281 N.C. App.—No. 3 **Pages 305-494**

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JULY 13, 2022

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

THE COURT OF APPEALS

OF

NORTH CAROLINA

Chief Judge

DONNA S. STROUD

Judges

CHRIS DILLON
RICHARD D. DIETZ
JOHN M. TYSON
LUCY INMAN
VALERIE J. ZACHARY
HUNTER MURPHY
JOHN S. ARROWOOD

ALLEGRA K. COLLINS
TOBIAS S. HAMPSON
JEFFERY K. CARPENTER
APRIL C. WOOD
W. FRED GORE
JEFFERSON G. GRIFFIN
DARREN JACKSON

Former Chief Judges

GERALD ARNOLD
SIDNEY S. EAGLES, JR.
JOHN C. MARTIN
LINDA M. McGEE

Former Judges

J. PHIL CARLTON
BURLEY B. MITCHELL, JR.
WILLIS P. WHICHARD
CHARLES L. BECTON
ALLYSON K. DUNCAN
SARAH PARKER
ELIZABETH G. McCRODDEN
ROBERT F. ORR
JACK COZORT
MARK D. MARTIN
JOHN B. LEWIS, JR.
CLARENCE E. HORTON, JR.
JOSEPH R. JOHN, SR.
ROBERT H. EDMUNDS, JR.
JAMES C. FULLER
K. EDWARD GREENE
RALPH A. WALKER
ALBERT S. THOMAS, JR.
LORETTA COPELAND BIGGS
ALAN Z. THORNBURG
PATRICIA TIMMONS-GOODSON
ROBIN E. HUDSON

ERIC L. LEVINSON
JAMES A. WYNN, JR.
BARBARA A. JACKSON
CHERI BEASLEY
CRESSIE H. THIGPEN, JR.
ROBERT C. HUNTER
LISA C. BELL
SAMUEL J. ERVIN, IV
SANFORD L. STEELMAN, JR.
MARTHA GEER
LINDA STEPHENS
J. DOUGLAS McCULLOUGH
WENDY M. ENOCHS
ANN MARIE CALABRIA
RICHARD A. ELMORE
MARK A. DAVIS
ROBERT N. HUNTER, JR.
WANDA G. BRYANT
PHIL BERGER, JR.
REUBEN F. YOUNG
CHRISTOPHER BROOK

Clerk
EUGENE H. SOAR

Assistant Clerk
Shelley Lucas Edwards

OFFICE OF APPELLATE DIVISION STAFF

Executive Director
Jonathan Harris

Director
David Alan Lagos

Staff Attorneys
Michael W. Rodgers
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James
Megan Shook
Danielle Allen

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Andrew Heath

Assistant Director
David F. Hoke

OFFICE OF APPELLATE DIVISION REPORTER

Alyssa M. Chen
Jennifer C. Peterson
Niccolle C. Hernandez

COURT OF APPEALS

CASES REPORTED

FILED 18 JANUARY 2022

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ANIMALS

Dogfighting—sufficiency of evidence—The State presented substantial evidence to send to the jury multiple charges of dogfighting where, on a property at which defendant ran a kennel business, investigators seized numerous dogs that had injuries and scarring consistent with trained, organized dogfighting and discovered equipment designed to condition dogs to increase their strength and endurance, medication commonly used in dogfighting operations, an area that appeared to be a dogfighting pit or training area, and publications and notes related to dogfighting. **State v. Crew, 437.**

APPEAL AND ERROR

Preservation of issues—contract dispute—attorney fees—no hearing or ruling—In a contractual dispute between an HVAC and plumbing company and a homeowner in which the homeowner asserted a counterclaim under the Unfair and Deceptive Trade Practices Act, although both parties indicated to the trial court that they were interested in being heard on attorney fees, since neither party obtained a ruling from the trial court on a request for fees, the issue was not preserved for appellate review. **Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison, 312.**

APPEAL AND ERROR—Continued

Preservation of issues—order of closing arguments—purported objection insufficient—In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant) in which defendant raised multiple counterclaims, plaintiff's argument that the trial court erred by failing to give it the final closing (rebuttal) argument was not properly preserved for appellate review. Plaintiff's purported objection—"If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge."—did not qualify as an objection sufficient under Appellate Rule 10 for preservation purposes. **Dan King Plumbing Heating & Air Conditioning, LLC v. Harrison, 312.**

Preservation of issues—request for lesser-included offense—multiple theories—objection to denial of request—In a second-degree murder trial, defendant preserved for review the trial court's refusal to give a pattern involuntary manslaughter instruction to the jury. Although defendant failed to properly request the instruction based on a theory of culpable omission (by not obtaining aid for his wife, who was overdosing)—which, as a deviation from the pattern instruction amounted to a special instruction that needed to be submitted in writing—he also requested the instruction on a theory that he had acted in a criminally negligent manner, which did not deviate from the pattern instruction, and his subsequent objections to the court's refusal to give the pattern instruction was sufficient to preserve the issue. **State v. Brichikov, 408.**

Waiver—adequacy of DSS services—compliance with disability laws—raised for first time on appeal—In a permanency planning matter, where respondent-mother claimed on appeal that the department of social services violated the Americans with Disabilities Act by not providing adequate services to accommodate her intellectual disability, but had not raised the issue either before or during the permanency planning hearing, she waived the argument for appellate review. **In re A.P., 347.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Permanency planning order—reunification efforts—in light of mother's disability—sufficiency of evidence and findings—In a permanency planning matter, the trial court's conclusion that the department of social services (DSS) made reasonable efforts to prevent the need for placement of the child was supported by its findings of fact, which in turn were supported by the testimony of social workers, the guardian ad litem's report, and a psychological assessment. DSS provided services as recommended by the assessment, but respondent either declined to participate in or did not make sufficient improvement after using those services. Although respondent argued that DSS did not accommodate her intellectual disability, where DSS satisfied the reasonable efforts requirement under state law, DSS also met the reasonable accommodation requirement of the Americans with Disabilities Act. **In re A.P., 347.**

Permanency planning—ceasing further review hearings—statutory requirements—In a permanency planning matter in which legal custody of the child was granted to the father, the trial court met the requirements of N.C.G.S. §§ 7B-906.1(k) and 7B-905.1(d) when it stated in its visitation decree that no further regular review hearings would be held but that the parties could file a motion for review of the visitation plan. Although respondent-mother had an intellectual disability, the Americans with Disabilities Act did not impose additional requirements on the trial court before cessation of further review hearings. **In re A.P., 347.**

DISCOVERY

Post-conviction—instructions on remand—scope of in camera review—failure to comply with mandate—In a sexual offense case in which the appellate court instructed the trial court on remand to conduct an in camera review of child protective services records for materiality—requested in defendant's motion for post-conviction discovery seeking information regarding prior unfounded claims of sexual abuse made by the victim—the trial court impermissibly narrowed the scope of its review to records involving specific time periods and accusations against specific people. Therefore, its order denying defendant's motion for post-conviction discovery was vacated and the matter remanded for further review. **State v. Cataldo, 425.**

EMBEZZLEMENT

Fiduciary relationship—joint bank accounts—intent—elder abuse—The State presented sufficient evidence to survive defendant's motion to dismiss an embezzlement charge where defendant was in a fiduciary relationship with the victim (whom he called "Mom" and convinced to grant him access to all of her financial accounts after her husband died so that he could "help her") and he wrongfully converted the victim's money to his own use (being a joint holder of the victim's bank accounts did not entitle him to use her money). Further, there was sufficient evidence that he embezzled more than $100,000—elevating the offense to a Class C felony—because the circumstances allowed the inference that he intended for overdrafts on his personal account to be paid from the joint account funded with the victim's money. **State v. Steele, 472.**

Jury instructions—special instruction requested—bank protection law—confusion of jury—In an embezzlement prosecution arising from defendant's financial exploitation of an elderly woman whose husband had just died, the trial court properly declined to give defendant's requested special jury instruction—that if defendant was lawfully named on the joint bank accounts with the victim, then he was entitled to use the funds in the accounts. The requested instruction, which summarized a statute for the protection of banks (N.C.G.S. § 54C-165) and was not dispositive as to the ownership of funds, would have confused the jury. **State v. Steele, 472.**

EVIDENCE

Expert testimony—dogfighting case—leading question on direct exam—In a dogfighting and animal cruelty case, the trial court exercised appropriate discretion when it allowed the State to ask a leading question of the forensic veterinary medicine expert on direct examination as a follow-up to an earlier, non-leading question that elicited the expert's opinion that the dogs were being kept for the purpose of organized dogfighting. **State v. Crew, 437.**

Statutory rape trial—expert testimony—use of words "victim" and "disclosure"—credibility vouching—There was no plain error in a statutory rape trial by the expert witness using the words "victim" and "disclosure" during her testimony to describe the child prosecuting witness and the allegations made against defendant. The jury also heard testimony about defendant's assaults directly from the prosecuting witness as well as testimony from family members, a counselor, and others. Given the overwhelming evidence of guilt presented, defendant's alternative argument that his counsel was ineffective for failing to object to the expert's language was also without merit. **State v. Ward, 484.**

WORKERS' COMPENSATION

Disability—futility of seeking employment—evidentiary burden—improper conclusion—After plaintiff's workplace injury, the Industrial Commission erred by concluding that plaintiff presented no evidence of disability and by failing to consider whether the evidence she did present established the futility of seeking other employment due to preexisting conditions. Plaintiff's evidence showed she was in her fifties; had been receiving Social Security disability benefits for an unrelated medical condition for several decades; was working a part-time job earning less than the minimum wage at the time she was injured (despite having a bachelor's degree); and, after her injury, had several work restrictions and suffered from persistent pain, culminating in a need for knee surgery. Notably, the Commission made no findings regarding evidence of plaintiff's medical records in which multiple medical providers described her post-injury "work status" as "unable to work secondary to dysfunction." **Monroe v. MV Transp., 363.**

Lack of written notice of injury—delay in treatment—excuse—prejudice— Where plaintiff-employee was injured in a serious accident while driving a tractor trailer for defendant-employer, and more than a year later underwent corrective spinal surgery—without first providing written notice of her injury or treatment to defendant—the opinion and award entered by the Industrial Commission in plaintiff's favor was reversed. The Commission's conclusion that plaintiff's condition was causally related to her work accident was not supported by the findings of fact (plaintiff had a pre-existing back condition); plaintiff failed to show a reasonable excuse for failing to timely notify defendant of her injury and failed to show that defendants were not thereby prejudiced; and the date of disability determined by the Commission was unsupported by the findings of fact (it should have begun the date the doctor recommended that she stop working). **Sprouse v. Turner Trucking Co., 372.**

N.C. COURT OF APPEALS
2022 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	10 and 24
February	7 and 21
March	7 and 21
April	4 and 25
May	9 and 23
June	6
August	8 and 22
September	5 and 19
October	3, 17, and 31
November	14 and 28
December	None (unless needed)

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

CARMICHAEL v. CORDELL

[281 N.C. App. 305, 2022-NCCOA-26]

DANIEL ALLEN CARMICHAEL, Plaintiff
v.
LEO W. CORDELL, Defendant

No. COA21-317

Filed 18 January 2022

1. Jurisdiction—in personam—in rem—nonresident stepfather —trust account funds in North Carolina

In an action where a North Carolina resident (plaintiff) sought a declaratory judgment naming him the rightful owner of funds that his deceased mother had placed into North Carolina trust accounts, the trial court properly determined that asserting in personam jurisdiction over plaintiff's stepfather (defendant), a California resident who made claims to the funds, was unreasonable because defendant had never conducted any activities in North Carolina and had no ties to the state apart from his relationship with plaintiff. Nevertheless, the court could properly exercise in rem jurisdiction over plaintiff's suit because the subject of the action was personal property located in North Carolina, and plaintiff had demanded relief that would exclude defendant from claiming any interest in that property.

2. Pretrial Proceedings—motion—challenging party's standing and conflicts of interest—notice and calendaring requirements

In plaintiff's declaratory judgment action seeking to exclude his stepfather (defendant) from claiming rights to funds in certain trust accounts, where defendant's daughter and attorney-in-fact was later added as a party, plaintiff's motion challenging his stepsister's standing to sue and alleging she had conflicts of interest was not properly before the trial court where, although plaintiff raised an objection five days before the hearing in the case, the court did not receive notice of the motion until the day of the hearing and the motion had not been calendared with the trial court coordinator beforehand.

Appeal by plaintiff from order entered 14 October 2020 by Judge John O. Craig, III, in Guilford County Superior Court. Heard in the Court of Appeals 14 December 2021.

Gordon Law Offices, by Harry G. Gordon, for plaintiff-appellant.

Nelson Mullins Riley & Scarborough LLP, by Fred M. Wood, Jr., and Holland & Knight, LLP, by Vivian L. Thoreen and Lydia L. Lockett admitted pro hac vice, for defendant-appellee.

TYSON, Judge.

¶ 1 Daniel Carmichael ("Plaintiff") appeals an order by the trial court granting Leo Cordell's ("Defendant") motion to dismiss. We affirm in part, reverse in part and remand.

I. Background

¶ 2 Defendant has been a California resident since 1954. Defendant married Patricia Cordell ("Decedent") on 8 July 1961. Defendant and Decedent (the "Cordells"), lived in California during the entirety of their marriage until Decedent died on 10 January 2020. The Cordells are parents of two daughters, Caroline P. Condon ("Ms. Condon") and Wendy Cordell. Decedent was the mother of one son, Plaintiff, from a previous relationship. Plaintiff resides in North Carolina. Defendant has never traveled to, conducted business in, or has any other ties to or in North Carolina.

¶ 3 The Cordells acquired assets during their 58 years of marriage, which are purportedly classified as community property under California law. Defendant allegedly discovered after Decedent had died that Decedent had set up separate accounts for Plaintiff and made changes to certain accounts, which affected the disposition of their asserted community property assets. Decedent had purportedly removed the Cordell's two daughters as beneficiaries on some accounts, leaving Plaintiff as the sole beneficiary. Decedent had also purportedly changed the address on the accounts to Plaintiff's address in North Carolina.

¶ 4 Plaintiff claimed ownership of funds from three accounts held by Decedent which named him as the sole beneficiary for twenty years. On 30 April 2020, Defendant sent Plaintiff a letter and threatened to sue Plaintiff. Defendant claimed the transfers Decedent made in trust to Plaintiff should be voided because Defendant did not approve the changes.

¶ 5 On 8 July 2020, Defendant sued Plaintiff in California ("CA action"). Defendant filed a first amended complaint against Plaintiff in the CA action for: (1) aiding and abetting breach of fiduciary duty; (2) elder financial abuse; (3) declaratory relief regarding non-probate transfers; and, (4) declaratory relief regarding transfer of stock. This amended complaint alleges Plaintiff unduly influenced Decedent to change the beneficiary designations of the accounts containing community funds and naming Plaintiff as the sole beneficiary of those accounts upon Decedent's death.

¶ 6 On 14 July 2020, Plaintiff filed his verified complaint as a declaratory judgment action, which initiated the instant litigation against Defendant in North Carolina ("NC Action"). This complaint was served on Defendant in California on 22 July 2020. The NC action arises out of the same facts as alleged in Defendant's CA action, and centers around actions the Decedent took in California involving the purported marital property and Defendant's spousal rights and duties as California residents. Plaintiff amended his complaint on 11 September 2020 and added Ms. Condon, Defendant's daughter, and his attorney-in-fact, as a party. The NC action seeks a declaratory judgment holding Plaintiff is the sole and rightful owner of the funds placed in trust accounts, by Decedent, for his benefit in North Carolina, yet to be paid to him. Plaintiff filed a motion challenging Ms. Condon's standing and alleging conflicts of interest on 2 October 2020.

¶ 7 Plaintiff also filed a petition for probate of lost will in California on 14 August 2020. In that petition, Plaintiff sought to probate a document purported to be a handwritten will of Decedent dated 24 October 2003, along with a document purported to be a handwritten codicil dated 10 July 2011.

¶ 8 Defendant filed his motion to dismiss for lack of personal jurisdiction. Defendant's motion was granted in the superior court on 12 October 2020. Plaintiff appeals.

II. Jurisdiction

¶ 9 This appeal is properly before this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1) and 1-277(b) (2021).

III. Issues

¶ 10 Plaintiff challenges whether the trial court erred: (1) by granting Defendant's motion to dismiss for lack of personal jurisdiction; (2) by not finding North Carolina possesses *in rem* jurisdiction over the property and proceeds; and, (3) in failing to rule on Plaintiff's motion challenging the standing of Caroline Condon and asserted conflicts of interest.

IV. Argument

A. Personal Jurisdiction

1. In Personam

¶ 11 **[1]** "Once jurisdiction is challenged, plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists."

Williams v. Institute for Computational Studies, 85 N.C. App. 421, 424, 355 S.E.2d 177, 179 (1987). For North Carolina courts to exercise *in personam* jurisdiction over a nonresident defendant, there is a two-part test: "first, the court must have jurisdiction over the person of defendant under our State's long-arm statute, and second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment of the United States Constitution." *Id.* (internal quotation marks omitted).

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person
>
> (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:
>
> . . . .
>
> 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)(d) (2021) (emphasis supplied).

¶ 12 "The Due Process Clause of the Fourteenth Amendment operates to limit the power of a State to assert *in personam* jurisdiction over a nonresident defendant." *Beem USA Ltd.-Liab. Ltd. P'ship v. Grax Consulting LLC*, 373 N.C. 297, 302, 838 S.E.2d 158, 161-62 (2020) (citations omitted). For North Carolina courts to assert jurisdiction the due process requirements must be satisfied. The primary concern of the Due Process Clause as it relates to a court's jurisdiction over a nonresident defendant is the protection of an individual's liberty interest in not being subject to the binding judgments of a forum with which he has established no meaningful contacts, ties, or relations." *Id.* at 302, 838 S.E.2d. at 162 (citations and internal quotation marks omitted).

> The United States Supreme Court has made [it] clear that the Due Process Clause permits state courts to exercise personal jurisdiction over an out-of-state defendant so long as the defendant has certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.

Id.

¶ 13 "Specific jurisdiction exists if the defendant has purposely directed its activities toward the resident of the forum and the cause of action relates to such activities." *Havey v. Valentine*, 172 N.C. App. 812, 815, 616 S.E.2d 642, 646 (2005) (citations and internal quotation marks omitted). "[T]he court considers (1) the extent to which the defendant purposefully availed itself of the privilege of conducting activities in the State; (2) whether the plaintiffs' claims arise out of those activities directed at the State; and (3) whether the exercise of personal jurisdiction would be constitutionally reasonable." *Id.* at 815, 616 S.E.2d at 647 (alterations, citations and quotation marks omitted).

¶ 14 "Purposeful availment is shown if the defendant has taken deliberate action within the forum state or if he has created continuing obligations to forum residents." *Id.* "[C]ontacts that are isolated or sporadic may support specific jurisdiction if they create a substantial connection with the forum, the contacts must be more than random, fortuitous, or attenuated." *Id.* (citation and internal quotation marks omitted).

¶ 15 Here, Defendant has never been to North Carolina, he has never conducted any business in North Carolina, and except for his relationship with Plaintiff, he has no other known ties to North Carolina. Defendant has not purposely availed himself of conducting activities in North Carolina sufficient to justify him being haled into a court of this State under *in personam* jurisdiction. Assertion of *in personam* jurisdiction over Defendant is unreasonable because he has no contacts with this forum. This portion of the trial court's order is affirmed.

2. In Rem

¶ 16 Plaintiff argues Defendant may be haled into North Carolina courts based upon *in rem* jurisdiction. Assertions of *in rem* and *quasi in rem* actions should be evaluated in accordance with the minimum contacts standard. *See Ellison v. Ellison*, 242 N.C. App. 386, 390, 776 S.E.2d 522, 525-26 (2015) (stating the defendant and State must possess minimum contacts so the jurisdiction does not offend "traditional notions of fair play and substantial justice").

> Jurisdiction in rem or quasi in rem may be invoked in any of the following cases:
>
> (1) When the subject of the action is real or personal property in this State and the defendant has or claims any lien or interest therein, or the relief demanded consists wholly or partially in excluding the defendant from any interest or lien therein. This

> subdivision shall apply whether any such defendant is known or unknown.

N.C. Gen. Stat. § 1-75.8 (2021).

¶ 17 In *Lessard v. Lessard* this Court held:

> The estate of the defendant's deceased daughter is personal property in this State and the relief demanded is to exclude the defendant from any interest in this property.

68 N.C. App. 760, 762, 316 S.E.2d 96, 97 (1984).

¶ 18 This Court further held in *Ellison*, "[t]he relief sought in the present action, like in *Lessard*, is to exclude [d]efendant from any interest in property located in North Carolina. When the subject matter of the controversy is property located in North Carolina, the constitutional requisites for jurisdiction will generally be met." *Ellison*, 242 N.C. App. at 391, 776 S.E.2d at 526.

¶ 19 Here, Defendant initiated the controversy by threatening to sue Plaintiff by claiming an interest in the accounts in North Carolina. Defendant essentially reached into North Carolina to claim the property being held within this state by a citizen of this state. Plaintiff responded by filing a declaratory judgment to bar Defendant from taking an interest in the accounts in North Carolina. Defendant challenges and asserts a superior interest in the property purportedly owned by a person, who is located in and is a citizen of North Carolina. Plaintiff's complaint demands relief which excludes Defendant from property within North Carolina. This is sufficient and reasonable to establish the *in rem* jurisdiction of North Carolina courts for Plaintiff's declaratory action over funds and accounts held in North Carolina.

B. Standing of Ms. Condon

1. Standard of Review

¶ 20 "It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

2. Analysis

¶ 21 **[2]** Plaintiff argues the trial court erred by declining to hear Plaintiff's Motion Challenging the Standing of Caroline Patricia Condon and

Finding Conflicts of Interest ("Plaintiff's Motion") and instead of granting Defendant's Motion to Dismiss for lack of jurisdiction.

¶ 22 Prior to the hearing, the trial judge emailed counsel for Plaintiff and Defendant and stated: "I do not need to address [Plaintiff counsel's] additional motion. . . . you can cite the G.S. Sec. 32C-2-212, as well as the fact that even though the objection was served more than five days before, it was not calendared with my TCC and the court received no notice of it until the day of the hearing." N.C. Gen. Stat. § 32C-2-212 (2021) permits a power of attorney to "assert and maintain before a court . . . an action to recover property or other thing of value."

¶ 23 Plaintiff amended his complaint to include Ms. Condon as a party and made allegations asserting her power of attorney and her "total control" over Defendant. In his discretion, the trial judge determined Plaintiff failed to comply with the motion's prior notice and calendaring requirements to bar Ms. Condon's standing or find conflict of interest. The trial judge acted within his authority. Plaintiff's argument fails to show any abuse of that discretion and is overruled.

V. Conclusion

¶ 24 The trial court properly ruled assertion of personal jurisdiction over Defendant is unreasonable because he has no contacts with this forum. Plaintiff's interest in the bank accounts and funds located in North Carolina permits the courts of this State to exercise *in rem* jurisdiction over his declaratory judgment action to address his claims. The trial court did not err in refusing to hear Plaintiff's arguments concerning Caroline Condon's standing and asserted conflicts of interest. We affirm in part, reverse in part, and remand for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Judges CARPENTER and GORE concur.

DAN KING PLUMBING HEATING & AIR CONDITIONING, LLC, PLAINTIFF
v.
AVONZO HARRISON, DEFENDANT

No. COA20-698

Filed 18 January 2022

1. Unfair Trade Practices—dismissal of claims—sufficiency of allegations—actual reliance—injury

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant), the trial court's dismissal of defendant's unfair and deceptive trade practices (UDTP) counterclaim was affirmed in part and reversed in part. The dismissal was proper with regard to defendant's allegation that plaintiff forged his signature on an amendment to the contract—because defendant could not prove he actually relied on that contract—and to the allegation that plaintiff was deceptive by filling out an installation checklist form even though work had not yet been completed—because defendant could not prove any injury associated with the checklist. However, defendant's allegation that plaintiff sold him duplicate warranties (which ran concurrently with already-existing manufacturer's warranties that defendant was not made aware of) met each element of a UDTP claim, including injury; the dismissal on that basis was therefore reversed and the matter remanded for further findings of fact on the reasonableness of defendant's reliance on the contractual warranties.

2. Pleadings—denial of motion to amend counterclaim—discretionary ruling—undue delay

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant), the trial court did not abuse its discretion by denying defendant's motion to amend his counterclaim for unfair and deceptive trade practices in order to introduce a debt collection notice sent to him by plaintiff. Although the collection notice was not sent to defendant until after he had filed his counterclaim, defendant waited over six months to raise the debt collection issue before the trial court and did not move to amend his pleadings until after the trial had begun.

3. Contracts—breach—common knowledge exception—plumbing work—sufficiency of evidence

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant) in which defendant

filed counterclaims alleging that plaintiff breached the contract by (1) installing different equipment, (2) charging a higher price, and (3) performing substandard work, the trial court erred by denying plaintiff's motion for directed verdict on the workmanship claim. Defendant did not introduce any expert evidence showing that the plumbing work did not conform to the customary standard of skill and care and, where the work done was extensive, the common knowledge exception (which would allow a jury to resolve the claim without the aid of an expert) did not apply. The first two claims were properly sent to the jury because they did not require the presentation of expert testimony for the jury to resolve.

4. Appeal and Error—preservation of issues—contract dispute —attorney fees—no hearing or ruling

In a contractual dispute between an HVAC and plumbing company and a homeowner in which the homeowner asserted a counterclaim under the Unfair and Deceptive Trade Practices Act, although both parties indicated to the trial court that they were interested in being heard on attorney fees, since neither party obtained a ruling from the trial court on a request for fees, the issue was not preserved for appellate review.

5. Appeal and Error—preservation of issues—order of closing arguments—purported objection insufficient

In a contractual dispute between an HVAC and plumbing company (plaintiff) and a homeowner (defendant) in which defendant raised multiple counterclaims, plaintiff's argument that the trial court erred by failing to give it the final closing (rebuttal) argument was not properly preserved for appellate review. Plaintiff's purported objection—"If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge."—did not qualify as an objection sufficient under Appellate Rule 10 for preservation purposes.

Judge MURPHY concurring in result only as to Part II-C without separate opinion.

Appeal by Defendant from judgment entered on 12 March 2020 by Judge Paulina Havelka in Mecklenburg County District Court. Plaintiff filed a cross-appeal. Heard in the Court of Appeals 25 May 2021.

Hull & Chandler, P.A., by A. Joseph Volta, for Plaintiff-Appellee/ Cross-Appellant.

Redding Jones, PLLC, by Joseph R. Pellington, Corey Parton, and Joseph H. Powell, for Defendant-Appellant.

JACKSON, Judge.

¶ 1 This case presents a number of issues stemming from a contractual dispute between homeowner Avonzo Harrison ("Defendant") and the company that installed his HVAC system, Dan King Plumbing Heating and Air Conditioning ("the Company"). The action began when the Company filed suit against Defendant for money owed on the contract, and in response Defendant filed counter-claims against the Company for breach of contract and unfair and deceptive trade practices ("UDTP"). Following a jury trial, the Company was found liable for breach of contract, but the trial court dismissed Defendant's UDTP claim.

¶ 2 In his appeal, Defendant argues that the trial court erred in (1) ruling that the Company's actions did not constitute UDTP; and (2) not allowing him to amend his counterclaim to add a new debt collections UDTP claim. In its cross-appeal, the Company contends that the trial court erred in (1) denying the Company's motion for directed verdict on the breach of contract claim; (2) refusing to consider the Company's claim for attorneys' fees; and (3) denying the Company its right to make a final closing argument. We affirm in full the trial court's rulings as to the amendment of the counterclaim and the ordering of closing arguments. Because we hold that the trial court erred, in part, with regard to its evaluation of Defendant's UDTP claims and the Company's motion for directed verdict, we affirm in part, reverse in part, and remand on these issues.

I. Factual and Procedural Background

¶ 3 This case arises from a dispute between Defendant and the Company regarding plumbing, heating, and air conditioning services that the Company provided to Defendant in 2017—2018. Defendant is the owner of a home located on Symphony Woods Drive in Charlotte, North Carolina. Defendant decided to have a number of renovations done to the plumbing and HVAC systems in the home, and hired the Company for the task. On 25 October 2017, an employee of the Company, Adam Whal, visited Defendant's home to provide estimates for the work—which included new water heaters, a new HVAC system, a water filtration system, and extensive piping replacement. Defendant was charged $227.37 for the initial site visit and inspection.

¶ 4 On 1 November 2017, Defendant went to the Company's office in-person to meet with Paul Stefano, the general manager, and Ernie

Rodriguez, the sales manager. The managers outlined options and prepared written quotes for the plumbing and HVAC work to be performed on Defendant's home. After performing some independent research, Defendant returned to the office the following day and ultimately signed two separate contracts: a $16,324 contract for the plumbing work, and a separate $17,076 contract for the HVAC work. The work and warranties included, among other items not relevant to this appeal:

(1) Plumbing

a. Installing a whole-house water filtration system.

i. 10-year parts, 5-year media, and 2-year labor warranty.

b. Installing a tankless hot water heater and heat exchanger.

i. 5-year parts and 5-year labor warranty, and 5-years of required maintenance.

c. Replacement of all polybutylene piping with PEX piping "within reason," not to include drywall repair.

i. 2-year guarantee, including parts and labor.

(2) HVAC

a. Removing, replacing, and installing a 2-ton HVAC system upstairs and a 5-ton HVAC system downstairs.

i. 12-year parts and labor warranty, and 1-year of maintenance.

b. Insulating the attic.

¶ 5 Following the finalization of the contract on 2 November 2017, the Company began performing plumbing work in the home in early November 2017.[1] The Company obtained a permit for the plumbing work, and the plumbing work was completed and ultimately passed its final inspection on 4 December 2017.

¶ 6 During the time that the Company was performing the plumbing work, Defendant was engaged in several other on-site home renovation projects, such as removing the old bathroom vanities and installing new ones, and removing the old kitchen cabinets and installing new ones. Defendant brought in outside workers from Habitat for Humanity to assist in this work.

---

1. During the time period that the plumbing and HVAC work was being performed, Defendant was not residing at the property and the property was unoccupied.

¶ 7 Sometime during this period, the Company ran into unanticipated difficulties in installing the tankless water heaters that were specified in the contract. Two employees of the Company, Tommy Rea and Adam Whal, spoke with Defendant, and recommended that they install traditional tank-based water heaters instead. Defendant agreed, and the parties then entered into a modified oral agreement for the water heaters.

¶ 8 The modified agreement was memorialized in a written document, dated 7 November 2017, which specified that the filtration system and re-piping work would remain the same, but the tankless water heater would be replaced with two 50-gallon, tank-based water heaters. The modified written agreement was $437 more than the original plumbing contract, and did not mention any warranties.

¶ 9 Defendant, however, denies having ever seen or signed the 7 November written agreement. He asserts that the discussion surrounding the tank-based water heaters was only an oral agreement, and was never presented with a new written contract for the plumbing work. He believes that his signature was forged on the 7 November document.

¶ 10 On the 7 November written agreement, there appears to be a second signature visible underneath Defendant's. The Company asserts that Chad Cockerill, the employee who filled out and signed the 7 November written agreement, accidentally signed the agreement in the wrong place and used white-out to correct the mistake, and that Defendant then signed on top of Chad's whited-out signature. Adam Whal maintains that he witnessed Defendant signing the new contract over the whited-out portion. At trial, the jury agreed with Defendant and found that the Company "superimpose[d] Mr. Harrison's signature onto a document Mr. Harrison did not sign."

¶ 11 Adam Whal returned to Defendant's home on 8 November 2017 to conduct a final inspection and test of the completed plumbing work. The inspection revealed that all plumbing was functional; however, a 40-gallon tank heater had been installed upstairs and a 50-gallon tank heater had been installed downstairs—despite the fact that the amended agreement specified two 50-gallon heaters.

¶ 12 The Company also began work on the HVAC system during the first week of November 2017. The Company obtained a permit for the HVAC work on 3 November 2017, and on this date the Company also completed an "Installation Excellence Checklist" regarding the HVAC work. The Checklist included a list of approximately 50 tasks related to the HVAC work on the home, and indicated that all relevant HVAC tasks had been completed. However, according to the testimony of both Defendant and

employees of the Company, the HVAC work had not, in fact, been completed as of 3 November 2017. Defendant asserts that none of the tasks were complete as of that date, while the Company maintains that some of the tasks were completed as of that date. It is unclear from the record when the HVAC work was actually completed, though it was completed at least by February 2018 when it passed inspection.

¶ 13 On 19 November 2017, Defendant emailed Paul Stefano a "punch list" listing several uncompleted plumbing and HVAC tasks, and expressing concern over the completeness of the re-piping work and the professionalism exhibited by the Company. On 30 November 2017, the Company returned to Defendant's residence to conduct a final walkthrough of the plumbing work, prior to inspection. The plumbing work passed County inspection on 4 December 2017. In February of 2018, the HVAC work passed County inspection. The Company visited Defendant's residence several more times between 18 December 2017 and 3 July 2018 to complete various miscellaneous items the parties had contracted for, including the attic insulation.

¶ 14 On several occasions during 2018, Defendant hired or requested quotes from third-party contractors to complete or remediate some of the work performed by the Company, such as replacing one of the water heaters that had begun to leak. He chose to use third-parties, rather than contract any further with the Company or make a claim under the warranty, because their relationship had deteriorated and he did not trust the quality of their work. Defendant also personally registered the manufacturers' warranties for the equipment purchased through the Company, contrary to his expectations.

¶ 15 When it came time to make payments, under the original two 2 November contracts, Defendant owed the Company $33,400. Under the 7 November amended contract, the amount due was slightly higher, $33,702.97. Defendant paid $30,000 of the amount due on 15 November 2017, via funds obtained from a third-party creditor. The Company calculated Defendant's outstanding balance as the remaining $3,702.92, less a $227 difference crediting the cost of the 25 October visit to Defendant's account, as the parties had agreed to. This amount was not paid by Defendant.

¶ 16 On 18 August 2018, the Company commenced a small claims action against Defendant in Mecklenburg County, requesting money owed for contractual services rendered. The magistrate dismissed the action with prejudice on 17 October 2018, finding that the Company had failed to prove the case by the greater weight of the evidence. The Company timely filed a notice of appeal to the District Court on 25 October 2018.

¶ 17 On 14 November 2018, Defendant filed an answer denying all allegations in the complaint, and also filed a counterclaim against the Company, alleging various misrepresentations and contractual breaches. The Company replied, denied all of Defendant's allegations, and moved to dismiss the countersuit on 17 December 2018. On 20 February 2019, Defendant moved to file an amended counterclaim. The District Court granted Defendant's motion to amend on 29 March 2019. In his amended counterclaim, Defendant added claims for breach of contract, unfair and deceptive trade practices, fraud, and breach of the implied warranty of workmanship. The Company answered the amended counterclaim on 29 July 2019, substantially denying all allegations and raising a number of affirmative defenses.

¶ 18 On 3 September 2019, the Company moved for summary judgment and attorneys' fees. On 20 December 2019, a summary judgment hearing was held before the Honorable Kimberley Y. Best. During this hearing, Defendant voluntarily dismissed the fraud counterclaim. On 7 January 2020, the trial court issued an order granting in part and denying in part the Company's motion for summary judgment. The court awarded summary judgment to the Company with respect to one aspect of Defendant's UDTP claim—namely, his claim that the Company had "[generated] the altered invoice reflecting a 4-ton unit versus a 5-ton unit"—but the court denied summary judgment with respect to the remainder of the parties' claims and counterclaims.

¶ 19 A jury trial was held beginning on 18 February 2020, presided over by the Honorable Paulina Havelka. During trial, the court rejected a motion by Defendant to amend his counterclaim to include a UDTP claim for unfair debt collection practices by the Company, ruling that Defendant had not raised the issue properly prior to trial.

¶ 20 The trial concluded on 24 February 2020, and the jury returned a verdict in favor of Defendant on all breach of contract claims and findings of fact concerning the UDTP claims. The jury awarded Defendant damages in the amount of $15,572 for the breach of contract and $15,000 for injuries associated with the UDTP claims.

¶ 21 On 26 February 2020, an additional hearing was held before Judge Havelka, in order to determine whether the facts found by the jury amounted to UDTP as a matter of law. The court ultimately ruled that none of the jury's findings amounted to unfair or deceptive trade practices, and dismissed all remaining claims with prejudice. Before the hearing adjourned, the parties also discussed the possibility of scheduling a further post-trial hearing to determine potential awards of attorneys' fees, but the fee hearing never occurred.

¶ 22 On 11 March 2020, the Company filed a motion requesting to set aside the jury's verdict, and requesting to be heard on attorneys' fees. Later that same day, the trial court entered its written judgment in favor of Defendant, awarding him damages of $15,572 plus interest on the breach of contract claims, in accord with the jury's verdict. The judgment noted that none of the jury's findings amounted to unfair or deceptive trade practices, and dismissed all of the parties' remaining claims with prejudice.

¶ 23 On 3 April 2020 and 8 April 2020, the Company and Defendant, respectively, noticed appeal from the trial court's judgment.

II. Analysis

¶ 24 We first address Defendant's appeal, and then proceed to discuss the Company's appeal.

A. Whether the Jury's Findings Amounted to UDTP

¶ 25 **[1]** Defendant first contends that the trial court erred by ruling that the jury's findings of fact did not, as a matter of law, amount to unfair and deceptive trade practices. We agree with respect to the duplicate warranties claim, but disagree with respect to the forged signature and installation checklist claims. We accordingly affirm in part and remand in part.

¶ 26 Under North Carolina law, a consumer may bring a private cause of action against businesses who engage in unfair and deceptive trade practices. *See* N.C. Gen. Stat. § 75-1.1 (2019). The statute is intended to "provide consumers with a remedy for injuries done to them by dishonest and unscrupulous business practices." *Hester v. Hubert Vester Ford, Inc.*, 239 N.C. App. 22, 30, 767 S.E.2d 129, 136 (2015).

¶ 27 "In order to establish a violation of N.C.G.S. § 75-1.1, a plaintiff must show: (1) an unfair or deceptive act or practice, (2) in or affecting commerce, and (3) which proximately caused injury to plaintiffs." *Gray v. N. Carolina Ins. Underwriting Ass'n*, 352 N.C. 61, 68, 529 S.E.2d 676, 681 (2000). Ordinarily, in a UDTP case, the jury will determine the facts of the case, and the trial court, "based on the jury's findings, then determines, as a matter of law, whether the defendant engaged in unfair or deceptive practices in or affecting commerce." *Id.* This Court reviews the trial court's conclusions of law on unfair or deceptive trade practices *de novo*. *See Terry's Floor Fashions, Inc. v. Crown Gen. Contractors, Inc.*, 184 N.C. App. 1, 21, 645 S.E.2d 810, 823 (2007).

¶ 28 This case requires us to examine two corollary doctrines under our UDTP caselaw—the "aggravating circumstances" doctrine, and the

"reliance" doctrine. The first doctrine comes into play when a plaintiff's UDTP claim is centered around the defendant's breach of a contract. Our courts have long held that a mere breach of contract, standing alone, is not sufficient to maintain a UDTP claim. *See, e.g.*, *Branch Banking & Tr. Co. v. Thompson*, 107 N.C. App. 53, 62, 418 S.E.2d 694, 700 (1992) ("[A] mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1.").

¶ 29 When a plaintiff alleges a UDTP violation based upon a breach of contract, the plaintiff "must show substantial aggravating circumstances attending the breach to recover under the Act[.]" *Id.* (internal marks and citation omitted). Tortious conduct must be shown. "Fraud or deception" can constitute aggravating circumstances, when it rises to the level of a practice that is "immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers." *Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 230-31, 768 S.E.2d 582, 598-99 (2015).

¶ 30 The second doctrine—the reliance doctrine—holds that in order to satisfy proximate cause, a plaintiff must demonstrate that they detrimentally relied on the defendant's alleged misrepresentation or deception in order to recover under the statute. *See DC Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc.*, 273 N.C. App. 220, 233, 848 S.E.2d 552, 562 (2020); *Pearce v. Am. Defender Life Ins. Co.*, 316 N.C. 461, 471, 343 S.E.2d 174, 180 (1986). Reliance, in turn, is comprised of two factors—actual reliance and reasonableness. *Bumpers v. Cmty. Bank of N. Virginia*, 367 N.C. 81, 89, 747 S.E.2d 220, 227 (2013). The first element—actual reliance—requires a showing that "the plaintiff [] affirmatively incorporated the alleged misrepresentation into his or her decision-making process: if it were not for the misrepresentation, the plaintiff would likely have avoided the injury altogether." *Id.* at 90, 747 S.E.2d at 227. In other words, the plaintiff must have "acted or refrained from acting in a certain manner due to the defendant's representations." *Williams v. United Cmty. Bank*, 218 N.C. App. 361, 368, 724 S.E.2d 543, 549 (2012 (internal marks and citation omitted). The second element—reasonableness—requires a showing that the plaintiff's reliance on the defendant's "allegedly false representations [was] reasonable." *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. A plaintiff's reliance is not reasonable when "the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.*

¶ 31 Here, Defendant contends that the Company committed UDTP in three respects: (1) by superimposing Mr. Harrison's signature on the amended contract; (2) by selling him duplicate warranties; and (3) by misrepresenting the completeness of the work via the installation

checklist. The Company, in response, argues that Defendant has no UDTP claim because he is unable to show that he detrimentally relied on any purported misrepresentation by the Company, and because he is unable to show that the Company's conduct rose to the level of aggravating circumstances.

¶ 32 With respect to the superimposition of the signature, we affirm, as Defendant cannot show actual reliance. With respect to the installation checklist, we also affirm, as Defendant cannot show injury. However, with respect to the asserted fraud in duplicate warranties, we remand for further fact-finding regarding the reasonableness of Defendant's reliance.

1. Superimposition of Defendant's Signature

¶ 33 Defendant first argues that the Company committed UDTP by superimposing his signature on the 7 November contract. To review, Defendant and the Company entered into a contract for the plumbing work on his home on 2 November 2017. Several days later, after the Company had begun work on the project, unanticipated difficulties arose with the installation of the tankless water heater. So, Defendant and the Company reached an oral agreement to install two 50-gallon, tank-based water heaters in place of the tankless water heater. The Company then created a new written contract on 7 November 2017, which contained two key differences—a $437 difference in the contractual cost, and a provision for the installation of two 50-gallon, tank-based heaters. However, Defendant testified that he was never presented with the 7 November contract (at least until after this litigation began), and maintains that his signature on the contract was forged. The jury sided with Defendant and found that his signature had been superimposed on the 7 November contract.

¶ 34 We must now address whether these actions amounted to UDTP, above and beyond a mere breach of contract. The first element of a UDTP claim requires proof that the business engaged in "an unfair or deceptive trade practice." A practice is deceptive when "it has the capacity or tendency to deceive." *Walker v. Fleetwood Homes of N. Carolina, Inc.*, 362 N.C. 63, 72, 653 S.E.2d 393, 399 (2007). The act of signing someone else's name to a document without their authorization constitutes an act with the capacity to deceive, thus satisfying the first element. The second element of a UDTP claim requires proof that the conduct was "in or affecting commerce," and both parties here agree that a contract for plumbing services satisfies this element.

¶ 35 The third element of a UDTP claim requires proof that the unfair or deceptive acts "proximately caused injury" to the plaintiff. As explained above, our courts have interpreted this proximate cause element as requiring proof of detrimental reliance by the plaintiff—reliance which causes injury, and which is both actual and reasonable. As for actual reliance, Defendant here must show that he incorporated the Company's misrepresentation into his decision-making process, or that he "acted or refrained from acting in a certain manner" due to the Company's deceptive acts. *Williams*, 218 N.C. App. at 368, 724 S.E.2d at 549. As for reasonable reliance, Defendant must show that his reliance on the company's deceptive acts was reasonable. Both of these inquiries require "examin[ing] the mental state of the plaintiff." *Bumpers*, 367 N.C. at 89, 747 S.E.2d at 227.

¶ 36 The Company argues that Defendant cannot show actual reliance because, according to his own admission, Defendant "never saw the 7 November Plumbing Contract until approximately twelve to fourteen months after he initially met with [the Company]." Accordingly, because Defendant never received the allegedly forged contract until long after the work was completed, he could not have relied upon its contents to his detriment—i.e., he could not have relied upon a document that he did not know existed.

¶ 37 Defendant, in contrast, appears to argue that he detrimentally relied upon the price and terms that the Company provided to him in the *original* contract—and that the damage he suffered was reflected in the increased price of the second (forged) contract, and the installation of different equipment than he had originally contracted for.

¶ 38 We agree with the Company that this set of facts does not ultimately amount to UDTP. Even if we accept as fact that the Company forged the second contract, Defendant still cannot show that he actually relied on this misrepresentation by the company. A helpful precedent here is *Fazzari v. Infinity Partners, LLC*, 235 N.C. App. 233, 762 S.E.2d 237 (2014). In that case, a planned subdivision development failed after the properties were significantly over-appraised in representations made to lenders. *Id.* at 234-36, 762 S.E.2d at 238-39. The plaintiffs (who had all purchased lots in the planned subdivision) brought suit against the developers for UDTP, claiming that they relied on misrepresentations by the developer and appraisers "in making their decisions to take out the loans on which they later defaulted." *Id.* at 244, 762 S.E.2d at 244. On appeal, we held that the trial court had properly denied summary judgment to the plaintiff purchasers, as they were unable to demonstrate they actually relied on the deceptive appraisals. *Id.* at 243, 762 S.E.2d at 243.

¶ 39 We noted that the plaintiffs had testified that the developer "did not make any misrepresentations to them in regard to their loans[,]" apart from stating that the development project "should do well" and was "the real deal." *Id.* at 244, 762 S.E.2d at 244 (internal marks omitted). More importantly, even if these puffering or noncommittal statements "could be construed as factual misrepresentations," these remarks were not made until *after* the plaintiffs had already purchased their lots—and so the plaintiffs could not have relied on these statements. *Id.*

¶ 40 Likewise, with regard to the over-appraisal of the lots, we similarly concluded that no actual reliance was shown. *See id.* at 245, 762 S.E.2d at 244. We summed up the evidence as follows:

> the plaintiffs were purchasers of lots in [a] real estate investment scheme in which [the appraiser] appraised a large number of lots at an identical, inflated value to meet the loan-to-value conditions required to obtain bank loans. The scheme . . . involved contracts that promised repurchase of lots with a guaranteed profit for the investors. [However], the development was never completed, and investors were left with large loans and lots worth only a fraction of their appraised values.

Id. (internal marks and citations omitted).

¶ 41 Despite this unsavory behavior by the developers and appraisers, we nevertheless held that the plaintiffs could not show actual reliance because "[a]ll of the evidence show[ed] that the plaintiffs made their decisions to invest in the development and contracted to do so without any awareness of, much less reliance on, the appraisals." *Id.* This is because the misleading appraisals did not occur until *after* the plaintiffs had already signed their purchase contracts. *Id.* Thus, we concluded that the plaintiffs "cannot have relied on information they did not see and did not know existed (some of which did not, in fact, yet exist) at the time of their decisions." *Id.*, 762 S.E.2d at 245. Accordingly, in light of the plaintiffs' "inability to show either misrepresentations [by the developers] or reliance on the allegedly negligent appraisals," we held that the trial court properly denied their UDTP claims. *Id.* at 246-47, 762 S.E.2d at 245.

¶ 42 Here, like the plaintiffs in *Fazzari*, Defendant likewise attempts to base his UDTP claim on a deceptive act of which he had no awareness at the time he made his contractual decision. Defendant testified that he did not learn of the existence of the 7 November contract (with the

forged signature) until twelve to fourteen months after he had initially met with the Company—long after he signed the first contract, and long after the work had been completed. Thus, as in *Fazzari*, we conclude that Defendant could not have detrimentally relied on information which he did not know existed at the time of his decision, and that Defendant cannot satisfy the actual reliance element of his UDTP claim.[2] The trial court accordingly did not err in concluding that the forged signature on the second contract did not constitute UDTP.

2. Sale of Duplicate Warranties

¶ 43 Defendant next argues that the Company committed UDTP by selling him duplicate warranties for the plumbing and HVAC work—in essence, arguing that the Company duplicitously sold him warranties that he automatically received from the product manufacturer at the time of purchase. To review, as part of the 2 November contract, the Company sold Defendant two relevant warranties: (1) a warranty for the tankless water heater for "10 years parts, 5 years media, and 2 years labor," and (2) a warranty for the HVAC equipment for "12 years parts & labor" and "one year maintenance." However, evidence was presented at trial showing that the HVAC equipment which Defendant purchased already came with an included 10-year parts warranty from the manufacturer.

¶ 44 During trial, Defendant testified that he was not informed about the existence of the manufacturer's warranty at the time of the 2 November contract, and that he was "unaware at that time that [the Company's] warranties ran concurrently with the manufacturer's warranty." Defendant maintained, that by including the manufacturer warranty as part of the purchase price, the Company had misrepresented what it was selling to him. The jury sided with Defendant, and concluded in its findings of fact that "Dan King [sold] Mr. Harrison duplicate warranties."

¶ 45 We now address whether these actions amounted to UDTP. The sale of duplicate warranties may constitute an act which has the tendency

---

2. Even if we were to accept Defendant's theory of the case—that the original 2 November contract was the source of the misrepresentation, in that he detrimentally relied upon the price and terms that the Company provided to him in this first contract—Defendant's UDTP claim still fails. As we have previously explained, "[a] broken promise, standing alone, is not enough to establish a UDTP claim, unless the evidence shows the promisor intended to break its promise at the time that it made the promise." *Hills Mach. Co., LLC v. Pea Creek Mine, LLC*, 265 N.C. App. 408, 421, 828 S.E.2d 709, 718 (2019) (internal marks and citation omitted). Here, Defendant has presented no evidence showing that, at the time of the 2 November contract, the Company intended to break its promise to install the tankless water heater or intended to deviate from the originally agreed-upon price.

to deceive, and which occurs in or affecting commerce. It is the third element of UDTP that is in true contention here—i.e., whether or not Defendant suffered injury due to the Company's misrepresentations by detrimentally relying on any duplicity in the warranties.

¶ 46 We note that under this aspect of Defendant's UDTP claim, the aggravating circumstances doctrine is not triggered. As explained above, this doctrine holds that a "mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1"—thus, when a plaintiff's UDTP claim stems from a breach, the plaintiff must show aggravating circumstances in order to recover. *Thompson*, 107 N.C. App. at 62, 418 S.E.2d at 700. However, the duplicate warranties claim here does not stem from a *breach* of contract by the Company—rather, it is based on the idea that selling a warranty while withholding information regarding the existence of other applicable warranties with potentially overlapping coverage constitutes an UDTP. This scenario is distinct from the traditional aggravating circumstances and breach analysis, because it does not center around any contractual obligation that the Company failed to perform.

¶ 47 Under the first element of reliance, Defendant must show that he actually relied on the misrepresentation—that, but for the Company's actions, he would have "acted or refrained from acting in a certain manner." *Williams*, 218 N.C. App. at 368, 724 S.E.2d at 549. Here, we conclude that this element is satisfied because the Company did not disclose or identify the fact that these products carried pre-included manufacturer warranties, and because Defendant testified that he would not have purchased the warranty from the Company had he known that the HVAC products already came with an included manufacturer warranty.

¶ 48 Under the second element of reliance, Defendant must show that his reliance on the Company's misrepresentation was reasonable. *Bumpers*, 367 N.C. at 90, 747 S.E.2d at 227. Reliance is not reasonable when "the plaintiff could have discovered the truth of the matter through reasonable diligence, but failed to investigate." *Id.*

¶ 49 The Company argues that Defendant's reliance on the warranties was not reasonable because he failed to perform due diligence before signing the contract. The Company contends that Defendant should have researched the products that he was purchasing before he signed the contract, in which case he would have discovered that certain products had pre-included manufacturer's warranties. Moreover, the Company maintains that it is common knowledge that many HVAC products carry manufacturer's warranties.

¶ 50 Defendant, in response, argues that his reliance was reasonable because this was a transaction between a professional HVAC company and a layperson. Defendant contends that it would be unfair and irrational to hold that a consumer of HVAC or plumbing services must independently research every single product set to be installed in their home in order to determine whether the business they are contracting with might be selling them a duplicate warranty. Defendant contends that the existence of manufacturer warranties tied to certain HVAC parts is far from common knowledge, and that in this scenario he acted perfectly reasonably in relying on the Company's assurances regarding the warranties it sold.

¶ 51 In explaining the concept of "reasonable diligence," we have previously held that "a plaintiff cannot simply ignore facts which should be obvious to him or would be readily discoverable upon reasonable inquiry." *S.B. Simmons Landscaping & Excavating, Inc. v. Boggs*, 192 N.C. App. 155, 162, 665 S.E.2d 147, 151 (2008). On the other hand, we also think it true that a layperson consumer should not be held to the same standard of due diligence as a sophisticated commercial entity. *See DC Custom Freight*, 273 N.C. App. at 233, 848 S.E.2d at 562 (holding that it was unreasonable for the plaintiff, "a sophisticated business" specializing in trucking, to simply assume, without investigation, that the trucks it rented from the defendant were covered under the defendant's insurance policy).

¶ 52 Here, we are unable to determine based on the record whether Defendant would have discovered the existence of the duplicate warranties through reasonable diligence at the time of the original contract, and we do not have the benefit of any jury findings on this issue. During trial, no evidence was presented regarding whether the existence of HVAC manufacturer warranties is considered "common knowledge" (especially to a layperson); no evidence was presented regarding how it was that Defendant ultimately came to discover the existence of the manufacturer warranties; and no evidence was presented regarding whether it was a common practice in the HVAC industry to sell parts warranties for products that were already covered by a manufacturer warranty.

¶ 53 It is relevant whether Plaintiff provided new, additional, or extended warranties beyond those provided by the manufacturer. For example, if the manufacturer's warranties were for parts only or limited to a stated time, and Plaintiff extended those times, added maintenance or repair of excluded items or provided labor, these would be separate and independent warranties beyond what the manufacturer provided and would not be duplicative. It is also relevant that Plaintiff provided a warranty

as a member of the local community resulting in Defendant obtaining a more ready source for the resolution of any problems. "Though the risk to [Plaintiff's] separate assets may have been slight, said risk is consideration." *Poythress v. Poythress*, 2021-NCCOA-589, ¶ 16 (citing *Young v. Johnston Cnty.*, 190 N.C. 52, 57, 128 S.E. 401, 403 (1925) ("The slightest consideration is sufficient to support the most onerous obligation; the inadequacy, as has been said, is for the parties to consider at the time of making the agreement, and not for the court when it is sought to be enforced.")). Accordingly, we remand for further fact-finding on the issue of Defendant's reasonable diligence in discovering the existence and coverage of the duplicate warranties.[3]

3. Installation Checklist

¶ 54 Finally, Defendant argues that the Company committed UDTP by filling out an "Installation Excellence Checklist" indicating that it had completed all work on the project, when in fact much of that work had yet to be completed. To review, on 3 November 2017 an employee of the Company filled out and signed the checklist, which contains over three pages of specific plumbing and HVAC tasks related to the project. The Checklist contains the following representation: "I certify all of the items that have been checked are either complete or not applicable to this work site." It is undisputed that the majority of the tasks listed on the Checklist had not been completed by 3 November 2017. In fact, 3 November 2017 was the day that the Company first obtained the work permits and began work on Defendant's home, and the evidence showed that it was unfeasible that a project of this scope could have been completed in a single day.

¶ 55 We now address whether these actions amounted to UDTP. As with the forged signature claim, it is clear that Defendant can easily satisfy the first two elements of UDTP. The creation of a construction checklist that falsely represents the status of the Company's work on the project is an act which has the tendency to deceive and that occurs in or affecting commerce. It is part of the third element of UDTP that is in contention—i.e., whether or not Defendant suffered injury due to this misrepresentation.

¶ 56 The Company contends that Defendant suffered no injury stemming from the checklist because the Company continued its work on

3. The Company also argues that Defendant's UDTP claims are barred by the economic loss rule. As the Company cites no relevant, binding precedent to show that the economic loss rule applies in the context of UDTP claims, we decline to address this argument.

the project for several more months after the checklist was created, and that the end result was a functional HVAC and plumbing system that passed state inspection. Defendant contends that he was injured because the checklist contained misrepresentations about the true circumstances and completeness of the project.

¶ 57 Here, we agree with the Company that Defendant has not produced sufficient evidence that he was injured by the existence of this document. We have previously defined legal injury as "a wrongful act which causes loss or harm to another." *Heron Bay Acquisition, LLC v. United Metal Finishing, Inc.*, 245 N.C. App. 378, 384, 781 S.E.2d 889, 894 (2016) (citations omitted). Defendant has failed to produce any evidence of a harm or loss that he suffered as a result of this checklist—it caused him no monetary or economic injury, it did not cause any delay in the completion of the work, nor any lessening of the quality of the work. Moreover, it is not clear from the record when Defendant even discovered the existence of this checklist. As stated above, a person cannot detrimentally rely on a document he did not know existed. Accordingly, we conclude that Defendant cannot meet all elements of a UDTP claim and that the trial court did not err in ruling against him on this issue.

B. Denial of the Motion to Amend

¶ 58 **[2]** Defendant next argues that the trial court erred by refusing to allow him to amend his counterclaim to introduce a collection notice that was sent to him as a result of the Company's debt collection practices, which he asserts amounted to UDTP. We disagree, and hold Defendant has failed to show the trial court abused its discretion in refusing to allow the amendment.

¶ 59 Following Defendant's failure to pay the remaining balance on the plumbing and HVAC contracts, the Company sent his bill to an outside collections company. The collections company sent Defendant a collection notice on 5 June 2019. However, Defendant's amended counterclaim, which was filed on 29 March 2019, did not mention the collections notice as the basis of any potential claim. The Company then filed its motion for summary judgment on 3 September 2019. At the summary judgment hearing on 20 December 2019, Defendant argued (for the first time) that the issuance of the collection notice amounted to UDTP, and identified the collection notice as a potential trial exhibit.

¶ 60 During trial, Defendant attempted to introduce the collection notice. The Company objected to the introduction of the collection notice and any associated testimony, asserting that it had not received sufficient notice of this new claim. The trial court similarly expressed its

concern that the collections issue had not been included in Defendant's pleadings. Ultimately the trial court's ruling precluded Defendant from introducing the collection notice or from discussing any collection attempts—reasoning that introducing this evidence this late into the litigation would amount to bringing a new claim, of which the Company did not receive proper notice.

¶ 61 Defendant had attempted to introduce this collections evidence because he believed it amounted to an additional unfair and deceptive act by the Company, which would bolster his UDTP claim. Under our General Statutes, a debt collector can be held liable for attempting to collect a debt by contacting the adverse party directly, when the collector knows that the adverse party is represented by counsel. *See* N.C. Gen. Stat. §§ 75-55(3), 58-70-115(3) (2019). Defendant argued that the Company violated this law by having the collections agency contact him directly, when they knew he was represented by an attorney.

¶ 62 Regardless of the potential merit of Defendant's claims, we conclude that the trial court did not err in refusing to admit the collections evidence. We review the trial court's evidentiary rulings—including rulings on a motion to amend—for abuse of discretion. *Fintchre v. Duke Univ.*, 241 N.C. App. 232, 239, 773 S.E.2d 318, 323 (2015). An abuse of discretion is as a "ruling [] so arbitrary that it could not have been the result of a reasoned decision[.]" *Ferguson v. DDP Pharmacy, Inc.*, 174 N.C. App. 532, 535, 621 S.E.2d 323, 326 (2005) (internal marks and citation omitted).

¶ 63 Amendment of pleadings is governed by Rule 15 of the North Carolina Rules of Civil Procedure, which provides in pertinent part that "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served." N.C. Gen. Stat. §1A-1, Rule 15(a) (2019). However, after a party makes their amendment as a matter of course, further amendments are allowed "only by leave of court or by written consent of the adverse party." *Id.* Moreover,

> [i]f evidence is objected to at trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be served thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits.

Id., Rule 15(d).

¶ 64 In adjudicating a party's motion to amend, the trial court abuses its discretion when it "refuses to allow an amendment" without providing any "justifying reason for denying the motion to amend." *Ledford v. Ledford*, 49 N.C. App. 226, 233, 271 S.E.2d 393, 398 (1980). In contrast, a trial court acts properly in denying a motion to amend for reasons of "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Strickland v. Lawrence*, 176 N.C. App. 656, 666-67, 627 S.E.2d 301, 308 (2006) (internal marks and citation omitted).

¶ 65 When a trial court denies a party's motion to amend based on undue delay, "the trial court may consider the relative timing of the proposed amendment in relation to the progress of the lawsuit." *Id.* at 667, 627 S.E.2d at 308. For example, in *Strickland* we held that the trial court did not abuse its discretion in denying the plaintiffs' motion to amend to add a new claim, because of undue delay by the plaintiffs. *Id.* We noted that the plaintiffs' motion "was filed seven months after the institution of their action," and that at that point discovery had almost entirely concluded. *Id.* Similarly, in *Wilkerson v. Duke Univ.*, 229 N.C. App. 670, 679, 748 S.E.2d 154, 161 (2013), we held that the trial court did not abuse its discretion in denying the plaintiff's motion to amend to add three additional claims, because of both undue delay and prejudice. We noted that the defendant had received no notice of the three additional claims, and that the motion to amend was made "thirteen months after [the plaintiff] filed the initial complaint and only five days before the [summary judgment] hearing" was set to begin. *Id.*

¶ 66 In the present case, we likewise conclude that the trial court did not abuse its discretion in denying Defendant's motion to amend. During trial, the court engaged in extensive discussion with Defendant and the Company regarding the potential amendment of Defendant's pleadings to add the new collections claim. When Defendant asked whether a motion to amend would be permitted, the trial court responded "[n]ot in the middle of trial, no." When Defendant went on the argue that he could not have possibly included this claim in his original amended counterclaim because the collection notice was not sent until after the filing of the counterclaim, the court noted that it likely "would have allowed [Defendant] to amend the [counterclaim]" at an earlier date "since [Defendant] did not learn of [the collection notice] until after the discovery process," but that the court could not imagine allowing the amendment "midway after we started the trial."

¶ 67 The trial court's reasoning here is apt—while it is true that the collections notice was not sent until 5 June 2019, after Defendant's

amended counterclaim had already been filed, this does not change the fact that Defendant was aware of the existence of the collections notice all throughout the summer and fall of 2019 but failed to take any action to add this claim to the litigation. The first occasion that Defendant brought this collections issue to the trial court's attention was at the summary judgment hearing on 20 December 2019, and Defendant did not move to amend his pleadings to include this new claim until trial had already begun in February 2020. Thus, we conclude that the trial court did not abuse its discretion by denying Defendant's motion for leave to amend his complaint in the middle of trial.

C. Directed Verdict on Breach of Contract Claims

¶ 68 **[3]** We now turn to the issues raised by the Company in its cross-appeal. The Company first argues that the trial court erred in failing to grant a directed verdict on Defendant's breach of contract claims. We agree in part, and remand for a new trial on Defendant's claim for failure to perform in a workmanlike manner under a construction or building contract.

¶ 69 To review, Defendant argued at trial that the Company committed a breach of contract in three main respects: (1) by installing different equipment than was originally called for (such as the water heaters); (2) by charging a higher price than was originally called for; and (3) by performing substandard work, such as on the re-piping and insulation projects. During trial, the Company moved for a directed verdict at the close of all the evidence, and the trial court heard extensive arguments from both parties regarding whether the breach of contract claims should go to the jury. The trial court ultimately denied the Company's motion, concluding that there was sufficient evidence presented that would allow the jury to reach their own conclusions on whether the contract had been breached.

¶ 70 Following the close of all evidence during a jury trial, a party may move for a directed verdict in order to "test[] the sufficiency of the evidence to support a verdict for the non-moving party." *Williams v. CSX Transp., Inc.*, 176 N.C. App. 330, 344, 626 S.E.2d 716, 728 (2006). If the trial court allows the motion for directed verdict, judgment is awarded in favor of the moving party and the matter will not be decided by the jury—however, if the trial court denies the motion, then the case moves forward to be decided by the jury. *See* N.C. Gen. Stat. § 1A-1, Rule 50(a) (2019).

¶ 71 "In reviewing a direct verdict, this Court must determine whether the evidence taken in the light most favorable to the non-moving party is sufficient as a matter of law to be submitted to the jury." *Delta Env't*

Consultants of N. Carolina, Inc. v. Wysong & Miles Co., 132 N.C. App. 160, 168, 510 S.E.2d 690, 695 (1999). On appeal, we conduct a *de novo* review of a trial court's denial of a motion for directed verdict. *Denson v. Richmond Cnty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003).

¶ 72 We first address the Company's claim that the trial court should have issued a directed verdict as to Defendant's claim that the Company performed substandard work on the re-piping and insulation projects. The Company's primary argument here is that, as a matter of law, Defendant's evidence could not have been sufficient to survive a motion for directed verdict because he did not present any expert testimony showing that the Company's work was substandard. During trial, the only evidence presented by Defendant tending to show substandard work by the Company was Defendant's own testimony about the quality of the work and photos that Defendant had taken of the work.

¶ 73 "To state a claim for breach of contract, the complaint must allege that a valid contract existed between the parties, that defendant breached the terms thereof, the facts constituting the breach, and that damages resulted from such breach." *Jackson v. Associated Scaffolders & Equip. Co.*, 152 N.C. App. 687, 692, 568 S.E.2d 666, 669 (2002). In actions for breach of building or construction contracts, a plaintiff may bring a claim for "failure to construct in a workmanlike manner." *Cantrell v. Woodhill Enters., Inc.*, 273 N.C. 490, 497, 160 S.E.2d 476, 481 (1968). Under such a claim, "[t]he law recognizes an implied warranty that the contractor or builder will use the customary standard of skill and care" based upon the particular industry, location, and timeframe in which the construction occurs. *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 343, 315 S.E.2d 311, 314 (1984). When pleading this claim, "plaintiff's pleading should allege wherein the workmanship was faulty or the material furnished by defendant was not such as the contract required." *Cantrell*, 273 N.C. at 497, 160 S.E.2d at 481 (internal marks and citation omitted).

¶ 74 The Company contends that, in order to bring a proper claim for failure to construct in a workmanlike manner, the plaintiff must put on expert testimony to establish the relevant standard of care. Defendant contends that no such requirement exists, as the quality of the work is an issue that can be properly determined by the jury without the aid of an expert. On balance, we agree with the Company that at least some expert evidence must be presented to sustain a claim such as this.

¶ 75 We find two cases to be most instructive on this issue. First, in *Kenney v. Medlin Const. & Realty Co.*, 68 N.C. App. 339, 341, 315 S.E.2d

311, 313 (1984), we addressed a breach of contract action in which the plaintiff homeowner sued the defendant builder for failure to construct in a workmanlike manner when building the plaintiff's new home. Plaintiff retained two experts to testify regarding the structural problems with the home, and both testified that "the construction of plaintiff's house did not meet the standard of workmanlike quality prevailing in Cabarrus County in December, 1978." *Id.* at 340, 315 S.E.2d at 312. On appeal, the defendant argued that the testimony of the two witnesses was inadmissible because they were not sufficiently qualified, but we disagreed. *Id.* at 342, 315 S.E.2d at 313.

¶ 76 We noted that "opinion testimony of an expert witness is admissible if there is evidence that the witness is better qualified than the jury to form such an opinion." *Id.* Given that one of the witnesses had "built most of the houses in plaintiff's subdivision," and that the other "had been involved in building more than 200 residences," we held that both witnesses qualified as experts who were "better qualified than the jury to form an opinion as to the quality of the workmanship" on the home. *Id.* at 342-43, 315 S.E.2d at 313-14. Moreover, in evaluating whether the trial court properly denied the defendant's motion for directed verdict, we held that there was "plenary evidence supporting plaintiff's claim of breach"—given that "two expert witnesses testified to the various structural defects rendering the quality of construction of plaintiff's house below the standard prevailing in the area." *Id.* at 343, 315 S.E.2d at 314.

¶ 77 Second, in *Delta Env't Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 163, 510 S.E.2d 690, 692 (1999), the defendant (a factory owner) hired the plaintiff (an environmental consultant) to help the factory deal with pollution and soil contamination. The plaintiff sued the defendant for unpaid bills, and the defendant counter-claimed that the plaintiff had breached the contract by "fail[ing] to perform its remedial work to the level of skill ordinarily exercised by members of its profession." *Id.* During trial, the defendant apparently put on no expert testimony to prove its workmanship claim, and as a result the trial court granted a directed verdict in favor of plaintiff, ruling that defendant's "failure to offer expert testimony made its evidence insufficient to prove the standard of care owed by [plaintiff] as a matter of law." *Id.* at 168, 510 S.E.2d at 695.

¶ 78 On appeal, the defendant challenged this ruling by the trial court, arguing that under the "common knowledge" exception, it need not introduce expert testimony to prove its workmanship claim. *Id.* This exception holds that "where the common knowledge and experience of the jury is sufficient to evaluate compliance with a standard of care,

expert testimony is not needed." *Id.* However, we disagreed with the defendant, concluding that a case such as this fell far outside the bounds of the common knowledge exception. *Id.* We explained that this exception was reserved for cases where the complained-of professional conduct "is so grossly negligent that a layperson's knowledge and experience make obvious the shortcomings of the professional"—such as a medical malpractice case in which "an open wound was not cleansed or sterilized" before being placed in a cast. *Id.* at 168, 510 S.E.2d at 696 (citing *Little v. Matthewson*, 114 N.C. App. 562, 442 S.E.2d 567 (1994)).

¶ 79 In contrast, we held that a case involving the workmanship "utilized by professional engineers for environmental cleanup" was not the type of common-sense issue that could be determined by a jury alone. *Id.* Thus, given the lack of "required expert testimony to explain and prove the standard of care," we held that the trial court did not err in granting the motion for directed verdict. *Id.*

¶ 80 The core of a workmanship claim is a claim that a professional failed to utilize "the customary standard of skill and care" in completing a project, based upon the particular industry, location, and timeframe in which the project occurred. *See Kenney*, 68 N.C. App. at 343, 315 S.E.2d at 314. And in most cases, the average juror would not have the requisite knowledge and experience to evaluate the prevailing professional standards in a particular industry and area.

¶ 81 As recognized by the "common knowledge" exception, there are certainly some types of workmanship claims that can routinely be determined by a jury without the aid of an expert. *See Delta*, 132 N.C. App. at 168, 510 S.E.2d at 696. These are matters where the workmanship is so grossly subpar that it is obvious to any layperson that the work does not live up to a professional standard of care—such as a surgeon "[leaving] a sponge in a patient's body during surgery," or a lawyer "who is ignorant of the applicable statute of limitations or who sits idly by and causes the client to lose the value of his claim." *Little*, 114 N.C. App. at 569, 442 S.E.2d at 571.

¶ 82 This case is not like those cases. This case involved $16,324 worth of extensive plumbing work done throughout an entire home, encompassing removing and replacing all polybutylene piping with PEX piping "within reason." An employee of the Company testified that "the scope of the work was massive." Moreover, the contract expressly stated that the Company was under no obligation to repair or replace the drywall that would inevitably be cut open during the re-piping.

¶ 83 It is undisputed that Defendant did not offer any expert testimony to demonstrate that the plumbing work was not performed in a workmanlike manner. Instead, Defendant offered his own lay-testimony of why he believed the plumbing work was inadequate, and he introduced 12 photographs showing the allegedly inadequate piping and insulation work. We have examined these photographs, and we see no evidence that would indicate to a layperson that the plumbing work was obviously or grossly defective. Accordingly, as in *Delta*, we conclude that the common knowledge exception does not apply, and that expert testimony was required as a matter of law in order to prove Defendant's workmanship claim against the Company. Because Defendant presented no expert testimony, we hold that the trial court erred in failing to grant the Company's motion for directed verdict. We reverse and remand for a new trial on this claim.

¶ 84 As for Defendant's remaining breach of contract claims—failure to provide the correct water heater called for in the contract, and charging a higher price than called for—we conclude sufficient evidence was presented to allow these claims to proceed to the jury. These claims were based in a standard breach of contract cause of action (as opposed to a workmanship claim) and thus did not require the presentation of expert testimony. Defendant presented competent testimonial evidence tending to show that a 40-gallon tank was installed instead of a 50-gallon tank, and that the price of the 7 November contract was higher than the price of the 2 November contract. While the Company presented contrary evidence, the evidence presented by Defendant on these claims was sufficient to allow those claims to proceed to the jury. We accordingly hold that the trial court did not err in refusing to grant a directed verdict on Defendant's remaining breach of contract claims.

D. Attorneys' Fees

¶ 85 **[4]** The Company next argues that the trial court erred in failing to allow the parties to be heard regarding the award of attorneys' fees, and Defendant agrees. However, because neither party obtained a ruling on the request for attorneys' fees, this issue has not been preserved for our review.

¶ 86 Our General Statutes provide as follows regarding the award of attorneys' fees in a UDTP action:

> In any suit instituted by a person who alleges that the defendant violated G.S. 75-1.1, the presiding judge may, in his discretion, allow a reasonable attorney fee to the duly licensed attorney representing the

> prevailing party, such attorney fee to be taxed as part of the court costs and payable by the losing party, upon a finding by the presiding judge that:
>
> (1) The party charged with the violation has willfully engaged in the act or practice, and there was an unwarranted refusal by such party to fully resolve the matter which constitutes the basis of such suit; or
>
> (2) The party instituting the action knew, or should have known, the action was frivolous and malicious.

N.C. Gen. Stat. § 75-16.1 (2019).

¶ 87 However, under Rule 10 of the North Carolina Rules of Appellate Procedure, "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). In addition, Rule 10 requires that "the complaining party [] obtain a ruling upon the party's request, objection, or motion." *Id.*

¶ 88 Here, though both Defendant and the Company had previously indicated on multiple occasions that they wished to be heard on attorneys' fees, the trial court never held a hearing on attorneys' fees, and never ruled on Defendant's request for attorneys' fees. This issue therefore has not been preserved for appellate review.

E. Closing Arguments

¶ 89 **[5]** Finally, the Company argues that the trial court erred when it implicitly disallowed the Company to make the final closing argument to the jury. We disagree, and hold that the trial court did not abuse its discretion in its ordering of the closing arguments in this case.

¶ 90 The basis of the Company's argument is that the unique procedure posture of this case—in which the Company acted as both plaintiff and defendant—resulted in the Company not being able to make its final argument to the jury regarding its defense to Defendant's counterclaims. The Company contends this resulted in unfair prejudice, as it left the jury with the false impression that the Company had no defense to Defendant's UDTP and breach of contract claims.

¶ 91 The Company's argument is based in Rule 10 of the General Rules of Practice for the Superior and District Courts. *See* N.C. Super. and Dist. Ct. R. 10 (2020). Rule 10 provides, in pertinent part, as follows:

> In all cases, civil and criminal, if no evidence is introduced by the defendant, the right to open and close the argument to the jury shall belong to him. If a question arises as to whether the plaintiff or the defendant has the final argument to the jury, the court shall decide who is so entitled, and its decision shall be final.

N.C. Super. and Dist. Ct. R. 10 (2020).

¶ 92 This Rule means that, generally, after the plaintiff introduces their evidence, and the defendant chooses to introduce no rebuttal evidence, then the defendant is entitled to be the final party to make arguments to the jury. Here, trial arguments proceeded in the following order: (1) the Company presented evidence on its breach of contract claims; (2) Defendant presented evidence on his breach of contract and UDTP counterclaims; (3) the Company made closing arguments on its breach of contract claims; and (4) Defendant made closing arguments on his breach of contract and UDTP counterclaims.

¶ 93 At the end of the Company's initial closing, counsel for the Company indicated that he intended to "come back up and talk to" the jury one more time in order to put forth the Company's rebuttal to Defendant's counterclaims. Defendant's counsel objected, asserting that the Company did not have the right to make a rebuttal argument, and that "anything he has [for closing], he says now." The following exchange then occurred:

> **[The Court]:** Was that your closing, sir?
>
> **[Counsel for the Company]:** If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge.
>
> **[The Court]:** All right.
>
> **[Counsel for the Company]:** I was under the presumption of a rebuttal, but okay.

¶ 94 Counsel for Defendant then proceeded to make his closing, and no further discussion occurred regarding the Company's desire for a rebuttal.

¶ 95 This exchange demonstrates the Company did not adequately object to this issue to preserve it for appellate review, and arguably waived any challenge. To recapitulate, under Rule 10, to preserve an issue for appellate review, "a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling

the party desired the court to make." N.C. R. App. P. 10(a)(1). If a party fails to object to a certain ruling or action by the trial court, then the matter is deemed waived. *See State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002).

¶ 96 Here, it would strain credulity to conclude that the Company's statements regarding the rebuttal argument amounted to an objection. When Defendant stated that the Company was not entitled to a rebuttal, the Company could have easily objected and asserted that it was, indeed, entitled to a rebuttal under Rule 10 of the General Rules of Practice. However, the Company did not make such an objection—instead, counsel stated "If I don't get a rebuttal, I don't get a rebuttal. That's fine, Judge." We hold that this did not qualify as an objection within the meaning of Rule 10 of the Rules of Appellate Procedure, especially given that counsel did not "stat[e] the specific grounds for the ruling the party desired the court to make." N.C. R. App. P. 10(a)(1).

III. Conclusion

¶ 97 In sum, we hold as follows:

(1) **UDTP Claims:** The trial court correctly concluded that Defendant's UDTP claims must fail as to the superimposition of the signature (given that Defendant cannot show actual reliance on the 7 November contract), and as to the installation checklist (given that Defendant cannot show any injury associated with the checklist). However, the trial court erred in concluding that Defendant's UDTP claim must fail as to the duplicate warranties, and we remand for further fact-finding as to the reasonableness of Defendant's reliance on the contractual warranties.

(2) **Amendment of the Counterclaim**: The trial court did not abuse its discretion in refusing to allow Defendant to amend his counterclaim during trial to add a new collections claim, because Defendant acted with undue delay.

(3) **Directed Verdict**: The trial court erred as a matter of law in failing to grant the Company's motion for directed verdict as to Defendant's workmanship claim, as Defendant failed to present any supporting expert testimony as required under our precedent. As for Defendant's remaining breach of contract claims, the trial court correctly refused to grant a directed verdict as sufficient supporting evidence had been presented.

(4) **Attorneys' Fees**: This issue has not been preserved for our review.

(5) **Closing Arguments**: Defendant has not preserved this argument for appellate review, and in any event the trial court did not abuse its discretion in the ordering of closing arguments.

AFFIRMED IN PART, REMANDED IN PART.

Judge TYSON concurs.

Judge MURPHY concurs in Parts I, II-A, II-B, II-D, II-E, and III; and concurs in result only in Part II-C.

JOHN L. DAVIS, PLAINTIFF
v.
LAKE JUNALUSKA ASSEMBLY, INC., DEFENDANT

No. COA21-333

Filed 18 January 2022

Real Property—retreat community—Planned Community Act—retroactive provisions—applicability

A retreat community established before the year 1999 was not subject to the Planned Community Act where plaintiff, who had purchased a lot within the community in 2011 (which was subject to the community's protective covenants recorded in the chain of title), failed to assert any events or circumstances occurring after 1 January 1999 to invoke the retroactive provisions of the Act (N.C.G.S. § 47F-1-102(c)). The community therefore was not subject to the Act's financial disclosure requirements.

Appeal by plaintiff from order entered 10 February 2021 by Judge Bradley B. Letts in Haywood County Superior Court. Heard in the Court of Appeals 14 December 2021.

John L. Davis pro se.

McGuire, Wood & Bissette, PA, by Matthew S. Roberson, for defendant-appellee.

TYSON, Judge.

¶ 1 John L. Davis ("Plaintiff") appeals from orders entered granting summary judgment in favor of Lake Junaluska Assembly, Inc. ("Defendant"). We affirm.

I. Background

¶ 2 Plaintiff is the owner of real property located in the Lake Junaluska Assembly Conference and Retreat ("Retreat"). Defendant is a non-profit, non-stock company, which manages, owns, develops, and sells real property in the Retreat. The Retreat contains more than 700 private residences. The Retreat also contains a lake, meeting facilities, event auditoriums, a campground, rental accommodations, and outdoor recreation facilities. The Retreat is used for meetings, events, religious conferences, and retreats.

¶ 3 In 1913, Defendant's predecessor-in-interest began selling lots for private residential use. The Retreat "was established for the benefit of the United Methodist Church" as "a resort for religious, charitable, educational and benevolent purposes[.]" In the declaration of the protective covenants, conditions, restrictions and easements, Defendant states the Retreat "is dedicated to the training, edification and inspiration of people who are interested in and concerned with Christian principles and concepts."

¶ 4 Plaintiff purchased his lot within the Retreat in 2011. Plaintiff's property was first conveyed in 1950 to Plaintiff's predecessor-in-interest, Eugene L. de Casteline. The following covenants are contained within Plaintiff's chain of title:

> Second: That said lands shall be held, owned and occupied subject to the provisions of the charter of the Lake Junaluska Assembly, Inc. and all amendments thereto, heretofore, or hereafter enacted, and to the bylaws and regulations, ordinances and community rules which have been or hereafter may be, from time to time, adopted by said Lake Junaluska Assembly, Inc., and its successors.
>
> . . . .
>
> Fifth: That it is expressly stipulated and covenanted between said party of the first part and that said party of the second part his heirs and assigns, that

> the bylaws, regulations, community rules and ordinances heretofore or hereafter adopted by the said Lake Junaluska Assembly, Inc. shall be binding upon all owners and occupants of said lands as full and to the same extent as if the same were fully set forth in this Deed, and all owners and occupants of said lands shall be bound thereby.

¶ 5 Plaintiff filed an action alleging: (1) the Retreat is a planned community pursuant to N.C. Gen. Stat. § 47F (2021); (2) Defendant made expenditures from assessments collected for purposes not stated in the Retreat's Rules; (3) an amendment in the Retreat's Rules conflicted with established case law; (4) Defendant improperly adopted Amendments to the Rules for the Retreat; and, (5) the lien practices of Defendant in the Retreat are not authorized by law.

¶ 6 The trial court granted Defendant's motion for summary judgment on 5 August 2020 holding the Planned Community Act, N.C. Gen. Stat. § 47F, does not apply to Defendant. Plaintiff filed a motion seeking Defendant to release detailed financial records on the collection and expenditures of assessments within the Retreat. Following a hearing, the trial court allowed in part and denied in part Plaintiff's disclosure motion. Plaintiff filed a motion for reconsideration pursuant to North Carolina Rule of Civil Procedure 59, which was denied following a hearing by order on 10 February 2021.

¶ 7 Defendant filed a motion for summary judgment on all remaining issues on 21 January 2021, which the trial court allowed on 10 February 2021. Plaintiff appealed.

II. Jurisdiction

¶ 8 Jurisdiction in this Court lies pursuant to N.C. Gen. Stat. § 7A-27(b)(1) (2021).

III. Issue

¶ 9 Plaintiff argues the trial court erred when it granted summary judgment in favor of Defendant.

IV. Analysis

A. Standard of Review

¶ 10 North Carolina Rule of Civil Procedure 56(c) allows a moving party to obtain summary judgment upon demonstrating "the pleadings,

depositions, answers to interrogatories, and admissions on file, together with the affidavits" show they are "entitled to a judgment as a matter of law" and "there is no genuine issue as to any material fact." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2021).

¶ 11 A material fact is one supported by evidence that would "persuade a reasonable mind to accept a conclusion." *Liberty Mut. Ins. Co. v. Pennington*, 356 N.C. 571, 579, 573 S.E.2d 118, 124 (2002) (citation omitted). "An issue is material if the facts alleged would . . . affect the result of the action." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 518, 186 S.E.2d 897, 901 (1972).

¶ 12 Our Court has held:

> A defendant may show entitlement to summary judgment by (1) proving that an essential element of the plaintiff's case is non-existent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense.

Draughon v. Harnett Cty. Bd. of Educ., 158 N.C. App. 208, 212, 580 S.E.2d 732, 735 (2003), *aff'd per curiam*, 358 N.C. 131, 591 S.E.2d 521 (2004) (citation and internal quotation marks omitted).

¶ 13 When reviewing the allegations and proffers at summary judgment, "[a]ll inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Boudreau v. Baughman*, 322 N.C. 331, 343, 368 S.E.2d 849, 858 (1988) (citation omitted). Summary judgment is not appropriate where matters of credibility and determining the weight of the evidence exist. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 422 (1979).

¶ 14 "[O]nce the party seeking summary judgment makes the required showing, the burden shifts to the nonmoving party to produce a forecast of evidence demonstrating specific facts, as opposed to allegations, showing that he can at least establish a *prima facie* case at trial." *Pacheco v. Rogers and Breece, Inc.*, 157 N.C. 448, 445, 579 S.E.2d 505, 507 (2003) (citation omitted).

¶ 15 On appeal, "[t]he standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007) (citation omitted).

B. 5 August 2020 Order

¶ 16 The North Carolina Planned Community Act was enacted in 1999 and "applies to all planned communities created within this State on or after January 1, 1999." N.C. Gen. Stat. § 47F-1-102(a) (2021). Certain provisions of the Planned Community Act apply to planned communities created prior to 1999, "unless the articles of incorporation or the declaration expressly provides to the contrary." N.C. Gen. Stat. § 47F-1-102(c) (2021).

¶ 17 N.C. Gen. Stat. § 47F-1-102(c) enumerates sections of the Planned Community Act that apply to planned communities created prior to 1999, but "only with respect to events and circumstances occurring on or after January 1, 1999, and *do not invalidate existing provisions of the declaration, bylaws, or plats and plans of those planned communities*." *Id.* (emphasis supplied).

¶ 18 Our Supreme Court examined the bylaws of the Retreat in *Southeastern Jurisdictional Admin. Council, Inc. v. Emerson*, 363 N.C. 590, 599-600, 683 S.E.2d 366, 372 (2009). The Court reviewed whether an amendment, which imposed an annual service charge "in an amount fixed by the SEJ Administrative Council for garbage and trash collection, police protection, street maintenance, street lighting, drainage maintenance, administrative costs and upkeep of the common areas," was reasonable. Nowhere in *Southeastern Jurisdictional* does the majority's opinion address the applicability of the Planned Community Act to the Retreat nor does it cite N.C. Gen. Stat. § 47F.

¶ 19 Plaintiff argues the trial court erred by holding "*Southeastern Jurisdictional Admin. Council v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009) is controlling for this case." Plaintiff asserts this conclusion of law constitutes reversible error. Contrary to Plaintiff's argument and presuming error, this ruling is not *per se* reversible error. Even if the trial court cited an incorrect basis for the judgment, this Court "will not disturb a judgment where the correct result has been reached." *Atlantic Coast Mech., Inc. v. Arcadis, Geraghty & Miller of N.C., Inc.*, 175 N.C. App. 339, 344, 623 S.E.2d 334, 338 (2006). Defendant, as appellee, is "free to argue on appeal any ground to support the trial court's grant of summary judgment regardless of the fact the trial court specified the grounds for its summary judgment decision." *Id.* at 344, 623 S.E.2d at 339 (citations omitted).

¶ 20 Our Court has held:

> The purpose of the entry of findings of fact by a trial court is to resolve contested issues of fact. This is

> not appropriate when granting a motion for summary judgment, where the basis of the judgment is 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.

War Eagle, Inc. v. Belair, 204 N.C. App. 548, 551-52, 694 S.E.2d 497, 500 (2010) (citations and quotation marks omitted). Summary judgment orders should not include contested findings of fact. "[A]ny findings should clearly be denominated as 'uncontested facts' and not as a resolution of contested facts." *Id.*

¶ 21 Plaintiff has not asserted any "events or circumstances" occurring after 1 January 1999 to invoke the retroactive provisions of N.C. Gen. Stat. § 47F-1-102(c). Plaintiff purchased the property with prior record notice of the covenants recorded within the chain of title. Plaintiff's argument is overruled.

C. 10 February 2021 Order on Plaintiff's Motion for Reconsideration

¶ 22 The trial court denied Plaintiff's motion for summary judgment in part and granted Plaintiff's motion for summary judgment in part by ordering Defendant to "make available to property owners in the Lake Junaluska Retreat, an annual profit and loss statement, a balance sheet, capital budget, and annual audit (if one is prepared)" for each year beginning with 2020.

¶ 23 "The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." *Westmoreland v. High Point Healthcare, Inc.*, 218 N.C. App. 76, 79, 721 S.E.2d 712, 716 (2012). Our Court has held:

> The classification of a determination as either a finding of fact or a conclusion of law is admittedly difficult. As a general rule, however, any determination requiring the exercise of judgment, or the application of legal principles, is more properly classified as a conclusion of law. Any determination reached through logical reasoning from the evidentiary facts is more properly classified a finding of fact.

In re Helms, 127 N.C. App. 505, 510, 491 S.E.2d 672, 675 (1997) (citations and quotation marks omitted).

¶ 24 The trial court stated "the following non-controverted facts:"

> 1. This Court, following a hearing on July 27, 2020 on cross-motions for summary judgment by Plaintiff and Defendant, ruled that that (sic) the North Carolina Planned Community Act (N.C. Gen. Stat. § 47F-1-101 et. seq) does not apply to Defendant or the Lake Junaluska Development;
>
> 2. Defendant and the Lake Junaluska development is a unique community;
>
> 3. The North Carolina Supreme Court's opinion and ruling in *Southeastern Jurisdictional Admin. Council v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009) does not address the issue concerning the disclosure of financial records of Defendant; and
>
> 4. Because the North Carolina Planned Community [Act] does not apply to the Defendant or the Lake Junaluska development, and given the unique character and long-standing history of covenant-imposed regulations, there is a gray area and ambiguity concerning the disclosure of financial records by Defendant and the entitlement of Plaintiff and other similarly situated property owners in the Lake Junaluska development who pay service charges imposed by Defendant to view financial records of Defendant.

¶ 25 Plaintiff argues these findings of fact are controverted. Number one is a recitation of the trial court's 5 August 2020 order. Number two does not have any legal significance. Numbers three and four involve the "application of legal principles" and are conclusions of law and not controverted or "non-controverted facts." *Id.*

¶ 26 Plaintiff argues the trial court erred in holding "The North Carolina Supreme Court's opinion and ruling in *Southeastern Jurisdictional Admin. Council v. Emerson*, 363 N.C. 590, 683 S.E.2d 366 (2009) does not address the issue concerning the disclosure of financial records of Defendant[.]" Our Supreme Court's holding in *Southeastern Jurisdictional*, only addresses the validity of service charges imposed on lot owners within the Retreat and not Defendant's disclosure responsibilities or lot owners' rights to disclosure of records. *Southeastern Jurisdictional Admin. Council Inc.*, 363 N.C. at 601, 683 S.E.2d at 373. Plaintiff's argument is overruled.

¶ 27 Plaintiff further argues the trial court erred in its holding of finding of fact four. As is held above, the Retreat is not subject to the Planned Community Act. Plaintiff is not entitled to disclosures pursuant to the Planned Community Act. Plaintiff's argument is overruled.

¶ 28 Plaintiff argues the trial court erred by denying him discovery of records and legers pursuant to Rule 26 of our Rules of Civil Procedure by denying his motion for summary judgment. *See* N.C. Stat. § 1A-1, Rule 26 (2021). Plaintiff sought the release of information pursuant to the Planned Community Act, which the trial court properly held was inapplicable to the Retreat. Plaintiff filed a motion for summary judgment, not a motion to compel Defendant's production of documents. The record on appeal does not contain any motion for discovery pursuant to Rule 26 of our Rules of Civil Procedure. Plaintiff's argument is overruled.

D. 10 February 2021 Order on Defendant's Summary Judgment Motion

¶ 29 The trial court granted summary judgment to Defendant on all remaining claims by order entered 10 February 2021. As is held above, the Retreat is not subject to the Planned Community Act. N.C. Gen. Stat. § 47F-1-102(c). Defendant is not subject to the Planned Community Act's disclosure requirements. *Id.*

¶ 30 Plaintiff argues summary judgment was improper because witness testimony is required to sort through conflicts of information to establish material facts. Plaintiff failed to present a forecast of evidence to the trial court to show any genuine factual dispute exists. *See Pacheco*, 157 N.C. at 448, 579 S.E.2d at 507. Plaintiff's argument is overruled.

V. Conclusion

¶ 31 The trial court properly granted summary judgment for Defendant on all remaining claims by order entered 10 February 2021. The trial court did not err in denying Plaintiff's motion for summary judgment in part. Plaintiff's forecast of evidence does not establish a genuine issue of material fact exists. The trial court's order is affirmed. *It is so ordered.*

AFFIRMED.

Judges CARPENTER and GORE concur.

IN RE A.P.

[281 N.C. App. 347, 2022-NCCOA-29]

IN THE MATTER OF A.P.

No. COA21-310

Filed 18 January 2022

1. Child Abuse, Dependency, and Neglect—permanency planning order—reunification efforts—in light of mother's disability—sufficiency of evidence and findings

In a permanency planning matter, the trial court's conclusion that the department of social services (DSS) made reasonable efforts to prevent the need for placement of the child was supported by its findings of fact, which in turn were supported by the testimony of social workers, the guardian ad litem's report, and a psychological assessment. DSS provided services as recommended by the assessment, but respondent either declined to participate in or did not make sufficient improvement after using those services. Although respondent argued that DSS did not accommodate her intellectual disability, where DSS satisfied the reasonable efforts requirement under state law, DSS also met the reasonable accommodation requirement of the Americans with Disabilities Act.

2. Appeal and Error—waiver—adequacy of DSS services—compliance with disability laws—raised for first time on appeal

In a permanency planning matter, where respondent-mother claimed on appeal that the department of social services violated the Americans with Disabilities Act by not providing adequate services to accommodate her intellectual disability, but had not raised the issue either before or during the permanency planning hearing, she waived the argument for appellate review.

3. Child Visitation—permanency planning order—improper delegation of authority to custodial parent

In a permanency planning matter, the portion of the trial court's order granting respondent-mother two hours of supervised visitation with her child every other week was vacated and the matter remanded because the trial court improperly delegated the other terms of visitation (the location and the supervisor) to the child's father to whom legal and physical custody was granted.

4. Child Abuse, Dependency, and Neglect—permanency planning—ceasing further review hearings—statutory requirements

In a permanency planning matter in which legal custody of the child was granted to the father, the trial court met the requirements

of N.C.G.S. §§ 7B-906.1(k) and 7B-905.1(d) when it stated in its visitation decree that no further regular review hearings would be held but that the parties could file a motion for review of the visitation plan. Although respondent-mother had an intellectual disability, the Americans with Disabilities Act did not impose additional requirements on the trial court before cessation of further review hearings.

Appeal by respondent-mother from order entered 16 February 2021 by Judge Carole A. Hicks in Iredell County District Court. Heard in the Court of Appeals 17 November 2021.

Lauren Vaughan for Petitioner-Appellee Iredell County Department of Social Services.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender J. Lee Gilliam, for Respondent-Appellant-Mother.

No brief filed for Respondent-Appellee-Father.

Womble Bond Dickinson (US) LLP, by Jessica L. Gorczynski, for Guardian ad Litem.

CARPENTER, Judge.

¶ 1 Respondent-Mother appeals from a permanency planning order (the "Order"), entered on 16 February 2021 following an initial permanency planning hearing. The Order granted legal and physical custody of the juvenile to Respondent-Father; ordered two hours of supervised visitation every other weekend to Respondent-Mother, allowing Respondent-Father to choose the place and supervisor of visitation; and waived further review hearings. On appeal, Respondent-Mother argues the Order was not consistent with her need for reasonable accommodations based on her intellectual disability, and therefore, violated Title II of the Americans with Disabilities Act of 1990 ("ADA") and Section 504 of the Rehabilitation Act of 1973 ("Section 504"). Furthermore, she contends the Order gave Respondent-Father "too much discretion" over the visitation plan. For the reasons set forth below, we affirm the Order in part; we vacate and remand the visitation provisions of the Order for the trial court to enter an appropriate visitation plan.

I. Factual & Procedural Background

¶ 2 On 19 November 2019, the date of A.P.'s birth, the Iredell County Department of Social Services ("DSS") received a report, from the

hospital where Respondent-Mother gave birth, alleging neglect of A.P. on the basis Respondent-Mother has brain damage due to a past car accident and is unable to care for the newborn infant. On 6 December 2019, DSS filed a juvenile petition alleging A.P. was a neglected juvenile. The petition alleged Respondent-Mother failed to provide basic care for the infant—including changing diapers and feeding—even with hands-on assistance from hospital staff. The petition further alleged Respondent-Mother was under the guardianship of her paternal aunt, S.L., who had cared for her since she was four years old and was the payee on Respondent-Mother's disability benefits. Respondent-Mother was reported as being previously diagnosed with "mild mental retardation" and as having an IQ similar to that associated with a ten-year-old child. The petition described an emergency assessment held by DSS on 22 November 2019 in which Respondent-Mother admitted to participating in concerning behaviors including having unsafe, one-time sexual encounters with men whom she met online and intentionally killing cats. The assessment also revealed Respondent-Mother was jealous of the attention A.P. received from S.L., and Respondent-Mother had been found in her room with a knife explaining she "was going to hurt herself and just wanted to make everything go away." The day after the assessment, Respondent-Mother and A.P. were released from the hospital to the care of S.L. Respondent-Mother and S.L. signed a safety plan in which Respondent-Mother agreed to be supervised at all times when with A.P., and S.L. agreed to provide "eyes-on" supervision.

¶ 3 On 15 January 2020, a hearing was held for determining whether a guardian *ad litem* should be appointed for Respondent-Mother. At the hearing, DSS made an oral motion to appoint a guardian *ad litem* in accordance with N.C. Gen. Stat. § 1A-1, Rule 17 for Respondent-Mother. The trial court found, *inter alia*, Respondent-Mother: is incompetent and cannot adequately act in her own interest, waived notice of the hearing and consented to the appointment of a guardian *ad litem* for her, is incompetent within the meaning of N.C. Gen. Stat. § 35A-1101 (2019), and lacks capacity due to mental retardation. Accordingly, the trial court appointed a guardian *ad litem* for Respondent-Mother.

¶ 4 On 12 February 2020, pre-adjudication and adjudication hearings were held before the Honorable Edward L. Hedrick, IV. On the same day, the trial court entered its adjudication order, making findings of fact by clear and convincing evidence and concluding A.P. was a neglected juvenile. A dispositional hearing was also held on 12 February 2020. The guardian *ad litem* for A.P. filed a court report for the dispositional hearing in which she expressed concerns for A.P. continuing to

live with S.L. and Respondent-Mother. She noted "if [S.L.'s] belittling behavior [toward Respondent-Mother] continues or escalates, the nexus of [Respondent-Mother's] mental deficit, jealousy, and propensity for violence will push [Respondent-Mother] to the limits of her tolerance and result in harm to [A.P.]". The guardian *ad litem* recommended A.P. be placed with S.L. and a new guardian be found for Respondent-Mother.

¶ 5 On 12 February 2020, the trial court entered its dispositional order in which it found, *inter alia*, that the primary conditions in the home that led to or contributed to the juvenile's adjudication and to the Court's decision to remove custody of the juvenile are the Respondent-Mother's mental health status and her inability to provide care for the infant juvenile. It further found that placement of A.P. with S.L. would be in the juvenile's best interest. The trial court concluded, *inter alia*, DSS made reasonable efforts to reunify and to prevent the need for placement of the juvenile outside of the juvenile's own home. The trial court then ordered, *inter alia*, Respondent-Mother remedy the conditions in the home that led to or contributed to the juvenile's adjudication and to the Court's decision to remove custody of the juvenile by: (1) entering into and complying with the terms of a case plan; (2) cooperating with DSS and the guardian *ad litem*; (3) signing all releases of information necessary for DSS and the guardian *ad litem* to exchange information with their providers and monitor progress; (4) providing DSS and the guardian *ad litem* with a comprehensive list of all living adult relatives; and (5) not living in the home of A.P. The trial court also ordered legal and physical custody of A.P. to DSS and supervised visitation to Respondent-Mother for two hours per week.

¶ 6 On 8 July 2020, a review hearing was held pursuant to N.C. Gen. Stat. § 7B-906.1(a) (2019). The trial court entered an order the same day, finding, *inter alia*, Respondent-Mother had entered but not completed a case plan, and DSS had become aware of a potential father whom it found to be a potential placement provider for the juvenile. The trial court then concluded that legal and physical custody of the juvenile should continue with DSS. While paternity results were pending, the trial court allowed the putative father ("Respondent-Father") to have two-hour weekly unsupervised visits with A.P. and continued supervised visitation for Respondent-Mother. On 24 July 2020, Respondent-Father confirmed paternity of A.P. and entered into a case plan with DSS. DSS held a child and family team meeting on 28 July 2020 and placed A.P. with Respondent-Father and the paternal grandmother.

¶ 7 On 27 August 2020, Dr. George Popper, Ph.D., P.A., ("Dr. Popper") performed a comprehensive psychological evaluation on Respondent-

Mother as requested by her 12 March 2020 DSS case plan, which consisted of multiple examinations to determine her cognitive and academic achievements, social-emotional development, personality, parenting skills, and mental health status. Respondent-Mother performed "extremely low" in the areas tested in the cognitive assessment. She received a full-scale IQ of 53 on the Weschsler Adult Intelligence Scale, Fourth Edition (WAIS-IV), which falls in the "intellectually disabled – moderate" range. Her test results on her mental status assessment were consistent with depression and anxiety disorder. In Dr. Popper's view, it was "unrealistic for [Respondent-Mother] to assume the role of full-time parent" because "[s]he has not yet demonstrated she has the skills needed for self-care, nor has she demonstrated the skills needed to care for a young child." Based on the examinations, Dr. Popper recommended Respondent-Mother to: (1) continue with supervised visits and with her parenting classes and modify visits if progress is noted; (2) attend individual counseling and possibly seek medication for her depression and anxiety; (3) train to improve domestic skills; (4) obtain innovation services; and (5) find a supported work placement or placement in a sheltered workshop.

¶ 8 An initial permanency planning hearing was held on 20 January 2021 before the Honorable Carole A. Hicks. Social worker Latoya Daniels testified Respondent-Mother participated in Pharo's Parenting parent classes and parental coaching program for at least four months. DSS also offered Respondent-Mother the opportunity to be placed at the Thelma Smith Foundation, an assisted living facility, where she could work on "independent skills" and learn how to provide her basic needs, which she declined.

¶ 9 Krista McMillan, a foster care supervisor with DSS also testified. According to Krista McMillan, Respondent-Mother did not want to participate in the services of the Thelma Smith Foundation although they were offered to her, and DSS set up an intake appointment. DSS made referrals for Respondent-Mother to receive mental health treatment at Daymark; Respondent-Mother also declined those services. Additionally, DSS assisted Respondent-Mother with applying for innovation services, as recommended by Dr. Popper.

¶ 10 The remainder of the testimony during the permanency planning hearing focused primarily on Respondent-Mother's visitation with A.P. According to Respondent-Father, A.P. had lived with him in the paternal grandmother's home since the end of July 2020. Respondent-Father has held consistent employment, has had no issues providing care for A.P., and feels bonded with A.P. When Respondent-Father was asked

by counsel for DSS if he would be willing to facilitate visits or supervise visits for Respondent-Mother, he replied, "I mean, due to the past, I don't [sic] willing just because of, you know, prior history. So I kind of stay away from everything." Although Respondent-Father confirmed he did not want to supervise visits for Respondent-Mother himself, he did testify that his mother and other friends or family would be willing to supervise visits. On cross-examination, Respondent-Father testified he did not want Respondent-Mother to be part of A.P.'s life due to allegations she harmed the child, and he did not want Respondent-Mother to have supervised visits.

¶ 11 On 16 February 2021, the trial court entered the permanency planning Order, which granted legal and physical custody of A.P. to Respondent-Father and awarded supervised visitation to Respondent-Mother every other weekend for a minimum of two hours, giving Respondent-Father discretion to choose the location and supervisor of the visitation. Respondent-Mother gave timely notice of appeal.

II. Jurisdiction

¶ 12 This Court has jurisdiction to address Respondent-Mother's appeal from the Order pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2019) and N.C. Gen. Stat. § 7B-1001(a)(4) (2019).

III. Issues

¶ 13 The issues before the Court are whether: (1) the trial court's findings of fact support its conclusion of law that DSS made reasonable efforts to unify and to eliminate the need for placement of the juvenile in light of Respondent-Mother's intellectual disability; (2) the trial court's finding of fact regarding DSS's reasonable efforts are supported by competent evidence; (3) the trial court made reasonable accommodations for Respondent-Mother, consistent with ADA and Section 504 requirements; (4) the trial court erred in allowing A.P.'s father to choose the place and supervisor of visitation; and (5) the trial court erred in waiving future reviews and informing all parties of their right to file a motion for review of the ordered visitation plan given Respondent-Mother's disability.

IV. Standard of Review

¶ 14 "Appellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re J.C.S.*, 164 N.C. App. 96, 106, 595 S.E.2d 155, 161 (2004) (citation omitted). "The trial court's findings of fact are conclusive on appeal if supported by any

competent evidence." *In re L.M.T.*, 367 N.C. 165, 168, 752 S.E.2d 453, 455 (2013) (citation omitted).

V. Permanency Planning Order

¶ 15 On appeal, Respondent-Mother argues DSS failed to make the necessary accommodations for her under the ADA and Section 504 when making efforts to reunify and eliminate the need for placement of the juvenile outside the juvenile's own home. Specifically, Respondent-Mother asserts she "was entitled to reunification services specially tailored to accommodate her intellectual disability." For the reasons set forth below, we are unpersuaded by Respondent-Mother's arguments relating to the ADA and Section 504.

A. DSS's Compliance with the ADA and Section 504 when Making Reasonable Efforts

¶ 16 **[1]** The parties do not dispute Respondent-Mother has a disability within the meaning of the ADA and Section 504 and is a qualified individual with a disability eligible for protection under these statutes.

¶ 17 Section 504 and Title II of the ADA "protect parents and prospective parents with disabilities from unlawful discrimination in the administration of child welfare programs, activities, and services." U.S. Dep't Health & Human Servs. & U.S. Dep't Justice, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, (Aug. 2015), https://www.ada.gov/doj_hhs_ta/child_welfare_ta.html. The ADA provides: "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination of any such entity." 42 U.S.C. § 12132. The ADA defines a "qualified individual with a disability" as

> an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131. Likewise, Section 504 provides: "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by

reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794(a).

1. Sufficiency of Conclusion regarding DSS's Reasonable Efforts

¶ 18 We first consider whether there are findings of fact to support the trial court's conclusion that DSS made reasonable efforts to prevent the need for placement of A.P. This Court has previously considered ADA protections afforded to parents in the context of the Juvenile Code. In *In re C.M.S.*, we addressed the issue of whether the ADA precludes the State from terminating parental rights of an intellectually disabled parent. 184 N.C. App. 488, 646 S.E.2d 592 (2007). After considering persuasive authority from other jurisdictions, we held the ADA does not prevent the State's termination of parental rights so long as the trial court made its statutorily required findings to show "the department of social services has made reasonable efforts to prevent the need for placement of the juvenile." *Id.* at 491–93, 646 S.E.2d at 594–95; *see also* N.C. Gen. Stat. § 7B-507(a)(2) (2019). Thus, when a department of social services, such as DSS in the instant case, satisfies this requirement, it complies with the ADA's mandate that individuals with disabilities be reasonably accommodated. *Id.* at 492–93, 646 S.E.2d at 595. We noted "Congress enacted the ADA to eliminate discrimination against people with disabilities and to create causes of action for qualified people who have faced discrimination. Congress did not intend to change the obligations imposed by unrelated statutes." *Id.* at 492, 646 S.E.2d at 595 (citations omitted).

¶ 19 We find the holding of *In re C.M.S.* on point in the case *sub judice*. *Id.* at 491, 646 S.E.2d at 594; *see also In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81 (2017) (unpublished) (rejecting a respondent-parent's argument that the trial court ignored the requirements of the ADA and Section 504 when it awarded custody of the juvenile to the child's father because the trial court made the proper findings under N.C. Gen. Stat. § 7B-507(a)(2) in its permanency planning order). Because the trial court in this case concluded "DSS has made reasonable efforts to reunify and to eliminate the need for placement of the juvenile," it necessarily complied with the ADA's directive that a parent not be "excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program." *See In re C.M.S.*, 184 N.C. App. at 492–93, 646 S.E.2d at 595; *see also* 42 U.S.C. § 12132. Additionally, we find this conclusion of law is supported by findings of fact 5, 6, and 8, which state:

5. [DSS] made reasonable efforts to reunify and to eliminate the need for placement of the juvenile outside of the juvenile's own home. Said efforts are as described in the social worker's report and prior court orders.

6. DSS has made reasonable efforts to identify an appropriate permanent plan for the juvenile. Said efforts are as described in the social worker's report and the prior court orders. DSS initiated DNA testing to determine paternity in this matter; approved [Respondent-Father's] home for placement; monitored [Respondent-Father's] trial home placement; made referrals for [Respondent-Mother] to complete her case; attempted to engage [Respondent-Mother] in services specifically recommended in the Parenting Assessment by Dr. Popper; attempted to monitor [Respondent-Mother's] compliance with her case plan and progress on completing the objectives in the Parenting Assessment.

. . . .

8. DSS attempted to enroll [Respondent-Mother] at the Thelma Smith Foundation in Salisbury to no avail. The Thelma Smith Foundation would provide training in domestic skills, help [Respondent-Mother] with transportation and employment, and provide [Respondent-Mother] with some level of independence. [Respondent-Mother] has continued to attend parenting classes and have her visits supervised by parenting skills teachers, yet she still is unable to consistently and properly change the juvenile's diaper and feed him.

¶ 20 The record and transcripts reveal DSS made reasonable efforts, consistent with Dr. Popper's recommendation, to assist Respondent-Mother with her supervised visits, mental health issues, parenting and home skills, and innovation services; thus, these findings of fact are supported by competent evidence.

2. Sufficiency of Factual Findings

¶ 21 Respondent-Mother next challenges findings of fact 6, 12, 13, and 15, on the ground these findings are unsupported by competent evidence. We disagree and consider each finding in turn.

a. Finding of Fact 6

¶ 22 Finding of fact 6 states in pertinent part, "[DSS] made referrals for [Respondent-Mother] to complete her case [and] attempted to engage [Respondent-Mother] in services specifically recommended in the Parenting Assessment by Dr. Popper . . . ."

¶ 23 As stated above, social worker Latoya Daniels and foster care supervisor Krista McMillan testified as to the services to which Respondent-Mother was referred including parenting coaching and classes, mental health services, supervised visitation, innovation services, and assisted living where Respondent-Mother could learn independent skills. These services were consistent with those recommended by Dr. Popper. We conclude finding of fact 6 is supported by competent evidence. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

b. Finding of Fact 12

¶ 24 Finding of fact 12 states in pertinent part: "Respondent Mother is not making adequate progress within a reasonable period of time under the plan."

¶ 25 Respondent-Mother expressly declined mental health services and services to assist her in improving independent skills despite Dr. Popper's finding that she suffered from depression and anxiety, lacked basic parenting skills, and was unable to live independently. Additionally, social worker Latoya Daniels testified that DSS "had attempted to . . . assist [Respondent-Mother] to the best of [its] ability at this point" through Pharos parenting classes. Placing a diaper on the child, a basic skill, had been "cover[ed] for a significant amount of time." Therefore, Respondent-Mother's argument is without merit. We conclude there was competent evidence in the record to support finding of fact 12. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

c. Finding of Fact 13

¶ 26 Finding of fact 13 states in pertinent part, "Respondent Mother is not actively participating in or cooperating with the plan, DSS, and the GAL for the juvenile."

¶ 27 Respondent-Mother argues finding of fact 13 is a conclusory finding not supported by the evidence. We disagree. The trial court determined

a fact of consequence, that Respondent-Mother had not actively participated in or cooperated with her case plan, DSS, and the guardian *ad litem* for the juvenile—and this finding is supported by competent evidence. The guardian *ad litem's* 20 January 2021 court report stated Respondent-Mother had not complied with DSS requests to maintain visits nor the court's orders to adhere to a case plan and was "combative on the topic of information flow" during the case review meeting. The guardian *ad litem* concluded Respondent-Mother "continues to have shown little growth in her ability to care for a child." The testimony of the social workers also supports this finding. Therefore, we conclude finding of fact 13 is supported by competent evidence. *See In re J.C.S.*, 164 N.C. App. at 106, 595 S.E.2d at 161.

d. Finding of Fact 15

¶ 28 Finding of fact 15 states in pertinent part, "The Court finds by clear and convincing evidence that the Respondent Mother is acting in a manner inconsistent with the health or safety of the juvenile."

¶ 29 In DSS's 20 January 2021 court summary prepared for the permanency planning hearing, it reported there were continuing "concerns regarding diaper changes and feedings." Additionally, Dr. Popper noted in his August 2020 assessment Respondent-Mother had not demonstrated skills needed to care for the juvenile child or herself and has a history of threatening self-harm. He further stated, "her limited cognitive resources, her lack of basic parenting skills, her emotional stability, and her inability to live independently are issues that impact her ability to safely and responsibly care for a young child at this time." We conclude finding of fact 15 is supported by competent evidence.

¶ 30 Although there may have been evidence to support findings to the contrary, we hold findings of fact 5, 6, 8, 12, 13, and 15 are "supported by . . . competent evidence," and therefore, are conclusive on appeal. *See In re L.M.T.*, 367 N.C. at 168, 752 S.E.2d at 455.

B. Adequacy of Services under the ADA

¶ 31 **[2]** Next, Respondent-Mother challenges the adequacy of services offered by DSS in its case plan and at the permanency planning hearing. DSS and the guardian *ad litem* for A.P. contend Respondent-Mother waived the issue of ADA compliance by DSS because she failed to challenge the adequacy of services before or during the permanency planning hearing. After careful review, we conclude Respondent-Mother waived her argument on this issue by failing to raise it in a timely manner after receiving services under her DSS case plan.

¶ 32 In the unpublished case of *In re S.A.*, our Court adopted the reasoning found in *In re Terry*, 240 Mich. App. 14, 27, 610 N.W.2d 563, 570–71 (2000) to hold the respondent-parent waived her argument as to adequacy of services offered by DSS. *In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81, 2017 N.C. App. LEXIS 906, at *6. We also cited to *In re Terry* as persuasive authority in our published case of *In re C.M.S.*, 184 N.C. App. at 492–93, 646 S.E.2d at 595, discussed *supra*. In *In re S.A.*, the respondent-parent did not participate in the services offered by DSS. *In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81, 2017 N.C. App. LEXIS 906, at *6–7. In holding the respondent-mother waived her argument on appeal, we reasoned that at no time did she object to the adequacy of the services being offered by DSS—neither before nor during the permanency planning hearing. *Id.* at *6.

¶ 33 Respondent-Mother attempts to distinguish *In re S.A.* from the instant case on the grounds the parent in *In re S.A.* "had a physical disability rather than an intellectual one." This argument is without merit. We are again persuaded by the Michigan Court of Appeals case of *In re Terry*. 240 Mich. App. at 26, 610 N.W.2d at 570. In *In re Terry*, the respondent-parent alleged she was a "qualified individual with a disability" as defined by the ADA because of her intellectual limitations. The court in *In re Terry* stated "[a]ny claim that the [social services agency] is violating the ADA must be raised in a timely manner . . . so that any reasonable accommodations can be made." 240 Mich. App. at 26, 610 N.W.2d at 570. Further, "[t]he time for asserting the need for accommodation in services is when the court adopts a service plan . . . ." *Id.* at 27, 610 N.W.2d at 571. The *In re Terry* court concluded that the respondent-parent's challenge of the accommodations in the closing argument of the termination of parental rights proceeding was "too late . . . to raise the issue." *Id.* at 27, 610 N.W.2d at 570–71.

¶ 34 Here, Respondent-Mother, like the mothers in *In re S.A.* and *In re Terry*, cannot show she raised an issue regarding the adequacy of services provided by DSS before or during the permanency planning hearing; therefore, we hold Respondent-Mother waived her argument by raising it for the first time on appeal. *See In re S.A.*, 256 N.C. App. 398, 806 S.E.2d 81, 2017 N.C. App. LEXIS 906, at *6; *In re Terry*, 240 Mich. App. at 27, 610 N.W.2d at 570–71.

C. Visitation Order

¶ 35 **[3]** In her next argument, Respondent-Mother maintains the trial court's visitation order "was not an adequate accommodation for an individual with an intellectual disability" because it gave A.P.'s father and

custodian too much discretion by allowing him to choose the place and the supervisor of visitation. She contends "this Court should remand the dispositional order for entry of an order that grants [her] appropriate visitation at a consistent location, to be supervised by a neutral third party." In light of our case precedent, we agree the trial court improperly gave Respondent-Father substantial discretion to choose the location and supervisor for Respondent-Mother's visitation; however, we reject Respondent-Mother's contention that the visitation order did not provide her with reasonable accommodations, because she failed to provide any support for that argument. *See* N.C. R. App. P. 28(b)(6) ("The body of the argument . . . shall contain citations of the authorities upon which appellant relies.").

¶ 36 We review visitation determinations for abuse of discretion. *In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007). "When reviewing for abuse of discretion, we defer to the trial court's judgment and overturn it only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 590 (2020) (citation omitted).

¶ 37 In decree 3 of the Order, the trial court mandated in pertinent part:

> The Respondent Mother shall be entitled to visit with the juvenile for a minimum of two hours every other weekend. These visits shall be supervised by [Respondent Father] or someone he approves. If the visiting Respondent Parent and the custodial Respondent Parent cannot agree regarding the specifics, visits shall take place from Noon-2pm at allocation [sic] [Respondent Father] chooses. [Respondent Father] shall arrange transportation for the juvenile to and from visits. Additionally, [Respondent Mother] shall be entitled to visitation of two hours surrounding major holidays such as Thanksgiving and Christmas. The Parents may agree on different times, locations, and frequency of visits if they desire.

¶ 38 N.C. Gen. Stat. § 7B-905.1 provides:

> (a) An order that removes custody of a juvenile from a parent . . . shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, including no visitation."
>
> . . . .

> (c) If the juvenile is placed or continued in the custody or guardianship of a relative or other suitable person, *any order providing for visitation shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.* The court may authorize additional visitation as agreed upon by the respondent and custodian or guardian.

N.C. Gen. Stat. § 7B-905.1(a), (c) (2019) (emphasis added).

¶ 39 We stated in *In re Custody of Stancil*:

> When the custody of a child is awarded by the court, it is the exercise of a judicial function. [N.C. Gen. Stat. §] 50-13.2. In like manner, when visitation rights are awarded, it is the exercise of a judicial function. We do not think that the exercise of this judicial function may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

¶ 40 Here, the Order specified the minimum frequency—every other weekend—as well as the length of visits—two hours. Furthermore, the Order specified that the visits shall be supervised. Therefore, the Order met the minimum requirements for a visitation plan under N.C. Gen. Stat. § 7B-905.1.

¶ 41 Nevertheless, Respondent-Mother cites to *In re C.S.L.B.*, 254 N.C. App. 395, 400, 829 S.E.2d 492, 495 (2017) and *In re J.D.R.*, 239 N.C. App. 63, 75–76, 768 S.E.2d 172, 180 (2015) in arguing that the visitation plan in the Order must be reversed because it gives Respondent-Father too much discretion over her visits.

¶ 42 In *In re C.S.L.B.*, this Court vacated a visitation order because it "improperly delegate[d] the court's judicial function to the guardians by allowing them to unilaterally modify [r]espondent-mother's visitation" by deciding if there was a "concern" she was using substances. 254 N.C.

App. at 400, 829 S.E.2d at 495. In *In re J.D.R.*, we concluded the visitation plan "delegate[d] to [the respondent-father] substantial discretion over the kinds of visitation" the respondent-mother would receive. 239 N.C. App. at 75, 768 S.E.2d. at 179. Additionally, the order placed conditions on the respondent-mother's visitation rights and gave respondent-father discretion to decide whether the respondent-mother "complied with the trial court's directives." *Id.* at 75, 768 S.E.2d at 179.

¶ 43 After careful review, we agree the trial court improperly gave Respondent-Father substantial discretion over the circumstances of Respondent-Mother's visitation by allowing him to choose the location and supervisor of the visitation. *See In re J.D.R.*, 239 N.C. App. at 75, 768 S.E.2d at 179 (concluding the trial court's "disposition order delegates to [respondent-father] substantial discretion over [some] kinds of visitation" by allowing him to determine whether the respondent-mother could eat lunch with the minor child at his school); *In re K.W.*, 272 N.C. App. at 496, 846 S.E.2d at 591 ("We have consistently held that [t]he court may not delegate [its grant of] authority [over visitation] to the custodian.") (internal quotation marks omitted). Moreover, Respondent-Father testified he was not willing to facilitate or supervise Respondent-Mother's visits and did not want Respondent-Mother to be part of A.P.'s life. This is precisely the scenario we cautioned against in *Stancil*: the trial court's grant of authority to a custodian-parent to decide the circumstances of the other parent's visitation plan, which could completely deny that parent of his or her right to visit with the minor child. *See In re Custody of Stancil*, 10 N.C. App. at 552, 179 S.E.2d at 849. Therefore, we hold the trial court's visitation order improperly delegated a judicial function to Respondent-Father by allowing him the sole discretion to decide where and by whom Respondent-Mother would be supervised during her visitations with the minor child. We vacate the visitation order and remand to the trial court for a proper visitation plan.

D. Future Review Hearings

¶ 44 **[4]** In her final argument, Respondent-Mother asserts the trial court erred by waiving further review hearings pursuant to N.C. Gen. Stat. § 7B-906.1 because such a result "does not comport with fundamental fairness, the ADA, or A.P.'s best interest." She further contends the trial court erred by "[m]erely informing" the parties of their right to file a motion for review of the visitation plan by notifying the parties in writing in the Order. As such, Respondent-Mother argues the Order should be remanded to require regular review hearings and continuous appointment of a guardian *ad litem* for Respondent-Mother for the pendency of the juvenile proceeding. We disagree.

¶ 45 N.C. Gen. Stat. § 7B-906.1(k) provides: "[i]f at any time a juvenile has been removed from a parent and legal custody is awarded to either parent . . ., the court shall be relieved of the duty to conduct periodic judicial reviews of the placement." N.C. Gen. Stat. § 7B-906.1(k) (2019). N.C. Gen. Stat. § 7B-905.1(d) states "[i]f the court waives permanency planning hearings and retains jurisdiction, all parties shall be informed of the right to file a motion for review of any visitation plan entered pursuant to this section." N.C. Gen. Stat. § 7B-905.1(d) (2019).

¶ 46 Here, the trial court stated in its visitation decree of the Order that "[a]ll parties are informed of the right to file a motion for review of this visitation plan. Upon motion of any party and after proper notice and a hearing, the Court may establish, modify, or enforce a visitation plan that is in the juvenile's best interest." It also retained jurisdiction and notified the parties that "no further regular review hearings [are] scheduled" after awarding legal custody to Respondent-Father.

¶ 47 In *In re C.M.S.* we adopted the rule followed by a majority of jurisdictions that "termination proceedings are not 'services, programs or activities' under the ADA." 184 N.C. App. at 491, 646 S.E.2d at 595 (citations omitted); *see* 42 U.S.C. § 12132. Similarly, we conclude abuse, neglect, and dependency proceedings are not "services, programs or activities" within the meaning of the ADA, and therefore, the ADA does not create special obligations in such child protection proceedings. *See In re Joseph W.*, 305 Conn. 633, 651, 46 A.3d 59, 69–70 (2012) (stating the ADA does not act as a defense or create special obligations in neglect proceedings); *M.C. v. Dep't of Child. & Families*, 750 So. 2d 705 (Fla. Dist. Ct. App. 2000) (explaining dependency proceedings are held for the benefit of the child rather than the parents; thus, parents may not assert the ADA as a defense in such a proceeding); 42 U.S.C. § 12132.

¶ 48 We hold the trial court met the statutory requirements set out in N.C. Gen. Stat. § 7B-906.1(k) and N.C. Gen. Stat. § 7B-905.1(d), and the ADA did not "change the obligations imposed by [these] unrelated statutes." *See In re C.M.S.*, at 492, 646 S.E.2d at 595.

VI. Conclusion

¶ 49 We affirm the Order in part because the trial court's findings of fact are supported by competent evidence, and the findings of fact in turn support its conclusions of law. We hold Respondent-Mother waived her argument regarding the adequacy of services provided by DSS by raising the issue for the first time on appeal. We vacate the visitation portion of the Order and remand for entry of an order prescribing a proper visitation plan, because the court's order on visitation gives

Respondent-Father substantial discretion to decide the circumstances of Respondent-Mother's visits. Finally, we hold the trial court met the statutory requirements imposed by N.C. Gen. Stat. § 7B-906.1(k) and N.C. Gen. Stat. § 7B-905.1(d), and the ADA does not expand the trial court's obligations to Respondent-Mother under those sections.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judges INMAN and ZACHARY concur.

WENDY MONROE, EMPLOYEE, PLAINTIFF
v.
MV TRANSPORTATION, EMPLOYER, SELF-INSURED
(BROADSPIRE, THIRD-PARTY ADMINISTRATOR) DEFENDANT

No. COA21-316

Filed 18 January 2022

Workers' Compensation—disability—futility of seeking employment—evidentiary burden—improper conclusion

After plaintiff's workplace injury, the Industrial Commission erred by concluding that plaintiff presented no evidence of disability and by failing to consider whether the evidence she did present established the futility of seeking other employment due to preexisting conditions. Plaintiff's evidence showed she was in her fifties; had been receiving Social Security disability benefits for an unrelated medical condition for several decades; was working a part-time job earning less than the minimum wage at the time she was injured (despite having a bachelor's degree); and, after her injury, had several work restrictions and suffered from persistent pain, culminating in a need for knee surgery. Notably, the Commission made no findings regarding evidence of plaintiff's medical records in which multiple medical providers described her post-injury "work status" as "unable to work secondary to dysfunction."

Appeal by plaintiff from opinion and award entered 3 March 2021 by the North Carolina Industrial Commission. Heard in the Court of Appeals 15 December 2021.

The Sumwalt Group, by Vernon Sumwalt and Christa Sumwalt, for plaintiff-appellant.

Wilson Ratledge, PLLC, by Kristine L. Prati, for defendant-appellee.

ARROWOOD, Judge.

¶ 1 Wendy Monroe ("plaintiff") appeals from the North Carolina Industrial Commission's (the "Commission") opinion and award concluding plaintiff had not satisfied her burden of proof to establish that she was entitled to disability benefits. For the following reasons, we vacate the Commission's opinion and remand for additional findings.

I. Background

¶ 2 Plaintiff began working for MV Transportation ("defendant-employer") in April 2016 as a part-time dispatcher and bus driver, where she earned $10.50 per hour. At the time, plaintiff was in her late forties, had a bachelor's degree, and had been receiving Social Security disability benefits since 1994 for an unrelated medical condition.[1]

¶ 3 Around 5:00 a.m. on 4 November 2016, plaintiff was performing a routine bus inspection. While checking the emergency windows, plaintiff "placed her left knee and part of her body weight on [a] bus seat and leaned towards the windows." Because the floor of the bus was wet and slippery, when plaintiff "stepped back with her right foot to reenter the bus aisle, she lost her footing, hit her left shin, and twisted her back and right knee." Plaintiff was able to catch herself, but "ended up leaning slightly backwards in an awkward position, with her left knee still on the seat."

¶ 4 Initially, plaintiff did not report the incident as she thought she had merely lightly injured her shin. However, "[w]ithin an hour" of the incident, plaintiff noticed "back pain, left shin pain, and pain in both her knees[,]" all of which interfered with her work. Thereafter, plaintiff reported the injury to her supervisor, who instructed plaintiff to seek treatment at "Med First Immediate Care and Family Practice."

¶ 5 Plaintiff made multiple visits to Med First Immediate Care and Family Practice. Plaintiff complained of pain in her lower back and knees; x-rays were performed on her lumbar spine, which "showed spondylosis," and on her knees, which "were both negative." On 7 November 2016, plaintiff "attempted to work, but had so much pain and difficulty that she returned to Med First" and was referred to the emergency room. Plaintiff received various restrictions for her work, including, among

1. Plaintiff had been diagnosed with having PTSD.

others, alternating between sitting and standing, and avoiding lifting over 20 pounds. On a few occasions, plaintiff tried returning to work; however, she continued to experience pain and was ultimately relieved by her supervisor on 15 November 2016. After that, plaintiff never returned to work.

¶ 6 For the three years that followed, plaintiff attended many medical appointments, throughout which she was given multiple referrals, as well as physical therapy and injection therapy to manage her persistent pain. Particularly, an MRI of her right knee performed 15 February 2018 revealed "complete cartilage loss in the medial compartment and a root tear avulsion of the posterior horn of the medial meniscus." On 14 January 2019, plaintiff "presented with severe progressive right knee pain[,]" which she found at times intolerable, and "walked with a limp"; at this point, a doctor deemed plaintiff "an appropriate candidate for a right total knee arthroplasty."

¶ 7 After seeking opinions regarding partial knee replacement surgery versus a full knee replacement, plaintiff "was scheduled for a partial knee replacement on March 21, 2019, but . . . had to reschedule it because of the availability of a home health care nurse." The surgery was then scheduled for 11 April 2018; however, due to a "miscommunication" and "complication with one of her medications," the surgery was canceled.

¶ 8 Plaintiff's claim, which was originally denied, was ultimately heard before Deputy Commissioner Lori A. Gaines (the "Deputy Commissioner") on 14 June 2019. At that time, "[p]laintiff was waiting to schedule the partial knee replacement surgery."

¶ 9 At the hearing, plaintiff introduced as her exhibits, among other things, medical records pertaining to her injury. Many of these medical records showed that multiple medical providers described plaintiff's "work status" following her injury as: "Unable to work secondary to dysfunction." After the hearing, "the parties took depositions of Dr. Arlene Hallegado, Stephen Free, PA-C, and Dr. Robert Boswell." During their respective depositions, all three medical professionals opined that they would have recommended work restrictions for plaintiff as a result of her injury and ongoing treatment.

¶ 10 In an opinion and award filed 7 February 2020, the Deputy Commissioner concluded that plaintiff had proven her injury was caused by an accident, and, "[b]ased upon a preponderance of the evidence in view of the entire record, . . . that [p]laintiff ha[d] proven a causal connection between her November 4, 2016 work-related accident and the

injuries to her low back and right knee." Then, the Deputy Commissioner found that "[f]rom November 7, 2016 to November 14, 2016 until her release to limited duty with restrictions, [p]laintiff was written entirely out of work." "Therefore," the Deputy Commissioner concluded that plaintiff had "met her burden of proving disability for that period of time."

¶ 11 The Deputy Commissioner continued:

> Plaintiff was given limited duty restrictions on November 11, 2016 but was not written out of work after that date. However, in order to determine Plaintiff's loss of wage-earning capacity, the Commission must take into account the significant restrictions Plaintiff has been provided, her age, her work history, her ongoing back and right knee pain, and her education . . . . Taking these factors into account, the undersigned concludes that because of her compensable injuries, Plaintiff has been unable to earn wages in the same or similar employment, and therefore she *is entitled to total disability compensation* beginning November 15, 2016, and continuing until she returns to work, until further order of the Industrial Commission, or until compensation is otherwise legally terminated.

(Emphasis added.) Then, the Deputy Commissioner concluded that plaintiff was "entitled to medical compensation for such treatment as is reasonably necessary to effect a cure, provide relief, or lessen the period of disability associated with [her] conditions related to the November 4, 2016 injuries."

¶ 12 The Deputy Commissioner awarded plaintiff the following: that defendant-employer "shall pay temporary total disability compensation to plaintiff at the rate of $131.24 per week[2] for the period from November 15, 2016 and continuing until plaintiff returns to work or further order of the Commission, [and] any amounts having accrued shall be paid in lump sum"; that plaintiff was entitled to have defendant-employer "provide all medical treatment, incurred or to be incurred, necessitated by the compensable 4 November 2016 injuries by accident, including but not limited to the proposed surgery for plaintiff's right knee

2. This monetary amount was consistent with plaintiff's weekly compensation rate of $131.24, derived from her average weekly wage of $196.86 while employed by defendant-employer.

replacement surgery"; and "[a] reasonable attorney's fee in the amount of twenty-five percent . . . ."

¶ 13 Defendant filed notice of appeal on 10 February 2020 to the Full Commission. The appeal was heard on 21 July 2020.

¶ 14 In an Opinion and Award filed 3 March 2021, the Commission found, among other things, that plaintiff was 51 years old at the time of the second hearing, had begun working for defendant-employer in 2016 as a part-time dispatcher and bus driver, where she earned $10.50 per hour, and had been receiving Social Security disability benefits for an unrelated medical condition since 1994.

¶ 15 The Commission found that, on 4 November 2016, plaintiff incurred an injury as described before the Deputy Commissioner, as a result of which plaintiff received work restrictions. Plaintiff had returned to work on 15 November 2016, but was relieved by her supervisor due to pain; thereafter, she never worked again. The Commission also found that, between November 2016 and November 2019, plaintiff underwent multiple medical examinations with multiple doctors, which included MRIs, physical therapy, injection therapy, referrals, use of a knee brace, and recommendations for surgery.

¶ 16 The Commission found that, at the time of the hearing, plaintiff had not yet undergone surgery "for various reasons, including a complication with her medications and a miscommunication with scheduling," but intended to do so. The Commission also found plaintiff had not looked for work, or "worked in any capacity," since 15 November 2016. The Commission made no findings pertaining to the medical records included in plaintiff's exhibits regarding plaintiff's work status as being described as "[u]nable to work secondary to dysfunction."

¶ 17 Then, the Commission found, "[b]ased upon the preponderance of the evidence in view of the entire record," that plaintiff's "low back and right knee conditions and current need for treatment [we]re causally related to her incident at work on November 4, 2016." It further found that plaintiff's "treatment for her low back and right knee conditions, and her need for additional treatment, [were] reasonably necessary to effect a cure or provide relief of [her] conditions." The Commission then found that, although plaintiff "ha[d] some work restrictions related to her low back and right knee conditions[,] . . . she is not restricted from all work."

¶ 18 The Commission concluded plaintiff's 4 November 2016 incident constituted an "accident" under North Carolina law, and that plaintiff had "met her burden of proving a causal relationship between her

medical conditions and the accident." Thus, "plaintiff [wa]s entitled to payment of medical treatment for her right knee and low back conditions, including pain management for her low back and orthopedic treatment for her right knee, for so long as such treatment is reasonably necessary to either effect a cure or provide relief."

¶ 19 Next, the Commission addressed the issue of whether plaintiff had met her burden of proving she had a disability as a result of her injuries. The Commission stated: "The burden of proof rests with [p]laintiff to establish disability as a result of her compensable injury." Then, citing *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982), it continued: "To satisfy this burden, [p]laintiff must show that, due to her compensable injury, she is incapable of earning her pre-injury wages in her pre-injury job or any other form of employment."

¶ 20 The Commission listed the following four factors, as provided by *Russell v. Lowes Prod. Distrib.*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993) (the "*Russell* factors") as what plaintiff may use "to establish disability":

> (1) the production of medical evidence that [plaintiff] is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that [s]he is capable of some work, but that [s]he has, after a reasonable effort on [her] part, been unsuccessful in [her] effort to obtain employment; (3) the production of evidence that [s]he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that [s]he has obtained other employment at a wage less than that earned prior to the injury.

(Alterations in original.) Then, however, the Commission followed this by stating: "The *Russell* factors are not exhaustive and do not preclude the Commission from considering other means of satisfying the ultimate standard of disability set forth in *Hilliard*."

¶ 21 The Commission found that plaintiff "failed to establish that she conducted a reasonable job search after she was placed on unpaid medical leave by Defendant-Employer," "ha[d] not worked in any other employment since November 15, 2016, and . . . *has not otherwise presented evidence to establish disability*." (Emphasis

added.) Accordingly, the Commission concluded that plaintiff "was not entitled to disability compensation."

¶ 22 The Commission awarded plaintiff that defendant-employer "pay for all medical treatment incurred or to be incurred for [p]laintiff's compensable right knee and low back conditions . . . for so long as such treatment is reasonably necessary to either effect a cure or provide relief." Then, the Commission denied "plaintiff's claim for temporary total disability compensation[,]" as well as plaintiff's request for attorney's fees and defendant-employer's motion to dismiss.

¶ 23 Plaintiff filed written notice of appeal on 29 March 2021.

II. Discussion

¶ 24 "Our review of an opinion and award of the Commission is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Griffin v. Absolute Fire Control, Inc.*, 269 N.C. App. 193, 198, 837 S.E.2d 420, 424 (2020) (citation and quotation marks omitted), *discretionary review improvidently allowed*, 376 N.C. 727, 2021-NCSC-9. "The findings of fact made by the Commission are conclusive on appeal if supported by competent evidence even if there is evidence to support a contrary finding." *Id.* (citation and quotation marks omitted). "The Commission's conclusions of law are reviewed *de novo*." *Id.*, 837 S.E.2d at 425 (citation omitted).

¶ 25 Plaintiff argues the Commission's findings of fact are insufficient to support, and for this Court to review, the conclusion that plaintiff did not meet her burden of proving disability. Specifically, plaintiff argues "the entire record contains evidence of the futility of making [plaintiff] look for work[,] considering her restrictions from the injury combined with preexisting factors unrelated to the injury[,] under the third *Russell* method." Accordingly, plaintiff requests this Court to remand to the Commission for further findings of fact. We agree.

¶ 26 "The term 'disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2021). "Under *Russell*," specifically the third *Russell* factor, "an employee may meet h[er] burden of proving disability by showing 'the employee is capable of some work, but that it would be *futile* because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment.' " *Griffin*, 269 N.C. App. at 202, 837 S.E.2d at 427 (emphasis added) (quoting *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457).

¶ 27 In *Griffin*, we reviewed the Commission's opinion and award in which it had found as fact that the plaintiff in question was 49 years old, had a ninth-grade education, had worked "primarily in the construction industry building houses or as a pipefitter[,]" had been assigned "permanent restrictions of no lifting more than twenty pounds, alternate sitting and standing, no bending, and to wear a brace while working[,]" and at times had needed to "leave work because of increased pain." *Id.* at 203, 837 S.E.2d at 427-28. Then, in the same award and order, the Commission, "[b]ased upon a preponderance of the evidence in view of the entire record," concluded that the plaintiff had not shown he was disabled, because "[*n*]*o evidence* was presented that [the] [p]laintiff [wa]s capable of some work, but that seeking work would be futile because of preexisting conditions, such as age, inexperience, or lack of education . . . ." *Id.*, 837 S.E.2d at 427 (emphasis added).

¶ 28 This Court made note of the discord between the Commission's findings of fact and its conclusion, stating: "It is unclear how the Commission concluded that [the] [p]laintiff presented 'no evidence' on futility given its findings reflect factors our appellate courts have found to support a finding of futility." *Id.*, 837 S.E.2d at 428.

¶ 29 In fact, in *Griffin*, this Court listed a myriad of examples of cases in which our appellate courts have previously found evidence tending to prove a plaintiff's disability by way of futility under *Russell*, including: *Thompson v. Carolina Cabinet Co.*, 223 N.C. App. 352, 734 S.E.2d 125 (2012), in which the plaintiff in question "was 45 years old, had only completed high school, [had] work experience . . . limited to heavy labor jobs, and . . . was restricted to lifting no more than 15 pounds"; *Johnson v. City of Winston-Salem*, 188 N.C. App. 383, 656 S.E.2d 608 (2008), in which an "effort to obtain sedentary light-duty employment, consistent with doctor's restrictions, would have been futile given [the] plaintiff's limited education, limited experience, limited training, and poor health"; and *Weatherford v. Am. Nat'l Can Co.*, 168 N.C. App. 377, 607 S.E.2d 348 (2005), in which the plaintiff in question "was 61, had only a GED, had worked all of his life in maintenance positions, was suffering from severe pain in his knee, and was restricted from repetitive bending, stooping, squatting, or walking for more than a few minutes at a time." *Griffin*, 269 N.C. App. at 202, 837 S.E.2d at 427.

¶ 30 In *Griffin*, this Court concluded that "the Commission's conclusion that there was no evidence to support [the] [p]laintiff's claim of futility reflects a misapplication of the governing precedent and is undermined by its own findings (or lack thereof)." *Id.* at 204, 837 S.E.2d at 428. Accordingly, we reversed and remanded the opinion in part "for

additional findings as to whether [the] [p]laintiff made a showing of disability[,] since the only factual findings in the record [we]re consistent with a conclusion of disability under the futility method from *Russell*." *Id.* at 207, 837 S.E.2d at 430.

¶ 31 Plaintiff's case is analogous. Plaintiff introduced the following evidence of "preexisting conditions" before the Commission: that she was in her fifties at the time the hearings began, had been receiving Social Security disability benefits unrelated to the incident in question for several decades, and, in spite of her bachelor's degree, was working a part-time job in transportation earning $10.50 per hour, equivalent to less than minimum wage. *See id.* at 202, 837 S.E.2d at 427 (quoting *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457).

¶ 32 The record also reflects that, after incurring her injury, from November 2016 through November 2019, plaintiff received work restrictions, including to alternate between sitting and standing, to limit stooping, bending, and twisting, and to avoid lifting more than 20 pounds. Then, plaintiff underwent innumerable medical evaluations and procedures, including MRIs, referrals, physical therapy, injections, and the use of a brace, culminating in a need for surgery. Furthermore, plaintiff continued to suffer persistent and worsening pain, with her knee frequently giving way.

¶ 33 Despite the Commission considering all of the above as findings of fact, it concluded that plaintiff had "*not otherwise presented evidence to establish disability*." (Emphasis added.) Moreover, the Commission made no findings whatsoever regarding plaintiff's exhibits containing copies of medical records in which plaintiff's "work status" following her injury was labeled as "[u]nable to work secondary to dysfunction."

¶ 34 The Commission's conclusion that plaintiff presented no evidence of disability ignores the evidence plaintiff actually introduced during both hearings. In addition to this mistake, the Commission failed to consider whether plaintiff had, under *Russell*, met her burden of establishing her disability by showing that, though she was capable of some work following her injury, it would be futile to seek other employment at the time due to preexisting conditions, such as age, inexperience, lack of education, or a previous disability. *See Griffin*, 269 N.C. App. at 202, 837 S.E.2d at 427 (quoting *Russell*, 108 N.C. App. at 766, 425 S.E.2d at 457).

¶ 35 "[G]iven its findings reflect factors our appellate courts have found to support a finding of futility[,]" and the fact that the Commission itself cited the futility method under *Russell* as a means by which a plaintiff may show disability, we are unable to reconcile the Commission's

findings, "or lack thereof[,]" to its conclusion that plaintiff failed to present *any* evidence showing disability. *See id.* at 203-204, 837 S.E.2d at 428. Accordingly, we must vacate the opinion and award and remand for additional findings as to whether, under *Russell*, the evidence plaintiff presented is sufficient to establish disability by way of futility. *See id.* at 207, 837 S.E.2d at 430.

III. Conclusion

¶ 36 We vacate and remand to the Commission to make further findings under the *Russell* tests.

VACATED AND REMANDED.

Judges INMAN and HAMPSON concur.

DONNA SPLAWN SPROUSE, Employee, Plaintiff
v.
TURNER TRUCKING COMPANY, Employer, and ACCIDENT FUND GENERAL INSURANCE COMPANY, Carrier, Defendants

No. COA20-874

Filed 18 January 2022

Workers' Compensation—lack of written notice of injury—delay in treatment—excuse—prejudice

Where plaintiff-employee was injured in a serious accident while driving a tractor trailer for defendant-employer, and more than a year later underwent corrective spinal surgery—without first providing written notice of her injury or treatment to defendant—the opinion and award entered by the Industrial Commission in plaintiff's favor was reversed. The Commission's conclusion that plaintiff's condition was causally related to her work accident was not supported by the findings of fact (plaintiff had a pre-existing back condition); plaintiff failed to show a reasonable excuse for failing to timely notify defendant of her injury and failed to show that defendants were not thereby prejudiced; and the date of disability determined by the Commission was unsupported by the findings of fact (it should have begun the date the doctor recommended that she stop working).

Judge JACKSON dissenting.

Appeal by defendants from opinion and award entered 10 September 2020 by the North Carolina Industrial Commission. Heard in the Court of Appeals 21 September 2021.

Roberts Law Firm, P.A., by Scott W. Roberts, for plaintiff-appellee.

Holder Padgett Littlejohn + Prickett, LLC, by Laura L. Carter, for defendants-appellants.

TYSON, Judge.

I. Background

¶ 1 Donna Sprouse ("Plaintiff") has been employed as a long-haul tractor trailer driver by the Mary B. Turner Trucking Company, LLC ("Defendant-Employer") for more than 18 years. The Accident Fund General Insurance Company ("Defendant Carrier") provides workers compensation coverage for Defendant-Employer (together "Defendants"). Plaintiff's husband ("Mr. Sprouse") is also employed by Defendant-Employer.

¶ 2 On 24 September 2016, Plaintiff was driving a tractor trailer for Defendant-Employer when the front right tire suddenly blew out. The tractor trailer crashed into an embankment on the side of the road. The truck remained upright, while the trailer turned onto its side. Plaintiff's head was severely jerked in the crash and her glasses and headset flew off. Mr. Sprouse, who was also inside the truck, suffered a foot and shoulder injury. Mr. Sprouse underwent shoulder surgery after the accident, and neither Plaintiff nor Mr. Sprouse worked from 24 September 2016 to January 2017. Plaintiff verbally notified Defendant of the accident the day it happened.

¶ 3 Plaintiff experienced pain and soreness and visited, E. Gantt, ANP-C ("Nurse Gantt"), two days after the accident. Plaintiff reported all-over soreness, but particularly in her neck and back, muscle spasms from her mid to low back, and pain in her right buttock down to her foot. Nurse Gantt prescribed Plaintiff an anti-inflammatory and muscle relaxer for her pain. On 13 October 2016, Plaintiff presented for a follow-up appointment with Nurse Gantt and appeared to be improving. Plaintiff testified that she was still experiencing neck, shoulder, and leg pain at that time. Plaintiff did not provide written notice of her injury by accident to Defendant or that she was seeking or undergoing medical treatment.

¶ 4 Plaintiff's pain continued to worsen after the 13 October appointment. Plaintiff's history of intermittent sciatica had never caused her to miss significant time at work prior to the accident. Plaintiff did not complain to Nurse Gantt about experiencing pain at her 26 January 2017, 13 February 2017, or 18 May 2017 appointments. Plaintiff testified she believed the pain was caused by her history of sciatica and was unrelated to the work accident.

¶ 5 On or about 28 September 2017, approximately about one year following the accident, Plaintiff presented for another appointment with Nurse Gantt. Plaintiff complained of constant weakness in her arms, with a numbness and tingling sensation in her fingers and reported persistent pain in her cervical and lumbar spine. Nurse Gantt believed Plaintiff's symptoms resembled cervical pain and acute left lumbar radiculopathy and she referred Plaintiff for a lumbar and cervical spine MRI. Plaintiff stopped working after this appointment and filed for short-term and long-term disability. This disability she filed for in September 2017 was apparently unrelated to the one at issue in this case. The Commission found Plaintiff was unable to work from 28 September 2017 until 21 April 2018 when she returned to work for Defendant.

¶ 6 On 29 November 2017, Plaintiff returned to Nurse Gantt and reported the same cervical and lumbar pain, in addition to her dragging her leg when walking. An MRI of Plaintiff's lumbar spine, taken on 7 December 2017, exhibited spinal stenosis. Plaintiff reported that she had fallen twice since her last visit because her leg gave way at a follow-up appointment. Nurse Gantt referred Plaintiff to Dr. M.J. McGirt, a neurosurgeon and practitioner in spinal neurosurgery. Defendants were not aware of any of these complaints or treatments, nor of Nurse Gantt's referral to Dr. McGirt.

¶ 7 Plaintiff presented to Dr. McGirt on 27 December 2017. Dr. McGirt recommended and referred her for another MRI of Plaintiff's cervical spine, suspecting cervical stenosis after a physical examination. On 8 January 2018, Plaintiff's cervical MRI showed multiple spinal disc extrusions, and spinal abnormalities including neural foraminal stenosis. Defendants were not informed of this treatment or referral.

¶ 8 On 10 January 2018, Dr. McGirt explained the MRI results to Plaintiff and recommended corrective surgery. He noted Plaintiff "definitely has myelopathy with weakness in her hands[,] numbness in her hands[,] dropping things[,] and significant gait abnormalities all which progressed over the last year." Dr. McGirt opined Plaintiff's

symptoms would worsen without surgery, given the severity of her spinal cord condition.

¶ 9 On 12 February 2018, Dr. McGirt performed a two-level anterior cervical discectomy and fusion on Plaintiff and removed "two large, herniated discs which had herniated back and compressed the spinal cord." He "rebuilt that by putting in two cages and some screws and a plate to hold that together for the two-level fusion." The surgery was successful. At Plaintiff's 17 April 2018 check up with Dr. McGirt, she felt stronger and reported no neck pain. Dr. McGirt released Plaintiff from her work restrictions, and on 21 April 2018, Plaintiff returned to work with Defendant-Employer.

¶ 10 Plaintiff submitted a post-surgical claim for her asserted work injury to Defendant-Carrier on 20 February 2018, while she was recovering from her spinal surgery. She told the adjuster she did not report an injury following the 24 September 2016 accident because she did not believe her injuries were that serious and presumed her claim would be dropped at that time.

¶ 11 Deputy Commissioner A.W. Bruce filed an Opinion and Award in favor of Plaintiff on 22 May 2019. Defendants appealed. After hearing the parties' arguments on 15 October 2019, the Full Commission entered an Opinion and Award affirming Deputy Commissioner Bruce's decision. The Commission made the following relevant findings of fact:

> 21. At his deposition, Dr. McGirt testified that the symptoms documented in Plaintiff's medical records prior to September 24, 2016, were different from neurological dysfunction and loss of function (i.e. "weaknesses and numbness") for which he treated Plaintiff. Dr. McGirt further opined that it was more likely than not that the September 24, 2016 tractor trailer wreck caused the two levels of herniated discs in Plaintiff's spine and that the herniations necessitated the surgery he performed. . . .
>
> 22. According to Dr. McGirt, Plaintiff was "pretty tough because . . . she had some pretty darn significant weakness that she was not coming in and screaming nor did we have a long drawn out workers [sic] comp conversation nor a causation conversation." Dr. McGirt further testified that "she didn't realize that she had a spinal cord issue" and that such

> a delay in symptoms is not "out of the realm of what we typically see in spinal cord compression."
>
> 23. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff sustained an injury by accident arising out of and in the course of her employment with Defendant-Employer when she was injured in the wreck of September 24, 2016. . . .
>
> 24. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds the medical treatment Plaintiff received from Dr. McGirt was reasonable and necessary to effect a cure, give relief, and lessen the period of disability from the cervical spine injury Plaintiff sustained on September 24, 2016.
>
> 25. Based upon the preponderance of the evidence in view of the entire record, the Full Commission finds that Plaintiff was unable to work from September 28, 2017 until April 21, 2018, the date she returned to work for Defendants.

¶ 12 The Commission concluded: (1) Plaintiff's injury was caused by the September 2016 accident; (2) Plaintiff had reasonable excuse for her delayed written notice; (3) Defendants were not prejudiced by the delay; and, (4) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018. The Commission made the following specific conclusions of law:

> 2. . . . the greater weight of the credible evidence establishes that Plaintiff's cervical spine injury was caused by Plaintiff's September 24, 2016 work accident. N.C. Gen. Stat. § 97-2(6) (2019).
>
> . . .
>
> 4. . . . Plaintiff had reasonable excuse for not providing written notice within 30 days because Plaintiff communicated with her employer on the date of the accident and because she did not reasonably know of the nature or seriousness of her injury immediately following the accident.
>
> 5. . . . Defendants have failed to show prejudice resulting from the delay in receiving written notice because

> Defendant-Employer had actual, immediate notice of Plaintiff's accident on the day of the accident. The actual notice provided to Defendant-Employer allowed ample opportunity to investigate Plaintiff's condition following the violent truck accident and direct Plaintiff's medical care. Thus, Defendants were not prejudiced by the delay in receiving written notice. Because Plaintiff has shown a "reasonable excuse" for not providing written notice of her accident to Defendants within 30 days, and because the evidence of record fails to show Defendants were prejudiced by not receiving written notice within 30 days, Plaintiff's claim is not barred pursuant to N.C. Gen. Stat. § 97-22 (2019).
>
> 6. . . . Dr. McGirt opined that Plaintiff was unable to work from September 27, 2017 to April 20, 2018, which prevented her from working at her job as a long-haul tractor trailer driver or any other employment. Plaintiff was temporarily totally disabled from September 28, 2017 until April 21, 2018.

Defendants timely filed notice of appeal.

II. Jurisdiction

¶ 13 This appeal is properly before this Court pursuant to N.C. Gen. Stat. § 97-86 (2021).

III. Issues

¶ 14 Plaintiff raises six issues on appeal. We have consolidated them into three issues: (1) whether Plaintiff failed to establish her condition is causally related to the trucking accident; (2) whether Plaintiff provided timely notice to her employer; and, (3) whether Plaintiff's disability began when her physician removed her from work.

IV. Analysis

A. Standard of Review

¶ 15 Plaintiff bears the burden of proving a causal relationship between the injury and work-related incident for compensability by a preponderance of the evidence under the worker's compensation statute. *Whitfield v. Laboratory Corp. of Am.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). Plaintiff's "evidence must be such as to take the case out of the realm of conjecture and remote possibility" to carry her burden

to prove causation. *Id.* at 350, 581 S.E.2d at 785 (citation and internal quotation marks omitted).

¶ 16 Where the evidence is stipulated, or the facts are uncontroverted, there are no credibility determinations for the Commission to make. The Commission's conclusions must be based upon the proper application of those facts to the statute. *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 433-34, 144 S.E.2d 272, 274 (1965) ("The Commission is the sole judge of the credibility of the witnesses and weight to be given their testimony.").

¶ 17 We review the Commission's conclusions of law and statutory interpretations *de novo*. *See Clark v. Burlington Industries., Inc.*, 78 N.C. App. 695, 698, 338 S.E.2d 553, 555 (1986) ("While the Industrial Commission's interpretation of [N.C. Gen Stat.] 97-53(28) is entitled to due consideration, the final say rests with the courts." (citation omitted)).

B. Causal Relation

¶ 18 Defendants argue that the Commission erred by concluding: (1) Plaintiff's injury was caused by the 24 September 2016 accident; (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018; and, (3) Plaintiff had reasonable excuse for her delayed written notice, which did not prejudice Defendants.

¶ 19 It is uncontested Plaintiff suffers from a long history of back, neck, and limb pain. Prior to the accident, Plaintiff suffered from a documented history of intermittent sciatica. Two days after the 26 September 2016 accident, Plaintiff reported soreness in her neck and back, muscle spasms from her mid-to-low back, and pain in her right buttock down to her foot. Despite these complaints, Plaintiff failed to provide written notice of her injury by accident to Defendants within 30 days as is statutorily required pursuant to N.C. Gen. Stat. § 97-22.

¶ 20 Plaintiff did not present nor complain to Nurse Gantt about the pain at her next three visits on 26 January 2017, 13 February 2017, or 18 May 2017. Plaintiff now asserts she believed the pain was caused by her history of sciatica and it was unrelated to the work accident. *More than a year after* the accident on 28 September 2017, Plaintiff attended another appointment with Nurse Gantt. Plaintiff did not consult Dr. McGirt until 27 December 2017. Defendants were never put on notice of these complaints or treatments.

¶ 21 Defendants argue Dr. McGirt's treatment was only related to Plaintiff's long history of chronic back and neck pain. Dr. McGirt also testified he knew from Plaintiff's records that she had a history

of pre-existing neck and back discomfort. Uncontested facts show Plaintiff's chronic medical conditions pre-existed the work accident. Plaintiff's argument is overruled.

C. Timely Notice

1. 30 Days

¶ 22 Plaintiff is statutorily required to have provided written notice of her injury by accident to Defendants within thirty days pursuant to N.C. Gen. Stat. § 97-22.

¶ 23 N.C. Gen. Stat. § 97-22 provides:

> Every injured employee . . . *shall immediately* on the occurrence of an accident, or as soon thereafter as practicable, *give or cause to be given* to the employer a *written notice of the accident*, and the *employee shall not be entitled to physician's fees nor to any compensation* which may have accrued under the terms of this Article prior to the giving of such notice, unless it can be shown that the employer . . . had knowledge of the accident, . . . *but no compensation shall be payable unless such written notice is given within 30 days after the occurrence of the accident* or death, unless reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice and the Commission is satisfied that the employer has not been prejudiced thereby.

N.C. Gen. Stat. § 97-22 (2021) (emphasis supplied).

¶ 24 Our Supreme Court reviewed this statute and held the "purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *Booker v. Duke Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979).

¶ 25 The evidence and record are uncontested that Plaintiff failed to provide timely notice, despite asserting a timely written notice and claim for her husband, who was injured in the same accident. Under the statute, Plaintiff is also required to provide a "reasonable excuse" for not so providing timely notice within thirty days, and must also show Defendants were not prejudiced by Plaintiff's admitted failure to provide

her employer written notice within thirty days. Otherwise, the statute provides "*no compensation shall be payable*," and Plaintiff's claim is barred pursuant to N.C. Gen. Stat. § 97-22.

2. Prejudice

¶ 26 Defendants argue they were prejudiced by Plaintiff's lack of notice and delays in two ways: (1) "by forcing a course of treatment that may not have been required, as [Plaintiff's] cervical stenosis began in 2010;" and, (2) lack of written notice of injury until 471 days after the accident is prejudicial "regardless of the circumstances." The Commission erred by not applying and enforcing the plain statutory written notice mandate and by shifting the burden from Plaintiff onto Defendants to prove they were prejudiced by Plaintiff's failure after more than a year and four months to comply with the clear timelines and mandates of the statute. *See* N.C. Gen. Stat. § 97-22.

¶ 27 Under *de novo* review, the Commission's conclusions: (1) Plaintiff's injury was caused by the 24 September 2016 accident; (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018; and, (3) Plaintiff had reasonable excuse for her 471 days delayed written notice of accident, which did not prejudice Defendants are erroneous. These conclusions are not supported by the uncontested and admitted facts and by its findings of fact.

¶ 28 There are no credibility determinations for the Commission to make when stipulated, objective, and uncontested facts and evidence are admitted, and the statutory mandates are clear and unambiguous. If the General Assembly had not considered the statutory 30 days written notice to be mandatory and enforced as a matter of public policy, verbal or actual notice to the employer alone under the statute would be sufficient. The statute allows the Plaintiff to show a "reasonable excuse" and no prejudice incurred by the Defendants as a failsafe to the otherwise mandatory notice timelines. *Id.*

¶ 29 Prejudice is also shown when a defendant is deprived of the opportunity to manage a plaintiff's medical care and treatment and provide early and timely intervention, diagnosis, and treatment. Plaintiff's long 471 days after-the-fact claim for compensation and payment to a non-approved heath care providers for non-authorized treatments is clearly not allowed under the statute. N.C. Gen. Stat. § 97-22. The record shows no evidence was admitted to support their finding Defendants were not prejudiced by Plaintiff's 471-day-failure to provide the statutory written notice.

D. Disability Date

¶ 30 The plaintiff carries and retains the burden of proving disability by the greater weight of the evidence. *Clark v. Wal-Mart*, 360 N.C. 41, 44-45, 619 S.E.2d 491, 493 (2005). "[D]isability [is defined as] the impairment of the injured employee's earning capacity rather than physical disablement." *Russell v. Lowes Product Distribution*, 108 N.C. App. 762, 765, 425 S.E.2d 454, 457 (1993).

> "[T]o support a conclusion of disability, the Commission must find: (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment, (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Hilliard v. Apex Cabinet Co., 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982).

¶ 31 The Commission erred by concluding Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018. Plaintiff did not consult Dr. McGirt until 27 December 2017. Dr. McGirt's testimony and medical records confirm he was unaware of the 24 September 2016 accident at the time he treated Plaintiff more than a year later. Dr McGirt also testified he knew from Plaintiff's complaints and records that she had a pre-existing history of neck and back pain. Dr. McGirt recommended Plaintiff stop working on 8 January 2018. Plaintiff was only disabled from 10 January 2018 to 21 April 2018.

V. Conclusion

¶ 32 The Full Commission's conclusion that Plaintiff's condition was causally related to her 24 September 2016 injury is unsupported by its findings of fact. Plaintiff failed to show a reasonable excuse for failing to timely notify her employer of her injury and that Defendants were not prejudiced by the 471 days delayed injury report. Defendants were unable to provide timely diagnosis and treatment to Plaintiff in the absence of statutory notice. Undisputed facts show Plaintiff was only disabled from 10 January 2018 to 21 April 2018. The opinion and award of the Commission is reversed and remanded. *It is so ordered.*

REVERSED AND REMANDED.

Judge GORE concurs.

Judge JACKSON dissents with separate opinion.

JACKSON, Judge, dissenting.

¶ 33 Defendants appeal from the Commission's Opinion and Award in favor of Plaintiff. The majority reverses the Commission, holding that the Commission's findings do not support its conclusions. I believe the majority misapplies the standard of review and would affirm the Commission's Opinion and Award. Therefore, I respectfully dissent.

I. Background

¶ 34 Except where noted below, I agree with the facts as described by the majority.

II. Standard of Review

¶ 35 The North Carolina Industrial Commission is the "sole judge" of the weight and credibility of evidence in worker's compensation disputes. *Deese v. Champion Int'l Corp.*, 352 N.C. 109, 115, 530 S.E.2d 549, 552 (2000). *See also* N.C. Gen. Stat. § 97-86 (2021) ("The award of the Industrial Commission . . . shall be conclusive and binding as to all questions of fact[.]"). Therefore, this Court's role on appeal is limited to reviewing "(1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are justified by the findings of fact." *Clark v. Wal-Mart*, 360 N.C. 41, 43, 619 S.E.2d 491, 492 (2005). This Court does not reweigh evidence on appeal. *Adams v. AVX Corp.*, 349 N.C. 676, 681, 509 S.E.2d 411, 414 (1998) ("The court's duty goes no further than to determine whether the record contains *any* evidence tending to support the finding.") (emphasis added). All evidence is viewed in the light most favorable to the plaintiff, with every inference in her favor. *Deese*, 352 N.C. at. 115, 530 S.E.2d at 553.

¶ 36 In my opinion, for much of its opinion, the majority applies a different standard of review and improperly reweighs the evidence all in favor of Defendants.

III. Analysis

¶ 37 On appeal, Defendants argue that the Commission erred by concluding that (1) Plaintiff's injury was caused by the 24 September 2016 accident, (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018, and (3) Plaintiff had reasonable excuse for her delayed written notice, which did not prejudice Defendant-Employer. I disagree and would affirm the Commission's conclusions.

A. Cause of Plaintiff's Injury

¶ 38 Defendants argue that the Commission erred in finding that Plaintiff's injury was caused by the September 2016 accident, effectively challenging finding 23 and conclusion two. I disagree and would affirm both.

¶ 39 The plaintiff in a worker's compensation case bears the burden of proving a causal relationship between the injury and work-related incident for compensability. *Whitfield v. Lab'y Corp.*, 158 N.C. App. 341, 350, 581 S.E.2d 778, 784 (2003). To establish causation, "the evidence must be such as to take the case out of the realm of conjecture and remote possibility." *Id.* at 350, 581 S.E.2d at 785 (internal quotation and citation omitted). "[W]here the exact nature and probable genesis of a particular type of injury involves complicated medical questions far removed from the ordinary experience and knowledge of laymen, only an expert can give competent opinion evidence as to the cause of the injury." *Click v. Pilot Freight Carriers, Inc.*, 300 N.C. 164, 167, 265 S.E.2d 389, 391 (1980) (citation omitted).

¶ 40 Here, in arguing that Plaintiff's injury was not caused by the September 2016 work accident, Defendants point to Plaintiff's long history of back, neck, and limb pain. Defendants theorize that Plaintiff's injury pre-existed the work accident and argue that this theory is supported by Dr. McGirt's testimony and medical records, where he admitted that he was unaware of the September 2016 accident at the time he treated Plaintiff and knew from Plaintiff's records that she had a history of neck and back discomfort. Defendants further contend that "Dr. McGirt's treatment was only related to [Plaintiff's long history of] chronic back and neck pain."

¶ 41 The majority agrees with Defendants and this argument. I believe this argument should be rejected because it improperly asks this Court to reweigh evidence on appeal. As described *supra*, the Commission found that Plaintiff's injury was caused by the 24 September 2016 accident. Because Plaintiff's injury involves complicated medical questions, "only an expert can give competent opinion evidence as to the cause of the injury." *Click*, 300 N.C. at 167, 265 S.E.2d at 391.

¶ 42 In his deposition, Dr. McGirt testified that Plaintiff's spinal cord injury was more likely than not caused by the September 2016 accident. Although Dr. McGirt did not discuss causation with Plaintiff at her appointments, Dr. McGirt based his opinion on the fact that Plaintiff's "spinal cord compression from [] two very large disc herniations[] had to have come from a more sizable injury" and the September 2016 accident

was the most fitting injury in her recent history. Dr. McGirt opined that this type of spinal cord injury, which he deals with frequently, can often take one to two years to become symptomatic. Dr. McGirt was continually asked in his deposition whether Plaintiff's medical history of back, neck, or limb pain impacted his opinion about the underlying cause of Plaintiff's spinal cord injury. Dr. McGirt repeatedly replied that it did not change his opinion on causation because "pain syndrome [is] very different than what [he] was treating which was neurological dysfunction and loss of function." Defendants fail to mention any of this evidence in their brief, despite their contention that Dr. McGirt's testimony supports their argument, and the majority similarly ignores this record evidence, despite concluding that the Commission's causation finding was unsupported.

¶ 43 I would therefore hold that the Commission's finding that Plaintiff's injury was caused by the September 2016 accident was supported by competent evidence in the form of Dr. McGirt's expert medical testimony, and the Commission did not err in concluding that the causation requirement for compensability was satisfied.

B. Length of Plaintiff's Disability

¶ 44 Defendants next argue that the Commission erred in finding that Plaintiff's disability began on 28 September 2017, at the onset of her spinal compression symptoms, and argue instead that Plaintiff's disability began on 10 January 2018, when Dr. McGirt put Plaintiff on work restrictions. Defendants therefore effectively challenge finding 25 and conclusion six.

¶ 45 Under the North Carolina Workers' Compensation Act, disability is defined as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C. Gen. Stat. § 97-2(9) (2021). The burden of proving disability is on the plaintiff. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). In order to conclude that a disability existed, the Commission must find

> (1) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in the same employment,
>
> (2) that plaintiff was incapable after his injury of earning the same wages he had earned before his injury in any other employment, and

> (3) that this individual's incapacity to earn was caused by plaintiff's injury.

Id. (citation omitted).

¶ 46 Here, Defendants argue that the first prong is not satisfied, because Plaintiff was not under work restrictions until her appointment with Dr. McGirt on 10 January 2018, and Nurse Gantt did not put restrictions on Plaintiff's ability to work at her 28 September 2017 appointment. However, Defendants again improperly ask this Court to reweigh evidence and ignore the expert opinion of Dr. McGirt, which was relied upon by the Commission in its findings.

¶ 47 Finding 21, which is uncontested and binding on appeal, establishes that it was Dr. McGirt's expert opinion that Plaintiff was unable to work when she reported numbness and weakness at her 28 September 2017 appointment with Nurse Gantt. In its statement of the facts, the majority omits and ignores a portion of finding 21 which states that "Dr. McGirt also testified Plaintiff would have been unable to work from September 28, 2017, when Plaintiff began experiencing numbness and weakness." In support of this finding, Dr. McGirt testified,

> I mean she should not have been working. Any patient who has that degree of spinal cord compression should not be working and if they are able to do it it's just out of dedication and determination to do it. I mean that's a major problem. So was she physically capable to drive a car? I believe she was physically capable to drive a car but the standard of care in neurosurgery or orthopedic spine surgery is somebody with severe cervical stenosis from disc herniations should not be allowed to drive those cars or professionally go back to work until they're fixed.

Therefore, even though Plaintiff was not formally diagnosed and restricted from working by Dr. McGirt until 10 January 2018, it was Dr. McGirt's opinion that Plaintiff was unable to work at the onset of her symptoms, due to the severity of her injury. This evidence is competent to support the Commission's finding that Plaintiff was unable to work beginning on 28 September 2017, and this finding supports the Commission's conclusion that Plaintiff's temporary disability began on 28 September 2017. I would therefore affirm the Commission's disability conclusion.

¶ 48 The majority appears to adopt Defendants' theory that "Dr. McGirt's treatment was only related to [Plaintiff's long history of] chronic back

and neck pain[,]" stating that "[u]ncontested facts show Plaintiff's chronic medical conditions pre-existed the work accident[,]" and "Dr. McGirt also testified he knew from Plaintiff's records that she had a history of pre-existing neck and back discomfort." However, in reaching this conclusion, I believe the majority mischaracterizes the record and misapplies the standard of review. While it's true that Plaintiff had chronic medical conditions prior to the work accident, the facts are certainly not "undisputed" that her injury at issue pre-existed the work accident. Moreover, even knowing about her pre-existing neck and back pain, Dr. McGirt specifically and repeatedly testified that Plaintiff's spinal cord compression injury "had to have come from a more sizable injury" and the existence of pre-existing pain did not change his opinion that the September accident caused her spinal injury because "pain syndrome [is] very different than what [he] was treating which was neurological dysfunction and loss of function."

C. Written Notice Requirement

¶ 49 Defendants' final argument is that (1) Plaintiff's compensation claim should be barred because she did not provide written notice of her injury to Defendant-Employer within 30 days pursuant to N.C. Gen. Stat. § 97-22, and (2) the Commission erred by finding that Plaintiff had reasonable excuse for her delayed written notice and Defendant-Employer was not prejudiced by the delay. Therefore, Defendants effectively challenge the Commission's conclusions four and five.

¶ 50 An injured employee involved in a work-related accident generally must give written notice of the accident to her employer within 30 days in order to receive compensation for the injury. N.C. Gen. Stat. § 97-22 (2021). The notice requirement can be waived by the Commission if (1) "reasonable excuse is made to the satisfaction of the Industrial Commission for not giving such notice" and (2) "the Commission is satisfied that the employer has not been prejudiced thereby." *Id.*

¶ 51 "A 'reasonable excuse' has been defined by this Court to include a belief that one's employer is already cognizant of the accident or where the employee does not reasonably know of the nature, seriousness, or probable compensable character of his injury and delays notification only until he reasonably knows." *Yingling v. Bank of Am.*, 225 N.C. App. 820, 828, 741 S.E.2d 395, 401 (2013) (internal quotation and citation omitted). The employee bears the burden of showing a reasonable excuse. *Id.* Either the employer's actual knowledge or the employee's lack of knowledge suffice to show reasonable excuse, but both are not required. *Id.* at 832, 741 S.E.2d at 403.

¶ 52 Even if the employee had a reasonable excuse, if the defendant-employer shows it was prejudiced by delayed notice, the employee's claim is barred. *Id.* at 832, 741 S.E.2d at 403-04. This Court has repeatedly held that "[a] defendant-employer bears the burden of showing that it was prejudiced." *See e.g.*, *id.* at 832, 741 S.E.2d at 403 (internal citation omitted); *Chavis v. TLC Home Health Care*, 172 N.C. App. 366, 378, 616 S.E.2d 403, 413 (2005); *Lakey v. U.S. Airways, Inc.*, 155 N.C. App. 169, 172-73, 573 S.E.2d 703, 706 (2002); *Peagler v. Tyson Foods, Inc.*, 138 N.C. App. 593, 604, 532 S.E.2d 207, 214 (2000). The majority incorrectly states that it is the Plaintiff's burden to prove Defendant-Employer was not prejudiced and that the Commission engaged in impermissible burden shifting.

¶ 53 With regard to prejudice, our Supreme Court has held that the "purpose of the notice-of-injury requirement is two-fold. It allows the employer to provide immediate medical diagnosis and treatment with a view to minimizing the seriousness of the injury, and it facilitates the earliest possible investigation of the circumstances surrounding the injury." *Booker v. Duke Medical Center*, 297 N.C. 458, 481, 256 S.E.2d 189, 204 (1979). The Commission's conclusion that an employer was not prejudiced can be supported by findings showing that the "purpose[] of the notice requirement [was] vindicated[.]" *Gregory v. W.A. Brown & Sons*, 363 N.C. 750, 762, 688 S.E.2d 431, 439 (2010). The purpose of the notice requirement is vindicated where the defendant-employer "had immediate, actual knowledge of the accident and failed to further investigate the circumstances surrounding the accident at that time." *Yingling*, 225 N.C. App at 834, 741 S.E.2d at 405 (citation omitted).

¶ 54 Here, it is uncontested that Plaintiff filed her disability claim after the 30-day statutory window. Therefore, I would only address conclusions four and five of the Commission, which are directly challenged by Defendants.

¶ 55 In conclusion four, which contains mixed findings of fact and law, the Commission concluded that Plaintiff had reasonable excuse for the delayed notice, finding both that Plaintiff reported the accident to Defendant-Employer on the day of the accident and that "she did not reasonably know of the nature or seriousness of her injury immediately following the accident." The finding that Plaintiff communicated with Defendant-Employer on the day of the accident is not challenged by Defendants on appeal and is therefore binding. The finding regarding Plaintiff's knowledge of her injury is supported by competent evidence, because Dr. McGirt testified that Plaintiff "didn't realize she had a spinal cord issue" at her appointments and Plaintiff told Defendant-Carrier that

she did not believe she was badly hurt immediately following the accident. The majority summarily concludes that "Plaintiff failed to show a reasonable excuse" without discussing the Commission's findings or corresponding evidence regarding Defendant-Employer's actual knowledge of Plaintiff's injury or Plaintiff's lack of knowledge of her injury's seriousness.

¶ 56 Defendants argue that Defendant-Employer should have been notified of Plaintiff's injury at the latest when Plaintiff was referred to Dr. McGirt in December 2017, because by then Plaintiff should have realized the seriousness of her injury. In essence, Defendants ask this Court to find as a fact that Plaintiff knew or should have known of the seriousness of her injury in December 2017, and therefore did not have a reasonable excuse to wait until February 2018 to report the injury. However, the Commission is the "sole judge" of the weight and credibility of witnesses on appeal, and this Court should decline to reweigh the evidence in Defendants' favor. Therefore, I would uphold the Commission's finding of reasonable excuse, because Defendant-Employer had actual notice of the accident and Plaintiff did "not reasonably know of the nature, seriousness, or probable compensable character of [her] injury and delay[ed] notification only until [she] reasonably [knew.]" *Yingling*, 225 N.C. App. at 828, 741 S.E.2d at 401.

¶ 57 In conclusion five, the Commission found that Defendants were not prejudiced by the delayed notice because "Defendant-Employer had actual, immediate notice of Plaintiff's accident on the day of the accident" which "allowed ample opportunity to investigate Plaintiff's condition following the violent truck accident and direct Plaintiff's medical care." Defendants do not contest the Commission's finding of actual notice, and therefore I would hold that it is binding on appeal.

¶ 58 Defendants argue that they were prejudiced in two ways: (1) "by forcing a course of treatment that may not have been required, as [Plaintiff's] cervical stenosis began in 2010," and (2) written notice of injury 471 days after the accident is prejudicial "regardless of the circumstances." I would decline to address the first argument, which is not supported by the Commission's binding factual finding that Plaintiff's injury was caused by the work accident, as discussed extensively above.

¶ 59 Defendant's second argument is unsupported by statute or case law. I would decline to create a *per se* rule of prejudice, which would abrogate the Commission's statutory role in evaluating prejudice on a case-by-case basis. Because I believe the Commission's finding of Defendant-Employer's actual notice is sufficient to vindicate the purpose

of the notice requirement, I would hold that this finding supported the conclusion that Defendants were not prejudiced.

¶ 60 In its recitation of the facts, the majority omits a portion of finding of fact 23, which states

> The Full Commission further finds that Defendant-Employer had actual notice of Plaintiff's September 24, 2016 injury by accident on or about September 24, 2016, when Plaintiff reported the wreck to Defendant-Employer, and that Plaintiff had reasonable excuse for the delay in providing written notice of her accident to Defendant-Employer as she did not reasonably know of the nature or seriousness of her injury immediately following the accident. The Full Commission further finds that Defendants failed to show they were prejudiced by any delay in the notice of Plaintiff's accident.

¶ 61 Thereafter, the majority holds that

> There are no "credibility determinations" for the Commission to make when undisputed facts and evidence are admitted, and the statutory mandates are clear and unambiguous. If the General Assembly had not considered the statutory 30 days written notice to be mandatory and enforced as a matter of public policy, verbal or actual notice to the employer alone under the statute would be sufficient. The statute allows the Plaintiff to show a "reasonable excuse" and no prejudice incurred by the Defendants as a fail-safe to the otherwise mandatory notice timelines.

¶ 62 Not only does the majority omit the Commission's finding of reasonable excuse, it also wholly ignores the law on "actual notice" as provided above, that the purpose of the notice requirement is vindicated where a defendant-employer "had immediate, actual knowledge of the accident and failed to further investigate the circumstances surrounding the accident at that time." *Yingling*, 225 N.C. App at 842, 741 S.E.2d at 405. Defendants never contest that they received actual notice, and the majority glosses over its significance in this case and its opinion.

¶ 63 Additionally, the majority, by improperly shifting the burden of disproving prejudice to Plaintiff, holds that "[t]he record shows no evidence was admitted to support [the Commission's] finding Defendants

were not prejudiced by Plaintiff's 471-day failure to provide the statutory written notice." However, as correctly noted by the Commission, Defendant-Employer is the one who has failed to admit evidence to prove prejudice, not Plaintiff. The Defendants did not offer any testimony to show that Plaintiff's course of treatment would have been different, or that surgery was avoidable, if she had provided written notice within the statutory window and likewise do not point to any record evidence to support their theory that Dr. McGirt "forc[ed] a course of treatment that may not have been required[.]" The majority holds that Defendant-Employer was deprived of the opportunity to manage Plaintiff's injury treatment by impliedly assuming that "early and timely diagnosis and treatment" would have been possible in this case. However, not only does this arguably engage in impermissible fact-finding solely in the province of the Commission, but the Commission specifically found, and competent record evidence supports, that the onset of Plaintiff's severe symptoms and loss of function, which signaled the need for further treatment, did not even begin until over a year after Plaintiff's work injury.

IV. Conclusion

¶ 64 For the foregoing reasons, I would affirm the Commission's conclusions that (1) Plaintiff's injury was caused by the 24 September 2016 accident, (2) Plaintiff was temporarily totally disabled from 28 September 2017 to 21 April 2018, and (3) Plaintiff had reasonable excuse for her delayed written notice, which did not prejudice Defendant-Employer. Accordingly, I respectfully dissent.

STATE EX REL. UTILS. COMM'N v. FRIESIAN HOLDINGS, LLC

[281 N.C. App. 391, 2022-NCCOA-32]

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF-NORTH CAROLINA UTILITIES COMMISSION, APPELLEES
v.
FRIESIAN HOLDINGS, LLC, PETITIONER; NORTH CAROLINA SUSTAINABLE ENERGY ASSOCIATION, INTERVENOR; AND NORTH CAROLINA CLEAN ENERGY BUSINESS ALLIANCE, INTERVENOR, APPELLANTS
v.
DUKE ENERGY PROGRESS, LLC AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, INTERVENORS

No. COA20-867

Filed 18 January 2022

1. Utilities—solar energy plant application—denied—merchant plant—no federal preemption

The decision of the Utilities Commission denying an independent energy company's application for a certificate of public convenience and necessity to build and operate a solar energy plant was not preempted by the Federal Power Act (which gives the Federal Energy Regulatory Commission (FERC) exclusive jurisdiction over wholesale rates), where the decision was based, in large part, on the upgrade costs that would be charged to ratepayers pursuant to FERC's crediting policy. Although the energy company sought to operate a merchant plant, which meant that it would sell its output exclusively at wholesale, the Utilities Commission retained sole authority to determine whether and where an energy-generating facility could be constructed.

2. Utilities—solar energy plant application—denied—cost analysis—potential future electricity generation—too speculative

The decision of the Utilities Commission denying an independent energy company's application for a certificate of public convenience and necessity to build and operate a solar energy plant was neither arbitrary and capricious nor unsupported by substantial evidence. Contrary to the energy company's argument on appeal, in its cost analysis the Commission did consider potential future electricity generation created by network upgrades—but it determined that the consideration was too speculative to support approval of the company's application.

3. Utilities—solar energy plant application—denied—need for facility—purchase power agreement—other factors

The decision of the Utilities Commission denying an independent energy company's application for a certificate of public convenience

and necessity to build and operate a solar energy plant was not rendered arbitrary and capricious by the fact that the Commission had never before denied a certificate application where a purchase power agreement (PPA) existed to demonstrate need. The Commission properly considered the existence of the PPA with the N.C. Electric Membership Corporation along with other factors, including the public interest and the economic viability of the project.

Judge MURPHY concurring by separate opinion.

Appeal by Petitioner and Intervenor-Appellants from order entered 11 June 2020 by the North Carolina Utilities Commission. Heard in the Court of Appeals 21 September 2021.

Fox Rothschild LLP, by Karen M. Kemerait, and Kilpatrick, Townsend & Stockton LLP, by Steven J. Levitas, Benjamin L. Snowden, and Adam H. Charnes, for Petitioner-Appellant.

Layla Cummings, Dianna W. Downey, and Robert B. Josey, Jr., for Appellee Public Staff-North Carolina Utilities Commission.

Benjamin W. Smith and Peter H. Ledford for Intervenor-Appellant North Carolina Sustainable Energy Association.

Adam Foodman and John D. Burns for Intervenor-Appellant North Carolina Clean Energy Business Alliance.

Nexsen Pruet PLLC, by David P. Ferrell, and Richard M. Feathers and Michael D. Youth, for Intervenor-Appellee North Carolina Electric Membership Corporation.

Jack E. Jirak for Intervenor Duke Energy Progress, LLC.

INMAN, Judge.

¶ 1 North Carolina has made significant strides in generating and employing alternatives to carbon-emitting fuels. We rank fourth in the nation in solar installations, with solar making up nearly eight percent of our state's electricity.[1] Our legislature has enacted clean energy goals

1. Solar Energy Industries Association (SEIA), *State Solar Spotlight: North Carolina Solar*, (Sept. 24, 2021), https://www.seia.org/sites/default/files/2021-09/North Carolina.pdf.

including a 70 percent reduction in carbon emissions by the year 2030 and carbon neutrality by 2050.[2] The southeastern region of the state, in particular, has attracted several solar energy facilities.[3] But growing production has strained the region's existing electric grid. A dispute over the cost and timing of upgrading the grid gives rise to this appeal.

¶ 2 Unlike other industrial and commercial enterprises, energy generation facilities can operate only as permitted by the North Carolina Utilities Commission ("the Commission"). N.C. Gen. Stat. § 62-110.1(a) (2019). This system of regulation is analogous to state law limiting medical facilities to providers who have obtained a certificate of need from the Department of Health and Human Services. *See* N.C. Gen. Stat. § 131E-175(7) (2019). Energy plants cannot spring up like many restaurants, fitness centers, or dry cleaners, even if consumer demand would support the increased supply. In this way, government regulation influences the energy market.

¶ 3 Petitioner-Appellant Friesian Holdings, LLC ("Friesian"), an independent energy company, seeks to generate additional solar energy in the southeast. Friesian applied to the Commission for a certificate of public convenience and necessity ("CPCN" or "certificate") to build and operate a solar energy plant, which would sell and distribute electricity through an existing electric grid. Citing the cost of upgrading the region's electric grid to accommodate additional transmission, the Commission denied Friesian's application. Friesian appeals, contending that the Commission's decision unfairly favors larger energy utilities and squelches competition, to the detriment of consumers.

¶ 4 Friesian presents three arguments on appeal: (1) federal law aimed at fostering free competition preempts the Commission's decision; (2) the Commission's cost analysis was unsupported by the evidence and was arbitrary and capricious; and (3) the Commission erred in concluding Friesian did not demonstrate a need for its facility. After careful review of the record and our precedent, we affirm the Commission.

---

2. *See* An Act to Authorize the Utilities Commission, S.L. 2021-951, § 1, https://www.ncleg.gov/Sessions/2021/Bills/House/PDF/H951v5.pdf.

3. In its order, the North Carolina Utilities Commission concluded, "[N]o party disputes that southeastern North Carolina exhibits many attributes favorable for the development of solar generating facilities and that those attributes have resulted in significant solar development in that region. As a result, however, the transmission infrastructure in that portion of the [Duke] system is approaching a tipping point where additional generation in certain portions of the system will require significant upgrades to the network."

I. FACTS & PROCEDURAL HISTORY

¶ 5 This appeal arises from Friesian's second application to the Commission to build and operate a solar energy plant. As explained below, Friesian's first application was successful, but Friesian amended its energy distribution plan, leading to the application process we now review.

¶ 6 On 9 September 2016, Friesian filed its first application with the Commission seeking a CPCN to construct a 70-MWAC solar photovoltaic electric generation facility ("the facility") in Scotland County. Pursuant to Commission Rule R8-64, Friesian classified itself as a small power producer or "qualifying facility," intending to sell the energy produced by its facility to the public utility Duke Energy Progress ("Duke") which owns and operates the energy grid servicing Scotland County. At the time of its application, Friesian had obtained most of the other federal and state permits required of them and planned to begin construction in early 2023 with commercial operation by December of the same year. The project did not generate any opposition from local residents or other interested parties. On 7 November 2016, the Commission granted Friesian a CPCN.

¶ 7 The Commission's policies for state generator interconnections assign directly to the qualifying facility—also known as the "interconnection customer," here Friesian—the cost of upgrades to the grid necessary to connect to the qualifying facility. *See* Order Approving Revised Interconnection Standard, *In the Matter of Petition for Approval of Revisions to Generator Interconnection Standards*, State of North Carolina Utilities Commission, Docket No. E-100, Sub 101 (May 5, 2015).

¶ 8 On 2 August 2018, Friesian filed a request with the Commission to amend the CPCN previously issued for its facility to file as a different type of energy facility so that it could sell energy to a third-party energy distributor. Friesian's proposed facility would still have to interconnect with the electric grid owned and operated by Duke. Because the amount of electricity already transmitted through the grid is approaching its current maximum capacity, the grid must be upgraded to accommodate Friesian's additional energy supply.

¶ 9 On 15 May 2019, Friesian requested the Commission (1) allow Friesian to withdraw the requested amendment and (2) consider a *new* application for a CPCN as a "merchant plant" pursuant to Commission Rule R8-63 for the same facility. The Commission treated Friesian's filing as a request to *cancel* the previously issued CPCN. The Commission allowed

withdrawal of the requested amendment, cancelled the previously issued CPCN, and closed the docket on 14 June 2019.

¶ 10 On 6 June 2019, Friesian and Duke entered into a large generator interconnection agreement defining the parties' respective obligations for constructing and upgrading existing systems to accommodate the new facility. The necessary upgrade is estimated to require reconstruction of roughly 73 miles of the existing grid at a cost of $223.5 million plus $25 million in interest.[4] The interconnection agreement requires Friesian to bear sole responsibility for $100 million in estimated construction costs and another $4 million to interconnect the old and new facilities. However, a crediting policy provided by the Federal Energy Regulatory Commission ("FERC") to level the playing field between large public utility companies and independent energy producers requires Duke to reimburse Friesian for the upgrade costs, in full, by passing along those costs in higher rates charged to its wholesale and North Carolina retail customers.[5]

¶ 11 On 14 June 2019, eight days after entering into the agreement with Duke, Friesian executed a purchase power agreement ("PPA") with North Carolina Electric Membership Corporation ("NCEMC")[6] providing that Friesian would sell all the power and renewable energy credits generated by its facility to NCEMC. Duke would distribute the energy produced by the facility to NCEMC on a wholesale basis. FERC maintains jurisdiction over generating facilities' wholesale distribution rates. *See Miss. Power & Light Co. v. Miss. ex rel. Moore*, 487 U.S. 354, 374, 101 L. Ed. 2d 322, 340 (1988).

¶ 12 Friesian's arrangements with Duke and NCEMC changed the regulatory classification of its facility to a "merchant plant," so Friesian filed a second petition with the Commission for a CPCN as a "merchant plant." A "merchant plant" is "an electric generating facility . . . the output of which will be *sold exclusively at wholesale*[.]" Commission

---

4. The Commission described these costs as "far and away [ ] the single costliest transmission project in North Carolina in recent times, perhaps the most expensive ever."

5. These costs were calculated by Duke pursuant to the Open Access Transmission Tariff it filed with FERC.

6. NCEMC is "one of the largest generation and transmission electric cooperatives in the nation, providing reliable, affordable electricity to its 25 member cooperatives. NCEMC owns power generation assets, purchases electricity through contracts, identifies innovative energy projects and coordinates transmission resources for its members." N.C. Electric Cooperatives, *Who We Are: About Us*, (last visited Oct. 28, 2021) https://www.ncelectriccooperatives.com/who-we-are/#about-us.

Rule R8-63(a)(2) (emphasis added). Duke, NCEMC, the North Carolina Sustainable Energy Association ("NCSEA"), and the North Carolina Clean Energy Business Alliance ("NCCEBA") petitioned to intervene in Friesian's certificate application proceeding. The Commission allowed those petitions. The Public Staff of the Commission ("Public Staff"), an independent agency charged with representing the interests of consumers,[7] also participated in the application process.

¶ 13 The Public Staff filed a motion asking the Commission to determine, among other legal questions:

> [w]hether the Commission has authority under state and federal law to consider as part of its review of the CPCN application the costs associated with the approximately $227 million dollars in transmission network upgrades and interconnection facilities necessary to accommodate the FERC-jurisdictional interconnection of the merchant generating facility, and the resulting impact of those network costs on retail rates in North Carolina[.]

Following briefing and arguments, the Commission entered an interlocutory order determining it could consider the upgrade costs pursuant to our General Statutes and its own rules. *See* § 62-110.1; Commission Rule R8-63.

¶ 14 In its second certificate application and before the Commission, Friesian presented evidence of potential benefits that could stem from its facility and the associated grid updates, including: (1) the interconnection of multiple gigawatts of new renewable generation in North Carolina and South Carolina; (2) expansion of the grid capacity so that other solar facilities in Duke's queue could be added in the future without additional upgrades; (3) the public would bear less of the upgrade costs compared to an alterative cost allocation under one of Duke's planned projects; and (4) additional solar energy generation would help bring Duke closer to its target clean energy goals.

¶ 15 The Public Staff challenged that evidence and argued against issuance of a CPCN. Witnesses for the Public Staff testified, and one of Friesian's witnesses conceded, that the facility would do little to

---

7. By its own account, the "[Public Staff] is an independent agency not subject to the supervision, direction, or control of [the Commission]. The Public Staff represents the interests of the using and consuming public."

supplement Duke's solar energy supply during the peak winter season,[8] and that Duke had not previously identified the transmission lines in question as needing upgrades due to reliability issues.

¶ 16 On 11 June 2020, the Commission entered an order denying Friesian's application, based on extensive findings. The Commission concluded Friesian's generating facility project was not in the public convenience or need in part because the network upgrade costs, to be passed on to the ratepayers under FERC's crediting policy, were unreasonably high. Before its decision denying Friesian's application, the Commission had never before denied a CPCN to an energy generator that had entered into a PPA. Friesian timely appealed the Commission's order.

II. ANALYSIS

¶ 17 We review Utility Commission decisions to determine:

> if substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are
>
> (1) In violation of constitutional provisions, or
>
> (2) In excess of statutory authority or jurisdiction of the Commission, or
>
> (3) Made up on unlawful proceedings, or
>
> (4) Affected by other errors of law, or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted, or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 62-94(b) (2019). A decision by the Commission is arbitrary and capricious if it "lack[s] fair and careful consideration or fail[s] to display a reasoned judgment." *State ex rel. Utils. Comm'n v. Carolina Water Serv., Inc. of N.C.*, 225 N.C. App. 120, 130, 738 S.E.2d 187, 195 (2013).

¶ 18 On appeal, "any rule, regulation, finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable." § 62-94(e). "[W]here there is substantial evidence supporting the Commission's findings and conclusions, we will not second guess

---

8. While Duke's energy resource plans demonstrate a need for additional capacity to meet the grid's winter peak loads, the addition of a solar facility, by its nature, could not provide the type of reliable or controlled additional power generation required during the winter season because of shorter days and less sunlight.

the Commission's determination." *In re Duke Energy Corp.*, 232 N.C. App. 573, 586, 755 S.E.2d 382, 390 (2014). We review the Commission's conclusions of law *de novo*. *State ex rel. Utils. Comm'n v. Stein*, 375 N.C. 870, 900, 851 S.E.2d 237, 256 (2020). When the issue on appeal concerns interpreting a statute,

> the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, [but] those interpretations are not binding. 'The weight of such [an interpretation] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'

In re N.C. Sav. & Loan League v. N.C. Credit Union Comm'n, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 89 L. Ed. 124, 129 (1944)).

¶ 19 The Commission's CPCN standard "is a relative or elastic theory rather than an abstract or absolute rule. The facts in each case must be separately considered[.]" *State ex rel. N.C. Utils. Comm'n v. Casey*, 245 N.C. 297, 302, 96 S.E.2d 8, 12 (1957) (citations omitted).

A. The Commission's Decision Is Not Preempted by Federal Law

¶ 20 **[1]** Friesian contends the Commission's denial of its CPCN was preempted by federal law because the Commission based its decision, in large part, on the upgrade costs that would be charged to ratepayers as required by FERC's crediting policy. After careful review, we disagree.

¶ 21 Federal law may preempt state law or action in three distinct ways. First, Congress may expressly preempt state action through legislation. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 203, 75 L. Ed. 2d. 752, 765 (1983). In the absence of express preemption, "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L. Ed. 1447, 1459 (1947) (citations omitted). Third, state law or action is preempted where it directly conflicts with federal law, such that it makes compliance with both federal and state law impossible, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co.*, 461 U.S. at 204, 75 L. Ed. 2d at 765 (citations omitted). Friesian asserts that the

Commission's order is preempted because it stands in the way of FERC's policy of preventing discrimination by incumbent energy producers—like Duke—against smaller, independent producers seeking to enter the energy market.

¶ 22 The Federal Power Act ("FPA") assigns FERC exclusive jurisdiction over the transmission of energy in interstate commerce and over the rates for wholesale transactions. 16 U.S.C. § 824(b)(1) (2018); *see also State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 161 N.C. App. 199, 203, 588 S.E.2d 77, 80 (2003), *rev'd on other grounds*, 359 N.C. 516, 614 S.E.2d 281 (2005). FERC is responsible for ensuring that the rates charged by utilities within its jurisdiction are "just and reasonable." § 824d(a); *see also Hughes v. Talen Energy Mktg., LLC*, 578 U.S. 150, 154, 194 L. Ed. 2d 414, 419 (2016).

¶ 23 On the other hand, the FPA "places beyond FERC's power, and leaves to the States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity." *Hughes*, 578 U.S. at 154, 194 L. Ed. 2d at 420 (quoting *FERC v. Elec. Power Supply Assn.*, 577 U.S. 260, 265, 193 L.Ed.2d 661, 667 (2016) and § 824(b)). For example, state utilities commissions, rather than FERC, determine the level of consumer need for power and the siting of a necessary facility. *Pac. Gas & Elec. Co.*, 461 U.S. at 205-06, 75 L. Ed. 2d at 766 ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States.").

¶ 24 Friesian's wholesale agreements with Duke and NCEMC trigger FERC jurisdiction over the interconnection of the systems. As noted above, the FPA provides: "All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of [FERC], and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable[.]" § 824d(a). FERC must remedy rates, charges, and other practices which are "unduly discriminatory or preferential." § 824e(a).

¶ 25 Pursuant to this authority, FERC issued the "Crediting Policy" in Order No. 2003 to establish standard procedures and pro forma agreements for the interconnection of generating facilities to transmission grids. Standardization of Generator Interconnection Agreements and Procedures, 68 Fed. Reg. 49,846 (Aug. 19, 2003) (codified at 18 C.F.R. 35). Order No. 2003 found that utilities owning or controlling transmission grids have strong incentives to preclude independent generators from accessing the grid and have engaged in discriminatory practices

in the past. *Id.* ¶ 19. The crediting policy was intended to serve the following goals: (1) limit opportunities for transmission providers to favor their own generation; (2) facilitate market entry for generation competitors; (3) encourage "needed investment in generator and transmission infrastructure;" (4) ensure interconnection customers' interconnections are treated comparably to the interconnections that a non-independent transmission provider makes with its own generating facilities; and (5) "enhance competition in bulk power markets by promoting the construction of new generation, particularly in areas where entry barriers due to unduly discriminatory transmission practices may still be significant." *Id.* ¶¶ 12, 694.

¶ 26 Our General Statutes provide:

> [N]o public utility or other person shall begin the construction of any steam, water, or other facility for the generation of electricity to be directly or indirectly used for the furnishing of public utility service . . . without first obtaining from the Commission a certificate that public convenience and necessity requires, or will require, such construction.

§ 62-110.1(a). Along with concerns like benefit to the public and the life of the facilities, the Commission may also consider the total costs of construction including those to construct the generating facility, to interconnect facilities, and to upgrade the existing network. § 62-110.1(e); Commission Rule R8-63.

¶ 27 Because the Commission has the sole authority to determine the need for new energy generation in North Carolina pursuant to Section 62-110.1, a power reserved for the states by Congress under the FPA, we hold the Commission's decision to deny Friesian's CPCN is not preempted by federal law. *See State ex rel. Utils. Comm'n v. Carolina Power & Light Co.*, 359 N.C. 516, 529, 614 S.E.2d 281, 289 (2005) (holding the Commission's decision was not preempted because the Commission "[wa]s not claiming . . . the authority to overrule or second-guess an agreement filed with or approved by FERC and subject to FERC's jurisdiction" and it was not "attempting to set rates in a wholesale agreement"). Further, our review of the record reveals that the Commission's decision to deny Friesian's application does not "stand[ ] as an obstacle" to FERC's crediting policy goals. *See Pac. Gas & Elec. Co.*, 461 U.S. at 204, 75 L. Ed. 2d. at 765 (outlining that state law is preempted by federal law when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress") (citations omitted)).

Friesian has failed to cite, and we cannot find, any precedent precluding a state from considering the cost of required network upgrades in a siting determination.

¶ 28 The United States Supreme Court has made clear that states may not interfere with FERC-regulated interstate wholesale rates. *See Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966, 90 L. Ed. 2d 943, 954 (1986) ("Once FERC sets such a rate, a State may not conclude in setting retail rates that the FERC-approved wholesale rates are unreasonable. A State must rather give effect to Congress' desire to give FERC plenary authority over interstate wholesale rates, and to ensure that the States do not interfere with this authority."); *Miss. Power & Light Co.*, 487 U.S. at 374, 101 L. Ed. 2d at 340 ("Congress has drawn a bright line between state and federal authority in the setting of wholesale rates and in the regulation of agreements that affect wholesale rates. States may not regulate in areas where FERC has properly exercised its jurisdiction to determine just and reasonable wholesale rates or to insure that agreements affecting wholesale rates are reasonable."). Yet nothing in the FPA precludes states from considering the cost of network upgrades in the preliminary determination of the most cost-effective location for a generating facility or whether energy generation is in the public convenience and need for its residents.

¶ 29 In this case, FERC has not yet allocated costs related to energy to be generated by Friesian's proposed facility. FERC has no authority to order, directly or otherwise, that Friesian's facility be constructed, that it be sited in a particular part of the state, or that its energy be sold to a certain purchaser. The Commission is empowered to make the siting decision of whether and where an energy generating facility can be constructed. FERC then has control over wholesale rates. The Commission's authority to make siting decisions is unaffected by FERC's jurisdiction. Surely, the Commission would be preempted from attempting to alter the cost allocation set by FERC after it approved a site and after parties had incurred costs. But that was not the sequence of events in this case.

¶ 30 We agree with Friesian that if Duke itself generates additional energy in the southeast that requires upgrading the grid, the Commission could not prohibit Duke from passing 100 percent of grid update costs to its ratepayers pursuant to FERC's crediting policy, costing consumers more than if they purchased energy generated by Friesian. *See Nantahala Power & Light Co.*, 476 U.S. at 964-67, 970, 90 L. Ed. 2d at 952-55, 957. However, the Commission's order reflects that it did not deny Friesian's second application merely because upgrade costs would be passed along to the public. Instead, the Commission compared the

unprecedented magnitude of upgrade costs to be borne by ratepayers to accommodate Friesian's proposed facility with the facility's expected output, and concluded they were too burdensome to be in the public convenience. So, we hold that in denying Friesian's application, the Commission did not usurp or alter FERC's crediting policy.

¶ 31 We acknowledge, as Friesian asserts, that the interconnection and upgrade process is ripe for discrimination by incumbents like Duke because of the economic incentive to favor its own generating facilities and disadvantage independent power producers. However, Friesian's generating plant was not the target of FERC's crediting policy in this circumstance and the Commission's denial of Friesian's application does not threaten FERC's comprehensive federal regulatory scheme. *See Pac. Gas & Elec. Co.*, 461 U.S. at 204, 75 L. Ed. 2d. at 765. *Cf. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, 964 F.3d 1177, 1188 (D.C. Cir. 2020) ("A State's regulations aimed directly at matters in FERC's jurisdiction cannot be sustained when they threaten the achievement of the comprehensive scheme of federal regulation.") (cleaned up)). That is because Friesian's entry into the energy market did not depend upon FERC's crediting policy.

¶ 32 Friesian was already a participant in the energy market, prepared to pay construction and upgrade costs as a qualifying facility. It then sought to take advantage of the cost allocation required under FERC's crediting policy by contracting with NCEMC. Under this arrangement, Duke would distribute the energy generated by Friesian's facility wholesale to NCEMC. As a result of the wholesale contract, Friesian re-classified itself as a merchant plant with the Commission. Absent this change in classification, Friesian already had a CPCN in hand and was permitted to build and operate its facility. For this reason, we conclude the Commission's denial of Friesian's second application does not frustrate FERC's policy goal to prevent discrimination in competition by an incumbent against a new provider.

¶ 33 We hold federal law does not preempt the Commission's denial of Friesian's application because it did not "interfere with FERC's authority by *disregarding* interstate wholesale rates." *Hughes*, 578 U.S. at 165, 194 L. Ed. 2d at 427 (emphasis added).

B. The Commission's Cost Analysis

¶ 34 **[2]** Second, Friesian argues the Commission's denial of its CPCN was arbitrary and capricious and unsupported by substantial evidence because the Commission did not consider "additional generation resources that the upgrades would facilitate."

¶ 35 As part of its need determination, the Commission adopted the levelized cost of transmission ("LCOT") test to evaluate "the reasonableness of the network upgrade costs associated with interconnecting a new generating facility."[9] The LCOT is "calculated by dividing the annualized cost of the required new transmission assets over the typical transmission asset lifetime by the expected annual generator output in [megawatt hour]."

¶ 36 At the hearing on its application, Friesian introduced evidence that the network upgrades would "facilitate the interconnection of 1,500 megawatts of additional generation in the Carolinas." Duke introduced evidence that the network upgrades would allow for greater interconnection in its southeastern service territory, alleviate any "queue paralysis" and delays in future interconnection, and minimize challenges in its own interconnection study process.

¶ 37 In its cost analysis, the Commission accounted only for the planned output from Friesian's facility, not the potential output from future electricity generation by other facilities that would use the upgraded grid. Based on the narrowed consideration, Friesian's upgrades were assigned an LCOT value of $62.94 per megawatt hour ("MWh") as opposed to between $1.56/MWh and $3.22/MWh for comparable nationwide solar network upgrades. Friesian's LCOT value was significantly higher than the LCOT values for two other generators in the state, both of which have received CPCNs from the Commission, at $0.33/MWh and $0.92/MWh.

¶ 38 Friesian asserts that if the Commission had weighed the potential future electricity generation created by the network upgrades, its upgrade figures would be much more comparable to benchmark LCOT numbers. But the record reflects that the Commission did, in fact, carefully consider and weigh the potential for additional energy generation. Rather than disregard that consideration outright, the Commission determined it was too speculative to support the approval of Friesian's CPCN. The Commission explained that the LCOT analysis provides a benchmark of reasonableness of the upgrades relative to other similar transmission investments, but it is not a determinative test upon which the Commission could solely base its CPCN decision. In its discretion, the Commission concluded that the potential additional generation was subject to many variables and "there is nothing in the record to conclude that any of the proposed generating facilities, much less all of them, will actually be

9. We note that Friesian challenged the propriety of this test before the Commission but "would accept an appropriate LCOT test for the purpose of evaluating the public convenience of the Friesian Facility in light of the Network Upgrade costs."

constructed and placed into service." Friesian cites no authority supporting its argument that the Commission was required to consider potential future generation. Nor does Friesian offer any reason for this Court to deviate from the deferential standard of review applicable to any discretionary decision by the Commission. *See* § 62-94(e) ("[A] rule, regulation, finding, determination, or order made by the Commission . . . shall be prima facie just and reasonable."); *N.C. Sav. & Loan League*, 302 N.C. at 466, 276 S.E.2d at 410 ("[T]he interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts[.]").

¶ 39 Considering the record and the Commission's exercise of its discretion in a fact-specific analysis, we cannot conclude the Commission's cost calculation was arbitrary and capricious, lacked "fair and careful consideration," or "failed to display reasoned judgment." *State ex rel. Utils. Comm'n*, 225 N.C. App. at 130, 738 S.E.2d at 194.

¶ 40 NCSEA and NCCEBA, as intervenors, further contend that the Commission could not implement this LCOT analysis for the first time in its consideration of Friesian's application without conducting rulemaking procedures including public notice and request for public comment. The LCOT analysis is not mandated by statute or Commission Rule for a CPCN application. *See* § 62-110.1; Commission R8-63. However, NCSEA and NCCEBA concede that the Commission is exempt from North Carolina's Administrative Procedures Act, N.C. Gen. Stat. § 150B-1(c)(3) (2019), so formal notice-and-comment rulemaking requirements do not generally apply to Commission policies. These intervenors have not cited, and we have not found, authority prohibiting the Commission from employing the LCOT analysis to the CPCN application process absent a rulemaking procedure.

¶ 41 For these reasons, we hold the Commission did not err by employing the LCOT analysis in its need determination.

C. The Commission Did Not Err in Concluding Friesian Did Not Demonstrate Public Need

¶ 42 **[3]** Friesian contends the Commission's conclusion that Friesian failed to demonstrate a need for the solar electric plant was arbitrary and capricious because Friesian presented evidence of an executed PPA with NCEMC and the Commission has never before denied a certificate application where a PPA existed to demonstrate need. Friesian also asserts that the Commission inappropriately imposed the more stringent need standard for public utilities when it considered Friesian's application as a merchant plant.

¶ 43 There is no indication in the record that the Commission applied the wrong need standard. The Commission considered Friesian's application as a merchant plant pursuant to R8-63, applying the correlating need requirement for that facility classification. *Compare* Commission Rule R8-61(b) (public utilities) *with* Commission Rule R8-63(b)(3) (merchant plants).

¶ 44 In 1992, the Commission established a rule (the "Empire Power Requirement," Docket No. SP-91, Sub 0), requiring a written output contract to demonstrate need for a facility. However, in 2001, the Commission adopted Rule R8-63(b)(3) (No. E-100, Sub 85), requiring that a merchant plant applying for a CPCN provide a "description of the need for the facility in the state and/or region, with supporting documentation." In adopting the current rule, the Commission expressly overruled its "Empire Power Requirement" that an applicant must submit a written contract for purchase of energy. Friesian contends that because it met the original, more stringent requirement to demonstrate need, it necessarily established need for its facility in this case.

¶ 45 We do not agree that the original requirement was necessarily more stringent than the current requirement. Rather, under the Commission's current rule, the presence or absence of an existing contract is simply not dispositive of the need for a facility. Our General Statutes provide that before the Commission can award a CPCN it must consider the "applicant's arrangement with other electric utilities for exchange of power, pooling of plant, purchase of power and other methods for providing reliable, efficient, and economical electric service." § 62-110.1(d). By its own rules, the Commission may consider other factors in its need determination, including compliance with state or federal laws.[10] That the Commission has yet to deny an application supported by an executed

---

10. *See* Order Granting Certificate and Accepting Registration of New Renewable Facility, *In the Matter of Application of Atlantic Wind, LLC, for a Certificate of Public Convenience and Necessity Construct a 300-Megawatt Wind Facility in Pasquotank and Perquimans Counties and Registration as a New Renewable Energy Facility*, State of North Carolina Utilities Commission, Docket No. EMP-49, Sub 0 (May 3, 2011); Order Issuing Certificate of Public Convenience and Necessity with Conditions, *In the Matter of Application of Duke Energy Carolinas, LLC, for a Certificate of Public Convenience and Necessity to Construct a 402-MW Natural Gas-Fired Combustion Turbine Generating Facility in Lincoln County, North Carolina*, State of North Carolina Utilities Commission, Docket No. E-7, Sub 1134 (Dec. 7, 2017); Order Granting Certificate with Conditions, *In the Matter of Application of Duke Energy Progress, LLC, for a Certificate of Public Convenience and Necessity to Construct a Microgrid Solar and Battery Storage Facility in Haywood County, North Carolina*, State of North Carolina Utilities Commission, Docket No. E-2, Sub 1127 (Apr. 6, 2017).

PPA makes this a case of first impression, but it does not establish an outright prohibition.

¶ 46 Here, relying on its past orders, the Commission applied the correct merchant plant need standard, affording "some weight to the existence of the PPA as a demonstration of need." However, it agreed with the Public Staff that while the PPA demonstrates potential financial or economic viability of the project, "it is not in and of itself a sufficient criterion on which to base a recommendation for approval or disapproval of a CPCN."

¶ 47 The record reveals the Commission considered and weighed the benefits of Friesian's contract with NCEMC and Duke. Nonetheless, the Commission concluded the project was not in the public interest: "the cost of the Network Upgrades dwarfs the costs of the generating plant" and "the scale of the costs associated with the Facility relative to the size and projected revenue from the Facility raises concerns regarding economic viability of the project." While reasonable minds may disagree about the Commission's judgment call, the applicable standard of review does not afford this Court the authority to "second guess the Commission's determination" in this regard. *In re Duke Energy Corp.*, 232 N.C. App. at 586, 755 S.E.2d at 390.

¶ 48 NCEMC argues, in the alternative to its request for reversal, that we remand this matter to the Commission with instructions that it consider developments which might have occurred with the passage of time since its denial of Friesian's application or that might occur in the service life of Friesian's facility, such as the completion of Duke's integrated resource plan, proposed queue reform, and additional generating capacity. Our review is limited to whether substantial evidence in the record before us supports the Commission's decision, *see* § 62-94(b)(5), so we cannot consider later occurring developments.

III. CONCLUSION

¶ 49 For the above reasons, we affirm the order of the Commission.

AFFIRMED.

Judge HAMPSON concurs.

Judge MURPHY concurs by separate opinion.

MURPHY, Judge, concurring in result only.

¶ 50 Based merely upon the arguments made by Petitioner-Appellant and Intervenor-Appellant, I agree with the Majority's analysis. While I have surmised potential winning arguments for Appellants, such arguments were not made by them and have not been made a part of this adversarial proceeding. This case does not present an issue of statutory interpretation that would necessitate our deviation from the basic tenet that "it is not the role of this Court to create an appeal for an appellant or to supplement an appellant's brief with legal authority or arguments not contained therein." *Thompson v. Bass*, 261 N.C. App. 285, 292, 819 S.E.2d 621, 627 (2018); *disc. rev. denied*, 822 S.E.2d 617 (2019); *Wells Fargo Bank, N.A. v. Am. Nat'l Bank & Tr. Co.*, 250 N.C. App. 280, 286, 791 S.E.2d 906, 911 (2016) ("When this Court is called upon to interpret a statute, we must examine the text, consult the canons of statutory construction, and consider any relevant legislative history, regardless of whether the parties adequately referenced these sources of statutory construction in their briefs. To do otherwise would permit the parties, through omission in their briefs, to steer our interpretation of the law in violation of the axiomatic rule that while litigants can stipulate to the facts in a case, no party can stipulate to what the law is. That is for the court to decide."). As a result, I would not consider our opinion today to foreclose future litigants from making additional or refined arguments on the issues presented by this case and concur in result only.

STATE v. BRICHIKOV

[281 N.C. App. 408, 2022-NCCOA-33]

STATE OF NORTH CAROLINA
v.
MARK BRICHIKOV, DEFENDANT

No. COA20-660

Filed 18 January 2022

1. Appeal and Error—preservation of issues—request for lesser-included offense—multiple theories—objection to denial of request

In a second-degree murder trial, defendant preserved for review the trial court's refusal to give a pattern involuntary manslaughter instruction to the jury. Although defendant failed to properly request the instruction based on a theory of culpable omission (by not obtaining aid for his wife, who was overdosing)—which, as a deviation from the pattern instruction amounted to a special instruction that needed to be submitted in writing—he also requested the instruction on a theory that he had acted in a criminally negligent manner, which did not deviate from the pattern instruction, and his subsequent objections to the court's refusal to give the pattern instruction was sufficient to preserve the issue.

2. Homicide—second-degree murder—failure to instruct on lesser-included offense—involuntary manslaughter—malice not established—new trial

Where defendant was entitled to a jury instruction on involuntary manslaughter in his trial for second-degree murder and the omission of the instruction constituted prejudicial error, he was granted a new trial. The murder charge arose from the death of defendant's wife, which experts from both sides agreed was caused not only by defendant's assault using his hands but also by the victim's heart condition and having fentanyl in her system. Since the State did not conclusively establish the element of malice necessary for second-degree murder and the evidence could have permitted the jury to infer that defendant's conduct was merely reckless and the result of culpable negligence rather than a specific intent to kill, defendant's request for the lesser-included instruction should have been granted.

Judge CARPENTER dissenting.

STATE v. BRICHIKOV

[281 N.C. App. 408, 2022-NCCOA-33]

Appeal by Defendant from judgment entered 11 December 2019 by Judge Rebecca W. Holt in Wake County Superior Court. Heard in the Court of Appeals 11 May 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Marc X. Sneed, for the State.

M. Gordon Widenhouse, Jr., for defendant-appellant.

MURPHY, Judge.

¶ 1 A defendant is entitled to a jury instruction on a lesser included offense when the evidence, viewed in the light most favorable to the defendant, could support a jury verdict on that lesser included offense. When there is a reasonable possibility that the jury would have reached a different result had the trial court given the jury instruction on a lesser included offense, a defendant suffers prejudice and is entitled to a new trial.

¶ 2 Here, the evidence, when viewed in the light most favorable to Defendant, entitled him to a jury instruction on the lesser included offense of involuntary manslaughter. There was a reasonable possibility that a different result would have been reached had the involuntary manslaughter instruction been given to the jury, and Defendant is entitled to a new trial.

BACKGROUND

¶ 3 Defendant Mark Brichikov appeals his second-degree murder conviction in the death of his wife, Nadia Brichikov. Defendant and Mrs. Brichikov both were regular drug users. Only two days prior to her death, Mrs. Brichikov suffered a drug overdose, which resulted in a significant wound to the back of her head and required medical personnel to use Narcan to reverse the impact of opioids in her system. Mrs. Brichikov subsequently told Defendant about the overdose and the use of Narcan to revive her.

¶ 4 On 21 April 2018, Defendant and Mrs. Brichikov coordinated their meet up at a motel, and expressed their love for one another and desire to be together multiple times. Defendant had just left a drug rehabilitation facility, and Mrs. Brichikov had recently left jail and suffered the overdose the day before. However, Mrs. Brichikov had been sexually active with at least one individual other than Defendant, and she was also presently working as a confidential police informant. Defendant and

Mrs. Brichikov met at a motel on the evening of 21 April 2018; during that evening and the early morning hours of 22 April 2018, Defendant and Mrs. Brichikov exited their motel room multiple times, and Defendant appeared to have purchased drugs from a truck nearby.

¶ 5 In the early morning hours on 22 April 2018, responding law enforcement personnel found Mrs. Brichikov deceased in her motel room, with blunt force trauma to her face, as well as drug paraphernalia and Narcan in the room. Mrs. Brichikov had cocaine and fentanyl in her system at the time of her death. Responding law enforcement viewed motel surveillance video, which showed Defendant exiting the motel room and Mrs. Brichikov lying on the floor of the room. Law enforcement obtained a warrant and arrested Defendant for murder.

¶ 6 Defendant was indicted for first-degree murder in the death of Mrs. Brichikov. At trial, the State presented evidence Defendant assaulted Mrs. Brichikov in the motel room after they entered the motel room together for the final time in the early morning of 22 April 2018. During the assault and until she was located by police, Defendant and Mrs. Brichikov were the only individuals inside the motel room; while multiple individuals walked by Mrs. Brichikov while she was lying on the ground in the motel room, they did not enter the room. The State introduced motel video surveillance, which showed Defendant left the motel room for the final time in the early morning hours of 22 April 2018, and also showed Mrs. Brichikov assaulted, on the floor, and moving when Defendant left.

¶ 7 At trial, the medical examiner called by the State opined that Mrs. Brichikov's death was a "homicide," due to the presence of blunt force trauma consistent with an assault as at least a partial cause of the death. The medical examiner called by Defendant agreed.

¶ 8 Further, both experts also agreed that Mrs. Brichikov's significant heart condition (due to a narrowing of a coronary artery), as well as fentanyl in her system, contributed to her death, and pointed to all three circumstances–the assault, the heart condition, and the fentanyl–as contributing factors to her death, or comorbidities. The State's expert was not certain whether the removal of any one of these factors would have prevented Mrs. Brichikov's death, while Defendant's expert testified Mrs. Brichikov would not have died of the facial fractures from the assault alone. Defendant's expert also testified that Mrs. Brichikov's movements when Defendant left the room appeared to be consistent with a fentanyl

overdose, rather than the assault to her face, and noted Mrs. Brichikov's airways "were unobstructed."[1]

¶ 9 Defendant did not testify during his case in chief, but he admitted under oath outside the jury's presence during the charge conference that he assaulted Mrs. Brichikov and allowed his attorney to admit the same in closing arguments. After both sides rested, Defendant requested voluntary manslaughter and involuntary manslaughter jury instructions. During the charge conference, Defendant also requested a pattern jury instruction for second-degree murder that included involuntary manslaughter and stated the following:

> [DEFENSE COUNSEL]: . . . . We are also requesting involuntary manslaughter under a different theory. And the theory is that if the jury determines that [Defendant] is not guilty of first-, second- and voluntary, if submitted, on the theory that he did not proximately cause her death, then we would submit that an involuntary manslaughter is appropriate under the theory that, based on the video, he -- and text messages and circumstantial evidence, that he would've had knowledge of her drug use and did not adequately get her any medical assistance, and as a result of no medical assistance, [Mrs. Brichikov] expired.

In addition to that request, the trial court and Defense Counsel had the following exchanges during the charge conference:

> THE COURT: . . . . I believe you mentioned earlier that you're requesting involuntary manslaughter.
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> . . . .

---

1. We note the experts' disagreement does not negate Defendant's criminal responsibility. *See State v. Bethea*, 167 N.C. App. 215, 222, 605 S.E.2d 173, 179 (2004) (marks and citations omitted) ("To escape responsibility based on an intervening or superseding cause, the defendant must show that the intervening or superseding act was the sole cause of death. An intervening or superseding cause is a cause that so entirely intervenes in or supersedes the operation of the defendant's negligence that it alone, without his negligence contributing thereto in the slightest degree, produces the injury."), *cert. denied*, 362 N.C. 88 (2007); *see also State v. Quesinberry*, 319 N.C. 228, 233, 354 S.E.2d 446, 449 (1987) ("A person is criminally responsible for a homicide if his act caused or directly contributed to the death of the victim."). Here, Defendant could still be criminally responsible for Mrs. Brichikov's death because his assaultive behavior directly contributed to her death.

> THE COURT: . . . . -- assuming the Court gives involuntary manslaughter, or not, either way, do you intend to argue that [Defendant] is guilty of . . .
>
> [DEFENSE COUNSEL]: Yes, Judge. If the Court is inclined to give the involuntary instruction, then yes, I would be inclined to argue [Defendant] is guilty. We have had that discussion, Judge.
>
> . . . .
>
> THE COURT: All right. So this one does include at the end of the second-degree, "If you do not find [Defendant] guilty of second-degree murder, you must determine whether [Defendant] is guilty of involuntary manslaughter," and . . . "First that [Defendant] acted in a criminally negligent way" is what you're requesting?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.

¶ 10 The North Carolina pattern jury instruction for "Second Degree Murder Where a Deadly Weapon Is Used, Not Including Self-Defense, Covering All Lesser Included Homicide Offenses" reads, *inter alia*, as follows regarding the lesser included offense of involuntary manslaughter:

> For you to find the defendant guilty of involuntary manslaughter, the State must prove two things beyond a reasonable doubt:
>
> First, that the defendant acted a) [unlawfully] (or) b) [in a criminally negligent way]. a) [The defendant's act was unlawful if *(define crime e.g. defendant recklessly discharged a gun, killing the victim*).] b) [Criminal negligence is more than mere carelessness. The defendant's act was criminally negligent, if, judging by reasonable foresight, it was done with such gross recklessness or carelessness as to amount to a heedless indifference to the safety and rights of others.]
>
> And Second, the defendant's [unlawful] (or) [criminally negligent] act proximately caused the victim's death.

N.C.P.I.–Crim. 206.30A (2019). The involuntary manslaughter pattern jury instruction does not include language specifically discussing a culpable omission. *See id.*

¶ 11 The trial court rejected Defendant's requests for pattern voluntary and involuntary manslaughter instructions. Defendant objected at the charge conference to the trial court's refusal to submit those instructions, and renewed his objection after the trial court instructed the jury. The trial court instructed the jury as to first-degree murder and second-degree murder.

¶ 12 On the element of malice, and the use of Defendant's hands as a deadly weapon, the trial court instructed as follows:

> Malice means not only hatred, ill will or spite, as it is ordinarily understood -- to be sure, that is malice -- but it also means that condition of mind that prompts a person to take the life of another intentionally or to intentionally inflict a wound with a deadly weapon upon another which proximately results in her death, without just cause, excuse or justification.
>
> If the State proves beyond a reasonable doubt that [Defendant] intentionally killed the victim with a deadly weapon or intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the person's death, you *may infer* first that the killing was unlawful and, second, that it was *done with malice*, *but you are not compelled to do so*.
>
> . . . .
>
> If the State proves beyond a reasonable doubt that [Defendant] intentionally inflicted a wound upon the victim with a deadly weapon that proximately caused the victim's death, you *may infer*, first, that the killing was unlawful and, second, that it was *done with malice*, *but you are not compelled to do so*.

(Emphases added). The trial court's instructions closely track the pattern jury instructions regarding malice in the "Second Degree Murder Where a Deadly Weapon Is Used, Not Including Self-Defense, Covering All Lesser Included Homicide Offenses" jury instruction. *See* N.C.P.I.–Crim. 206.30A (2019). In its closing argument, specifically regarding malice, the State referred to Mrs. Brichikov's facial wounds from Defendant's assault in arguing "[t]hat's malice. That's ill will. That's hatred. That's anger."

¶ 13 The jury convicted Defendant of second-degree murder. On appeal, Defendant argues the trial court's failure to instruct the jury on involuntary manslaughter was reversible error, as the jury could have found Defendant assaulted Mrs. Brichikov in a culpably negligent manner and failed to render aid in a culpably negligent omission, and accordingly could have convicted him of involuntary manslaughter.

¶ 14 The State argues a presumption of malice arose due to Defendant's use of his hands in his assault of Mrs. Brichikov. Specifically, the State argues it "has *established* malice in the instant case." (Emphasis added). Of note, in its brief, the State does not attempt to distinguish one of the most important cases relied on by Defendant, *State v. Debiase*, 211 N.C. App. 497, 711 S.E.2d 436, *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399 (2011).

ANALYSIS

A. Preservation

¶ 15 **[1]** "Where a defendant has properly preserved [a] challenge to jury instructions, an appellate court reviews the trial court's decisions regarding jury instructions de novo." *State v. Richardson*, 270 N.C. App. 149, 152, 838 S.E.2d 470, 473 (2020); *see also State v. Osorio*, 196 N.C. App. 458, 466, 675 S.E.2d 144, 149 (2009) ("Assignments of error challenging the trial court's decisions regarding jury instructions are reviewed *de novo* by this Court.").

¶ 16 We examine two preservation issues regarding the involuntary manslaughter instruction. First, we analyze whether Defendant's requests for an involuntary manslaughter instruction, with subsequent argument regarding the theory of culpable omission, were sufficient requests for a pattern jury instruction for involuntary manslaughter. Second, we examine whether Defendant preserved the involuntary manslaughter instruction via objection.

¶ 17 While Defendant requested a pattern jury instruction for involuntary manslaughter, the focus of the request turned to a theory of Defendant's culpable omission to obtain aid for his wife when he knew she was overdosing. A request for a culpable omission instruction would be a deviation from the pattern jury instruction, qualify as a special instruction, and would have needed to be submitted to the trial court in writing. *See State v. McNeill*, 346 N.C. 233, 240, 485 S.E.2d 284, 288 (1997) (citation omitted) ("We note initially that [the] defendant's proposed instructions [to modify the pattern jury instructions] were tantamount to a request for special instructions. . . . This Court has held that a trial

court's ruling denying requested [special] instructions is not error where the defendant fails to submit his request for instructions in writing. [The] [d]efendant here did not submit either of his proposed modifications in writing, and therefore it was not error for the trial court to fail to charge as requested."), *cert. denied*, 522 U.S. 1053, 139 L. Ed. 2d 647 (1998).

¶ 18 However, upon a thorough review of the Record, Defendant requested involuntary manslaughter under multiple theories and was not limited to the culpable omission theory. While Defendant requested a special instruction regarding culpable omission that deviated from the pattern jury instructions, he also requested the pattern jury instruction for involuntary manslaughter by responding affirmatively to the trial court's question regarding whether Defendant was requesting the following instruction: "First that the defendant acted in a criminally negligent way[.]" The trial court's language in that question derives from the pattern jury instruction for involuntary manslaughter, and Defendant orally requested the pattern jury instruction for involuntary manslaughter. *See* N.C.P.I.–Crim. 206.30A (2019) (marks omitted) ("For you to find the defendant guilty of involuntary manslaughter, the State must prove . . . that the defendant acted . . . in a criminally negligent way.").

¶ 19 Further, Defendant's objections to the trial court's refusal to give the involuntary manslaughter instruction preserved the issue for appeal. *See State v. McNeil*, 350 N.C. 657, 691, 518 S.E.2d 486, 507 (1999) ("We note that [the] defendant waived this [improper jury instructions] argument by failing to properly object during the charge conference."), *cert. denied*, 529 U.S. 1024, 146 L. Ed. 2d. 321 (2000); *State v. Ross*, 322 N.C. 261, 265, 367 S.E.2d 889, 891 (1988); N.C. R. App. P. 10(a)(2) (2021) ("A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury."). Defendant objected during the charge conference and after the trial court instructed the jury, and properly preserved his challenge to the trial court's refusal to give a pattern involuntary manslaughter instruction to the jury.

B. Refusal to Give Pattern Involuntary Manslaughter Instruction

¶ 20 **[2]** "When determining whether the evidence is sufficient to entitle a defendant to jury instructions, courts must consider the evidence in the

light most favorable to the defendant." *State v. Clegg*, 142 N.C. App. 35, 46, 542 S.E.2d 269, 277 (marks omitted), *disc. rev. denied*, 353 N.C. 453, 548 S.E.2d 529 (2001).

¶ 21 "[A] judge presiding over a jury trial *must instruct* the jury as to a lesser included offense of the crime charged where there is evidence from which the jury could reasonably conclude that the defendant committed the lesser included offense." *State v. McConnaughey*, 66 N.C. App. 92, 95, 311 S.E.2d 26, 28 (1984) (emphasis added); *see also State v. Collins*, 334 N.C. 54, 58, 431 S.E.2d 188, 190-91 (1993) ("If the evidence before the trial court in the defendant's non-capital trial . . . tended to show that the defendant might be guilty of lesser-included offenses, the trial court was required . . . to instruct the jury as to those lesser-included crimes.").

> A trial judge is required to instruct the jury on the law arising from evidence presented at trial. The necessity of instructing the jury as to lesser included offenses arises only where there is evidence from which the jury could find that a lesser included offense had been committed. Further, the trial judge is not required to submit lesser included offenses for a jury's consideration when the State's evidence is *positive as to each and every elemen*t of the crime charged and there is *no conflicting evidence* related to any element of the crime charged.

State v. Washington, 142 N.C. App. 657, 659-60, 544 S.E.2d 249, 251 (2001) (emphases added) (citation omitted), *disc. rev. denied*, 353 N.C. 532, 550 S.E.2d 165 (2001); *see also State v. Drumgold*, 297 N.C. 267, 271, 254 S.E.2d 531, 533 (1979) (citation and marks omitted) ("It is well settled that a defendant is entitled to have all lesser degrees of offenses supported by the evidence submitted to the jury as possible alternate verdicts. On the other hand, the trial court need not submit lesser degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the charged crime*.").

¶ 22 We review whether the State's evidence was sufficient to fully satisfy its burden of proving each element of the crime–second-degree murder. *See State v. Johnson*, 317 N.C. 193, 205, 344 S.E.2d 775, 783 (1986). Where other evidence negates those elements, when viewed in the light most favorable to Defendant, Defendant is entitled to an instruction regarding the lesser included offense of involuntary manslaughter. *Id.* ("Since the State's evidence was sufficient to fully satisfy its burden of proving

each element of first-degree murder and there was no other evidence to negate these elements other than the defendant's denial that he committed the offense, the defendant was not entitled to an instruction on the lesser-included offense of involuntary manslaughter."). Defendant's argument that the trial court should have given an involuntary manslaughter jury instruction posits that the evidence negated the element of malice and supported a jury verdict of involuntary manslaughter due to his criminally negligent actions.

¶ 23 Additionally,

> [o]n appeal, a defendant is required not only to show that a challenged jury instruction was erroneous, but also that such error prejudiced the defendant. "A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

Richardson, 270 N.C. App. at 152, 838 S.E.2d at 473 (citation omitted) (quoting N.C.G.S. § 15A-1443(a) (2019)).

1. Second-Degree Murder and Malice Presumption

¶ 24 Before our analysis of the lesser included offense of involuntary manslaughter, we note the elements of the more serious crime of second-degree murder, and analyze its element of malice. "Second-degree murder . . . is defined as an unlawful killing of a human being *with malice* but without premeditation and deliberation." *State v. Thomas*, 325 N.C. 583, 567, 386 S.E.2d 555, 603-04 (1989). The pattern jury instructions require the State to prove three things beyond a reasonable doubt in order to obtain a second-degree murder conviction: "the defendant wounded the victim with a deadly weapon"; "the defendant acted intentionally and with malice"; and "the defendant's act was a proximate cause of the victim's death." N.C.P.I.–Crim. 206.30A (2019).

¶ 25 Malice is defined as follows:

> [M]alice, as it is ordinarily understood, means not only hatred, ill will, or spite, but also that condition of mind which prompts a person to take the life of another intentionally, without just cause, excuse, or justification, or to wantonly act in such a manner as to manifest depravity of mind, a heart devoid of a sense of social duty, and a callous disregard for human life.

State v. Crawford, 329 N.C. 466, 481, 406 S.E.2d 579, 587 (1991).

¶ 26 "It is well settled that an instruction to the jury that the law implies malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive irrebuttable presumption." *State v. Holder*, 331 N.C. 462, 487, 418 S.E.2d 197, 211 (1992) (citing *State v. Reynolds*, 307 N.C. 184, 297 S.E.2d 532 (1982)); *see also State v. Forrest*, 321 N.C. 186, 191-92, 362 S.E.2d 252, 255 (1987) ("The trial court properly instructed the jury that it should consider this permissive inference [of malice] along with all the other facts and circumstances . . . ."). Defendant and the State disagree regarding whether the evidence established the second-degree murder element of malice, which would preclude a lesser included offense instruction in this case. After analyzing caselaw below, we do not agree with the State's contention that each element of second-degree murder, specifically malice, was conclusively established when the evidence is viewed in the light most favorable to Defendant.

2. Involuntary Manslaughter–Criminal Negligence

¶ 27 "Involuntary manslaughter, which is a lesser included offense of second degree murder, is the unlawful killing of a human being *without malice*, without premeditation and deliberation, and without intention to kill or inflict serious bodily injury." *Debiase*, 211 N.C. App. at 505, 711 S.E.2d at 441 (emphasis added) (citation and marks omitted).

¶ 28 "Involuntary manslaughter may also be defined as the unintentional killing of a human being *without malice*, proximately caused by (1) an unlawful act not amounting to a felony nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (emphasis added).

> [W]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is . . . accomplished by means of some intentional act. [W]ithout some intentional act in the chain of causation leading to death there can be no criminal responsibility. Death under such circumstances would be the result of accident or misadventure.

State v. Wilkerson, 295 N.C. 559, 582, 247 S.E.2d 905, 918 (1978).

¶ 29 Defendant was entitled to an involuntary manslaughter jury instruction, specifically in light of our opinion in *Debiase*. In *Debiase*, the defendant and the victim argued, and the defendant attacked the victim with a beer bottle and hit the victim multiple times in the head. *Debiase*, 211 N.C. App. at 500, 711 S.E.2d at 438. During the course of the attack, the

beer bottle broke, the defendant "jabbed [the victim] multiple times with the bottle[,]" and the victim died. *Id.* at 498, 500, 711 S.E.2d at 437, 438 (marks omitted). The defendant was convicted of second-degree murder, but argued the trial court erred in failing to instruct the jury on the lesser included offense of involuntary manslaughter because the evidence supported the charge. *Id.* at 503, 711 S.E.2d at 440. We agreed, stating the evidence, when viewed in the light most favorable to the defendant, indicated "[the] [d]efendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to [the victim's] neck." *Id.* at 506, 711 S.E.2d at 442.

¶ 30 Moreover, in *Debiase*, we rejected the State's argument that the defendant's use of a deadly weapon required a "conclusive, irrebuttable presumption" that the defendant acted with malice, which would have rendered the trial court's refusal to instruct the jury regarding involuntary manslaughter valid. *Id.* at 509, 711 S.E.2d at 444. The State makes a similar argument here regarding a required and established presumption of malice. This argument is similarly unpersuasive and is now in direct contradiction to our caselaw. The trial court's instruction regarding malice, which told the jury it was permitted, but not required, to infer malice from Defendant's use of his hands in the assault, comported with our holding in *Debiase*, which treated malice as a "permissible inference," and not a "mandatory presumption," when "the defendant adduces evidence or relies on a portion of the State's evidence raising an issue on the existence of malice[.]" *Debiase*, 211 N.C. App. at 509-10, 711 S.E.2d at 444-45 (marks omitted).

¶ 31 Viewing the evidence in the light most favorable to Defendant, the evidence was not "positive" as to the element of malice for second-degree murder. The jury could reasonably have found Defendant did not act with malice, but rather committed a reckless act without the intent to kill or seriously injure[2]–he spent the day declaring his love for Mrs. Brichikov,

---

2. We have held:

> Had the jury been permitted to consider the issue of Defendant's guilt of involuntary manslaughter, there is a reasonable possibility that it might have concluded that he acted 'without intention to kill or inflict serious bodily injury, and without either express or implied malice,' making him guilty of involuntary manslaughter rather than second degree murder.

Debiase, 211 N.C. App. at 510, 711 S.E.2d at 445 (quoting *State v. Foust*, 258 N.C. 453, 459, 128 S.E.2d 889, 893 (1963)). "'In this setting, and with credibility a matter for the jury, the court should have submitted involuntary manslaughter with appropriate instructions' to the jury." *Id.* (quoting *State v. Wrenn*, 279 N.C. 676, 683, 185 S.E.2d 129, 133 (1971)).

Further, we note Defendant acted intentionally in assaulting Mrs. Brichikov, which does not negate the possibility of him acting with criminal negligence to support an

they used drugs together, something occurred to trigger a confrontation after they spent hours together the day of the killing, and her body was in a weakened state from a recent overdose, heart blockage, and fentanyl overdose. Further, according to Defendant's expert, the assault did not cause the death on its own. Defendant also arguably used a less deadly weapon than the bottle used in *Debiase*, his hands, and "the evidence contained in the present [R]ecord is susceptible to the interpretation that, at the time that [Defendant] struck [Mrs. Brichikov]," he did so recklessly and with culpable negligence, permitting an involuntary manslaughter conviction. *Debiase*, 211 N.C. App. at 506, 711 S.E.2d at 442.

¶ 32 The State relies on *State v. Smith*, *inter alia*, to advance an argument that malice is presumed due to the use of a deadly weapon. *See State v. Smith*, 351 N.C. 251, 266-67, 524 S.E.2d 28, 40, *cert. denied*, 531 U.S. 862, 148 L. Ed. 2d 100 (2000); *see also State v. Bush*, 289 N.C 159, 170, 221 S.E.2d 333, 340, *judgment vacated in part and remanded on other grounds*, *Bush v. North Carolina*, 429 U.S. 809, 50 L. Ed. 2d 69 (1976). Specifically, the State argues it "has *established* malice in the instant case." (Emphasis added). Our Supreme Court's holding in *Smith*, where malice was not required to be shown in a first-degree murder conviction where the defendant used *poison* as a weapon, is clearly distinguishable from this case, where Defendant's *hands* were his deadly weapon, which do not support an irrebuttable presumption of malice. *See Smith*, 351 N.C. at 267, 524 S.E.2d at 40 (marks omitted) ("This Court has already stated that murder by torture, which is in the same class as murder by poison, is a dangerous activity of such reckless disregard for human life that, like felony murder, malice is implied by the law. The commission of torture implies the requisite malice, and a

---

involuntary manslaughter conviction. "[W]hile involuntary manslaughter imports an unintentional killing, i.e., the absence of a specific intent to kill, it is . . . accomplished by means of some intentional act. Indeed without some intentional act in the chain of causation leading to death there can be no criminal responsibility." *Wilkerson*, 295 N.C. at 582, 247 S.E.2d at 918; *see also State v. Drew*, 162 N.C. App. 682, 686-87, 592 S.E.2d 27, 30 (holding that, where the defendant stabbed an individual he did not expect to be in his home, "the jury could have . . . concluded that [the] defendant . . . intended to strike at [the intruder] to keep him away, but did not intend to kill or seriously injure him," which merited an involuntary manslaughter instruction), *disc. rev. denied*, *appeal dismissed*, 358 N.C. 735, 601 S.E.2d 867 (2004); *Debiase*, 211 N.C. App. at 508-10, 711 S.E.2d at 443-45 (noting that, despite the defendant's admission that he intentionally hit the deceased on the head with a beer bottle, the "evidence tending to show the occurrence of a killing caused by the negligent or reckless use of a deadly weapon without any intent to inflict death or serious injury [was] sufficient to support an involuntary manslaughter conviction" and merited an involuntary manslaughter instruction). Here, the evidence tending to show Mrs. Brichikov's death was caused by Defendant's negligent or reckless use of his hands without intent to kill or seriously injure Mrs. Brichikov was sufficient to support an involuntary manslaughter conviction.

separate showing of malice is not necessary."). We find *Smith* inapplicable to this case. Further, such an established, conclusive presumption of malice would be at odds with the trial court's permissible inference instruction in this case. Finally, such a mandatory presumption of malice would be contrary to our Supreme Court's precedent. *See Holder*, 331 N.C. at 487, 418 S.E.2d at 211 (holding a jury instruction regarding the implication of "malice and unlawfulness from the intentional use of a deadly weapon proximately resulting in death is not a conclusive irrebuttable presumption").

¶ 33 In light of *Debiase*, a defendant wielding a deadly weapon that is not a tool deemed *per se* malicious, such as poison, merits an involuntary manslaughter instruction when the evidence, viewed in the light most favorable to the defendant, supports that the defendant acted intentionally and recklessly or carelessly, rather than intentionally and maliciously, and also acted without a specific intent to kill. *See State v. Brewer*, 325 N.C. 550, 575-76, 386 S.E.2d 569, 583 (1989), *cert. denied*, 495 U.S. 951, 109 L. Ed. 2d 541 (1990); *State v. Fleming*, 296 N.C. 559, 564, 251 S.E.2d 430, 433 (1979); *Wilkerson*, 295 N.C. at 582, 247 S.E.2d at 918. The evidence, viewed in the light most favorable to Defendant, merited an involuntary manslaughter instruction, as the evidence supported a finding Defendant acted with criminal negligence. The trial court erred in denying Defendant's request for an involuntary manslaughter instruction.

3. Prejudice

¶ 34

> The trial court must give a requested instruction, at least in substance, if a defendant requests it and the instruction is correct in law and supported by the evidence. In determining whether the evidence supports an instruction requested by a defendant, the evidence must be interpreted in the light most favorable to [the defendant]. The trial judge making the decision must focus on the sufficiency of the evidence, not the credibility of the evidence. Failure to give the requested instruction where required is a reversible error.

State v. Reynolds, 160 N.C. App. 579, 581, 586 S.E.2d 798, 800 (2003) (citations omitted), *disc. rev. denied*, 358 N.C. 548, 599 S.E.2d 916 (2004); *see also State v. Tidwell*, 112 N.C. App. 770, 775-77, 436 S.E.2d 922, 926-27 (1993) (ordering a new trial where the trial court refused the defendant's request for an involuntary manslaughter jury instruction and the defendant's testimony supported a finding of culpably negligent action).

> Error in failing to submit the question of a defendant's guilt of lesser degrees of the same crime is not cured by a verdict of guilty of the offense charged because, in such case, it cannot be known whether the jury would have convicted of a lesser degree if the different permissible degrees arising on the evidence had been correctly presented in the charge.

State v. Thacker, 281 N.C. 447, 456, 189 S.E.2d 145, 151 (1972), *disapproved on other grounds in North Carolina v. Butler*, 441 U.S. 369, 372, 60 L. Ed. 2d 286, 291 (1979).

¶ 35 Upon our review of the Record, "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached[,]" as the jury could have found Defendant did not act with malice, but rather with culpable negligence, but we cannot know with certainty. *See Richardson*, 270 N.C. App. at 152, 838 S.E.2d at 473 (marks omitted) ("A defendant is prejudiced when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."). Defendant suffered prejudice due to the trial court's failure to instruct the jury regarding involuntary manslaughter and is entitled to a new trial.

4. Involuntary Manslaughter-Culpable Omission

¶ 36 Our holding that the evidence, when viewed in the light most favorable to Defendant, supported a finding Defendant acted with criminal negligence and entitled him to a jury instruction regarding involuntary manslaughter renders Defendant's second argument–the evidence supported a finding Defendant's actions were a culpable omission meriting an involuntary manslaughter instruction–moot. *See State v. Angram*, 270 N.C. App. 82, 88, 839 S.E.2d 865, 869 (2020) ("Because we must reverse the judgment, we need not address [the] defendant's other issue on appeal."). We decline to address the substance of Defendant's second and unpreserved argument. The mootness of Defendant's second argument is no indictment on the validity or invalidity of the argument.

CONCLUSION

¶ 37 Defendant was entitled to a jury instruction on involuntary manslaughter, as the evidence could have supported a guilty verdict for involuntary manslaughter under a theory of culpable negligence. Further, Defendant suffered prejudicial error, as there was a reasonable possibility that a different result would have been reached had the involuntary manslaughter instruction been given to the jury.

NEW TRIAL.

Judge GORE concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

¶ 38 In this matter, I concur with the majority that an instruction on involuntary manslaughter based upon a theory of culpable omission would require a special instruction be given to the jury, and Defendant failed to properly preserve this issue for appeal by failing to present his proposed special instruction in writing to permit review by this Court.

¶ 39 I write to respectfully dissent regarding the issue of whether the trial court's refusal to grant Defendant's request for a lesser included instruction on involuntary manslaughter contained in the pattern jury instructions was error. Based upon the jury finding beyond a reasonable doubt that this offense was especially heinous, atrocious, or cruel as an aggravating factor, it appears clear the verdict would not have been different had the trial judge given the lesser included involuntary manslaughter instruction.

¶ 40 "Involuntary manslaughter, which is a lesser included offense of second degree murder, is the unlawful killing of a human being without malice, without premeditation and deliberation, *and without intention to* kill or *inflict serious bodily injury*." *State v. Debiase*, 211 N.C. App. 497, 505, 711 S.E.2d 436, 441, *disc. rev. denied*, 365 N.C. 335, 717 S.E.2d 399 (2011) (emphasis added) (citation and marks omitted). "Involuntary manslaughter may also be defined as the unintentional killing of a human being without malice, proximately caused by (1) *an unlawful act not amounting to a felony* nor naturally dangerous to human life, or (2) a culpably negligent act or omission." *State v. Powell*, 336 N.C. 762, 767, 446 S.E.2d 26, 29 (1994) (emphasis added).

¶ 41 My colleagues rely heavily on the application of *Debiase*, 211 N.C. App. 497, 711 S.E.2d 436. However, *Debiase* is distinguishable from this case. In *Debiase*, factual accounts varied as to the occurrences resulting in the victim's fatal wound, and the jury had to determine whether the defendant acted intentionally in inflicting the wound. *See Debiase*, 211 N.C. App. at 499, 711 S.E.2d at 438 (testimony presented to the effect the defendant did not make a stabbing motion at the victim using a broken beer bottle).

¶ 42 In the case at bar, there was no dispute Defendant intentionally and feloniously assaulted the victim, causing facial fractures. At all times, expert testimony was consistent in the conclusion the death was a homicide. Further, there was substantial evidence of malice in this case. The jury was asked to consider aggravating factors and found beyond a reasonable doubt the presence of the aggravating factor: the offense was "especially heinous, atrocious, or cruel." We have special insight into the jury's treatment and consideration of the malice element of second degree murder, based upon its findings of aggravating factors: insight that we would not ordinarily have. In finding this offense was especially heinous, atrocious, or cruel beyond a reasonable doubt, it is clear the jury gave substantially the same consideration to the evidence that it would have given in the determination of the presence of malice. Therefore, the verdict would not have been different had the lesser included instruction on involuntary manslaughter been given. The majority correctly writes that in *Debiase*, we decided, when viewing the evidence in the light most favorable to the defendant, "[the] [d]efendant did not know and had no reason to believe that the bottle would break or that the breaking of the bottle would inflict a fatal wound to [the victim's] neck." *Id.* at 506, 711 S.E.2d at 442. I cannot similarly agree that in the case at bar, where Defendant beat his wife so badly that she suffered multiple facial fractures, the Defendant did not know or did not have reason to believe he would cause serious bodily injury or inflict a fatal wound.

¶ 43 Given that the jury found this crime to be especially heinous, atrocious, or cruel, the evidence is undisputed that Defendant committed an unlawful act amounting to a felony intended to inflict serious bodily injury. Even in the light most favorable to Defendant, no evidence existed to contravene the fact that Defendant assaulted his wife, nor did evidence exist to contravene the fact that Defendant acted with the intention to inflict serious bodily injury, or the knowledge or reason to know his actions could do so. Therefore, Defendant was not entitled to an involuntary manslaughter instruction.

¶ 44 I would find no error in the trial court's decision to decline to deliver an instruction to the jury on involuntary manslaughter because the jury's verdict would not have been different had the instruction been given. Therefore, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
FRANK CATALDO

No. COA20-740

Filed 18 January 2022

Discovery—post-conviction—instructions on remand—scope of in camera review—failure to comply with mandate

In a sexual offense case in which the appellate court instructed the trial court on remand to conduct an in camera review of child protective services records for materiality—requested in defendant's motion for post-conviction discovery seeking information regarding prior unfounded claims of sexual abuse made by the victim—the trial court impermissibly narrowed the scope of its review to records involving specific time periods and accusations against specific people. Therefore, its order denying defendant's motion for post-conviction discovery was vacated and the matter remanded for further review.

Judge ARROWOOD dissenting.

Appeal by Defendant from order entered 17 June 2019 by Judge Edwin G. Wilson, Jr., in Rockingham County Superior Court. Heard in the Court of Appeals 8 September 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sherri Horner Lawrence, for the State-Appellee.

North Carolina Prisoner Legal Services, Inc., by Christopher J. Heaney, for Defendant-Appellant.

COLLINS, Judge.

¶ 1 Defendant appeals an order wherein the trial court concluded that certain sealed child protective services records obtained by the trial court and reviewed in camera during post-conviction discovery were immaterial to Defendant's defense and denied Defendant's request for access to those records and a new trial. Because the trial court impermissibly narrowed the scope of its post-conviction discovery orders, the trial court failed to comply with this Court's mandate in *State v. Cataldo*,

261 N.C. App. 538, 818 S.E.2d 203, WL 4441414 (2018) (unpublished) ("*Cataldo II*"). We reverse the trial court's order and remand for post-conviction discovery orders and an in camera review of the records at issue, in accordance with *Cataldo II*.

I. Procedural Background

¶ 2 On 8 May 2013, following a trial, a jury found Defendant guilty of two counts of statutory sex offense and one count of statutory rape of T.B., a minor.[1] The trial court consolidated the two statutory sex offense convictions and entered judgment, sentencing Defendant to consecutive prison terms of 240 to 297 months for statutory sex offense and 240 to 297 months for statutory rape. Defendant appealed. By opinion filed 3 June 2014, this Court found no error in the proceeding below. *State v. Cataldo*, 234 N.C. App. 329, 762 S.E.2d 2, WL 2507788 (2014) (unpublished) ("*Cataldo I*").

¶ 3 On 7 July 2015, Defendant filed in the trial court a motion for appropriate relief ("MAR") and a motion for post-conviction discovery. In his MAR, Defendant alleged that he had received ineffective assistance of counsel because his "trial counsel did not request an *in camera* review of DSS records about the complainant's prior allegations of sexual abuse," and "[a]s a result, trial counsel failed to discover exculpatory and impeachment evidence that would have greatly aided [Defendant's] defense."

¶ 4 Defendant relied on *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), to support his argument. In *Ritchie*, the defendant was charged with various sex offenses against a minor and sought disclosure of the victim's child protective services records in order to raise a defense. In a plurality decision, the United States Supreme Court stated, "It is well settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment." *Id.* at 57 (citations omitted). "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (citation omitted). The Court concluded that the defendant was "entitled to know whether the [child protective services] file contains information that may have changed the outcome of his trial had it been disclosed[,]" and remanded for an in camera review of the file. *Id.* at 61.

---

1. The transcript indicates that the jury found Defendant not guilty of one other count of statutory rape.

¶ 5 Defendant alleged in his MAR that before accusing Defendant, "T.B. made multiple allegations of sexual abuse against family members that were investigated by DSS and determined to be unfounded," including: "a previous DSS investigation when T.B. was four years old regarding T.B. being sexually abused by her biological father and by a neighbor"; accusations made in 2008 against her biological father for sexually abusing her; and accusations made in 2009 against her uncle for sexually abusing her. Defendant argued that T.B.'s "history of making false allegations of sexual abuse" was "directly relevant to the credibility of her claims against [Defendant]." Defendant requested the trial court "order post-conviction discovery from the State so he may review the materials, continue post-conviction investigation, and amend his [MAR]."

¶ 6 In his motion for post-conviction discovery, Defendant requested that the trial court order Rockingham Department of Health and Human Services ("Rockingham DHHS") and Guilford County Department of Social Services ("Guilford DSS") "to turn over all records, including medical and mental health records, concerning [T.B.] . . . to the Court for *in camera* review" and order Kim Madden, a psychiatrist who interviewed T.B. in January 2011, "to turn over all notes and/or reports concerning her treatment of T.B. for an *in camera* review," pursuant to *Ritchie*.

¶ 7 The State filed an answer to Defendant's MAR, arguing that it should be denied. Defendant moved to stay a decision on his MAR until he received and had an opportunity to review post-conviction discovery materials. The trial court entered an order on 5 October 2016 denying Defendant's motion to stay a decision on his MAR, his MAR, and his motion for post-conviction discovery.

¶ 8 Defendant filed a petition for writ of certiorari with this Court, seeking review of the 5 October 2016 order. This Court granted certiorari. By opinion filed 18 September 2018, this Court reversed the denials of Defendant's MAR and motion for post-conviction discovery stating,

> Our precedent, as well as that of *Ritchie*, is clear. The DSS records sought by defendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released. Its materiality, however, is questionable. Do the records exist? Do they show what defendant contends? These are matters best suited to an *in camera* review. . . .
>
> [W]e hold that [D]efendant made the requisite showing to support his motion for post-conviction

> discovery, and that the trial court erred in denying it. We therefore reverse the trial court's order, and remand for an *in camera* review of the DSS records at issue. Should the trial court determine that these records are in fact material, and would have changed the outcome of defendant's trial, [D]efendant should be granted a new trial.

Cataldo II, WL 4441414 at *11-12 (citations omitted).

¶ 9 Upon remand, the State, through Rockingham DHHS, provided the trial court "with the complete files of Rockingham DHHS, as they pertain to this matter." The trial court held a hearing on the matter and entered an Order Post-Conviction Discovery on 18 December 2018 ("Rockingham Order"), in which it found, in relevant part:

> 9. This Court has reviewed the records provided by the State through Rockingham DHHS and finds that the file does not contain any records "at issue" as requested by [D]efendant in his post-conviction motion for discovery and as described by the Court of Appeals. The records at issue are records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009.
>
> 10. This Court does find that the records provided contain references to the records at issue, but they do not provide the substance of those records and this Court is unable to complete its *in camera review* as Ordered by the Court of Appeals until it receives the appropriate records.

¶ 10 Upon its findings, the trial court concluded and ordered that Rockingham DHHS "shall make available to this Court the DSS records at issue, specifically records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009."

¶ 11 Subsequently, the trial court and the parties exchanged emails regarding the scope of the Rockingham Order. Specifically, Defendant contended that the Rockingham Order's time ranges were too narrow, and that it failed to request both the files related to allegations made by T.B. against Defendant himself or unknown others, and the documents from Kim Madden regarding her treatment of T.B. The trial court declined to modify the Rockingham Order in response to Defendant's contentions, explaining that "the Court of Appeals was clear the remand was for a review of DSS records."

¶ 12 In response to the Rockingham Order, Rockingham DHHS sent a letter to the trial court, indicating that it "did not respond to any abuse, neglect or dependency reports regarding the victim child in 2000-2001, 2008, or 2009." However, the letter advised that the Central Registry "indicate[d] that the Guilford . . . [DSS] responded to abuse and/or neglect reports on the victim child on or around these time periods." The letter also indicated that Rockingham DHHS investigated a situation regarding T.B. in 2004, during which Guilford DSS had provided it with records from its involvement with the family in 2001 and 2002. Copies of the Guilford DSS records from 2001 and 2002 were attached to the letter.

¶ 13 The trial court entered an Order Post-Conviction Discovery Guilford DSS on 18 February 2019 ("Guilford Order"), finding in part:

> This Court has reviewed the Guilford County DSS records provided by [Rockingham] DHHS and finds they do not contain any records described by the Court of Appeals regarding T.B.'s allegations of prior abuse in 2008 or 2009. This Court is unable to complete its *in camera review* as Ordered by the Court of Appeals until it receives the appropriate records.

¶ 14 The trial court thus ordered Guilford DSS to "make available to this [c]ourt the DSS records at issue, specifically records regarding T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009."

¶ 15 The trial court entered an Order on Remand Defendant's Motion for Post-Conviction Discovery ("Order on Remand") on 17 June 2019. The trial court found, in pertinent part, that it had "conducted an *in camera* review of the records provided by [Guilford] DSS as directed by the Court of Appeals and observed that the records contained documentation related to allegations of prior abuse occurring on or around the dates noted in the Opinion of the Court of Appeals."

¶ 16 The trial court concluded, in relevant part:

> 23. Having conducted an *in camera* review of the records provided by [Guilford DSS], this Court concludes that, in the context of the entire record, there is not a reasonable probability that the outcome of defendant's trial would have been different had he been able to access these records. As such, the records of T.B.'s prior allegations of abuse are not material to the defense.

> 24. Defendant, therefore, is not entitled to have access to the records of T.B.'s prior allegations of abuse and is not entitled to a new trial.

¶ 17 The trial court denied Defendant's Motion for Post-Conviction Discovery and ordered the records reviewed be sealed and placed in the record for appellate review, in accordance with *State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977).

¶ 18 Defendant filed a petition for writ of certiorari with this Court on 29 May 2020. This Court allowed the petition "for purposes of reviewing Judge Edwin G. Wilson, Jr.'s, 17 June 2019 order denying [Defendant's] motion for post-conviction discovery upon the *in camera* review ordered by this Court in [*Cataldo II*]."

II. Discussion

A. Scope of post-conviction discovery orders

¶ 19 Defendant argues that the trial court erred on remand by impermissibly narrowing the scope of its post-conviction discovery orders to Rockingham DHHS and Guilford DSS, such that the trial court failed to conduct a sufficient in camera review of relevant records, as mandated by this Court in *Cataldo II*. We agree.

¶ 20 "The general rule is that an inferior court must follow the mandate of an appellate court in a case without variation or departure." *Condellone v. Condellone*, 137 N.C. App. 547, 551, 528 S.E.2d 639, 642 (2000) (quoting *Metts v. Piver*, 102 N.C. App. 98, 100, 401 S.E.2d 407, 408 (1991)); *see, e.g.*, *Creech v. Melnik*, 147 N.C. App. 471, 473-74, 556 S.E.2d 587, 589 (2001) ("Under the law of the case doctrine, an appellate court ruling on a question governs the resolution of that question both in subsequent proceedings in the trial court and on a subsequent appeal, provided the same facts and the same questions, which were determined in the previous appeal, are involved in the second appeal.").

¶ 21 In the Factual and Procedural Background of *Cataldo II*, this Court explained that Defendant had filed an MAR on 7 July 2015 in which

> Defendant alleged that T.B.'s father had been accused of sexually abusing her from 2000 to 2001, and again in 2008, and that she had accused her uncle of sexually abusing her in 2009. He argued that he received ineffective assistance of counsel at trial, due to (1) counsel's failure to subpoena T.B.'s DSS records regarding prior claims of abuse; (2) counsel's failure

> to cross-examine T.B.'s therapist regarding prior claims of abuse; and (3) counsel's failure to impeach T.B. regarding her prior claims of abuse. That same day, [D]efendant filed a motion for post-conviction discovery, seeking an *in camera* review of T.B.'s DSS records regarding prior claims of abuse.

Cataldo II, WL 4441414 at *2. This Court then addressed the trial court's denial of Defendant's MAR as follows:

> [D]efendant contends that the trial court erred in denying his MAR because he made a plausible showing that material, favorable DSS records exist. We agree.
>
> . . . .
>
> Our precedent in [*State v. Taylor*, 327 N.C. 147, 393 S.E.2d 801 (1990), and *State v. Hardy*, 293 N.C. 105, 235 S.E.2d 828 (1977)], as well as that of *Ritchie*, is clear. The DSS records sought by [D]efendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released. Its materiality, however, is questionable. Do the records exist? Do they show what defendant contends? These are matters best suited to an *in camera* review. *See Ritchie*, 480 U.S. at 61, 94 L. Ed. 2d at 60 (concluding that *in camera* review by the trial court would serve the defendant's interest while also protecting the confidentiality of individuals involved in child-abuse investigations).
>
> In accordance with all of this precedent, we hold that [D]efendant made the requisite showing to support his motion for post-conviction discovery, and that the trial court erred in denying it. We therefore reverse the trial court's order, and remand for an *in camera* review of the DSS records at issue. Should the trial court determine that these records are in fact material, and would have changed the outcome of [D]efendant's trial, [D]efendant should be granted a new trial.

Cataldo II, WL 4441414 at *3-4.

¶ 22 At issue is the proper scope of "the DSS records at issue" in this Court's directive to the trial court. *Id.* at *5.

¶ 23 Defendant argues that his original request was for Rockingham DHHS and Guilford DSS to produce "all records, including medical and mental health records, concerning [T.B.] . . . for *in camera* review[,]" and this request "defined the requisite scope of the DSS records at issue on remand." Thus, Defendant argues, the trial court erred in limiting the scope of review to the specified time periods and excluding any records of Rockingham DHHS's investigation in 2004, any allegations by T.B. against Defendant in 2006 or 2007, and any other relevant social services records.

¶ 24 In its Rockingham Order, the trial court found and concluded that "[t]he records at issue are records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009." Similarly, in its Guilford Order, the trial court concluded "the DSS records at issue" are "records regarding T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009." In its Order on Remand, the trial court noted the limited scope of its review, finding that "[i]n response to the Order of the Court of Appeals, this [c]ourt ordered [Rockingham] DHHS to provide the [c]ourt with the records described by the Court of Appeals, specifically regarding T.B.'s allegations of prior abuse in 2000-2001, 2008, and 2009." The trial court also found that it "ordered [Guilford] DSS to make available to [the court] the DSS records at issue, specifically those related to T.B.'s allegations of prior abuse from 2000-2001, 2008, and 2009[.]"

¶ 25 In *Cataldo II*, as quoted above, this Court mentioned these specific time periods in the Factual and Procedural Background of the opinion, describing specific allegations of abuse asserted in Defendant's MAR as grounds for Defendant's ineffective assistance of counsel claims. This Court, with a general reference to T.B.'s prior allegations of sexual abuse investigated by social services, then summarized Defendant's argument on appeal as "he was entitled to an *in camera* review and the disclosure of these DSS documents proving that T.B. has falsely accused others of sexual abuse." *Cataldo II*, WL 4441414 at *2-3. However, in describing Defendant's motion for post-conviction discovery – the main issue ultimately decided in *Cataldo II* – this Court described the motion as "seeking an *in camera* review of T.B.'s DSS records regarding prior claims of abuse." *Id.* at *2.

¶ 26 In his motion for post-conviction discovery, while Defendant referenced allegations from the specific time periods, Defendant's request for discovery of DSS records was not limited to those time periods.

Defendant argued that he "should be granted an *in camera* review of all DSS records concerning T.B." and requested the trial court order Rockingham DHHS and Guilford DSS "to turn over all records, including medical and mental health records, concerning [T.B.] to the [c]ourt for *in camera* review[.]"

¶ 27 In support of its holding that "[D]efendant made the requisite showing to support his motion for post-conviction discovery, and that the trial court erred in denying it[,]" this Court reasoned that "[t]he DSS records sought by [D]efendant, if in fact they exist, may have permitted him to confront and impeach T.B. Defendant could not be expected to present a showing of this evidence prior to it being released." *Id.* at *4-5. This reasoning applies to all DSS records sought by Defendant in his motion for post-conviction discovery regarding T.B.'s prior allegations of sexual abuse, not just those specific instances identified by Defendant without access to the records. The in camera review is designed to safeguard Defendant's due process right to evidence favorable and material to his guilt or punishment. *Ritchie*, 480 U.S. at 57.

¶ 28 Based on Defendant's motion for post-conviction discovery seeking all Rockingham DHHS and Guilford County DSS records regarding T.B. and this Court's language in *Cataldo II* ordering in camera review of the DSS records at issue, the trial court erred by impermissibly narrowing the scope of its post-conviction discovery orders to Rockingham DHHS and Guilford DSS, such that the trial court failed to conduct a sufficient in camera review of relevant records, as mandated by this Court in *Cataldo II*.

¶ 29 Accordingly, we reverse the trial court's order and remand for post-conviction discovery orders of proper scope and in camera review of "T.B.'s DSS records regarding prior claims of abuse." *Cataldo II*, WL 4441414 at *2.

B. In camera review on appeal

¶ 30 Defendant also asks this Court to review the social services records already reviewed by the trial court to determine whether they contain exculpatory information that would be favorable and material to his defense. We decline to review the records until all of the relevant records have been requested and reviewed in camera by the trial court. In light of our holding, we need not reach any remaining arguments.[2]

2. Defendant also argues that he is entitled to post-conviction discovery under N.C. Gen. Stat. § 15A-1415(f) and that the trial court erred when it failed to order production of such discovery by the State. We are uncertain what discovery Defendant believes he is entitled to beyond the scope of the issues decided in this opinion.

III. Conclusion

¶ 31 The trial court erred when it impermissibly narrowed the scope of its orders to Rockingham DHHS and Guilford DSS to include only records regarding allegations of events during certain time periods and against certain persons. Accordingly, we reverse the trial court's order and remand to the trial court with instructions to order Rockingham DHHS and Guilford DSS to produce T.B.'s social services records "regarding prior claims of abuse." *Id.*

¶ 32 Upon receipt and in camera review of the records, should the trial court determine that the records are in fact material, Defendant should be granted a new trial. *See id.* at *5.

REVERSED AND REMANDED.

Judge JACKSON concurs.

Judge ARROWOOD dissents by separate opinion.

ARROWOOD, Judge, dissenting.

¶ 33 I respectfully dissent from the majority's holding that the trial court failed to comply with this Court's mandate as set out in *State v. Cataldo*, 261 N.C. App. 538, 818 S.E.2d 203 (2018) (unpublished) ("*Cataldo II*"). I sat on the panel that decided *Cataldo II* and concurred in that opinion, and I believe the trial court complied with *Cataldo II*. I vote to affirm the trial court's order, and respectfully dissent.

¶ 34 In defendant's motion for post-conviction discovery, defendant alleged the following:

> A review of the State's discovery materials contained in the file indicates that there are Department of Social Services records regarding T.B.'s past allegations of sexual abuse against other people that were determined to be unfounded by DSS. Additionally, there are records concerning T.B.'s work with counselor Kim Madden that are likely to contain information helpful for the defense.

Defendant's factual allegations included three subsections, describing T.B.'s allegations of sexual abuse against her father in 2000-2001, again in 2008, and against her uncle in 2009. After highlighting the allegations

made during these relevant periods, defendant argued that he "should be granted an in camera review of all DSS records concerning T.B."

¶ 35 In *Cataldo II*, this Court addressed defendant's contention "that he was entitled to an *in camera* review and the disclosure of *these DSS documents proving that T.B. had falsely accused others of sexual abuse*." 261 N.C. App. 538, 818 S.E.2d 203 at *8 (emphasis added). After concluding that the trial court erred in denying defendant's motion for post-conviction discovery, we directed the trial court to conduct "an *in camera* review of the DSS records at issue[,]" and if the trial court "determine[d] that these records [were] in fact material, and would have changed the outcome of defendant's trial," the trial court should grant defendant a new trial. *Id.* at *12.

¶ 36 On 18 December 2018, the trial court entered an order for post-conviction discovery with respect to Rockingham County DSS records. In the order, the trial court made the following relevant findings:

> 9. This Court has reviewed the records provided by the State through Rockingham DHHS and finds that the file does not contain any records regarding the DSS records "at issue" as requested by defendant in his post-conviction motion for discovery and as described by the Court of Appeals. The records at issue are records regarding T.B.'s allegations of prior abuse by her father from 2000-2001, and again in 2008, and by her uncle in 2009. The allegations of prior abuse are alleged to have occurred in North Carolina.
>
> 10. This Court does find that the records provided contain references to the records at issue, but they do not provide the substance of those records and this Court is unable to complete its *in camera review* as Ordered by the Court of Appeals until it receives the appropriate records.

On 18 February 2019, the trial court entered a similar order with respect to Guilford County DSS records, ordering the State to furnish complete records for the aforementioned time periods.

¶ 37 The issue on appeal is whether the trial court properly determined the scope of "the DSS records at issue" as directed by this Court in *Cataldo II*. In *Cataldo II*, we answered the question of whether defendant was entitled to an *in camera* review and disclosure of DSS

documents "proving that T.B. had falsely accused others of sexual abuse." *Id.* at *8. Although defendant's MAR did request "an *in camera* review of all DSS records concerning T.B.[,]" *Cataldo II* did not grant an *in camera* review of all DSS records concerning T.B., instead limiting the review to documents related to T.B.'s allegations against others. *Id.* This scope aligns with defendant's MAR, which specifically described three sets of allegations in 2000-2001, 2008, and 2009. I believe that the scope of "the DSS records at issue" is limited by the argument presented in defendant's MAR and encompasses DSS records pertaining to T.B.'s allegations against others in 2000-2001, 2008, and 2009.

¶ 38 Notably, the trial court entered two orders requiring the State to furnish additional records prior to completing the *in camera* review. The trial court recognized that the *in camera* review, as mandated by *Cataldo II*, required the production of specific records, but that the *in camera* review was limited in scope. After obtaining the relevant records at issue, the trial court conducted its *in camera* review and properly determined that the records of T.B.'s prior allegations of abuse were not material to the defense. The trial court complied with *Cataldo II* by conducting an *in camera* review of DSS records from these relevant time periods.

¶ 39 I believe the majority has misapprehended the holding and mandate set out in *Cataldo II*, and I vote to affirm the trial court's order. I respectfully dissent.

STATE v. CREW

[281 N.C. App. 437, 2022-NCCOA-35]

STATE OF NORTH CAROLINA
v.
DANIEL ISIAH CREW, JR.

No. COA20-721

Filed 18 January 2022

1. Animals—dogfighting—sufficiency of evidence

The State presented substantial evidence to send to the jury multiple charges of dogfighting where, on a property at which defendant ran a kennel business, investigators seized numerous dogs that had injuries and scarring consistent with trained, organized dogfighting and discovered equipment designed to condition dogs to increase their strength and endurance, medication commonly used in dogfighting operations, an area that appeared to be a dogfighting pit or training area, and publications and notes related to dogfighting.

2. Evidence—expert testimony—dogfighting case—leading question on direct exam

In a dogfighting and animal cruelty case, the trial court exercised appropriate discretion when it allowed the State to ask a leading question of the forensic veterinary medicine expert on direct examination as a follow-up to an earlier, non-leading question that elicited the expert's opinion that the dogs were being kept for the purpose of organized dogfighting.

3. Damages and Remedies—restitution—criminal case—evidentiary support—ability to pay

In a dogfighting and animal cruelty case in which thirty dogs were seized and placed in the care of a county animal shelter, the trial court's seven orders requiring defendant to pay a total of $70,000 in restitution for the dogs' care and housing was supported by sufficient evidence. The appellate court rejected defendant's argument that, where he was convicted of crimes relating to only seventeen out of thirty dogs seized, he could not be required to pay the costs associated with all thirty animals, since restitution may be imposed for any injuries or damages directly and proximately caused by criminal offenses pursuant to N.C.G.S. § 15A-1340.34(c), and in this case, all the dogs needed to be removed due to defendant's criminal activities. Further, the trial court was not required to make specific findings and conclusions of law to support its determination that defendant had the ability to pay the amount of restitution where there was sufficient supporting evidence.

4. Judgments—criminal case—awards of restitution—immediate conversion to civil judgments improper

In a dogfighting and animal cruelty case in which defendant was ordered to pay a total of $70,000 in restitution for the care and housing of thirty dogs that were seized, the trial court erred by immediately converting the restitution orders to civil judgments. Where the offenses at issue were not subject to the Crime Victim's Rights Act (and thus not subject to a specific statutory procedure allowing a restitution award to be converted into a civil judgment), and there was no other, separate statutory authority for the court's action, the civil judgments were vacated.

Appeal by defendant from judgments entered 25 September 2019 by Judge Carl R. Fox in Orange County Superior Court. Heard in the Court of Appeals 6 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Brenda Menard, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for defendant.

DIETZ, Judge.

¶ 1 Defendant Daniel Crew appeals his convictions for dogfighting, felony cruelty to animals, misdemeanor cruelty to animals, and restraining dogs in a cruel manner. Crew also challenges the trial court's restitution orders totaling $70,000, which the trial court immediately converted to civil judgments.

¶ 2 As explained below, the State presented sufficient evidence to support the dogfighting charges, and Crew's unpreserved challenge to a leading question posed by the prosecutor at trial is meritless. We therefore find no error in Crew's criminal convictions. We also find no error in the trial court's restitution orders, which were supported by sufficient evidence at trial. But we hold that the trial court lacked the authority to immediately convert those restitution orders into civil judgments. We therefore vacate those civil judgments.

Facts and Procedural History

¶ 3 Defendant Daniel Crew ran Crew Kennels on property owned by his parents in Rougemont. Most of the dogs he kept in his kennel

were pit bulls, which he bred and sold primarily for hunting and pulling competitions.

¶ 4 In 2018, law enforcement officers arrived at the property and found 30 pit bulls. The officers contacted Orange County Animal Services, who arrived and took over the investigation. Animal Control Manager Irene Phipps went to the property during the search. She found some of the dogs chained and others in "above ground box housing." Phipps was concerned because some of the dogs had injuries, which were "similar to injuries a dog would sustain through dogfighting." Some of the dogs had what appeared to be topical medication applied to the skin to attempt to heal the wounds. Phipps testified that she saw twenty dogs with no water and ten dogs with inadequate water. Phipps also testified that some of the animals appeared unhealthy and underweight.

¶ 5 Officers also found dogfighting publications and "keep notes" for preparing a dog for a fight at the property. Officers took five dogs that appeared to need immediate care to a veterinary facility and the rest to the Orange County Animal Services shelter.

¶ 6 The equipment found at the site included a device called a "Jenny," to which a dog is harnessed, a spring pole, two flirt poles, heavy chains, and a treadmill with two weighted dog collars. These items are used for exercise and conditioning to build up a dog's strength. The site also contained areas that appeared to be staging and dogfighting pit areas and weight scales used in organized dogfighting operations to weigh dogs before a fight.

¶ 7 Many of the dogs had injuries or significant scarring from past wounds. A number of dogs ultimately were euthanized.

¶ 8 The State charged Crew with fifteen counts of engaging in dogfighting, one count of allowing property to be used for dogfighting, five counts of felony cruelty to animals, twenty-five counts of misdemeanor cruelty to animals, and sixteen counts of restraining dogs in a cruel manner.

¶ 9 Dr. Clarissa Noureddine conducted two forensic examinations of the dogs. Dr. Noureddine is the chief veterinarian at the Guilford County Animal Shelter. She was admitted as an expert in forensic veterinary medicine. Dr. Noureddine reviewed photos and evidence found on site, exam findings from the emergency veterinary hospital and its veterinarian, and results of testing performed on the dogs.

¶ 10 At trial, Dr. Noureddine described the secluded environment in which the dogs were kept, and the items located at the site, as consistent with those found at dogfighting operations. Dr. Noureddine also testified

that the injuries the dogs sustained indicated that the animals were engaged in trained, organized fighting, not spontaneous fighting.

¶ 11 Andi Morgan, Assistant Director of Orange County Animal Services, testified that the agency incurred $92,500 in costs to house the seized dogs and provide necessary medical care and other services. According to Morgan, the cost to house the dogs alone was "a little over 80,000."

¶ 12 Crew moved to dismiss the dogfighting charges. The trial court granted the motion to dismiss the charge of allowing property to be used for dogfighting. The trial court denied the motion to dismiss as to the other dogfighting charges.

¶ 13 The jury found Crew guilty of eleven counts of dogfighting, three counts of felony cruelty to animals, fourteen counts of misdemeanor cruelty to animals, and two counts of restraining dogs in a cruel manner. The trial court imposed six consecutive active sentences of 10 to 21 months each along with several suspended sentences. The trial court also ordered Crew to pay Orange County Animal Services $10,000 in seven separate restitution orders that were then entered as civil judgments, totaling $70,000 in restitution.

¶ 14 Crew timely appealed the criminal judgments. He later petitioned for a writ of certiorari seeking review of the restitution awards entered as civil judgments. Because, as explained below, Crew's challenge to those civil judgments has merit, in our discretion, we allow the petition and issue of a writ of certiorari to review that issue. N.C. R. App. P. 21.

Analysis

I. Denial of motion to dismiss

¶ 15 **[1]** Crew first argues the trial court erred by denying his motion to dismiss the dogfighting charges. He contends that the State's evidence was insufficient to show that he intended to use the dogs for fighting purposes.

¶ 16 "This Court reviews the trial court's denial of a motion to dismiss de novo." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). When a criminal defendant moves to dismiss, "the trial court is to determine whether there is substantial evidence (a) of each essential element of the offense charged, or of a lesser offense included therein, and (b) of defendant's being the perpetrator of the offense." *State v. Earnhardt*, 307 N.C. 62, 65–66, 296 S.E.2d 649, 651 (1982). "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). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994).

¶ 17 The crime of possession of a dog for the purpose of dogfighting is a specific intent crime; it applies to a person "who owns, possesses, or trains a dog with the intent that the dog be used in an exhibition featuring the baiting of that dog or the fighting of that dog with another dog or with another animal." N.C. Gen. Stat. § 14-362.2(b). Crew argues that the State did not present sufficient evidence of his intent to commit that crime.

¶ 18 We reject this argument. The State presented evidence that the property at which they found the dogs contained equipment designed to increase the dogs' strength and endurance. They also recovered medication commonly used in dogfighting operations that could be used for wound care without involving a veterinarian. The property also contained an area that appeared to be a dogfighting pit or training area. Finally, the officers recovered dogfighting publications and "keep notes" for preparing a dog to fight.

¶ 19 In addition, the State presented expert testimony that many of the dogs had scarring and parasite infections consistent with dogs who were trained and used for dogfighting.

¶ 20 This evidence was sufficient for a reasonable juror to find that Crew intended to engage in dogfighting. Accordingly, the trial court did not err by denying the motion to dismiss.

II. The State's leading question during direct examination

¶ 21 **[2]** Crew next argues that the trial court plainly erred by allowing the prosecutor to ask a leading question to Dr. Noureddine, the expert who testified about the use of the dogs for fighting purposes.

¶ 22 As an initial matter, Crew acknowledges that the trial court's decision to permit this leading question was a discretionary one and that our Supreme Court and this Court repeatedly have held that plain error review does not apply to discretionary decisions. *See, e.g.*, *State v. Steen*, 352 N.C. 227, 256, 536 S.E.2d 1, 18 (2000) ("[T]his Court has not applied the plain error rule to issues which fall within the realm of the trial court's discretion, and we decline to do so now."); *State v. Smith*, 194 N.C. App. 120, 126–27, 669 S.E.2d 8, 13 (2008) ("Our Supreme Court

has held, however, that discretionary decisions by the trial court are not subject to plain error review."). Crew thus asks this Court to invoke Rule 2 of the Rules of Appellate Procedure to excuse his failure to preserve this issue for appellate review. We reject this request. We can invoke Rule 2 only "in exceptional circumstances" that present a manifest injustice or issues of importance in the public interest. *State v. Ricks*, 378 N.C. 737, 2021-NCSC-116, ¶ 5. This case does not remotely approach that high bar.

¶ 23 Indeed, even if we were to apply the plain error standard—which, itself, is an exceedingly high standard of review—we could not find any error, much less any plain error. Leading questions generally are not permitted during direct examination. N.C. Gen. Stat. § 8C-1, Rule 611(c). But trial courts have discretion to permit a leading question that elicits "testimony already received into evidence without objection." *State v. Stafford*, 150 N.C. App. 566, 569, 564 S.E.2d 60, 62 (2002). Here, the prosecutor posed the following non-leading questions to Dr. Noureddine concerning the use of the dogs for dogfighting:

> Q. Dr. Noureddine, based on your observations and examinations in this case, did you form an opinion as to whether these dogs had been or were intended to be used in organized dogfighting?
>
> A. Yes.
>
> Q. And what was that opinion?
>
> A. It's my opinion that the 30 dogs in this case that we have described either have been, are, or are intended to be used in organized dogfighting.

After Dr. Noureddine further described the basis for her opinion, the prosecutor then asked the leading question that Crew challenges on appeal:

> Q. But it – it's your opinion that all of them were, in your opinion, being kept for that purpose?
>
> A. Yes.

¶ 24 The trial court's decision to permit this question was well within its sound discretion and not error, certainly not plain error, and not even remotely close to the sort of exceptional circumstances that would justify the use of Rule 2. We therefore reject Crew's argument.

III. Restitution

¶ 25 **[3]** Finally, Crew challenges the trial court's seven restitution orders, which the court converted into seven civil judgments. Those restitution orders require Crew to pay Orange County Animal Services a total of $70,000 in restitution.

¶ 26 This Court reviews "*de novo* whether the restitution order was supported by evidence at trial or sentencing." *State v. Hardy*, 242 N.C. App. 146, 159, 774 S.E.2d 410, 419 (2015).

¶ 27 Crew first argues that, although the State charged him with offenses related to thirty dogs, he was convicted only of offenses related to seventeen of those dogs. Thus, he argues, the trial court's restitution orders impermissibly impose restitution based on offenses for which he was not convicted, because they were based on evidence of costs associated with all thirty of the seized animals.

¶ 28 We reject this argument. The trial court may impose restitution for "any injuries or damages arising directly and proximately out of the offense committed by the defendant." N.C. Gen. Stat. § 15A-1340.34(c). Crew's acts of engaging in dogfighting, cruelty to animals, and restraining dogs in a cruel manner led directly to the need to remove all thirty dogs from his possession and place them with animal services. Employees of Orange County Animal Services testified that the shelter spent $92,500 on care and housing of those dogs, including $80,000 solely for housing of the animals. This evidence was sufficient to support the trial court's seven separate restitution orders, amounting to $70,000 in total restitution.

¶ 29 Crew next argues that the trial court failed to adequately consider his ability to pay the restitution judgments. Again, we disagree. "Whether the trial court properly considered a defendant's ability to pay when awarding restitution is reviewed by this Court for abuse of discretion." *State v. Hillard*, 258 N.C. App. 94, 98, 811 S.E.2d 702, 705 (2018). "An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Triplett*, 368 N.C. 172, 178, 775 S.E.2d 805, 809 (2015).

¶ 30 Under N.C. Gen. Stat. § 15A-1340.36(a), a trial court determining the amount of restitution must consider factors pertaining "to the defendant's ability to make restitution." These factors include, but are not limited to, the defendant's resources "including all real and personal property owned by the defendant and the income derived from the

property" and "the defendant's ability to earn." *Id.* The trial court need not make "findings of fact or conclusions of law on these matters." *Id.*

¶ 31 Here, there was evidence concerning Crew's ability to pay, including evidence that the kennel Crew operated "generate[s] good money"; that a "good puppy" could sell for a thousand dollars; and that the kennel generated $15,927 of income in 2017. There also was evidence that, although Crew has four minor dependents, he lives with his fiancée who has a job outside the kennel. Based on this evidence, the trial court's determination that Crew had the ability to pay the restitution award was within the court's sound discretion and certainly not manifestly arbitrary or outside the realm of reason.

¶ 32 Crew responds that, although this evidence *might* support the trial court's discretionary decision concerning ability to pay, the court never expressly stated that it considered this evidence. But the law does not require the court to expressly make this sort of statement. To be sure, if there was evidence indicating that the court did *not* consider this evidence of ability to pay, or misapprehended the requirement to consider it, we could find an abuse of discretion. But absent that indication, we presume that the trial court knew the law and followed it. *See Hillard*, 258 N.C. App. at 98, 811 S.E.2d at 705; *State v. Tate*, 187 N.C. App. 593, 597–99, 653 S.E.2d 892, 896–97 (2007) (holding that restitution orders will be overturned only when the trial court "did not consider *any* evidence of defendant's financial condition") (emphasis in original). We thus reject Crew's argument.

¶ 33 **[4]** Finally, Crew argues that the trial court erred by immediately converting the restitution awards into civil judgments. The restitution statutes distinguish between two categories of offenses: (1) those for which the victim is entitled to restitution under the Crime Victims' Rights Act (VRA), and (2) those not covered by the VRA. N.C. Gen. Stat. § 15A-1340.34(b), (c). For VRA offenses falling in the first category, the restitution statutes provide a procedure through which a trial court may convert the restitution award into a civil judgment and a corresponding procedure to enforce that civil judgment. N.C. Gen. Stat. § 15A-1340.38. The restitution statutes do not expressly address whether a restitution award for an offense in the second category—offenses not covered by the VRA—can be converted into a civil judgment.

¶ 34 In a series of unpublished cases, this Court reasoned that restitution awards for some offenses in this second category can be converted to civil judgments based on other, separate statutory authority. For example, in *State v. Batchelor*, the Court held that although "the offense

for which [the defendant] was convicted, larceny, is not one to which the VRA applies," a separate statute, "N.C. Gen. Stat. § 15-8 grants the trial court authority to award restitution where a defendant is convicted of stealing goods, and to 'make all such orders and issue such writs of restitution or otherwise as may be necessary for that purpose.'" 267 N.C. App. 691, 833 S.E.2d 255, 2019 WL 4803703, at *2 (2019) (unpublished). The Court then held that "given the trial court's broad authorization under N.C. Gen. Stat. § 15-8 to 'make all such orders and issue such writs of restitution or otherwise as may be necessary,' it had the authority to enforce, *ab initio*, restitution by civil judgment." *Id.*

¶ 35 We are persuaded by the reasoning of *Batchelor*, but unable to extend it to justify the civil judgments in this case. Unlike *Batchelor*, a larceny case subject to N.C. Gen. Stat § 15-8, there is no corresponding statute authorizing the trial court to "make all such orders and issue such writs" as are necessary to enforce the restitution awards in this case—which provide restitution to an animal services agency in a criminal case involving charges of dogfighting and animal cruelty.

¶ 36 The State contends that the trial court does not need any separate statutory authority because courts have the "inherent authority" to convert any restitution award to a civil judgment. But we agree with Crew that, if this were so, it would render the language in N.C. Gen. Stat. § 15A-1340.38 superfluous, counter to long-standing principles of statutory construction. *State v. Morgan*, 372 N.C. 609, 614, 831 S.E.2d 254, 258 (2019). Moreover, the General Statutes contain a separate provision that can compel a defendant charged with the offenses at issue in this case to pay the reasonable expenses of the animal shelter that took custody of the dogs. N.C. Gen. Stat. § 19A-70. There is no indication in the record that the animal services agency availed itself of this statutory provision. Because there is no statutory provision authorizing the immediate entry of civil judgments for the restitution in this case, we vacate those civil judgments.

Conclusion

¶ 37 For the reasons explained above, we find no error in the trial court's criminal judgments but vacate the civil judgments concerning the awards of restitution.

NO ERROR IN PART; VACATED IN PART.

Judges ARROWOOD and HAMPSON concur.

STATE v. GUINN

[281 N.C. App. 446, 2022-NCCOA-36]

STATE OF NORTH CAROLINA
v.
LUMARRIS GUINN

No. COA21-153

Filed 18 January 2022

Probation and Parole—right to counsel—violated—void order—subject matter jurisdiction in later proceeding

Defendant's right to counsel was violated in a probation violation hearing where the hearing transcript did not show a "thorough inquiry" into defendant's waiver of counsel (the trial court merely asked defendant "Who is your attorney?") and the standard "Waiver of Counsel" form was incomplete (it was signed by defendant and the trial court, defendant checked the box regarding the extent of his waiver, but the trial court did not check the corresponding box in the "Certificate of Judicial Official" section). Therefore, the resulting order extending his probationary term by twelve months was void, and when the State filed a new probation violation report after the expiration of defendant's original probationary period (but during the extended period), the trial court lacked subject matter jurisdiction to revoke defendant's probation.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 28 October 2020 by Judge Jesse B. Caldwell, III, in Gaston County Superior Court. Heard in the Court of Appeals 3 November 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Heather Haney, for the State.

Blass Law PLLC, by Danielle Blass, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Lumarris Guinn appeals from the trial court's judgment revoking his probation and activating his suspended sentence for two counts of uttering a forged instrument. After careful review, we vacate the judgment.

I. Background

¶ 2 On 11 July 2014, Defendant entered an *Alford* plea[1] to two counts of uttering a forged instrument in exchange for the State's dismissal of two counts of obtaining property by false pretenses. The trial court accepted Defendant's plea and that same day entered a judgment sentencing Defendant to 6 to 17 months in the custody of the North Carolina Division of Adult Correction, suspending the sentence, placing Defendant on supervised probation for 30 months, and ordering Defendant to pay restitution along with court costs and fees.

¶ 3 On 18 July 2016, Defendant's probation officer filed a probation violation report alleging that Defendant had violated the conditions of his probation by failing to make required monetary payments. The trial court held a probation violation hearing, at which Defendant was not represented by counsel, on 31 August 2016. On 13 September 2016, the trial court entered an order ("the 2016 Order") finding the probation violations alleged by the State and modifying the terms of Defendant's probation. The trial court extended Defendant's term of probation by 12 months and ordered Defendant to complete 40 hours of community service within six months, for which Defendant would receive $20 credit per hour worked against the balance of the restitution that he was originally ordered to pay as a condition of his probation. The trial court further ordered that Defendant be placed on unsupervised probation upon completion of his community service.

¶ 4 On 29 September 2017, Defendant's probation officer filed a second probation violation report, this time alleging that Defendant did not comply with the conditions of his probation, in that (1) he twice tested positive for marijuana; (2) he left the jurisdiction of the court without the permission of his probation officer; (3) he failed to report for scheduled office appointments; and (4) he failed to make required monetary payments. The probation officer also alleged that Defendant had a new criminal charge pending against him. On 3 October 2017, the probation officer filed the 29 September report again, together with an addendum alleging that Defendant had absconded.

¶ 5 On 28 October 2020, the trial court held another probation violation hearing, at which Defendant was represented by counsel. By judgment

---

1. An *Alford* plea is a guilty plea in which the defendant does not admit to any criminal act, but admits that there is sufficient evidence to convince the judge or jury of the defendant's guilt. *See North Carolina v. Alford*, 400 U.S. 25, 37, 27 L. Ed. 2d 162, 171 (1970); *State v. Baskins*, 260 N.C. App. 589, 592 n.1, 818 S.E.2d 381, 387 n.1 (2018), *disc. review denied*, 372 N.C. 102, 824 S.E.2d 409 (2019).

entered that same day, ("the 2020 Judgment") the trial court found that Defendant had willfully violated the terms and conditions of his probation, revoked Defendant's probation, and activated Defendant's original sentence. The trial court also reduced the balance owed by Defendant to a civil judgment. Defendant timely filed his notice of appeal.

II. Discussion

¶ 6 Defendant argues on appeal that the trial court lacked subject-matter jurisdiction to revoke his probation because his right to counsel was violated at the 2016 probation violation hearing, rendering void the 2016 Order extending his probation; thus, the 2017 probation violation reports were filed after the expiration of Defendant's probation. Alternatively, Defendant argues that the trial court lacked subject-matter jurisdiction to revoke his probation for absconding because he was on unsupervised probation, and thus no longer subject to the conditions of supervised probation, when the probation officer filed the 2017 violation reports.

¶ 7 Defendant further argues that the trial court (1) erred by finding that he had committed a new criminal offense because the State presented insufficient evidence to support that finding, (2) abused its discretion by revoking his probation because the State presented insufficient evidence that he had absconded, and (3) erred by failing to make a finding of "good cause" before denying him the opportunity to confront and cross-examine his probation officer.

¶ 8 After careful review, we conclude that the trial court lacked subject-matter jurisdiction to revoke Defendant's probation because the 2016 Order was void, and thus we must vacate the 2020 Judgment. Accordingly, we need not reach Defendant's remaining arguments.

A. Collateral Attack

¶ 9 As an initial matter, the State argues that Defendant's subject-matter jurisdiction argument "amounts to an impermissible collateral attack" on the 2016 Order. We disagree.

¶ 10 Our Supreme Court has repeatedly held that "a direct appeal from the original judgment lies only when the sentence is originally entered." *State v. Pennell*, 367 N.C. 466, 470, 758 S.E.2d 383, 386 (2014) (citation omitted). Accordingly, "a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence." *Id.* at 472, 758 S.E.2d at 387.

¶ 11 In its brief, the State relies on *State v. Rush*, in which this Court dismissed an appeal from a judgment entered pursuant to a plea agreement

where the defendant "failed to file a motion to withdraw her guilty plea, failed to give oral or written notice of appeal within ten days after the judgment was entered, and failed to petition for writ of certiorari[.]" 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003) (italics omitted). We held that "[b]y failing to exercise any of [these] options, [the] defendant waived her right to challenge the judgment[,]" and her "appeal amount[ed] to an impermissible collateral attack on the initial judgment." *Id.*

¶ 12 However, the State's attempt to paint the instant appeal as "an impermissible collateral attack" is misguided. Indeed, we rejected a similar argument in *State v. Hoskins*, where the defendant was "not challenging the trial court's jurisdiction over her original convictions; rather she contend[ed] that the . . . trial court lacked statutory authority to extend her probation." 242 N.C. App. 168, 170, 775 S.E.2d 15, 17 (2015). Although the State relied on both *Rush* and *Pennell* to argue that the appeal in *Hoskins* was an impermissible collateral attack, *id.* at 167, 775 S.E.2d at 17, we distinguished those cases because "[u]nlike an original conviction, a probation extension order is not immediately appealable. . . . N.C. Gen. Stat. § 15A-1347 provides the only avenues for appeal from a probation order[,]" *id.* at 170, 775 S.E.2d at 17. Under that statute, a "defendant may only appeal a probation order that either activates his sentence or places the defendant on 'special probation.' " *Id.*; *see* N.C. Gen. Stat. § 15A-1347(a) (2019). Accordingly, because the *Hoskins* defendant "had no mechanism to appeal her probation extension orders[,]" we held that she had not waived her right to challenge those orders on appeal from the trial court's subsequent order terminating her probation. *Hoskins*, 242 N.C. App. at 170, 775 S.E.2d at 17.

¶ 13 In the present case, Defendant is not challenging his original conviction; rather, he challenges the validity of the 2016 Order extending his probation. Here, as in *Hoskins*, the 2016 Order neither activated Defendant's sentence nor placed him on special probation. Thus, Defendant "had no mechanism to appeal" the 2016 Order, and under *Hoskins* he "has not waived [his] right to challenge" the 2016 Order on appeal from the 2020 Judgment activating his sentence. *Id.*

¶ 14 Nonetheless, after the State challenged the permissibility of Defendant's appeal, out of an abundance of caution, Defendant filed with this Court a petition for writ of certiorari requesting review of the 2016 Order, if the issue was not preserved by law. However, we conclude that Defendant's argument concerning his right to counsel at the 2016 probation violation hearing is properly before us on appeal from the 2020 Judgment revoking his probation and activating his suspended

sentence. Accordingly, we dismiss as moot Defendant's petition for writ of certiorari and proceed to the merits of his appeal.

B. Standard of Review

¶ 15 This Court reviews de novo "the issue of whether a trial court had subject[-]matter jurisdiction to revoke a defendant's probation." *State v. Moore*, 240 N.C. App. 461, 462, 771 S.E.2d 766, 767 (2015). We similarly review de novo issues concerning a defendant's waiver of the right to counsel under N.C. Gen. Stat. § 15A-1242. *State v. Lindsey*, 271 N.C. App. 118, 124, 843 S.E.2d 322, 327 (2020). When conducting de novo review, "this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* (citation omitted).

C. Analysis

¶ 16 Defendant argues that the trial court lacked subject-matter jurisdiction to revoke his probation. Defendant's argument hinges on whether the trial court erred by extending his probation in the 2016 Order where the hearing was allegedly conducted in violation of his right to counsel under N.C. Gen. Stat. § 15A-1345(e) and the procedural requirements of § 15A-1242. Because an order modifying probation that is entered without statutory authority is "void and of no effect," *State v. Gorman*, 221 N.C. App. 330, 333, 727 S.E.2d 731, 733 (2012) (citation omitted), Defendant contends that his probationary term expired on 11 January 2017, as originally scheduled. After careful review, we agree.

1. Subject-Matter Jurisdiction

¶ 17 "[O]ther than as provided in N.C. Gen. Stat. § 15A-1344(f), a trial court lacks jurisdiction to revoke a defendant's probation after the expiration of the probationary term." *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Section 15A-1344(f) provides that a trial court may only

> extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.

> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f).

¶ 18 In the case at bar, if Defendant is correct that the 2016 Order was void and as a result, his probation was not properly extended, then the State did not file either the 3 October 2017 probation report or its addendum "[b]efore the expiration of the period of probation" on 11 January 2017. *Id.* Thus, the trial court "lack[ed] jurisdiction to revoke [D]efendant's probation[.]" *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767.

¶ 19 Accordingly, Defendant's subject-matter jurisdiction argument rises and falls on the validity of the 2016 Order extending his probation.

2. Defendant's Right to Counsel at the 2016 Hearing

¶ 20 "[A]n accused is entitled to the assistance of counsel at every critical stage of the criminal process as constitutionally required under the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Jacobs*, 233 N.C. App. 701, 702, 757 S.E.2d 366, 368 (2014) (citation omitted). Our General Statutes specifically provide that "a defendant is entitled to be represented by counsel at a probation revocation hearing and, if indigent, to have counsel appointed for him." *Id.* at 703, 757 S.E.2d at 368; *see* N.C. Gen. Stat. § 15A-1345(e).

¶ 21 The trial court must ensure that "constitutional and statutory standards are satisfied" before allowing a defendant to waive the right to counsel. *Jacobs*, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation omitted). "To satisfy the trial court, a defendant must first clearly and unequivocally waive his right to counsel and instead elect to proceed *pro se*. Second, the trial court must determine whether the defendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel." *Id.* (citation and internal quotation marks omitted). "A signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney. However, the trial court must still comply with N.C. Gen. Stat. § 15A-1242." *Id.* (citation omitted).

¶ 22 Section 15A-1242 establishes that prior to accepting a defendant's waiver of the right to counsel, the trial court must make a "thorough inquiry" and be satisfied that the defendant:

> (1) Has been clearly advised of his right to the assistance of counsel, including his right to the assignment of counsel when he is so entitled;
>
> (2) Understands and appreciates the consequences of this decision; and
>
> (3) Comprehends the nature of the charges and proceedings and the range of permissible punishments.

N.C. Gen. Stat. § 15A-1242.

¶ 23 Defendant argues that the trial court did not conduct the statutorily required "thorough inquiry" into his purported waiver of his right to counsel prior to entering the 2016 Order. Indeed, the transcript of the 2016 hearing contains only one fleeting reference to Defendant's representation, which occurred at the commencement of the hearing:

> (Court proceedings were called to order Wednesday, August 31st, 2016)
>
> [THE STATE]: Lumarris Guinn.
>
> Who is your attorney, Mr. Guinn?
>
> [DEFENDANT]: Officer Samuals.[2]
>
> [THE STATE]: Samuals?
>
> [DEFENDANT]: Yes.
>
> Well, that's my probation officer. He was here.
>
> (Officer Samuals entered the courtroom)
>
> PROBATION OFFICER SAMUALS: I apologize, Your Honor.
>
> THE COURT: Yes, sir. Thank you.

The transcript of the 2016 hearing does not otherwise reflect any inquiry into Defendant's waiver of his right to counsel. Accordingly, the transcript of this hearing indicates that the trial court did not satisfy N.C. Gen. Stat. § 15A-1242's requirements for a knowing, intelligent, and voluntary waiver of the right to counsel.

---

2. The record on appeal suggests that the probation officer's last name is actually "Samuels."

¶ 24 However, the record contains the standard "Waiver of Counsel" form, AOC-CR-227, which is signed by Defendant and the trial court, and dated 31 August 2016, the day of the hearing. That form contains the following "Acknowledgment of Rights and Waiver," which is to be executed by a defendant seeking to waive his or her right to counsel:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

¶ 25 Beneath this acknowledgment are two check blocks with instructions to the defendant to "check only one," thereby indicating the extent of the defendant's waiver of counsel:

> I freely, voluntarily and knowingly declare that:
>
> . . . .
>
> ☐ 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.
>
> ☐ 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

¶ 26 Here, in addition to signing the waiver form, Defendant checked block #2, thereby indicating that he waived his right to all assistance of counsel.

¶ 27 On appeal, the State argues that this signed form "establishes that Defendant's waiver was knowing, intelligent, and voluntary." However, the trial court did not check any block in the "Certificate of Judicial Official" section. That section, which follows the defendant's portion of the form, contains the following language:

> I certify that the above named defendant has been fully informed of the charges against him/her, the nature of and the statutory punishment for each charge, and the nature of the proceeding against the defendant and his/her right to have counsel assigned by the court and his/her right to have the assistance of counsel to represent him/her in this action; that the defendant comprehends the nature of the charges and proceedings and the range of punishments; that he/she understands and appreciates the consequences of his/her decision and that the defendant has voluntarily, knowingly and intelligently elected in open court to be tried in this action[.]

¶ 28 As in the defendant's section of the form, this language is followed by two numbered blocks—again, with instructions to "check only one"—for the trial court to specify whether the defendant elected to proceed:

> ☐ 1. without the assignment of counsel.
>
> ☐ 2. without the assistance of counsel, which includes the right to assigned counsel and the right to assistance of counsel.

¶ 29 Below these two check blocks, appearing prominently in its own thick-framed box and bold typeface, the following note emphasizes:

> **NOTE: For a waiver of assigned counsel only, both blocks numbered "1" must be checked. For a waiver of all assistance of counsel, both blocks numbered "2" must be checked.**

¶ 30 Despite this clear instruction, here, the trial court did not check either block on the waiver form.

¶ 31 The State contends that the trial court's failure to check one of the blocks is merely a clerical error, claiming that the omission "is inconsequential and does not result in an unclear or incorrect record." Furthermore, the State maintains that because "Defendant himself checked the appropriate [block] on the form indicating that he would be proceeding without counsel and on his own behalf[,]" the trial court's failure to check the appropriate block "does not render the form unclear or erroneous, and Defendant is presumed to have knowingly, intelligently and voluntarily waived his right to counsel." This argument lacks merit.

¶ 32 This Court has defined a clerical error as "an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination." *State v. Allen*, 249 N.C. App. 376, 380, 790 S.E.2d 588, 591 (2016) (citation omitted). However, "[w]e have repeatedly rejected attempts to change the substantive provisions of judgments under the guise of clerical error." *State v. Harwood*, 243 N.C. App. 425, 429, 777 S.E.2d 116, 119 (2015) (citation omitted).

¶ 33 The *Harwood* defendant was charged in 2009 with 79 offenses and pleaded no contest to each. *Id.* at 426, 777 S.E.2d at 117. The trial court consolidated his convictions into seven judgments and ordered that he serve the seven sentences consecutively, suspended five of the seven judgments, and placed the defendant on 48 months of supervised probation. *Id.* at 426–27, 777 S.E.2d at 117–18. In 2010, the defendant was released from incarceration, and in 2014, a probation officer filed probation violation reports. *Id.* at 427, 777 S.E.2d at 118. The defendant admitted to willfully violating the terms of his probation without lawful justification and the trial court activated all five of the defendant's suspended sentences. *Id.*

¶ 34 On appeal, the defendant argued that the trial court lacked jurisdiction to revoke his probation in 2014 because in each of the 2009 judgments suspending his sentences, the trial court had "failed to either check the box to order that the probation would begin upon [the] defendant's release from incarceration or check the box to order that the period of probation would begin at the expiration of another sentence." *Id.* at 430, 777 S.E.2d at 120. Accordingly, the defendant argued that his 48-month probation term had actually begun in 2009 when the trial court entered its judgments, and thus expired "several months before the probation officer filed violation reports" in 2014. *Id.* at 428, 777 S.E.2d at 119.

¶ 35 In response, the State acknowledged the trial court's failure to check the boxes on the judgments but argued that the trial court's omissions were mere clerical errors. *Id.* at 428–29, 777 S.E.2d at 119. Yet assuming, *arguendo*, that the trial court's failure to check these boxes was a mistake, we held that "this mistake would be a substantive error, rather than a clerical one. Changing this provision would retroactively extend [the] defendant's period of probation by more than one year and would grant the trial court subject[-]matter jurisdiction to activate five consecutive sentences of 6 to 8 months' imprisonment." *Id.* at 430, 777 S.E.2d at 120. Because we determined that the relevant provision was "substantive," we rejected the State's request to remand the case to permit the

trial court to correct what the State contended was merely a "clerical" error. *Id.*

¶ 36 Similarly, if we accept the State's argument here that the trial court made a mistake by failing to check the block certifying that Defendant's waiver of his right to the assistance of counsel was knowing, intelligent, and voluntary, such error would be substantive, rather than clerical. As in *Harwood*, correcting the asserted "mistake" here "would retroactively extend [D]efendant's period of probation . . . and would grant the trial court subject[-]matter jurisdiction to activate" his sentence of imprisonment. *Id.* Thus, this does not constitute a clerical error.

¶ 37 Moreover, even if the error were merely clerical, this would not change the outcome of this case. "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, *unless the rest of the record indicates otherwise*." *State v. Sorrow*, 213 N.C. App. 571, 574, 713 S.E.2d 180, 182 (2011) (citation omitted). Although "[a] signed written waiver is presumptive evidence that a defendant wishes to act as his or her own attorney[,] . . . the trial court must still comply with N.C. Gen. Stat. § 15A-1242." *Jacobs*, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation omitted).

¶ 38 In *Jacobs*, this Court reversed a judgment revoking probation—even though the defendant had signed a waiver—where the transcript of the revocation hearing "reveal[ed] that the trial judge made no inquiry as to whether [the] defendant understood the 'range of permissible punishments' pursuant to N.C. Gen. Stat. § 15A-1242(3)." *Id.* at 705, 757 S.E.2d at 369. "Although we recognize[d] that [the] defendant signed a written waiver of his right to assistance of counsel, the trial court was not abrogated of its responsibility to ensure the requirements of N.C. Gen. Stat. § 15A-1242 were fulfilled." *Id.*

¶ 39 We reach a similar conclusion in the instant case. As explained above, the waiver form was incomplete, in that the trial court failed to check either of the two blocks presented for the purpose of indicating the extent of Defendant's waiver of counsel. The instructions on the AOC-CR-227 "Waiver of Counsel" form very plainly require that the trial court must "check only one" of two numbered blocks, and that the court's selection—either #1 or #2—must match the defendant's: "For a waiver of assigned counsel only, *both blocks numbered '1' must be checked*. For a waiver of all assistance of counsel, *both blocks numbered '2' must be checked*." (Emphases added).

¶ 40 In the instant case, although signed by both parties, the form includes only one party's response to the critical question regarding the extent of Defendant's waiver of counsel. While Defendant checked block #2, the trial court made no selection at all. We are not persuaded by the State's characterization of this omission as "a missing duplicative check mark . . . [that] does not render the form unclear or erroneous[.]" This assertion contradicts the explicit instructions set out—quite emphatically—on the face of the waiver form itself.

¶ 41 Accordingly, although a signed written waiver is generally "*presumptive* evidence that a defendant wishes to act as his or her own attorney[,]" *id.* at 703, 757 S.E.2d at 368 (emphasis added) (citation omitted), we conclude that the written waiver in the instant case is insufficient—notwithstanding the presence of both parties' signatures—to pass constitutional and statutory muster.

¶ 42 Moreover, even assuming, *arguendo*, that the waiver form in this case presented no concerns, "the trial court must still comply with N.C. Gen. Stat. § 15A-1242." *Id.* (citation omitted). "The execution of a written waiver is no substitute for compliance by the trial court with the statute. A written waiver is something in addition to the requirements of N.C. Gen. Stat. § 15A-1242, not an alternative to it." *State v. Evans*, 153 N.C. App. 313, 315, 569 S.E.2d 673, 675 (2002) (citations and internal quotation marks omitted). "Failure to conduct the mandatory inquiry under N.C. Gen. Stat. § 15A-1242 is prejudicial error." *Sorrow*, 213 N.C. App. at 577, 713 S.E.2d at 184.

¶ 43 In the instant case, the 2016 hearing transcript is silent on the subject of Defendant's waiver of counsel. Indeed, in response to the prosecutor's question, "Who is your attorney, Mr. Guinn?", Defendant identified *his probation officer*, Officer Samuels, who was present at the hearing to testify as a witness for the State. This limited exchange—initiated by the prosecutor, not the trial court—constitutes the sole inquiry into Defendant's legal representation that occurred during the 2016 hearing.

¶ 44 Perhaps, as the State contends, it may be that "[t]his exchange was not indicative of any confusion on the part of Defendant"; as the State accurately observes, Defendant subsequently "corrected himself unprompted to clarify that he meant that Officer Samuels was his probation officer, not his attorney." (Original emphasis omitted). But regardless of whether Defendant was confused by the prosecutor's question or whether he merely misspoke, our analysis remains the same.

¶ 45 Simply put, the 11-page hearing transcript fails to establish that Defendant "clearly and unequivocally waive[d] his right to counsel and

instead elect[ed] to proceed *pro se*." *Jacobs*, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation and internal quotation marks omitted). Although Defendant apparently signed the AOC-CR-227 waiver form on 31 August 2016, the date of the violations hearing, we cannot agree with our dissenting colleague that this fact, alone, "establishes that Defendant's waiver was knowing, intelligent, and voluntary[,]" nor that it was "*made and entered in open court*." *Dissent* at ¶ 65 (emphasis added) (internal quotation marks omitted). To the contrary, the brief hearing transcript contains no mention of Defendant's waiver of counsel, or of the trial court's statutory responsibilities pursuant to N.C. Gen. Stat. § 15A-1242. Except for the incomplete AOC-CR-227 waiver form, the record is devoid of evidence establishing that the trial court took appropriate steps to ensure that "constitutional and statutory standards [we]re satisfied" before accepting Defendant's purported waiver of counsel. *Jacob*s, 233 N.C. App. at 703, 757 S.E.2d at 368 (citation omitted).

¶ 46 Accordingly, as in *Jacobs*, the record in this case fails to demonstrate that Defendant "clearly and unequivocally waive[d] his right to counsel and instead elect[ed] to proceed *pro se*[,]" or that the trial court made the requisite inquiry to "determine whether [D]efendant knowingly, intelligently, and voluntarily waived his right to in-court representation by counsel." *Id.* (citation and internal quotation marks omitted); *see also State v. Doisey*, 277 N.C. App. 270, 2021-NCCOA-181, ¶ 9 ("Absent a more searching inquiry, we conclude that the colloquy between [the d]efendant and the trial court did not comply with the requirements of a valid waiver under N.C. Gen. Stat. § 15A-1242."). We thus conclude that the 2016 Order was entered in violation of Defendant's statutory right to counsel and was therefore "void and of no effect." *Gorman*, 221 N.C. App. at 333, 727 S.E.2d at 733.

¶ 47 As the 2016 Order was void on account of the violation of Defendant's right to counsel, Defendant's probation was not properly extended, and the State did not file either the 3 October 2017 probation violation report or its addendum before Defendant's period of probation expired on 11 January 2017. Therefore, the trial court lacked subject-matter jurisdiction to conduct a probation revocation hearing "after the expiration of the probationary term." *Moore*, 240 N.C. App. at 463, 771 S.E.2d at 767. Accordingly, the trial court's 2020 Judgment revoking Defendant's probation and activating his sentence of imprisonment "must be vacated." *Id.* at 464, 771 S.E.2d at 768.

III. Conclusion

¶ 48 The 2016 Order extending Defendant's probation was entered in violation of Defendant's statutory and constitutional right to counsel and

was, therefore, void. Consequently, the trial court lacked subject-matter jurisdiction to revoke Defendant's probation in 2020, and the 2020 Judgment must be vacated.

VACATED.

Judge ARROWOOD concurs.

Judge TYSON dissents by separate opinion.

TYSON, Judge, dissenting.

¶ 49 Our Supreme Court and this Court have repeatedly recognized that probation hearings are summary in nature and the full panoply of protections available at trial or upon entry of a guilty plea do not attach to a defendant, who has already been convicted and is under judgment and sentence. "The trial court has authority to alter or revoke a defendant's probation pursuant to N.C. Gen. Stat. § 15A-1344(a)." *State v. Johnson*, 246 N.C. App. 132, 136, 782 S.E.2d 549, 552 (2016). Suspension of a sentence is given to one convicted of a crime "as an act of grace." *State v. Boggs*, 16 N.C. App. 403, 405, 192 S.E.2d 29, 31 (1972).

¶ 50 A proceeding to revoke probation is informal or summary, and "the court is not bound by strict rules of evidence." *State v. Tennant*, 141 N.C. App. 524, 526, 540 S.E.2d 807, 808 (2000). An alleged violation by a defendant/probationer of "a condition upon which his sentence is suspended need not be proven beyond a reasonable doubt." *Id.* (citation omitted).

¶ 51 All that is required is for the State's evidence to reasonably satisfy the court in "the exercise of [its] sound discretion that the defendant has violated a valid condition upon which the sentence was suspended." *Id.* (citation omitted). Defendant does not challenge the findings of the court not being supported by competent evidence. His judgment based thereon is not reviewable on appeal in the absence of showing a manifest abuse of discretion. *Id.*

¶ 52 Defendant does not challenge the findings and conclusion of violations or show any abuse of discretion here. Nothing divested the superior court of subject matter jurisdiction over a felony probation extension or revocation hearing. The trial court's order is properly affirmed. I vote to affirm the trial court's order and respectfully dissent.

I. Background

¶ 53 On 11 July 2014, Defendant was in open court and offered and accepted a plea bargain and entered an *Alford* plea to two counts of uttering

a forged instrument in exchange for the State's dismissal of two counts of obtaining property by false pretenses. Defendant was sentenced to 6 to 17 months in the custody of the North Carolina Division of Adult Correction, which was suspended, and he was placed upon supervised probation for 30 months and ordered to pay restitution along with court costs and fees. Defendant was represented by counsel at this hearing and sentencing.

¶ 54 While unquestionably still under probation supervision, Defendant was served and ordered back into court in 2016 to answer for his alleged repeated probation violations. Defendant appeared in court, voluntarily waived counsel, signed and checked the waiver in the record, which was also signed by the judge, and did not object to nor challenge the extension of his probation to allow him to remain out of prison. He alternatively faced revocation and activation of his suspended sentence. Presuming any error, he cannot now demonstrate any prejudice.

¶ 55 The record clearly demonstrates Defendant has repeatedly and grossly violated the terms and conditions of his probation and suspended sentence on multiple occasions and has shown no regard for the grace of not being actively incarcerated for his crimes. The State correctly argues Defendant's lack of subject matter jurisdiction assertion amounts to an impermissible collateral attack on the 2016 Order where he was present in open court and executed a valid waiver of counsel.

¶ 56 Our Supreme Court has repeatedly held "a direct appeal from the original judgment lies only when the sentence is originally entered." *State v. Pennell*, 367 N.C. 466, 470, 758 S.E.2d 383, 386 (2014) (citation omitted). "[A] defendant *may not challenge the jurisdiction over the original conviction* in an appeal from the order revoking his probation and activating his sentence." *Id.* at 472, 758 S.E.2d at 387 (emphasis supplied).

¶ 57 Even if Defendant had no direct appeal of right from the Order extending his probation, if any asserted error or prejudice occurred, Defendant could have sought discretionary appellate review at that time, failed to do so, and has waived any claim. *See* N.C. R. App. P. 21(a)(1) ("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, or when no right to appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. §15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.").

¶ 58 N.C. Gen. Stat. § 15A-1344(f) provides a trial court may:

> extend, modify, or revoke probation after the expiration of the period of probation if all of the following apply:
>
> (1) Before the expiration of the period of probation the State has filed a written violation report with the clerk indicating its intent to conduct a hearing on one or more violations of one or more conditions of probation.
>
> (2) The court finds that the probationer did violate one or more conditions of probation prior to the expiration of the period of probation.
>
> (3) The court finds for good cause shown and stated that the probation should be extended, modified, or revoked.
>
> (4) If the court opts to extend the period of probation, the court may extend the period of probation up to the maximum allowed under G.S. 15A-1342(a).

N.C. Gen. Stat. § 15A-1344(f) (2021).

¶ 59 Defendant does not challenge that the trial court or the probation officer failed to comply with all provisions of the above statute or that he failed to receive all protections accorded therein at his 2016 hearing. *Id.* Recognizing now, as then, the lack of appellate jurisdiction to seek review, Defendant filed a petition for writ of certiorari requesting review of the 2016 Order. I agree with the majority's opinion that Defendant's petition should be dismissed. This panel should dismiss Defendant's petition for writ of certiorari for lack of prejudice, but we should also dismiss his purported appeal and affirm the 2020 judgment.

II. Waiver of Counsel

¶ 60 "It is well-settled that a criminal defendant can waive his right to be represented by counsel so long as he voluntarily and understandingly does so." *State v. Hyatt*, 132 N.C. App. 697, 700, 513 S.E.2d 90, 93 (1999). This Court has held "to obtain relief from a waiver of [the] right to counsel, a criminal defendant must move the court for withdrawal of the waiver." *Id.* at 702, 513 S.E.2d at 94 (citation omitted).

¶ 61 A defendant waives any right to appeal the issue of his prior probation revocation where "[t]he record does not contain any suggestion

that defendant ever objected to this determination prior to this appeal, but rather reveals that she accepted both the terms and the benefits of the modified order." *State v. Rush*, 158 N.C. App. 738, 741, 582 S.E.2d 37, 39 (2003). In *Rush*, this Court dismissed an appeal from a judgment entered pursuant to a plea agreement where the defendant "failed to file a motion to withdraw her guilty plea, failed to give oral or written notice of appeal within ten days after the judgment was entered, and failed to petition for writ of certiorari[.]" *Id.* (alteration omitted). This Court held "[b]y failing to exercise any of [these] options, [the] defendant waived her right to challenge the judgment[,]" and her "appeal amount[ed] to an impermissible collateral attack on the initial judgment." *Id.*

¶ 62 Defendant fails to show either during the initial entry of his plea or at the multiple probation violations hearing thereafter, he was not accorded every right and protection due to him. The State correctly asserts Defendant himself checked the appropriate block on the form indicating that he would be proceeding without counsel and on his own behalf, and Defendant is presumed to have knowingly, intelligently and voluntarily waived his right to counsel.

¶ 63 The record contains the standard "Waiver of Counsel" form, AOC-CR-227, signed by Defendant and the trial court, and is dated 31 August 2016, the day of the hearing. That form contains the following "Acknowledgment of Rights and Waiver," which is executed by a defendant seeking to waive his or her right to counsel:

> As the undersigned party in this action, I freely and voluntarily declare that I have been fully informed of the charges against me, the nature of and the statutory punishment for each such charge, and the nature of the proceedings against me; that I have been advised of my right to have counsel assigned to assist me and my right to have the assistance of counsel in defending against these charges or in handling these proceedings, and that I fully understand and appreciate the consequences of my decision to waive the right to assigned counsel and the right to assistance of counsel.

¶ 64 Beneath this acknowledgment are two check blocks with instructions to the defendant to "check only one," thereby indicating the extent of the defendant's waiver of counsel:

> I freely, voluntarily and knowingly declare that:
>
> . . . .

> ☐ 1. I waive my right to assigned counsel and that I, hereby, expressly waive that right.
>
> ☐ 2. I waive my right to all assistance of counsel which includes my right to assigned counsel and my right to the assistance of counsel. In all respects, I desire to appear in my own behalf, which I understand I have the right to do.

¶ 65 Defendant was present in court, signed the waiver form, and also checked block #2, clearly indicating he waived his right to all assistance of counsel. The State correctly argues this signed form "establishes that Defendant's waiver was knowing, intelligent, and voluntary" made and entered in open court. Defendant's term of probation was extended for merely 12 months, and he was ordered to complete 40 hours of community service within six months. Defendant would receive $20 credit per hour worked against the balance of the restitution he was ordered to pay as a condition of his probation. Defendant was to be placed on unsupervised probation *upon completion of* his community service. Defendant failed to complete this condition of his probation, along with later absconding supervision and committing new crimes.

III. Subject Matter Jurisdiction

¶ 66 Defendant next argues the trial court lacked subject matter jurisdiction in 2020 because he was on unsupervised probation during the relevant time period. The State bears the burden of "demonstrating beyond a reasonable doubt that a trial court has subject matter jurisdiction." *State v. Williams*, 230 N.C. App. 590, 595, 754 S.E.2d 826, 829 (2013) (citation omitted).

¶ 67 Defendant bases this notion on a series of implications, which are not supported by the evidence in the record. The record contains no evidence Defendant had completed the ordered hours of community service and was transferred from supervised to unsupervised probation.

¶ 68 Defendant does not contest the trial court's jurisdiction at the entry of his plea, sentence, and imposition of his probation. "Once the jurisdiction of a court or administrative agency attaches, the general rule is that it will not be ousted by subsequent events." *In re Peoples*, 296 N.C. 109, 146, 250 S.E.2d 880, 911 (1978); *see State v. Armstrong*, 248 N.C. App. 65, 67, 786 S.E.2d 830, 832 (2016). "Jurisdiction is not a light bulb which can be turned off or on during the course of the trial." *Armstrong*, 248 N.C. App. at 67, 786 S.E.2d at 832 (citations omitted).

¶ 69 Despite the additional grace for violations and opportunities provided by the extension, Defendant continued to disregard and violate the terms and conditions of his probation and commit new crimes. On 29 September 2017, Defendant's probation officer filed a second probation violation report and alleged Defendant had again failed to comply with the conditions of his probation: (1) he twice tested positive for marijuana; (2) he left the jurisdiction of the court without the permission of his probation officer; (3) he failed to report for scheduled office appointments; (4) he failed to make the required monetary payments; and, (5) he had a new criminal charge pending against him.

¶ 70 On 3 October 2017, the probation officer filed the 29 September report again, together with an addendum alleging Defendant had absconded with a warrant issued for his arrest. After being arrested, the trial court held another probation violation hearing, at which Defendant was represented by counsel on 28 October 2020. The trial court found Defendant had willfully violated the terms and conditions of his probation, revoked Defendant's probation, and activated Defendant's original sentence. The trial court also reduced the balance owed by Defendant to a civil judgment.

¶ 71 Defendant's probation was revoked for committing a new criminal offense and for absconding. Regardless of whether Defendant's probation was supervised or not at the time of the violations, the violations rose to the level to warrant revocation pursuant to N.C. Gen. Stat. § 15A-1344(a). The State has carried its burden beyond a reasonable doubt, Defendant's arguments are without merit. *See Williams*, 230 N.C. App. at 595, 754 S.E.2d at 829.

IV. Conclusion

¶ 72 The trial court acquired and maintained subject matter jurisdiction to revoke Defendant's probation in 2020. Defendant waived counsel, has not sought to withdraw that waiver, and did not challenge nor seek review of the 2016 Order extending Defendant's probation. The 2020 Judgment is properly affirmed. I respectfully dissent.

STATE v. HEATH

[281 N.C. App. 465, 2022-NCCOA-37]

STATE OF NORTH CAROLINA
v.
REBECCA MICHELLE HEATH, DEFENDANT

No. COA20-715

Filed 18 January 2022

Search and Seizure—motion to suppress—traffic stop—reasonable articulable suspicion—conflicting evidence—insufficient findings

In a drug prosecution arising from a traffic stop in which defendant initially denied the officer's request to search the car, the officer called for a K-9 officer, and defendant subsequently admitted to having drugs in the car, the trial court improperly denied defendant's motion to suppress where its findings did not resolve material conflicts in the evidence regarding the interaction between defendant and the officer and the timing of certain events in relation to the canine sniff. Defendant's judgment was vacated and the matter remanded for additional findings and conclusions.

Appeal by defendant from judgment entered on or about 6 September 2019 by Judge Daniel A. Kuehnert in Superior Court, Cleveland County. Heard in the Court of Appeals 8 June 2021.

Attorney General Joshua H Stein, by Special Deputy Attorney General Alexander G. Walton, for the State.

Shawn R. Evans, for defendant-appellant.

STROUD, Chief Judge.

¶ 1 Defendant appeals the denial of her motion to suppress. Because the trial court failed to make sufficient findings of fact resolving conflicting evidence of material facts, we must vacate and remand for further findings of fact and the requisite conclusions of law.

I. Procedural Background

¶ 2 On 27 August 2018, defendant was indicted for possession of methamphetamine. On 1 August 2019, defendant filed a motion to suppress "any statements made by the Defendant as well as any controlled substances seized after an unconstitutional stop and delay pursuant to a search without a search warrant on or about June 4, 2018." Defendant

argued, "there was no reasonable articulable suspicion or traffic violation warranting a stop of the vehicle, that the Defendant was asked to leave her vehicle without justification and that she was further detained without reasonable articulable suspicion that criminal activity was afoot[.]" Defendant filed an affidavit in support of her motion to suppress.

¶ 3 After a hearing on the motion to suppress on 1 August 2019, the trial court entered an order denying defendant's motion. The trial court found:

> 1. That on June 4, 2018, the defendant Rebecca Heath was stopped by Deputy Nathan Hester for driving left of center and driving without an active license.
>
> 2. That Deputy Hester had a connection with this individual from prior drug activity and recognized the vehicle she was driving as one owned by someone involved in drug activity.
>
> 3. That upon conducting [sic] the vehicle, he began to perform those standard vehicle checks involved with a traffic stop which included checking car registration, VIN, and license status of Heath.
>
> 4. That, as Deputy Hester was in an unmarked car and thus did not have the ability to run the defendant's information himself, the information had to be called in and run through dispatch.
>
> 5. That while that information was being run, *Deputy Hester asked the defendant for consent to search the vehicle which the defendant did not give.*
>
> 6. That Deputy Hester then asked the defendant to get out of the vehicle and called for a canine officer to come to the scene.
>
> 7. That the call to the canine officer for a sniff came approximately four minutes after the defendant's vehicle was stopped by Deputy Hester.
>
> 8. That within four minutes of being called to the scene, Canine Officer Chris Graham with the Kings Mountain Police Department arrived on scene.

> 9. That prior to the canine officer's arrival, the defendant advised Deputy Hester that she possessed illegal narcotics in the vehicle.
>
> 10. That upon the canine officer's arrival following the admission, a canine sniff was done and confirmed the presence of narcotics in the vehicle.
>
> 11. That a subsequent search of the vehicle uncovered in what [sic] was believed to be methamphetamine in the defendant's purse along with marijuana and a glass pipe.
>
> 12. That during the entire period of the vehicle stop, prior to the defendant's admission to the presence of narcotics and the arrival of the canine officer, Deputy Hester was waiting on dispatch to run all the information on the defendant and the vehicle with regards to the original basis of the stop for left of center and driving without an active license.
>
> 13. At no time did Deputy Hester prolong the stop involved in this case.

(Emphasis added.)

The trial court concluded:

> 1. Deputy Hester had reasonable, articulable suspicion and justification to stop the vehicle based on the violation of driving left of center and knowledge the defendant was driving without an active license.
>
> 2. The Court also concludes as a matter of law that Deputy Hester did not violate the defendant's Fourth Amendment *rights in that the consent to search was given within the context of the stop* and the stop was not extended.
>
> 3. The Court also concludes as a matter of law that Deputy Hester *received consent from the defendant to search the vehicle* and, upon searching, found what he believed to be methamphetamine in the defendant's vehicle, thus establishing probable cause.

(Emphasis added.) Thereafter, defendant entered a plea arrangement to plead guilty to possession of methamphetamine while reserving her

right to appeal the denial of her motion to suppress. On 6 September 2019, the trial court entered judgment for possession of methamphetamine, and defendant appeals.

II. Defendant's Appeal

¶ 4 Defendant contends the trial court erred in denying her motion to suppress.

A. Standard of Review

> The standard of review in evaluating the denial of a motion to suppress is whether competent evidence supports the trial court's findings of fact and whether the findings of fact support the conclusions of law. The trial court's findings are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting. Conclusions of law are reviewed de novo and are subject to full review. Under a de novo review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal.

State v. Royster, 224 N.C. App. 374, 375–76, 737 S.E.2d 400, 402–03 (2012) (citations and quotation marks omitted).

B. Findings of Fact

¶ 5 Defendant primarily challenges many of the findings of fact based on arguments regarding the exact sequence of events. *Both* Deputy Hester and defendant's testimonies establish that defendant was stopped; Deputy Hester asked for consent to search the vehicle; defendant denied the request for consent; Deputy Hester called in the K-9 officer; and after this call, defendant admitted she had drugs in the vehicle.

¶ 6 But there was also conflicting evidence as to the details of the interactions between Deputy Hester and defendant and the timing of the relevant events, and the findings of fact do not resolve these conflicts. *See generally State v. Bartlett*, 368 N.C. 309, 312, 776 S.E.2d 672, 674 (2015) ("At the suppression hearing in this case, disagreement between two expert witnesses created a material conflict in the evidence. Although defendant did not dispute the officer's testimony about what happened during the field sobriety tests, defendant's expert sharply disagreed with the officer's opinion on whether defendant's performance indicated impairment. Expert opinion testimony is evidence, and the two expert opinions in this case differed from one another on a fact that

is essential to the probable cause determination—defendant's apparent degree of impairment. Thus, a finding of fact, whether written or oral, was required to resolve this conflict. Here, Judge Jones made no such finding. Although he did attempt to explain his rationale for granting the motion, we cannot construe any of his statements as a definitive finding of fact that resolved the material conflict in the evidence. Without such a finding, there can be no meaningful appellate review of the trial judge's decision. *See Salinas*, 366 N.C. at 124, 729 S.E.2d at 66. Accordingly, the oral ruling by Judge Jones did not comply with N.C.G.S. §§ 15A–974 and 15A–977.")

¶ 7 Defendant's testimony raised an issue regarding the timing of when Deputy Hester seized the drugs in relation to the canine sniff. Defendant claims Deputy Hester removed the drugs from the vehicle before the K-9 officer's arrival, and then he put the drugs back into the car and allowed the sniff for training purposes. Deputy Hester testified that defendant confessed; the K-9 officer arrived; the dog sniffed the vehicle; then he searched the vehicle to seize the drugs. The order does not include any findings resolving the conflicting evidence as to the potential timing issue or the relevance of the K-9 officer's search. Finding of fact 10 notes that the canine sniff "confirmed the presence of narcotics in the vehicle" but does not state whether the narcotics were found based upon defendant's admission before the K-9 officer arrived, as defendant testified.

¶ 8 But the trial court did not base its ruling regarding the search upon Defendant's "admission" or the canine sniff for the narcotics. The trial court concluded:

> 2. The Court also concludes as a matter of law that Deputy Hester did not violate the defendant's Fourth Amendment rights in that *the consent to search* was given within the context of the stop and the stop was not extended.
>
> 3. The Court also concludes as a matter of law that Deputy Hester *received consent* from the defendant to search the vehicle and, upon searching, found what he believed to be methamphetamine in the defendant's vehicle, thus establishing probable cause.

(Emphasis added.) Thus, the specific basis for the trial court's denial of defendant's motion to suppress is her "consent to search[.]"

¶ 9 The State argues the consent mentioned in conclusions of law 2 and 3 is based upon defendant's consent for the canine to sniff and the

officer to search the vehicle after her confession. The State summarizes the evidence as follows:

> Upon the arrival of the K-9 officer however, she did give consent to a search of her vehicle. According to Defendant, upon arriving the K-9 officer asked her, "Do you mind since I'm here, for dog training purposes, to go ahead and search your car?" (T p 63) Defendant responded, "No, I don't care. Go ahead." (*Id.*) She continued, "He already had the drugs in his car, Hester. He had to go back, put it back where it was in my car so the canine could do its training thing – I consented to that – and then take the drugs back out."

¶ 10 The trial court is the finder of fact, and we cannot assume facts from the unusual evidence of this alleged transaction where defendant claimed the drugs were removed from the vehicle before the canine arrived and then put back into the vehicle. We note that even according to the State's summary of the evidence, Deputy Hester had seized the drugs *before* defendant "consented" for the canine to sniff, and thus it does not make sense for the trial court to base its determination of defendant's "consent" on a "consent" which occurred *after* the drugs were seized. Further, the trial court's findings of fact do not discuss most of the evidence the State relies upon in its argument on appeal regarding consent, as the trial court's written findings of fact mention *only* the request for consent to search before the call for the canine, and the trial court found defendant did not consent at that point.

¶ 11 The State also contends this Court should note the trial court's oral findings of fact. At the hearing, while the trial court briefly explained why it denied the motion, it did not render oral findings of fact and conclusions of law which were then memorialized in a written order as the State contends. The trial court's rendition in open court does not clarify the basis for denial of the motion to suppress. Because the findings of fact are not sufficient to allow proper appellate review, we must remand for further findings of fact, particularly regarding whether and when defendant consented to a search and the timing of the search and seizure in relation to the consent and the call for, arrival, and sniff of the canine officer. *See Bartlett*, 368 N.C. at 312, 776 S.E.2d at 674 ("In determining whether evidence should be suppressed, the trial court 'shall make findings of fact and conclusions of law which shall be included in the record.' N.C.G.S. § 15A–974(b) (2013); *see also id.* § 15A–977(f) (2013) ('The judge must set forth in the record his findings of facts and

conclusions of law.'). A written determination setting forth the findings and conclusions is not necessary, but it is the better practice. *State v. Oates*, 366 N.C. 264, 268, 732 S.E.2d 571, 574 (2012). Although the statute's directive is in the imperative form, only a material conflict in the evidence—one that potentially affects the outcome of the suppression motion—must be resolved by explicit factual findings that show the basis for the trial court's ruling. *State v. Salinas*, 366 N.C. 119, 123–24, 729 S.E.2d 63, 66 (2012); *State v. Ladd*, 308 N.C. 272, 278, 302 S.E.2d 164, 168 (1983). When there is no conflict in the evidence, the trial court's findings can be inferred from its decision. *State v. Munsey*, 342 N.C. 882, 885, 467 S.E.2d 425, 427 (1996). Thus, our cases require findings of fact only when there is a material conflict in the evidence and allow the trial court to make these findings either orally or in writing."). Without such a finding, there can be no meaningful appellate review of the trial judge's decision. *See generally id.*

¶ 12 Ultimately, the trial court's findings of fact are not sufficient to allow meaningful appellate review.

III. Conclusion

¶ 13 Because the trial court failed to make sufficient findings of fact resolving conflicting evidence of material facts, we must vacate and remand for further findings of fact and the requisite conclusions of law.

VACATED and REMANDED.

Judges COLLINS and WOOD concur.

STATE v. STEELE

[281 N.C. App. 472, 2022-NCCOA-39]

STATE OF NORTH CAROLINA
v.
THOMAS WAYNE STEELE

No. COA20-894

Filed 18 January 2022

1. Embezzlement—fiduciary relationship—joint bank accounts—intent—elder abuse

The State presented sufficient evidence to survive defendant's motion to dismiss an embezzlement charge where defendant was in a fiduciary relationship with the victim (whom he called "Mom" and convinced to grant him access to all of her financial accounts after her husband died so that he could "help her") and he wrongfully converted the victim's money to his own use (being a joint holder of the victim's bank accounts did not entitle him to use her money). Further, there was sufficient evidence that he embezzled more than $100,000—elevating the offense to a Class C felony—because the circumstances allowed the inference that he intended for overdrafts on his personal account to be paid from the joint account funded with the victim's money.

2. Embezzlement—jury instructions—special instruction requested—bank protection law—confusion of jury

In an embezzlement prosecution arising from defendant's financial exploitation of an elderly woman whose husband had just died, the trial court properly declined to give defendant's requested special jury instruction—that if defendant was lawfully named on the joint bank accounts with the victim, then he was entitled to use the funds in the accounts. The requested instruction, which summarized a statute for the protection of banks (N.C.G.S. § 54C-165) and was not dispositive as to the ownership of funds, would have confused the jury.

Appeal by defendant from judgments entered 31 January 2020 by Judge John E. Nobles, Jr., in Pamlico County Superior Court. Heard in the Court of Appeals 19 October 2021.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Amy Kunstling Irene, for the State.

Tin Fulton Walker & Owen, PLLC, by Noell P. Tin, for defendant-appellant.

ZACHARY, Judge.

¶ 1 Defendant Thomas Wayne Steele appeals from judgments entered upon a jury's verdicts finding him guilty of one count of embezzlement and four counts of exploitation of an older adult. On appeal, Defendant contends that the trial court erred by (1) denying his motion to dismiss the embezzlement charge for insufficient evidence, and (2) declining to give Defendant's proposed special jury instruction. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

Background

¶ 2 Defendant first met Lillie Monk and her late husband, Pastor Mike Monk, Jr., in 1985. They became very close, eventually considering themselves family; Defendant called Mrs. Monk and Pastor Monk "Mom" and "Dad," and the Monks referred to Defendant as their "son." On 28 March 2015, Pastor Monk passed away unexpectedly. Defendant, who was also a pastor, delivered the eulogy at Pastor Monk's funeral.

¶ 3 Mrs. Monk struggled to return to her daily life. She testified that her husband's death "almost took [her] out[,]" and she felt like she "couldn't make it without him[.]" Mrs. Monk's family was concerned about her because she was so "grief-stricken" and "distraught."

¶ 4 Following the funeral, Mrs. Monk visited Defendant and his wife for a week in their home in Concord, North Carolina, against her family's advice. Over the next few months, she stayed with Defendant and his wife periodically. Defendant told Mrs. Monk that "he was there to help" her. Mrs. Monk testified at trial that she "thought [Defendant] was a man of God" who "loved [her]" and was "going to take care of [her.]" Mrs. Monk had little experience managing the household finances, as that had been her husband's responsibility throughout their marriage. Because she trusted Defendant and thought of him as family, Mrs. Monk "just turned everything"—including the keys to her home and post office box—over to Defendant after Pastor Monk's death.

¶ 5 On 16 April 2015, less than a month after her husband's death, Mrs. Monk added Defendant as joint holder on her State Employees' Credit Union (SECU) savings and money-market accounts. She also redeemed over $146,000 in savings bonds and deposited that money into the joint money-market account. That same day, Mrs. Monk added Defendant as a joint holder on her First Citizens Bank accounts as well. In addition, at some point, Defendant linked his personal SECU accounts to Mrs. Monk's SECU accounts, with the effect that any overdrafts on

Defendant's personal SECU account would be paid from the joint SECU accounts funded with Mrs. Monk's money.

¶ 6 Shortly thereafter, on 12 June 2015, Defendant drove Mrs. Monk to an attorney's office. Mrs. Monk testified that at Defendant's behest, she executed a power of attorney naming Defendant as her attorney-in-fact. She also executed a will, naming Defendant to serve as her executor and leaving the majority of her estate to him.

¶ 7 A few months later, on 4 September 2015, funds were withdrawn from the joint First Citizens accounts and used to fund two bank accounts at Wells Fargo Bank. Mrs. Monk and Defendant were named as joint holders of the new Wells Fargo accounts. There was conflicting evidence as to who opened the Wells Fargo accounts. Defendant testified that Mrs. Monk agreed to open these joint accounts. Mrs. Monk testified that the signatures on the applications for the two Wells Fargo accounts did not look like her handwriting; that she did not give Defendant permission to open the Wells Fargo accounts; and that she "didn't know what was going on" with the Wells Fargo accounts because Defendant "took over."

¶ 8 Concerned that Defendant was committing financial crimes against Mrs. Monk, her brother contacted the Pamlico County Sheriff's Office, which transferred the case to Agent Kevin Snead at the State Bureau of Investigation. On 22 April 2019, a Pamlico County grand jury returned indictments charging Defendant with four counts of exploitation of an older adult and one count of embezzlement of $100,000 or more. On 21 October 2019, a Pamlico County grand jury returned a superseding indictment amending the range of dates alleged for one of the charges of exploitation of an older adult.

¶ 9 On 28 January 2020, this matter was called for trial in Pamlico County Superior Court, the Honorable John E. Nobles, Jr., presiding. At trial, SBI Agent Snead testified that Defendant obtained a total of $123,367.09 from the accounts that he held with Mrs. Monk.

¶ 10 Agent Snead explained that, because Defendant linked his personal SECU checking account to Mrs. Monk's now jointly held SECU accounts, SECU transferred $21,350 from the joint money-market account to Defendant's personal checking account to cover his overdrafts between 11 August 2015 and 11 May 2016. He also testified that Defendant used $102,017 of Mrs. Monk's money from the jointly-held SECU, Wells Fargo, and First Citizens accounts for his benefit, including $15,000 for a down payment on a Ford truck titled to Defendant; $6,000

in contributions to his IRA; $4,850 for repairs to his Mercedes; $8,000 in payments on his credit card account; and $25,250 in cash withdrawals.

¶ 11 Defendant testified that the money in the joint accounts belonged to Mrs. Monk, stating, "it was her money—her accounts, her money. I was there to help her. It wasn't about me." He maintained that he had "no idea" that SECU was transferring money from the SECU accounts that he held with Mrs. Monk to cover overdrafts from his personal checking account, because he had not reviewed the SECU statements and instead "just stuck them in a drawer." Defendant also testified that Mrs. Monk asked him to recruit a new pastor for Pastor Monk's church and agreed to fund that project, and that he withdrew money from the accounts as she requested. However, Defendant conceded that he suffered from financial difficulties. Although his annual salary was $80,000, he had to pay the IRS "a bunch of money back" at one time and had struggled with his finances and bookkeeping.

¶ 12 Mrs. Monk testified that, although she "just turned everything over" to Defendant after her husband's death, she never authorized Defendant to link his personal SECU checking account to any joint account in order to cover his overdrafts, never gave Defendant permission to withdraw money from the joint accounts for his personal use, and never requested that Defendant find a new pastor for the church. She also stated that she never gave Defendant permission to use her money to purchase a new truck or to fix his Mercedes.

¶ 13 At the close of the State's evidence, Defendant moved to dismiss the embezzlement charge due to insufficient evidence, and he renewed the motion at the close of all evidence. The trial court denied the motion both times.

¶ 14 At the charge conference, Defendant submitted a written request for the following special jury instruction with regard to the embezzlement charge:

> Pursuant to NC law, NCGS [§] 54C-165, Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants. You should consider this as well as all other evidence as you evaluate whether the State has proven its case beyond a reasonable doubt.

¶ 15 Defense counsel argued that the proposed special instruction was necessary because "if the jury finds that [Defendant] was lawfully on the

joint accounts, meaning that there was no deception involved, then he would have been entitled to use those funds regardless." The trial court denied Defendant's request on the grounds that the special instruction was likely to confuse the jury.

¶ 16 On 31 January 2020, the jury returned its verdicts finding Defendant guilty of all charges. The trial court sentenced Defendant to 6-17 months for three of the four counts of exploitation of an older adult and an additional 13-25 months for the fourth count, with the sentences to run consecutively in the custody of the North Carolina Division of Adult Correction. The court also sentenced Defendant to 73-100 months for the embezzlement conviction, to run concurrently with Defendant's other sentences. In addition, the court ordered Defendant to pay $123,367.09 in restitution to Mrs. Monk. Defendant entered oral notice of appeal in open court.

Discussion

¶ 17 On appeal, Defendant argues that the trial court erred by (1) denying his motion to dismiss the embezzlement charge, and (2) declining to deliver his requested special jury instruction. We disagree.

I. Motion to Dismiss

¶ 18 **[1]** Defendant contends that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence that (1) he had a fiduciary relationship with Mrs. Monk when he converted the funds to his use; (2) he wrongfully converted Mrs. Monk's money to his own use, when he was entitled to the funds in the bank accounts as a joint holder; and (3) Defendant embezzled at least $100,000.

A. Standard of Review

¶ 19 We review the denial of a motion to dismiss based on an insufficiency of evidence de novo. *State v. Parker*, 233 N.C. App. 577, 579, 756 S.E.2d 122, 124 (2014).

¶ 20 "A motion to dismiss is properly denied where there is substantial evidence of each element of the offense charged and of [the] defendant being the perpetrator of that offense." *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* (citation and internal quotation marks omitted). The evidence "should be viewed in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. Where the State offers substantial evidence of each essential element of the crime charged, [the] defendant's motion to dismiss must be denied." *Id.* (citation omitted).

B. Embezzlement

¶ 21 The felony offense of embezzlement applies to any person "[w]ho is a guardian, administrator, executor, trustee, or any receiver, or any other fiduciary[.]" N.C. Gen. Stat. § 14-90(a)(3) (2019). Our embezzlement statute also provides that:

> (b) Any [fiduciary] who shall:
>
> (1) Embezzle or fraudulently or knowingly and willfully misapply or convert to his own use, or
>
> (2) Take, make away with or secrete, with intent to embezzle or fraudulently or knowingly and willfully misapply or convert to his own use,
>
> any money, goods or other chattels, bank note, check or order for the payment of money issued by or drawn on any bank or other corporation, or any treasury warrant, treasury note, bond or obligation for the payment of money issued by the United States or by any state, or any other valuable security whatsoever that . . . belongs to any other person or corporation, unincorporated association or organization . . . , which shall have come into his possession or under his care, shall be guilty of a felony.

Id. § 14-90(b). In short, "to constitute embezzlement, the property in question initially must be acquired lawfully, pursuant to a trust relationship, and then wrongfully converted." *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990). If the value of the property embezzled is $100,000 or more, the offense constitutes a Class C felony. N.C. Gen. Stat. § 14-90(c).

C. Fiduciary Relationship

¶ 22 Defendant first argues that the trial court erred in denying his motion to dismiss because the State presented insufficient evidence that a fiduciary relationship existed between himself and Mrs. Monk. Specifically, Defendant contends that "[n]o such relationship existed . . . until the power of attorney was executed on June 12, 2015, approximately two months after [Defendant] came into possession of the funds in Mrs. Monk's bank accounts[.]" We disagree.

¶ 23 It is axiomatic that "[t]he relationship created by a power of attorney between the principal and the attorney-in-fact is fiduciary in nature[.]" *Albert v. Cowart*, 219 N.C. App. 546, 554, 727 S.E.2d 564, 570

(2012). However, a fiduciary relationship may arise "under a variety of circumstances; it exists in all cases where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *State v. Seay*, 44 N.C. App. 301, 307, 260 S.E.2d 786, 789 (1979) (citation omitted), *appeal dismissed and disc. rev. denied*, 299 N.C. 333, 265 S.E.2d 401, *cert. denied*, 449 U.S. 826, 66 L. Ed. 2d 29 (1980). Indeed, as this Court explained in *State v. Newell*:

> In determining whether an agency or fiduciary relationship exists, it is the terms of the relationship that are important and not how the relationship is designated. The question which determines the nature of the relationship between the defendant and the alleged victim is the ownership of the money at the time it came into the hands of the defendant.

189 N.C. App. 138, 141, 657 S.E.2d 400, 403 (2008) (citation and internal quotation marks omitted).

¶ 24 Here, Defendant concedes that he acted as Mrs. Monk's fiduciary *after* she executed the power of attorney naming Defendant as her attorney-in-fact. Nevertheless, the evidence sufficiently established that a fiduciary relationship existed between Defendant and Mrs. Monk prior to that point, when he "came into possession of the funds in Mrs. Monk's bank accounts[.]" The parties' relationship was certainly one of special confidence and trust: Defendant called Mrs. Monk "Mom," and she called him "son." Mrs. Monk "thought he was a man of God" who "loved" and was "going to take care of" her. Defendant told Mrs. Monk that "he was there to help" her. Only a few weeks after her husband's funeral, Mrs. Monk granted Defendant access to her accounts in reliance on Defendant's promise to "take care of" her. She "turned everything over" to Defendant—including the keys to her home and post office box.

¶ 25 Mrs. Monk clearly granted Defendant access to the funds in her bank accounts "pursuant to a trust relationship[.]" *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. Because Defendant and Mrs. Monk had a relationship of trust, and because "it is the terms of the relationship that are important and not how the relationship is designated[,]" *Newell*, 189 N.C. App. at 141, 657 S.E.2d at 403 (citation omitted), we conclude that there was sufficient evidence that Defendant was acting as Mrs. Monk's fiduciary when he gained access to her money.

D. Joint Ownership of Bank Accounts

¶ 26 Defendant next argues that the trial court erred in denying his motion to dismiss because there was insufficient evidence that Defendant wrongfully converted Mrs. Monk's money to his own use, in that "[a]s a holder of the [joint] accounts, [he] was entitled to the balance of the [joint] accounts" that he held with Mrs. Monk. Again, we disagree.

¶ 27 In support of his theory of the case, Defendant relies on N.C. Gen. Stat. § 54C-165(a), which provides, *inter alia*:

> Any two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants, with or without right of survivorship, as the contract shall provide. . . . Unless the persons establishing the account have agreed with the savings bank that withdrawals require more than one signature, payment by the savings bank to, or on the order of, any persons holding an account authorized by this section is a total discharge of the savings bank's obligation as to the amount so paid.

N.C. Gen. Stat. § 54C-165(a).

¶ 28 Defendant interprets this statute as granting joint ownership of the funds deposited into the accounts by virtue of his being named a joint holder. Consequently, Defendant maintains that as a joint holder of the accounts, he was an owner of the funds, and thus, he could not be prosecuted for unlawful withdrawal and use of the funds. This contention is without merit.

¶ 29 Although § 54C-165 governs savings banks, it is essentially the same as § 53C-6-6 (formerly § 53-146, governing banks) and § 54-109.58 (governing credit unions). *See id.* §§ 53C-6-6(f); 54-109.58(f); 54C-165(a). These statutes simply provide, in sum, that the financial institution "may safely pay either of the two persons." *O'Brien v. Reece*, 45 N.C. App. 610, 617, 263 S.E.2d 817, 821 (1980). It is well established that these statutes are "for the protection of the [financial institution] only, and absent any other evidence, [are] not dispositive as to the ownership of funds." *Id.*

¶ 30 It is true that "[t]he ownership of funds in a bank account is presumed to belong to or be owned by the person(s) named on the account." *Mut. Cmty. Sav. Bank, S.S.B. v. Boyd*, 125 N.C. App. 118, 122, 479 S.E.2d 491, 493 (1997). Nevertheless, where ownership is disputed,

the presumption may be rebutted with evidence of the "facts surrounding the creation and history of the account, the source of the funds, the intent of the depositor[,] the nature of the bank's transactions with the parties, and whether the owner of the monies . . . intended to make a gift to the person named[.]" *Id.* at 122, 479 S.E.2d at 494 (citations omitted). "The depositor is . . . deemed to be the owner of the funds." *Myers v. Myers*, 68 N.C. App. 177, 181, 314 S.E.2d 809, 812 (1984) (concluding that husband's unauthorized removal and use of funds deposited by wife in a joint checking account supported a claim of conversion). "[A] deposit by one party into an account in the names of both, standing alone, does not constitute a gift to the other. In order for the exchange of property to constitute a gift, there must be donative intent coupled with loss of dominion over the property." *Hutchins v. Dowell*, 138 N.C. App. 673, 678, 531 S.E.2d 900, 903 (2000). The intent of the parties controls when ownership is disputed. *McAulliffe v. Wilson*, 41 N.C. App. 117, 120, 254 S.E.2d 547, 549 (1979).

¶ 31 In the instant case, it is undisputed that Mrs. Monk, alone, funded the joint accounts. Indeed, Defendant testified that all of the money in the accounts "was [Mrs. Monk's] money." Thus, Mrs. Monk, as the depositor, was "still deemed to be the owner of the funds." *Myers*, 68 N.C. App. at 181, 314 S.E.2d at 812.

¶ 32 Moreover, there was ample evidence that Mrs. Monk did not intend to make a gift to Defendant of $123,367.09, the total amount of funds that Defendant was eventually convicted of embezzling from her. Mrs. Monk testified that she did not give Defendant permission to use the funds for his personal expenses, nor did she gift him the money. Although there was contrary evidence presented at trial—Defendant testified that Mrs. Monk did, in fact, authorize his particular use of the funds—in reviewing the denial of a motion to dismiss, we nonetheless must "view [the evidence] in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom." *Parker*, 233 N.C. App. at 579, 756 S.E.2d at 124.

¶ 33 We conclude that there was sufficient evidence that the funds taken were the property of Mrs. Monk, and that she did not have the requisite "donative intent" to grant Defendant the money to withdraw and use for his personal benefit. *Hutchins*, 138 N.C. App. at 678, 531 S.E.2d at 903. Thus, Defendant was not entitled to convert the money to his use without her permission.

E. Amount Embezzled

¶ 34 Defendant also contends that the State presented insufficient evidence that the amount of money he embezzled was $100,000 or more—thus elevating the offense to a Class C felony—because: (1) less than $100,000 was taken while Defendant acted as a fiduciary to Mrs. Monk; and (2) Defendant did not have the requisite intent to embezzle the overdraft fees, and therefore, the amount of money embezzled was less than $100,000. We disagree with both contentions.

¶ 35 Defendant first argues that the trial court erred in denying his motion to dismiss the Class C embezzlement charge, because there was insufficient evidence that Defendant was acting as a fiduciary when he converted $100,000 or more of Mrs. Monk's funds to his personal use. As explained above, there was sufficient evidence that Defendant was acting as Mrs. Monk's fiduciary prior to his appointment as her attorney-in-fact. The wrongful conversion of $123,367.09 occurred while Defendant acted as a fiduciary. Accordingly, this argument fails.

¶ 36 Second, Defendant maintains that there was insufficient evidence that he had the requisite intent to wrongfully convert $21,350 in transfers from a joint account in order to cover overdraft fees in his personal checking account. Defendant asserts that "[t]here was no evidence that [he] initiated or knowingly allowed those transfers, nor was there evidence that [he] was aware of those transfers when they occurred" or that "he knowingly linked the joint account to his personal account" with the intent of instituting the overdraft transfers.

¶ 37 "The fraudulent intent required [for the offense of embezzlement] is the intent to willfully or corruptly use or misapply the property of another for purposes other than those for which the agent or fiduciary received it[.]" *State v. Rupe*, 109 N.C. App. 601, 609, 428 S.E.2d 480, 486 (1993). "When a defendant receives money under an agency relationship and does not transmit it to the party to whom it is due, this is circumstantial evidence of intent. Evidence that the defendant was experiencing personal financial problems is also circumstantial evidence of intent." *Newell*, 189 N.C. App. at 142–43, 657 S.E.2d at 404 (citations omitted).

¶ 38 Here, there was sufficient evidence of Defendant's fraudulent intent to embezzle $21,350 in overdraft fees from Mrs. Monk. Although Defendant denied linking the accounts or knowing that his personal checking account overdrafts were being covered with funds from a joint account, the $21,350 in overdraft fees constituted more than a quarter of his approximately $80,000 annual salary, and Defendant admitted

receiving SECU statements for that account. Moreover, transfers from the joint account covered Defendant's personal overdrafts for many months, from August 2015 to May 2016, with each month's statements providing Defendant with additional notice of the transfers. Defendant also testified that he was experiencing money problems, as he struggled with his finances and bookkeeping, and had to pay the IRS "a bunch of money back" at one time.

¶ 39 The evidence was sufficient to support that Defendant embezzled $100,000 or more from Mrs. Monk. Accordingly, the trial court did not err in denying Defendant's motion to dismiss the charge of embezzlement.

II. Special Jury Instruction

¶ 40 **[2]** Finally, Defendant argues on appeal that the trial court erred in declining to give his requested special jury instruction that "if the jury found that he was lawfully named on the joint bank accounts with [Mrs.] Monk, then he would be entitled to use the funds in the accounts[.]" A review of the record, however, reveals that Defendant's requested special instruction was in fact a brief summary of N.C. Gen. Stat. § 54C-165; counsel had intended to use this statute to argue that Defendant was not guilty of the embezzlement charge. We conclude that the trial court did not err in denying Defendant's request for this special instruction.

A. Standard of Review

¶ 41 A trial court should give a specific jury instruction when "(1) the requested instruction [i]s a correct statement of law and (2) [i]s supported by the evidence, and . . . (3) the [pattern jury] instruction . . . , considered in its entirety, fail[s] to encompass the substance of the law requested and (4) such failure likely misle[ads] the jury." *State v. Oxendine*, 242 N.C. App. 216, 219, 775 S.E.2d 19, 21–22 (2015) (citation omitted). "Where the request for a specific instruction raises a question of law," this Court reviews de novo "the trial court's decisions regarding jury instructions[.]" *State v. Palmer*, 273 N.C. App. 169, 171, 847 S.E.2d 449, 451 (2020). "Failure to give a requested and appropriate jury instruction is reversible error if the requesting party is prejudiced as a result of the omission." *State v. Guerrero*, 2021-NCCOA-457, ¶ 9 (citation omitted).

B. Discussion

¶ 42 During the charge conference, Defendant requested that the trial court instruct the jury that:

> Pursuant to NC law, NCGS [§] 54C-165, Any two or more persons may open or hold a withdrawable

> account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants. You should consider this as well as all other evidence as you evaluate whether the State has proven its case beyond a reasonable doubt.

Defendant requested this special instruction in the hopes of arguing to the jurors that if they found that Defendant "was lawfully on the joint accounts, meaning that there was no deception involved," then they should also find that "he would have been entitled to use those funds regardless."

¶ 43 Defendant's requested special instruction is a correct statement of law insofar as "[a]ny two or more persons may open or hold a withdrawable account or accounts. The withdrawable account and any balance of the account is held by them as joint tenants[.]" N.C. Gen. Stat. § 54C-165(a). It does not, however, accurately negate any element of the offense of embezzlement; Defendant was not entitled to spend the funds because he was a joint holder of the accounts. Consequently, the trial court correctly concluded that such an instruction would have been confusing to the jury.

¶ 44 As we addressed above, N.C. Gen. Stat. § 54C-165 and its related statutes, §§ 53C-6-6 and 54-109.58, are "for the protection of the *bank* only, and absent any other evidence, [are] *not dispositive as to the ownership of funds*." *O'Brien*, 45 N.C. App. at 617, 263 S.E.2d at 821 (emphases added). Furthermore, Defendant admitted at trial that all of the money in the joint accounts belonged to Mrs. Monk: "[I]t was her money—her accounts, her money. I was there to help her. It wasn't about me." Mrs. Monk testified that she granted Defendant joint access so that he could "take care of [her]."

¶ 45 Additionally, Defendant can show no prejudice from the trial court's refusal to give the requested special instruction. Indeed, the requested instruction actually *supports* an element of the offense of embezzlement—that Defendant had lawful access to the funds. *See* N.C. Gen. Stat. § 14-90; *Speckman*, 326 N.C. at 578, 391 S.E.2d at 166. Thus, there is no reasonable possibility that, had the trial court given the requested special instruction, the jury would have reached a different result at trial. Moreover, it is evident upon review that the trial court appropriately instructed the jury.

¶ 46 Because the requested special instruction could have misled the jury and was likely to create an inference unsupported by the law and the record—that Defendant's lawful access to the funds in the joint

accounts entitled him to freely spend the money therein—the trial court properly declined to deliver Defendant's requested special jury instruction. *See Guerrero*, 2021-NCCOA-457 at ¶ 9.

Conclusion

¶ 47 For the foregoing reasons, we conclude that the trial court did not err in denying Defendant's motion to dismiss the embezzlement charge, nor in refusing to deliver Defendant's requested special jury instruction.

NO ERROR.

Judges MURPHY and COLLINS concur.

STATE OF NORTH CAROLINA
v.
JOHNATHAN WENDELL WARD

No. COA21-303

Filed 18 January 2022

1. Constitutional Law—right to counsel—trial strategy—absolute impasse

The trial court did not err in a statutory rape trial by denying defendant's request to remove his counsel and represent himself, or in not more fully informing defendant of his constitutional rights, where the record did not clearly disclose there was an absolute impasse between defendant and his attorney on trial strategy. Although defendant expressed that he did not believe his attorney had his best interest at heart and made vague claims of misconduct, the trial court gave defendant an opportunity to raise his concerns and adequately addressed them.

2. Evidence—statutory rape trial—expert testimony—use of words "victim" and "disclosure"—credibility vouching

There was no plain error in a statutory rape trial by the expert witness using the words "victim" and "disclosure" during her testimony to describe the child prosecuting witness and the allegations made against defendant. The jury also heard testimony about defendant's assaults directly from the prosecuting witness as well as testimony from family members, a counselor, and others. Given the overwhelming evidence of guilt presented, defendant's alternative

argument that his counsel was ineffective for failing to object to the expert's language was also without merit.

Appeal by defendant from judgment entered 9 December 2020 by Judge Jeffery B. Foster in Pasquotank County Superior Court. Heard in the Court of Appeals 14 December 2021.

Attorney General Joshua H. Stein, by Assistant Attorney General Justin Isaac Eason, for the State.

Mark Montgomery for defendant-appellant.

TYSON, Judge.

¶ 1 Johnathan Ward ("Defendant") appeals a jury's verdict finding him guilty of statutory rape and abduction of a child. We find no prejudicial error.

I. Background

¶ 2 Katy was 14 years old when she attended a gathering at her grandmother's home on 25 December 2016. *See* N.C. R. App. P. 42(b) (pseudonym used to protect the identity of the juvenile). Defendant attended the same gathering because he was dating Katy's aunt, Naquana.

¶ 3 On 26 December 2016, Katy's sister, Ada Doe, awoke to find Katy was no longer inside the bedroom with her. Ada looked for her sister and awoke her mother and stepfather. The family looked for Katy and eventually they spotted Defendant's car in the apartment complex parking lot beside their house. Ada and her stepfather approached Defendant's car and saw Defendant in the front seat and Katy in the backseat. Ada and her stepfather tried to open the car doors and rapped upon the windows. Defendant started the car and drove away with Katy still in the backseat. Naquana called the police.

¶ 4 Katy was found and taken to Children's Hospital of the King's Daughters by her biological father, Kenneth Doe. Katy's mother, Denita Doe, testified at trial that Katy was missing for eight to ten hours. Denita testified Katy was "distant, upset, scared" upon being reunited at the hospital. Denita arranged an interview for Katy at Kid's First Child Advocacy Center ("Kid's First").

¶ 5 Ida Rodgers, a licensed clinical social worker, conducted Katy's interview at Kid's First. Rodgers testified when she met Katy on 28 December 2016 Katy was "very withdrawn . . . and she had a hood

over her head. Her face was not visual (sic) . . . She was extremely nervous and very soft spoken . . . reluctant to talk."

¶ 6 Katy told Rodgers that she had attempted to talk to Defendant, and that is why she was inside of his car on 26 December 2016. Katy told Rodgers that Defendant had panicked and drove away, and that she had slept in a bed with him at his friend's house. Katy did not disclose any sexual activity with Defendant during the first interview.

¶ 7 Rodgers interviewed Katy again on 28 February 2020. At this interview, Katy told Rodgers she had been raped once, and Defendant had attempted to rape her again.

¶ 8 Katy was 18 years old when she testified at Defendant's trial. Katy told the jury she had met Defendant in the summer of 2016. Defendant began to show an interest in her, which made her feel uncomfortable. Katy testified that during the summer of 2016, she was asleep in her cousin's room and she "woke up to [Defendant being] knelt beside me, and he was touching me . . . [m]y breasts and my vagina." Katy testified Defendant was touching her on top of her clothing.

¶ 9 Katy testified of another incident when she was asleep at her aunt's house in a recliner and awoke to find Defendant touching her breasts. Defendant "pulled his penis out" and "pulled [Katy's] head toward that way" and asked her to perform oral sex on him.

¶ 10 The prosecutor asked Katy during direct examination if Defendant had engaged in sexual activities with her. Katy testified she had been asleep on her aunt's sofa and all she remembered "is him putting his penis inside of [my vagina]." The prosecutor asked Katy if Defendant had sex with her more than once, and Katy replied "Yes." Katy testified she was 14 years old, and Defendant was 28 years old when these incidents had occurred.

¶ 11 During trial, Defendant expressed dissatisfaction with his appointed counsel and claimed to have fired him "seven times." The trial judge heard Defendant's concerns regarding the witness list and the State's burden to prove elements of the charges and answered Defendant's questions. Defendant tried to "relieve [counsel] of his duties" on the second day of trial. Defendant stated he would like to represent himself, and the court denied his motion twice.

¶ 12 The jury found Defendant guilty of statutory rape and abduction of a child. Defendant was sentenced to an active term of imprisonment for 240 to 348 months for the statutory rape conviction to run concurrently to a term of active imprisonment of 16 to 29 months for the abduction of a child.

II. Jurisdiction

¶ 13 This Court has jurisdiction pursuant to N.C. Gen. Stat. § 7A-27(b) (2021).

III. Issues

¶ 14 Defendant raises two issues on appeal. First, whether the trial court erred by not inquiring of Defendant's disagreements with his counsel's trial strategy and his request to represent himself. Second, whether the trial court committed plain error in allowing the State's expert witness to testify regarding Defendant's truthfulness, and in the alternative, whether Defendant received ineffective assistance of counsel.

IV. Argument

A. Defendant's Complaints Regarding His Counsel

1. Standard of Review

¶ 15 "The standard of review for alleged violations of constitutional rights is *de novo*." *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009).

2. Absolute Impasse

¶ 16 **[1]** Defendant argues the trial court committed errors during trial and each error prejudiced his constitutional rights as a matter of law. Defendant argues that he voiced dissatisfaction with his attorney on the first and second day of trial and then asked to have his attorney removed and to represent himself.

¶ 17 The Sixth Amendment to the Constitution of the United States gives a criminal defendant the "right to proceed without counsel when he voluntarily and intelligently elects to do so[.]" *Faretta v. California*, 422 U.S. 806, 807, 45 L. Ed. 2d 562, 566 (1975).

¶ 18 Defendant argues he is entitled to an "*Ali*" error and to have his strategic wishes honored by defense counsel. An *Ali* error occurs when "counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control[.]" *State v. Ali*, 329 N.C. 394, 404, 407 S.E.2d 183, 189 (1991).

¶ 19 A defendant's disagreement with counsel will not always rise to the level of an absolute impasse as noted in *State v. Curry*, 256 N.C. App. 86, 97, 805 S.E.2d 552, 559 (2017). In *Curry*, the defendant argued an absolute impasse occurred with his attorney because his counsel did not believe him about the crime and charges. *Id.* at 98, 805 S.E.2d at

559. In *Curry*, this Court held "no actual impasse exists where there is no conflict between a defendant and counsel. . . . Moreover, when a defendant fails to complain about trial counsel's tactics and actions, there is no actual impasse." *Id.* at 97, 805 S.E.2d at 559 (citations omitted). This Court emphasized that conclusory allegations of impasse are not enough. *Id.* at 98, 805 S.E.2d at 559. This Court reasoned in *Curry*, the defendant "was the sole cause of any purported conflict that developed, and there has been no reasonable or legitimate assertion by [d]efendant that an impasse existed that would require a finding that counsel was professionally deficient in this case." *Id.*

¶ 20 The first colloquy between Defendant and the trial court occurred as follows:

> THE COURT: Did you have some concerns about your attorney that you wanted to express?
>
> . . . .
>
> THE DEFENDANT: It seems as though he couldn't do anything I asked him to do for some reason or another. You know, I asked for certain people to be taking the stand and I asked him for certain evidence, like, there was things that was said in court because everyone who was on the original case is no longer here, you know, and there's new charges are coming up out of the blue, so I wanted to fill you in on how the case has gone so far I guess.
>
> THE COURT: Okay. So your attorney -- you say you got some witnesses that you want to call that he doesn't want to call?
>
> THE DEFENDANT: Well, I mean, he said he couldn't -- he said he couldn't find them or he needed an address, but they already on the witness list it seems, so I will just cross-examine them.
>
> . . . .
>
> THE COURT: If they're on the witness list, they can be called. Whether or not they're called is a matter of legal strategy.
>
> THE DEFENDANT: Right. That's what I was saying. It seems as though he don't have my best interests at heart.

THE COURT: Well, I mean, why do you say that?

THE DEFENDANT: I mean, just the excuses that was kind of weak, you know, tactics to keep prolonging and buying time. I tried to fire him seven times, and he refused to admit that I fired him, I guess, so he keeping his voicemail secret. He's not making the district attorney prove anything she is saying or, you know –

THE COURT: Well, I can promise you, sir, that before this case goes to the jury, the State is going to prove every allegation beyond a reasonable doubt, and I get to make that final call.

THE DEFENDANT: Okay.

THE COURT: If they don't prove their case and there's not enough evidence to send it to the jury, I won't let it go to the jury.

THE DEFENDANT: And I also feel as though he's corroborating misconduct or turning a blind eye to a lot of misconduct, but, I mean, it's really speculation so I can't really –

THE COURT: Then you understand speculation, we can't do anything about that.

THE DEFENDANT: I hope we keep that attitude.

THE COURT: Okay. All right. Anything else?

THE DEFENDANT: No, sir.

¶ 21 The second colloquy occurred as follows:

THE DEFENDANT: I would like to relieve him of his duties. I asked him to do a few things yesterday he refused to do.

THE COURT: Mr. Ward, once again, I ruled on that motion yesterday. I am going to deny that motion, okay, and nothing is going to change between yesterday and today, so that motion is still denied, all right? Anything else?

. . . .

> THE DEFENDANT: I would really like to represent myself today.
>
> THE COURT: Well, again, for the last time, that motion is denied, okay?
>
> THE DEFENDANT: All right.

¶ 22 The trial judge heard Defendant's concerns, considered them, personally addressed, explained, and assured Defendant of the integrity of the process and of his rights. At the conclusion of the two colloquies, the trial judge gave Defendant another opportunity to voice any concerns and addressed them. Defendant communicated he was satisfied and had nothing further to say. Defendant's questions and comments cannot be said to rise to the level of an "absolute impasse as to such tactical decisions" as was described in *Ali*. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189.

¶ 23 Defendant's complaints regarding the witness list and proving the elements of his charges were deemed misunderstandings that were corrected during the colloquies by the trial court. Like the defendant in *Curry*, Defendant may have had a personality conflict with his counsel, and asserted he did not believe defense counsel had his best interest at heart. Defendant has failed to show an "absolute impasse as to such tactical decisions" occurred during trial. *Id.* Defendant's argument is overruled.

3. Right to be Informed

¶ 24 Defendant concedes he can find no authority to support his notion that the trial court committed an *Ali* error. Defendant asserts "[i]t follows that a defendant has the right to be so informed[]" because "in order for a defendant to exercise his [*Ali*] right, he must be made aware that he has it."

¶ 25 In assessing the right to self-representation under the Sixth Amendment, our Supreme Court held that when the defendant effectively admits that no request for self-representation had been communicated to the trial court during the pretrial phase, the recognition of a right under the Constitution does not carry with it a concurrent recognition of a right to be notified of the existence of that right. *State v. Hutchins*, 303 N.C. 321, 337-38, 279 S.E.2d 788, 798-99 (1981).

¶ 26 After the jury was seated, sworn and during the second day trial, Defendant raised his motion to discharge his appointed counsel. Defendant asserts the trial court denied the motion without conducting a "thorough analysis" in accordance with N.C. Gen. Stat. § 15A-1242 (2021).

¶ 27 This Court has held "while the right to counsel may be waived only expressly, knowingly, and intelligently, the right to self-representation can be waived by failure timely to assert it, or by subsequent conduct giving the appearance of uncertainty." *State v. Walters*, 182 N.C. App. 285, 292, 641 S.E.2d 758, 762 (2007) (citation and internal quotation marks omitted). "Statements of a desire not to be represented by court-appointed counsel do not amount to expressions of an intention to represent oneself. *Hutchins*, 303 N.C. at 339, 279 S.E.2d at 800.

¶ 28 Here, the transcript shows Defendant expressed generalized dissatisfaction with his attorney on the first day of trial, as well as a substantial level of confusion regarding the nature of the charges and process. Defendant insinuated that various individuals, including witnesses, the prosecutor, and his attorney, were engaged in misconduct.

¶ 29 Defendant did not clearly express a wish to represent himself until the second day of trial. The trial court gave Defendant several opportunities to address and consider whether he wanted continued representation by counsel and personally addressed and inquired into whether Defendant's decision was being freely, voluntarily, and intelligently made. Defendant's arguments are without merit and overruled.

B. Expert Witness Testimony

1. Plain Error

¶ 30 **[2]** Defendant argues the trial court erred in permitting State's witness Ida Rodgers to use the terms "victim" and "disclosure" during her testimony.

¶ 31 "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

> 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.

Id.

¶ 32 Our Supreme Court recently considered this issue and determined: "[d]efendant has not shown that the use of the word 'disclose' had a probable impact on the jury's finding that he was guilty." *State v. Betts*,

2021-NCSC-68, ¶ 21, 377 N.C. 519, 525, 858 S.E.2d 601, 606 (concluding the jury had heard substantial evidence the defendant inappropriately touched the victim and had ample opportunities to assess her credibility, thus making it improbable the word "disclose" had an impact on their verdict). Further "[e]ven if the trial court erred in [permitting] use of the term 'victim,' [the defendant] must show prejudice to receive a new trial." *State v. Jackson*, 202 N.C. App. 564, 569, 688 S.E.2d 766, 769 (2010).

¶ 33 The word "disclose" was used several times throughout the trial, and during the jury charge. The word "victim" also appears several times throughout the indictment, the pattern jury instructions, and several dozen times throughout the trial. We again caution of the State's repeated use of both terms, "disclose" and "victim," as the State carries the burden of proof and overuse of both characterizations may prejudice a defendant.

¶ 34 Here, the jury had the opportunity to hear from 18-year-old Katy, several of her family members, Katy's counselor, and others. Katy clearly articulated the kind and nature of the assaults inflicted on her by Defendant. Defendant had a fair and full opportunity to cross-examine her and all of the other State's witnesses and to present his own evidence and witnesses in rebuttal. The jury weighted the credibility of all witnesses and evidence to reach its verdicts. Defendant has failed to show plain error or prejudice to award a new trial.

2. Ineffective Assistance of Counsel

¶ 35 As an alternative to Defendant's appeal regarding the words Ida Rodgers used in her testimony, Defendant argues he received ineffective assistance of counsel because counsel failed to object to Rodger's use of those terms during her testimony.

> To succeed on an IAC claim, defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

State v. Womble, 272 N.C. App. 392, 402, 846 S.E.2d 548, 555 (2020) (citations omitted).

¶ 36 For the same reason plain error review fails under these facts as described above, Defendant's IAC argument also fails. Given the other overwhelming evidence of guilt presented, Defendant has shown no reasonable probability the jury would have reached a different verdict, if

his trial counsel had objected to the use of the terms "disclosure" and "victim" during trial to demonstrate prejudice. Defendant's IAC argument has no merit and is dismissed.

V. Conclusion

¶ 37 The trial court did not commit a reversible error by failing to conduct a more "thorough analysis" before denying Defendant's right to represent himself. The trial court did not commit a Constitutional error by failing to inform Defendant of his "*Ali*" error rights. *Ali*, 329 N.C. at 404, 407 S.E.2d at 189.

¶ 38 Defendant does not show plain error or prejudice by the trial court permitting an expert witness to use the words "disclose" during her testimony and the use of "victim" on several occasions. Defense counsel did not provide ineffective assistance of counsel by failing to object to the use of those same words during trial. Defendant received a fair trial free from prejudicial errors he preserved or as reviewed for plain error. We find no prejudicial error. *It is so ordered.*

NO PREJUDICIAL ERROR.

Judges CARPENTER and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 18 JANUARY 2022)

ENOCH v. MONARCH 2022-NCCOA-41 No. 20-585	N.C. Industrial Commission (15-769318)	Affirmed
IN RE J.B. 2022-NCCOA-42 No. 21-457	New Hanover (13JA187)	Affirmed
KIM v. CALLOWAY 2022-NCCOA-43 No. 21-52	Orange (12CVD142)	Vacated and Remanded
McGIRT v. DURHAM CNTY. GOV'T 2022-NCCOA-44 No. 21-261	Durham (20CVS3058)	Affirmed in Part, Dismissed in Part, and Remanded.
MILLER v. E. BAND OF CHEROKEE INDIANS 2022-NCCOA-45 No. 21-206	Graham (20CVS130)	Dismissed
REVIS v. SCHLEDER 2022-NCCOA-46 No. 21-360	Buncombe (20CVS3449)	Dismissed
ROTH v. ROTH 2022-NCCOA-47 No. 21-84	Wake (14CVD7863)	Affirmed.
STATE v. DAWSON 2022-NCCOA-48 No. 21-372	Surry (19CRS51017-19) (20CRS50555)	Affirmed
STATE v. HUGAYES 2022-NCCOA-49 No. 20-756	Lenoir (16CRS52315)	No Error
STATE v. JOHNSON 2022-NCCOA-50 No. 20-820	Alamance (17CRS53028) (17CRS53672) (19CRS1776)	No Error in Part; Dismissed in Part
WOODFOREST NAT'L BANK v. EDWARDS BROTHERS MALLOY, INC. 2022-NCCOA-51 No. 20-217	Harnett (18CVS1980)	Dismissed

COMMERCIAL PRINTING COMPANY
PRINTERS TO THE SUPREME COURT AND THE COURT OF APPEALS