all of the issues, *id.*, just as in this case, where the trial court needed additional hearings to consider Mother's mental health evaluation and its effect upon her visitation. Here, however, another panel of this Court has previously ordered the relevant provisions of the 5 December 2014 order stayed, pending this appeal. As we are bound by that ruling, we will address Mother's appeal. *See*, *e.g.*, *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court."). In addition, if we were to dismiss Mother's appeal, it would only add to the delay in establishing a final custodial schedule, much to Timothy's detriment.

III. Discussion

On appeal, Mother raises multiple issues with the trial court's order in relation to custody, child support, civil contempt, and attorney fees. We address the issues raised regarding each in separate sections below.

A. Custody

Mother raises at least six issues on appeal regarding the custody portion of the order, and we will address the second and third issues first, since they challenge the adequacy of the trial court's findings of fact and evidentiary support for the findings. If the trial court's findings are inadequate or not supported by evidence, they cannot support its conclusions of law, and the order would fail for that reason alone.

1. Recitations of testimony

Mother identifies 17 findings of fact, out of the 209 findings made by the trial court, which she argues are entirely or partly recitations of testimony which do not resolve the disputes raised by the conflicting evidence presented. She also argues that the order is "written in an unwieldly, haphazard style," citing to *Peltzer v. Peltzer*, 222 N.C. App. 784, 789, 732 S.E.2d 357, 361 (2012), in which we noted that an order was "written in a style perhaps best described as stream of consciousness." Here, Mother notes the repeated use of the words "testified," "indicated," "told," "asserts," and "believes" in those findings.

[2] We first address Mother's argument regarding the "haphazard" style of the order. This order is nothing like the equitable distribution order in *Peltzer*, in which findings were all mixed together and did not

"address the identification, classification, and valuation of the property and the distributional factors in any logical or organized manner[.]" *Id.* In this order, by contrast, the findings of fact are set out in separate sections entitled as follows: "Parties, Jurisdiction and Background"; "Arkansas Issues"; "DSS Involvement"; "School"; "Child Support (Permanent Support, Contempt and Motion to Reduce)"; "Difficulty in Mother Returning the Child"; "Miscellaneous"; "Attorney Fees"; and "Arrangements at Time of Hearing." Furthermore, in *Peltzer*, despite the haphazard style, we searched through the order and found that the trial court had made all of the findings required by the issues in the case and ultimately affirmed the majority of the order, other than remanding "for clarification of one of the trial court's findings of fact[.]". *Id.* at 798, 732 S.E.2d at 367. We do not require that orders have any particular style or organization, although a well-organized order is easier for everyone to understand. In any event, this order is reasonably well-organized. Thus, we reject this portion of Mother's argument.

[3] We also reject Mother's argument that the trial court's findings are merely recitations of evidence. She is correct that some of the findings recite portions of testimony of various witnesses and that the order uses the words noted above. In the interest of brevity, we will not quote large portions of the nineteen-and-a-half page, single-spaced, small-font order. Moreover, we note that Mother does not challenge the vast majority of the 209 findings.

Most of Mother's objections are from the portion of the order dealing with "DSS Involvement." The order does recite some of the testimony from social workers who interviewed Timothy and the parties regarding various reports of abuse. Since there were four DSS investigations during the course of the case, this evidence was extensive. The transcript of the entire trial comprises more than 1400 pages, and the Rule 9(d) supplement including exhibits from trial has 889 pages. To summarize very briefly, the order makes many findings which indicate repeated, persistent efforts by Mother to obtain custody of Timothy by accusing Father of being physically abusive, mentally unstable, and a "druggie." Therapists and social workers have had concerns that Mother was "coaching" Timothy to report abuse or bad behavior by Father. Although the findings of fact are certainly not entirely favorable to Father either, overall the trial court entirely rejected Mother's claims of child abuse, drug abuse, or uncontrolled mental illness. The trial court also very definitely resolved any conflicts in the evidence and determined that Mother was intentionally trying to alienate Timothy from Father. For example, the following findings are not challenged by Mother, at least as recitations of testimony:

178. Ms. Lueallen called Charlotte Mecklenburg Schools about two children being left unattended at Mr. Lueallen's football practice.

179. On April 20th, Ms. Lueallen texted Mr. Lueallen, "are you going to kill yourself and [Timothy] when you lose in court like you promised?" On December 24, Ms. Lueallen texted Mr. Lueallen, "maybe you are like Anakin Skywalker, are you at least a [sic] good a father as Vader?"

180. Ms. Lueallen paid a private investigator to go through Mr. Lueallen's trash, and paid for two drug tests on Mr. Lueallen.

181. Defendant Mother's efforts to destroy the Plaintiff Father and re-obtain custody have been persistent and on-going since September of 2013 and the child has demonstrated deterioration psychologically as a result.

182. Ms. Lueallen has incurred $70,000.00 to $80,000.00 in attorney's fees, including the Arkansas lawyer, private investigator and two North Carolina lawyers and has paid the lawyers $10,000.00 to $20,000.00.

183. Further, Mother's advancement of false claims of abuse have necessarily increased the costs of litigation, the number of witnesses necessary for trial to defend such accusations and the length of the trial as well.

184. The Court finds as a conclusion of law that the Defendant Mother has acted in bad faith.

. . . .

209. The Plaintiff Father has not physically abused the minor child.

The trial court also includes under " Conclusions of Law" in the order what are probably better characterized as ultimate findings of fact:

11. Plaintiff Father has never physically abused the minor child.

12. Defendant Mother's false belief that Plaintiff physically abused the child, and her baseless and false

> belief that Plaintiff Father is a "druggie" and an "alcoholic" has created an environment of investigation, physical, psychological and emotional that has created anxiety in the child and has not been in the child's best interest.

Overall, the findings of fact are not simply recitations of testimony, and they definitively find ultimate facts " 'sufficient for the appellate court to determine that the judgment [was] adequately supported by competent evidence.' " *In re Anderson*, 151 N.C. App. 94, 97, 564 S.E.2d 599, 602 (2002) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 156-57, 231 S.E.2d 26, 28 (1977)). In addition, the findings " 'reflect a conscious choice between the conflicting versions of the incident[s] in question which emerged from all the evidence presented.' " *Moore v. Moore*, 160 N.C. App. 569, 571-72, 587 S.E.2d 74, 75 (2003) (quoting *In re Green*, 67 N.C. App. 501, 505 n. 1, 313 S.E.2d 193, 195 n. 1 (1984)). Mother's argument is without merit.

2. Evidentiary Support for Findings

[4] Mother also argues that "many findings lack competent evidentiary support." Mother identifies several findings which she claims are unsupported. First, she argues that "no competent evidence" supports Finding of Fact No. 181, which was as follows:

> 181. Defendant Mother's efforts to destroy the Plaintiff Father and re-obtain custody have been persistent and on-going since September of 2013 and the child has demonstrated deterioration psychologically as a result.

Her argument consists of noting portions of the testimony that are favorable to her and her interpretations of the evidence. She makes the same argument regarding Finding of Fact No. 183, and we reject it for the same reasons. Although there was conflicting evidence on many facts, as noted above, the trial court rejected Mother's interpretations of the evidence. The trial court evaluated the credibility and weight of the evidence and made findings accordingly.

> [A]s is true in most child custody cases, the determination of the evidence is based largely on an evaluation of the credibility of each parent. Credibility of the witnesses is for the trial judge to determine, and findings based on competent evidence are conclusive on appeal, even if there is evidence to the contrary. Here, each parent testified to his

> or her version of the events which led to the above crucial findings of fact. The fact that the trial judge believed one party's testimony over that of the other and made findings in accordance with that testimony does not provide a basis for reversal in this Court. The findings are based largely on defendant's competent, and apparently credible, testimony and are thus binding on this Court.

Woncik v. Woncik, 82 N.C. App. 244, 248, 346 S.E.2d 277, 279 (1986) (citations omitted).

Her other objections are mainly arguments that certain findings misstated evidence in minor ways. For example, she notes that in Finding of Fact No. 180, the trial court found that she paid for two drug tests of Father, but the evidence shows that *she paid* for only one and that DSS paid for the other. There is no dispute that he had two drug tests, both negative, and both inspired by Mother's claims that he was abusing drugs. Who paid for one of the tests is not dispositive. And even if she is correct and we were to ignore this particular finding, the remaining 208 findings would fully support the trial court's order. Her other arguments as to a few other findings are similar, noting minor misstatements in portions of findings or her favorable interpretations of various bits of evidence. We find that all of the findings of fact regarding custody were more than adequately supported by the evidence.

3. Decree Provisions 4 and 6

[5] Now that we have established that the findings of fact are sufficient, we will address Mother's first argument regarding custody, which is that "Decrees four and six of the custody decision contravene established precedent." She argues that Decree 4 "subjects [Mother] to a mandatory mental health evaluation/therapy process, the goal of which is to force her to believe the trial court's determinations that [Father] never abused substances or [Timothy.]" She also notes that the decree "commands [Timothy's] therapist to 'wholeheartedly' accept such determinations as true and thereby assess, *inter alia*, '[w]hat effect, if any the continued contact or exposure to [Mother], especially her belief that [Father] abused the child and abused substances, has had on [Timothy.]"

Mother cites *Peters v. Pennington*, 210 N.C. App. 1, 707 S.E.2d 724 (2011) in support of her argument, noting that in *Peters*, this Court "vacated a decree equivalent to Decrees 4 and 6." The *Peters* case is factually somewhat similar to this one, in that after cooperating with each other regarding joint custody for approximately two years, the mother and father engaged in an extended, extremely contentious custody

dispute. *Id.* at 4-5, 707 S.E.2d at 729. The mother accused the father of sexually abusing the children and continued to insist that the children were being sexually abused even after investigations by law enforcement and DSS and an evaluation by a private therapist found the accusations to be unfounded. *Id.* at 5-7, 707 S.E.2d at 729-30. After a three-week trial, with over 24 witnesses, "including the parties, relatives and friends, school officials, law enforcement officers, DSS personnel, the boys' former and current therapists, and several expert witnesses[,]" the trial court's order addressed the "two central issues: (1) whether [the father] abused his sons and (2) whether [the mother's] actions in connection with her allegations of abuse were abusive and caused damage to the children." *Id.* at 7-8, 707 S.E.2d at 730. The trial court definitively found that the father had not sexually abused the children and that the mother's continued insistence that he had and her actions based upon this belief were abusive and had damaged the children. *Id.* at 8, 707 S.E.2d at 731.

The relevant portion of the order challenged in *Peters* was as follows:

> 5. Defendant/Mother shall obtain mental health treatment by a provider who shall read this Order in full, shall commit to wholeheartedly accepting that the findings contained herein constitute the reality of Frank and Dennis's lives and Defendant/Mother's role in fabricating sex abuse allegations, even though she may have genuine belief that such events occurred, and shall work towards Defendant/Mother's rehabilitation in acknowledging that Plaintiff/Father has not sexually abused the minor children and in taking responsibility for the damage she has caused to her sons. Defendant/Mother's therapy may include any other areas that the provider identifies.
>
> . . . .
>
> 7. The minor children shall continue in therapy with Dr. Curran and Ms. Duncan, who shall read this order in its entirety and commit to accepting it wholeheartedly as the facts constituting the false allegations of sexual abuse with respect to Frank and Dennis. Dr. Curran and Ms. Duncan shall determine what type of therapy the minor children need in light of these findings.

Id. at 9-10, 707 S.E.2d at 731.

The order in *Peters* also provided for future review of the mother's visitation based upon consideration of her progress in therapy and

compliance with the court's order. *Id.* at 10, 707 S.E.2d at 732. This Court concluded:

> [T]he trial court abused its discretion when fashioning [mother's] therapy. [Mother] is required by the 6 March 2009 order to acknowledge that [father] did not sexually abuse their children and accept as true the trial court's conclusion that she harmed her children. Thus, [mother] must force herself to believe that she implanted false images of sexual abuse in her children. Presumably, she must prove to a medical professional or counselor that she genuinely believes the trial court findings were correct before being certified as rehabilitated, which may be a prerequisite to obtaining significant visitation or any level of custody in the future. We hold this is an unwarranted imposition under these facts. Our objection to this requirement is that it mandates [mother] and the therapist attain a standard based upon [mother's] beliefs rather than her behavior. It would have been appropriate to require [mother] to demonstrate to the court that she would not engage in any behavior that suggests to the children that they were sexually abused. We believe this is best achieved through non-disparagement requirements and prohibitions on discussing these matters with the children, which are enforceable through the contempt powers of the trial court, including incarceration. It was an abuse of discretion to require [mother] to change her beliefs and prove to a counselor that such a change has in fact occurred. We therefore vacate paragraph 5 of the decretal portion of the 6 March 2009 order ("Decree 5") and remand the order to the trial court to enter a new order based upon [mother's] and her agents' ability to comply with existing court orders and demonstrate behavior that prevents harm to her children.

Id. at 21, 707 S.E.2d at 738-39.

The similarity of the provisions of this order and those in *Peters* is perhaps no coincidence. Father's counsel asked the trial court in the closing argument to "look at these cases and to seriously consider restricting Ms. Lueallen's access to supervised therapeutic settings," and then specifically identified *Peters* as a similar case factually, such that similar restrictions and therapy requirements should be imposed. Unfortunately, the trial court's order relied a bit too heavily upon

the wording of the challenged decrees from *Peters*. We agree that the provisions of Decrees 4 and 6 are substantially the same as the decree provisions vacated in *Peters*, and thus we must also vacate these provisions of the order. But this Court's additional observations in *Peters* also apply to this case:

> However, we note that [mother's] conduct placed the trial court in a difficult position. The court specifically ordered the parties not to disparage one another or to discuss the case with the children. It found, based on competent evidence, that [mother] willfully ignored these rulings, which were designed to protect the integrity of the judicial process and to protect the children from harm. The trial court likely concluded non-disparagement requirements and other tools would have been of little future value as a restraint on [mother.] The court's skepticism was justified, not only by [mother's] actions in taking the children to therapy with Dr. Tanis before a guardian *ad litem* was appointed, but also by her affidavits in which she documented her conversations with the children about the specific topics the court had restrained her from discussing with the children.
>
> Nevertheless, we hold it was error to require [mother] prove to her therapists that her beliefs about the factual underpinnings of the case had changed. While the trial court properly vested authority in medical professionals to determine when supervised visitation was appropriate, the court went too far in dictating the specifics of the therapists' work. [Mother's] actual behavior -- and not her subjective beliefs over what occurred in the case -- should have been the critical focus for evaluating when visitation was appropriate.

Id. at 22, 707 S.E.2d at 738-39.

Mother is correct that the trial court cannot order her to "believe" that Father is not physically abusive and that he does not abuse drugs. Yet what a trial court can, and must, do is make findings of fact regarding events which happened in the past and order parties to take certain actions based upon those facts. In nearly every disputed case, one party claims that an event happened, and the other party claims that the event either did not happen or happened differently than claimed by the other party. The trial court must determine which of the competing versions

of the past event is correct, and based upon that determination must order the appropriate action. In a certain sense, every court order requires all of the parties to the case to accept a particular version of the past events, at least to the extent that the parties must *act* in accord with the order or suffer consequences of contempt or other penalty.

On remand, the trial court shall "reform the therapeutic requirements placed on [Mother] in accordance with this opinion." *Id.* at 29, 707 S.E.2d at 743. The trial court's order may not require Mother or a therapist to "wholeheartedly accept" or believe anything and cannot evaluate Mother's progress by her beliefs, but it can require them to conform their behavior and speech when dealing with Timothy fully in accord with the trial court's findings and conclusions. The trial court properly ordered Mother to have a "mental health evaluation from a licensed psychologist" to assess any need for additional therapy. In addition, the trial court ordered that Timothy continue with his current therapist and that Mother read the order and "commit to accepting it wholeheartedly as the facts constituting the false allegations of physical and substance abuse with respect to the minor child[.]"

On remand, the trial court may again order a mental health evaluation of Mother and continuing therapy for Timothy, without the offending language identified in *Peters*. As a practical matter, we would note that any mental health evaluation of Mother will be useless to the trial court if Mother simply repeats her allegations again to the psychologist and the psychologist accepts Mother's claims as true. In fact, if the psychologist accepts Mother's claims as true, the psychologist will be bound by law to make yet another report to DSS of Father's alleged abuse, since a report is *required* by N.C. Gen. Stat. § 7B-301(a) (2015). Mother even acknowledged that she was aware of this legal duty to report any allegations of abuse based upon her training as a teacher. And testimony of Timothy's therapist, Kristin Montanino, reveals that several of the DSS investigations began based upon reports which the therapist made because of what she heard from either Timothy or Mother.

Additional reports of allegations of abuse based upon the same things would simply perpetuate the cycle of DSS investigations needlessly, to Timothy's detriment. The trial court in *Peters* was attempting to end a similar cycle of investigations of repeated, unfounded allegations of sexual abuse. If Timothy's therapist were to accept Mother's version of the facts, she would also be legally bound to make additional reports to DSS and to conduct therapy accordingly, which would likely only add to the harm to Timothy. Thus, it is entirely appropriate for the trial court to require an evaluator or therapist for either party or the child to

read the court's orders so that they will be aware of the background in which the evaluation or therapy has been ordered, and they will be able to make an informed professional judgment about whether there is any need for a new report of abuse to DSS[5]. It is also appropriate for the trial court to order that a particular therapist who is conducting therapy based upon Mother's version of the facts instead of those established by the trial court to cease treating the child, to avoid further confusion and harm. And although Mother may continue to believe anything she likes, the trial court can take into account Mother's continued insistence on her version of the facts and the futility of any evaluations or therapy based upon her version of the facts, which unfortunately could result in a visitation order that restricts Mother's visitation even more.

4. Abuse of Discretion in Custody Order

[6] Mother argues that the "custody decision manifests an abuse of discretion" mainly because "the trial court stripped [Mother] of all legal custody -- and nearly all physical custody -- of [Timothy] based solely on her beliefs about [Father's] conduct."

"A trial judge's decision will not be upset in the absence of a clear abuse of discretion if the findings are supported by competent evidence." *Phillips v. Choplin*, 65 N.C. App. 506, 511, 309 S.E.2d 716, 720 (1983). Furthermore,

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

White v. White, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citation omitted).

As we have determined above, the trial court's findings of fact were supported by the evidence. Mother also argues very briefly -- just three sentences, with one cite to *Peters* -- that the findings of fact do not support the trial court's conclusion that it is in Timothy's "best interest for

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5. In particular, any new therapist who is not familiar with the history of this family needs to be able to determine if some information from Mother or Timothy is related to an incident or issue already addressed by the court's order, or if something new and different has happened that may actually need to be reported. The therapist is not required to "believe" anything but does need to be fully aware of the prior allegations and the trial court's determinations regarding those allegations.

[Father] to have sole legal custody" and "primary physical custody." Mother points out evidence favorable to her, and the trial court made findings regarding much of this evidence. She did travel from Arkansas to visit many times and consistently ate lunch with Timothy at school. The trial court found that Timothy "seemed to enjoy" these lunch visits -- although the trial court also noted that she "sometimes violated the seating policy" but would move when asked. The trial court also noted that "[i]t was unusual that on about fifty (50) percent of occasions [Timothy] sat on his mother's lap."

Mother's argument also notes that Father "frequently holds long hours as a football coach" and notes other evidence negative to him. Again, we will not quote large portions of the 209 findings of fact, but the findings do support the trial court's conclusion. Mother's argument asks us to re-weigh the voluminous evidence and to draw inferences in her favor instead of Father's, but that is the trial court's role, not ours. The order includes extensive findings regarding the strengths and weaknesses of both parties as parents and regarding the effects of the protracted bickering and strife and repeated investigations of alleged abuse on Timothy. The trial court did address Mother's beliefs about Father but based its order on her actions -- which are most likely motivated by her beliefs, as are most of any person's actions -- that "created an environment of investigation, physical, psychological and emotional that has created anxiety in the child and has not been in the child's best interest." The trial court, in its discretion, weighed all of the evidence and determined that Father is a "fit and proper person to have primary physical custody" and "sole legal custody" of Timothy and that this arrangement would be in his best interest. We cannot discern any abuse of discretion in the trial court's ruling.

B. Child support

[7] Mother's next arguments address the child support order. Mother first argues that "the trial court wrongfully imputed income to [Mother.]" The trial court ordered Mother to pay $616.68 per month as permanent child support, based upon Worksheet A of the North Carolina Child Support Guidelines. As Mother argues, the trial court "seemingly imputed income to her in the annual amount of $47,000.00," since she was unemployed at the time of trial. Mother also notes that the record does not include a child support worksheet which shows the child support calculation, and from the findings in the order, it is unclear exactly how the trial court calculated the obligation.

Before we address the argument as to imputation of income, we note that we also have been unable to determine exactly what numbers

the trial court used to set the child support obligation. As this Court has previously noted, "[t]he better practice is for an appellant to include the Guidelines worksheet in the record on appeal." *Hodges v. Hodges*, 147 N.C. App. 478, 483 n.1, 556 S.E.2d 7, 10 n.1 (2001). We do not know whether Mother or the trial court is responsible for the missing worksheet, since we have no brief from Father; but in any event, we cannot review the calculation without sufficient information. The trial court's findings of fact regarding the numbers needed to set child support were as follows:

	Monthly amount	Finding No.
Father's monthly income	$4210.87[6] or $3590.91	102 or 95
Health insurance premium costs	243.27	98
Work-related day care costs	$113.00	97[7]
Mother's income	$3916.67	106 (Mother "anticipates if hired in a teaching position she would earn $47,000.00 per year.")

The findings of fact are supported by the evidence, but when we calculate child support using these numbers in Worksheet A based upon the Child Support Guidelines in effect at the time of the trial, we do not get a child support obligation for Mother of $616.68 or any number close enough that we can trust our calculation to be the same as the trial

6. Some of the confusion comes from the length of the trial, which began on 10 February 2014, during the 2013-14 school year. The trial court's Finding of Fact No. 95 found "[Father's] current income is $3590.91 per month." (Emphasis added). This was Father's income during the trial. The trial ended on 1 August 2014. Finding of Fact No. 102 states that "[Father's] salary *will be* $48,492.20 per year plus $2,038.30 as an assistant coach." (Emphasis added.) He was to begin a new position with the Charlotte-Mecklenburg schools as of 19 August 2014, with an annual income for the 2014-15 school year of $48,492.20. Thus, by the time of the entry of an order, Father would be receiving the greater income.

7. In Finding of Fact No. 97, the trial court found that Father pays $35.00 per week for afterschool care. We have assumed 4.3 weeks per month, for nine months of the school year, to calculate a monthly total, but we also realize that since Father is a teacher and coach his need for after-school care may vary from the usual.

court's, whether we use the greater or lesser income for Father from the findings of fact. We are therefore unable to review the trial court's calculation of child support and must remand for the trial court to re-calculate child support and to set out the values used in the calculation. The trial court should also attach Worksheet A to any order regarding child support issued on remand.

1. Imputed Income

[8] We now return to the question of whether the trial court erred by imputing income to Mother. Even if the exact numbers used in the child support calculation are uncertain, the trial court did clearly impute income to Mother, since she was unemployed and had no income at the time of trial.

The North Carolina Child Support Guidelines state:

> If either parent is voluntarily unemployed or underemployed to the extent that the parent cannot provide a minimum level of support for himself or herself and his or her children when he or she is physically and mentally capable of doing so, and the court finds that the parent's voluntary unemployment or underemployment is the result of a parent's bad faith or deliberate suppression of income to avoid or minimize his or her child support obligation, child support may be calculated based on the parent's potential, rather than actual, income.

The primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations. To apply the earnings capacity rule, the trial court must have sufficient evidence of the proscribed intent. The earnings capacity rule can be applied if the evidence presented shows that a party has disregarded its parental obligations by:

> (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) acting in deliberate disregard for his support obligations, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or

> (8) intentionally leaving his employment to go into another business.
>
> The situations enumerated . . . are specific types of bad faith that justify the trial court's use of imputed income or the earnings capacity rule.

Mason v. Erwin, 157 N.C. App. 284, 288-89, 579 S.E.2d 120, 123 (2003) (citations and quotation marks omitted).

Mother argues that the trial court's imputation of income "rests entirely upon the finding that she last applied for a job in Mecklenburg County three years' prior." Mother also notes evidence that she "persistently pursued employment after her substitute teaching job" ended in May 2013 and that she had some brief periods of temporary employment. Mother is correct that there was evidence of her efforts to obtain a new job, but the evidence also supports the trial court's determination that she was acting in disregard of her child support obligation. The determination was based only in part on the fact that Mother had not applied for a job in Mecklenburg County in the past three years.

The trial court identified other factors as well. And the trial court may have considered her failure to apply for jobs in Mecklenburg County particularly telling, since she alleged in her verified motion to modify child support, filed on 3 July 2013, that she was "*currently actively seeking employment* as a teacher in both the elementary and middle school levels *in both Union County and Southern Mecklenburg County*." (Emphasis added). At trial over a year after she filed this verified motion, she had actually *not* sought employment in Mecklenburg County in "three years" as found by the trial court -- contrary to her motion. In addition, there was extensive testimony at trial regarding Mother's educational and professional qualifications and her work history. It was not unreasonable to expect her to seek employment in Mecklenburg County, based on her own verified statement that she was actually doing so. In addition, she had taught in the Mecklenburg County schools in the past, before taking her more recent teaching job in Union County which she resigned prior to her move to Arkansas.

Here, the order also notes at least two of the factors identified by *Mason* which can support the trial court's conclusion that Mother acted in bad faith and intentionally suppressed her income and imputation of income. One factor is that a parent " 'intentionally leav[es] his employment to go into another business' " *Id.* at 289, 579 S.E.2d at 123 (quoting *Wolf v. Wolf*, 151 N.C. App. 523, 527, 566 S.E.2d 516, 519 (2002)). Here, the trial court found that Mother "resigned her employment with Union

County Schools . . . effective June 21, 2012." She quit this job "without having another job lined up." She also left her job in Arkansas to move back to North Carolina. She did get a job after that, but it was temporary, and she had minimal income from a brief "customer service job" and as a substitute teacher. In addition, the trial court considered that Mother was " 'refusing to seek or to accept gainful employment.' " *Id.* (quoting *Wolf*, 151 N.C. App. at 527, 566 S.E.2d at 519). The trial court made the following findings of fact and related conclusion of law:

> 106. Ms. Lueallen has interviewed for jobs and anticipates if hired in a teaching position she would earn $47,000.00 per year.
>
> . . . .
>
> 115. Ms. Lueallen last applied for a job at Charlotte Mecklenburg Schools three (3) years ago.
>
> . . . .
>
> 117. The Defendant Mother has had the means and ability to comply with the prior orders of the court, has failed to look for a job in the largest county neighboring the county of residence of the Defendant Mother and the court finds that she has failed to exert the necessary effort to obtain employment and the court finds that she has willfully suppressed her income to avoid her child support obligation.
>
> . . . .
>
> Conclusions of Law:
>
> . . . .
>
> 8. The Defendant Mother has had the means and ability to comply with the prior orders of the court, has failed to look for a job in the largest county neighboring the county of residence of the Defendant Mother and the court finds that she has failed to exert the necessary effort to obtain employment and the court finds that she has willfully suppressed her income to avoid her child support obligation.

As noted by *Mason*, "[t]he primary issue is whether a party is motivated by a desire to avoid his reasonable support obligations." *Id.* (quotation marks omitted). The trial court made several findings about

Mother's failure to pay any child support at all during some time periods when she did receive income or unemployment compensation. The trial court also found that Mother had "regularly eaten at fast food restaurants" during some months when she paid no child support.

Mother could have paid some amount of child support during these months, even if far less than required by the temporary child support order, but she chose to pay nothing, which is relevant to determining her motivation and bad faith. The trial court found further that Mother "has incurred $70,000.00 to $80,000.00 in attorney's fees, including the Arkansas lawyer, private investigator, and two North Carolina lawyers and has paid the lawyers $10,000.00 to $20,000.00." In fact, Mother testified that she had paid $10,000.00 to $20,000.00 of the fees, totaling up to $80,000.00; her mother had paid "in the ballpark" of $50,000.00 to $60,000.00, but she had not obtained any financial assistance from anyone to pay any child support. The trial court may well have doubted Mother's motivations when she paid up to $20,000.00 in attorney fees and obtained assistance to pay up to $80,000.00, during a time when she went many months without paying even one dollar toward her child support obligation.

The trial court also made findings which more directly address Mother's motivations:

> 100. Ms. Lueallen has told Mr. Lueallen, "I am a mom and moms don't pay child support."
>
> 101. In regards to Ms. Lueallen reducing her child support, she has stated, "I've not got unemployment since December so child support should be $50.00 per month.["]
>
> . . . .
>
> 207. In the past, when [Timothy] has been placed in the custody and care of Ms. Lueallen she has demanded that Mr. Lueallen pay babysitting fees.

The trial court also concluded, in regard to bad faith:

> 14. The Court finds as a conclusion of law that the Defendant Mother has acted in bad faith.

The findings support the trial court's conclusions that Mother was willfully suppressing her income to avoid her child support obligation and that she was acting in bad faith. The trial court properly imputed income to Mother. On remand, when recalculating child support as

noted above, the trial court should use the imputed income, which we believe to be $47,000.00 annually, but the trial court should make the actual amount used clear in its findings and calculations.

2. Amount of Child Support Arrearage

[9] Mother next argues that "the findings of fact do not support the arrearage decree." The trial court set the total child support arrearages at $7,314.43, and this number includes $616.68 which "came due on November 1, 2014." We also note that the trial ended on 1 August 2014. It is impossible for the trial court's determination as to arrears accrued *after* the trial ended to be based upon the evidence presented *at* trial, nor could it be supported by the record on appeal. On remand, the order may address any arrears accrued up to the last day of trial, based on the evidence presented at trial. We also realize that there may have been communications between counsel and the trial court regarding the November child support payment and an agreement to include this month to avoid the expense of an additional hearing or order. Unfortunately, our record does not reflect any such agreement, and we have no brief from Father, so the trial court can correct this calculation on remand.

[10] Mother also argues that five of the factual findings of amounts of child support owed and paid in various months do not add up to the amount ordered as arrears, and the months after April 2014 seem to have been omitted. We are not entirely sure if any months were omitted from the trial court's calculations, since one again, we cannot get the math to work.

By our calculations, based upon the trial court's findings of fact, the arrears owed as of the last day of trial would be $6797.75, and the trial court did specifically and erroneously include at least one month after the trial ended. On remand, the trial court should clearly set forth the calculation of arrears. We would suggest that a table showing the calculation would be helpful. Purely as a practical matter, it is easier to avoid mathematical errors when the numbers can be totaled in columns instead of having to hunt for numbers paid and owed and dates scattered throughout 19 single-spaced, small-font pages of findings.

C. Civil Contempt for Failure to Pay Temporary Child Support

[11] In addition to establishing permanent custody and support, the trial court also heard Father's motion to show cause for failure to comply with the order in the child support action, filed on 23 May 2014. An

order to show cause was issued to Mother, requiring her to appear on 2 June 2014 for a hearing. The motion alleged that Mother owed arrears of $4,498.35 as of 13 May 2014. The trial court heard the motion along with the other matters during the trial.

1. Failure to Pay

Mother argues that "the trial court reversibly erred in holding [Mother] in civil contempt" because her failure to pay was not willful, based upon her periods of unemployment.

> Review in civil contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. Findings of fact made by the judge in contempt proceedings are conclusive on appeal when supported by any competent evidence and are reviewable only for the purpose of passing upon their sufficiency to warrant the judgment.
>
> However, findings of fact to which no error is assigned are presumed to be supported by competent evidence and are binding on appeal. The trial court's conclusions of law drawn from the findings of fact are reviewable de novo.

Tucker v. Tucker, 197 N.C. App. 592, 594, 679 S.E.2d 141, 142-43 (2009) (citations, quotation marks, and brackets omitted).

Mother's primary argument regarding civil contempt is that the evidence did not support the trial court's finding that she had the ability to comply with the subject order yet willfully failed to do so. She argues that she was "unemployed for significant periods of time after her substitute teaching position at New Town Elementary School ended in May 2013" and that although she received some unemployment compensation and earnings from temporary jobs intermittently, the income did not allow her to pay her living expenses and her temporary child support obligation of $574.85. Thus, she argues that her failure to pay was not willful and that she did not have the ability to comply.

The temporary child support order was entered on 25 June 2013, although it was based upon a hearing which ended on 22 April 2013. Mother was ordered to pay $574.85 beginning on 1 June 2013. In the temporary child support order, the trial court found that Mother was

employed at New Town Elementary School[8] "through the rest of this year as a contract teacher filling in for a teacher who is out on maternity leave." Thus, by the time the temporary order was entered by the court, Mother's temporary job at New Town Elementary had already ended, in May 2013. On 3 July 2013, Mother filed a motion to modify child support, alleging that her job had ended so she was receiving unemployment compensation. She also alleged that she "is currently actively seeking employment as a teacher in both the elementary and middle school levels in both Union County and Southern Mecklenburg County school districts in the hopes of obtaining a job and maximizing her income potential." The order on appeal, in addition to finding her in contempt, specifically denied this motion to modify.

As discussed above, we have already determined that the trial court's findings were supported by the evidence. The trial court properly concluded that Mother had "willfully suppressed her income to avoid her child support obligation." In addition, we have determined that the trial court properly imputed income to Mother and concluded that she acted in bad faith based on her failure to make reasonable efforts to obtain a new full-time position.

The trial court's conclusions of law regarding Mother's willful failure to pay child support and her ability to comply are supported by the findings of fact.

> Our State's case law reveals a well-established line of authority which holds that a failure to pay may be willful within the meaning of the contempt statutes where a supporting spouse is unable to pay because he or she voluntarily takes on additional financial obligations or divests him or herself of assets or income after entry of the support order. A contrary rule would permit a supporting spouse to avoid his or her obligations by the simple means of expending assets as he or she pleased, and then pleading inability to pay support, thereby insulating him or herself from punishment by an order of contempt.

Shippen v. Shippen, 204 N.C. App. 188, 190-91, 693 S.E.2d 240, 243-44 (2010) (citations and quotation marks omitted).

For these reasons, Mother's argument is without merit.

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8. One finding in the temporary order states that New Town Elementary is in Arkansas, but from the evidence and other findings we believe that this was a clerical error, as the evidence shows that New Town Elementary is in Union County, North Carolina.

2. Purge Conditions

[12] Mother next argues that the purge conditions of the order are not supported by the findings of fact and conclusions of law. The trial court ordered that Mother "shall purge herself of said contempt by payment of an additional $75.00 per month through Centralized Collections, which shall also be applied towards her arrears."[9] The order does not specify when the purge payments end.

As noted above, we are remanding for the trial court to recalculate the child support obligation and child support arrears. For this reason alone, we would have to vacate this portion of the order, since the amounts may be different on remand and the trial court would need to set new purge conditions, based upon appropriate findings of fact and a conclusion of law as to Mother's ability to purge herself of contempt. As also noted above, we are not entirely certain of the income which the trial court imputed to Mother.

This Court recently vacated an order which did not set any ending date for payments to purge contempt in *Spears v. Spears*, __ N.C. App. __, 784 S.E.2d 485 (2016). In *Spears*, the order held the defendant in contempt and required the defendant to make purge payments of an additional $900.00 per month "over and above" the ongoing child support and alimony obligations set by the order. *Id.* at __, 784 S.E.2d at 488. The *Spears* plaintiff countered that

> the absence of an ending date for the monthly payment of $900.00 "over and above" the February 2013 Order's obligations indicates that this additional payment is simply a monthly payment towards the arrears of $12,770.80, which would end on a definite date when the arrears were paid in full. (Plaintiff contends that the $900.00 monthly payments would satisfy the first purge condition in "just over 14 months" since "$12,770.80 delinquency ÷ $900.00 additional payment = 14.189 months)." This is a reasonable argument, but it might be more convincing if the amount paid each month would divide evenly by a number of months. By plaintiff's logic, the order implies that defendant must pay $900.00 for fourteen months and 18.98 percent of that amount in the fifteenth month, or $170.80.

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9. On top of that, the order *also* required Mother to pay $100.00 per month toward arrears, in addition to her ongoing child support obligation of $616.68. Thus, the order required a total monthly payment of $791.68.

> Even if this was the trial court's intent, the order is impermissibly vague as written. Accordingly, we hold that the trial court erred in failing to establish a definite date by which defendant could have purged himself of the contempt. We also note that in the Order on Purge Condition Noncompliance, the trial court repeated this error when it ordered that defendant's "civil contempt shall continue unless he makes payments consistent with the February 2013 Order and the purge conditions set by this Court."

Id. at __, 784 S.E.2d at 501 (citations omitted).

Here, as in *Spears*, the purge conditions are impermissibly vague. Even if the $75.00 per month is applied toward arrears, the ending date is uncertain. We vacate the purge conditions and direct that the trial court enter new conditions on remand, consistent with this opinion.

D. Attorney Fees

[13] Finally, Mother argues that "the trial court reversibly erred in awarding [Father] $20,000.00 in attorneys' fees" because "the findings of fact do not support the award." The trial court's findings of fact regarding attorney fees are limited as they address only the total amounts billed by Father's counsel in North Carolina and Arkansas; Father's inability to pay all of his attorney fees and that he had to borrow money; and that he "brought this action in good faith and does not have the means and ability to defray the costs of this action, which has been greatly increased due to the false allegations made by [Mother.]"

The order fails to make any findings regarding the reasonableness of the attorney fees as required by law. Although the trial court found that Father was acting in good faith and has insufficient means to defray the expense of the suit, as required by N.C. Gen. Stat. § 50-13.6, the order failed to make any findings as to " 'the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers.' " *Smith*, 195 N.C. App. at 255, 671 S.E.2d at 586 (quoting *Cobb v. Cobb*, 79 N.C. App. 592, 595, 339 S.E.2d 825, 828 (1986)). It is necessary that the record contain findings regarding these factors in order to determine whether an award for attorney fees is reasonable, and "[i]f these requirements have been satisfied, the amount of the award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Id.* (quotation marks and brackets omitted).

The parties offered detailed affidavits regarding attorney fees, so on remand the trial court must also make additional findings of fact addressing " 'the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers' " in support of its award of attorney fees. *Id.* (quoting *Cobb*, 79 N.C. App. at 595, 339 S.E.2d at 828).

IV. Conclusion

For the reasons stated above, we affirm the portions of the trial court's order addressing custody, with the exception of Decree provisions 4 and 6, which must be vacated and rewritten on remand. In addition, we vacate portions of the order regarding calculating child support and arrears and remand for recalculation of those amounts and so that the trial court may set out in more detail the numbers used in making those calculations. We also find that the purge conditions in the order are impermissibly vague and therefore must be redefined more precisely on remand. Finally, we remand for additional findings of facts regarding the award of attorney fees.

On remand, since portions of the order on appeal are vacated and the trial court will be entering a new order -- and must be able to make findings and conclusions as to Mother's present ability to comply with the obligations set by the order, including any purge conditions for contempt -- the court shall, upon timely written request from either party, hold an additional hearing to address the order on remand. Evidence and argument presented at this hearing shall be limited to evidence necessary for the purposes as noted in this opinion.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.

Judges ELMORE and DIETZ concur.

MANNISE v. HARRELL

[249 N.C. App. 322 (2016)]

ASHLEY MANNISE, PLAINTIFF
v.
STEPHEN J. HARRELL, DEFENDANT

No. COA16-42

Filed 6 September 2016

1. Appeal and Error—preservation of issues—notice of appeal—after oral ruling, before entry of order

Defendant's notice of appeal was treated as a petition for writ of certiorari and the writ was issued where defendant filed his notice of appeal after the trial court's oral ruling, but before the written order was entered.

2. Appeal and Error—interlocutory appeals—motions to dismiss for lack of jurisdiction denied

In a case arising from a Domestic Violence Protective Order, an appeal from the denial of defendant's motion to dismiss for lack of personal jurisdiction was properly before the Court of Appeals, but the appeal from the denial of the motion to dismiss for lack of subject matter jurisdiction was not. N.C.G.S. § 1-277(b) allows for the immediate appeal of the denial of a Rule 12(b)(2) motion, but not for the immediate appeal of the denial of a Rule 12(b)(1) motion.

3. Jurisdiction—personal—one telephone call—no evidence of location

The trial court erred in a case arising from a Domestic Violence Protective Order by denying defendant's motion to dismiss for lack of personal jurisdiction where the evidence did not provide the trial court with any basis for asserting personal jurisdiction. The trial court found personal jurisdiction as a result of a single phone call, but plaintiff's complaint was wholly silent on the issue of plaintiff's location when she received the alleged threat, or whether it was communicated by phone or otherwise.

4. Domestic Violence—protective order—personal jurisdiction

Plaintiff was required to prove that personal jurisdiction existed over defendant in an action concerning a Domestic Violence Protective Order.

Appeal by defendant from order entered 26 October 2015 by Judge Paul A. Holcombe, III in Harnett County District Court. Heard in the Court of Appeals 9 August 2016.

Carver Law Firm, PLLC, by Baccuhus H. Carver, for plaintiff-appellee.

Levy Law Offices, by Joshua N. Levy, for defendant-appellant.

TYSON, Judge.

Defendant, Stephen J. Harrell, appeals from the trial court's order, which denied his motion to dismiss Ashley Mannise's complaint ("Plaintiff"). We reverse the trial court's order.

I. Background

Plaintiff and Defendant are the unmarried parents of a child, who was five years old when this action commenced. On 8 September 2015, Plaintiff filed a *pro se* Complaint and Motion for a Chapter 50B Domestic Violence Protective Order in the Harnett County District Court. Plaintiff asserted she was a resident of Harnett County. She listed Defendant's address in Butler, Pennsylvania.

Plaintiff alleged Defendant had threatened her life on 6 September 2015, two days prior to the filing of the complaint, because she was "moving out of state with [their] son." She asserted Defendant had hit her, yelled at her, and made her cry in front of the child in the past. Plaintiff also alleged Defendant had beat her with a chair and chased her around the house with a gun in October 2013, while her children were present. Plaintiff's complaint does not allege she was a resident of North Carolina at the time of any of these allegations, or any actions took place while she or Defendant were physically present in North Carolina.

An Affidavit as to Status of Minor Child was attached to the complaint. The affidavit states the parties' child resided with Plaintiff in Pennsylvania from August 2012 until September 2015, and with Plaintiff in Lillington, North Carolina from 6 September 2015 until the filing of the complaint two days later.

Based upon these allegations, the trial court issued an Ex Parte Domestic Violence Order of Protection on 8 September 2015. *See* N.C. Gen. Stat. § 50B-2(c)(5) (2015) ("Upon the issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later.").

The trial court found Defendant had placed Plaintiff in fear of imminent serious bodily injury on 6 September 2015. The court stated, "[t]he

allegations in the Complaint are incorporated herein by reference." The court did not make any factual findings that any of the alleged events occurred within North Carolina, or while Plaintiff was a resident of North Carolina.

On 15 September 2015, Defendant filed a motion pursuant to Rules 12(b)(1) and 12(b)(2) to dismiss Plaintiff's complaint. Defendant argued the trial court did not have personal jurisdiction over him under Rule 12(b)(2), because he did not live in North Carolina during any times referenced in the complaint, and had not taken any action to subject himself to the jurisdiction of the North Carolina courts. Defendant also asserted Plaintiff failed to allege Defendant had taken any action or made any contacts while either party was physically present in North Carolina.

Defendant's motion also alleged the trial court lacked subject matter jurisdiction under Rule 12(b)(1). He argued Plaintiff made no allegations regarding any actions by Defendant within North Carolina, or any injury she suffered while in North Carolina.

In support of his motion to dismiss, Defendant filed an affidavit and stated he was a resident of North Carolina from 1998 until August 2012. Plaintiff and Defendant both moved together to Pennsylvania in August 2012, where they resided together until November 2013, when they ended their relationship. Defendant's affidavit states he has not been a resident of North Carolina since August 2012, when he became a resident of Pennsylvania.

On 26 October 2015, the trial court denied Defendant's motion to dismiss, and concluded North Carolina's courts have personal and subject matter jurisdiction over the parties. Even if personal jurisdiction is lacking, the court concluded Defendant's motion to dismiss should be denied "to the extent that the plaintiff should be allowed to seek a prohibitory order serving to protect her from further acts of domestic violence but without any provisions requiring the defendant to undertake any actions." Defendant appeals.

II. Issues

Defendant argues the trial court erred by denying his motions to dismiss Plaintiff's complaint, where the trial court lacked personal and subject matter jurisdiction.

III. Notice of Appeal

[1] Neither party has raised an issue regarding Defendant's notice of appeal. Defendant's motion to dismiss was heard and orally ruled upon

on 15 September 2015. Thereafter, on 7 October 2015, Defendant filed notice of appeal. The trial court's written order was signed and filed on 26 October 2015, more than a month after Defendant had filed notice of appeal. Defendant did not file an amended notice of appeal. The trial court's order states, "Date Entered: 15 September 2015[,] Date Signed: 26 October 2015." Defendant filed notice of appeal subsequent to the date the order was orally rendered, but before the order was reduced to writing, filed, and entered.

Rule 3 of the North Carolina Rules of Appellate Procedure governs the notice of appeal in civil cases. The rule provides the appellant must file and serve 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," or "within thirty days after *service* upon the party of a copy of the judgment if service was not made within that three day period[.]" N.C. R. App. P. 3(c)(1) and (2) (2015) (emphasis supplied).

In civil cases, a judgment is "entered" when it is "reduced to writing, signed by the judge, and filed with the clerk of court." N.C. Gen. Stat. § 1A-1, Rule 58 (2015). " 'When [the trial court's] oral order is not reduced to writing, it is non-existent and thus cannot support an appeal.' " *Griffith v. N.C. Dep't of Corr.*, 210 N.C. App. 544, 549, 709 S.E.2d 412, 416-17 (2011) (quoting *Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001)). " 'The announcement of judgment in open court is the mere rendering of judgment, not the entry of judgment. The entry of judgment is the event which vests this Court with jurisdiction.' " *Id.* at 549, 709 S.E.2d at 417 (quoting *Worsham v. Richbourg's Sales & Rentals*, 124 N.C. App. 782, 784, 478 S.E.2d 649, 650 (1996)).

Here, the trial court's order was "entered" when it was reduced to writing, signed, and filed with the clerk of court on 26 October 2015. An entered order did not exist when Defendant filed notice of appeal on 7 October 2015. *See id.* Defendant did not file a subsequent or amended notice of appeal following entry of the order.

On 13 October 2015, the trial court entered the following order: "Defendant filed a Notice of Appeal on 10-7-2015 as to the Court overruling defendant's Motion to Dismiss on 9-15-2015 (oral rendering). Although the written order has not been signed, defendant's intention is clear and the parties agree to continue the case to 2-2-2016." Defendant has failed to take timely action to perfect his appeal pursuant to Appellate Rule 3, and his appeal is not properly before this Court. N.C. R. App. P. 3(c).

"The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a) (2015). Defendant has not filed a petition for writ of certiorari.

In the exercise of our discretion, we invoke Rule 2 to suspend the Rules of Appellate Procedure, treat Defendant's notice of appeal and brief as a petition for the issuance of a writ of certiorari to review the issues Defendant has raised in his brief, and issue the writ. N.C. R. App. P. 2; *see Newcomb v. Cnty. of Carteret*, 207 N.C. App. 527, 545, 701 S.E.2d 325, 338-39 (2010) (electing to treat the record and briefs as a petition for the issuance of a writ of certiorari where consideration of the issue on the merits would expedite the ultimate disposition of the case).

IV. Interlocutory Appeal

[2] Plaintiff instituted this purported action on 8 September 2015 by the filing of a complaint and motion for a Chapter 50B domestic violence protective order. Later that day, the district court entered an *ex parte* domestic violence protective order, effective until 15 September 2015. Defendant filed his motion to dismiss on 15 September 2015. On that date, the court denied Defendant's motion, but did not rule upon Plaintiff's complaint.

Defendant appeals from the trial court's interlocutory order, which denied his motion to dismiss Plaintiff's complaint for lack of personal and subject matter jurisdiction. Defendant argues on appeal the trial court lacked subject matter jurisdiction, because Plaintiff attempts to plead a claim for custody of the parties' child, and North Carolina is not the home state of the child. "Typically, the denial of a motion to dismiss is not immediately appealable to this Court because it is interlocutory in nature." *Reid v. Cole*, 187 N.C. App. 261, 263, 652 S.E.2d 718, 719 (2007).

Defendant acknowledges his appeal is interlocutory, but asserts the district court's order is immediately appealable to this Court pursuant to N.C. Gen. Stat. § 1-277(b). Defendant's statement is partially correct.

The appeal from the trial court's denial of Defendant's motion to dismiss for lack of personal jurisdiction is properly before us. N.C. Gen. Stat. § 1-277(b) (2015) ("Any interested party shall have the right of *immediate appeal* from an adverse ruling as to the jurisdiction of the court over the *person* or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause." (emphasis supplied)).

It is well-established N.C. Gen. Stat. § 1-277(b) allows for the immediate appeal of a denial of a Rule 12(b)(2) motion, but not for the immediate appeal of a denial of a Rule 12(b)(1) motion for lack of subject matter jurisdiction. *See*, *e.g.*, *Teachy v. Coble Dairies*, *Inc.*, 306 N.C. 324, 293 S.E.2d 182 (1982). Defendant's issue regarding subject matter jurisdiction is interlocutory and not immediately appealable. In light of our holding, we need not address any issue of subject matter jurisdiction.

V. Personal Jurisdiction

[3] Defendant argues the trial court erred by denying his motion to dismiss. Defendant asserts the record evidence does not provide the district court any basis to assert personal jurisdiction over him. We agree.

A. Standard of Review

> "When this Court reviews a decision as to personal jurisdiction, it considers only 'whether the findings of fact by the trial court are supported by competent evidence in the record;' . . . [w]e are not free to revisit questions of credibility or weight that have already been decided by the trial court." *Banc of Am. Secs. LLC v. Evergreen Int'l Aviation*, *Inc.*, 169 N.C. App. 690, 694- 95, 611 S.E.2d 179, 183 (2005)(quoting *Replacements*, *Ltd. v. MidweSterling*, 133 N.C. App. 139, 140-41, 515 S.E.2d 46, 48 (1999)). If the findings of fact are supported by competent evidence, we conduct a *de novo* review of the trial court's conclusions of law and determine whether, given the facts found by the trial court, the exercise of personal jurisdiction would violate defendant's due process rights. *Id.* at 141, 515 S.E.2d at 48 (stating that "it is this Court's task to review the record to determine whether it contains any evidence that would support the trial judge's conclusion that the North Carolina courts may exercise jurisdiction over defendants without violating defendants' due process rights").

Deer Corp. v. Carter, 177 N.C. App. 314, 321-22, 629 S.E.2d 159, 165 (2006).

B. Analysis

A two-prong analysis is employed to determine whether North Carolina courts may exercise personal jurisdiction over a non-resident defendant, consistent with constitutional due process. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process

clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Indus. Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986).

North Carolina's long-arm statute, N.C. Gen. Stat. § 1-75.4, provides for a court's assertion of personal jurisdiction. The statute provides, in pertinent:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to [Rule 4] of the Rules of Civil Procedure under any of the following circumstances:
>
> (1) Local Presence or Status. -- In any action, whether the claim arises within or without this State, in which a claim is asserted against a party who when service of process is made upon such party:
>
> a. Is a natural person present within this State; or
>
> b. Is a natural person domiciled within this State; or
>
> c. Is a domestic corporation; or
>
> d. Is engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise.

N.C. Gen. Stat. § 1-75.4(1) (2015). The statute also sets forth circumstances under which North Carolina courts may assert personal jurisdiction in actions claiming injury to person or property, or for wrongful death. N.C. Gen. Stat. § 1-75.4(3)-(4) (2015).

The degree of contacts required for North Carolina courts to exercise personal jurisdiction over an out of state individual defending a claim for a domestic violence protective order is an issue of first impression in our Court. The facts asserted in Plaintiff's complaint do not comply with any provision set forth in the long-arm statute to enable the trial court to invoke personal jurisdiction over Defendant. *Id.*

Chapter 50B contains no provision that requires the underlying act or acts of domestic violence to have occurred in this State. Courts in other jurisdictions have taken various approaches to this issue. The trial court's order cites and sets forth two different bases to find personal jurisdiction from other jurisdictions. The court found:

> 8. The plaintiff alleged in paragraph 4 of her complaint that the defendant threatened her life. When taken in

> conjunction with the plaintiff's statements on the Affidavit as to Status of Minor Child, it is reasonable to infer that the threat was received in North Carolina, as this was her first day of residence in this state. Further, counsel for the plaintiff forecast that the threat was made over the telephone after the plaintiff was physically in the State of North Carolina.

The court concluded it had acquired personal jurisdiction over Defendant and cited an opinion of the New Jersey Superior Court, Appellate Division, *A.R. v. M.R.*, 351 N.J. Super. 512, 520, 799 A.2d 27, 32 (2002) ("In light of the parties' historical and present connections to this state, the viciousness of the precipitating event, and the nature of the threats to exact revenge, the telephone calls were tantamount to defendant's physical pursuit of the victim here.").

In the alternative, the trial court concluded:

> 3. [E]ven if personal jurisdiction does not exist, the Motion to Dismiss should still be denied – at least to the extent that the plaintiff should be allowed to seek a prohibitory order serving to protect her from further acts of domestic violence but without any provisions requiring the defendant to undertake any actions. *See Spencer v. Spencer*, 191 S.W.3d 14, 19 (Ky. Ct. App. 2006) ("In our view, the distinction made by New Jersey's highest court between prohibitory and affirmative orders represents the fairest balance between protecting the due process rights of the nonresident defendant and the state's clearly-articulated interest in protecting the plaintiff and her children against domestic violence."); *accord Hemenway v. Hemenway*, 992 A.2d 575 (N.H. 2010); *Caplan v. Donovan*, 879 N.E.2d 117 (Mass. 2008); *Bartsch v. Bartsch*, 636 N.W.2d 3 (Iowa 2001).

1. Phone Call to North Carolina

As the first basis for its denial of Defendant's motion to dismiss, the court found personal jurisdiction exists as a result of a single phone call to Plaintiff, which her counsel represented to the court occurred while she was present within North Carolina. Plaintiff's complaint is wholly silent on the issue of her physical location when she received Defendant's alleged threat, or whether it was transmitted by telephone or otherwise.

The complaint states, "Sunday Sept. 6, 2015 he threatened my life because I was moving out of state with our son, we don't have a court

custody agreement." According to the Affidavit of Status as to Minor Child, Plaintiff began living in North Carolina on 6 September 2015, the day she received the threat. Plaintiff's complaint fails to allege whether she was present in Pennsylvania, North Carolina, or somewhere in between when she allegedly received Defendant's threat.

Plaintiff carries the prerequisite burden of proving *prima facie* that jurisdiction exists. *Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 616, 532 S.E.2d 215, 218 (citation omitted), *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 90 (2000). Plaintiff did not present any testimony or file an affidavit in response to Defendant's motion to dismiss.

The trial court found it is "reasonable to infer" Plaintiff was present in North Carolina when she received the threat, but Plaintiff submitted no evidence, direct or indirect, regarding her physical location on 6 September 2015, when she alleged Defendant threatened her. The only evidence before the court was Defendant's uncontroverted affidavit, which states:

> 5. On September 6, 2015, Ms. Manisse informed me that she was leaving Pennsylvania with our son, [C.H.]. Pursuant to the terms of our custody arrangement, Ms. Manisse is not allowed to leave the State of Pennsylvania with [C.H.]. Additionally, I have had regular custody of [C.H.] on a weekly basis pursuant to the terms of the custody agreement since my relationship with Ms. Mannise ended.
>
> 6. When I informed Ms. Manisse that the terms of the custody arrangement prohibited her from leaving Pennsylvania with [C.H.], she informed me that she would contact me again shortly. When Ms. Manisse contacted me via telephone later that day, she informed me that she was in West Virginia. I did not find out that Ms. Manisse had relocated to North Carolina until I was served with a copy of the Complaint in the above-captioned action by a local sheriff in Pennsylvania.

The record does not show the trial court conducted an evidentiary hearing. In determining it was "reasonable to infer" Plaintiff was in North Carolina, the trial court relied upon a "forecast" provided by Plaintiff's counsel, rather than the sworn and unchallenged affidavit that is part of Defendant's motion and the record evidence.

> If the exercise of personal jurisdiction is challenged by a defendant, *a trial court may hold an evidentiary hearing*

> *including oral testimony or depositions* or may decide the matter based on affidavits. If the court takes the latter option, the plaintiff has the initial burden of establishing *prima facie* that jurisdiction is proper. Of course, this procedure does not alleviate the plaintiff's ultimate burden of proving personal jurisdiction at an evidentiary hearing or at trial by a preponderance of the evidence.

Id. at 615, 532 S.E.2d at 217 (emphasis supplied) (internal citations omitted).

On the complaint and record before us, no evidence shows and it is purely speculative that Defendant had any contacts with Plaintiff while she was present in North Carolina. Defendant's unchallenged affidavit states no contacts occurred. Furthermore, while the trial court relies on the rationale of the New Jersey Superior Court case of *A.R.* to assert personal jurisdiction over Defendant, the record contains no findings of "the parties' historical and present connections to this state, the viciousness of the precipitating event, and the nature of the threats to exact revenge." *A.R.*, 315 N.J. Super. at 520, 799 A.2d at 32.

2. Entry of a Domestic Violence Protective Order Absent Personal Jurisdiction

[4] The trial court also found that "even if personal jurisdiction does not exist, the Motion to Dismiss should still be denied." The trial court cites cases in other jurisdictions, in which courts have issued domestic violence protective orders absent a finding of personal jurisdiction. These courts have drawn a distinction between "affirmative" and "prohibitive orders." The Kentucky Court of Appeals opinion in *Spencer*, cited by the trial court, follows the reasoning of the Superior Court of New Jersey in *Shah v. Shah*. *Spencer v. Spencer*, 191 S.W.3d 14, 18-19 (Ky. Ct. App. 2006). The Kentucky Court explains:

> In its opinion, the [Superior Court of New Jersey] drew a distinction between a prohibitory order that serves to protect the victim of domestic violence, and an affirmative order that requires that a defendant undertake an action.
>
> The former, which allows the entry of an order prohibiting acts of domestic violence against a defendant over whom no personal jurisdiction exists, is addressed not to the defendant but to the victim; it provides the victim the very protection the law specifically allows, and it prohibits the defendant from engaging in behavior already specifically

> outlawed. Because the issuance of a prohibitory order does not implicate any of defendant's substantive rights, the trial court had jurisdiction to enter a temporary restraining order to the extent it prohibited certain actions by defendant in New Jersey.
>
> An affirmative order, on the other hand, involves the court attempting to exercise its coercive power to compel action by a defendant over whom the court lacks personal jurisdiction.

Id. at 18-19 (citing *Shah v. Shah*, 184 N.J. 125, 875 A.2d 931 (2005)). We decline to adopt the rule or reasoning of the New Jersey and Kentucky courts.

The entry of a North Carolina domestic violence protective order involves both legal and non-legal collateral consequences. "[C]ollateral legal consequences may include consideration of the order by the trial court in any custody action involving Defendant." *Smith v. Smith*, 145 N.C. App. 434, 436, 549 S.E.2d 912, 914 (2001). Pursuant to N.C. Gen. Stat. § 50-13.2(a) (2015), the trial court must consider "acts of domestic violence" when determining the best interest of the child in a custody proceeding. Furthermore, " 'a person applying for a job, a professional license, a government position, admission to an academic institution, or the like, may be asked about whether he or she has been the subject of a [domestic violence protective order].' " *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (quoting *Piper v. Layman*, 125 Md. App. 745, 753, 726 A.2d 887, 891 (Md. Ct. Spec. App. 1999)).

A domestic violence protective order may also place restrictions on where a defendant may or may not be located, or what personal property a defendant may possess or use. The entry of a domestic violence protective order must be consistent and compatible with North Carolina's long-arm statute, and also comport with constitutional due process. *Tom Togs*, 318 N.C. at 364, 348 S.E.2d at 785.

Here, the trial court restricted Defendant from any place where Plaintiff works, the child's daycare or school, and "any place where the plaintiff and/or the child is/are located." Because the issuance of a domestic violence protective order implicates substantial rights of Defendant, including visitation with and the care, custody, and control of his minor son, or access to the schools he is attending, Plaintiff is required to prove personal jurisdiction over Defendant. To hold otherwise would violate Due Process and "offend traditional notions of fair

play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 102 (1945).

VI. Conclusion

Plaintiff failed to plead or prove and the trial court failed to find any contacts exist to establish or exercise personal jurisdiction over this out of state Defendant. The order of the trial court is reversed.

REVERSED.

Judges BRYANT and INMAN concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, Plaintiff
v.
MISSION BATTLEGROUND PARK, DST; MISSION BATTLEGROUND PARK LEASECO, LLC, Lessee; LASALLE BANK NATIONAL ASSOCIATION, as Trustee for the Register Holders of CD 2006-CD3 Commercial Mortgage Pass-Through Certificates; LAT BATTLEGROUND PARK, LLC, Defendants

No. COA16-125

Filed 6 September 2016

1. Eminent Domain—motion to exclude expert testimony

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err by ruling upon NCDOT's motion to exclude expert testimony without conducting a voir dire.

2. Eminent Domain—exclusion of sound and noise demonstration

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err by excluding a sound and noise demonstration prepared by defendants' acoustical expert.

3. Eminent Domain—juror misconduct

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err when it did not hold an evidentiary hearing on the issue of juror misconduct and when it denied defendants' motion for a new trial.

4. Eminent Domain—special jury instruction

In a trial to determine just compensation for land condemned by the North Carolina Department of Transportation (NCDOT), the trial court did not err by giving the jury a special instruction. Defendants failed to show that the instruction was likely to mislead the jury or was prejudicial error.

Appeal by defendants from judgment entered 30 July 2015 and orders entered 24 September 2015 by Judge Richard S. Gottlieb in Guilford County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Hilda Burnett-Baker and Assistant Attorney General Phyllis A. Turner, for the North Carolina Department of Transportation.

Smith Moore Leatherwood LLP, by Patrick M. Kane, Bruce P. Ashley and Matthew Nis Leerberg, for defendant-appellants.

TYSON, Judge.

Defendants appeal from judgment entered upon a jury's verdict returned on just compensation. We find no error.

I. Background

Landmark at Battleground Park ("Landmark") is a 240-unit apartment complex located on Drawbridge Parkway in Greensboro, North Carolina. The named Defendants are the current owner, former owner, mortgage holder, and lessee of Landmark.

On 11 March 2013, the North Carolina Department of Transportation ("NCDOT") condemned a 2.193 acres portion of Landmark's property for construction of a portion of "the Greensboro Urban Loop." The elevated highway was constructed near and on an angle relative to the front entrance of the property.

Landmark is owned by Defendant LAT Battleground Park, LLC ("LAT Battleground"). LAT Battleground purchased the property from Defendant, Mission Battleground Park DST, for $14,780,000.00, with knowledge of and during the pendency of the condemnation.

Prior to the highway construction, the apartment complex was described as "tucked away" from the road and situated "in the woods" on 32.76 acres. A heavily wooded tree buffer existed adjacent to the road. Landmark's secluded location was asserted to provide a market

advantage for prospective tenants. The outdoor amenities, including pools, volleyball and tennis courts, and wooded areas are "main selling points" for potential residents. Drawbridge Parkway was a low traffic volume, two-lane roadway with a posted thirty mile-per-hour speed limit prior to the construction. Drawbridge Parkway was relocated on two lanes closer to the complex on property taken as part of this condemnation.

The highway construction eliminated the wooded buffer in front of the property, part of which was located on the Drawbridge Parkway's right-of-way. The elevated six-lane highway runs at an angle in front of the property, thirty-five to forty feet above the ground. Evidence presented showed a portion of the highway was constructed over LAT Battleground's property.

The highway plans include construction of a 15-foot noise wall, rising from the highway to fifty to fifty-five feet in front of Landmark. The construction plans also include another thirty-five foot noise wall on Drawbridge Parkway, directly across the street from Landmark.

The parties did not agree upon the amount of damages and compensation owed to Landmark for the property taken. NCDOT deposited $276,000.00 with the Guilford County Clerk of Superior Court as its estimate of just compensation. Landmark claimed NCDOT's estimate was grossly inadequate, and asserted just compensation for the appropriation and damages ranged between $3,100,000.00 and $3,700,000.00.

NCDOT filed a complaint in Guilford County Superior Court to obtain a determination of just compensation due. The cause was tried before a jury on 29 June 2015. Defendants' evidence tended to show damages of $3,169,175.00 incurred from the construction of the highway project across a portion of the property.

NCDOT presented two expert witnesses. One expert witness testified Defendants' damages were $276,000.00, the amount of the deposit with the clerk of court. NCDOT's other expert witness testified Defendants' damages were $1,271,850.00. The jury returned a verdict, and determined $350,000.00 was just compensation for damages arising from the taking of the property. LAT Battleground appeals.

II. Issues

LAT Battleground argues the trial court erred by: (1) excluding James Collins' expert opinion testimony on fair market value; (2) excluding a sound and noise demonstration by LAT Battleground's acoustical expert, Dr. Noral Stewart; (3) declining to hold a hearing on the issue of juror misconduct and denying LAT Battleground's motion for a new trial

based upon juror misconduct; and (4) giving a special jury instruction requested by NCDOT.

III. Evidentiary Rulings

A. Standard of Review

The trial courts are afforded "wide latitude of discretion when making a determination about the admissibility of expert testimony." *State v. Bullard*, 312 N.C. 129, 140, 322 S.E.2d 370, 376 (1984). The standard of review for a trial court's evidentiary ruling is abuse of discretion. *Marley v. Graper*, 135 N.C. App. 423, 425, 521 S.E.2d 129, 132 (1999). "To demonstrate an abuse of discretion, the appellant must show that the trial court's ruling was manifestly unsupported by reason, or could not be the product of a reasoned decision." *Wachovia Bank v. Clean River Corp.*, 178 N.C. App. 528, 531, 631 S.E.2d 879, 882 (2006) (citation and emphasis omitted).

B. Opinion Testimony and Report of James Collins

1. Preservation of Error

[1] NCDOT argues LAT Battleground did not preserve the trial court's ruling on the admissibility of Mr. Collins' testimony and evidence for appellate review, because NCDOT did not call Mr. Collins as a witness at trial. We disagree.

Pursuant to Rule 103 of the Rules of Civil Procedure:

> (a) Effect of erroneous ruling. -- Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> . . . .
>
> (2) Offer of proof. -- In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

N.C. Gen. Stat. § 8C-1, Rule 103(a)(2) (2015).

LAT Battleground made an offer of proof of the substance of Mr. Collins' testimony, which appears in the record. This issue was preserved under the plain language of Rule 103, and is properly before us.

See GE Betz, Inc. v. Conrad, 231 N.C. App. 214, 232, 752 S.E.2d 634, 648 (2013) ("A motion *in limine* is typically insufficient to preserve for appeal the admissibility of evidence; however, a party may preserve the exclusion of evidence for appellate review by making a specific offer of proof."). This argument is overruled.

2. Requirement of *Voir Dire*

LAT Battleground argues the trial court erred by ruling upon NCDOT's motion to exclude Mr. Collins' opinion and evidence without conducting a *voir dire*. It asserts the absence of a *voir dire* deprived the court of the opportunity to understand the nature and scope of Mr. Colllins' testimony before deciding to exclude it.

LAT Battleground cites no binding precedent which requires the trial court to conduct a formal *voir dire* hearing prior to ruling on a motion *in limine*. LAT Battleground cites *Floyd v. Allen*, 2008 N.C. App. LEXIS 2000, *20-21, 2008 WL 4779737, *7 (N.C. Ct. App. Nov. 8, 2008), an unpublished opinion of our Court, in which the Court held it was error to exclude expert testimony when the trial court ruled on the motion within fifteen minutes, and without considering the expert's deposition or other evidence of his anticipated testimony.

Here, the record shows the trial court heard arguments of counsel and considered Mr. Collins' 124-page report, which included his credentials, research, methodology, and opinion. The trial court took the matter under advisement during the overnight recess, far different than the facts present in *Floyd*. The information presented to and considered by the trial court was sufficient to allow the court to properly rule upon NCDOT's motion *in limine* without holding a formal *voir dire*. This argument is overruled.

3. Trial Court's Ruling on N.C. Gen. Stat. § 93A-83

N.C. Gen. Stat. § 93A-83, a provision of the regulatory Real Estate License Law, provides a licensed real estate broker in good standing "may prepare a broker price opinion or comparative market analysis and charge and collect a fee for the opinion," if the list of requirements in subsection (c) of the statute are met. N.C. Gen. Stat. § 93A-83(a) (2015). The terms "broker price opinion" and "comparative market analysis" are statutorily defined as

> an estimate prepared by a licensed real estate broker that details the probable selling price or leasing price of a particular parcel of or interest in property and provides a varying level of detail about the property's condition,

> market, and neighborhood, and information on comparable properties, but does not include an automated valuation model.

N.C. Gen. Stat. § 93A-82 (2015).

The statute also prohibits a licensed broker from preparing an appraisal. The statute states:

> Notwithstanding any provisions to the contrary, a person licensed pursuant to this Chapter may not knowingly prepare a broker price opinion or comparative market analysis for any purpose in lieu of an appraisal when an appraisal is required by federal or State law. A broker price opinion or comparative market analysis *that estimates the value of or worth a parcel of or interest in real estate rather than sales or leasing price shall be deemed to be an appraisal and may not be prepared by a licensed broker* under the authority of this Article, but may only be prepared by a duly licensed or certified appraiser, and shall meet the regulations adopted by the North Carolina Appraisal Board. *A broker price opinion or comparative market analysis shall not under any circumstances be referred to as a valuation or appraisal.*

N.C. Gen. Stat. § 93A-83(f) (2015) (emphases supplied).

The statute sets forth eleven enumerated "required contents" of a broker price opinion or comparative market analysis. N.C. Gen. Stat. § 93A-83(c) (2015). Included in these requirements is a disclaimer, which states as follows:

> "This opinion is not an appraisal of the market value of the property, and may not be used in lieu of an appraisal. If an appraisal is desired, the services of a licensed or certified appraiser shall be obtained. This opinion may not be used by any party as the primary basis to determine the value of a parcel of or interest in real property for a mortgage loan origination, including first and second mortgages, refinances, or equity lines of credit."

N.C. Gen. Stat. § 93A-83(c)(10) (2015).

LAT Battleground retained Mr. Collins, a licensed real estate broker and certified property manager ("CPM"), to provide an independent analysis of a "broker price opinion or comparative market analysis"

of Landmark before and after the taking. N.C. Gen. Stat. § 93A-83(a). Mr. Collins opined the fair price for Landmark before the taking was $15,338,000.00, and a fair price after the taking of $11,603,733.00, a difference of $3,734,276.00. Mr. Collins explained his opinion and market analysis in a 124-page report.

On the morning of trial, NCDOT moved to exclude the testimony and report prepared by Mr. Collins under the provisions of N.C. Gen. Stat. § 93A-83. NCDOT argued Collins' report failed to meet the statutory requirements for a broker price opinion or comparative market analysis, violated the restrictions imposed by the statute regarding a broker price opinion or comparative market analysis, and violated Rule of Evidence 702.

The trial court determined Mr. Collins' report violated N.C. Gen. Stat. § 93A-83(f), because it "purports to offer a fair market analysis before and after the taking that was determined on history bases." The court further stated the report "repeatedly refers to a fair market valuation and such references may not be offered at trial." The court allowed Mr. Collins' testimony before the jury, but limited him to offering an opinion on sales and leasing prices for the property.

LAT Battleground chose not to call Mr. Collins as a witness. LAT Battleground presented the testimony of Michael Clapp, a certified appraiser. Mr. Clapp testified the fair market value of the property before the taking was $13,944,250.00, and the fair market value after the taking was $10,775,075.00, a difference of $3,169,175.00.

NCDOT's certified appraiser, Rod Meers, testified the fair market value of Landmark before the taking was $14,835,100.00, and the fair market value after the taking was $14,559,050.00, for a difference of $276,050.00. Another certified appraiser, J. Thomas Taylor, testified for NCDOT that the fair market value of Landmark before the taking was $14,743,975.00, and the fair market value after the taking was $13,472,125.00, for a difference of $1,271,850.00. The jury did not adopt the exact value opinions of any of the appraisers in determining its verdict of just compensation.

Mr. Collins' report repeatedly states it is an opinion of the "fair market value" of the property, before and after the taking, rather than the "probable selling price," which would be permitted under the statute. Under the plain language of the statute, Mr. Collins, a licensed real estate broker, who is not also a licensed appraiser, is not permitted to prepare "a valuation appraisal." N.C. Gen. Stat. § 93A-83(f). The trial

court properly held Mr. Collins was bound by the restriction set forth in the statute in limiting his testimony. This assertion of error is overruled.

C. Exclusion of the Sound Demonstration

[2] LAT Battleground argues the trial court abused its discretion by excluding a sound and noise demonstration prepared by Dr. Noral Stewart. We disagree.

Dr. Stewart was tendered and accepted as an expert witness in the areas of acoustics, noise control, and environmental noise. LAT Battleground sought to introduce into evidence a sound demonstration as part of Dr. Stewart's testimony to show the purported increase in the noise levels in the apartment complex before and after the taking and construction.

The test for determining whether a demonstration is admissible "is whether, if relevant, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues or misleading the jury, under Rule 403 of the Rules of Evidence." *State v. Witherspoon*, 199 N.C. App. 141, 149, 681 S.E.2d 348, 353 (2009) (citation omitted). The sounds Dr. Stewart used for the demonstration was "pink noise," which is a broadband sound, rather than highway noise. Dr. Stewart opined that the noise levels in Landmark would be up to four times louder as a result of the taking, and was attempting to show various decibel levels of sound through this demonstration.

Defendants informed the trial court that their experts had relied upon estimates of increased noise in determining their values, but had not heard Dr. Stewart's sound demonstrations. The court performed a Rule 403 balancing test, and determined: (1) Defendant's valuation experts did not consider the sound demonstrations in formulating their opinions of value; (2) the demonstration was of a sound that was not similar to highway noise; (3) the noise generated was based on an average, inflated by ten percent; and, (4) a potential tenant or resident "would not hear an average," and excluded the demonstration.

Based upon these considerations, LAT Battleground has failed to show the trial court abused its discretion in excluding Dr. Stewart's sound demonstration. This argument is overruled.

IV. Juror Misconduct

[3] LAT Battleground argues the trial court erred by failing to hold an evidentiary hearing on the issue of juror misconduct and by denying their motion for a new trial. We disagree.

After the jury's verdict was announced, counsel for LAT Battleground spoke with Jurors Number Five and Six. Both jurors disclosed to counsel that "extraneous" information was before the jury during deliberations. Juror Number Six told the jury that through his work as a civil engineer, he knew that NCDOT was spending millions of dollars constructing "noise walls" at Landmark. Evidence of the planned construction of noise walls was in evidence and before the jury, but an estimated cost of the noise barrier walls had not been introduced at trial.

The trial concluded on 7 July 2015. The trial court's judgment was entered on 30 July 2015. On 10 August 2015, LAT Battleground filed a motion for a new trial under Rule 59(a)(2), based upon juror misconduct. On 2 September 2015, LAT Battleground filed a request for an evidentiary hearing on the issue of juror misconduct.

A. Standard of Review

"[A] motion for a new trial is addressed to the sound judicial discretion of the trial judge and is not reviewable in the absence of an abuse of discretion." *Smith v. Price*, 315 N.C. 523, 533, 340 S.E.2d 408, 414 (1986) (citation omitted).

B. Analysis

Rule 606(b) of the Rules of Evidence provides:

> Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, *except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention* or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

N.C. Gen. Stat. § 8C-1, Rule 606(b) (2015) (emphasis supplied).

Extraneous information is defined as

> Information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced into evidence. It does not include

> information which a juror has gained in his experience which does not deal with the defendant or the case being tried.

State v. Rosier, 322 N.C. 826, 832, 370 S.E.2d 359, 363 (1988). "When there is substantial reason to fear that the jury has become aware of improper and prejudicial matters, the trial court must question the jury as to whether such exposure has occurred and, if so, whether the exposure was prejudicial." *State v. Black*, 328 N.C. 191, 196, 400 S.E.2d 398, 401 (1991).

In ruling on LAT Battleground's motion for a new trial, the court relied solely on the affidavit of Patrick Kane, Esq., the attorney for LAT Battleground who spoke with Jurors Number Five and Six after the trial. Mr. Kane's affidavit states that he spoke with the two jurors, and learned that the jury had heard from Juror Number Six that the cost of the noise barrier walls was "millions of dollars." Juror Number Six told Mr. Kane that his work involves designing roadways, and he has extensive experience in condemnation of properties for roadway construction, and had consulted on projects involving NCDOT in the past.

The trial court found that the statement made by Juror Number Six that the sound walls "cost millions of dollars" was general, vague, and related to a tangential matter. The court determined that the juror's statement was not "extraneous information," and declined to conduct an evidentiary hearing. The court noted LAT Battleground learned of Juror Number Six's statement to the jury on the same day as the verdict, but failed to take any steps to address the issue for over a month.

Our courts have distinguished between "external" influences on jurors, which may be used to attack a verdict, and "internal" influences on a verdict. *See State v. Quesinberry*, 325 N.C. 125, 133-35, 381 S.E.2d 681, 687 (1989), *cert. granted and judgment vacated in light of McKoy*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990), *death sentence vacated and remanded for new sentencing*, 328 N.C. 288, 401 S.E.2d 632 (1991) (holding juror consideration of the possibility of the defendant's parole was an "internal influence," "general information," and a "belief" or "impression," and did not constitute grounds to award a new trial).

Jurors do not leave their general opinions, knowledge, and life experiences at the door of the courthouse. Evidence was presented to show construction of noise barrier walls in front of Landmark was planned and included as part of the highway project. Evidence was also presented to show the size, scale, length, and heights of the noise barrier walls. The trial court could fairly conclude most jurors would generally

understand that substantial costs are incurred in erecting the immense concrete highway noise barrier walls.

Juror Number Six's statement constituted tangential and non-specific "general information." LAT Battleground did not show a "substantial reason to fear that the jury ha[d] become aware of improper and prejudicial matters" during deliberations, to rise to an abuse of discretion to deny an evidentiary hearing. *Black*, 328 N.C. at 196, 400 S.E.2d at 401. The statement of Juror Number Six during deliberations was not prejudicial "extraneous information" to warrant a new trial under Rule 606(b). This argument is overruled.

V. Special Jury Instruction

[4] LAT Battleground argues the trial court erred by giving the jury an inapplicable special instruction. We disagree.

A. Standard of Review

This Court reviews a jury instruction to determine if an error occurred and, if so, whether "such error was likely, in light of the entire charge, to mislead the jury." *Boykin v. Kim*, 174 N.C. App. 278, 286, 620 S.E.2d 707, 713 (2005) (citation omitted).

B. Analysis

Defendants introduced an animation and testimony to show the wetland area owned by the City of Greensboro across the street from Landmark was a "feature" that added value to their property. The land across the street was not owned by Defendants, belonged to the City of Greensboro, and was not part of the condemnation at issue. The City's property consisted of undeveloped woodlands and wetland. LAT Battleground argues the law requires "that view from the property be considered in the 'after' valuation."

LAT Battleground asserts reversible error from the following jury instruction:

> Fair market value should not include the diminution in value of the remainder of the property caused by the acquisition and use of the adjoining lands of others for the same undertaking.

NCDOT acquired only a portion of LAT Battleground's tract of property. Our Supreme Court has explained:

> If only a portion of a single tract is taken, the owner's compensation for that taken includes any element of value

> arising out of the relation of the part taken to the entire tract. *United States v. Miller*, 317 U.S. 369, 87 L. Ed. 336, 63 S. Ct. 276. "The rule supported by better reason and the weight of authority is that the just compensation assured by the 5th Amendment to an owner a part of whose land is taken for public use, does not include the diminution in value of the remainder, caused by the acquisition and use of adjoining lands of others for the same undertaking." *Campbell v. United States*, 266 U.S. 368, 69 L. Ed. 328, 45 S. Ct. 115.

Carolina Power & Light Co. v. Creasman, 262 N.C. 390, 401, 137 S.E.2d 497, 505 (1964). The Court further stated:

> No additional compensation may be awarded to him by reason of proper public use of other lands located in proximity to but not part of the lands taken from the particular owner. The theory behind this denial of recovery is undoubtedly that such owner may not be considered as suffering legal damage over and above that suffered by his neighbors whose lands were not taken.

Id. at 402-03, 137 S.E.2d at 506.

LAT Battleground relies heavily on this Court's decision in *Bd. of Transp. v. Brown*, 34 N.C. App. 266, 237 S.E.2d 854 (1977), *aff'd per curiam*, 296 N.C. 250, 249 S.E.2d 803 (1978). In *Brown*, an eight-acre portion of the landowners' 52.2 acre tract was taken for construction of a "controlled access highway facility." *Id.* at 267, 249 S.E.2d at 855. The trial court excluded all evidence of the effect of traffic noise from the highway on the landowners' remaining property, and instructed the jury not to consider such effect. *Id.*

This Court held the exclusion of the effect of noise on the remaining property was error, and stated:

> Noise or any other element of damages to the remaining lands is compensable only if it is demonstrably resultant from the use of the particular lands taken. "If only a portion of a single tract is taken the owner's compensation for that taking includes *any element of value arising out of the relation of the part taken to the entire tract.*" (Emphasis added) *United States v. Miller*, 317 U.S. 369, 376, 63 S.Ct. 276, 281, 87 L.Ed. 336, 344 (1943).

Id. at 269, 249 S.E.2d at 856 (added emphasis in original). This language in *Brown* pertains to circumstances in which the physical taking is of

a portion of a parcel, and the remaining portion of property not taken is damaged thereby, also referred to as damage to the "remainder." *Id.* Here, LAT Battleground argues its residual or remaining property not physically taken was damaged by actions of NCDOT on the City of Greensboro's property across the street.

LAT Battleground argues the trial court's instruction was error, because the destruction of the "view" from Landmark of the City of Greensboro's wetlands across the street should be included in just compensation. LAT Battleground conceded at oral argument that Landmark would not be entitled to just compensation if the City of Greensboro had damaged the "view" from Landmark by removing all of the trees on the wetlands across the street, by building a concrete wall there, or making other affirmative use of the City's property. As noted above, the undeveloped 2.193 acres portion taken from Landmark's 32.76 acres parcel was primarily used to relocate the existing two lane Drawbridge Parkway closer to the improved portions of Landmark's remaining parcel. A portion of the removed wooded buffer apparently was also located on the existing right of way for Drawbridge Parkway, and not on Landmark's property.

The special jury instruction provided was a clear and correct statement of law. LAT Battleground has failed to show the instruction was likely to either mislead the jury or was prejudicial error. This argument is overruled.

VI. Conclusion

The trial court did not abuse its discretion in limiting Mr. Collins' testimony and evidence of "fair market value" of the property before and after the taking due to the restrictions set forth in N.C. Gen. Stat. § 93A-83. LAT Battleground has failed to show the trial court abused its discretion by excluding the sound demonstration prepared by Dr. Stewart, LAT Battleground's acoustical expert.

The trial court did not err in denying LAT Battleground's motion for a new trial based upon juror misconduct. LAT Battleground has failed to show the trial court's jury instruction, that other owners' properties taken did not impact LAT Battleground's property, included a misstatement of law or was likely to mislead the jury. We also reject LAT Battleground's final contention that "cumulative errors" warrant a new trial.

NO ERROR.

Judges BRYANT and INMAN concur.

SANCHEZ v. COBBLESTONE HOMEOWNERS ASS'N OF CLAYTON, INC.

[249 N.C. App. 346 (2016)]

TATITA M. SANCHEZ, PLAINTIFF
v.
COBBLESTONE HOMEOWNERS ASSOCIATION OF CLAYTON, INC.,
A NORTH CAROLINA NON-PROFIT CORPORATION, DEFENDANT

No. COA15-1281

Filed 6 September 2016

1. Associations—homeowners' association—return of assessments—no contract implied in fact

The trial court did not err in concluding that no contract implied in fact had been created between plaintiff and defendant homeowners' association. Plaintiff was entitled to a return of assessments paid in the amount of $4,000.00.

2. Associations—homeowners' association—assessments—estoppel

The trial court did not err by failing to conclude that plaintiff was estopped from denying the obligation to pay assessments. The only potential benefit accepted by plaintiff and found as fact by the trial court was that plaintiff rarely, if ever, used the tennis courts or swimming pool.

Judge DILLON dissenting.

Appeal by Defendant from order entered 13 May 2015 by Judge O. Henry Willis, Jr. in District Court, Johnston County. Heard in the Court of Appeals 23 May 2016.

No brief for Plaintiff-Appellee.

Jordan Price Wall Gray Jones & Carlton, by J. Matthew Waters and Hope Derby Carmichael, for Defendant-Appellant.

McGEE, Chief Judge.

This appeal is a companion case to four other related cases involving substantially the same facts, COA15-1280, COA15-1282, COA15-1302, and COA15-1303. The plaintiffs in all these cases own homes in a community known as the Cobblestone Subdivision ("the subdivision"). Cobblestone Homeowners Association of Clayton, Inc., a homeowners association ("Defendant Association"), was created in order to maintain certain subdivision common areas and to handle the financial requirements of said

management. The common areas relevant to this appeal were a pool and tennis courts, which were regulated and maintained by Defendant Association, and which were, pursuant to Defendant Association's covenants, allegedly open to all residents of the subdivision who paid the regular homeowners association fees or dues ("the dues").

Tatita Sanchez ("Plaintiff") owned a home ("the property") in the subdivision, and was regularly paying dues Defendant Association assessed until she received a letter on or about 30 July 2014 from the then counsel for Defendant Association. In that letter, Defendant Association informed Plaintiff that, as a result of an earlier mistake, Plaintiff and certain other homeowners[1] in the subdivision were not members of Defendant Association. The letter further informed Plaintiff and similarly situated homeowners that, if they wanted to continue enjoying the pool, tennis courts and other benefits and responsibilities of membership in Defendant Association, they would have to execute a "Supplemental Declaration" to bring themselves and their properties within Defendant Association's authority, and continue to pay the dues.

Plaintiff decided not to join Defendant Association, and requested return of the dues she had been erroneously charged over the years. Defendant Association refused to reimburse Plaintiff for dues already paid, so Plaintiff filed a complaint in small claims court on 31 October 2014, seeking reimbursement. The magistrate in small claims court ruled in favor of Plaintiff by judgment entered 1 December 2014, and Defendant Association appealed to district court. Plaintiff's action was heard on 20 April 2015, and the trial court again ruled in favor of Plaintiff by order entered 13 May 2015. Defendant Association appeals.

I. Standard of Review

This matter was decided by the trial court sitting without a jury.

> "[W]hen 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 its conclusions of law were proper in light of such facts."
>
> . . . . The trial court's conclusions of law, by contrast, are reviewable *de novo*.

Lake Toxaway Cmty. Ass'n, Inc. v. RYF Enters., Inc., 226 N.C. App. 483, 487, 742 S.E.2d 555, 559 (2013) (citations omitted). Because Defendant

1. Including Plaintiffs in the companion cases.

Association does not contest any of the trial court's findings of fact in this matter, they are binding on appeal. *Id.* at 489, 742 S.E.2d at 560. Our review is therefore limited to determining whether the trial court's findings of fact support its conclusions of law. *Id.* at 487, 742 S.E.2d at 559. Our review is further limited to those arguments Defendant Association brings forth on appeal. "Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned." N.C. R. App. P. App. R. 28(b)(6) (2016).

II. Analysis

On appeal, Defendant Association contends that "the trial court erred as a matter of law in concluding that [Plaintiff] was entitled to a return of assessments paid in the amount of $4,000.00." We disagree.

Defendant Association's contention is based upon two specific arguments: (1) "The trial court erred in concluding that no contract existed between [Plaintiff] and [Defendant Association] given the facts established an implied in fact contract existed between the parties[,]" and (2) "the trial court erred in failing to conclude that [Plaintiff] was estopped from denying the obligation to pay assessments to [Defendant Association.]" We limit our review to these two specific arguments, and address each argument in turn.

A. *Contract Implied in Fact*

[1] Defendant Association first argues "the trial court erred in concluding that no contract existed between [Plaintiff] and [Defendant Association] given the facts established an implied in fact contract existed between the parties." We disagree.

Though somewhat couched in terms of "unjust enrichment," the argument made by Defendant Association is actually restricted to the presence or absence of a contract implied in fact that would have bound Plaintiff to pay the dues. Defendant Association put its argument to this Court in the following manner:

> Where the facts establish that [Plaintiff] received benefits from [Defendant Association], and [Plaintiff] had clear knowledge of such benefits and services being provided by [Defendant Association], an implied in fact contract exists between [Plaintiff] and [Defendant Association]. If the evidence demonstrates that [Plaintiff] consciously accepted the benefits and services provided by [Defendant Association], the trial court cannot conclude that [Plaintiff]

> unjustly enriched [Defendant Association] by paying [the dues]. (Citation omitted).[2]

At trial Defendant Association argued, *inter alia*, that, because there existed a contract implied in fact between the parties, the trial court could not base any remedy upon the theory of unjust enrichment. Unjust enrichment may be found when there exists a contract implied in *law*, and recovery based upon unjust enrichment is improper when an actual contract – such as a contract implied in *fact* – exists.[3]

> *Quantum meruit* is a measure of recovery for the reasonable value of services rendered in order to prevent unjust enrichment. It operates as an equitable remedy based upon a quasi contract or a contract implied in law. "A quasi contract or a contract implied in law is not a contract." An implied [in law] contract is not based on an actual agreement, and *quantum meruit* is not an appropriate remedy when there is an actual agreement between the parties. Only in the absence of an express agreement of the parties will courts impose a quasi contract or a contract implied in law in order to prevent an unjust enrichment.

Whitfield v. Gilchrist, 348 N.C. 39, 42, 497 S.E.2d 412, 414–15 (1998) (citations omitted). In fact, the mere existence of a contract implied in law would make any consideration of the equitable remedy of unjust enrichment improper. *Booe v. Shadrick*, 322 N.C. 567, 570, 369 S.E.2d 554, 556 (1988) (citation omitted) ("If there is a contract between the parties the contract governs the claim and the law will not imply a contract [in law].").[4]

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2. The dissenting opinion references a quote found in the "Standard of Review" section of Defendant Association's argument: "'The findings of fact in this matter simply do not support the trial court's conclusion of law that [Plaintiff's] payment of assessments to [Defendant Association] unjustly enriched [Defendant Association].'" Though Defendant Association does make this statement in its brief, it does not cite any law laying out the elements of unjust enrichment in its brief, and does not make any direct argument that Plaintiff failed to satisfy her burden of presenting evidence in support of all the required elements. This is because Defendant Association's argument does not depend on whether the elements of unjust enrichment were established.

3. "Although the terms of an implied in fact contract may not be expressed in words, or at least not fully in words, the legal effect of an implied in fact contract is the same as that of an express contract in that it too is considered a 'real' contract or genuine agreement between the parties." *Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 36, 604 S.E.2d 327, 333 (2004).

4. In *Lake Toxaway*, discussed in detail below, this Court held that an implied in fact contract existed which obligated the defendant to pay property maintenance fees. This

Our review of this argument is entirely limited to whether or not a contract implied in fact existed between Plaintiff and Defendant Association. If such a contract existed, Plaintiff was thereby obligated to pay the dues, and the trial court's order should be reversed. If no such contract existed, the trial court should be affirmed because Defendant Association makes no further argument on appeal.[5]

This Court has stated:

> [A] contract implied in fact . . . arises where the intention of the parties is not expressed, but an agreement in fact, creating an obligation is implied or presumed from their acts[.] With regard to contracts implied in fact, . . . one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.

Lake Toxaway, 226 N.C. App. at 488, 742 S.E.2d at 560 (citation omitted). Defendant Association contends that the actions of Plaintiff and Defendant Association created a contract implied in fact for the payment of the dues in exchange for the benefits of membership in Defendant Association.

The trial court made the following relevant findings of fact and conclusions of law:

> 3. At or about the time that [P]laintiff acquired the property, [P]laintiff was informed and believed that said property was subject to said covenants and that the property was a part of and subject to the rules of [D]efendant [Association].
>
> 4. In accordance with the rules and covenants, Plaintiff paid periodic dues . . . to [D]efendant [Association] from at

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Court further held that absent payment of those fees, the defendant would be unjustly enriched. Having held that a contract existed between the parties, the additional holding related to unjust enrichment was legally incorrect unless viewed as an alternative holding should its finding that a contract implied in fact existed be overturned. *See Ellis Jones, Inc. v. W. Waterproofing Co.*, 66 N.C. App. 641, 646–47, 312 S.E.2d 215, 218–19 (1984). We view these holdings as alternative holdings. Further, in *Miles*, also discussed in detail below, though the plaintiffs argued that there was "insufficient evidence of unjust enrichment for the court to grant a directed verdict in favor of [the] defendant under the theory of an implied contract[,]" this Court determined that the implied contract was one of fact, not law, and therefore damages were based upon breach of that contract, not unjust enrichment. *Miles*, 167 N.C. App. at 34, 37, 604 S.E.2d at 332, 34.

5. Excepting Defendant Association's argument concerning estoppel, which we consider below.

> or about the time Plaintiff was notified of said [dues] until approximately July 30, 2014.
>
> 5. By letter from the attorney for the Defendant [Association] dated July 30, 2014, [P]laintiff was notified that the property was not and had never been subject to the covenants. The requirement that the aforesaid periodic [dues] be paid was a condition of the covenants.
>
> 6. Plaintiff rarely, if ever, used the tennis courts or swimming pool, which were the main two amenities offered by [D]efendant [Association].
>
> 7. Plaintiff, without legal obligation has paid to [D]efendant [Association] periodic [dues] payments in the total sum of $4,000.00.
>
> 8. Plaintiff was not aware of nor had any reasonable way of knowing that there was no legal obligation to pay periodic dues . . . until [P]laintiff received the letter referred to in paragraph 5 above.
>
> 9. Defendant [Association] had no legal right to require or receive payments from [P]laintiff.[6]
>
> CONCLUSIONS OF LAW
>
> . . . .
>
> 3. No contract or other legal obligation existed between the parties as would require Plaintiff to pay periodic dues . . . to Defendant [Association].
>
> 4. Plaintiff's payments to defendant resulted in [D]efendant [Association] being unjustly enriched in the total amount of the payments made.

As Defendant Association does not challenge the findings of fact, nor argue that the trial court should have made additional findings of fact, we restrict out analysis to whether those findings support the

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6. The findings of fact include no reference to Plaintiff attending a homeowner's meeting, being provided with a key to the pool, nor that she called Defendant Association on occasion concerning homeowner's issues. In its brief, Defendant Association did improperly attempt to argue that Plaintiff contacted Defendant Association regarding a homeowner's issue. We restrict our review to those facts actually found as fact in the trial court's order.

trial court's conclusion that no contract existed between Plaintiff and Defendant Association requiring payment of the dues. *Lake Toxaway*, 226 N.C. App. at 489, 742 S.E.2d at 560. The findings establish the following: (1) Plaintiff was informed that the property was subject to covenants requiring her to pay periodic dues; (2) Plaintiff was in fact not obligated to pay the dues, and did not have any reason to know she was not legally obligated to pay the dues until informed pursuant to the 30 July 2014 letter from Defendant Association; (3) based upon Defendant Association's erroneous assertions and requests, Plaintiff paid $4,000.00 to Defendant Association as "dues;" and (4) Plaintiff "rarely, if ever, used the tennis courts or swimming pool, which were the main two amenities offered by [D]efendant [Association]."

Defendant Association argues that this Court's opinions in *Lake Toxaway* and *Miles* require that we find a contract implied in fact existed between Plaintiff and Defendant Association. In *Lake Toxaway*, developer Lake Toxaway Company ("LTC") developed certain real property ("the development") which included a man-made lake ("the lake") and individual building lots. *Lake Toxaway*, 226 N.C. App. at 485-86, 742 S.E.2d at 558. In 2000, the defendant purchased a lot ("the lot"), located within the development. *Id.* at 485, 742 S.E.2d at 558. Access to the lake was granted by deed to certain property owners within the development, but LTC contended that lake privileges were not specifically granted appurtenant to the lot. *Id.* at 486, 742 S.E.2d at 558. The plaintiff was the property owners association for the development. *Id.* The plaintiff and LTC entered into an agreement in December 2003 whereby the plaintiff became responsible for maintaining certain common areas within the development, including the lake and the rights-of-way for the private roads that provided access to the individual parcels of property in the development, including the lot. *Id.* The plaintiff delivered an invoice to the defendant in 2008, demanding the defendant pay an amount representing its *pro-rata* share of the costs of maintaining the roads and the lake for the 2008-09 fiscal year. *Id.* The defendant refused to pay, and the plaintiff initiated an action to determine the rights and obligations of the parties. *Id.* The trial court ruled that a contract implied in fact had been created by the actions of the plaintiff and the defendant. *Id.* at 487, 742 S.E.2d at 559.

Upon review of the trial court's ruling, this Court noted: "It is uncontested that plaintiff's upkeep, repair, and maintenance of the dam, Lake Toxaway, roads, and common areas have conferred a measurable benefit on defendant." *Lake Toxaway*, 226 N.C. App. at 491, 742 S.E.2d at 561. This Court then held:

> Since August 1965, when [the lot] was first deeded by LTC, subsequent owners of the [lot,] including defendant, have used [the lake] continuously for boating and other recreational purposes. *See Snyder*, 300 N.C. at 218, 266 S.E.2d at 602 (stating that "[a]cceptance by conduct is a valid acceptance"). [The d]efendant has also used the private roads, containing multiple points of access, within [the development]. [The d]efendant benefits from having the availability of well-maintained and secured private roads to and from the [lot] and for travel within [the development], in addition to a well-maintained and secure [lake] and dam.
>
> We agree with the trial court that:
>
> > [w]ith knowledge of the services provided by the [p]laintiff in maintaining and managing the operations and care of the private roads, roadsides, and [the lake], [the d]efendant agreed by its conduct . . . in using or claiming the right to use the private roads and lake so maintained and managed by the [p]laintiff to pay for the maintenance, repair and upkeep of the roads, roadsides, and lake.
>
> Because the uncontested findings of fact support the trial court's conclusion that implicit in [the] defendant's acceptance of the benefits of using the roads and the lake, was an agreement to pay for the upkeep, maintenance and repair of the roads and lake. Therefore, based on the record before us, we hold that a contract implied in fact existed between the parties.

Id. at 489-90, 742 S.E.2d at 560-61 (citation omitted). The ruling in *Lake Toxaway* was thus based upon the "defendant's *acceptance* of the benefits of *using* the roads and the lake," and other amenities, *Id.* at 490, 742 S.E.2d at 561 (emphasis added), not upon the mere existence of those benefits.

In *Miles*, the covenants of the defendant homeowner's association, Carolina Forest Association ("CFA"), of a subdivision ("Carolina Forest") required all real property owners in Carolina Forest to pay association fees for the purposes of maintenance and upkeep of common roads and recreation areas. *Miles*, 167 N.C. App. at 29, 604 S.E.2d at 329. The covenants included a clause whereby the covenants would

expire on 1 January 1990. CFA believed that the covenants could be extended if the owners of two-thirds of Carolina Forest lots agreed in writing to do so. *Id.* at 29-30, 604 S.E.2d at 329. The owners of just over two-thirds of Carolina Forest lots did agree to extend the covenants, and all the plaintiff lot owners continued to pay the maintenance fees until at least 1997. *Id.* at 30, 604 S.E.2d at 329. In 1998, the plaintiffs filed an action requesting the trial court rule that they were not obligated to pay the maintenance fees based upon an argument that the 1990 "amendment" to the covenants did not bind them. *Id.* at 31, 604 S.E.2d at 329-30. The trial court ultimately determined there existed a contract implied in fact based upon the benefits the plaintiffs' had received. *Id.* at 31, 604 S.E.2d at 330. This Court held:

> Plaintiffs were assessed specific fees for benefits to their unimproved properties. These benefits protected both the access to and the value of their properties, by way of maintaining private roads, recreational facilities, a pool, a guard station, and an administrative office. The record shows that plaintiffs were on clear notice that these benefits were being incurred: Approximately half of them actually voted for the amendments to declaration No. 10 as recorded in 1990, which included consent to pay the assessment fees for the exact benefits at issue in this case. All of the plaintiffs had paid some or all of the fees and assessments up until 1997 and 1998, and were incurring the benefit from the improvements funded by such payments. This conduct is consistent with the existence of a contract implied in fact, and plaintiffs' attempt to stop payment on these known benefits, without more, is tantamount to breach of that contract.

Id. at 37, 604 S.E.2d at 333-34. Unlike in the present case, the plaintiffs in Miles continued to pay the contested fees *after* they were aware of the events which brought the validity of those fees into question.[7] This act of continued payment strongly suggested that the plaintiffs recognized they were receiving a benefit in return for those payments, even if they disputed that the extension of the covenants applied to them. In the present case, Plaintiff immediately ceased paying the association fees

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7. In *Miles*, the plaintiffs continued to pay association fees after 1 January 1990, the expiration date of the covenants absent amendment. If the plaintiffs believed the amendment to the covenants did not obligate them to pay association fees after 1 January 1990, they could have contested their obligations at that time.

once Defendant Association informed her that she was under no legal obligation to continue doing so.

Further, in both *Lake Toxaway* and *Miles*, the trial court ruled that the property owners directly benefitted by the actions of the relevant homeowners associations in maintaining roadways and other common areas. As an obvious example, the property owners in those two cases could not access their properties in any meaningful manner absent the roadways maintained through association fees.[8] For this reason, in both cases this Court held that the trial court had not erred in finding the existence of a contract implied in fact. However, in the present case, the trial court ruled that Plaintiff "rarely, if ever" used the "main amenities" maintained by the association dues collected by Defendant Association.[9] The trial court did not find as fact that Plaintiff benefitted in any other manner from services rendered by Defendant Association. On these facts, we hold that the trial court did not err in concluding that no contract implied in fact had been created between Plaintiff and Defendant Association.

We further note that if a contract had existed between Plaintiff and Defendant Association, Defendant Association would also have been bound by that contract. However, by its 30 July 2014 letter to Plaintiff, Defendant Association, through counsel, informed Plaintiff that the property was "not subject to [Defendant Association's] declaration[.]" Defendant Association informed Plaintiff that, in order to become a member of Defendant Association and be allowed access to the pool or tennis courts, Plaintiff would be required to execute a " 'Supplemental Declaration' . . . where [Plaintiff] agree[d] to be subject to the terms and provisions of [Defendant Association.]" Had there been an enforceable implied in fact contract between Plaintiff and Defendant Association, Defendant Association would not have been able to deny Plaintiff the amenities provided by [Defendant Association] regardless of whether Plaintiff executed any "supplemental declaration." Defendant Association's argument seems to be that there was no contract enforceable by Plaintiff, but that there was a contract enforceable by Defendant Association.

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8. There is no evidence, nor finding of fact, that the dues in the present case went toward maintenance of the subdivision roads or any other common area necessary for Plaintiff to enjoy the property.

9. We note that in companion appeal COA15-1282 the trial court found that Plaintiff Frank Christopher and his family "never used" the pool and tennis courts, and that he was not benefitted by Defendant Association.

This Court is not called upon to make an independent determination of whether Defendant Association was unjustly enriched; we are called upon to determine whether Defendant Association's arguments on appeal have merit. It is not the job of this Court to "create an appeal for" Defendant Association. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

Defendant Association bases its argument on cases in which this Court found, by the actions of the parties involved, the mutual agreement necessary to form a contract implied in fact. Specifically, this Court in *Lake Toxaway* found that "the plaintiffs received benefits to their properties and the plaintiffs were on clear notice that these benefits were being incurred[.]" *Lake Toxaway*, 226 N.C. App. at 490, 742 S.E.2d at 560. " 'Whether mutual assent is established and whether a contract was intended between parties *are questions for the trier of fact.*' " *Lake Toxaway*, 226 N.C. App. at 488, 742 S.E.2d at 560 (emphasis added) (citing *Miles*, 167 N.C. App. at 37, 604 S.E.2d at 333–34). The only "benefit" found by the trial court in the present case was that Plaintiff "rarely, if ever, used the tennis courts or swimming pool[.]"[10] We can only conclude that the trial court determined that this "benefit" was insufficient to establish mutual assent between Plaintiff and Defendant Association, and thus no contract between the parties was intended. This was the trial court's determination to make. *Id.* Defendant Association, by its own actions upon discovering Plaintiff's property was not subject to its covenants, indicated that *it* did not believe any contract existed. Had a contract existed, Defendant Association could not have denied Plaintiff access to any of its benefits, so long as Plaintiff continued to pay dues, regardless of whether Plaintiff executed the "supplemental declaration" to bring her and her property within Defendant Association's authority. However, Defendant Association made continued availability of access to its benefits contingent upon Plaintiff executing the "supplemental declaration."

In addition, we are not persuaded by the dissenting opinion's analogy of the facts before us to membership in a health club. When someone joins a health club, that person *executes a contract* requiring fees be paid in return for access to certain facilities. In the present case, we are called upon to *determine whether any such contract existed* between

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10. The dissenting opinion points to evidence indicating that Plaintiff used the pool "on occasion." However, our job is not to find facts based upon the evidence presented at trial, it is to apply the law to the facts found by the trial court based upon that evidence. We note that in four of the five companion cases, including the present case, the trial court used identical language: "Plaintiff rarely, if ever, used the tennis courts or swimming pool[.]" In the fifth companion case, COA15-1282 *Christopher*, the trial court found as fact that Plaintiff Christopher never used these amenities.

Plaintiff and Defendant Association. It is uncontested that those homeowners who *were* contractually obligated to pay dues to Defendant Association were so obligated whether or not they took advantage of any of Defendant Association's benefits.

Assuming *arguendo* some of the trial court's findings are in fact conclusions, as the dissenting opinion contends, we do not see how our analysis would change. Importantly, whether a finding or a conclusion, it is the duty of Defendant Association, as the appellant, and not the duty of this Court, to challenge findings and conclusions, and make corresponding arguments on appeal. It is not the job of this Court to "create an appeal for" Defendant Association. *Viar v. N.C. Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005). Defendant Association does *not* argue that the trial court erred in either finding *or* concluding that "Plaintiff was not aware of nor had any reasonable way of knowing that there was no legal obligation to pay periodic dues or association fees until [P]laintiff received the letter" dated 30 July 2014.[11] Defendant Association does not argue that Plaintiff was charged with notice as a matter of law through her chain of title that she was not required to pay the dues. Defendant Association makes no mention of, much less argument concerning, the chain of title to Plaintiff's property. Any such arguments have therefore been abandoned. "It is not the duty of this Court to supplement an appellant's brief with legal authority or arguments not contained therein. Th[ese] [arguments are] deemed abandoned by virtue of N.C. R. App. P. 28(b)(6) (2005)." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358 (2005). We are not called upon to determine the equities involved in this case, we are called upon to render a legal opinion on the issue of whether there existed between Plaintiff and Defendant Association a contract implied in fact that obligated Plaintiff to pay the dues.

The dissenting opinion would hold that *access* to benefits alone is sufficient to meet the requirements set forth in *Lake Toxaway* and *Miles*, irrespective of whether those available benefits were actually enjoyed. We believe the law requires something more.

B. *Estoppel*

[2] In Defendant Association's second argument, it contends the trial court erred in "failing to conclude that [Plaintiff] was estopped from denying the obligation to pay assessments[.]" We disagree.

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11. We note that this is not a conclusion by the trial court concerning Plaintiff's legal obligation to pay, it is a finding related to Plaintiff's understanding of what her obligations were.

Defendant Association cites to this Court's opinion in *Reidy v. Whitehart Ass'n*, 185 N.C. App. 76, 648 S.E.2d 265 (2007), for the proposition that Plaintiff should be equitably estopped from denying

> the validity of [Defendant Association], at least until July 2014. [Plaintiff] accepted membership within [Defendant Association] at the closing of the purchase of her home and paid her first assessments then. . . . .[12] [Plaintiff] at all times had the right to enter and use the pool and tennis courts, and used the pool on one occasion. [Plaintiff] paid quarterly assessments as she believed she was required to do under the covenants and as a member of [Defendant Association], without objection.

As this Court stated in *Reidy*: " 'Under a quasi-estoppel 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.' " *Reidy*, 185 N.C. App. at 80, 648 S.E.2d at 268-69 (citation omitted). The only potential benefit "accepted" by Plaintiff and found as fact by the trial court was that "Plaintiff rarely, if ever, used the tennis courts or swimming pool[.]" We hold the trial court did not err in failing to find Plaintiff was estopped from accepting the validity of "Defendant Association" or the validity of any "obligation to pay assessments to [Defendant Association.]"

AFFIRMED.

Judge HUNTER, JR. concurs.

Judge DILLON dissents with separate opinion.

DILLON, Judge, dissenting.

I do not believe that the trial court's findings support its conclusion that the HOA was unjustly enriched by its receipt of dues from Homeowner from 2002-2014. Rather, as the HOA argues, the findings support a conclusion that the parties had a contract, implied-in-fact, whereby the parties agreed – as evidenced by their conduct – that the

12. Defendant Association argues certain alleged facts that are not included in the findings of fact for the 13 May 2015 order. Our review is limited to the facts as found by the trial court in its order. *Lake Toxaway*, 226 N.C. App. at 489, 742 S.E.2d at 560.

HOA would allow Homeowner access to amenities/benefits in return for the dues paid by Homeowner. *See Revels v. Miss Am. Org.*, 182 N.C. App. 334, 337, 641 S.E.2d 721, 724 (2007) ("With regard to contracts implied in fact, . . . one looks not to some express agreement, but to the actions of the parties showing an implied offer and acceptance.").

As shown by the uncontradicted evidence in the record, the trial court essentially found that (1) Plaintiff ("Homeowner") purchased her home in 2002 believing she would be part of the Defendant homeowners' association (the "HOA"), allowing her access to the HOA amenities in exchange for her payment of dues;[1] (2) Homeowner paid the HOA dues for a number of years; (3) the HOA provided Homeowner access to amenities;[2] (4) in 2014, the HOA sent Homeowner a letter which informed Homeowner that the HOA had learned that Homeowner's home was not included as part of the recorded HOA declarations, but that the HOA was willing to execute the necessary paperwork for filing to include her home in the declarations.[3]

I do not agree with the majority that the trial court's finding that Homeowner "rarely, if ever" used the HOA amenities has any bearing: The implied-in-fact contract was that Homeowner was paying for *access* to the HOA amenities; *the actual number of times* Homeowner took advantage of her right of access is not relevant.[4] The trial court essentially found that Homeowner was provided this benefit of access, stating that the HOA provided a swimming pool and tennis courts. *See Miles v. Carolina Forest Ass'n*, 167 N.C. App. 28, 37, 604 S.E.2d 327, 333-34 (2004) (holding that an implied-in-fact contract existed where plaintiffs, who were lot owners in a subdivision, received benefits to their properties and that plaintiffs were on notice that these benefits were being

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1. This finding is supported by Homeowner's admission that she believed she would be part of the HOA when she bought her home; that the appraisal ordered by her lender states that the home she was buying included the right to access HOA amenities (swimming pool and tennis courts); and that the HOA accounting reflects dues she paid to the HOA as part of her 2002 closing.

2. This finding is supported by Homeowner's admission that the HOA provided her with a key to the HOA pool; that she used it on occasion (though not often); and that she attended at least one HOA meeting.

3. The letter identified in the trial court's finding is part of the record.

4. The trial court's "rarely, if ever," phrase is imprecise. The record, however, is uncontradicted. Homeowner admitted that the HOA provided her with a key to the pool; that she did use the pool on a few occasions; that she did call the HOA on occasions about HOA issues; and that she attended at least one HOA meeting.

incurred).[5] The effect of the presence of an implied-in-fact contract, here, is similar to an express contract to join a health club: The dues are earned by the club whether the member uses the facilities thirty times each month, or never. Accordingly, I respectfully dissent.

While I agree with the majority that the HOA is bound by the trial court's *findings*, I note that many of the statements designated as "findings" are actually mislabeled conclusions of law. For instance, the trial court's statement that the HOA "had no legal right to require or receive payments from [Homeowner]" is clearly a legal conclusion.

Also, the trial court's statement that "[Homeowner] … had [no] reasonable way of knowing that there was no *legal obligation*" to pay assessments is a conclusion of law. Whether Homeowner had a legal obligation to pay dues is a question of law. And the statement that Homeowner had no reasonable way of knowing that her home was not part of the HOA declaration is incorrect *as a matter of law*. Specifically, our Supreme Court has long recognized the bedrock principle that, as a matter of law, "a purchaser [of real estate] is charged with notice of the contents of each recorded instrument constituting a link in [her] chain of title and is put on notice of any fact or circumstance affecting [her] title which any such instrument would reasonably disclose." *Randle v. Grady*, 224 N.C. 651, 656, 32 S.E.2d 20, 22 (1944). *See also Hughes v. N.C. State Highway*, 275 N.C. 121, 130, 165 S.E.2d 321, 327 (1969); *Turner v. Glenn*, 220 N.C. 620, 625, 18 S.E.2d 197, 201 (1942); *Holmes v. Holmes*, 86 N.C. 205, 209 (1882); *Harborgate Prop. Owners. Ass'n v. Mt. Lake Shore*, 145 N.C. App. 290, 293-94, 551 S.E.2d 207, 210 (2001).[6]

Finally, I note that the HOA states in its brief that "[t]he findings of fact in this matter simply do not support the trial court's conclusion of law that [Homeowner's] payment of assessments to [the HOA] unjustly enriched [the HOA]." Assuming that this statement is sufficient to preserve our consideration beyond the HOA's arguments concerning an implied-in-fact contract and estoppel, I note that the Supreme Court has held that an unjust enrichment occurs where a party to a contract

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5. I note that the HOA also argues "estoppel." I agree that *alternatively* Homeowner is estopped from claiming a refund of her dues. The findings showed that she acted as if she were a member of the HOA and had access to the HOA amenities.

6. Any suggestion that the HOA has failed to challenge the mislabeled conclusions of law would be overly technical. Though the HOA may not have referred to the trial court's mislabeled conclusions *expressly*, the HOA's main argument is that the Homeowner *did* have a legal obligation to pay dues, based on a contract, implied-in-fact, in return for the years of access she had to the HOA amenities.

which is technically unenforceable "expends money as contemplated by the contract, and the other party to the contract consciously receives or accepts the benefits thereof and then fails or refuses to perform his part of the special contract[.]" *Wells v. Foreman*, 236 N.C. 351, 354, 72 S.E.2d 765, 767 (1952). Here, Homeowner did expend money. The trial court's findings, however, also reveal that the HOA did not fail or refuse to perform its part of the agreement, but in fact recognized Homeowner as a member of the HOA and provided her with full access to its amenities. Therefore, based on *Wells*, the HOA has *not* been unjustly enriched.

KEITH SAUNDERS, Plaintiff
v.
ADP TOTALSOURCE FI XI, INC., Employer, and LIBERTY MUTUAL/HELMSMAN MANAGEMENT SERVICES, Carrier Defendants

No. COA15-1390

Filed 6 September 2016

Jurisdiction—subject matter—superior court reviewing Industrial Commission—reweighing facts—attorney fees

The superior court, under its limited appellate review, lacked jurisdiction under N.C.G.S. § 90-97(c) to reweigh the Industrial Commission's factual determinations or to award attorney fees from attendant care medical compensation to be paid to a third party medical provider. The order of the superior court purporting to order attorney fees to be paid from medical compensation awarded by the Commission was vacated.

Appeals by plaintiff and defendants from order entered 4 September 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 7 June 2016.

The Sumwalt Law Firm, by Mark T. Sumwalt, Vernon Sumwalt and Lauren H. Walker; and Grimes Teich Anderson, LLP, by Henry E. Teich for plaintiff.

Hedrick Gardner Kincheloe & Garofalo, LLP, by M. Duane Jones, Paul C. Lawrence and Kari L. Schultz, for defendants.

TYSON, Judge.

The superior court's order awarded Plaintiff's attorneys a 25% contingent attorney's fee, payable from retroactive third party attendant care medical compensation awarded by the Industrial Commission. The Industrial Commission had denied a deduction of attorney's fees from the medical compensation award. We vacate the superior court's order for lack of subject matter jurisdiction, and remand.

I. Background

Plaintiff sustained two compensable injuries to his lower back on 6 March 2010 and 7 July 2010. He underwent back surgery in October 2010, but his condition failed to improve. Plaintiff developed left foot drop and reflex sympathetic dystrophy, or complex regional pain syndrome. Defendants did not dispute the payment of disability benefits and have compensated Plaintiff.

Plaintiff retained Henry E. Teich, Esq. to represent him before the Industrial Commission, and on 3 November 2010 he entered into a contingency fee agreement ("the fee agreement") with Mr. Teich. The fee agreement provided Mr. Teich's law firm a contingency fee of "25% of any recovery as Ordered by the North Carolina Industrial Commission." Plaintiff's claim or condition presented no issues of attendant care medical compensation or home modification when the fee agreement was executed.

Plaintiff's condition continued to decline. He and Mr. Teich subsequently amended the fee agreement to provide for a contingency attorney's fee of 25% of any award for ongoing temporary total disability benefits. By order of the Industrial Commission filed 23 April 2012, Mr. Teich began receiving additional compensation of 25% of Plaintiff's temporary total disability compensation, every fourth weekly check, in accordance with the amended fee agreement.

Plaintiff's physical condition further deteriorated to the point where his treating physician concluded he was unable to perform activities of daily living or otherwise live independently. Plaintiff's medical providers prescribed attendant care medical services for him. Defendants received notice of Plaintiff's request for attendant care services in January 2012. A month later, Defendants agreed to provide the recommended attendant care to Plaintiff for a three-month period upon the condition that Defendants be permitted to take the pre-hearing depositions of two of Plaintiff's providers without an order by the Commission. Plaintiff's partner, Glenn Holappa, who is not medically certified or trained, assumed the role as Plaintiff's primary attendant caregiver. Defendants discontinued payment for attendant care medical services after the initial three-month period because Plaintiff failed to allow the promised depositions,

and because Plaintiff's physician had ordered attendant care subject to a re-evaluation of Plaintiff's condition after three months.

With the knowledge and approval of Plaintiff and Mr. Holappa, and to assist Mr. Teich, Mark T. Sumwalt, Esq. and his law firm were associated to litigate Defendants' discontinuance of attendant care services to Plaintiff. Attorneys Teich and Sumwalt extensively litigated issues pertaining to attendant care medical compensation, home modifications, equipment needs, prescription medications, psychological treatment, and other medical services before the Industrial Commission.

On 23 December 2013, the Deputy Commissioner issued an Opinion and Award, which awarded retroactive attendant care medical compensation for the time period from 8 May 2012 to 23 December 2013, payable to Plaintiff or Mr. Holappa. The Deputy Commissioner also approved an attorney's fee of 25% of the award of the retroactive attendant care medical services provided. Defendants appealed to the Full Commission.

On 23 February 2015, the Full Commission issued an Opinion and Award, which awarded retroactive medical care compensation to Mr. Holappa, for six hours per day, seven days per week, at a rate of $10.00 per hour from 8 May 2012 until the date of the award. The Full Commission awarded ongoing attendant care medical compensation provided through a home healthcare agency for eight hours per day, seven days per week, until further order of the Commission. The Commission also awarded Plaintiff for his "out of pocket expenses for prescription medications prescribed for treatment of his depression and anxiety" and ordered "Defendants shall pay for all treatment related to Plaintiff's psychological condition with a provider or providers to be agreed upon by the parties."

Plaintiff's counsel did not seek an attorney fee for this additional medical care, treatments, and compensation the Commission awarded. The Commission further determined there is no evidence before the Commission of a fee agreement between Plaintiff's counsel and any of Plaintiff's medical providers, including Mr. Holappa.

The Commission concluded, "to the extent plaintiff's counsel's fee agreement with plaintiff, and specifically the phrase 'any recovery,' could be interpreted to include medical compensation, it is unreasonable under the facts of this case." The Commission ordered no additional attorney's fee for Plaintiff's counsel to be paid from the past attendant care or other medical compensation Defendants were ordered to pay to Mr. Holappa, but ordered Plaintiff's attorney would continue to receive every fourth check from Plaintiff's disability award as a result of their efforts.

After the Industrial Commission declined to award further fees to Attorneys Teich and Sumwalt for medical compensation, Plaintiff and Mr. Holappa indicated to the attorneys their intention to pay them 25% of the medical compensation recovered, without involving the Commission or the courts. Mr. Teich and Mr. Sumwalt acknowledged and informed them it would be unlawful for an attorney to accept the voluntary or further payment of attorney's fees without approval by the Industrial Commission. *See* N.C. Gen. Stat. § 97-90(b) (2015).

On 9 March 2015, Plaintiff purported to appeal the Industrial Commission's decision to the Buncombe County Superior Court by petition for judicial review pursuant to N.C. Gen. Stat. § 97-90(c). Defendants moved to intervene in the superior court proceeding, which was granted. The superior court reversed the decision of the Industrial Commission, and awarded attorney's fees to be paid from the medical compensation award for retroactive attendant care. The court ordered 25% of the amount ordered by the Commission for attendant care medical care compensation to be paid directly to Plaintiff's counsel. Both parties appeal from the superior court's order.

II. Issues

Defendants argue the superior court did not have subject matter jurisdiction under N.C. Gen. Stat. § 97-90 to review the Commission's denial of attorney's fees from medical compensation. In the alternative, and presuming N.C. Gen. Stat. § 97-90(c) would permit the superior court's review under these facts, Defendants argue the superior court erred by engaging in fact finding, exceeding the proper standard of review, and reversing the Full Commission's decision to deny attorney's fees arising out of payment of medical compensation.

Plaintiff argues: (1) the superior court erred by granting Defendants' motion to intervene; and, (2) this Court is without subject matter jurisdiction to hear Defendants' appeal without standing.

III. Defendants' Standing to Appeal

Plaintiff argues Defendants' appeal should be dismissed, because Defendants do not have standing before this Court to challenge the superior court's order. We disagree.

A. Standard of Review

"Subject matter jurisdiction is conferred upon the courts by either the North Carolina Constitution or by statute." *Harris v. Pembaur*, 84 N.C. App. 666, 667, 353 S.E.2d 673, 675 (1987). "Whether a trial court has

subject-matter jurisdiction is a question of law, reviewed de novo [sic] on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511, 689 S.E.2d 590, 592 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008) (citation and internal quotation marks omitted). Plaintiff's cross appeal also provides this Court with jurisdiction to review the superior court's order and the existence of any jurisdiction for the superior court to enter it. This Court may also raise and review issues of jurisdiction *sua sponte*. *Xiong v. Marks*, 193 N.C. App. 644, 652, 668 S.E.2d 594, 599 (2008).

B. Defendant's Assertion of Right to Direct Medical Treatment as a Basis for Standing

The Workers' Compensation Act provides that an appeal from an opinion and award of the Industrial Commission is subject to the same terms and conditions as which govern appeals from the superior court to the Court of Appeals in ordinary civil actions.

> Under N.C. Gen. Stat. 1-271 . . . , [a]ny party aggrieved is entitled to appeal in a civil action. A party aggrieved is one whose legal rights have been denied or directly and injuriously affected by the action of the trial tribunal. If the party seeking appeal is not an aggrieved party, the party lacks standing to challenge the lower tribunal's action and any attempted appeal must be dismissed.

Adcox v. Clarkson Bros. Constr. Co., 236 N.C. App. 248, 252, 773 S.E.2d 511, 515 (2014) (citation and internal quotation marks omitted).

Standing consists of three main elements:

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

Estate of Apple v. Commercial Courier Express, Inc., 168 N.C. App. 175, 177, 607 S.E.2d 14, 16 (2005) (quoting *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 114, 574 S.E.2d 48, 52 (2002)). "The issue of standing generally turns on whether a party has suffered injury in fact." *Id.* Further, "[i]t is not necessary that a party demonstrate that injury has already occurred, but a showing of 'immediate

or threatened injury' will suffice for purposes of standing." *Mangum v. Raleigh Bd. of Adjustment*, 362 N.C. 640, 642-43, 669 S.E.2d 279, 282 (2008) (quoting *River Birch Assocs. v. City of Raleigh*, 326 N.C. 100, 129, 388 S.E.2d 538, 555 (1990)).

Defendants argue they have standing to appeal, both as parties before the Industrial Commission and as admitted intervenors in the superior court action. They assert the deduction of Plaintiff's attorney's fee from the award of medical compensation infringes upon Defendants' right to direct medical treatment for its injured employee. We agree.

The employer is statutorily required to provide "medical compensation" as statutory benefits to an injured employee "as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability[.]" N.C. Gen. Stat. § 97-2(19) (2015); *see also* N.C. Gen. Stat. § 97-25 (2015).

The Workers' Compensation Act and case law presume the injured worker will heal, recover from the injuries, for which he is receiving medical care, and return to work. *See Effingham v. Kroger Co.*, 149 N.C. App. 105, 114-15, 561 S.E.2d 287, 294 (2002) ("Temporary disability benefits are for a limited period of time. There is a presumption that [the employee] will eventually recover and return to work. Therefore, the employee must make reasonable efforts to go back to work or obtain other employment." (internal citations and quotation marks omitted)).

N.C. Gen. Stat. § 97-2(19) specifically defines "medical compensation" to include "attendant care services prescribed by a health care provider authorized by the employer[.]" Both parties also stipulated during oral arguments that payment for attendant care services to any provider constitutes medical compensation. *Id.*

"[A]n employer's right to direct medical treatment (including the right to select the treating physician) attaches once the employer accepts the claim as compensable." *Kanipe v. Lane Upholstery*, 141 N.C. App. 620, 623-24, 540 S.E.2d 785, 788 (2000). Under N.C. Gen. Stat. § 97-25, "the employer has the right to direct the medical treatment for a compensable injury. This includes the right to select the treating physician." *Kanipe*, 141 N.C. App. at 624, 540 S.E.2d at 788. The employer has the statutory duty to provide reasonable, complete, and quality medical compensation arising in a compensable claim to an injured employee. *Id.*

Having both the duty and right to direct medical care and treatment provided to their injured employee, Defendants have a continuing

interest in the pool of resources available for medical care and benefits for their employees' injuries and assuring the medical providers do not reduce care and are fully compensated for services they render to an injured employee. Defendants have shown their "legal rights have been denied or directly and injuriously affected" by the superior court's purported *de novo* award of attorney's fees from funds stipulated as medical compensation, and have standing to challenge that order before this Court. *Adcox*, 236 N.C. App. at 252, 773 S.E.2d at 514-15; *see also Palmer v. Jackson* (*Palmer I*), 157 N.C. App. 635, 579 S.E.2d 908 (2003).

C. Alternative Basis for Defendants' Standing

Even if Defendants' right to direct medical treatment would not provide them with standing to appeal to this Court, Defendants in this case have also demonstrated by their argument before the Commission, wherein they disputed the nature and amount of attendant care compensation to which Plaintiff is entitled, shared issues of fact and law in common with their argument before the trial court opposing the award of attorney's fees for that attendant care.

Defendants argued before the Commission that Plaintiff's seeking an award for attendant care provided by a family member, including an award of attorney's fees from that compensation, infringed upon his employer's right to direct his medical treatment. Defendants disputed the amount of past attendant care medical compensation to which Plaintiff is entitled and argued that a family member providing attendant care – as opposed to a third-party provider – may have a pre-existing obligation to provide care and is not subject to the same accountability as a third-party provider, who is required to document the hours and nature of care as well as the employee's ongoing condition.

The Commission apparently agreed with Defendants' argument and found that for a period ending with the date of the award, it was reasonable and necessary for Plaintiff to receive assistance from Mr. Holappa for six hours a day, as opposed to the eight hours a day requested for the reasons "that Mr. Holappa is frequently out of the home and that some of what he does in the home are tasks which he would otherwise do as a member of the household . . . ."

The Commission further found that going forward from the date of the award, it was reasonable and necessary for Plaintiff to receive assistance from a third-party attendant care agency for the following reasons:

> Care from a home health care agency as opposed to a family member is preferable and medically necessary because

> it is provided under the direction of a registered nurse and clinical director, who will ensure that the patient's medical needs are being met and who can make recommendations for a greater level of care, i.e., CNA, if that is medically necessary. Moreover, when care is provided by a home health care agency, they are required to generate reports which show how the patient is doing and what service they are providing. These types of records in turn would permit plaintiff's doctors to make informed recommendations regarding plaintiff's ongoing care.

In awarding Plaintiff compensation for ongoing attendant care provided by a third-party provider only, the Commission protected the employer's interest in directing the employee's medical care. This case, in which the employer had initially agreed to provide attendant care and withdrew ongoing compensation because of disputed issues of fact regarding the selection of attendant care provider and the nature and amount of care needed, involves factual and legal issues in common between medical compensation for attendant care and attorney's fees ordered by the superior court to be paid from that compensation.

IV. Intervention

Plaintiff has cross-appealed, and argues the superior court erred by allowing Defendants to intervene in the superior court action. "A party who cross assigns error in the grant or denial of a motion under the Rules of Civil Procedure is a party aggrieved." N.C. Gen. Stat. § 1-271 (2015). Plaintiffs argue Defendants did not have a right to intervene in the superior court action. Defendants counter-argue Plaintiff did not have a right to seek review or a *de novo* ruling from the superior court under these facts.

A trial court's order allowing intervention as a matter of right is reviewed *de novo*, whereas permissive intervention is reviewed under an abuse of discretion standard. *See Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 460, 515 S.E.2d 675, 683 (1999); *Harvey Fertilizer & Gas Co. v. Pitt Cnty.*, 153 N.C. App. 81, 86, 568 S.E.2d 923, 926 (2002). Defendants argued before the superior court that they met the criteria for both permissive intervention and intervention as of right, and the superior court's order is unclear upon which grounds of intervention it allowed Defendants' motion. Under either standard, the superior court properly allowed Defendant to intervene.

Rule 24 of the North Carolina Rules of Civil Procedure provides for intervention as a matter of right when the intervenor shows: (1) it has an

interest relating to the property or transaction; (2) denying intervention would result in a practical impairment of the protection of that interest; and (3) there is inadequate representation of that interest by existing parties. N.C. Gen. Stat. § 1A-1, Rule 24(a)(2) (2015); *Virmani*, 350 N.C. at 459, 515 S.E.2d 675 at 683. Rule 24 allows for permissive intervention when "an applicant's claim or defense and the main action have a question of law or fact in common." N.C. Gen. Stat. § 1A-1, Rule 24(b)(2). For the reasons stated above, and as a proper party before the Commission, the trial court appropriately recognized Defendants' interests in the purported action pending before it, and correctly allowed Defendants to intervene.

Furthermore, this Court has previously validated the employer's interests in the proceeding in superior court when the plaintiff appropriately appeals under N.C. Gen. Stat. § 97-90. *See Hurley v. Wal-Mart Stores, Inc.*, 219 N.C. App. 607, 613, 723 S.E.2d 794, 798 (2012) ("The proper procedure for addressing the issue of attorney's fees pursuant to Section 97-90(c) would have been for the full commission to make its findings and conclusions, and then *either party* who desired review could appeal that decision to the superior court." (emphasis supplied)).

Defendants lawfully intervened as parties before the superior court. An appeal lies of right directly to this Court "[f[rom any final judgment of a superior court, . . . including any final judgment entered upon review of a decision of an administrative agency[.]" N.C. Gen. Stat. § 7A-27(b)(1) (2015). Defendants are "parties aggrieved" and their appeal is appropriately before us. N.C. Gen. Stat. § 1-271. Furthermore, Defendants' intervenor status before the superior court would be rendered meaningless, if they were denied the right to appeal from the superior court's decision on the very issue for which intervention was permitted.

V. Superior Court's Review of the Award of Attorney's Fees

Defendants argue the superior court was without jurisdiction under the limited purposes of N.C. Gen. Stat. § 97-90(c) to review the Industrial Commission's denial of attorney's fees from the award of attendant care medical compensation and to order attorney's fees to be paid from that medical compensation.

"Fees for attorneys and charges of health care providers for medical compensation under [the Workers' Compensation Act] shall be subject to the approval of the Commission[.]" N.C. Gen. Stat. § 97-90(a) (2015). Plaintiff's counsel correctly realized that it is a criminal offense for an attorney to receive a fee for his or her representation of a client in a

worker's compensation claim without approval by the Commission. N.C. Gen. Stat. § 97-90(b) (2015).

A. N.C. Gen. Stat. § 97-90(c)

N.C. Gen. Stat. § 97-90(c) provides the superior court with appellate authority to review the Industrial Commission's determination of the "reasonableness" of the award of attorney's fees. The statute provides:

> If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file *notice of appeal* to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by *filing written notice of appeal* within 10 days after receipt of such action by the full Commission, *appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal* said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. . . In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, *appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides*; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after *notice of appeal has been filed*, transmit its findings and

> reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; *provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action.*

Id. (emphases supplied).

The statute further provides "the *appealing* attorney shall notify the Commission and the employee of any and all proceedings before the superior court *on the appeal*, and either or both may appear and be represented at such proceedings." *Id.* (emphases supplied). This language supports our interpretation that the statute solely applies to an appellate reasonableness review of a fee award on a contract between the claimant-employee and his attorney previously reviewed by the Full Commission, and not a *de novo* hearing.

B. *Brice v. Salvage Co.*

A review of the legislative history of N.C. Gen. Stat. § 97-90(c) helps show the General Assembly's purpose and intent in its enactment. In *Brice v. Salvage Co.*, 249 N.C. 74, 105 S.E.2d 439 (1958), the superior court had reviewed the Industrial Commission's award of an attorney's fee. This opinion was issued prior to the establishment of the Court of Appeals in 1967 and the establishment of our comprehensive jurisdiction to review direct appeals from the Industrial Commission. *Id.*

N.C. Gen. Stat. § 97-90 at that time did not include any language to grant jurisdiction to the superior court to review an attorney's fee award by the Commission. The superior court had determined the fee awarded by the Commission was inadequate to reasonably compensate the attorney for services rendered, struck the Commission's award, and awarded a higher attorney's fee. *Id.*

The Supreme Court held the statute gave the Commission exclusive power to approve attorney's fees in the exercise of its discretion, and the superior court had no jurisdiction to hear evidence on the question of attorney's fees, or to modify or strike the Commission's award. *Brice*, 249 at 83, 105 S.E.2d at 445-46.

The General Assembly amended N.C. Gen. Stat. § 97-90 in 1959 to add subsection (c), in response to the *Brice* decision. *See Palmer I*, 157 N.C. App. at 632, 579 S.E.2d at 906 ("[Section] 97-90(c) was enacted to rectify the specific problem of the trial court not having jurisdiction over attorneys' fees in a workers' compensation cases [sic]."). By amending the statute, the General Assembly gave the superior court the limited

appellate authority to review the reasonableness of attorney's fees arising in a fee contract between an employee and his attorneys, and as presented to and reviewed by the Industrial Commission. The plain language of subsection (c) and the case and legislative history behind the General Assembly's amendment of the statute, shows it applies only to circumstances as set forth in *Brice*: fee disputes between the client and his attorney regarding fair compensation for indemnity claims and awards in light of the attorney's services rendered. *Id.*

The statute further provides guidance to the Commission in determining a reasonable attorney's fee:

> The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

N.C. Gen. Stat. § 97-90(c). The inclusion of these guiding factors into the statute further supports the conclusion that the superior court's appellate power to review the Commission's award of attorney's fees is limited to the question of reasonableness of the fee awarded by the Commission in light of the services rendered to the employee by agreement with his attorney.

Here, the Industrial Commission's Opinion and Award states:

> 7. When there is a request for an attorney fee out of compensation to be awarded by the Commission, the Commission has the duty to consider the reasonableness of the fee pursuant to N.C. Gen. Stat. 97-90, even in the absence of an assignment of error by defendants. In the case at bar, the Full Commission finds and concludes that the fee agreement between plaintiff and plaintiff's counsel is reasonable, as is the attorney fee plaintiff's counsel has received and will continue to receive from plaintiff's ongoing indemnity compensation. However, "[m]edical and hospital expenses which employers must provide pursuant to N.C.G.S. § 97-25 are not a part of 'compensation' as it always has been defined in the Workers' Compensation Act." *Hyler v. GTE Products Co.*, 333 N.C. 258, 264, 425

> S.E.2d 698, 702 (1993) (citation omitted). "[T]he relief obtainable as general 'compensation' is different and is separate and apart from the medical expenses recoverable under the Act's definition of 'medical compensation.' " *Id.* at 265, 425 S.E.2d at 703. There is no evidence of a fee agreement between plaintiff's counsel and any of plaintiff's medical providers, including Mr. Holappa. The Full Commission concludes that to the extent plaintiff's counsel's fee agreement with plaintiff, and specifically the phrase "any recovery," could be interpreted to include medical compensation, it is unreasonable under the facts of this case. The Full Commission therefore declines to approve an attorney fee for plaintiff's counsel out of the medical compensation which defendants have been ordered to pay Mr. Holappa.

The Industrial Commission's decision is based upon two theories: (1) medical compensation is separate and apart from indemnity compensation under *Hyler* and N.C. Gen. Stat. § 97-25; and, (2) no evidence of a fee agreement between Plaintiff and any medical provider, including Mr. Holappa, was presented to the Commission.

The superior court found:

> 8. Mr. Holappa, through Plaintiff's counsel, submitted an affidavit to [the superior court] in which he stated that he consented and agreed to Plaintiff's counsel's pursuit of such recovery on his behalf with the understanding and desire that any recovery made on his behalf through Plaintiff's workers' compensation claim would be subject to the 25% fee previously agreed to in the retainer agreement.

The superior court considered evidence, the purported "fee agreement" between Plaintiff's attorney and Mr. Holappa, which was not considered before the Industrial Commission. Plaintiff's counsel took the indemnity and disability fee contract between Plaintiff and Mr. Teich, added an affidavit, which had never been considered by or ruled upon by the Industrial Commission, and argued for the first time before the superior court that these documents "created" an implied third party contract between Plaintiff's counsel and Mr. Holappa.

Plaintiff's counsel did not petition the superior court for appellate review of the "reasonableness" of the Industrial Commission's decision related to the "agreement for fee or compensation" between Plaintiff and his attorneys referenced in the Full Commission's Opinion and Award,

but instead presented a theory and a purported "fee contract," which was never presented to or reviewed by the Industrial Commission. *See* N.C. Gen. Stat. § 97-90(c).

The application of a statute must be limited to its "express terms, as those terms are naturally and ordinarily defined." *Turlington v. McLeod*, 323 N.C. 591, 594, 374 S.E.2d 394, 397 (1988). The narrow scope of N.C. Gen. Stat. § 97-90(c) permits the superior court on appellate review to consider the factors set forth in the statute in reviewing the Commission's determination of the "reasonableness" of a fee agreement. The statute does not give the superior court authority to look beyond the evidence presented before the Commission or to take new evidence. *See Blevins v. Steel Dynamics*, No. 09-540, 2010 N.C. App. LEXIS 291 (N.C. Ct. App. Feb. 16, 2010) (unpublished) (unanimously holding the superior court had no original jurisdiction under N.C. Gen. Stat. § 97-90(c) to determine or award attorney's fees in the absence of findings and reasoning provided by the Commission, and vacating and remanding to the superior court for further remand to the Industrial Commission).

Furthermore, the superior court in its order apparently found facts and ruled far beyond an appellate review of the "reasonableness" of the attorney's fee, for legal services rendered to the injured worker by his attorney. The superior court purported to adjudicate a question of workers' compensation law, *i.e.*, whether the Commission may order an attorney's fee to be paid from the award of medical compensation. This determination is outside the scope the superior court's appellate jurisdiction under N.C. Gen. Stat. § 97-90(c), and rests within the statutes governing the Industrial Commission, subject to appeal to this Court. N.C. Gen. Stat. § 97-91 (2015). Our Court has determined "medical compensation is solely in the realm of the Industrial Commission, and § 97-90(c) gives no authority to the superior court to adjust such an award under the guise of attorneys' fees. Doing so constitutes an improper invasion of the province of the Industrial Commission, and constitutes an abuse of discretion." *Palmer I*, 157 N.C. App. at 635, 579 S.E.2d at 908.

Jurisdiction over "all questions" arising under the Workers' Compensation Act is vested solely in the North Carolina Industrial Commission. *Id.* The Workers' Compensation Act contains very few exceptions to this rule, which are specifically set forth in the Act. None of these exceptions apply here. The superior court acted beyond its statutory and appellate jurisdiction by entering an order based upon evidence not presented to the Commission, and by its *de novo* review and order of the lawfulness of the award of an attorney's fee from the Commission's award of medical compensation. *Id.*

The Industrial Commission, and not the superior court, interprets and enforces the provisions of the Worker's Compensation Act and Rules of the North Carolina Industrial Commission, subject to appellate review by this Court. *Id.* The superior court's purported adjustment and set-off from the amount of medical compensation due a medical provider is without any authority and substantially and impermissibly intrudes into both the jurisdiction of the Industrial Commission under the Workers' Compensation Act and the appellate authority of this Court. *Id.*

VI. Conclusion

Our Court has jurisdiction to hear the issues raised by both parties' appeals. Defendants have shown they have suffered, or stand to suffer, a "concrete and particularized[,] . . . actual or imminent," injury. *Estate of Apple*, 168 N.C. App. at 177, 607 S.E.2d at 16 (citation and quotation marks omitted). We also have jurisdiction to review the superior court's order by virtue of Plaintiff's cross-appeal. Furthermore, this Court can review issues of jurisdiction of the lower courts *sua sponte*. *Xiong*, 193 N.C. App. at 652, 668 S.E.2d at 599.

With limited exceptions specifically set forth in the Act, the Industrial Commission is the sole arbiter of "any questions" under the Workers' Compensation Act. N.C. Gen. Stat. § 97-91. N.C. Gen. Stat. § 90-97(c) does not provide the superior court with jurisdiction to interpret the provisions of the Workers' Compensation Act to determine whether attorney's fees can lawfully be deducted from an award of attendant care medical compensation awarded by the Commission to a third party medical provider, or to adjust the Commission's award of medical compensation. *Palmer I*, 157 N.C. App. at 635, 579 S.E.2d at 90. *See also Blevins*, No. 09-540, 2010 N.C. App. LEXIS 291 (N.C. Ct. App. Feb. 16, 2010).

This Court, not the superior court, is the appropriate and exclusive tribunal to review the Commission's ruling under these circumstances. *Id.* The superior court also acted beyond the scope of its statutory and limited appellate review of the reasonableness of the Commission's fee award by taking and considering new evidence, which was not presented to the Commission.

Under the present comprehensive statutory framework of appellate review of the Commission's decisions before this Court, and the particular historical circumstances which gave rise to the amendment of N.C. Gen. Stat. § 90-97 adding subsection (c) after *Brice*, and prior to the establishment of the Court, the reasonableness review by the superior court under subsection (c) may have become an obsolete relic. In light

of the precedents, statutory history, and the primary appellate jurisdiction being vested in this Court upon its creation, we refer this issue to the General Assembly and request their review of the risks of inconsistent rulings inherent within the multitude of judicial districts, and the continuing need for this limited appellate review by the superior court of the reasonableness of the Commission's attorney's fee awards.

The superior court, under its limited appellate review, was without jurisdiction under N. C. Gen. Stat. § 90-97(c) to re-weigh the Commission's factual determinations under these facts, or to award, *de novo*, attorney's fees from attendant care medical compensation to be paid to a third party medical provider. The order of the superior court purporting to order attorney's fees to be paid from medical compensation awarded by the Commission is a nullity and is vacated. We remand to the superior court for further remand to the Industrial Commission for further proceedings as necessary.

VACATED AND REMANDED.

JUDGE BRYANT concurs.

JUDGE INMAN concurs in result only.

STATE OF NORTH CAROLINA
v.
CHRISTINA RENEE ALLEN

No. COA16-271

Filed 6 September 2016

Criminal Law—plea agreement—clerical error

The classification of defendant's ten-day sentence in the original written order as "Intermediate Punishment" was an inadvertent clerical error. The case was remanded for correction consistent with defendant's plea agreement. The modified order was vacated and defendant's motion for appropriate relief was dismissed as moot.

Appeal by defendant from judgment entered 11 August 2015 by Judge Alan Z. Thornburg in Buncombe County Superior Court. Heard in the Court of Appeals 24 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Tracy Nayer, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

TYSON, Judge.

Christina Renee Allen ("Defendant") appeals from judgment entered after she pled guilty to felony failure to appear and misdemeanor obtaining a controlled substance by fraud. We remand for correction of the clerical error in the original written order to reflect Defendant's plea agreement. We vacate the modified order as it concerns the error contained within the original written order.

I. Factual Background

On 9 July 2012, Defendant was indicted on one felony count of obtaining a controlled substance by fraud. She failed to appear in court as scheduled on 10 September 2012 and was arrested approximately two years later.

On 11 August 2015, Defendant pled guilty pursuant to a plea agreement to one count of misdemeanor obtaining a controlled substance by fraud and one count of felonious failure to appear. The plea agreement provided:

> The State agrees to a *community punishment*. The defendant shall be placed on supervised probation, the length of which will be determined by the Court. The defendant shall submit to a period or periods of confinement in the local confinement facility pursuant to N.C.G.S. 15A-1343(a1)(3), with the scheduling of said periods of confinement to be in the discretion of the probation officer. All other terms and conditions of probation shall be in the discretion of the Court.

(emphasis supplied).

At the beginning of the hearing, the trial court restated that "the plea arrangement is that [Defendant] will plead to community punishment" and asked the prosecutor to "educate [the court] a little bit" on the requirements under N.C. Gen. Stat. § 15A-1343(a1)(3) and the role of the probation officer. At that point, the prosecutor stated that the statute allows "a period or periods of confinement in a local confinement

facility for a total of no more than six days per month during any three separate months during the period of probation" and that "the six days per month confinement provided for in this subdivision may only be imposed as two- or three-day consecutive periods."

Later during the hearing, Defendant stipulated to the factual basis supporting her plea agreement and to the contents of the sentencing worksheet. After the facts supporting the plea agreement were summarized, the trial court again reiterated the requirements of jail confinement under "community punishment" to ensure its understanding. The trial court stated, "I know the Court can in a community or intermediate punishment order jail confinement . . . to two or three days, no more than six days per month for any three separate months."

The trial court then asked the prosecutor "to educate [the court] again" and requested clarification regarding the prosecution's request for periods of confinement. The prosecutor requested specific periods of confinement "to be imposed at the discretion of the probation officer," which was consistent with the plea agreement. Defendant's counsel further requested that the confinement be "no more than a couple weekends in this particular situation."

The trial court accepted Defendant's plea agreement and sentenced Defendant to "*community punishment* of between 6 and 17 months and the defendant will serve ten days in the local jail at the discretion of the probation officer within the next 60 days." (emphasis supplied). However, when the trial court's AOC-CR-603C form order was reduced to writing, Defendant's ten-day sentence was included on page two as "Special Probation – G.S. 15A-1351" under "Intermediate Punishments." It was not included under "Community and Intermediate Probation Conditions – G.S. 15A-1343(a1)." This occurred despite the fact that at the top of page one of the form, the court indicated that it was sentencing Defendant to "community" punishment. The written order was filed 11 August 2015. Defendant filed her notice of appeal on 20 August 2015.

Pursuant to the original written order's inclusion of "intermediate punishment," Judge Marvin P. Pope, Jr. signed a modified order requiring Defendant serve her ten-day sentence from 1 September 2015 to 10 September 2015. Like the original written order, the modified order indicated that it was modifying "Special Probation – G.S. 15A-1344(e)" under the "Intermediate Punishments – Contempt" section of the form.

Although the modified order was signed the same day as Defendant had filed notice of her appeal, it was not filed until 28 August 2015. The record does not indicate whether the courtroom clerk made any

notation of the rendering of the trial court's modified order in the court minutes kept for 20 August 2015.

Along with her brief, Defendant contemporaneously filed a Motion for Appropriate Relief and requested this Court to vacate the modified order based on the trial court's lack of subject matter jurisdiction to enter the modified order.

II. Issues

Defendant alleges the trial court erred in the original written order by sentencing Defendant to intermediate punishment in contravention of the accepted plea agreement. Defendant also argues the trial court lacked subject matter jurisdiction to enter the modified order after her appeal had been entered. She has filed a Motion for Appropriate Relief requesting that the modified order be vacated on that ground.

III. Standard of Review

"In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Pimental*, 153 N.C. App. 69, 72, 568 S.E.2d 867, 869, *disc. review denied*, 356 N.C. 442, 573 S.E.2d 163 (2002). N.C. Gen. Stat. § 15A-1444 (2015) governs a defendant's right to appeal from judgment entered upon a guilty plea and limits it to specific circumstances. This includes when a sentence "[c]ontains a type of sentence disposition that is not authorized by G.S. 15A-1340.17 or G.S. 15A-1340.23 for the defendant's class of offense and prior record or conviction level." N.C. Gen. Stat. § 15A-1444(a2)(2) (2015).

Generally, "[w]hen a defendant assigns error to the sentence imposed by the trial court our standard of review is whether [the] sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Chivers*, 180 N.C. App. 275, 278, 636 S.E.2d 590, 593 (2006) (internal quotation and citation omitted), *disc. review denied*, 361 N.C. 222, 642 S.E.2d 709 (2007); *see* N.C. Gen. Stat. § 15A-1444(a1) (2015). When this Court is confronted with statutory errors regarding sentencing issues, such errors "are questions of law, and as such, are reviewed *de novo*." *State v. Mackey*, 209 N.C. App. 116, 120, 708 S.E.2d 719, 721 (2011) (citations omitted).

If the alleged sentencing error is only clerical in nature, "it is appropriate to remand the case to the trial court for correction because of the importance that the record speak the truth." *State v. Smith*, 188 N.C. App. 842, 845, 656 S.E.2d 695, 696-97 (2008) (internal quotations and citation omitted). Rule 60 of the North Carolina Rules of Civil Procedure provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the judge at any time on his own initiative or on the motion of any party and after such notice, if any, as the judge orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate division, and thereafter while the appeal is pending may be so corrected with leave of the appellate division.

N.C. Gen. Stat. § 1A-1, Rule 60(a) (2015). A clerical error is defined as, "[a]n error resulting from a minor mistake or inadvertence, esp[ecially] in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Jarman*, 140 N.C. App. 198, 202, 535 S.E.2d 875, 878 (2000) (quotation marks and citation omitted).

IV. Original Written Order

"It is the responsibility of the trial judge to accept or reject a tendered plea negotiated between the district attorney and defendant." *In re Fuller*, 345 N.C. 157, 160, 478 S.E.2d 641, 643 (1996); *see State v. Collins*, 300 N.C. 142, 149, 265 S.E.2d 172, 176 (1980) (holding a plea agreement involving a recommended sentence must be approved by the trial judge before it becomes effective). "Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly." N.C. Gen. Stat. § 15A-1023(b) (2015).

In 2011, the General Assembly created new "community punishment" conditions a trial court may order during sentencing. *See* N.C. Gen. Stat. § 15A-1343(a1) (2015). Community punishment is defined by statute as "[a] sentence in a criminal case that does not include an active punishment or assignment to a drug treatment court, or special probation as defined in G.S. 15A-1351(a). It may include any one or more of the conditions set forth in G.S. 15A-1343(a1)." N.C. Gen. Stat. § 15A-1340.11(2). One such condition is:

> Submission to a period or periods of confinement in a local confinement facility for a total of no more than six days per month during any three separate months during the period of probation. The six days per month confinement provided for in this subdivision may only be imposed as two-day or three-day consecutive periods. When a defendant is on probation for multiple judgments, confinement

> periods imposed under this subdivision shall run concurrently and may total no more than six days per month.

N.C. Gen. Stat. § 15A-1343(a1)(3) (2015).

Here, the trial court accepted Defendant's plea agreement in which the parties had agreed to "community punishment," including a period or periods of confinement pursuant to N.C. Gen. Stat. § 15A-1343(a1)(3). Based upon the agreement, the trial court required Defendant to "serve ten days in the local jail at the discretion of the probation officer within the next 60 days." Although this ten-day sentence could have been served pursuant to the requirements of "community punishment" under N.C. Gen. Stat. 15A-1343(a1)(3), the order reducing the trial court's statements to writing incorrectly indicated that the sentence was "Special Probation – G.S. 15A-1351" under "Intermediate Punishment."

Defendant argues that the original written order's classification of the ten-day sentence was unlawful pursuant to N.C. Gen. Stat. § 15A-1444(a2)(2) and this Court should vacate the judgment and remand for resentencing. The State contends the order simply contained an inadvertent clerical error made when the judgment was reduced to writing. The State asserts that the appropriate remedy is to remand for correction of the clerical error with instruction that the trial court indicate the periods of confinement under the appropriate section of the form.

The record before this Court shows the mistake in sentencing was purely a clerical error on the original written order. First, the trial court and prosecutor clearly stated at the beginning of the hearing that the plea agreement contained "community punishment." Second, the trial court indicated at the hearing that it was sentencing Defendant to community punishment and correctly stated the requirements for the periods of confinement as being "two or three days, no more than six days per month for any three separate months." Third, the top of the first page of the original written order indicated that the trial court sentenced Defendant to "community punishment," not intermediate.

Finally, although the sentence was under "Intermediate Punishment" on page two of the form, the ten days could have been served in compliance with the requirements of N.C. Gen. Stat. § 15A-1343(a1)(3). For example, Defendant could have served five days over two weekends each month during the 60 days following the order.

Taken together, these facts demonstrate the entry of Defendant's sentence under "Intermediate Punishment" was a clerical error. We remand to the trial court for correction of the clerical error regarding

Defendant's sentence pursuant to her plea agreement. *See Smith*, 188 N.C. App. at 845, 656 S.E.2d at 696-97.

V. Modified Order

The modified order sentenced Defendant to ten consecutive days of confinement under the "Intermediate Punishments – Contempt" portion of the form. This sentence directly conflicts with the requirements found in N.C. Gen. Stat. § 15A-1343(a1)(3), as agreed to by the parties in the plea agreement, and accepted by the sentencing judge. The State, in its brief, admits that "the probation modification order carried forward, and essentially repeated the clerical error reflected on the judgement when it was reduced to writing." Since the modified order was made pursuant to the clerical error contained in the original written order and we remand the original written order for correction of the error, the modified order imposing a sentence not allowed under community punishment is vacated.

VI. Conclusion

The classification of Defendant's ten-day sentence in the original written order as "Intermediate Punishment" was an inadvertent clerical error made when the order was reduced to writing. We remand for correction of the clerical error in the original written order to be consistent with Defendant's plea agreement with community punishment. We vacate the modified order as it was made pursuant to the clerical error contained within the original written order. Defendant's motion for appropriate relief is dismissed as moot.

REMANDED FOR CORRECTION OF CLERICAL ERROR IN PART; VACATED IN PART.

Judges BRYANT and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
DOMINIC IAN CLEVINGER, DEFENDANT

No. COA15-1292

Filed 6 September 2016

1. Evidence—videotaped interrogation—failure to show prejudice

The trial court committed harmless error, if any, in a robbery with a dangerous weapon case by admitting the challenged portions of a videotaped interrogation. Although the statements in the video were not relevant to the nonhearsay purposes for which they were offered, defendant failed to show prejudice to warrant a new trial.

2. Robbery—dangerous weapon—failure to instruct—common law robbery

The trial court did not err in a robbery with a dangerous weapon case by failing to instruct the jury on the elements of common law robbery. Defendant was either guilty of robbing the business by the threatened use of the chef's knife, or he was not guilty at all.

Appeal by defendant from judgment entered 4 November 2014 by Judge Susan E. Bray in Forsyth County Superior Court. Heard in the Court of Appeals 25 May 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Ann W. Matthews, for the State.

Jarvis John Edgerton, IV for defendant.

ELMORE, Judge.

A jury found Dominic Clevinger (defendant) guilty of robbery with a dangerous weapon. On appeal, defendant contends that the trial court erred in admitting prejudicial statements by a detective during defendant's interrogation, and in failing to instruct the jury on the elements of common law robbery. We conclude that defendant received a trial free from prejudicial error.

I. Background

The State's evidence at trial tended to show the following: On 11 June 2013, Crystal Lynn McDade was working as the manager and cashier at

the Stanleyville Business Center (SBC). The SBC was an Internet sweepstakes café where customers could purchase Internet time to play games and win cash prizes. McDade had brought her fifteen-year-old daughter, Alyssia Hicks, to work with her that morning.

Around 9:00 a.m., McDade observed a man walk into the SBC to use the restroom and leave a few seconds later. She thought it was unusual because "he did not purchase anything" and "did not speak to anyone . . . . We don't usually have people [ ] walk off the street to use the restroom." Around 10:30 a.m., the same man returned to the SBC and approached McDade at the cashier's station. He handed her a twenty-dollar bill and began patting himself down, searching for his driver's license. He told McDade that he could not find his license and left to look for it in his car.

The man returned a few seconds later and dropped a plastic Dollar General bag on the counter in front of McDade. He grabbed Hicks, jerked her head back, and held a knife to her exposed neck, telling McDade to "put the money in the bag or he was going to slit [Hicks'] throat." At trial, Hicks described the knife as "cold and hard." McDade testified that she saw the knife but could not recall how big it was. McDade opened the register and started pulling out money. Before she could put it into the bag, the man snatched the money and fled the store. Hicks was left with a red mark on her throat where the knife was held, but she was not bleeding.

Officers responded to the scene and took a statement from McDade. She described the suspect as a white male with reddish-brown hair, a slender build, and freckles on his arms and face. He was wearing a red polo-style shirt and long plaid shorts. Sergeant Gomez, one of the responding officers, located a red shirt on the side of the road in a gravel area near the SBC. It was preserved for evidence and sent to the state crime lab for testing, where Agent Hannan obtained DNA samples from the shirt. A few days after the robbery, McDade identified defendant in a photographic line-up as the robbery suspect.

McDade provided Detective Watkins with a series of videos captured that morning on the SBC's surveillance cameras. As he watched the videos, Detective Watkins noticed that, in addition to McDade's description, the male suspect was wearing "a low cut shoe" and "had what appeared to be the end of a belt hanging down the right side of his body that is kind of flapping against his leg as he walked." He also noticed that before the male suspect entered the SBC, a woman wearing a bandana, a t-shirt with writing across the top and a design in the center, and red Capri pants walked into the SBC to use the restroom and leave. Video

surveillance taken earlier that morning from a nearby Target showed the same woman leaving the store with a man who matched the physical description of the male robbery suspect.

After learning from McDade that the male suspect had used what appeared to be a new Dollar General bag during the robbery, Detectives Watkins and Olivo went to a nearby Dollar General to follow up on the lead. When they entered the store, they noticed a woman in a bright green tank-top checking out at the cash register. She caught their attention because of the bright color of her shirt, her tattoos, and her noticeable hairstyle.

The detectives made contact with the assistant manager of the Dollar General to review the surveillance footage taken earlier that day—approximately one hour before the robbery. The video showed the same woman in the bright green tank-top purchasing a three-piece set of chef's knives and a DVD at 9:09 a.m. One minute later, a white male walked into the store, stood next to her at the cash register, picked up the DVD to look at it, and then set it back down. He was wearing a red polo shirt, long plaid shorts, a belt hanging down the right side of his leg, and otherwise matched the physical description of the robbery suspect.

After reviewing the surveillance footage, detectives returned to the front of the store looking for the woman in the green tank-top. The Dollar General cashier, Tiffany Perdue, informed the detectives that the woman had left, but she had spoken to Perdue about tattoos while she was in the store and had given Perdue her telephone number. A reverse search of the number revealed that it belonged to defendant's cousin, Krystal Clevinger. Detective Olivo secured an address for Ms. Clevinger and her photo. He recognized her as the woman in the green tank-top he had seen at Dollar General and on the surveillance video.

The detectives went to Ms. Clevinger's home to ask about her purchase earlier that day at Dollar General. She produced a three-piece set of chef's knives, one of which was missing from the opened package. At that point, Ms. Clevinger agreed to go with the detectives to the public safety center for an interview. She also consented to a search of her vehicle, where the detectives found the DVD she had purchased at Dollar General. The knife set and the DVD packaging were submitted for latent fingerprint examination.

At trial, the State called Cindy Persinger as a witness, with whom defendant and his girlfriend had lived several years ago. Persinger recalled that on 10 June 2013, the day before the robbery, defendant came to her house accompanied by an older woman. Persinger testified

that the woman was wearing a bandana, a white t-shirt, and red Capri pants, and that defendant was wearing a black shirt, plaid shorts, black hat, and was carrying a red shirt over his shoulder. Defendant told Persinger that he was in town from Florida for a "quick visit," and was waiting for his cousin, Ms. Clevinger, to pick him up. Defendant and the woman waited for about three hours until they decided to walk. He called Persinger shortly after leaving her house to tell her that Ms. Clevinger had picked him up as he was walking down the road. When Detective Watkins interviewed Persinger and showed her still images of the male and female suspects in the Target video, she identified them as defendant and the woman who had been at her house.

Defendant was arrested in Florida in October 2013 on an unrelated charge, and extradited to North Carolina on 15 December 2013. Detectives obtained a saliva sample from defendant, which was sent to the state crime lab for testing. A comparison of the DNA results from the red polo shirt found near the SBC matched the predominant profile of defendant's DNA. In addition, defendant's fingerprints were identifiable on both the DVD and the set of chef's knives purchased from Dollar General on the same day as the robbery.

During a video-taped interrogation, defendant repeatedly denied any involvement in the robbery. He filed a motion *in limine* to redact portions of the interrogation video in which Detective Watkins: (1) expressed his opinion that all of the evidence "points to [defendant]"; (2) referenced alleged statements by Ms. Clevinger that defendant had a drug problem; (3) asserted that the "same exact person" seen in the SBC surveillance video is seen with Ms. Clevinger in surveillance footage from other stores; (4) opined that it was defendant on the SBC video and stated that he had "seen the video himself"; (5) referenced alleged statements by Ms. Clevinger that defendant was with her at the other stores; (6) referenced alleged statements by Ms. Clevinger that defendant looked thinner than usual because of his drug use; (7) referenced an alleged statement by Ms. Clevinger that defendant took one of the knives she bought at Dollar General; (8) referenced defendant's prior arrest; (9) told defendant he had phone records and proof that defendant and Ms. Clevinger changed their phone numbers after the robbery; (10) alleged that defendant "called the shit out of [Ms. Clevinger]" while she was being interviewed by law enforcement; and (11) told defendant that he was "one cold dude."

In response to defendant's motion, the State argued that it was not offering the statements for their truth, but to provide "context to defendant's responses" and "to explain how a detective conducts an interview

and interview techniques." Over defendant's objections, the trial court admitted the challenged portions of the video with the following limiting instruction:

> THE COURT: Members of the jury, in the exhibit that you are about to see, Detective Watkins and Olivo interviewed the defendant, Mr. Clevinger, after he had been arrested. During the course of the interview it may be that one of the detectives expresses his opinion that the defendant, Dominic Clevinger, is the person shown in one or more of the surveillance videos.
>
> You are not to consider this opinion evidence for the truth of whether Mr. Clevinger is pictured in the videos. It is your duty to determine whether the defendant is depicted in any of the surveillance videos. You may consider any such statement or opinion only for the impact that opinion or statement may have had on the defendant as an interviewing technique by the detectives.
>
> Officers are permitted to employ investigative and questioning techniques designed to elicit information. During the course of the interview it may be that the detective accuses the defendant of being untruthful or lying to him. You can consider the detective's remarks not for the truth of what the detective is alleging but as an investigative technique designed to elicit information from a suspect.
>
> Similarly, if the detective makes any statements to the defendant about what other people told him or about any alleged evidence against the defendant or what that alleged evidence is, you can consider such statements in the context of interrogation techniques used by law enforcement officers to secure confessions. You are not to consider the statements the detective attributes to others as being made for the truth of those statements because they were not made under oath and admitted at this trial.

The trial court repeated the instruction at the close of the evidence, at which point it also instructed the jury on the elements of robbery with a dangerous weapon. The court declined the State's request to declare the knife a dangerous weapon as a matter of law, leaving the question for the jury, and denied defendant's request for an instruction on the lesser-included offense of common law robbery.

The jury found defendant guilty of robbery with a dangerous weapon, and he pled guilty to an aggravating factor of willful violation of probation or parole. The trial court entered a judgment and commitment in the aggravated range, sentencing defendant to an active term of 140 to 180 months of imprisonment. Defendant gave notice of appeal in open court.

II. Discussion

A. Hearsay and Relevance

[1] First, defendant argues that the trial court erred in admitting the challenged portions of the video-taped interrogation. Defendant contends that no portion of the interview was relevant, and that the State's reasons for admitting the video—to show the detective's interrogation techniques and provide context for defendant's responses—were a pretext to put before the jury what was otherwise inadmissible hearsay and improper lay opinion testimony.

"Preserved legal error is reviewed under the harmless error standard of review." *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012) (citing N.C. Gen. Stat. § 15A-1443 (2009); N.C. R. App. P. 10(a)(1); *State v. Bishop*, 346 N.C. 365, 385, 488 S.E.2d 769, 779 (1997)). Where, as here, "the error relates to a right not arising under the United States Constitution, North Carolina harmless error review requires the defendant to bear the burden of showing prejudice." *Id.* at 513, 723 S.E.2d at 331 (citing N.C. Gen. Stat. § 15A-1443(a)). "In such cases the defendant must show 'a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *Id.* (quoting N.C. Gen. Stat. § 15A-1443(a)).

"Hearsay" is a an out-of-court statement "offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801 (2015). "Hearsay is not admissible except as provided by statute or by [the rules of evidence]." N.C. Gen. Stat. § 8C-1, Rule 802 (2015). Where an out-of-court statement is offered for a purpose other than to prove the truth of the matter asserted, it is not hearsay because it does not fit the legal definition. *State v. Call*, 349 N.C. 382, 409, 508 S.E.2d 496, 513 (1998); *Long v. Asphalt Paving Co. of Greensboro*, 47 N.C. App. 564, 569, 268 S.E.2d 1, 4–5 (1980). To be admissible, however, the statement must still be relevant to the nonhearsay purpose for which it was offered. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2015) ("Evidence which is not relevant is not admissible.").

"Relevant evidence" is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2015). "In order to be relevant, . . . evidence need not bear directly on the question in issue if it is helpful to understand the conduct of the parties, their motives, or if it reasonably allows the jury to draw an inference as to a disputed fact." *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991) (citing *State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 401–02 (1978)). While "a trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Wallace*, 104 N.C. App. 498, 502, 410 S.E.2d 226, 228 (1991) (citation omitted), *appeal dismissed and disc. review denied*, 331 N.C. 290, 416 S.E.2d 398, *cert. denied*, 506 U.S. 915, 121 L. Ed. 2d 241 (1992).

This Court has previously addressed the admissibility of statements made by law enforcement during video-taped interrogations. In *State v. Miller*, 197 N.C. App. 78, 676 S.E.2d 546 (2009), the defendant argued that "statements attributed to non-testifying third parties, which were contained in the detectives' questions, should have been redacted before the [interrogation] was presented to the jury." *Id.* at 85, 676 S.E.2d at 551. We held that the detectives' questions were relevant to give context to concessions made by the defendant during the interrogation, and to explain the defendant's subsequent conduct in changing his story when confronted with purported statements of others through the detectives' questions. *Id.* at 87, 676 S.E.2d at 552.

Similarly, in *State v. Castaneda*, 215 N.C. App. 144, 715 S.E.2d 290 (2011), the defendant moved to redact portions of a transcript from an interrogation in which the detectives referred to statements from "other witnesses" about events surrounding a homicide, "as well as portions in which the detectives told [the] defendant that his version of events was a 'lie.' " *Id.* at 146, 715 S.E.2d at 292. During his post-arrest interview, the defendant's story shifted significantly in response to a detective's allegations that the defendant was not being truthful. *Id.* at 150, 715 S.E.2d at 295. We held that the statements were admissible to show the effect that they had on the defendant. *Id.* More specifically, as "part of an interrogation technique designed to show [the] defendant that the detectives were aware of the holes and discrepancies in his story," the detectives' statements were relevant because they yielded inculpatory responses from the defendant which were "relevant to the murder charge." *Id.* at 150–51, 715 S.E.2d at 295; *see also id.* at 151, 715 S.E.2d at 295 ("[A]n

interrogator's comments that he or she believes the suspect is lying are only admissible to the extent that they provide context to a relevant answer by the suspect." (quoting *State v. Cordov*a, 137 Idaho 635, 641, 51 P.3d 449, 455 (Idaho Ct. App. 2002))).

Finally, in *State v. Garci*a, 228 N.C. App. 89, 743 S.E.2d 74 (2013), *disc. review denied*, 367 N.C. 326, 755 S.E.2d 619 (2014), the defendant initially denied any knowledge of a homicide during an interview with police. *Id.* at 98, 743 S.E.2d at 80. At trial, however, he admitted to killing the victim but claimed he did so in self-defense. *Id.* at 99, 743 S.E.2d at 80. We held that the challenged statements made by the detectives during the interrogation were admissible because the "[d]efendant's credibility was a key issue for the jury to decide," and his willingness "to repeatedly lie, in spite of [the detective's] pressuring interrogation techniques, was highly probative of [the] defendant's credibility." *Id.*

Consistent with its position at trial, the State maintains that Detective Watkins' statements were "relevant and admissible, not for the truth of the matter asserted, but to show the interrogation techniques of the detectives and to provide context for defendant's responses." Its reliance on the above-cited cases, however, is misplaced. First, unlike *Miller*, the evidence was not relevant for the purpose of placing defendant's answers in "context" because defendant made no concessions during the interrogation. Instead, he repeatedly denied any involvement in the robbery, and we cannot agree with the State that defendant's denials were incriminating and, therefore, relevant and admissible. Second, unlike *Castaneda*, the evidence was not relevant for the purpose of showing the detective's interrogation techniques because defendant's responses never changed—much less due to any method used by the detective. And a demonstration of even the most impressive interrogation tactics, standing alone, would not have "made facts of consequence to this case more probable or less probable than they would be otherwise." *Miller*, 197 N.C. App. at 87, 676 S.E.2d at 552. Finally, although we declined to limit *Miller* as allowing an interrogator's statements to be admitted into evidence "only if they caused the defendant to concede the truth or change his story," *Garcia*, 228 N.C. App. at 98, 743 S.E.2d at 80, here, unlike *Garcia*, the evidence was not relevant for the purpose of impeaching defendant's credibility because he did not testify at trial.

While we agree with defendant that the statements were not relevant to the nonhearsay purposes for which they were offered, he has failed to show prejudice to warrant a new trial. We presume that the jury follows the trial court's instructions, *State v. Gregory*, 340 N.C. 365, 408, 459 S.E.2d 638, 663 (1995) (citation omitted), and in this case, the

court instructed the jury twice that it was not to consider the detective's statements for their truth. Moreover, this was not a situation where the State relied on the detective's statements to develop its central theory or build its case against defendant. *Cf. State v. Canady*, 355 N.C. 242, 249, 559 S.E.2d 762, 766 (2002) (holding that officer's testimony received to explain his subsequent actions was inadmissible hearsay where it went "so far beyond the confines of the instruction" and the State relied on it "as substantive evidence of the details of the murders and to imply defendant had given a detailed confession of his alleged crimes"). In fact, based on the overwhelming evidence against defendant, there appears to have been no need for the State to publish the video to the jury. Surveillance footage captured a male suspect matching defendant's description leaving Target, standing with Ms. Clevinger at Dollar General as she purchased the knife set, and subsequently entering the SBC. Persinger identified the male suspect as defendant, whom she had seen the day before the robbery, and McDade identified defendant as the perpetrator in a photographic line-up. In addition, the DNA results from the red polo shirt found near the SBC matched defendant's DNA profile. Defendant's fingerprints were also found on both the DVD and the chef's knife set purchased from the Dollar General store. In light of this evidence, we are not convinced there is a reasonable possibility that without the video, the jury would have reached a different result. Any error in the admission of the challenged evidence was harmless.

B. Jury Instructions

[2] Defendant also argues that the trial court erred in failing to submit his requested instruction for common law robbery. Because the court left it to the jury to determine if the alleged weapon was a dangerous weapon, defendant contends, it was also required to submit the lesser-included instruction to the jury.

We review *de novo* the trial court's decision regarding its jury instructions. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) (citations omitted). The trial court must "instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988). "Failure to instruct upon all substantive or material features of the crime charged is error." *State v. Bogle*, 324 N.C. 190, 195, 376 S.E.2d 745, 748 (1989). On the other hand, "a trial judge should not give instructions to the jury which are not supported by the evidence produced at the trial." *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973), *cert. denied*, 418 U.S. 905, 41 L. Ed. 2d 1153 (1974).

"An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002); *see also State v. Bailey*, 278 N.C. 80, 86, 178 S.E.2d 809, 812 (1971) ("When there is evidence of defendant's guilt of common law robbery, it is error for the court to fail to submit the lesser offense to the jury." (citations omitted)). If, however, "the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718–19 (1980) (citing *State v. Alston*, 293 N.C. 553, 238 S.E.2d 505 (1977)).

Robbery with a dangerous weapon consists of the following elements: (1) the unlawful taking or an attempt to take personal property from the person or in the presence of another (2) by use or threatened use of a firearm or other dangerous weapon (3) whereby the life of a person is endangered or threatened. N.C. Gen. Stat. § 14-87(a) (2015). Common law robbery is a lesser-included offense of robbery with a dangerous weapon. *State v. Frazier*, 150 N.C. App. 416, 418–19, 562 S.E.2d 910, 913 (2002). The difference between the two offenses is that robbery with a dangerous weapon is "accomplished by the use or threatened use of a dangerous weapon whereby the life of a person is endangered or threatened." *Id.* (quoting *State v. Peacock*, 313 N.C. 554, 562, 330 S.E.2d 190, 195 (1985)).

"A deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Sturdivant*, 304 N.C. 293, 301, 283 S.E.2d 719, 725 (1981) (citations omitted). Relevant here, "the evidence in each case determines whether a certain kind of knife is properly characterized as a lethal device as a matter of law or whether its nature and manner of use merely raises a factual issue about its potential for producing death." *Id.* at 301, 283 S.E.2d at 726 (citations omitted). "The dangerous or deadly character of a weapon with which [the] accused was armed in committing a robbery may be established by circumstantial evidence." *State v. Rowland*, 263 N.C. 353, 357, 139 S.E.2d 661, 664 (1965) (citation and internal quotation marks omitted).

In support of his argument, defendant relies on *State v. Jackson*, 85 N.C. App. 531, 355 S.E.2d 224 (1987), and *State v. Brandon*, 120 N.C. App. 815, 463 S.E.2d 798 (1995), for the proposition that where the trial court submits to the jury the question of whether a dangerous weapon

was used to commit a robbery, it must also submit an instruction for common law robbery. That may be the rule when there is evidence of common law robbery, but as our Supreme Court has held repeatedly, an instruction for the lesser-included offense is not required when there is no evidence to support it:

> The necessity for instructing the jury as to an included crime of lesser degree than that charged arises when and only when there is evidence from which the jury could find that such included crime of lesser degree was committed. The *presence of such evidence* is the determinative factor. Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is *no conflicting evidence* relating to elements of the crime charged. Mere contention that the jury might accept the State's evidence in part and might reject it in part will not suffice.

State v. Hicks, 241 N.C. 156, 159–60, 84 S.E.2d 545, 547 (1954); *see Peacock*, 313 N.C. at 564, 330 S.E.2d at 196 (holding that common law robbery instruction was not required where "all of the State's uncontradicted evidence, if believed, tend[ed] to compel the conclusion that the vase as wielded by defendant, 'endangered or threatened' the victim's life" and "[t]here was no evidence to support an instruction on a lesser included offense"); *State v. Porter*, 303 N.C. 680, 686, 281 S.E.2d 377, 382 (1981) ("As a general rule, when there is evidence of defendant's guilt of a crime which is a lesser included offense of the crime stated in the bill of indictment, the defendant is entitled to have the trial judge submit an instruction on the lesser included offense to the jury." (citations omitted)); *State v. Lee*, 282 N.C. 566, 569, 193 S.E.2d 705, 707 (1973) ("In a prosecution for armed robbery the court is not required to submit the lesser included offense of common law robbery unless there is evidence of defendant's guilt of that crime."); *State v. Richardson*, 279 N.C. 621, 627, 185 S.E.2d 102, 107 (1971) (rejecting defendant's argument that an instruction on common law robbery was required because "[t]here was no evidence that would warrant or support a finding that defendant was guilty of a lesser included offense"); *State v. Wenrich*, 251 N.C. 460, 460, 111 S.E.2d 582, 583 (1959) ("[T]he court should not submit to the jury an included lesser crime where there is no testimony tending to show that such lesser offense was committed."), *overruled on other grounds by State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987), *overruled by State v. White*, 322 N.C. 506, 369 S.E.2d 813 (1988); *see also State v. Rowland*, 89 N.C. App. 372, 377, 366 S.E.2d 550, 553 ("[T]here is no requirement to

submit the lesser included offense to the jury when there is no evidence to sustain a verdict of defendant's guilt of such lesser offense." (citations omitted)), *disc. review improvidently allowed*, 323 N.C. 619, 374 S.E.2d 116 (1988).

In this case, the circumstantial yet uncontroverted evidence shows that the knife was the same one missing from a new three-piece set of chef's knives purchased hours before the robbery. It also shows that during the robbery, the man identified as defendant grabbed McDade's fifteen-year-old daughter, pulled her head back, and held the knife against her neck as he threatened to slit her throat. The State's evidence was clear and positive as to the dangerous weapon element, and there was no evidence from which a rational juror could find that the knife, based on its nature and the manner in which it was used, was anything other than a dangerous weapon.

Nor was there any evidence that a knife was not used during the robbery, that the knife used was different than the one from the knife set, or that the knife was used in a non-threatening manner. If the jury believed the State's evidence—that defendant robbed the SBC with the missing chef's knife—then it was required to find him guilty of robbery with a dangerous weapon. But if the jury was not convinced that defendant was the robber, then it was required to acquit him altogether. *See State v. Black*, 286 N.C. 191, 196, 209 S.E.2d 458, 462 (1974). On the facts of this case, therefore, defendant was not entitled to a lesser-included instruction for common law robbery: he was either guilty of robbing the SBC by the threatened use of the chef's knife, or he was not guilty at all. *See State v. Fletcher*, 264 N.C. 482, 485, 141 S.E.2d 873, 875 (1965); *Rowland*, 89 N.C. App. at 379, 366 S.E.2d at 554.

III. Conclusion

Defendant received a trial free from prejudicial error. While we agree that the challenged portions of the interrogation video were not relevant to the nonhearsay purposes for which they were offered, any error in their admission was harmless in light of the trial court's limiting instructions and the overwhelming evidence of defendant's guilt. In addition, the trial court did not err in denying defendant's request for an instruction on the lesser-included offense of common law robbery because there was no evidence to support it.

NO PREJUDICIAL ERROR; NO ERROR.

Judges DAVIS and DIETZ concur.

STATE v. CRABTREE

[249 N.C. App. 395 (2016)]

STATE OF NORTH CAROLINA
v.
WILLIAM CLIFTON CRABTREE, SR.

No. COA15-1124

Filed 6 September 2016

1. Sexual Offenses—vouching for victim's credibility

Where defendant appealed from his convictions for first-degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and crime against nature, the Court of Appeals rejected his argument that the trial court plainly erred by allowing three witnesses to vouch for the child victim's credibility. While one of the witnesses did improperly vouch for the victim's credibility during otherwise acceptable testimony, defendant was not prejudiced. Further, defendant did not receive ineffective assistance of counsel when his attorney did not object to this testimony.

2. Sexual Offenses—jury charge—supported by evidence

Where defendant appealed from his convictions for first-degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and crime against nature, the Court of Appeals rejected his argument that the trial court erred by submitting the charge of first-degree sexual offense to the jury on a theory not supported by the evidence.

Judge McCULLOUGH dissenting.

Appeal by Defendant from judgments entered 19 March 2015 by Judge Beecher R. Gray in Person County Superior Court. Heard in the Court of Appeals 23 February 2016.

Attorney General Roy Cooper, by Assistant Attorney General Natalie Whiteman Bacon, for the State.

Mark Montgomery for Defendant.

STEPHENS, Judge.

Defendant William Clifton Crabtree, Sr., appeals from judgments entered upon his convictions for first-degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and

crime against nature. Crabtree argues that the trial court plainly erred by (1) allowing three witnesses to vouch for the child victim's credibility and (2) submitting the first-degree sexual offense charge to the jury on a theory not supported by the evidence. While we agree that one of the State's witnesses impermissibly vouched for the victim's credibility, we conclude that this error did not prejudice Crabtree. We find no error in the trial court's submission of the first-degree sexual offense charge.

Factual and Procedural Background

The evidence at trial tended to show the following: In late April 2013, ten-year-old "L.R."[1] and her two brothers began living with her grandmother and Crabtree, the grandmother's husband of sixteen years. L.R. testified that, shortly thereafter, Crabtree, whom L.R. considered her "grandpa," began making sexual advances towards her, starting with an incident in the family's barn when Crabtree kissed L.R., inserted his tongue into her mouth, and touched her breasts. Crabtree progressed to entering her room at night to "rub his thing on" her. L.R. testified that Crabtree "rubbed his dick on my vagina and white stuff was coming out[.]" Sometimes Crabtree made L.R. put her hand on his "thing" and move it up and down. Crabtree touched the inside of L.R.'s vagina using his fingers and moving them "up and down." L.R. testified that it hurt when Crabtree's fingernails would poke her vagina and she had itching on the inside of her vagina. Crabtree also licked L.R.'s vagina.

L.R. testified that this sexual abuse took place when she was home sick from school and her grandmother was at work and also on a morning following Thanksgiving. L.R. explained that, on the latter occasion, her grandmother had awakened, come to L.R.'s bedroom door, and witnessed Crabtree abusing L.R. In that incident, Crabtree used his hand to rub her vagina and then "he started licking it." According to L.R., Crabtree threatened her with foster care if she told anyone about his abuse.

"D.J.," L.R.'s younger brother, who, like his sister, had known Crabtree as his "grandpa" for his entire life, testified about several instances when he saw Crabtree "do things with [L.R.] that [D.J.] thought [were] weird or strange or inappropriate[.]" D.J. testified that he witnessed Crabtree "lift up her skirt, her nightgown" while they were seated at "the eating table." On another occasion, in the family barn, D.J. saw Crabtree "do something that [he] thought was wrong to" L.R., to wit, Crabtree "had

1. We refer to the child victim and her younger brother by initials in order to protect their identities.

his hand in her pants." The third incident D.J. witnessed took place in L.R.'s bedroom:

> A. I saw him sitting on the edge of the bed. [L.R.] was between his legs. I didn't know what he was doing, but I did see that.
>
> Q. Did you know at this time what anybody was wearing when you saw that?
>
> A. Um, I think he was wearing his underwear, and she was wearing[] her purple nightgown.
>
> Q. Could you see anybody's body parts?
>
> A. No, I did not.
>
> Q. Could you see any private parts of anybody?
>
> A. No, I did not.
>
> Q. Okay. Now, when you saw those things that you thought were weird and wrong, did you say anything about it to anybody?
>
> A. I told my grandma.
>
> Q. When did you tell your grandma?
>
> A. Like the first time I saw it, I told her.
>
> Q. Okay. What did you say?
>
> A. That, um, I think something like that, um, he was messing with [L.R.].

The grandmother testified that, on 29 November 2013, she awoke to find Crabtree was not in their shared bedroom. Looking for her husband, she walked through the house to the doorway of L.R.'s bedroom and saw Crabtree sitting on the side of L.R.'s bed with his hands between L.R.'s legs and L.R.'s hands between his legs. According to the grandmother, "[t]hey was feeling each other up[]" and there was no doubt in her mind that the contact was sexual in nature. The grandmother motioned for L.R. to remain quiet by placing her finger over her mouth because the grandmother wanted to "see what all he was going to do." The grandmother then quietly retreated to her bedroom, unnoticed by Crabtree, but later returned to L.R.'s bedroom and asked Crabtree what he was doing. Crabtree replied that he was "looking for a mouse." After Crabtree left the room, the grandmother spoke with L.R. about what she had just

seen, and L.R. disclosed her past sexual abuse by Crabtree. The grandmother did not confront Crabtree, instead contacting the Person County Department of Social Services ("DSS") and local law enforcement.

Several witnesses testified about the investigation into L.R.'s allegations. Later in December, the grandmother took L.R. to the emergency room ("ER") after she complained of pain and itching in her vaginal area and stated that Crabtree had engaged in intercourse with her. An ER doctor alerted the Child Abuse Medical Evaluation Clinic, an outpatient clinic affiliated with Duke University Hospital, and, on 23 December 2013, Dr. Karen Sue St. Claire, a pediatrician and the medical director of the clinic, began an evaluation of L.R. St. Claire testified as an expert witness. During her initial exam of L.R., St. Claire received L.R.'s medical history from the grandmother while Scott Snyder, St. Claire's child interviewer, interviewed L.R. about the alleged abuse. St. Claire's physical examination of L.R. revealed no physical signs of trauma or infection to L.R.'s vagina or anal area.

St. Claire testified about the clinic's five-tier rating system for evaluating an alleged child victim's description of sexual abuse. St. Claire and Snyder each classified L.R.'s description as level five, the "most diagnostic" category. St. Claire testified that L.R.'s description provided a "clear disclosure" and a "clear indication" of sexual abuse. Snyder was not formally offered or accepted as an expert witness, but offered testimony about his interviews with L.R. Pertinent to this appeal, when asked on re-direct examination about L.R.'s report of a detail regarding an incident of fellatio L.R. was forced to perform on Crabtree, Snyder testified as follows:

> Q Is that correct? Was it remarkable to you when she described the juice hitting the roof of her mouth?
>
> A Umm, remarkable in terms of not typically something that you would hear from a ten-year-old child, and not necessarily something, again trying to understand what may be the reason the child might be saying these things. It is striking in terms of what the child may have seen something happen, but that's more of a experiential statement, in other words something may have actually happened to her as opposed to something seeing on a screen or something having been heard about.

DSS social worker Antoinetta Royster received L.R.'s case in early December 2013 and subsequently interviewed L.R., her family members, and Crabtree. Like Snyder, Royster was neither formally offered nor

admitted as an expert witness. Royster testified about her interviews and then was asked about the process DSS follows in abuse and neglect cases:

> Umm, the family had based upon the recommendations from the CME, the Child Medical Evaluation, one other evaluation was recommended, and that's called a Child Family Evaluation. And with those, it's a lot of times in the abuse and serious neglect cases where the Child Medical Evaluation look[s] more at the physical, but could be physical evidence of abuse and neglect, the Child Family Evaluation look[s] more at the emotional piece of it to basically talk with everyone in the family. And if there is any other thing, any other treatment is needed, they would recommend that to DSS for us to like move on with that, move forward in that direction. They . . . also give what they, not really a diagnosis, but their conclusion or decision about those children that have been evaluated if they were abused or neglected in any way.
>
> Q So and all of those recommendations and treatments have been followed up on—
>
> A Yes.
>
> Q —as you continue to be involved in this case. Is that correct?
>
> A Yes.

Captain A.J. Weaver of the Person County Sheriff's Office also testified on behalf of the State. Weaver testified about his recorded interview with L.R. on 4 December 2013. The recorded interview was introduced into evidence as State's Exhibit 3, published, and played for the jury without objection. In the recording, which was transcribed by the court reporter when it was played for the jury at trial, L.R. disclosed that Crabtree had touched her "private area" with his hands and forced L.R. to "rub" his "private." L.R. also described Crabtree pulling her pants down and licking her "private." L.R. further explained that, after playing with her "private," Crabtree would put his "private" in L.R.'s mouth, go "up and down" until "stuff start[ed] coming out" and went into L.R.'s mouth. L.R. said the latter form of abuse had happened two or three times. Weaver testified that, following his interview with L.R., he sought warrants and arrested Crabtree on 4 December 2013.

On 9 December 2013, a Person County Grand Jury indicted Crabtree on three charges based on the events alleged to have occurred on

29 November 2013: one count of first-degree sex offense against a child under the age of thirteen years, one count of indecent liberties with a child, and one count of crime against nature. Crabtree pled not guilty, and his case came on for trial at the 16 March 2015 session of Person County Superior Court, the Honorable Beecher R. Gray, Judge presiding. Following the close of the State's evidence,[2] Crabtree elected not to present any evidence. At the close of all evidence, Crabtree moved to dismiss the charges against him, and the trial court denied that motion.

On 19 March 2015, the jury returned verdicts finding Crabtree guilty on all charges. The court consolidated the first-degree sexual offense against a child under the age of thirteen years and the crime against nature convictions and entered a judgment sentencing Crabtree to a term of 317-441 months. The court then entered a separate judgment sentencing Crabtree to a concurrent term of 21-35 months for the indecent liberties with a child conviction. Crabtree gave notice of appeal in open court.

Discussion

On appeal, Crabtree argues that (1) the trial court committed plain error in allowing St. Claire, Snyder, and Royster to vouch for L.R.'s credibility, or in the alternative, that Crabtree received ineffective assistance of counsel ("IAC") when his trial counsel failed to object to the challenged testimony; and (2) the trial court committed plain error in submitting the charge of first-degree sexual offense to the jury on a theory not supported by the evidence. We find no prejudicial error in the admission of the challenged testimony and no error in the submission of the first-degree sexual offense charge.

I. Standard of review

To preserve an issue for review on appeal, a defendant "must have presented the trial court with a timely request, objection[,] or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." N.C.R. App. P. 10(a)(1). However,

> [i]n 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

2. The State offered testimony from several other witnesses in addition to those discussed *supra*. The testimony of those witnesses was corroborative of the direct, eyewitness accounts of abuse offered by L.R. and her grandmother.

> the judicial action questioned is specifically and distinctly contended to amount to plain error.

N.C.R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 172 L. Ed. 2d 58 (2008). Plain error review is limited to issues that "involve either (1) errors in the judge's instructions to the jury, or (2) rulings on the admissibility of evidence." *State v. Gregory*, 342 N.C. 580, 584, 467 S.E.2d 28, 31 (1996) (citations omitted).

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.

State v. Lawrence, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (internal quotation marks and citations omitted). Thus, "[u]nder the plain error rule, [a] defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result." *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

II. Vouching for L.R.'s credibility

Crabtree first argues that St. Claire, Snyder, and Royster improperly vouched for the credibility of L.R. during their testimony. We conclude that neither Snyder nor Royster improperly testified as to L.R.'s credibility. While we agree that St. Claire improperly vouched for L.R.'s credibility in the midst of otherwise acceptable testimony, we conclude that Crabtree was not prejudiced by the impermissible testimony.

"[T]estimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988) (citations omitted). In child sexual abuse cases, where there is no physical evidence of the abuse, an expert witness's affirmation of sexual abuse amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony. *State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 89, *disc. review denied*, 346 N.C. 551, 488 S.E.2d 813 (1997). Examples of impermissible vouching for a child victim's

credibility include a clinical psychologist's testimony that a child victim was "believable[,]" *see State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986), and an expert witness's statement, based on an interview with the child, that she "was a sexually abused child." *See State v. Grover*, 142 N.C. App. 411, 414, 543 S.E.2d 179, 181, *affirmed per curiam*, 354 N.C. 354, 553 S.E.2d 679 (2001). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002) (*per curiam*) (citations omitted). Further, the same analysis applies to a witness who is a DSS worker or child abuse investigator because, even if she is "not qualified as an expert witness, . . . the jury [will] most likely [give] her opinion more weight than a lay opinion." *State v. Giddens*, 199 N.C. App. 115, 122, 681 S.E.2d 504, 508 (2009), *affirmed per curiam*, 363 N.C. 826, 689 S.E.2d 858 (2010).

Crabtree contends that Snyder and Royster, lay witnesses for the State, improperly vouched for L.R.'s credibility during their testimony. Crabtree cites Royster's statement, in explaining the process of investigating a report of child sexual abuse, that "[St. Claire and her team] give . . . their conclusion or decision about those children that have been evaluated if they were abused or neglected in any way." Read in context as quoted *supra* in the Factual and Procedural Background of this opinion, it is clear that Royster's comment was merely a description of what St. Claire's team are expected to have done before sending any case to DSS for further evaluation. Royster was not commenting directly on L.R.'s case at all, let alone her credibility, and thus the challenged testimony was not inadmissible.

Crabtree also challenges testimony in which Snyder characterized L.R.'s description of performing fellatio on Crabtree as "more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about." As with Royster's remark, Snyder's testimony specifically left the credibility determination to the jury by stating, "something *may* have actually happened to [L.R.] as opposed to something" L.R. learned about from the media or another source. (Emphasis added). Thus, we conclude that Snyder did not improperly vouch for L.R.'s credibility.

In contrast, St. Claire's testimony did include impermissible vouching. We find no fault with St. Claire's description of the five-tier rating system that the clinic uses to evaluate potential child sexual abuse victims based on the particularity and detail with which a patient gives his

or her account of the alleged abuse. However, her statement that "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened" and her reference to the latter category as "clear disclosure" or "clear indication" of abuse, in conjunction with her identification of that category as the one assigned to L.R.'s 23 December 2013 interview, crosses the line from a general description of the abuse investigation process into impermissible vouching. Likewise, St. Claire's testimony that her team's "final conclusion [was] that [L.R.] had given a very clear disclosure of what had happened to her and who had done this to her" was an inadmissible comment on L.R.'s credibility.

As part of our plain error review, having concluded that the admission of these remarks by St. Claire was error, we must next determine whether they prejudiced Crabtree. After careful consideration, we conclude that they did not.

This Court's opinion in *State v. Ryan* provides a helpful, well-reasoned framework for assessing the prejudice of an expert witness's vouching for an alleged child victim's credibility:

> Under our plain error review, we must consider whether the erroneous admission of expert testimony that impermissibly bolstered the victim's credibility had the prejudicial effect necessary to establish that the error was a fundamental error. This Court has held that it is fundamental to a fair trial that a witness's credibility be determined by a jury, that expert opinion on the credibility of a witness is inadmissible, and that the admission of such testimony is prejudicial when the State's case depends largely on the testimony of the prosecuting witness.
>
> Notably, a review of relevant case law reveals that [(1)] where the evidence is fairly evenly divided, or [(2)] where the evidence consists largely of the child victim's testimony and testimony by corroborating witnesses with minimal physical evidence, *especially where the defendant has put on rebuttal evidence*, the error is generally found to be prejudicial, even on plain error review, since the expert's opinion on the victim's credibility likely swayed the jury's decision in favor of finding the defendant guilty of a sexual assault charge.

223 N.C. App. 325, 336-37, 734 S.E.2d 598, 606 (2012) (citations and internal quotation marks omitted; emphasis added), *disc. review denied*,

366 N.C. 433, 736 S.E.2d 189 (2013). In *Ryan*, this Court found the expert's vouching prejudicial, noting that the defendant testified, denying all of the charges, and his ex-wife also testified on his behalf, while

> the State's evidence consisted of testimony from the child, her family members, her therapist, the lead detective on the case who was an acquaintance of the family, and an expert witness. All of the State's evidence relied in whole or in part on the child's statements concerning the alleged sexual abuse. . . . There was *no testimony presented by the State that did not have as its origin the accusations of the child*. For this reason, the credibility of the child was central to the State's case.

Id. at 337, 734 S.E.2d at 606 (emphasis added). *See also State v. Bush*, 164 N.C. App. 254, 260, 595 S.E.2d 715, 719 (2004) ("In the case at bar, any and all corroborating evidence is *rooted solely in* [*the victim's*] *telling of what happened*, and that her story remained consistent. . . . Therefore, the conclusive nature of [the doctor's] testimony as to the sexual abuse and that [the] defendant was the perpetrator was highly prejudicial. This constituted plain error." (Emphasis added)).

In contrast, this Court has found no prejudice to a defendant where "absent the [impermissible vouching] testimony, the . . . case involve[s] more evidence of guilt against the defendant than simply the testimony of the child victim and the corroborating witnesses." *State v. Sprouse*, 217 N.C. App. 230, 242, 719 S.E.2d 234, 243 (2011), *disc. review denied*, 365 N.C. 552, 722 S.E.2d 787 (2012). In *Sprouse*, the defendant contended "that the trial court committed plain error by allowing [a] DSS social worker . . . to testify that there had been a substantiation of sex abuse of [the child victim] by [the] defendant." *Id.* at 241, 719 S.E.2d at 243. Although we agreed that the social worker's "testimony that DSS had substantiated the allegations of abuse" was error, this Court concluded that "the error [did] not rise to the level of plain error . . . ." *Id.* at 243, 719 S.E.2d at 244. In that case,

> [a]side from the testimony of A.B.[, the child victim,] and the witnesses corroborating her testimony, the following evidence was presented at trial: testimony by Raquel[, the defendant's wife,] that shortly after A.B. filed charges against [the] defendant, [the] defendant "manipulat[ed]" Raquel to tattoo his penis in order to "blow [A.B.'s] story out of the water"; [the] defendant asked Raquel to contact Burris[, a female acquaintance,] in an effort to get Burris

> to lie about having seen the tattoo during the time period associated with the allegations by A.B.; photographs of [the] defendant's penis, coupled with Raquel's testimony, showed that he did not have a tattoo as of 2 January 2007, despite the fact that he testified he did have the tattoo as early as 2003 or 2004; and [the] defendant tried to have A.B. killed after charges were filed against him.

Id. at 242-43, 719 S.E.2d at 243-44. Thus, as in Crabtree's case, there was substantial evidence supporting the victim's abuse allegations that was independent of the victim's report.

Similarly, in *State v. Davis*, this Court noted that "it is not plain error for an expert witness to vouch for the credibility of a child sexual abuse victim where the case does not rest solely on the child's credibility." 191 N.C. App. 535, 541, 664 S.E.2d 21, 25 (2008) (citation omitted). Thus, although "admission of [the challenged] statement was error as it improperly vouched for [the victim's] credibility[,]" because evidence independent of the child's account of abuse was before the jury, "we [held] that admission of this statement did not constitute plain error." *Id.*

Here, although there was no physical evidence of sexual abuse, Crabtree presented no evidence, let alone evidence rebutting L.R.'s allegations. More importantly, unlike in *Ryan* and *Bush*, the State's entire case did not rest solely on L.R.'s account of what happened. The criminal charges against Crabtree arose from an incident that was alleged to have occurred on 29 November 2013. As noted *supra*, the grandmother testified that, on that date, she saw Crabtree "sitting on the side of [L.R.'s] bed, and he had his hands between [L.R.'s] legs, and [L.R.] had her hands between his legs. . . . They was feeling each other up." This eyewitness account of Crabtree sexually abusing L.R. is entirely independent of L.R.'s reports of abuse at the hands of her "grandpa," and thus not dependent on L.R.'s credibility. Further, the grandmother also testified that she had been married to Crabtree for twenty years, had loved him during their marriage, and had a son with him. Thus, her testimony that she witnessed her own husband sexually abusing her granddaughter was likely highly persuasive to the jury.

Likewise, L.R.'s brother, D.J., testified that he had seen several "weird" encounters between Crabtree and his sister, including Crabtree "lift[ing] up her skirt, her nightgown" at the dinner table; Crabtree with "his hand in her pants" in the barn; and Crabtree, in his underwear "sitting on the edge of [L.R.'s] bed. She was between his legs." While these incidents were apparently not those for which Crabtree was charged

in this matter, D.J.'s testimony about them bolsters L.R.'s reports that Crabtree had been sexually abusing her for a period of time, and, like the grandmother's testimony, is entirely independent of L.R.'s credibility.

In light of this independent evidence of Crabtree's guilt not based on L.R.'s reports of abuse, the precedent established in *Sprouse* and *Davis* compels our conclusion that "it was not plain error for [St. Claire] to vouch for the credibility of [L.R. because] the case [did] not rest solely on the child's credibility." *See Davis*, 191 N.C. App. at 541, 664 S.E.2d at 25 (citation omitted). Accordingly, Crabtree cannot show he was prejudiced by St. Claire's vouching and, as a result, has failed to establish plain error.

We likewise reject Crabtree's alternative argument that he received IAC in that his trial counsel failed to object to St. Claire's vouching testimony.

> To prevail on a claim of [IAC], a defendant must first show that his counsel's performance was deficient and then that counsel's deficient performance *prejudiced his defense*. . . . 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.*

State v. Allen, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citations and internal quotation marks omitted; emphasis added), *cert. denied*, 549 U.S. 867, 166 L. Ed. 2d 116 (2006). In light of our determination that St. Claire's impermissible vouching for L.R.'s credibility was not prejudicial to him, Crabtree cannot establish the second prong of a successful IAC claim.

III. First-degree sexual offense charge

Crabtree also argues that the trial court committed plain error in submitting the charge of first-degree sexual offense to the jury on a theory not supported by the evidence. Specifically, Crabtree contends that there was no substantive evidence of fellatio presented at trial and, therefore, the trial court erred in instructing the jury that a sexual act for purposes of first-degree sex offense included fellatio as well as cunnilingus and penetration. We disagree.

"[I]t is plain error to allow a jury to convict a defendant upon a theory not supported by the evidence." *State v. Jordan*, 186 N.C. App. 576, 584, 651 S.E.2d 917, 922 (2007) (citations omitted), *disc. review denied*,

362 N.C. 241, 660 S.E.2d 492 (2008). Thus, a defendant is entitled to a new trial when "the trial court erroneously submits the case to the jury on alternative theories, one of which is not supported by the evidence . . . and . . . it cannot be discerned from the record upon which theory or theories the jury relied in arriving at its verdict . . . ." *State v. Lynch*, 327 N.C. 210, 219, 393 S.E.2d 811, 816 (1990) (citation omitted). However, "the testimony of a single witness will legally suffice as evidence upon which the jury may found a verdict." *State v. Vehaun*, 34 N.C. App. 700, 704, 239 S.E.2d 705, 709 (1977) (citation and internal quotation marks omitted), *disc. review denied*, 294 N.C. 445, 241 S.E.2d 846 (1978). Further,

> [e]vidence of an out-of-court statement of a witness, related by the in-court testimony of another witness, may be offered as substantive evidence . . . . Although the better practice calls for the party offering the evidence to specify the purpose for which the evidence is offered, unless challenged there is no requirement that the purpose be specified.

State v. Ford, 136 N.C. App. 634, 640, 525 S.E.2d 218, 222 (2000) (citations and footnotes omitted).

At trial, L.R. gave no testimony describing an instance in which she performed fellatio on Crabtree, and, on appeal, Crabtree asserts that "[t]he only references to fellatio were in the form of alleged out-of-court statements by [L.R.] to [the grandmother], . . . St. Claire, . . . Snyder, and . . . Royster." However, as noted *supra*, the State also presented testimony from Weaver about his 4 December 2013 interview of L.R. A recording of that interview was admitted as "substantive" evidence without objection as State's Exhibit 3 and was published to the jury. The recording includes the following exchange between Weaver and L.R.:

> Q Has he tried to put his private area anywhere else on you?
>
> A In my mouth.
>
> Q He did. When did that happen, do you know?
>
> A My, like whenever he's done with me, he'll like take his private and go in my mouth.
>
> Q When you say done with you, what do you mean by that?
>
> A Like he's done playing, playing with me.

Q Uh-huh.

A Like in my private area, he's done playing.

Q Then he'll put his private area in your mouth?

A (Nods affirmatively.)

Q What happens when that happens? What happens when he does that?

A He'll like go up and down.

Q Uh-huh. And then what happens?

A It like, it's stuff starts coming out.

Q In your mouth?

A (Nods affirmatively.)

Q Okay. All right. All right. How many times has that happened?

A Like two or three.

Q Two or three. Do you remember when that happened?

A Umm, on the Friday morning.

Q On Friday morning that happened?

A Yeah, before my grandma got up.

During a bench discussion with the prosecutor and defense counsel about the DVD which contained the recording and also included an interview of the victim's grandmother, the trial court clarified that, "The only part that's going to be substantive is the interview of [L.R.]." The recording was admitted without objection or limiting instruction, and the only instruction regarding the recording given by the trial court during the jury charge was that the recording could be considered "as evidence of facts it illustrates or shows." L.R.'s recorded description of Crabtree forcing her to perform fellatio on him was thus substantive evidence supporting Crabtree's conviction for first-degree sexual abuse on the basis of fellatio. Crabtree's argument is overruled, and we hold that he received a fair trial, free of prejudicial error.

NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART.

Judge BRYANT concurs.

Judge McCULLOUGH dissents in a separate opinion.

McCullough, Judge, dissents.

From the majority opinion's conclusion that an expert witness's testimony vouching for the credibility of the victim was harmless error, I dissent. As the majority acknowledges, vouching for a victim-witness's credibility is normally not permissible.

Defendant argues that three witnesses improperly vouched for the credibility of L.R. in this case. We agree that the State's expert witness improperly vouched for L.R.'s credibility in the midst of otherwise acceptable testimony. However, we disagree that any other witness improperly testified as to L.R.'s credibility.

"[T]estimony of an expert to the effect that a prosecuting witness is believable, credible, or telling the truth is inadmissible evidence." *State v. Bailey*, 89 N.C. App. 212, 219, 365 S.E.2d 651, 655 (1988); *see also State v. Aguallo*, 318 N.C. 590, 599, 350 S.E.2d 76, 81 (1986) (a clinical psychologist's testimony as an expert witness that a child victim was "believable" was inadmissible). This Court has also recognized that where no physical evidence of sexual abuse exists, an expert witness's affirmation of sexual abuse of a child amounts to an evaluation of the veracity of the child witness and is, therefore, impermissible testimony. *See State v. Dick*, 126 N.C. App. 312, 315, 485 S.E.2d 88, 90 (1997) (distinguishing the holdings in *State v. Trent*, 320 N.C. 610, 359 S.E.2d 463 (1987) and *State v. Parker*, 111 N.C. App. 359, 432 S.E.2d 705 (1993)). "However, an expert witness may testify, upon a proper foundation, as to the profiles of sexually abused children and whether a particular complainant has symptoms or characteristics consistent therewith." *State v. Stancil*, 355 N.C. 266, 267, 559 S.E.2d 788, 789 (2002).

The majority acknowledges that the testimony of Dr. St. Claire, in part, constituted inadmissible "vouching." At trial, Dr. St. Claire testified as the State's expert witness regarding L.R.'s interview and physical examination. As noted above, Dr. St. Claire described a five-tier rating system that the clinic uses to evaluate potential child sexual abuse victims based on the particularity and detail with which a patient gives his or her account of the alleged abuse. Upon review of Dr. St. Claire's testimony, I find no fault with Dr. St. Claire's description of the five-tier system apart from Dr. St. Claire's statement that, "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened."

See State v. Grover, 142 N.C. App. 411, 414-19, 543 S.E.2d 179, 181-83 (2001) (an expert witness's conclusion, based only on an interview with the child and with no physical evidence, that "[she] was a sexually abused child" was impermissible testimony). Dr. St. Claire and her team refer to the latter category as "clear disclosure" or "clear indication" and assigned L.R.'s 23 December 2013 interview at the clinic to this category. To be exact, their "final conclusion [was] that [L.R.] had given a very clear disclosure of what had happened to her and who had done this to her."

In cases involving alleged sexual abuse of a child, there is a fine line between expert testimony properly evaluating a diagnosis of the child witness and expert testimony that improperly vouches for the credibility of the child witness. Had Dr. St. Claire not supplemented her description of the five-tier rating system with the comment that a "clear disclosure" signifies near certainty as to the sexual abuse of the child, no improper vouching for the credibility of the child witness would have occurred. However, by testifying that the team is near certain that sexual abuse has occurred when a child's allegations are classified in the "clear disclosure" tier and then testifying that L.R.'s interview was classified as a clear disclosure, Dr. St. Claire effectively testified that the team was near certain that L.R. had been sexually abused. I believe that this testimony crosses that delicate line and amounts to vouching for L.R.'s credibility. Because the State's evidence almost entirely relies on L.R.'s testimony and the corroborative testimony of other witnesses, it is likely that Dr. St. Claire's testimony caused the jury to rely on Dr. St. Claire's opinion of L.R.'s disclosure rather than reach its own conclusion as to the credibility of L.R.'s testimony at trial. Thus, I believe Dr. St. Claire's testimony regarding the certainty of sexual abuse occurring had a probable impact on the jury finding the defendant guilty of first degree sexual offense against a child under the age of thirteen years, indecent liberties with a child, and crime against nature.

The majority recognizes that this portion of Dr. St. Claire's testimony is inadmissible, but concludes that the sexual activity observed by the victim's grandmother along with observations made by the victim's brother provide such overwhelming evidence of guilt that the admission of the expert's improper vouching testimony is harmless beyond a reasonable doubt. I recognize that vouching for the victim's credibility is not always plain error and can be harmless error when the other evidence in the case is very strong. *See State v. Hammet*, 361 N.C. 92, 637 S.E.2d 518 (2006) and *State v. Stancil*, 355 N.C. 266, 559 S.E.2d 788 (2002).

In the case *sub judice*, however, without the grandmother's and brother's observations there might not have been a conviction, even with the inadmissible expert witness testimony. This victim was an admitted liar. She admitted to lying about sexual activity in order to live with her aunt who would let her do what she wanted. On cross examination L.R. testified as follows:

Q. What grade did you say you were in?

A. Fourth.

Q. What type of grades do you get?

A. Eighties and Nineties and one hundreds.

Q. And have you been told you're pretty smart?

A. Yes.

Q. You said it's more important to tell the truth?

A. Yes.

Q. And you talked to Investigator Weaver about this case; is that correct?

A. Yes.

Q. Do you remember talking to him about 6 months before?

A. Yes.

. . . .

Q. Do you remember talking to them another time about 6 months before?

A. Yes.

Q. Did you tell them that your brothers had raped you?

A. Yes.

Q. Was that the truth or a lie?

A. A lie.

Q. Do you know why you told it?

A. Yes.

Q. Can you tell us why you told that lie?

A. So, I could go and live with somebody else.

Q. That would have been your Aunt Delilah?

A. Yes.

Q. And you loved her a lot?

A. Yes.

Q. Was she your grandmother's sister?

A. Yes.

Q. Did she let you do whatever you wanted?

A. Yes.

Q. Did you like doing that?

A. Yeah.

Q. Now, you had recently moved in with your grandmother, Mildred. Is that right?

A. Yes.

Q. But you didn't like living there so much, did you?

A. Yeah, because of the horses.

Q. You liked the horses.

A. (No response).

Q. But did you tell Officer Weaver that you didn't like all the rules?

A. Yeah.

Q. But you liked living with Aunt Delilah because she let you do what you wanted?

A. Yes, but not all the time.

Q. Not all the time. Okay. And do you remember talking to officers in February of that year, a few months before you talked to Officer Weaver?

A. No.

Q. Do you remember telling the officer in Durham that a black man had had sex with you, too?

A. Yes.

Q. Was that a truth or a lie?

A. A truth.

Q. That was the truth?

A. (Witness nods yes).

Q. Do you know what officer you told? Do you remember who you told about that?

A. No.

Q. Okay. But that was a few months before you talked with Officer Weaver?

A. Yes.

Q. Okay. Does your step-grandfather, Mr. Crabtree, have any physical problems that you know about?

A. Yes.

Q. Can you tell us what they are?

A. Um, my grandma said that he was mentally crazy.

Q. Do you know if he had a heart attack?

A. Yes.

Q. Do you know if he had cancer?

A. No.

Q. Were you able to tell if he had a hard time walking?

A. Yes.

Q. Did he sometimes have a hard time walking?

A. Yes.

Q. Were you able to tell if he had a hard time with his hands sometimes?

A. No.

Q. You couldn't tell it was hard for him to grab ahold of things?

A. No.

Q. Okay. Do you ever remember him having a job?

A. Yeah.

Q. What was his job?

A. Um, cutting wood. Trees.

Q. Was that a long time ago?

A. No.

Q. Is that a few years ago?

A. No.

Q. Was it before he had the heart attack?

A. I guess.

Q. Pardon?

A. I guess.

Q. Okay. You don't live with your grandma, Mildred, any more. Is that right?

A. Yes.

Q. Why is that?

A. Because, um, she couldn't take care of us no more.

Q. Okay. Did you tell people things about her?

A. Yes.

Q. Were they true or were they a lie?

A. Some were a lie.

Q. Why did you tell those lies?

A. Because I didn't want to live with her no more.

Q. So, is it fair to say you told lies in the past when you wanted to move somewhere else?

A. Yes.

With a child under the age of 13 testifying that she had actually accused her own brothers of rape, just to go live with an aunt who had

few rules presents the prosecutor with a very difficult situation. The observations of the grandmother and brother are helpful but they do not constitute a first degree sex offense although they clearly provide sufficient evidence to sustain the indecent liberties charges. Thus, L.R.'s statement about fellatio which is the basis of the first degree sex offense charge depends solely on L.R.'s credibility. Of course, the jury could conclude that any person who would do what the grandmother observed probably did everything else. I prefer to believe that jurors do not jump to such assumptions and base their verdict on the evidence actually introduced at trial.

Consequently, I believe that the observations are important but insufficient to sustain the first degree sex offense charges and that the expert's testimony prejudiced defendant. A young woman under the age of 13 who will accuse her brothers of rape is going to have severe credibility problems. I believe an expert who vouches for the victim's credibility was of great assistance in persuading the jury to believe that she had performed fellatio as she described it to the investigators. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
KENNETH SAMUEL DOWNEY

No. COA16-164

Filed 6 September 2016

Search and Seizure—residence—motion to suppress—drugs

The trial court did not err in a drugs case by denying defendant's motion to suppress the evidence removed from his residence as a result of the 26 February 2013 search. Defendant's contention that the evidence was obtained as a result of a violation of N.C.G.S. § 15A-254 failed as a matter of law. Taken together, the State's evidence was sufficient to support a reasonable inference that defendant committed the crimes charged.

Appeal by Defendant from judgments entered 6 August 2015 by Judge James G. Bell in Superior Court, Richmond County. Heard in the Court of Appeals 8 August 2016.

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

Willis Johnson & Nelson PLLC, by Drew Nelson, for Defendant-Appellant.

McGEE, Chief Judge.

Kenneth Samuel Downey ("Defendant") appeals his convictions for possession of marijuana, possession with the intent to sell and deliver cocaine, intentionally keeping and maintaining a dwelling for keeping or selling a controlled substance, possession of drug paraphernalia, selling cocaine and delivering cocaine. Defendant contends the trial court erroneously denied his pretrial motion to suppress evidence seized from his home during the execution of a search warrant, and further committed plain error by admitting the same evidence at trial. We find no error.

I. Background

Tammy Honeycutt ("Honeycutt") met with Lieutenant Creed Freeman ("Lt. Freeman") and Detective George Gillenwater ("Det. Gillenwater") of the Rockingham Police Department ("RPD") at the police station at approximately 10:00 a.m. on 26 February 2013 to discuss conducting a "controlled buy" of narcotics. A controlled buy is a process in which a confidential police informant, typically wired with an audio or video recording device, purchases an illegal substance or substances from a specific target. Confidential informants usually receive some sort of legal or financial compensation for assisting with a controlled buy. Honeycutt had worked with the RPD as a confidential informant on several prior investigations, and she contacted Lt. Freeman to indicate she "could bust [Defendant], because [Honeycutt's] son had gotten into some trouble and [she] needed some [legal] help." Honeycutt had accompanied a mutual friend to Defendant's residence several times. Honeycutt told Lt. Freeman and Det. Gillenwater she believed Defendant was selling crack cocaine from his home. Both officers regarded Honeycutt as a reliable source.

Before initiating the controlled buy the same morning, and in keeping with RPD protocol, Lt. Freeman searched Honeycutt for contraband and Det. Gillenwater searched Honeycutt's vehicle. At approximately 11:00 a.m., Honeycutt attempted to call Defendant to arrange the drug buy. Defendant did not answer but called Honeycutt five minutes later and, while on speakerphone, told Honeycutt to "come on." Det. Gillenwater recognized Defendant's voice from having "dealt with [Defendant] previously[.]" Honeycutt was given forty dollars in traceable "buy-money" to

use in the planned transaction with Defendant. She was also fitted with a wristwatch audio recording device. According to Det. Gillenwater, that "was the easiest way to try and record [the] transaction[]" because Honeycutt expressed concern Defendant "might notice a video recording device . . . [if] he patted her down." Honeycutt was instructed to drive to Defendant's residence and relay back to the officers as much information as possible, including the address of the home, descriptions and license plate numbers of any vehicles on the premises, and number of people present in the home.

Honeycutt left the police station driving alone in a gold Honda Accord, the same vehicle that Det. Gillenwater had searched. Lt. Freeman and Det. Gillenwater followed Honeycutt in a separate vehicle. The officers were not able to follow Honeycutt all the way to Defendant's residence, but they "were able to see her pull onto Hazelwood [Avenue] and see her pull into [Defendant's] yard," which was located at 114 Hazelwood Avenue. Before getting out of her vehicle, Honeycutt reported the home's address and the presence of two automobiles in the yard through the audio recording device.

A man Honeycutt did not recognize came out of "a little shack in the back of [Defendant's] yard" and approached Honeycutt's car. The man asked Honeycutt if she had called first and, when she responded that she had called, he moved aside so Honeycutt could get out of the vehicle. Honeycutt knocked on the back door of Defendant's residence and Defendant let her inside. Defendant and Honeycutt sat down at a kitchen table where Honeycutt observed "a big pile of what [she] assumed to be crack cocaine" that Defendant appeared to be "in the process of bagging up." Honeycutt also observed weight scales and a revolver on the table. Defendant's front door appeared to be "barricaded shut" and Honeycutt noticed additional "drug paraphernalia stuff, scales, [and] baggies." Honeycutt gave Defendant the marked buy-money in exchange for a baggie of "what [she] assumed to be crack rock." Honeycutt put the baggie in her pocket, left Defendant's residence, and drove back to the police station, where she was patted down and debriefed. She gave Lt. Freeman and Det. Gillenwater the bag of suspected crack cocaine Defendant had sold her. Det. Gillenwater placed the bag into another clear bag, which he sealed with clear packaging tape and labeled with his initials, the date, and the case number. He placed the bag in a locked desk drawer.[1] Honeycutt was paid sixty dollars for participating in the controlled buy.

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1. Det. Gillenwater testified that the evidence was stored until it could be mailed to the State Bureau of Investigation. The state crime lab received the evidence on 18 March 2013.

While Lt. Freeman interviewed Honeycutt, Det. Gillenwater prepared an application for a warrant to search Defendant's residence. The warrant was issued and executed that afternoon. Based on Honeycutt's information that Defendant's front door was barricaded shut and that there was a firearm inside the home, members of the RPD SWAT team accompanied Lt. Freeman and Det. Gillenwater to Defendant's residence. Once the SWAT team deemed the house secure, Lt. Freeman and Det. Gillenwater entered through the back door. Defendant was inside. Lt. Freeman began searching the residence and identifying items to be seized, while Det. Gillenwater "wr[ote] down on a piece of notebook paper a general description of [each item]." Det. Gillenwater's handwritten notes were as follows:

01 [-] digital scales in kitchen

02 - razor blades

03 - sandwich bags

04 - suspected crack/cocaine

05 - 53 [U.S. dollars]

06 - video equipment living room

07 - baggies with corners cut up in trash

08 - cooking apparatus – kitchen

09 - digital scales – kitchen cabinet

10 - bag of money – safe in bedroom back left

11 - small bag of marijuana/in flashlight/kitchen area

12 - box of bullets back left bedroom

13 - piece of mail desk drawer

14 - small bag of weed [and] papers – desk drawer

15 - .38 cal[iber] pistol

<u>Front right bedroom</u>

Money

.38 cal[iber pistol]

The list indicated that the first four items were removed from the "kitchen area." After Defendant was arrested and taken to the police

station, he was given an Inventory of Items Seized Pursuant to Search standardized form, with Det. Gillenwater's handwritten notes attached. Defendant never signed the form's acknowledgment of receipt.

Det. Gillenwater transported the items seized from Defendant's residence to the police station, where he placed them in evidence bags that he labeled and sealed. He secured the items in a storage locker until they could be picked up by a designated RPD property officer. Det. Gillenwater later prepared a more detailed Property Evidence Report for Defendant's case. The Property Evidence Report noted that a total of $1,163.00 in cash was seized from Defendant's residence, and indicated that only one .38-caliber handgun[2] was recovered during the 26 February 2013 search. All evidence seized from Defendant's residence, along with the formal Property Evidence Report, was turned over to RPD Detective Donovan Young on 14 March 2013.

Defendant was indicted on 18 March 2013 for possession with intent to sell or deliver marijuana, possession with intent to sell or deliver cocaine, maintaining a dwelling to use, keep, or sell a controlled substance, and possession of drug paraphernalia. Additionally, Defendant was indicted on 12 May 2014 for selling cocaine and delivering cocaine.

All charges against Defendant were joined for trial and tried on 3 August 2015. Defendant filed motions to suppress (1) all evidence seized from Defendant's residence during the 26 February 2013 search and (2) a custodial statement Defendant alleged he made before being read his *Miranda* rights. The trial court heard and denied both motions. A jury convicted Defendant on 6 August 2015 of possession of marijuana, possession with intent to sell and deliver cocaine, intentionally keeping and maintaining a dwelling house for keeping and/or selling a controlled substance, possession of drug paraphernalia, selling cocaine, and delivery of cocaine. Defendant received consecutive suspended sentences of 8 to 19 months' and 14 to 26 months' imprisonment and was placed on supervised probation for a period of 36 months. Defendant appeals.

II. Motion to Suppress

A. Standard of Review

Defendant first argues the trial court erred by denying his motion to suppress the evidence removed from his residence as a result of the

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2. Defendant emphasizes that Det. Gillenwater's handwritten inventory, prepared during the search, contained two separate references to a .38 caliber gun, whereas the later-prepared property evidence report showed only one gun was removed from Defendant's home.

26 February 2013 search. "This Court's review of an appeal from the denial of a defendant's motion to suppress is limited to determining 'whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the [trial court's] conclusions of law.' " *State v. Granger*, 235 N.C. App. 157, 161, 761 S.E.2d 923, 926 (2014) (quoting *State v. Biber*, 365 N.C. 162, 167-68, 712 S.E.2d 874, 878 (2011)). "[W]e examine the evidence . . . in the light most favorable to the State[.]" *State v. Hunter*, 208 N.C. App. 506, 509, 703 S.E.2d 776, 779 (2010).

On appeal, "[t]he trial court's findings of fact regarding a motion to suppress are conclusive . . . if supported by competent evidence." *State v. Edwards*, 185 N.C. App. 701, 702, 649 S.E.2d 646, 648 (2007). In the present case, because Defendant has failed to challenge any of the factual findings in the trial court's order denying his motion to suppress evidence, those findings are binding on this Court. *See State v. Elder*, 232 N.C. App. 80, 83, 753 S.E.2d 504, 507 (2014).

"Our review of a trial court's conclusions of law on a motion to suppress is *de novo*." *Edwards*, 185 N.C. App. at 702, 649 S.E.2d at 648 (citation omitted). "Under *de novo* review, this Court considers the matter anew and freely substitutes its own judgment for that of the [trial court]." *State v. Ward*, 226 N.C. App. 386, 388, 742 S.E.2d 550, 552 (2013) (citation and internal quotation marks omitted) (alteration in original). According to Defendant, the trial court erroneously denied his motion to suppress because the evidence was collected as a result of a statutory violation. "An alleged error in statutory interpretation is an error of law, and thus our standard of review for this question is *de novo*." *State v. Skipper*, 214 N.C. App. 556, 557, 715 S.E.2d 271, 272 (2011) (citation and quotation marks omitted). We review *de novo* the trial court's conclusion that "Defendant was properly noticed as to the . . . items seized at [his] residence."[3]

B. Analysis

Defendant contends the trial court erred in denying his motion to suppress evidence collected from his residence on the grounds that the inventory list prepared by Det. Gillenwater, as required by N.C. Gen.

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3. Defendant does not challenge the trial court's other conclusions of law, *i.e.*, that (1) the officers properly executed the 26 February 2013 search warrant at Defendant's home; (2) Defendant was properly noticed as to the search warrant under N.C. Gen. Stat. § 15A-252, and (3) none of Defendant's state or federal constitutional rights were violated by the seizure of his property.

Stat. § 15A-254, was unlawfully vague and inaccurate in describing the items seized. This argument is without merit.

Defendant maintains his motion to suppress the evidence should have been granted under N.C. Gen. Stat. § 15A-974, which requires suppression if, *inter alia*, the evidence "is obtained as a result of a substantial violation of the provisions of [Chapter 15A of our General Statutes]." N.C. Gen. Stat. § 15A-974(a)(2) (2015). In determining whether a particular violation is "substantial," a court

> must consider all the circumstances, including:
>
> a. The importance of the particular interest violated;
>
> b. The extent of the deviation from lawful conduct;
>
> c. The extent to which the violation was willful; [and]
>
> d. The extent to which exclusion will tend to deter future violations of this Chapter.

Id. However,

> [e]ven where a substantial violation has occurred, . . . evidence will only be suppressed where there is a causal connection between the violation and the evidence obtained. [I]f the challenged evidence would have been obtained regardless of the violation . . . , such evidence has not been obtained 'as a result of' such illegality and is not, therefore, to be suppressed by reason of G.S. 15A-974(2) [sic].

State v. Vick, 130 N.C. App. 207, 219, 502 S.E.2d 871, 878-79 (1998) (citation omitted) (alteration in original).

Defendant argues the evidence gathered from his residence was obtained in substantial violation of N.C.G.S. § 15A-254, which provides that "[u]pon seizing items pursuant to a search warrant, an officer must write and sign a receipt itemizing the items taken and containing the name of the court by which the warrant was issued." N.C. Gen. Stat. § 15A-254 (2015). If items "were" seized from a person, the receipt must be given to that person. *Id.* If items "are" taken from a place or vehicle, "the receipt must be given to the owner, or person in apparent control of the premises or vehicle if the person is present; or if he is not, the officer must leave the receipt in the premises or vehicle from which the items were taken." *Id.* Defendant asks us to consider the level of descriptiveness required of an itemized receipt under N.C.G.S. § 15A-254, a matter of first impression, and to hold that the inventory receipt at issue in this

case was "vague and inaccurate and fail[ed] to satisfy the requirements of North Carolina law[.]" However, because we conclude that evidence is not obtained "as a result of" a violation of N.C.G.S. § 15A-254, rendering N.C.G.S. § 974(a)(2) inapplicable, we need not determine whether Det. Gillenwater's receipt in fact violated N.C.G.S. § 15A-254.

The requirement that evidence be obtained "as a result of" a violation of Chapter 15A to warrant suppression under N.C.G.S. § 974(a)(2) means, at minimum, that the evidence was "obtained *as a consequence* of the officer's unlawful conduct . . . [and] would not have been obtained *but for* the unlawful conduct of the investigating officer." *See State v. Pearson*, 356 N.C. 22, 32, 566 S.E.2d 50, 56 (2002) (citation omitted) (emphases in original). Thus, to prevail in the present case, Defendant must show that the evidence seized during the 26 February 2013 search of his residence would not have been obtained *but for* the alleged violation of N.C.G.S. § 15A-254. *See id.* (noting that "[a] defendant bears the burden of presenting facts in support of his motion to suppress." (citation and internal quotation marks omitted)). Defendant has failed to make such a showing.

By definition, evidence must be obtained before an inventory of items seized may be prepared. The plain language of N.C.G.S. § 15A-254 recognizes as much, providing that "an officer must write and sign a receipt itemizing the *items taken*" only "*[u]pon seizing items* pursuant to a search warrant." *Cf.* N.C. Gen. Stat. § 15A-252 (2015) (providing officer must read warrant and furnish a copy of the warrant application and affidavit "*[b]efore undertaking any search or seizure*[.]" (emphasis added)). *See also Pearson*, 356 N.C. at 32, 566 S.E.2d at 56 (concluding N.C.G.S. § 15A-974(a)(2) did not require suppression of evidence where "the collection of the evidence obtained . . . was not causally related to the statutory violations . . . because [the statutes requiring return of inventory of evidence obtained from a person subject to nontestimonial identification procedures] focus on policies to be followed *after* samples are taken . . . [and] are not related to *obtaining* the samples." (emphases in original)). Additionally, N.C.G.S. § 15A-254 uses the past tense —"if items *were* taken"— in setting forth procedures that apply where property is seized from a person directly, as occurred in Defendant's case.

In *State v. Richardson*, 295 N.C. 309, 245 S.E.2d 754 (1978), a defendant argued that evidence seized during a search of his home should have been excluded based in part on law enforcement officers' failure to comply with N.C. Gen. Stat. § 15A-223(b), which provides that in the context of consent searches, "[u]pon completion of the search, the officer must make a list of the things seized, and must deliver a receipt

embodying the list to the person who consented to the search[.]" N.C. Gen. Stat. § 15A-223(b) (2015). Our Supreme Court rejected the defendant's contention, holding that N.C. Gen. Stat. § 974(a)(2) was inapplicable because

> [i]t [was] clear that the items seized and later offered into evidence were not "obtained as a result of" violations of Chapter 15A. No causal connection exist[ed] between the failure to follow the requirements of G.S. 15A-223(b) and the acquisition of the items seized from [the] defendant's residence and toolbox.

295 N.C. 309, 324, 245 S.E.2d 754, 764 (1978). We conclude that the same reasoning applies to alleged violations of N.C.G.S. § 15A-254.

This is consistent with prior decisions in which this Court has declined to suppress evidence based on actual or alleged violations of N.C.G.S. § 15A-254. In *State v. Fruitt*, 35 N.C. App. 177, 241 S.E.2d 125 (1978), an officer executed a search warrant on the defendant's premises while the defendant was not at home. The officer seized marijuana found during the search and then left the premises without leaving either a copy of the warrant or a receipt of items taken as required by N.C.G.S. § 15A-252 and N.C.G.S. § 15A-254, respectively. This Court held the officer violated the explicit terms of both statutes,[4] but that N.C.G.S. § 15A-974(a)(2) was nevertheless inapplicable, because "[the] violations occurred only after the marijuana had been lawfully seized, [and thus] . . . the marijuana was not 'obtained as a result' of these violations[.]" 35 N.C. App. at 180, 241 S.E.2d at 127. We also observed that "[t]he primary interest protected by the prohibition against unreasonable searches and seizures is the individual's reasonable expectation of privacy." *Id.* at 181, 241 S.E.2d at 127. The officer's violation of N.C.G.S. § 15A-254, we concluded, "had no adverse impact whatever on that primary interest, [because it] occurred after the search was completed." *Id.*

In *State v. O'Kelly*, 98 N.C. App. 265, 390 S.E.2d 717 (1990), the defendant alleged N.C.G.S. § 15A-974(a)(2) mandated suppression of

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4. We note that *Fruitt* is factually distinguishable from Defendant's case. In *Fruitt*, the officer violated the express language in N.C.G.S. § 15A-254 requiring that a copy of the itemized receipt be left on the premises *if the owner or apparent owner is not present at the time of the search.* By contrast, in the present case, there was no explicit violation of N.C.G.S. § 15A-254. Defendant was present at the time of the search, and he was given a list of items seized after being taken into custody. Additionally, N.C.G.S. § 15A-254 does not, on its face, require any specific level of descriptiveness.

evidence collected from his residence and storage unit in part because he was not given inventories of the items taken, in violation of N.C.G.S. § 15A-254. We again rejected that argument, observing that the law enforcement officer "exercised due diligence in attempting to comply with the requirement that the defendant be supplied with the inventory of seized property," *id.*, 98 N.C. App. at 272, 390 S.E.2d at 721, and mailed a copy of the itemized receipt to the defendant within a week of the search and seizure. We affirmed the trial court's conclusion that because the officer "substantially complied with the provisions of Article 11 of North Carolina General Statute 15A . . . [there was no] ground or reason to exclude or suppress evidence seized [during] the incident search." *Id.*, 98 N.C. App. at 273, 390 S.E.2d at 721-22.

We disagree with Defendant's contention that "[a]llowing evidence to be admitted because it was not seized 'as a result' of [a violation of N.C. Gen. Stat. § 15A-254] would undercut the purpose of the statute" and authorize law enforcement officers to "ignore the [statute's] dictates[.]" Defendant is mistaken in his assertion that "[t]he clear purpose of [N.C.G.S. § 15A-254] is to . . . establish a process by which the owner of the property is notified [of the items seized]." N.C.G.S. § 15A-254 does not operate as a notice requirement in the discovery process. Instead, the statute prescribes procedures to be followed *after* property has been seized which promote accountability for items so obtained. Defendant himself appears to acknowledge the statute's *post hoc* operation, noting that "[another] purpose of N.C. Gen. Stat. § 15-254 is to create a record of the *items seized*[.]" (emphasis added) Defendant further observes that the statutory requirements "must be met . . . after a search is completed."

"In interpreting statutes, all statutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *In re R.L.C.*, 179 N.C. App. 311, 317, 635 S.E.2d 1, 4 (2006) (citation and internal quotation marks omitted). Accordingly, in considering the purpose and effect of N.C.G.S. § 15A-254, we look to other provisions in Chapter 15A's Article 11, which governs search warrants. Article 11 defines a search warrant as "a court order and process directing a law-enforcement officer to search designated premises . . . for the purpose of [1] *seizing designated items* and [2] *accounting for any items so obtained* to the court which issued the warrant." N.C. Gen. Stat. § 15A-241 (2015) (emphases added). This is instructive in the present case. It demonstrates that Article 11 encompasses procedures to be followed both before and after evidence is obtained, and bolsters our conclusion that N.C.G.S. § 15A-254 concerns post-search accountability, not the collection of evidence.

The suppression of illegally obtained evidence is rooted in the "individual's right to be free from unreasonable searches and seizures . . . [and is] based on a defendant's reasonable expectation of freedom from government intrusion." *See State v. Joe*, 222 N.C. App. 206, 211-12, 730 S.E.2d 779, 783 (2012) (citation and internal quotation marks omitted). This interest is recognized throughout Article 11. *See*, *e.g.*, N.C. Gen. Stat. § 15A-242 (2015) (providing that search warrant must be supported by probable cause); N.C. Gen. Stat. § 15A-246 (2015) (requiring that search warrant "establish with reasonable certainty the premises, vehicles, or persons to be searched[.]"); N.C. Gen. Stat. § 15A-249 (2015) (requiring officer to give notice of identity and purpose before entering premises to be searched); N.C. Gen. Stat. § 15A-251 (2015) (permitting entry by force only if certain conditions are met); N.C. Gen. Stat. § 15A-252 (2015) (providing that executing officer must read warrant and give copy of warrant application and affidavit to person to be searched before undertaking any search or seizure). However, as we observed in *Fruitt*, not all Article 11 subsections implicate "the individual's reasonable expectation of privacy." *Fruitt*, 35 N.C. App. at 181, 241 S.E.2d at 127-28. It follows that not all Article 11 subsections afford a basis for suppression of evidence under N.C.G.S. §15A-974(a)(2), regardless of whether a violation of the subsection in fact occurs.

It seems clear that the itemized receipt requirement in N.C.G.S. § 15A-254 is not intended to protect an individual's reasonable expectation of privacy, since it applies only after search and seizure have occurred. We note that N.C.G.S. § 15A-254 does not specify an exact time at which or by which an itemized receipt must be given to the person searched. Where items are seized from a person, nothing in the statute requires that the person be given an itemized receipt, *e.g.*, before the officers leave the premises or before the person is taken into custody. It provides only that if (1) items are taken from a place or vehicle, *and* (2) the owner or apparent owner is not present, then an officer must leave the receipt on the premises or in the vehicle. Otherwise, the statute is silent about when exactly a person must be given a receipt of items seized. The statute also does not require affirmative acknowledgement of receipt from *the recipient* of the inventory list; it provides only that *the officer* must sign the receipt.[5] The receipt must contain "the name

5. As the State noted during the hearing on Defendant's motion to suppress, although the standardized Inventory of Items Seized Pursuant to Search form includes an acknowledgment of receipt signature block (which, in this case, Defendant did not sign), N.C.G.S. § 15A-254 itself does not require a signature from the recipient of the itemized inventory list.

of the court by which the warrant was issued." In keeping with N.C.G.S. § 15A-241, the inventory receipt requirement serves "the purpose of . . . accounting for any items . . . obtained to the court which issued the warrant."

To hold that evidence may be obtained "as a result of" a violation of N.C.G.S. § 15A-254 would disregard the distinctions throughout Article 11 between individual rights incident to search and seizure of property, and procedures to be followed after property is seized. Construing the statutes together, we conclude N.C.G.S. § 15A-254 applies only after evidence has been obtained and does not implicate the right to be free from unreasonable search and seizure. In turn, because evidence cannot be obtained "as a result of" a violation of N.C.G.S. § 15A-254, N.C.G.S. § 15A-974(a)(2) is inapplicable to either alleged or actual N.C.G.S. § 15A-254 violations.

We do not hold that it is impossible for a law enforcement officer to violate N.C.G.S. § 15A-254. *See Fruitt*, *supra*, (finding law enforcement officer violated explicit language of the statute by failing to leave a receipt on the premises after conducting a search and seizing contraband in the absence of the property owner). We also do not speculate about what recourse may be available where a violation occurs. We hold only that any such violation is not a basis for the suppression of evidence under N.C.G.S. § 15A-974(a)(2), the only statute Defendant cites in support of this argument. Defendant's contention that the evidence in the present case was obtained "as a result of" a violation of N.C.G.S. § 15A-254 fails as a matter of law. This argument is overruled.

III. Admission of Evidence

A. Standard of Review

In the alternative, Defendant argues the trial court committed plain error by admitting "illegally obtained" evidence. "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial . . . [which] had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citations and internal quotation marks omitted).

B. Analysis

Defendant contends it was plain error to admit the evidence seized from his residence because it was "illegally obtained" and, "[h]ad the trial court prevented the introduction of this evidence, [Defendant] would not have been convicted." In making this argument, Defendant essentially reasserts his argument that the evidence was unlawfully obtained because "[t]he [inventory] list created by [Det.

Gillenwater] fell substantially below the legal standard required by N.C. Gen. Stat. § 15A-254." As discussed above, Defendant has failed to demonstrate that any evidence was illegally obtained as a result of a violation of N.C.G.S. § 15A-254. Defendant does not advance any additional argument in support of his contention that the evidence was illegally obtained (and thus erroneously omitted).

Further, even assuming *arguendo* that the evidence taken from Defendant's residence was erroneously admitted, the error did not amount to plain error. Our Supreme Court has held that "[s]ubstantial evidence of a defendant's guilt is a factor to be considered in determining whether [an] error was a fundamental error rising to plain error." *State v. Moore*, 366 N.C. 100, 108, 726 S.E.2d 168, 174 (2012); *see also State v. Black*, 328 N.C. 191, 199, 400 S.E.2d 398, 403 (1991) (defining "substantial evidence" as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."). In the present case, the State presented substantial evidence of Defendant's guilt, largely in the form of mutually corroborative testimony from Honeycutt, Det. Gillenwater, and Lt. Freeman. *See State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 383 (1988) (noting that, in considering whether evidence is substantial, the evidence is viewed in the light most favorable to the State, and the credibility of its witnesses is a question for the jury). Defendant did not present any evidence at trial. Additionally, while defense counsel objected to the introduction into evidence of a number of individual items seized from Defendant's home, counsel did not object to the admission of a RPD property evidence report which listed all evidence seized from Defendant's residence, in greater and more precise detail than did the itemized inventory receipt prepared on the day of the search. Taken together, the State's evidence was "clearly sufficient to support a reasonable inference that [Defendant committed] the crime[s] charged." *State v. Smith*, 40 N.C. App. 72, 80, 252 S.E.2d 535, 540 (1979). We find nothing in the record suggesting a "miscarriage of justice" occurred in this case. *See State v. Perkins*, 154 N.C. App. 148, 152, 571 S.E.2d 645, 648 (2002) (citation omitted). Accordingly, we conclude Defendant received a trial free from error.

NO ERROR.

Judges CALABRIA and STROUD concur.

STATE OF NORTH CAROLINA
v.
HENRY DATWANE HUNT

No. COA 16-143

Filed 6 September 2016

1. Drugs—trafficking—failure to give requested jury instruction—lesser included charge—possession of controlled substance

The trial court did not err by failing to give a requested jury instruction on the lesser-included offense of possession of a controlled substance. Defendant's challenges to the State's expert testimony did not amount to a conflict in the evidence. The State's evidence was clear and positive as to every element of the trafficking charge.

2. Evidence—expert witness testimony—facts and data—principles and methods

The trial court did not err in a possession with intent to sell or deliver marijuana and trafficking by possession of 4 or more grams but less than 14 grams of opium case by admitting certain testimony from the State's expert witness. The agent's testimony was based upon sufficient facts and data, and showed that he applied the principles and methods reliably to the facts.

Appeal by defendant from judgments entered 30 July 2015 by Judge Todd Pomeroy in Henderson County Superior Court. Heard in the Court of Appeals 11 August 2016.

Attorney General Roy Cooper, by Assistant Attorney General Steven Armstrong, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Nicholas C. Woomer-Deters, for defendant-appellant.

McCULLOUGH, Judge.

Henry Datwane Hunt ("defendant") appeals from judgments entered upon his convictions of possession with intent to sell or deliver marijuana and trafficking by possession of 4 or more grams but less than 14 grams of opium. Defendant argues that the trial court erred by failing to give a requested jury instruction on a lesser-included offense and in

admitting certain testimony from the State's expert witness. After careful review, we hold no error.

I. Background

On 14 July 2014, defendant was indicted for possession with intent to sell or deliver marijuana in violation of N.C. Gen. Stat. § 90-95(a)(2), possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22(a), and trafficking by possession of more than 4 but less than 14 grams of opium in violation of N.C. Gen. Stat. § 90-95(h)(4)(a). Defendant's case came on for trial at the 27 July 2015 criminal session of Henderson County Superior Court, the Honorable Todd Pomeroy presiding.

The State's evidence at trial tended to show the following: On 2 March 2013, officers from the Henderson County Sheriff's Department responded to a call about a suspicious vehicle located in the parking lot of Mountain Inn and Suites ("the hotel"). Detective Steve Pederson ("Detective Pederson") testified that based on information obtained from a telephone conversation with a clerk at the hotel, he decided to conduct a "knock-and-talk" investigation of hotel rooms 200 and 206. Upon entering the hotel, officers noticed a strong odor of raw marijuana in the lobby. Detective Pederson proceeded to the second floor of the hotel where Corporal Josh Harden ("Corporal Harden") and Deputy Scott Lindsay were already located.

Corporal Harden testified that he had seen defendant walking down the hallway of the second floor. Corporal Harden asked defendant what room he was staying in and defendant said room 206. Corporal Harden asked if "there was somewhere we could go to talk" when defendant opened the door to room 206 and invited the officers inside. Corporal Harden testified that the room smelled of marijuana. During the course of his subsequent conversation with Corporal Harden, defendant admitted to smoking "four blunts" and gave consent to search his room. Defendant stated that he had also rented room 200. Defendant then requested to use the restroom. Corporal Harden told defendant that he would be have to be searched first and defendant consented to a search of his person. After the search revealed a lump in defendant's right front pocket, defendant produced a clear plastic bag containing pills. Defendant stated that the pills were "Percs," what Corporal Harden understood to be "Percocet," and that he was holding them for a friend. Defendant consented to searches of both hotel rooms and the searches revealed marijuana, cash, and various drug paraphernalia.

The State tendered, without objection from defendant, Miguel Cruz-Quinones ("Agent Cruz-Quinones"), a special agent and forensic chemist with the North Carolina State Crime Laboratory, as an expert in forensic drug chemistry. Agent Cruz-Quinones testified that after visual inspection, he determined that the pills found in defendant's possession were pharmaceutically manufactured pills containing oxycodone. Agent Cruz-Quinones testified that the North Carolina State Crime Laboratory procedures are governed by a document called the "administrative procedure for sampling" ("APS"). Pursuant to the APS, Agent Cruz-Quinones elected to use a testing procedure called the "administrative sample selection" that is applied to pharmaceutically manufactured pills. This method of analysis involves visually inspecting the shape, color, texture, and manufacturer's markings or imprints of all units and comparing them to an online database called "Micromedex[1]" to determine whether the pills are pharmaceutically prepared. After the chemist has determined that the units are similar, and not counterfeit, the administrative sample selection method requires the chemist to weigh the samples and "randomly select one and chemically analyze the one tablet" using gas chromatography and a mass spectrometer.

Here, Agent Miguel Cruz-Quinones testified that upon receiving the pills found to be in defendant's possession, he divided them into four separate categories based on the physical characteristics of the pills. He labeled these categories 1A, 1B, 1C, and 1D. Using administrative sample selection, Agent Miguel Cruz-Quinones tested one pill from groups 1A, 1B, and 1C. Each chemically analyzed pill tested positive for oxycodone, a Schedule II controlled substance. Agent Cruz-Quinones testified that the combined weight of the pills seized from defendant exceeded four grams: twenty-four pills in 1A weighed 2.97 grams; nine pills in 1B weighed 0.88 grams; and three pills in 1C weighed 0.30 grams. Agent Cruz-Quinones did not test 1D, which consisted of only 1 pill, because the statutory threshold for trafficking had already been met. Agent Cruz-Quinones' laboratory report provided that as to the non-tested tablets in each group, they "were visually examined, however no chemical analysis was performed. . . . The physical characteristics, including shape, color and manufacturer's markings of all units were visually examined and found to be consistent with a pharmaceutical preparation containing Oxycodone – Schedule II Opium Derivative. There were no visual indications of tampering." The results of this particular drug analysis

1. The transcript of Agent Cruz-Quinones' testimony reflects the spelling, "Micromatics." However, we believe the correct spelling to be "Micromedex" as noted in footnote 1 of *State v. Ward*, 364 N.C. 133, 136, 694 S.E.2d 738, 740 n.1 (2010).

were subjected to peer review by a senior level analyst at the North Carolina State Crime Laboratory.

On 24 July 2015, defendant filed a motion in limine and argued that the State's experts should be prohibited from "expressing any opinion as to the identity of any and all items submitted to the State Crime Lab which were not actually subjected to forensic chemical testing." Defendant contended that the State Crime Lab's protocols provided that in the use of administrative sample selection, "No inferences about unanalyzed materials are made."

The trial court denied defendant's motion, concluding that the "reasoning and methodology underlying [Agent Cruz-Quinones'] testimony regarding the weight, composition, and his use of Administrative Sampling Method" were scientifically valid, could be applied to the facts in issue, and complied with Rule 702 of the North Carolina Rules of Evidence.

On 30 July 2015, a jury found defendant guilty on all charges. Defendant was sentenced as a prior record level I to concurrent sentences of 70 to 93 months imprisonment for trafficking opium and 5 to 15 months for possession with intent to sell or deliver marijuana. Defendant appeals.

II. Discussion

Defendant presents two issues on appeal. He argues that (A) the jury should have received an instruction on the lesser-included offense of possession of a controlled substance and that (B) the trial court erred in admitting certain testimony of the State's expert witness. We address each argument in turn.

A. Lesser-Included Offense Jury Instruction

[1] Defendant contends that the trial court committed error by failing to instruct the jury on the lesser-included charge of possession of a controlled substance. This contention is without merit.

Defendant's arguments challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court. *State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009). Even in the absence of a special request, judges are required to charge upon lesser-included offenses if the evidence supports such a charge. *State v. Peacock*, 313 N.C. 554, 558, 330 S.E.2d 190, 193 (1985). "The sole factor determining the judge's obligation to give such an instruction is the presence, or absence, of any evidence in the record which might convince a

rational trier of fact to convict the defendant of a less grievous offense." *State v. Wright*, 304 N.C. 349, 351, 283 S.E.2d 502, 503 (1981). "[W]hen the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of a lesser included offense, it is not error for the trial judge to refuse to instruct on the lesser offense." *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980).

The crime of trafficking in opium, N.C. Gen. Stat. § 90-95(h)(4), contains two essential elements. Defendant must engage in the: "(1) knowing possession (either actual or constructive) of (2) a specified amount of [opium]." *State v. Keys*, 87 N.C. App. 349, 352, 361 S.E.2d 286, 288 (1987). N.C. Gen. Stat. § 90-95 (h)(4) also applies to trafficking in pharmaceutical preparations containing opium derivatives. *State v. Ellison*, 366 N.C. 439, 444, 738 S.E.2d 161, 164 (2013). Simple possession of opium is a lesser-included offense of trafficking in opium. *See State v. McCracken*, 157 N.C. App. 524, 528, 579 S.E.2d 492, 495 (2003).

Specifically, defendant challenges Agent Cruz-Quinones' testimony that the tablets delivered to the State Crime Lab collectively contained over 4 grams of opium. The APS, which governs State Crime Lab protocol, notes in its definition of the administrative sample selection that "No inferences about unanalyzed material are made." At trial, Agent Cruz-Quinones testified that this language applies to non-pharmaceutical tablets and not to pharmaceutically prepared tablets. Defendant argues that Agent Cruz-Quinones' interpretation of the APS was incorrect and that because he only performed a chemical analysis of three pills, which weighed less than the statutory threshold for the trafficking charge, the jury should have received the instruction on the lesser-included offense of possession.

Defendant relies on *State v. Riera*, 276 N.C. 361, 172 S.E.2d 535 (1970), for his arguments. In *Riera*, the defendant was convicted of violating a statute that made the possession of 100 or more "tablets, capsules or other dosage forms containing either barbiturate or stimulant drugs, or a combination of both" *prima facie* evidence that such possession was for the purpose of "sale, barter, exchange, dispensing, supplying, giving away, or furnishing." *Id.* at 365, 172 S.E.2d at 538. The North Carolina Supreme Court held that because there was ample evidence which would allow a jury to find that the defendant committed the lesser-included offense of the misdemeanor, possession of barbiturate drugs, the trial court erred by failing to submit to and instruct the jury on the lesser-included offense. *Id.* at 370, 172 S.E.2d at 541. However, the

circumstances found in *Riera* are distinguishable from the case before us. In *Riera*, there was conflicting evidence presented as to whether the defendant possessed the capsules for the purpose of sale, thereby providing conflicting evidence as to whether the defendant had violated the applicable statute. The defendant's evidence tended to demonstrate that he had found the capsules behind a building three to four weeks before the search of his home and that he had no intention to use or sell them, did not know what the capsules were, and had intended to throw them out. *Id.* at 364, 172 S.E.2d at 537. Also in *Riera*, the State's expert witness testified that out of 205 capsules that were found at the defendant's home, "he did not test all 205 capsules and that he did not know exactly how many he did test[,]" but that he "usually tested three or four and looked at the others to see if they all had the same physical appearance." *Id.* Here, Agent Cruz-Quinones thoroughly documented his analysis and followed protocol, grouping the pharmaceutically manufactured tablets seized from defendant into four categories based on the unique physical characteristics of the pills. He then chemically analyzed one pill from three categories and determined that they tested positive for oxycodone. Agent Cruz-Quinones was able to testify extensively as to the exact procedures he performed instead of making a conjecture as to his analysis as the State's expert did in *Riera*.

The following cases are helpful in our analysis: In *State v. Wilhelm*, 59 N.C. App. 298, 296 S.E.2d 664 (1982), the defendant was convicted of trafficking methaqualone. On appeal, the defendant argued that since only three tablets were chemically analyzed, the State had failed to prove that he possessed more than 5,000 methaqualone tablets. *Id.* at 303, 296 S.E.2d at 667. Our Court rejected the defendant's argument and held that "[w]hen a random sample from a quantity of tablets or capsules identical in appearance is analyzed and is found to contain contraband, the entire quantity may be introduced as the contraband." *Id.* Our Supreme Court held in *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), that, in trafficking cases "[a] chemical analysis of each individual tablet is not necessary" and that while "[a] chemical analysis is required in this context, [] its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Id.* at 148, 694 S.E.2d at 747.

Recently, in *State v. Lewis*, __ N.C. App.__, 779 S.E.2d 147 (2015), *disc. rev. denied*, __ N.C. __, 781 S.E.2d 480 (2016), the defendant was convicted of conspiracy to traffic 14 grams or more but less than 28 grams of opiates. *Id.* at __, 779 S.E.2d at 148. The police seized twenty pills from the defendant, weighing 17.63 grams total. The State's expert

chemically analyzed one pill and testified that it contained oxycodone with a net weight of 0.88 grams. *Id.* The remaining pills, with a net weight of 16.75 grams, were visually examined and found to have "the same similar size, shape and form as well as the same imprint on each of them." *Id.* On appeal, the defendant contended that the jury was entitled to instructions on all lesser-included offenses because the evidence did not clearly establish the amount of opium derivative present in the pills. *Id.* As in the present case, the defendant in *Lewis* "[did] not challenge the evidence supporting the fact that he was trafficking in opium derivative; rather, [he challenged] the sufficiency of the expert's analysis as to precisely how much opium derivative was present." *Id.* at __, 779 S.E.2d at 148-49. Our Court, citing to precedent established in *Wilhelm* and *Ward*, concluded that it was not necessary to test every tablet. Instead, it held that "upon establishing the chemical composition of a sufficient sample, and visually confirming that the remaining pills were similar, the State's analyst satisfied the evidentiary burden upon the State to determine the quantity of opium derivative in the pills." *Id.* at __, 779 S.E.2d at 149. Accordingly, our Court held that the trial court did not err by declining to instruct the jury on lesser-included offenses because the evidence was sufficient to support the charge of conspiracy to traffic 14 grams or more but less than 28 grams of opiates. *Id.*

Based on the reasoning stated in *Wilhelm*, *Ward*, and *Lewis*, it was not necessary for Agent Cruz-Quinones to chemically analyze each individual tablet. Here, Agent Cruz-Quinones visually inspected all the pills and after comparing them to an online database, determined that they were pharmaceutically manufactured pills containing oxycodone. He then divided the pills into four separate categories based on the physical characteristics of the pills, which included the shape, color, texture, and manufacturer's markings or imprints. Agent Cruz-Quinones then selected one pill from three of the categories and chemically analyzed the pill. Each pill tested positive for oxycodone. As to the remaining pills that were not chemically analyzed, Agent Cruz-Quinones reported that they were visually examined and found to be consistent with pharmaceutically prepared oxycodone. He testified that the combined weight of the pills seized from defendant exceeded four grams. Agent Cruz-Quinones' sample was "sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." *Lewis*, __ N.C. App. at __, 779 S.E.2d at 149. Because he confirmed that he visually analyzed the remaining pills and determined that they were similar to the chemically analyzed pills, Agent Cruz-Quinones satisfied the State's evidentiary burden of establishing the quantity of opium in the pills. *See State v. Dobbs*, 208 N.C. App. 272, 276, 702 S.E.2d 349,

352 (2010) ("a chemical analysis test of a portion of the pills, coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone."). Accordingly, the State's evidence was clear and positive with respect to each element of trafficking in opium.

Defendant contends that the introduction of the APS into evidence and Agent Cruz-Quinones' deviation from the protocol distinguishes his case from *Lewis* and its antecedents. Our Court addressed a comparable issue in an unpublished opinion, *State v. Hudson*, 218 N.C. App. 457, 721 S.E.2d 763, 2012 N.C. App. LEXIS 153, 2012 WL 379936 (Feb. 2012) (unpub.). Although this case does not constitute controlling legal authority, we find its reasoning persuasive. In *Hudson*, the defendant argued that testimony from the State's fingerprint expert, Amanda Wiltzus, should have been excluded because she failed to adhere to the Analysis, Comparison, Evaluation, and Verification ("ACE-V") methodology, which she purported to apply in her analysis. *Id.* at __, 721 S.E.2d at __, 2012 N.C. App. LEXIS 153, at *5. The defendant argued that the ACE-V protocol required independent verification for fingerprint analysis and that because verification in his case was performed by Wiltzus' supervisor, the supervisor could not have conducted an independent examination of Wiltzus' work. *Id.* at __, 721 S.E.2d at __, 2012 N.C. App. LEXIS 153, at *5-6. This Court held that "[o]nce the trial court determines the expert meets the minimum qualifications to qualify as such, deviations from guidelines go to the weight of the expert's testimony, not admissibility." *Id.* at __, 721 S.E.2d at __, 2012 N.C. App. LEXIS 153, at *9. In accordance with this reasoning, we also hold that any deviation that Agent Cruz-Quinones might have taken from the established methodology went to the weight of his testimony and not the admissibility of the testimony.

In addition, several circuit courts have held that, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 125 L. Ed. 2d 469 (1993), the introduction of laboratory protocols goes to the weight and not the admissibility of evidence. *See e.g. United States v. Shea*, 211 F.3d 658, 668 (1st Cir. 2000) (holding that flaws in an application of an otherwise reliable methodology go to weight and credibility, not admissibility); *United States v. Chischilly*, 30 F.3d 1144, 1154 (9th Cir. 1994) ("The impact of imperfectly conducted laboratory procedures might therefore be approached more properly as an issue going not to the admissibility, but to the weight of the DNA profiling evidence."); *United States v. Bonds*, 12 F.3d 540, 563 (6th Cir. 1993) ("[C]riticisms about the specific application of the procedure used or questions about the accuracy of the test results do not render the scientific theory and methodology invalid

or destroy their general acceptance. These questions go to the weight of the evidence, not the admissibility.").

Based on the foregoing, we hold that defendant's challenges to the State's expert testimony did not amount to a conflict in the evidence. The State's evidence was clear and positive as to every element of the trafficking charge and the trial court did not err in failing to instruct the jury on the lesser-included offense of possession of a controlled substance.

B. State Expert Testimony Under Rule 702(a)

[2] In the alternative, defendant argues that the trial court erred by admitting Agent Cruz-Quinones' testimony which required inferences that were expressly prohibited under the APS. As a result, defendant contends that Agent Cruz-Quinones' testimony contravened Rule 702(a) of the North Carolina Rules of Evidence, which governs the testimony of expert witnesses.

Our Supreme Court has recently confirmed that the General Assembly's amendment to Rule 702 adopted the federal standard for the admission of expert witness testimony articulated in *Daubert*. *State v. McGrady*, __ N.C. __, __, 787 S.E.2d 1, __, 2016 N.C. LEXIS 442 (June 2016). We review a trial court's ruling on admissibility of expert testimony pursuant to Rule 702(a) for an abuse of discretion. *Id.* at __, 787 S.E.2d at __, 2016 N.C. LEXIS 442, at *22.

Rule 702(a) of the North Carolina Rules of Evidence provides 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. Gen. Stat. § 8C-1, Rule 702(a) (2015). "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." *McGrady*, __ N.C. at __, 787 S.E.2d at __, 2016 N.C. LEXIS 442, at *17 (internal citations and quotation marks omitted). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.*

> 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.

Id. at __, 787 S.E.2d at __, 2016 N.C. LEXIS 442, at *18-19.

In the present case, Agent Cruz-Quinones testified that he analyzed the pills seized from defendant in accordance with procedures set forth in the APS which were employed by the State Crime Lab at the time he completed his testing and which he was required to follow in drug testing. Agent Cruz-Quinones visually inspected the shape, color, texture, and manufacturer's markings or imprints on all the pills and compared them to an online database to determine whether the pills were pharmaceutically manufactured. Once he made the determination that the pills were pharmaceutically prepared, Agent Cruz-Quinones was required to

use a testing procedure called the administrative sample selection, pursuant to the guidelines of the APS.

Agent Cruz-Quinones testified that he divided the pills into four separate categories and grouped the pills together based on similar physical characteristics. The groups were labeled 1A, 1B, 1C, and 1D. The administrative sample selection required Agent Cruz-Quinones to indiscriminately select one pill from each group and chemically analyze that one pill. When questioned what he did with each pill, Agent Cruz-Quinones testified:

> A. What I did with that pill was I took a small sample of it, a small piece of it and submitted to analysis using the gas chromatography and mass spectrometer. That piece was dissolved in a, I believe it was choleriform, yes, choleriform sol[v]ent in a sterile glass vial. After it was dissolved it was sealed with an aluminum cap and labeled with the item number, laboratory number, my initials and date. And it was analyzed in the gas chromatography and mass spectrometer.

The chemically analyzed pills tested positive for oxycodone. Agent Cruz-Quinones testified that the combined weight of all the pills exceeded four grams: twenty-four pills in 1A weighed 2.97 grams; nine pills in 1B weighed 0.88 grams; and three pills in 1C weighed 0.30 grams. 1D was not tested because the statutory threshold for trafficking had already been met. The pills that he did not chemically analyze were nevertheless inspected "using the physical characteristics . . . [such as] the color, the texture, the shape and the imprints[.]" These tablets were also examined for evidence of being counterfeit, compared to an online database of pharmaceutical preparations, and found to be consistent with a pharmaceutical preparation containing oxycodone.

Based on Agent Cruz-Quinones' detailed explanation of the procedure he employed to identify the pills seized from defendant, a procedure adopted by the State Crime Lab to analyze and identify pharmaceutically manufactured pills, we hold that his testimony was the "product of reliable principles and methods[,]" sufficient to satisfy the second prong of Rule 702(a).

However, the crux of defendant's argument is that Agent Cruz-Quinones should not have been permitted to testify regarding the pills that were not chemically analyzed and, therefore, Agent Cruz-Quinones' testimony was not "based upon sufficient facts or data" and Agent

Cruz-Quinones did not apply "the principles and methods reliably to the facts of the case[,]" failing to satisfy the first and third prongs of Rule 702(a). We disagree.

At trial, Agent Cruz-Quinones was cross-examined as follows:

> Q. The other pills you did a visual inspection of but no actual testing; correct?
>
> A. Correct. Visual inspection.
>
> Q. But you're sitting here today offering an opinion as to the whole amount; correct?
>
> A. Correct.
>
> Q. And that's in spite of your rules and regulations that say specifically under administrative sampling selection that no inferences about unanalyzed materials are made. You are saying that in spite of your rules; correct?
>
> A. That's incorrect. The administrative sample selection has two parts. One, that it is specific to pharmaceutically prepared tablets. And the other one that would apply to more commonly controlled substances that are not pharmaceutically prepared. That statement about not making inference about unanalyzed material refers to that second part, for more commonly controlled substances. It does not refer to pharmaceutically prepared tablets. Pharmaceutically prepared tablets are visually inspected. So they have been visually inspected. That constitutes a preliminary part of the analysis. So that statement about not making inferences about unanalyzed material only applies to other type[s] of controlled substances, more commonly controlled substances, not pharmaceutically prepared tablets.

Agent Cruz-Quinones testified that the pills that were not chemically analyzed were nevertheless carefully visually inspected and compared to an online pharmaceutical database. These pills had similar characteristics, including the shape, color, texture, and manufacturer's markings, as the other pills which were consistent with a pharmaceutical preparation containing oxycodone, a Schedule II opium derivative. Agent Cruz-Quinones also reported "[t]here were no visual indications of tampering."

As such, we hold that Agent Cruz-Quinones' testimony was based upon sufficient facts and data and that he applied the principles and methods reliably to the facts of the case, satisfying the first and third prong of the reliability analysis under Rule 702(a). Accordingly, the trial court did not abuse its discretion in admitting this testimony.

III. Conclusion

For the reasons discussed above, we hold that defendant received a fair trial, free from error.

NO ERROR.

Judges STEPHENS and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
TONY KING, DEFENDANT

No. COA15-765

Filed 6 September 2016

1. Evidence—vouching for credibility of witness—objection sustained—no prejudice

The trial court did not abuse its discretion by not declaring a mistrial ex mero motu in a prosecution for sexual offense and kidnapping where an officer testified that the prosecuting witness had been reliable with him. Even assuming that the officer vouched for the credibility of the prosecuting witness, an objection was sustained and the statement did not prejudice defendant such that a fair trial was impossible.

2. Kidnapping—second-degree—forced victim into car

The trial court did not err by denying a motion to dismiss a second-degree kidnapping charge where defendant told the victim not to walk away from him after he sexually assaulted her and forced the her to get into a car with him, although he ultimately drove her home.

Appeal by defendant from judgment entered on or about 14 January 2015 by Judge Yvonne Mims Evans in Superior Court, Cleveland County. Heard in the Court of Appeals 13 January 2016.

Attorney General Roy A. Cooper, III, by Special Deputy Attorney General Donna D. Smith, for the State.

Michael E. Casterline, for defendant-appellant.

STROUD, Judge.

Defendant appeals judgment convicting him of second degree sexual offense and second degree kidnapping. For the following reasons, we conclude there was no error.

I. Background

The State's evidence tended to show that in August of 2005, Marie[1] contacted defendant to look at a rental property. Defendant arranged to meet Marie and drove her to the rental house. After they went inside for Marie to look at the house, defendant grabbed Marie by the throat and began kissing her neck and breasts. Defendant moved Marie from the hallway to a bedroom with his hands on her throat and threw her onto a bed. Defendant ripped off Marie's pants and placed his fingers inside her vagina. Defendant tried to get Marie to perform oral sex on him, but she refused. Marie tried to get away from defendant after they left the house, but she ended up riding with defendant to return home. After Marie got back home, she told her mother what had happened and Marie's mother called the police. While she was speaking with the police at her home, defendant called Marie asking, "Are you mad at me?" and saying, "[I]f you meet me somewhere . . . I will pay you to keep your mouth shut." After a trial by jury, defendant was convicted of second degree sexual offense and second degree kidnapping.[2] Defendant appeals.

II. Mistrial

[1] During defendant's trial Sergeant Carl Duncan stated, "She's been reliable to me[,]" in regards to his prior interactions with Marie. The defense objected to this statement, and the trial court sustained the objection. Defendant contends that "the trial court erred in failing to declare a mistrial *ex mero motu* after Officer Duncan improperly vouched for the credibility of the prosecuting witness." (Original in all caps.)

---

1. A pseudonym will be used.

2. The trial court arrested judgment for a first degree kidnapping conviction.

> The decision to grant a mistrial is within the trial court's discretion. This is particularly true where, as here, defendant has not moved for a mistrial. A mistrial may be granted only when the case has been prejudiced at trial to such an extent that a fair and impartial verdict is impossible. A trial court's decision regarding a motion for mistrial will not be disturbed on appeal unless the trial court clearly has abused its discretion.

State v. Jaynes, 342 N.C. 249, 279, 464 S.E.2d 448, 467 (2005) (citations omitted).

Even assuming *arguendo* that Sergeant Duncan "vouched for the credibility of the prosecuting witness[,]" his statement, which was both objected to and sustained, did not prejudice defendant such "that a fair and impartial verdict is impossible." *Id.* ("In the present case, the trial court sustained each of defendant's three objections. As a result, no evidence prejudicial to defendant was introduced in response to the prosecutor's questions concerning defendant's alleged prior crimes or convictions. The trial court's actions were sufficient to remedy any possible harm resulting from the mere asking of the three questions by the prosecutor. The trial court did not err by failing to declare a mistrial. This assignment of error is overruled.") This argument is overruled.

III. Motion to Dismiss

[2] Defendant next argues that "the trial court erred in denying the motion to dismiss the kidnapping charge, when the evidence was insufficient to prove that any confinement or restraint was separate and apart from the force necessary to facilitate the sex offense." (Original in all caps.)

> The standard of review for a motion to dismiss is well known. A defendant's motion to dismiss should be denied if there is substantial evidence of: (1) each essential element of the offense charged, and (2) of defendant's being the perpetrator of the charged offense. Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion. The Court must consider the evidence in the light most favorable to the State and the State is entitled to every reasonable inference to be drawn from that evidence.

State v. Johnson, 203 N.C. App. 718, 724, 693 S.E.2d 145, 148 (2010) (citations and quotation marks omitted).

> The elements of kidnapping are: (1) confining, restraining, or removing from one place to another; (2) any person sixteen years or older; (3) without such person's consent; (4) if such act was for the purposes of facilitating the commission of a felony. This Court has previously held that the offense of kidnapping under N.C. Gen. Stat. § 14–39 is a single continuing offense, lasting from the time of the initial unlawful confinement, restraint or removal until the victim regains his or her free will. . . .
>
> In situations involving both kidnapping and sexual offense, the restraint of the victim must be a complete act, independent of the sexual offense.
>
> > It is self-evident that certain felonies (e.g., forcible rape and armed robbery) cannot be committed without some restraint of the victim. [O]ur Supreme Court has held 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. 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.
>
> The test of the independence of the act is whether there was substantial evidence that the defendant restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape, statutory sex offense, or crime against nature. Further, the test does not look at the restraint necessary to commit an offense, rather the restraint that is inherent in the actual commission of the offense.

State v. Martin, 222 N.C. App. 213, 220-21, 729 S.E.2d 717, 723 (2012) (citations, quotation marks, ellipses, and brackets omitted). Furthermore, our Supreme Court has clarified that "[t]he key question is whether the victim is exposed to greater danger than that inherent in the [charged offense] itself or subjected to the kind of danger and abuse the kidnapping statute was designed to prevent." *State v. Johnson*, 337 N.C. 212, 221, 446 S.E.2d 92, 98 (1994) (citation and quotation marks omitted).

Both defendant and the State cite numerous cases turning on small factual nuances to determine whether the restraint in each particular case was independent from or an inherent part of each crime at issue. Such small distinctions are not necessary in this particular case, since Marie testified that after defendant committed his sexual offenses against her she wanted to "take [off] running[,]" but defendant ordered her to " '[f]ix [herself] up' " and told her " 'this is going to be our secret.' " Marie walked out of the room "speed walking" and defendant told her, " 'You better slow down.' " Marie then decided she was "going to cooperate just so I can get back – just Lord get me back – get me back to my mama." Marie had no other way to get home, since she had ridden with defendant, and defendant had already told her not to try to walk away from him. Defendant and Marie then got into defendant's car. While defendant did ultimately drive Marie back to her home, defendant also forced Marie to get into a car with him immediately after he had sexually assaulted her. Forcing Marie to ride in his car is exactly "the kind of danger and abuse the kidnapping statute was designed to prevent" and "exposed [her] to greater danger" than that inherent in the sexual offenses, and thus the State did show sufficient evidence of the element of restraint for the charge of second degree kidnapping to proceed to the jury. *Id.*; *see also State v. Boyce*, 361 N.C. 670, 674-75, 651 S.E.2d 879, 882-83 (2007) ("The State's evidence in the present case sufficiently established that defendant prevented the victim's escape by pulling her back into her residence before the onset of the robbery with a dangerous weapon. This restraint and removal was a distinct criminal transaction that facilitated the accompanying felony offense and was sufficient to constitute the separate crime of kidnapping under North Carolina law. That the victim was removed just a short distance and only momentarily before the robbery is irrelevant, as this Court long ago dispelled the importance of distance and duration.") Therefore, this argument is overruled.

IV. Conclusion

For the foregoing reasons, we conclude there was no error.

NO ERROR.

Judges ELMORE and DIETZ concur.

STATE v. WAGNER

[249 N.C. App. 445 (2016)]

STATE OF NORTH CAROLINA
v.
RICKEY HARDING WAGNER, JR.

No. COA15-1111

Filed 6 September 2016

1. Sexual Offenses—wife's opinion of guilt—unusual behavior of defendant

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not plainly err by allowing defendant's wife to offer her opinion regarding defendant's guilt. She was merely responding to a question on direct examination as to whether she had ever observed any unusual behavior involving defendant and the victim.

2. Sexual Offenses—wife's testimony—phone call from jail

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not plainly err by allowing defendant's wife to testify regarding a phone call with defendant after his arrest and while he was incarcerated. Her statement that he declined to discuss the allegations over the phone due to his concern that the call was being recorded could not be considered a violation of his privilege against self-incrimination.

3. Sexual Offenses—evidence of victim's virginity

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not plainly err by admitting testimony regarding the victim's virginity at the time she was first sexually abused. Even assuming error, defendant failed to demonstrate a probable impact on the jury's verdict.

4. Sentencing—mitigating factors—not found by trial court

Where defendant was convicted of numerous sexual offenses against his daughter, the trial court did not err by declining to find two mitigating factors—successful completion of a substance abuse program and positive employment history—during the sentencing phase of his trial.

Appeal by defendant from judgments entered 13 March 2015 by Judge W. David Lee in Rowan County Superior Court. Heard in the Court of Appeals 25 April 2016.

Roy Cooper, *Attorney General*, *by Jennie Wilhelm Hauser*, *Special Deputy Attorney General*, *for the State.*

Glenn Gerding, *Appellate Defender*, *by Daniel Shatz*, *Assistant Appellate Defender*, *for defendant-appellant.*

DAVIS, Judge.

Rickey Harding Wagner, Jr. ("Defendant") appeals from the judgments entered upon his convictions for two counts of statutory rape, two counts of incest, three counts of sex offense with a child, and three counts of taking indecent liberties with a child. On appeal, Defendant contends that the trial court erred by (1) allowing his wife to offer her opinion regarding Defendant's guilt and to testify about a statement by Defendant that implicated his privilege against self-incrimination; (2) admitting testimony regarding the victim's virginity at the time she was first sexually abused; and (3) failing to find certain mitigating factors during the sentencing phase of Defendant's trial. After careful review, we conclude that Defendant received a fair trial free from plain error.

Factual Background

The State presented evidence at trial tending to establish the following facts: "Mary" is the daughter of Defendant and J.C.[1] Defendant did not live with Mary or J.C. but had regular visits with Mary on Thursdays and every other weekend.

In 2012, when Mary was 13 years old, Defendant began taking her on drives in his truck during their visits. Defendant would drive to various residences where he would sell drugs to individuals while Mary remained in the front passenger seat of his truck. During these drives, Defendant forced Mary to take methamphetamine, and he would then touch her breasts and buttocks.

On one occasion, Defendant drove Mary to a barn where he forced her to snort methamphetamine through a rolled-up dollar bill. He then put his hands inside Mary's pants, touching her vagina.

Later that year, Defendant drove Mary to a secluded field in a rural area where he again made her snort methamphetamine. He then proceeded to grope her breasts and buttocks and digitally penetrated her vagina. He proceeded to take off her clothes and engage in vaginal

1. Pseudonyms and initials are used throughout this opinion for the protection of the minor child and for ease of reading.

intercourse with her. Afterwards, he warned Mary not to tell anyone about the incident or else "there would be consequences."

That same year, around Thanksgiving, Defendant took Mary to his home where he lived with his wife, N.E., and their infant daughter. On the way there, Defendant made Mary ingest methamphetamine. When they arrived, N.E. was asleep. Mary took off her clothes and went to the bathroom. As Mary exited the bathroom, she encountered Defendant wearing only a shirt. He began groping her breasts and buttocks and penetrated her vagina with his fingers. He then forced her to perform oral sex on him. When Mary went back to her bedroom, Defendant followed her, physically forced her onto the floor, and proceeded to engage in vaginal intercourse with her.

On another occasion, Defendant once again drove Mary to a secluded rural area, forced her to take methamphetamine, and touched her breasts and buttocks while digitally penetrating her vagina. He then took off her clothes and engaged in vaginal and anal intercourse with her.

On 2 March 2014, after this latest incident of sexual abuse by Defendant, Mary told J.C. that Defendant had raped her and that she did not want to see him again. J.C. called the police and informed them of Mary's accusations against Defendant.

Detective Sarah Benfield ("Detective Benfield") with the Rowan County Sheriff's Office went to the home of Mary and J.C. and interviewed Mary. After hearing Mary's account of Defendant's actions, Detective Benfield subsequently obtained an arrest warrant and placed Defendant under arrest on 28 March 2014.

On 19 May 2014, Defendant was indicted on (1) two counts of statutory rape; (2) two counts of incest; (3) three counts of sex offense with a child; and (4) three counts of taking indecent liberties with a child. Beginning on 9 March 2015, a jury trial was held before the Honorable W. David Lee in Rowan County Superior Court. At trial, the State introduced the testimony of Mary, J.C., Detective Benfield, and N.E. Defendant testified on his own behalf.

The jury found Defendant guilty of all charges. The trial court sentenced Defendant to consecutive sentences of 220-324 months imprisonment for his statutory rape and incest convictions (which were consolidated in file number 14 CRS 51824); 220-324 months imprisonment for his statutory rape and incest convictions (which were consolidated in file number 14 CRS 51828); 166-260 months imprisonment in

connection with his sex offense with a child conviction in file number 14 CRS 51826; 166-260 months imprisonment with regard to his sex offense with a child conviction in file number 14 CRS 51830; 166-260 months imprisonment in connection with his sex offense with a child conviction in file number 14 CRS 51833; and 12-24 months imprisonment for his taking indecent liberties with a child convictions in file numbers 14 CRS 51826, 51830, and 51833. Defendant was also ordered to register as a sex offender and enroll in satellite-based monitoring for the remainder of his natural life. Defendant gave oral notice of appeal in open court.

Analysis

I. Opinion Testimony

[1] Defendant's first argument on appeal is that the trial court erred by allowing N.E. to offer opinion testimony as to whether Defendant was guilty of sexually abusing Mary. 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 on the following portions of N.E.'s testimony on direct examination:

> Q. Did you ever see anything abnormal take place between [Defendant] and [Mary] when she was at the home?

> A. Actually, yes. Now that I've had time to think about some things --
>
> Q. Okay.
>
> A. -- since he's been incarcerated. It's just little things that -- well, *red flags that I should have picked up on*, but I didn't think much of it at the time.
>
> Q. Okay. What were those little red flags that you didn't pick up on?
>
> A. I'd wake up at like maybe three or four or something like that to go get the baby a bottle, go use the restroom, and him and [Mary] would be wide awake. And it -- I would really be upset because I was thinking in my mind, "you know, why aren't y'all in the bed asleep? You could help me with the baby instead of staying up all night."
>
> On another occasion, which I found very odd, I had gotten up to go use the restroom because I was on a lot of antibiotics, so, you know, it affected my stomach. And it's like [Defendant] had come running out of [Mary's] bedroom, and [Mary] actually went into the bathroom.

(Emphasis added).

Defendant asserts that N.E.'s reference to "red flags that I should have picked up on" in connection with Defendant's behavior towards Mary constituted an improper opinion that Defendant was, in fact, guilty of the crimes with which he was charged. It is true that witnesses are not permitted to "offer their opinions of whether [a] defendant [is] guilty." *State v. Carrillo*, 164 N.C. App. 204, 210, 595 S.E.2d 219, 223 (2004), *appeal dismissed and disc. review denied*, 359 N.C. 283, 610 S.E.2d 710 (2005). However, a contextual reading of this portion of her testimony shows that N.E. was not offering an opinion as to Defendant's guilt. Rather, she was merely responding to a question on direct examination as to whether she had ever observed any unusual behavior involving Defendant and Mary while Mary was visiting their home. In so doing, she testified solely as to her own observations of Defendant's behavior during Mary's overnight visits. Her use of the phrase "red flags" was a shorthand label for instances of unusual conduct she personally observed as opposed to a declaration of her opinion as to his guilt.

Therefore, we believe that the trial court's admission of this evidence clearly did not constitute plain error. Defendant's argument on this issue is overruled.

II. Privilege Against Self-Incrimination

[2] Defendant also contends that during her testimony N.E. improperly commented on Defendant's exercise of his constitutional right to remain silent following his arrest. Defendant did not object to this testimony at trial. Therefore, our review is limited to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Defendant's argument is specifically based on the following testimony from N.E. regarding a phone call between her and Defendant after his arrest and while he was incarcerated for the charges upon which he was ultimately convicted.

> Q. Okay. Do you still talk to the defendant now?
>
> A. No.
>
> Q. When is the last time that you spoke to him?
>
> A. I want to say it was the week before Halloween.
>
> Q. Did you ever talk to him about these specific allegations?
>
> A. I want to say that I did ask him what had happened, and *he said that he couldn't talk over the phone because it was being recorded.*

(Emphasis added).

This argument is lacking in merit. "[A] proper invocation of the privilege against self-incrimination is protected from prosecutorial comment or substantive use, no matter whether such invocation occurs before or after a defendant's arrest." *State v. Boston*, 191 N.C. App. 637, 651, 663 S.E.2d 886, 896, *appeal dismissed and disc. review denied*, 362 N.C. 683, 670 S.E.2d 566 (2008). However, this is not what happened here. The testimony at issue was from Defendant's wife rather than from a law enforcement officer and was given by her in the course of explaining whether she had ever discussed with Defendant Mary's allegations against him. Her statement that Defendant had declined to discuss those allegations over the phone due to his stated concern that the call was being recorded cannot properly be characterized as a violation of his privilege against self-incrimination.

III. Testimony as to Victim's Virginity

[3] Defendant next challenges the admission of testimony from J.C. and Detective Benfield stating that Mary was a virgin at the time

Defendant began sexually abusing her. J.C. testified as follows on direct examination:

> Q. Okay. Was there anything specific that happened on that Sunday that led [Mary] to -- to talk to you about what had taken place?
>
> A. No, nothing happened. She just kind of out of the blue said she just wanted to talk to me, and that's when she told me.
>
> Q. Okay. Did she go into any great detail about it? [O]r did she pretty much leave it as you've testified; that he raped her and had done things to her?
>
> A. Yes, she had told me -- she had told me what happened; *that she was still a virgin when it happened.*

(Emphasis added). Detective Benfield testified on direct examination as follows:

> Q. Okay. And what did [Mary] tell you about what occurred at that time?
>
> A. She said that her dad told her *that he was going to take her virginity*, and that he made her take her pants off and had sex with her in the backseat of the car.

(Emphasis added).

On appeal, Defendant argues that this evidence was inadmissible under Rule 412 of the North Carolina Rules of Evidence, which generally prohibits evidence of a rape or sex offense victim's sexual history. N.C.R. Evid. 412. Defendant asserts that "[t]he improper admission of testimony regarding [Mary's] virginity at the time of [Defendant's] alleged conduct could only serve to inflame the jury against [him], causing the jury to decide the case based on passion and prejudice, rather than on a rational weighing of the evidence in light of the State's burden of proof beyond a reasonable doubt." The State, conversely, contends that this testimony was properly admitted as corroborative evidence of Mary's account of Defendant's actions.

Defendant did not object to this testimony at trial. Therefore, our review is once again limited to plain error. *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Even assuming — without deciding — that the testimony regarding Mary's virginity was improperly admitted, Defendant has failed to

demonstrate that this evidence had a probable impact on the jury's verdict. Because Mary was only 13 years old at the time the sexual conduct between her and Defendant began, a reasonable juror would have assumed that she was a virgin at the time even without testimony on that issue. We therefore hold that this testimony did not rise to the level of plain error.

IV. Mitigating Factors

[4] Defendant's final arguments on appeal concern the trial court's refusal to find two mitigating factors during the sentencing phase of his trial. Specifically, he contends that the trial court erred in failing to find as mitigating factors the fact that he (1) successfully completed a substance abuse program prior to trial; and (2) had a positive employment history. We disagree.

It is well settled that

> [t]he court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court. The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists.

N.C. Gen. Stat. § 15A-1340.16(a) (2015).

"The weighing of factors in aggravation and mitigation is within the sound discretion of the sentencing court, and will not be disturbed upon appeal absent a showing of an abuse of discretion." *State v. Clifton*, 125 N.C. App. 471, 480, 481 S.E.2d 393, 399, *disc. review improvidently allowed*, 347 N.C. 391, 493 S.E.2d 56 (1997). *See also State v. Butler*, 341 N.C. 686, 694, 462 S.E.2d 485, 489-90 (1995) ("The balance struck by a sentencing court in weighing the aggravating and mitigating factors is a matter left to the sound discretion of the sentencing court and will not be disturbed on appeal absent a showing that the decision was manifestly unsupported by reason. The sentencing court need not justify the weight it attaches to any factor." (internal citation omitted)).

A. Completion of Substance Abuse Program

The completion of a drug treatment program after a defendant's arrest and prior to trial is one of the statutory mitigating factors set out in N.C. Gen. Stat. § 15A-1340.16.

> (e) Mitigating Factors. — The following are mitigating factors:
>
> . . . .
>
> (16) The defendant has entered and is currently involved in or has successfully completed a drug treatment program or an alcohol treatment program subsequent to arrest and prior to trial.

N.C. Gen. Stat. § 15A-1340.16(e)(16).

During sentencing, Defendant presented his certificate of completion for a substance abuse program dated 7 January 2014. However, Defendant was not arrested for the offenses at issue in the present case until 28 March 2014. Therefore, his completion of the program occurred *prior to* — rather than *after* — his arrest and thus did not meet the statutory criteria set out in N.C. Gen. Stat. § 15A-1340.16(e)(16).

Defendant nevertheless contends that the trial court erred by failing to treat his completion of the substance abuse program as a non-statutory mitigating factor. Factors not expressly enumerated in N.C. Gen. Stat. § 15A-1340.16(e) may also be deemed by a trial court, in its discretion, as worthy of consideration as a mitigating factor. *See State v. Cameron*, 314 N.C. 516, 518-19, 335 S.E.2d 9, 10 (1985) ("Regarding non-statutory factors that are proven by a preponderance of the evidence and are reasonably related to the purposes of sentencing . . . the trial judge may consider them, but such consideration is not required.").

The trial court is authorized to consider any such non-statutory mitigating factors under the "catch-all" provision of N.C. Gen. Stat. § 15A-1340.16(e), which provides for a trial court's consideration of "[a]ny other mitigating factor reasonably related to the purposes of sentences." N.C. Gen. Stat. § 15A-1340.16(e)(21). *See State v. Spears*, 314 N.C. 319, 322-23, 333 S.E.2d 242, 244 (1985) ("[A]lthough failure to find a *statutory* mitigating factor supported by uncontradicted, substantial and manifestly credible evidence is reversible error, a trial judge's consideration of a non-statutory factor which is (1) requested by the defendant, (2) proven by uncontradicted, substantial and manifestly credible evidence, and (3) mitigating in effect, is a matter entrusted to the sound discretion of the sentencing judge. . . . Thus, [the trial court's] failure to find such a non-statutory mitigating factor will not be disturbed on appeal absent a showing of abuse of discretion.").

Here, the trial court carefully considered and weighed the applicable mitigating and aggravating factors, ultimately finding one mitigating

factor — that Defendant "has a support system in the community" — and finding no aggravating factors. As a result, the trial court sentenced Defendant within the mitigated range. Moreover, it is clear from the trial transcript that the trial court inquired about Defendant's completion of the substance abuse program as a potential non-statutory mitigating factor.

Defendant argues, in essence, that the timing of Defendant's substance abuse program in relation to his arrest should be deemed irrelevant and asserts that the trial court's refusal to find this as a mitigating factor entitles him to a new sentencing hearing. Defendant's argument, however, is inconsistent with the balance struck by the General Assembly in N.C. Gen. Stat. § 15A-1340.16(e)(16). By requiring trial courts to consider as a statutory mitigating factor a defendant's involvement in a drug treatment program only in cases where he entered the program following arrest and prior to trial, the legislature has implicitly directed that a defendant's completion of such a program prior to arrest is not *required* to be so considered.

Adoption of Defendant's argument would essentially require us to rewrite N.C. Gen. Stat. § 15A-1340.16(e)(16) to do away with the timing requirement imposed by the General Assembly in this statutory provision. This we cannot do. Our courts lack the authority to rewrite a statute, and instead, "[t]he duty of a court is to construe a statute as it is written." *In re Advance Am., Cash Advance Centers of N.C., Inc.*, 189 N.C. App. 115, 122, 657 S.E.2d 405, 410 (2008) (citation and quotation marks omitted). *See Carolina Power & Light Co. v. City of Asheville*, 358 N.C. 512, 518, 597 S.E.2d 717, 722 (2004) ("Where the statutory language is clear and unambiguous, the Court does not engage in judicial construction but must apply the statute to give effect to the plain and definite meaning of the language." (citation and quotation marks omitted)). The trial court therefore did not abuse its discretion by declining to find as a mitigating factor Defendant's completion of a substance abuse program prior to his arrest.

B. Positive Employment History

Finally, Defendant contends that the trial court should have found as a statutory mitigating factor his positive employment history. N.C. Gen. Stat. § 15A-1340.16(e)(19) sets forth the following mitigating factor: "The defendant has a positive employment history or is gainfully employed." N.C. Gen. Stat. § 15A-1340.16(e)(19). Defendant asserts that he demonstrated at the sentencing phase through his own testimony and the testimony of his mother as well as by his introduction of a newspaper article into evidence that he had achieved success as a professional bull rider.

Initially, we note that at the sentencing hearing Defendant's trial counsel did not specifically request that Defendant's employment history be considered as a mitigating factor under N.C. Gen. Stat. § 15A-1340.16(e)(19). Instead, evidence of his bull riding career was introduced for the purpose of showing that he possessed a "support system in the community" — a separate statutory mitigating factor that is set out in N.C. Gen. Stat. § 15A-1340.16(e)(18). Defendant's counsel argued that the evidence of his prior employment history showed that he had been a more "normal" member of society prior to his drug use and that he could revert back to that status with the help of the family and community support system he now had in place.

We have emphasized that 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 that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law." *State v. Davis*, 206 N.C. App. 545, 549, 696 S.E.2d 917, 920 (2010) (internal citations and quotation marks omitted).

Taken together, Defendant's evidence merely showed that he had (1) participated in and won several bull riding competitions; (2) won several thousand dollars in prize money, as well as a saddle for his horse and a truck; and (3) competed in the 2007 national bull riding championship with a broken leg. Even assuming, without deciding, that a career in professional bull riding constitutes the type of positive employment history envisioned by N.C. Gen. Stat. § 15A-1340.16(e)(19), Defendant's evidence indicated that he retired from professional bull riding in 2007, and he did not present evidence that he was gainfully employed between 2007 and the date of his arrest in 2014. Indeed, to the contrary, the only evidence at trial of Defendant earning money during this time period concerned his sale of methamphetamine. Therefore, the trial court did not err in declining to find Defendant's employment history as a mitigating factor.

Conclusion

For the reasons stated above, we conclude that Defendant received a fair trial free from plain error.

NO PLAIN ERROR.

Chief Judge McGEE and Judge STEPHENS concur.

STATE OF NORTH CAROLINA
v.
JACKSON CAIN WHISENANT

No. COA16-82

Filed 6 September 2016

1. Robbery—dangerous weapon—motion to dismiss—sufficiency of evidence—unopened knife—afraid for life

The trial court did not err by denying defendant's motion to dismiss the robbery with a dangerous weapon charge. The unopened knife was a dangerous weapon when defendant threatened to use it to cause great bodily harm or death. Viewed in the light most favorable to the State, the evidence tended to show the store loss prevention associate was afraid his life was endangered by defendant's actions and threats.

2. Constitutional Law—effective assistance of counsel—denial of motion to continue—denial of motion for appointment of substitute counsel

Defendant's appeal of the trial court's denial of his motion to continue and for appointment of substitute counsel was dismissed without prejudice.

Appeal by defendant from judgment entered 16 July 2015 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 9 August 2016.

Attorney General Roy Cooper, by Special Deputy Attorney General Grady L. Balentine, Jr., for the State.

Law Office of Aaron Young PLLC, by Aaron Young, for defendant-appellant.

TYSON, Judge.

Jackson Cain Whisenant ("Defendant") appeals from judgments entered upon return of the jury's verdicts finding him guilty of robbery with a dangerous weapon, possession of methamphetamine, and simple assault. We find no error in part, and dismiss without prejudice in part.

I. Factual Background

At approximately 2:30 p.m. on 20 December 2014 in Waynesville, North Carolina, Kmart loss prevention associate William Pate observed a male, later identified as Defendant, scanning the jewelry section inside the store. Mr. Pate observed Defendant take two separate watches and place them inside his pants, and conceal two necklaces under his shirt. The items had a total retail value of $95.95.

Defendant walked away from the jewelry section and past the registers without paying for the merchandise. Mr. Pate followed Defendant outside and asked him to return to the foyer of the Kmart.

After Mr. Pate questioned Defendant about taking the jewelry, Defendant stated, "I don't have anything on me" and "F you. I don't have anything. I'm leaving." During this confrontation, Defendant repeatedly placed his hands into his pockets. Mr. Pate testified he saw a knife in Defendant's pocket. When Defendant's hand went to the knife in his pocket, Mr. Pate told Defendant to "get his hands off his knife."

Mr. Pate testified Defendant attempted to force his way out of the Kmart foyer and pulled the unopened knife out of his pocket. Immediately, Mr. Pate grabbed Defendant's hand and wrestled the closed knife away from him. Defendant repeatedly said, "I will kill you" to Mr. Pate.

Gregory Winsell, another Kmart security officer, approached to assist Mr. Pate. At this point, Mr. Pate pushed Defendant out of the foyer. Defendant walked into the parking lot and then returned and sprayed the men with pepper spray. The spray hit Mr. Winsell directly in the face.

Defendant fled across the parking lot to a Little Caesars pizza shop. James Messer, an employee of Little Caesars, had parked his truck beside the pizza shop. Mr. Messer saw Defendant bend down and toss something underneath his truck. The police found the items stolen from Kmart underneath the truck, as well as 2.58 grams of methamphetamine hidden between the windshield and hood. Defendant was arrested and later indicted for robbery with a dangerous weapon, possession with intent to manufacture, sell, or deliver methamphetamine, and three counts of simple assault.

Immediately prior to his trial on 13 July 2015, Defendant's attorney moved for a continuance due to his inability to prepare the case for trial. The trial court denied the motion and the case proceeded to trial. The jury found Defendant guilty on all counts. Defendant appeals from the judgment entered thereon.

II. Issues

Defendant argues the trial court erred by denying his motion to dismiss the robbery with a dangerous weapon charge because (1) the weapon was unopened, and (2) the State failed to establish Mr. Pate's life was in danger or threatened.

Defendant also argues his appointed counsel was not adequately prepared and the trial court's denial of his motion to continue and for substitute counsel violated his Sixth Amendment right to counsel.

III. Robbery With a Dangerous Weapon

A. Standard of Review

[1] When ruling upon a defendant's motion to dismiss, the trial court determines whether substantial evidence exists of: (1) each essential element of the offense charged, and (2) whether defendant is the perpetrator of the crime. *State v. Scott*, 356 N.C. 591, 595, 573 S.E.2d 866, 868 (2002). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

Upon a motion to dismiss, the court must review the evidence in the light most favorable to the State to determine whether substantial evidence was present of each element of the offense. *State v. McKinnon*, 306 N.C. 288, 298, 293 S.E.2d 118, 125 (1982). This Court reviews a trial court's denial of a defendant's motion to dismiss *de novo*. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted).

B. Analysis

Defendant asserts the wielded knife must have been opened with an exposed blade to satisfy the dangerous weapon element of the crime of robbery with a dangerous weapon. We disagree.

A dangerous weapon is any article, instrument, or substance that is likely to produce either death or great bodily harm. *State v. Marshall*, 188 N.C. App. 744, 749, 656 S.E.2d 709, 713, *disc. review denied*, 362 N.C. 368, 661 S.E.2d 890 (2008). "Whether an instrument can be considered a dangerous weapon depends upon the nature of the instrument, the *manner in which defendant used it or threatened to use it*, and in some cases the *victim's perception* of the instrument and its use." *State v. Peacock*, 313 N.C. 554, 563, 330 S.E.2d 190, 196 (1985) (emphasis supplied). The conduct of Defendant and the victim's perception are factors as relevant as the actual weapon used in the altercation. *Id.*

This Court has repeatedly addressed what constitutes a dangerous weapon in North Carolina. *See State v. Blair*, 181 N.C. App. 236, 638 S.E.2d 914 (upholding robbery with a dangerous weapon conviction where victim did not see the defendant's knife when defendant took his wallet, but a police officer saw defendant verbally threaten victim while holding the wallet and knife), *disc. review denied*, 361 N.C. 570, 650 S.E.2d 815 (2007); *State v. Williams*, 335 N.C. 518, 438 S.E.2d 727 (1994) (holding a jury can infer danger or threat to life and find defendant guilty of robbery with a dangerous weapon where defendant had his hand in his pocket pointing toward victims, appearing to his victims to be a firearm during the robbery).

While an issue of first impression in this Court, courts in other jurisdictions have ruled closed knives used in the commission of a robbery satisfy the dangerous weapon element. The Georgia Court of Appeals held a gesture toward another individual with an unopened knife during the commission of a robbery is sufficient to satisfy the element of a dangerous weapon. *Alford v. State*, 204 Ga. App. 14, 15, 418 S.E.2d 397, 398 (1992). Similarly, the Texas Court of Appeals held an unopened knife could be "legally sufficient to support a conviction" for aggravated robbery based on evidence that, while in an attempt to commit theft, the defendant "placed [the victim] in fear of imminent serious bodily injury or death, and during the course of that attempt, exhibited an unopened knife that, in the manner of its use or intended use, was capable of causing serious bodily injury or death." *Blanson v. State*, 107 S.W.3d 103, 106 (Tex. App. 2003). Both cases rely on the manner and conduct in which the respective defendants displayed the knives. *Id.*, *Alford*, 204 Ga. App. at 15, 418 S.E.2d at 398.

Based on precedents from our Courts, as well as persuasive authority in other jurisdictions, we conclude Defendant's brandishing and use of the knife satisfied the element of a dangerous weapon. The manner and circumstances in which Defendant displayed the knife alludes to its purpose: Defendant yelled "I will kill you," attempted to push past Mr. Pate, removed the knife from his pocket and brandished it when Mr. Pate mentioned police involvement.

We hold the unopened knife was a dangerous weapon when Defendant threatened to use it to cause great bodily harm or death. Sufficient evidence shows Defendant not only possessed a knife while committing the theft, he also removed it from his pocket and wielded it with dire threats when Mr. Pate attempted to call the police.

Defendant also argues the State presented insufficient evidence tending to show Mr. Pate's life was "endangered or threatened" as required by N.C. Gen. Stat. § 14-87 (2015). The State must present "evidence that the defendant endangered or threatened the life of the victim by possession of [the] weapon, aside from the mere fact of the weapon's presence." *State v. Gibbons*, 303 N.C. 484, 490, 279 S.E.2d 574, 578 (1981).

While Mr. Pate was attempting to disarm him, Defendant threatened, "I will kill you. I will kill you." Mr. Pate testified he felt afraid "when the knife came out" of Defendant's pocket. The State's evidence clearly shows more than mere possession of a dangerous weapon. Reviewed in the light most favorable to the State, this evidence tends to show Mr. Pate was afraid his life was endangered by Defendant's actions and threats. *Id.* Defendant's argument is overruled.

IV. Motion to Continue and Motion for Substitute Counsel

A. Standard of Review

[2] A motion to continue generally rests solely within the trial court's discretion and is reviewable on appeal only for an abuse of discretion. *State v. Thomas*, 294 N.C. 105, 11, 240 S.E.2d 426, 432 (1978). However, "[d]ue process requires that every defendant be allowed a reasonable time and opportunity to investigate and produce competent evidence, if he can, in defense of the crime [for] which he stands charged." *State v. Baldwin*, 276 N.C. 690, 698, 174 S.E.2d 526, 531 (1970). When the motion to continue is based on a constitutional right, "the question presented is one of law and not of discretion and is reviewable." *State v. Harris*, 290 N.C. 681, 686, 228 S.E.2d 437, 440 (1976).

B. Analysis

In arguing his motion to continue, Defendant's attorney, Mr. Patton, asserted lack of adequate time to prepare, due to Defendant's incarceration in Catawba County from April to early June, and counsel's own illnesses during April through June. Mr. Patton was appointed to represent Defendant on 22 December 2014. Mr. Patton indicated he and Defendant had no communication from 10 March 2015 to 13 July 2015, when the case was called for trial. Mr. Patton also stated he underwent rotator cuff surgery on 10 April 2015 and did not return to work until the week of 18 May 2015.

Mr. Patton also informed the trial court he had tried a large criminal case during the week of 8 June and re-entered the hospital on 14 June 2015. Mr. Patton indicated the "antibiotic treatment" he received in the hospital "had a very severe effect" on him and that he "had not had

many good days since then." He informed the trial court he was unable to return to work until 29 June 2015, approximately two weeks prior to trial.

On the morning of trial, Defendant informed counsel he had two witnesses "that could come to court for him." Defendant also informed counsel that morning that he had prior contact with the prosecuting witness.

Criminal defendants are constitutionally guaranteed "a fair trial and a competent attorney." *Engle v. Isaac*, 456 U.S. 107, 134, 71 L. Ed. 2d 783, 804 (1982). "To establish a constitutional violation, a defendant must show that he did not have ample time to confer with counsel and to investigate, prepare and present his defense." *State v. Tunstall*, 334 N.C. 320, 329, 432 S.E.2d 331, 337 (1993).

Defendant must meet a two prong test to establish counsel's assistance was so defective to require reversal of a conviction. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984). "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show the deficient performance prejudiced the defense." *Id.*

Under our analysis we presume, without deciding, Defendant may meet the first prong to show counsel's representation of Defendant was deficient due to counsel's illnesses, his failure to speak to Defendant between March 2015 and 13 July 2015, counsel's recent knowledge of the potential defense witnesses, and the alleged prior contact with the prosecution's witness.

Under *Strickland*, this Court must determine whether Defendant was prejudiced due to counsel's deficient performance. *State v. Thompson*, 359 N.C. 77, 115, 604 S.E.2d 850, 876. In order to establish prejudice "[t]he 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." *Strickland*, 466 U.S. at 694, 80 L. Ed. 2d at 698.

"[W]hen [a] 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 defendant to bring them pursuant to a subsequent motion for appropriate relief in the trial court." *Thompson*, 359 N.C. at 123, 604 S.E.2d at 881.

The factual record before us is insufficient to allow us to determine whether Defendant was prejudiced. No testimony or other information

reveals what Defendant's proposed witnesses would have testified to, what relationship Defendant had with the prosecution's witness, or what specifically Mr. Patton was unable to master or present at trial due to his illnesses. We dismiss Defendant's appeal of the denial of a continuance without prejudice. Defendant may review procedures to develop a factual record surrounding the trial court's denial of his motion to continue and appointment of substitute counsel before the superior court.

V. Conclusion

We hold the trial court properly submitted the charge of robbery with a dangerous weapon to the jury and find no error. We dismiss Defendant's argument regarding the trial court's denial of his motion to continue and for appointment of substitute counsel without prejudice.

NO ERROR IN PART. DISMISSED WITHOUT PREJUDICE IN PART.

Judges BRYANT and INMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 SEPTEMBER 2016)

BREIGHNER v. BREIGHNER No. 16-146	Moore (13CVD613)	Dismissed
CLARK v. N.C. DEP'T OF PUB. SAFETY No. 15-624	Office of Admin. Hearings (14OSP5446)	Affirmed
CRAWFORD v. NAWRATH No. 15-955	Mecklenburg (14CVD12037)	Affirmed
ELDER v. WILLIAMS No. 16-121	Carteret (11CVD1543)	Dismissed
GREATAMERICA FIN. SERVS. CORP. v. LILLINGTON FAM. CHIROPRACTIC, PA No. 15-1314	Wake (15CVD1018)	Affirmed
HAIRE v. KRAMER No. 16-140	Iredell (12CVS1419)	Dismissed
IN RE B.N.H. No. 16-275	Wilkes (15JA118) (15JA119) (15JA121) (15JA122)	Reversed
IN RE E.A.L. No. 16-266	Caswell (10JT19-20)	Affirmed
IN RE E.R.S. No. 16-220	Guilford (13JT484) (13JT485)	Affirmed
IN RE I.T. No. 15-1342	Wake (13JT189)	Affirmed
IN RE Z.B. No. 16-128	Wake (14JA134)	Affirmed
LOCAL GOV'T FED. CREDIT UNION v. DISHER No. 15-1402	Pitt (14CVD2186)	Reversed and Remanded
NEWELL v. NEWELL No. 15-1016	Wake (12CVD4605)	Affirmed in part; vacated and remanded in part

SHOPE v. PENNINGTON No. 15-1249	Lee (09CVD933)	Affirmed
STATE v. BOWLES No. 15-1359	Iredell (13CRS55042)	Affirmed
STATE v. BRITT No. 16-99	Johnston (12CRS55220)	No Error
STATE v. BROWN No. 15-847	Buncombe (13CRS57281) (14CRS80662)	Reversed and Remanded
STATE v. BROYAL No. 16-21	Chatham (13CRS50376-78) (13CRS640)	No Error
STATE v. CERASI No. 16-45	Wake (11CRS228622)	Affirmed
STATE v. DIXON No. 15-350	Alamance (09CRS55361) (09CRS7503)	No Error
STATE v. FIELDS No. 15-1086	Alamance (09CRS55401) (09CRS55483) (09CRS7504)	No plain error.
STATE v. JOHNSON No. 15-732	Cumberland (13CRS51987)	No Error
STATE v. JONES No. 15-995	Wake (12CRS204285) (12CRS206010) (12CRS3090) (13CRS3100) (13CRS3101)	No prejudicial error.
STATE v. McCANN No. 16-152	Vance (14CRS52728)	NO ERROR AT TRIAL, RESTITUTION AMOUNT VACATED AND REMANDED.
STATE v. McLEAN No. 16-158	Cumberland (13CRS5373)	No prejudicial error
STATE v. MOLINA No. 15-1180	Johnston (14CRS55115) (14CRS594)	No Error

STATE v. ORE No. 16-100	Durham (09CRS42754)	Vacated
STATE v. ROBERSON No. 16-118	Rowan (15CRS869)	No Plain Error
STATE v. SCHIMMELPFENNING No. 15-1315	Forsyth (14CRS168) (15CRS478)	Vacated and Remanded
STATE v. VAZQUEZ No. 16-191	Pitt (13CRS56868) (13CRS56870)	No error in part. dismissed in part.
STATE v. WILCOX No. 16-91	Affirmed (08CRS51854)	New Hanover

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