297 N.C. App.—No. 3 Pages 581-732

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 17, 2025

MAILING ADDRESS: The Judicial Department
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OF
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[1] Sworn in 1 January 2025. [2] Sworn in 1 January 2025. [3] Died 20 January 2025.
[4] Term ended 31 December 2024. [5] Term ended 31 December 2024.

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COURT OF APPEALS

CASES REPORTED

FILED 15 JANUARY 2025 AND 5 FEBRUARY 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Motion for judgment notwithstanding the verdicts—no notice of appeal from denial—no appellate jurisdiction—Plaintiffs' purported appeal from the denial of their motion for judgment notwithstanding the verdicts (JNOV) entered against them was dismissed for lack of jurisdiction where plaintiffs' notice of appeal only designated the judgment entered upon the jury's verdicts and did not specifically designate the order denying their JNOV motion. **Warren v. Bonner, 615.**

Notice of appeal—jurisdictional defect—not signed by respondent—appeal dismissed—An appeal from the trial court's orders terminating respondent-mother's parental rights to her children was dismissed for lack of jurisdiction because respondent did not sign the notice of appeal as required by N.C.G.S. § 7B-1001(c); although the notice of appeal was filed on respondent's behalf and signed by her attorney and guardian ad litem (who had been appointed pursuant to Civil Procedure Rule 17), there was no indication in the record that respondent had been adjudicated incompetent or that she wished to pursue an appeal. **In re Z.A.N.L.W.C., 698.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse—lack of evidentiary support—prior abuse of sibling insufficient— The trial court's order adjudicating a child as abused was reversed where the only evidence of abuse pertained to the child's older sibling—whose prior adjudication of abuse and neglect resulted from having sustained serious injuries through non-accidental means while in her parents' care—and where there was no evidence that the child subject to the current juvenile petition had ever been subjected to physical harm by the parents or that the parents had directly placed the child in a substantial risk of harm. **In re N.R.R.N., 673.**

Adjudication—sufficiency of evidence and findings—testimony verifying truth of petition allegations—The trial court's findings of fact in its order adjudicating a child neglected and abused were based on clear, cogent, and convincing evidence—including a prior adjudication and disposition of the child's older sibling—and reflected the trial court's processes of logical reasoning and independent evaluation of the ultimate facts of the case rather than a mere verbatim recitation of the allegations contained in the juvenile petition. Further, the sworn testimony of an investigator for the department of social services verifying that the allegations in the petition were true constituted competent evidence. In addition, neither mother nor father objected to the introduction of the petition, presented evidence in opposition to the petition and its allegations, or availed themselves of the opportunity to conduct a cross-examination of the investigator. **In re N.R.R.N., 673.**

Effective assistance of counsel—juvenile petition—failure to advocate during adjudication—pending felony child abuse charges—In an adjudication proceeding on a juvenile petition alleging abuse and neglect, neither parent received ineffective assistance of counsel where their counsels' decisions to "stand mute" or not object to the submission of the juvenile petition constituted permissible strategic decisions in light of the pending felony child abuse charges both parents faced for the alleged child abuse of their older child and the fact that counsel for each parent actively participated in the dispositional phase of the hearing. Further, neither parent could show they were deprived of a fair hearing given the sufficiency of the evidence to conclude that the child was a neglected juvenile. **In re N.R.R.N., 673.**

Initial disposition—ceasing reunification efforts—statutory requirements —In a juvenile abuse and neglect proceeding, the trial court properly ordered the department of social services to cease reunification efforts with the parents at the initial disposition hearing pursuant to N.C.G.S. § 7B-901(c)(3)(iii) after determining, as a "court of competent jurisdiction," that the parents had committed a felony assault resulting in serious bodily injury to the child's sibling. However, the court's order ceasing reunification efforts pursuant to N.C.G.S. § 7B-901(c)(1)(f) was vacated for lack of sufficient findings of the existence of "other" aggravated circumstances, since the facts that gave rise to the adjudication could not also serve as the "other act, practice, or conduct" for purposes of disposition. **In re N.R.R.N., 673.**

Neglect—injurious environment—prior abuse of sibling from non-accidental injuries—The trial court properly adjudicated a child as neglected based on evidence that the child's older sibling had been abused and neglected from sustaining non-accidental injuries, for which the parents had not provided an explanation, and that the parents had not acknowledged the injurious environment created for the sibling or taken steps to remedy the environment to prevent future harm to the child subject to the current juvenile petition. **In re N.R.R.N., 673.**

CONSTITUTIONAL LAW

Right to speedy trial—no order entered on defendant's motion—remand required—In a prosecution on charges including first-degree murder—arising from an October 2020 incident in which the victim died as the result of gunshot wounds received just after he was seen arguing with defendant, but which did not come on for trial until March 2023—where the trial court failed to enter an order on defendant's speedy trial motion following a hearing in November 2022, remand to the trial court was required for the entry of findings of fact and conclusions of law on the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, assertion of the right, and prejudice) because the trial delay of more than two years was sufficient to establish presumptive prejudice to defendant and the court's indeterminant oral statements following the hearing were not minimally sufficient to resolve defendant's motion. **State v. Boyd, 624.**

CRIMINAL LAW

Guilty plea—voluntariness—extended post-release supervision added later—direct consequence of plea—Where defendant entered a plea of guilty to robbery and kidnapping charges without being made aware that he would be subjected to an extended period of post-release supervision (although defendant's initial judgment placed him on nine months of post-release supervision, that component was later amended to five years without notice to defendant or an opportunity to be heard), the trial court erred by summarily dismissing defendant's supplemental motion for appropriate relief (MAR) challenging the voluntariness of his guilty plea. First, defendant pled sufficient facts in his initial MAR to preserve this argument in his subsequent filing. Further, since post-release supervision is a direct consequence of a guilty plea—as distinguished from satellite-based monitoring and sex offender registration—because it has a definite, immediate, and essentially automatic effect on the range of punishment, the details of such supervision must be conveyed to a defendant before entry of a guilty plea. **State v. Spry, 641.**

Motion for appropriate relief—summary denial—factual issues unresolved—hearing required on remand—The trial court erred by summarily denying defendant's motions for appropriate relief—in which defendant challenged the voluntariness of his guilty plea on the grounds that he was never informed that he would be subject to sex offender registration or five years of post-release supervision, conditions that were added as a correction to the original judgment without prior notice to defendant or opportunity to be heard—where there was a question of fact whether defendant entered his guilty plea under a misapprehension and where the record on appeal was devoid of any verbatim transcript of the plea proceedings. The trial court's orders were vacated and the matter was remanded for the trial court to hold an evidentiary hearing, receive and consider evidence, and make additional findings of fact. **State v. Spry, 641.**

DOMESTIC VIOLENCE

Protective order—on behalf of parties' child—good cause for renewal—child's continued, legitimate fear of father—sufficiency of evidence—In a case involving unmarried parents sharing joint custody of their thirteen-year-old daughter, the trial court erred in renewing a domestic violence protective order (DVPO) entered against the father on the child's behalf, where there was no competent evidence showing that the child had a continued, legitimate fear of her father as required to establish good cause for renewal. The court's findings of fact

incorporated many allegations from the mother's original complaint seeking the DVPO, including that the father had recorded the child while she undressed, forced her to sleep in the same bed as him, and monitored her electronic devices. However, these allegations could not serve as the basis for renewing the DVPO because: (1) they were not supported by evidence presented at the renewal hearing; (2) after multiple investigations, neither the department of social services nor law enforcement found any evidence substantiating the allegations; and (3) because the DVPO was entered as a consent order without findings of fact or conclusions of law (pursuant to N.C.G.S. § 50B-3(b1)), it did not establish any facts alleged in the complaint as proven. Furthermore, the court failed to make findings about the child's actual subjective fear of the father, relying instead on the mother's unproven allegations and the child's vague and inconsistent testimony on that key issue. **Roy v. Martin, 704.**

EVIDENCE

Authentication—through circumstantial evidence—murder trial—Facebook messages purportedly sent by defendant to victim—In a prosecution for first-degree murder, the trial court did not err in admitting photographs of Facebook messages purportedly sent by defendant to the victim (his brother) on the day of the murder. The State properly authenticated the messages through circumstantial evidence, including: testimony from defendant's niece, who identified the victim's phone (used to retrieve the messages) in the photographs and testified that defendant communicated exclusively via Facebook Messenger; testimony from a police deputy regarding chain of custody and his process of retrieving the messages (by opening the Facebook Messenger application on the victim's phone and clicking on defendant's name); and the content of the messages, which repeatedly referenced the sibling relationship between the sender and the victim, as well as certain details about the victim's personal life. **State v. Davenport, 605.**

Murder trial—report showing 911 call—factual relevance—distinguished from prejudicial nature of the call's contents—In a prosecution for first-degree murder, the trial court did not err in admitting a Computer-Aided-Dispatch report showing that a second 911 call was made shortly after law enforcement responded to the initial call reporting the murder. Defendant argued on appeal that the report was irrelevant and should not have been admitted where the trial court subsequently excluded the content of the call from evidence. However, the report was relevant under Evidence Rule 401 because it confirmed the time when the call was made and explained why the police officer who received the call chose to leave the crime scene. Further, the actual content of the call—which the court, in its discretion, determined was substantially more prejudicial than probative under Rule 403—was a separate evidentiary matter altogether, and the court's rulings on the factual relevance of the report and the prejudicial nature of the phone call's contents were consistent with each other. **State v. Davenport, 605.**

Testimony from a jailhouse witness—not inherently incredible—no plain error—constitutional arguments not preserved—In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not commit plain error in admitting evidence from a witness who had shared a jail cell with defendant and testified that defendant gave various stories about the twins' injuries before confessing to striking one of the

infants with a bottle and then throwing the child to the floor. That testimony did not concern inherently incredible observations, but rather only the type of witness-credibility determinations that jurors must make in any trial. Further, since defendant did not raise any objection to this testimony at trial—on constitutional grounds or otherwise—his constitutional arguments were not preserved for appellate review. **State v. Middleton, 592.**

HOMICIDE

First-degree murder—second-degree murder—distinction—jury instruction—intent to kill—no plain error—In a prosecution on charges including first-degree murder, where the trial court gave an accurate clarifying instruction distinguishing between first- and second-degree murder in response to a jury question, but omitted the "intent to kill" requirement for first-degree murder when giving the final mandate (a summary of the charge), defendant did not preserve the issue for appellate review because he failed to timely object. Nor could defendant establish plain error where precedent held, in a similar context, that there was no fundamental error where accurate instructions were, at most, "incomplete at one important part." **State v. Boyd, 624.**

First-degree murder of one infant—intentional child abuse inflicting serious bodily injury to the deceased infant's twin—evidence sufficient—In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not err in denying defendant's motion to dismiss both charges. First, the State presented evidence sufficient to send to the jury charges of intentional child abuse, including that: both children suffered multiple severe head injuries while in the sole care of defendant, defendant changed his story of how the twins were injured several times, and, eventually, defendant admitted to causing the injuries. Second, as to the twin who died as a result of injuries inflicted by defendant, the jury was permitted to infer that, when used against a helpless infant, defendant's hands were deadly weapons (an essential element when intentional child abuse is the underlying offense for felony murder). **State v. Middleton, 592.**

JURY

Juror misconduct—discussing the case outside the courtroom—investigation by trial court—no abuse of discretion—no showing of prejudice—In a prosecution for first-degree murder, the trial court did not abuse its discretion in removing a juror and an alternate juror who had allegedly discussed the facts of the case outside of the courtroom, where, after an eyewitness reported the alleged misconduct, the trial court promptly held a hearing and conducted a thorough investigation, during which it determined that the evidence—including testimony from the eyewitness and from the jurors involved, as well as video footage (taken by the eyewitness) showing part of the jurors' out-of-court conversation—substantiated the allegations of juror misconduct. The court properly acted within its discretion to ensure an impartial jury; furthermore, defendant failed to demonstrate any prejudice resulting from the jurors' removal or that the second alternate juror whom the court selected to replace the removed juror was incompetent or biased. **State v. Nobles, 719.**

the administrative law judge (ALJ) and entering declaratory judgment for plaintiff where its findings did not support its conclusions. The court did not reach the dispositive issue of whether the construction company had ownership or control over the highway property in question (and, thus, could have authorized plaintiff's actions) but instead focused on the applicability of various federal regulations and the effect of contract provisions on the scope of plaintiff's authority. Therefore, the court's decision and declaratory judgment were vacated and the matter was remanded for reconsideration by the ALJ. **Se. Pub. Safety Grp., Inc. v. N.C. Dep't of Just., 655.**

SEXUAL OFFENDERS

Registration—mandatory—effect on validity of guilty plea—collateral consequence—In a criminal matter in which defendant pled guilty to an offense compelling mandatory sex offender registration (pursuant to N.C.G.S. § 14-208.7), in evaluating defendant's claim in a motion for appropriate relief that his plea was not voluntary because he was not made aware of the registration requirement prior to pleading guilty, the trial court did not err by holding that the registration requirement was a collateral rather than a direct consequence of the guilty plea. **State v. Spry, 641.**

TERMINATION OF PARENTAL RIGHTS

Appointed counsel—withdrawal permitted at start of termination hearing—no inquiry—abuse of discretion—In a proceeding for termination of a mother's parental rights to her minor children, the district court abused its discretion in allowing an oral motion by respondent-mother's appointed counsel to withdraw at the start of a termination hearing—on the basis of appointed counsel's assertion that he had no contact with respondent-mother in over a year—where respondent-mother was not present and there was no further inquiry by the court into counsel's efforts to contact respondent-mother to provide her with notice of his intention to withdraw. The termination order entered was vacated, and the matter was remanded to the district court for a hearing, after adequate notice to respondent-mother, to determine whether appointed counsel had attempted to contact respondent-mother regarding his intent to withdraw and whether he had justifiable cause to make such a request. **In re D.E.-E.Y., 724.**

N.C. COURT OF APPEALS

2025 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	13 and 27
February	10 and 24
March	17
April	7 and 21
May	5 and 19
June	9
August	11 and 25
September	8 and 22
October	13 and 27
November	17
December	1

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

HIGGINS v. MENDOZA

[297 N.C. App. 581 (2025)]

LISA HIGGINS, ADMINSTRATOR OF THE ESTATE OF MICHAEL S. HIGGINS, PLAINTIFF
v.
OMAR ROMERO MENDOZA, IN HIS INDIVIDUAL CAPACITY, AND BRANDON CESAR CRUZ, IN HIS INDIVIDUAL CAPACITY, DEFENDANTS

No. COA24-140

Filed 15 January 2025

Negligence—gross negligence—police officer—death of passenger—high-speed pursuit of suspect—no immunity—genuine issue of material fact

In a wrongful death case, where a state trooper crashed his police car during a high-speed pursuit of a suspected drunk driver, which resulted in the death of a 22-year-old passenger who was accompanying the trooper on a "ride-along" as part of an internship with the State Highway Patrol, the trial court erred in granting summary judgment in the trooper's favor. Although N.C.G.S. § 20-145 would prevent the trooper from being held personally liable for injuries to another resulting from his ordinary negligence, it could not provide the same immunity to the trooper for acts of gross negligence. Here, a genuine issue of material fact existed as to whether the trooper was grossly negligent where the evidence showed that he: was not authorized to take the passenger on a ride-along; and, by his own admission, drove in a manner where he was unable to maintain control of his car (specifically, he drove into a curve in the road at a speed of 113 miles per hour (despite the speed limit being 55 miles per hour), failed to observe the visible "Curve ahead" warning sign, failed to react to the suspect vehicle's turning and use of brake lights, and lost control of his car).

Chief Judge DILLON dissenting.

Appeal by plaintiff from orders entered 20 December 2022 by Judge Eula Reid and 11 July 2023 by Judge William D. Wolfe in Superior Court, Pitt County. Heard in the Court of Appeals 9 October 2024.

J.C. White Law Group, PLLC, by James C. White, for plaintiff-appellant.

Hedrick Gardner Kincheloe & Garofalo, LLP, by Brian M. Williams, for defendants-appellees.

ARROWOOD, Judge.

Lisa Higgins, in her capacity as the administrator of the Estate of Michael S. Higgins ("plaintiff") appeals from the trial court's orders granting an extension of time to serve requests for admission and a motion for summary judgment in favor of Trooper Omar Romero Mendoza ("defendant Romero")[1] and Trooper Brandon Cesar Cruz ("defendant Cruz") (together, "defendants").[2] Plaintiff contends there was sufficient disputed evidence to find defendant Romero liable for gross negligence, and that the motion for extension of time was filed after the deadline to do so had passed. For the following reasons, we reverse the trial court's order granting summary judgment and remand for further proceedings.

I. Background

Michael S. Higgins ("Michael") was a 22-year-old student at East Carolina University ("ECU") majoring in criminal justice and security studies. ECU maintained an affiliation agreement with North Carolina State Highway Patrol ("NCSHP") for an internship program for qualified college students interested in careers in law enforcement. Michael enrolled in the internship program at the beginning of the fall semester in August 2020. As part of the internship, Michael was assigned to ride-alongs to observe NCSHP patrol work and went on two successful ride-alongs with Senior Troopers A.M. Bowen and N.S. Miles. Per NCSHP Directive O.04 § IV B, ride-alongs may be conducted by Field Training Officers ("FTO") or members holding the rank of Senior Trooper or higher if an FTO is not available.

On or around 17 August 2020, Michael was assigned to a third ride-along with defendant Cruz, who held the rank of Trooper at the time. Defendant Cruz allegedly told Michael that he could not bring him on a ride-along because of "some errands he had to run[,]" and suggested that Michael contact defendant Romero, who also held the rank of Trooper. Apparently unaware that defendant Romero was not authorized to take him for a ride-along, Michael texted defendant Romero his request to be assigned and they agreed to do a ride-along on the evening of 21 August 2020 into the morning of 22 August 2020.

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1. The defendant is referred to by the name of Romero throughout the transcripts and discovery documents, and we adopt the same.

2. Plaintiff filed a motion for voluntary dismissal of the appeal as to defendant Cruz on 30 April 2024, which this Court allowed by order entered 1 May 2024. This appeal only concerns plaintiff's claims against defendant Romero.

At approximately 12:21 a.m. on 22 August 2020, defendant Romero, carrying Michael as a passenger, responded to the scene of an accident where a car had driven off the road into a ditch in Pitt County so that Michael could witness an accident investigation. Defendant Cruz had also responded to the scene, and allegedly told defendant Romero about an unidentified female driver in the area that was observed with an odor of alcohol on her breath; defendant Cruz encouraged defendant Romero to pursue the driver "in a high-speed chase." Defendant Romero allegedly did not notify the dispatch center of the intended high-speed chase or contact a supervisor to get authority to do so. At his deposition, defendant Romero acknowledged that he "never had any contact" with the driver and "did not personally observe any intoxication," and based his pursuit on defendant Cruz's assessment that he "smelled" alcohol on the driver.

With Michael as a passenger, defendant Romero activated the emergency lights and siren and "immediately accelerated his cruiser to a speed of at least 110 miles per hour in a matter of seconds[,]" in an attempt to catch up to the driver's last known whereabouts. At his deposition, defendant Romero stated his primary consideration in assessing the safety of the road was "the conditions of traffic." When asked about his determination to pursue at that rate of speed, defendant Romero stated he was "trying to catch up to the violator[,]" and determined it would be safe to travel at that speed because "[t]here were no other cars on the roadway." Defendant Romero further stated that he could "see the taillights [of the vehicle] in the distance" when he initiated the pursuit and believed the road he was pursuing on was straight "[b]ecause the vehicle in front of [him] was going straight."

As he continued the pursuit, defendant Romero observed the suspect vehicle braking to the left, indicating a turn or curve in the road, but stated he could not recall any adjustments he made to his driving upon this observation and did not recall seeing a warning sign. Defendant Romero maintained his speed into the curve, at which point the cruiser veered sideways off the roadway, knocking down a utility pole and fence and ultimately colliding with two trees on the passenger side of the vehicle. Michael died a result of the injuries suffered during the crash.

A "Collision Scene Information" report produced by NCSHP indicated that the speed limit on the roadway was 55 miles per hour, and a "Curve ahead" warning sign was present and visible on the side of the roadway. Another report from the Collision Reconstruction Unit indicated that defendant Romero's vehicle was traveling at a speed of 113 miles per hour prior to airbag deployment, and the "high speed coupled

with the application of brakes while negotiating a curve could have created a potentially dangerous combination" leading to defendant Romero losing control of his vehicle. The "critical speed" of the curve was estimated to be between 85 and 100 miles per hour, and the average speed of the suspect was estimated to be between 55 and 65 miles per hour. That report concluded by finding that "Trooper Romero's speed alone would never have allowed him to negotiate this curve successfully, but an improper curve set up that included the application of brakes in the curve increased the probability of loss of control exponentially[,]" leading to Michael's death. The report found defendant Romero violated State Highway Patrol Policy Directive B.02, which provides:

> Any member in an authorized Patrol vehicle may initiate a traffic enforcement response. Prior to initiating such action, the member shall determine if the traffic enforcement response can be accomplished with due regard for the safety of the public, the member and the suspect or violator.

Plaintiff filed a complaint on 25 April 2022 asserting claims against both defendants for gross negligence and willful or wanton conduct. Plaintiff served requests for admission on defendant Romero on 22 July 2022. On 16 August 2022, defendant Romero filed a motion to dismiss pursuant to Rule 12(b)(6). That same day, defendant Romero filed an answer denying wrongdoing and liability and asserting several defenses.

On 29 September 2022, defendant Romero filed a motion for additional time to respond or for relief to set aside responses, which was heard before the trial court on 14 November 2022. The trial court granted defendant Romero's motion pursuant to Rule 6 by order entered 20 December 2022.

Defendant Romero then filed a motion for summary judgment on 23 May 2023. Following a hearing on 15 June 2023, the trial court granted defendant Romero's motion for summary judgment by order entered 6 July 2023. Plaintiff filed notice of appeal on 8 August 2023.

II. Discussion

Plaintiff contends the trial court erred in granting summary judgment in favor of defendant Romero because there was sufficient disputed evidence to find defendant Romero liable for gross negligence. We agree.

"We review a trial court's order for summary judgment de novo . . . ." *Robins v. Town of Hillsborough*, 361 N.C. 193, 196 (2007) (citations

omitted). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (2023). "The party moving for summary judgment bears the burden of establishing that there is no triable issue of material fact," and in reviewing evidence at summary judgment, "all inferences of fact from the proofs offered at the hearing must be drawn against the movant and in favor of the party opposing the motion." *Gary v. Wigley*, 271 N.C. App. 584, 586 (2020) (cleaned up).

> While summary judgment is rarely appropriate in cases involving negligence and contributory negligence, summary judgment is appropriate in such cases when the moving party carries his initial burden of showing the nonexistence of an element essential to the other party's case and the non-moving party then fails to produce or forecast at hearing any ability to produce at trial evidence of such essential element of his claims.

Terry v. Pub. Serv. Co. of N. Carolina, Inc., 385 N.C. 797, 801 (2024) (quoting *DiOrio v. Penny*, 331 N.C. 726, 729 (1992)). Furthermore, "[g]ross negligence is determined based on the facts and circumstances of each case and is a matter generally left to the jury." *Ray v. N. Carolina Dep't of Transp.*, 366 N.C. 1, 13 (2012).

Defendant Romero contends he is exempt from personal civil liability through governmental immunity, and that the proper channel of recovery is to sue him in his official capacity in the Industrial Commission. We disagree.

Although N.C.G.S. § 20-145 provides immunity to law enforcement officers for ordinary negligence, it does not grant the same for gross negligence:

> The speed limitations set forth in this Article shall not apply to vehicles *when operated with due regard for safety* under the direction of the police in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . nor to any of the following when either operated by a law enforcement officer in the chase or apprehension of violators of the law or of persons charged with or suspected of any such violation . . . *This exemption shall not, however, protect*

> *the driver of any such vehicle from the consequence of a reckless disregard of the safety of others.*

Our Supreme Court has reiterated that an officer may be held *personally* liable for injuries to another caused by his gross negligence when pursuing a criminal suspect. *Estate of Graham v. Lambert*, 385 N.C. 644, 658 (2024). That Court has defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583 (1988). And that Court has further instructed that "an act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Parish v. Hill*, 350 N.C. 231, 239 (1999).

In *Parish*, our Supreme Court discussed several cases addressing the burden of a plaintiff to show gross negligence on the part of an officer in a vehicle pursuit. In *Young v. Woodall*, the Court held that an officer was entitled to summary judgment on a plaintiff's gross negligence claim where he hit another car while speeding through an intersection. 343 N.C. 459, 463 (1996). The Court found that "[h]is following the [suspect] without activating the blue light or siren, his entering the intersection while the caution light was flashing, and his exceeding the speed limit" were discretionary acts that may have been negligent but did not reach the level of gross negligence. *Id.* Similarly in *Bray v. N. Carolina Dep't of Crime Control & Pub. Safety*, this Court held that a pursuing officer was entitled to summary judgment on a gross negligence claim where that officer crossed the middle line, was traveling at a speed of at least eighty miles per hour on a curving rural road, and lost control of his car resulting in a collision with plaintiff. 151 N.C. App. 281, 284 (2002).

Defendant asserts that *Allmond v. Goodnight*, 230 N.C. App. 413 (2013) is dispositive in this case and requires affirming the grant of summary judgment. In *Allmond*, a state trooper was sued in his individual capacity in a claim that he violated N.C.G.S. § 20-145. The defendant trooper was driving 120 miles per hour when he collided with the plaintiffs' car, killing an elderly woman and severely injuring her grandson. *Id.* at 415. The trial court denied the defendant's motion for summary judgment which this Court upheld, while also stating: "[i]n the event that the jury determines that Defendant was pursuing a speeding motorist at the time that he entered the intersection in which the collision occurred, he will be immune from liability." *Id.* at 426–27.

We note that although several facts of *Allmond* are similar to the facts of this case, particularly the speed and loss of life in the collision,

Allmond is an unpublished opinion[3] and is not binding on this Court nor dispositive in this case with respect to determining whether a suit may proceed against defendant Romero in his individual capacity for gross negligence. Furthermore, "[g]ross negligence is determined based on the facts and circumstances of each case and is a matter generally left to the jury." *Ray*, 366 N.C. at 13. Although our Courts have declined to allow suit for gross negligence to continue in other officer pursuit cases, these determinations are based on the peculiar facts and circumstances of each case.

Turning now to this case and viewing the evidence and pleadings in the light most favorable to plaintiff, here defendant Romero travelled at an extreme rate of speed in pursuit of a suspected drunk driver and with little to no regard for the conditions of the road or Michael as his passenger. Defendant Romero reached a speed of at least 113 miles per hour, failed to appropriately observe or react to the warning sign or the suspect vehicle's turning and use of brake lights, and ultimately lost control of his vehicle, with the passenger side taking the full impact of the crash. Defendant Romero later acknowledged that he drove in a manner where he was unable to maintain control of his vehicle, and that he was not authorized to take Michael on a ride-along.

The evidence and testimony before the trial court indicates at minimum a genuine issue of material fact as to whether defendant Romero's actions rise to the level of gross negligence. Defendant Romero engaged in a chase at an unnecessarily high speed with reckless disregard for the safety of Michael, his student intern passenger. It should be for the jury to determine whether defendant Romero's actions were needless or manifested a reckless indifference to the rights of Michael. Accordingly, it was improper for the trial court to grant summary judgment in defendant Romero's favor, and we reverse the order and remand for further proceedings.

Plaintiff additionally contends the trial court erred in granting defendant Romero's motion for additional time. However, the reversal of the summary judgment order effectively moots the order granting additional time, and we decline to address it.

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3. Although *Allmond v. Goodnight* does appear in the N.C. App. Vol. 230 book, it was designated as a 30(e) unpublished case with no motion or order altering its publication status.

III. Conclusion

For the foregoing reasons, we reverse the trial court's orders and remand for further proceedings.

REVERSED AND REMANDED.

Judge COLLINS concurs.

Chief Judge DILLON dissents by separate opinion.

DILLON, Chief Judge, dissenting.

Based on the jurisprudence of our Supreme Court and our Court, I conclude that the evidence in the light most favorable to Plaintiff does not show that Defendant Romero Mendoza acted with gross negligence when he crashed his patrol car while in pursuit of a suspected drunk driver resulting in the death of Michael S. Higgins (a passenger in Trooper Mendoza's patrol car). Therefore, I conclude the trial court did not err in granting Trooper Mendoza summary judgment on the claims by the administrator of Mr. Higgins' estate against him. Accordingly, I respectfully dissent.

Trooper Mendoza argues that he is entitled to public official immunity. Indeed, "North Carolina courts have deemed police officers engaged in performance of their duties as public officials for the purposes of public official immunity: a police officer is a public official who enjoys absolute immunity from personal liability *for discretionary acts done without corruption or malice.*" *Bartley v. City of High Point*, 381 N.C. 287, 295 (2022) (internal marks omitted) (emphasis added).

Our Supreme Court has recently explained the wisdom of clothing police officers and other public officials a certain level of immunity for injuries caused by their actions in the performance of their duties:

> A judicially created doctrine steeped in prudential concerns, that immunity shields public officials from tort liability when those officials truly perform discretionary acts within the scope of their official duties. The doctrine has two primary goals: promoting fearless, vigorous, and effective administration of government policies, and dampening trepidation about personal liability that may deter competent people from taking office. And as the name suggests,

> public officer immunity is for public officers—i.e., people charged with duties involving the exercise of some portion of the sovereign power. But the doctrine does not immunize conduct at odds with the protections afforded by it and that underlie its utility. For that reason, an officer is immune only when he lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption.

Estate of Graham v. Lambert, 385 N.C. 644, 654 (2024) (internal citations and marks omitted).

Our Supreme Court has instructed that, based on G.S. 20-145, an officer, though shielded with public official immunity, may be held personally liable for injuries to another caused by his *gross negligence* when pursuing a criminal suspect. *Parish v. Hill*, 350 N.C. 231, 238 (1999) (stating that "as the law stands currently, in any civil action resulting from the vehicular pursuit of a law violator, the gross negligence standard applies in determining the officer's liability"); *Lambert*, 385 N.C. at 658.[1] That Court has defined "gross negligence" as "wanton conduct done with conscious or reckless disregard for the safety of others." *Bullins v. Schmidt*, 322 N.C. 580, 583 (1988). And that Court has further instructed that "an act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others." *Parish v. Hill*, 350 N.C. 231, 239 (1999).

Our Supreme Court in *Parish* cited several cases to demonstrate that the burden of an injured plaintiff to show "gross negligence" on the part of that officer in pursuit of a suspect is particularly high. For example, that Court cited its decision in *Young v. Woodall*, 343 N.C. 459 (1996), in which it held that an officer, though negligent, was *not* grossly negligent *as a matter of law*, where the evidence showed that the officer's vehicle while speeding through an intersection in hot pursuit of a suspect struck another car. In *Young*, the Court reasoned:

> Applying the gross negligence standard, we hold the superior court should have granted [the officer's] motion for summary judgment. His following the [suspect] without activating the blue light or siren, his entering

1. G.S. 20-145 exempts an officer from speed limit laws but expressly states that the exemption "shall not, however, protect the driver of any such vehicle from the consequence of a reckless disregard of the safety of others."

> the intersection while the caution light was flashing, and his exceeding the speed limit were acts of discretion on his part which may have been negligent but were not grossly negligent.

Young v. Woodall, 343 N.C. 459, 463 (1996).

In 2002, our Court, applying *Young*, affirmed a conclusion by the Industrial Commission that an officer who struck a vehicle after crossing the center line in pursuit of a suspect, though negligent, was not *grossly* negligent:

> Plaintiff's attempt to distinguish *Young* is unavailing. Plaintiff argues that in this case, unlike *Young*, [the trooper] crossed the center line in addition to exceeding a safe speed. Also, [the trooper] was traveling at a speed of at least eight miles per hour, at dusk, on a curving, rural road. Finally, [the trooper] lost control of his car resulting in the collision with plaintiff . . . . None of these distinctions, however, would justify this Court in reversing the Commission's conclusion that [the trooper] did not engage in "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Bullins*, 322 N.C. at 583.

Bray v. N.C. Dep't of Crime, 151 N.C. App. 281, 284 (2002).

Indeed, neither Plaintiff nor the majority in this case has cited a North Carolina case where a police officer was held personally liable for injuries sustained by a third party due to the officer crashing his car while in hot pursuit of a suspect. *See Truhan v. Walston*, 235 N.C. App. 406 (2014) (differentiating between an officer responding to the scene of an accident and an officer in hot pursuit of a suspect).

The evidence in the present case, when viewed in the light most favorable to Plaintiff, showed that Defendant's acts in pursuing a suspected drunk driver was risky: (1) Defendant's blue lights and siren were turned on; (2) Defendant's actions directly and independently caused a collision; (3) Defendant admitted that he "drove [his] cruiser at a speed and in a manner such that [he was] unable to maintain proper control" of his vehicle and he only had one hand on the steering wheel; (4) Defendant violated the policies of NCSHP, as the Internal Affairs report shows, both by taking Michael Higgins as a passenger to this pursuit, and by engaging in the pursuit in the manner which he did; and finally, (5) Defendant's speed was 113 mph in a 55 mph zone. However, based on our jurisprudence, though the manner Trooper Mendoza exercised

his discretion in his pursuit of the suspected drunk driver may have been negligent, it did not rise to the level of "wanton conduct", done with "corruption or malice". Accordingly, I disagree with the majority's conclusion that the trial court erred in granting summary judgment for Trooper Mendoza in his individual capacity.

I note Plaintiff's argument in her brief concerning the discovery order (also subject to this appeal) allowing Trooper Mendoza additional time under Rule 6 of our Rules of Civil Procedure to respond to her requests for admissions, where Trooper Mendoza did not seek the extension until after the time he was to respond to Plaintiff's requests had expired. Plaintiff contends the requests were deemed admitted under Rule 36 once the deadline to respond had passed; a Rule 6 extension of time is ineffective to cure *deemed* admissions; and Defendant should have moved to withdraw or amend his deemed admissions.

Generally, where a party fails to timely respond to another party's request for admissions, the facts in question are deemed to be judicially admitted. N.C.G.S. § 1A-1, Rule 36. *See also Goins v. Puleo*, 350 N.C. 277, 281 (1999).

Rule 6(b) grants a trial court with broad authority (with some exceptions, as outlined in the Rule) to extend time periods specified in any of the Rules of Civil Procedure for the doing of any act required by those rules. *See Lemons v. Old Hickory Council*, 322 N.C. 271, 276 (1998) (allowing for the retroactive extension of time for the issuance of a summons after the statute of limitations had expired). Further, under Rule 36(b), a trial court has discretion to "permit withdrawal or amendment" of an admission made under the Rule. N.C.G.S. § 1A-1, Rule 36(b).

Here, to the extent that a trial court may have lacked authority to extend time *after* a party has failed to timely respond to requests for admissions, I conclude that the trial court did not err. By allowing Trooper Mendoza to respond to Plaintiff's requests after the 30-day deadline, the trial court was, in substance, allowing him to withdraw his deemed admissions or, otherwise, amend his deemed admissions. To me, Plaintiff's argument that another motion is required to withdraw the admissions is overly technical and does not comport with the canon of liberal interpretation of the Rules. *See Sutton v. Duke*, 277 N.C. 94, 99 (1970) ("The North Carolina Rules of Civil Procedure are modeled after the federal rules."); *see also Johnson v. Johnson*, 14 N.C. App. 40, 42 (1972) ("The canon of interpretation of the [ ] Rules is one of liberality, and it has been held in numerous decisions that the general policy of the Rules is to disregard technicalities and form and determine the rights of litigants on the merits.").

STATE OF NORTH CAROLINA
v.
ROBERT AHMAAD MIDDLETON, JR.

No. COA24-252

Filed 15 January 2025

1. Homicide—first-degree murder of one infant—intentional child abuse inflicting serious bodily injury to the deceased infant's twin—evidence sufficient

In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not err in denying defendant's motion to dismiss both charges. First, the State presented evidence sufficient to send to the jury charges of intentional child abuse, including that: both children suffered multiple severe head injuries while in the sole care of defendant, defendant changed his story of how the twins were injured several times, and, eventually, defendant admitted to causing the injuries. Second, as to the twin who died as a result of injuries inflicted by defendant, the jury was permitted to infer that, when used against a helpless infant, defendant's hands were deadly weapons (an essential element when intentional child abuse is the underlying offense for felony murder).

2. Evidence—testimony from a jailhouse witness—not inherently incredible—no plain error—constitutional arguments not preserved

In a prosecution for intentional child abuse inflicting serious bodily injury and first-degree felony murder, arising from a father's abuse of his infant twin sons—less than two weeks after the premature babies had been released from a hospital's neonatal intensive care unit—the trial court did not commit plain error in admitting evidence from a witness who had shared a jail cell with defendant and testified that defendant gave various stories about the twins' injuries before confessing to striking one of the infants with a bottle and then throwing the child to the floor. That testimony did not concern inherently incredible observations, but rather only the type of witness-credibility determinations that jurors must make in any trial. Further, since defendant did not raise any objection to this testimony at trial—on constitutional grounds or otherwise—his constitutional arguments were not preserved for appellate review.

Appeal by defendant from judgments entered 28 February 2023 by Judge William R. Bell in Gaston County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Heidi M. Williams, for the State.

William D. Spence for defendant-appellant.

ZACHARY, Judge.

Defendant Robert Ahmaad Middleton, Jr., appeals from judgments entered upon a jury's verdicts finding him guilty of (1) first-degree murder of his infant son, "Dylan," and (2) intentional child abuse inflicting serious bodily injury of Dylan's twin brother, "Daniel."[1] After careful review, we conclude that Defendant received a fair trial, free from error.

BACKGROUND

Defendant and Takaylia Young ("Ms. Young") began a relationship in the spring of 2018. Soon after the couple began living together, Ms. Young became pregnant. She terminated the pregnancy at Defendant's urging; however, she told Defendant that if she became pregnant again, she would not obtain another abortion. In October 2019, Ms. Young discovered that she was pregnant again—this time, with twins. But when she told Defendant, he "wasn't too excited about it" and hung up the phone. Defendant made it clear to Ms. Young that he wanted her to abort the twins. Ms. Young refused.

Twins Dylan and Daniel were born prematurely in May 2020, and they remained in the neonatal intensive care unit ("NICU") until early June. When they were discharged from the NICU, Ms. Young brought the twins home to the apartment she shared with Defendant. On 12 and 18 June 2020, the twins had wellness checks with their pediatrician, during which nothing unusual was noted.

On Saturday, 20 June 2020, Ms. Young and her stepfather drove to Walmart in Belmont to get groceries, diapers, and other necessities, leaving Defendant home alone with the twins for a couple of hours.

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1. Throughout their appellate briefs, Defendant and the State respectively identify the twins as "T1" or "Twin 1" and "T2" or "Twin 2." However, for clarity and ease of reading—as well as sensitivity to the minor victims in this case—we employ pseudonyms in this opinion. *See generally* N.C. R. App. P. 42. Hereinafter, we shall refer to "T1"/"Twin 1" as "Dylan" and "T2"/"Twin 2" as "Daniel."

Defendant was playing video games when Ms. Young and her stepfather returned from their errands. Ms. Young inquired about the twins, and Defendant "said they were fine."

However, the next day, 21 June 2020, Ms. Young began to notice concerning changes in Dylan. She observed that Dylan "was off," in that "he was really, really tired, like, exhausted tired." The twins had an eye doctor's appointment scheduled for early Monday morning, 22 June 2020, which was only the twelfth day since their release from the NICU. But Dylan had not fed since Sunday night, after multiple attempted feedings throughout the night and into Monday morning. Before the twins' appointment, Ms. Young called their pediatrician and left a message expressing concern that Dylan was not eating.

At the eye doctor's office, Dylan failed to blink his eyes during dilation, and "he just didn't look right and [his] breathing patterns . . . [weren't] right." Meanwhile, the twins' pediatrician returned Ms. Young's phone call and instructed her to take Dylan directly to the local emergency room. Although Ms. Young heeded the pediatrician's advice, Dylan's condition worsened at the emergency room, and he was airlifted to Levine Children's Hospital ("Levine") in Charlotte. There, Dylan was diagnosed with, *inter alia*, "a fractured skull and . . . severe bleeding in the brain." Dylan was also severely dehydrated and unable to breathe on his own; he was given fluids and medication and placed on life support.

Dr. Kendra Ham ("Dr. Ham"), a child-abuse pediatrician at Levine, testified at trial that Dylan had a parietal skull fracture on the left side of his head, along with "associated scalp swelling," which "happen[ed] quickly after [an impact], . . . up to 72 hours after an injury occurred." Dr. Ham also noted the existence of a bilateral subdural hematoma—a brain injury that typically results from "extreme force" or "rapid acceleration, deceleration"—which had occurred "within the last 72 hours." According to Dr. Ham, this injury could not have been caused by "a simple fall from an adult height," and Dylan's records showed no "pre-existing condition or injury" that would account for it.

In addition, Dylan suffered (1) bilateral subarachnoid hemorrhages; (2) an intraventricular hemorrhage, which Dr. Ham noted was not typically seen "in accidental injuries"; (3) cerebral edema, or "swelling of the brain"; and (4) a fracture to his left wrist, which Dr. Ham said was "very specific for physical abuse." Dr. Ham explained that "[d]ue to the constellation and extent of [Dylan's] injuries," her "medical assessment was consistent with abusive head trauma." According to Dr. Ham, Dylan's injuries could not have resulted from "a simple fall" or "accidentally bump[ing the] child's head into the wall or door frame"; rather, Dr. Ham

explained, Dylan's injuries were consistent with those that she would expect to see from "someone shaking [the] child and throwing [him] on the floor."

On the evening of 23 June 2020, Daniel was also admitted to Levine, where doctors noticed "bruising and swelling on [his] eyes." According to Dr. Ham's report, which was admitted at trial as State's Exhibit 34, Daniel "presented [at Levine] for a medical screening exam per recommendations due to his twin brother being admitted to the [pediatric intensive care unit] with injuries concerning for abusive head trauma and physical abuse." Following a full examination, doctors determined that Daniel "had similar injuries [to Dylan]. He also had a brain fracture and several bleeds on his brain." Dr. Ham diagnosed Daniel with (1) a left parietal skull fracture; (2) a subdural hematoma; (3) a subarachnoid hemorrhage; and (4) bruising to his upper left eyelid. Dr. Ham testified that, as with Dylan, Daniel's injuries were "consistent with inflicted trauma or abusive head trauma" but not with "a bump into the wall" or "a simple fall."

During his hospitalization, Daniel exhibited "intermittent hypothermia . . . and feeding difficulties believed to be due to his traumatic brain injury"; however, his condition eventually improved, and he was discharged from Levine on 8 July 2020. That same day, Dylan "was withdrawn from life support due to his very poor prognosis." He died that day.

Dr. Thomas Owens ("Dr. Owens"), a forensic pathologist and medical examiner, performed an autopsy on Dylan's body on 9 July 2020. Dr. Owens testified that Dylan suffered (1) a skull fracture on the left side of his head, which "require[d] an impact"; (2) a hemorrhage in the left parietal tissue; (3) bilateral subarachnoid hemorrhages caused by "violent, rapid, forceful shaking"; and (4) a fracture on the left wrist, caused by the arm "being moved back and forth in a rapid manner." Dr. Owens ultimately opined that Dylan's death was caused by "blunt force head trauma due to a nonaccidental method."

Investigation and Trial

Investigators representing various law enforcement and child protective services agencies questioned Defendant and Ms. Young on multiple occasions during the twins' stay at Levine. Defendant initially reported no knowledge of any traumatic events, although he admitted that he had once "plopped down" on the bed beside Dylan during a nighttime feeding, causing Dylan's head to rise "approximately two inches off the bed." Defendant shared this story with at least three

investigators, including Detective Albert Fleming ("Detective Fleming") of the Gastonia Police Department.

On 23 June 2020, Ms. Young told a DSS caseworker that Defendant "would sometimes be fast and rough" in his interactions with the twins, leading her to ask him "to be gentler with the children." Ms. Young also reported that when she first asked Defendant about the twins' injuries, he denied any knowledge of what had occurred. However, Defendant eventually "offered one explanation." Defendant told Ms. Young that he had awoken one night because he heard one of the twins crying: "It was dark in the hall so he picked one of the boys up, . . . [they] had spit up on themselves, and they were crying so he was trying to pick the baby up and accidentally ran into the corner of the wall in the bedroom."

At Ms. Young's urging, Defendant repeated this story to DSS. Ms. Young also asked the physicians at Levine whether the events described by Defendant could have caused the twins' injuries, but "they told [her] it couldn't have."

On 20 July 2020, a grand jury returned indictments charging Defendant with murder (as to Dylan) and intentional child abuse inflicting serious bodily injury (as to Daniel).[2]

Defendant continued to adopt different stories throughout the investigation of the case and while he awaited trial in this matter. While he was in jail, Defendant spoke to fellow inmate Brandon Woods ("Mr. Woods") about the twins and the reasons for his incarceration. Mr. Woods testified at trial that the "first story" that Defendant told him about Dylan's injuries was that an "old lady" had "bumped into him while he was carrying his baby and he dropped his baby"; however, this story "[didn't] sound right" to Mr. Woods. Defendant later told Mr. Woods a different version of the "same little story," in which "two Mexican kids . . . playing soccer . . . bumped into [Defendant]," who "dropped [the] baby, and [Defendant] just kept it moving." Mr. Woods testified that he ultimately told Defendant that he "didn't believe it . . . . [the] story kept changing and [Defendant] needed to keep it real."

According to Mr. Woods, upon this confrontation, Defendant broke down and

> said that he was playing his [video] game and the baby kept crying and [he] couldn't get the baby to stop crying and didn't know what [the baby] wanted. He said he got

2. Superseding indictments were issued for both charges on 16 May 2022.

> frustrated, and when the baby wouldn't take a bottle, then bam bam and [he] hit the baby with the bottle and the baby started crying louder. . . . He said the baby kept . . . making these little noises, and he picked [the baby] up . . . and he threw [the baby] down.

Mr. Woods, who was incarcerated on drug-related charges, shared Defendant's statements with Detective Fleming in October 2020. He testified, however, that he did not receive "any consideration from the State" as a result of the information that he provided to law enforcement officers in Defendant's case.[3]

On 14 February 2023, Defendant's case came on for jury trial in Gaston County Superior Court. At the close of the State's evidence, Defendant moved to dismiss both charges due to insufficient evidence, and he renewed his motion at the close of all evidence; the trial court denied Defendant's motion on both occasions.

On 28 February 2023, the jury returned verdicts finding Defendant guilty of first-degree murder and intentional child abuse inflicting serious bodily injury. The trial court entered separate judgments, sentencing Defendant to life imprisonment without parole for his conviction of first-degree murder and imposing a concurrent, active term of 180 to 228 months' imprisonment for his conviction of intentional child abuse inflicting serious bodily injury.

Defendant gave oral notice of appeal.

DISCUSSION

On appeal, Defendant first contends that the trial court erred by denying his motion to dismiss the charges of (1) first-degree murder (as to Dylan), and (2) intentional child abuse inflicting serious bodily injury (as to Daniel), because the State's evidence was insufficient to submit either charge to the jury.

Defendant further argues "that the trial court committed plain error" by allowing the State to present the testimony of Mr. Woods, because (1) the evidence "was 'inherently incredible' pursuant to *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967)"; and (2) Mr. Woods was acting "as an agent of the State" when he unlawfully "interrogated" Defendant in jail, in violation of his constitutional rights.

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3. Mr. Woods's charges were dismissed, and he was released from jail in December 2020 after his codefendant "took responsibility for everything."

A. Defendant's Motion to Dismiss

[1] The State sought to convict Defendant of first-degree felony murder in the death of his infant son, Dylan, based on the underlying felony of intentional child abuse inflicting serious bodily injury. The State also charged Defendant with the same offense—intentional child abuse inflicting serious bodily injury, in violation of N.C. Gen. Stat. § 14-318.4(a3)—in relation to Dylan's twin brother, Daniel.

Excluding medical testimony and similar evidence regarding the twins' individual injuries (and death, in Dylan's case), much of the State's evidence at trial was, by necessity, the same for each victim. As a result, many of Defendant's appellate arguments concerning the trial court's denial of his motion to dismiss are also quite similar. Accordingly, we shall consider the sufficiency of the State's evidence of both charges contemporaneously.

1. Standard of Review

Whether the State presented sufficient evidence to withstand a motion to dismiss is a question of law reviewed de novo. *State v. Cox*, 367 N.C. 147, 150–51, 749 S.E.2d 271, 274–75 (2013). "Upon a defendant's motion to dismiss for insufficient evidence, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged and (2) of [the] defendant's being the perpetrator of such offense." *Id.* at 150, 749 S.E.2d at 274 (cleaned up).

> Substantial evidence is relevant evidence that a reasonable person might accept as adequate, or would consider necessary to support a particular conclusion. In this determination, all evidence is considered in the light most favorable to the State, and the State receives the benefit of every reasonable inference supported by that evidence.

State v. Hunt, 365 N.C. 432, 436, 722 S.E.2d 484, 488 (citation omitted).

The same test applies "whether the evidence is direct, circumstantial, or both." *State v. Bullard*, 312 N.C. 129, 160, 322 S.E.2d 370, 388 (1984). "Thus, if there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied." *Hunt*, 365 N.C. at 436, 722 S.E.2d at 488 (citation omitted).

2. Analysis

In North Carolina, the felony-murder rule is statutory. *See* N.C. Gen. Stat. § 14-17(a) (2023). Pursuant to the felony-murder rule, a homicide "committed in the perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree." *Id.*

When the offense underlying a felony-murder charge is felonious intentional child abuse, the State must "prove that the killing took place while the accused was perpetrating or attempting to perpetrate felonious child abuse with the use of a deadly weapon." *State v. Pierce*, 346 N.C. 471, 493, 488 S.E.2d 576, 589 (1997); *see also* N.C. Gen. Stat. § 14-17(a).

Pursuant to N.C. Gen. Stat. § 14-318.4(a3), the felony child-abuse statute at issue here,

> [a] parent or any other person providing care to or supervision of a child less than 16 years of age who intentionally inflicts any serious bodily injury to the child or who intentionally commits an assault upon the child which results in any serious bodily injury to the child, or which results in permanent or protracted loss or impairment of any mental or emotional function of the child, is guilty of a Class B2 felony.

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

Certain inferences may arise from the evidence in cases of felony child abuse or felony murder based on felony child abuse. Foremost, as our Supreme Court articulated in *Pierce*, "[w]hen a strong or mature person makes an attack by hands alone upon a small child, the jury may infer that the hands were used as deadly weapons." 346 N.C. at 493, 488 S.E.2d at 589; *see*, *e.g.*, *State v. Frazier*, 248 N.C. App. 252, 262, 790 S.E.2d 312, 320 (reiterating that "the offense of felonious child abuse, where [the] defendant's hands were a deadly weapon, serve[s] to elevate the killing to first-degree murder under the felony murder rule"), *disc. review denied*, 369 N.C. 188, 794 S.E.2d 330 (2016).

Furthermore, "when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries." *State v. Liberato*, 156 N.C. App. 182, 186, 576 S.E.2d 118, 120–21 (2003). This is significant because both offenses—that is, felony child abuse and felony murder predicated on felony child abuse—are general-intent, rather than specific-intent, crimes. *See Pierce*, 346 N.C. at 494, 488 S.E.2d at 589 ("General-intent crimes are crimes which only require the doing of some act." (cleaned up)). As a result, N.C. Gen. Stat. § 14-318.4(a3) merely "requires the State to prove that the accused intentionally inflicted a serious [bodily] injury upon the child or intentionally committed an assault resulting in a serious [bodily] injury to the child." *Id.* (cleaned up). Similarly, "[f]elony murder on the basis of felonious child abuse requires the State to prove that the victim was killed during the perpetration or attempted perpetration of felonious child abuse with the use of a deadly weapon." *Id.* (citing N.C. Gen. Stat. § 14-17). Neither offense "require[s] the State to prove any specific intent on the part of the accused." *Id.*

In the present case, the State presented substantial evidence that Defendant committed intentional child abuse inflicting serious bodily injury with regard to both twins, and that Dylan died as a result. It is undisputed that Defendant fathered the twins, and that Dylan and Daniel were infants at the time they incurred their injuries. Moreover, the overwhelming medical evidence establishes that both twins suffered multiple severe head injuries, including bilateral subdural hematomas and subarachnoid hemorrhages. It is manifest that such serious trauma to the developing heads of five-week-old infants constitutes "serious bodily injury" within the meaning of our child-abuse statutes. *See* N.C. Gen. Stat. § 14-318.4(d)(1) (defining "[s]erious bodily injury" as "[b]odily injury that creates a substantial risk of death or that causes serious permanent disfigurement, coma, a permanent or protracted condition that causes extreme pain, or permanent or protracted loss or impairment of the function of any bodily member or organ, or that results in prolonged hospitalization"). Indeed, both twins required approximately two weeks' hospitalization in Levine's pediatric intensive care unit due to their injuries. Although Daniel's condition improved and he was discharged on 8 July 2020, Dylan died that day, after he was withdrawn from life support.

Significantly, Dr. Ham noted that during their previous stay in the NICU—which preceded their admission to Levine by barely a fortnight—both twins had two normal ultrasounds of their heads; the significant

trauma that was evident at Levine had not yet occurred when the twins were in the NICU.

Dylan also suffered a "corner or bucket handle fracture" of his left wrist. According to Dr. Ham, such fractures "have a high predictive value for physical abuse in infants less than one year of age" and are the most common type of fracture "found in fatal abuse cases." This type of fracture "involves torsional and shearing strains of the bone by forcefully pulling or twisting of the extremity and can also be seen when infants are shaken, and extremities are flailing." *Cf. Pierce*, 346 N.C. at 493, 488 S.E.2d at 589 ("The evidence that [the defendant] caused a small child's death by shaking her with his hands was sufficient to permit the jury to conclude that [the] defendant committed felonious child abuse and that he used his hands as deadly weapons.").

Daniel, on the other hand, presented at Levine with bruising and swelling to the upper left eyelid "without explanation for the injury." Dr. Ham noted in her report that "[a]ny bruise in an infant under 4 months is highly concerning and suspicious for physical abuse." *See Liberato*, 156 N.C. App. at 186, 576 S.E.2d at 120–21 (explaining that "when an adult has exclusive custody of a child for a period of time during which the child suffers injuries that are neither self-inflicted nor accidental, there is sufficient evidence to create an inference that the adult intentionally inflicted those injuries").

On appeal, Defendant concedes that Dr. Ham testified that the injuries to Dylan and Daniel, "taken all together, were consistent with child abuse"; however, he contends that "Dr. Ham did not express an opinion that the injuries she found were caused by intentional child abuse, nor that [D]efendant had assaulted either child." This argument is demonstrably false. Dr. Ham testified that in her medical opinion, both twins' injuries were indicative of "nonaccidental" or "inflicted trauma"—specifically, "abusive head trauma." And although Defendant also asserts that the State failed to present substantial "credible" evidence that his actions (or the twins' injuries) were, in fact, *intentional*, our precedent does not require the State to make such a showing. *See Pierce*, 346 N.C. at 494, 488 S.E.2d at 589.

Notwithstanding Defendant's assertions otherwise, we conclude that the State's evidence was more than sufficient to withstand Defendant's motion to dismiss the charges. In addition to the evidence discussed above, the State established that Defendant's story changed numerous times, which the jury could infer as a sign of his dishonesty, or even guilt. Mr. Woods testified that Defendant admitted to getting

frustrated with one of his babies for crying; to striking one of the babies in the face with a bottle; and to picking up and throwing down one of the babies during the time that Ms. Young was out grocery shopping on 20 June 2020, within the 72-hour window of injury described by Dr. Ham. Defendant also admitted that he bumped one of the twins' heads against a wall and slapped and threw the other twin. Moreover, although he initially denied having any knowledge of the twins' injuries, Defendant eventually admitted to Detective Fleming that he was aware that his "actions . . . caused those injuries."

Viewed in the light most favorable to the State, the State's evidence was more than sufficient to allow a jury to reasonably infer that Defendant committed intentional child abuse inflicting serious bodily injury with regard to both Dylan and Daniel. The trial court therefore did not err by denying Defendant's motion to dismiss this charge as applied to Daniel. And because the State also presented substantial evidence that Dylan's death resulted from felonious child abuse with the use of a deadly weapon (i.e., Defendant's hands), the court properly denied Defendant's motion to dismiss the charge of first-degree murder of Dylan.

Accordingly, we conclude that the State presented sufficient evidence to withstand Defendant's motion to dismiss both charges.

B. Admission of Mr. Woods's Testimony

[2] Defendant's final argument on appeal is that the trial court erred by allowing the State to present the testimony of Mr. Woods because (1) the evidence was "inherently incredible"; and (2) its admission violated Defendant's constitutional rights under the Fifth and Sixth Amendments.

1. Plain Error

Although Defendant acknowledges that he failed to object at trial to the testimony that he now challenges on appeal, he specifically and distinctly contends that the admission of this testimony amounted to plain error. *See* N.C. R. App. P. 10(a)(4).

To meet his burden of establishing plain error, Defendant "must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that the defendant was guilty." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (cleaned up). "Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings . . . ." *Id.* (cleaned up).

Here, Defendant asserts that the trial court committed plain error in admitting Mr. Woods's testimony because "it was 'inherently incredible' pursuant to *State v. Miller*, 270 N.C. 726, 154 S.E.2d 902 (1967)." The State responds that "[a]ccepting Defendant's argument would drastically expand the scope of *Miller* and would encroach upon the jury's exclusive role to determine the credibility of witnesses and to determine the truth." We agree with the State.

It is well established that "the credibility of witnesses and the proper weight to be given their testimony is to be determined by the jury," rather than the trial court. *Miller*, 270 N.C. at 730, 154 S.E.2d at 904. In *Miller*, however, our Supreme Court recognized a narrow exception to this general rule, which applies "where the only evidence identifying the defendant as the perpetrator of the offense is inherently incredible because of undisputed facts, clearly established by the State's evidence, as to the physical conditions under which the alleged observation occurred." *Id.* at 731, 154 S.E.2d at 905; *see also id.* at 732, 154 S.E.2d at 905 ("Without the testimony of [the witness], there would be a complete failure of the State's evidence to connect the defendant . . . with the offense with which he is charged.").

We agree with the State that the *Miller* rule propounded by Defendant is wholly inapplicable here. First, our Supreme Court has long since clarified that its holding in *Miller* "was based on the general rule that *evidence which is inherently impossible or in conflict with indisputable physical facts or laws of nature* is not sufficient to take the case to the jury." *State v. Cox*, 289 N.C. 414, 422–23, 222 S.E.2d 246, 253 (1976) (emphasis added). Defendant does not—and indeed, cannot—suggest that Mr. Woods's testimony in this case conflicts with "indisputable physical facts or laws of nature"; rather, Defendant merely identifies certain discrepancies in Mr. Woods's testimony as compared to other evidence offered by the State. But whether these discrepancies evinced flaws in Mr. Woods's overall credibility as a witness, or instead with the content of his testimony—namely, Defendant's constantly changing stories regarding the twins' injuries and his knowledge thereof—was properly a matter for the jury's determination. *Cf. id.* at 423, 222 S.E.2d at 253 (reaffirming the "sound" holding in *Miller*, but noting that "it has no application where, as here, there is a reasonable possibility of observation sufficient to permit subsequent identification" because "[i]n such event, the credibility of the witness and the weight of his identification testimony is for the jury" (cleaned up)).

Moreover, contrary to Defendant's assertions, any potential questions about Mr. Woods's credibility—including, for example, the

circumstances through which he became acquainted with Defendant or his decision to share information with law enforcement—are characteristic of those properly left for the jury's determination. Recognizing this, the trial court properly instructed the jurors, *inter alia*, that they "[we]re the sole judges of the believability of a witness"; that they could "believe all or any part or none of what a witness . . . testified to from the witness stand"; and that, in deciding whether to believe a witness, they should consider such common-sense factors as "any interest, bias, or prejudice" displayed by the witness, "or whether the testimony is consistent with other believable evidence in the case."

In summary, Defendant's challenge to Mr. Woods's testimony does not concern "inherently incredible" observations but rather the type of witness-credibility determinations that jurors are called upon to make in nearly every trial. Defendant has thus failed to show that the trial court's admission of this testimony constituted error, much less plain error.

2. Constitutional Arguments

Defendant last argues that the trial court erred by admitting Mr. Woods's testimony because Mr. Woods was acting "as an agent of the State who interrogated [Defendant] on behalf of the State in violation of [D]efendant's rights under the Fifth and Sixth Amendments of the United States Constitution."

However, Defendant did not object to the admission of Mr. Woods's testimony—on constitutional grounds or otherwise—and therefore, he has waived appellate review of this issue. "In order to preserve a question for appellate review, a party must have presented the trial court with a timely request, objection or motion, stating the specific grounds for the ruling sought if the specific grounds are not apparent." *State v. Patterson*, 249 N.C. App. 659, 664, 791 S.E.2d 517, 521 (citation omitted), *disc. review denied*, 369 N.C. 199, 794 S.E.2d 328 (2016); *see also* N.C. R. App. P. 10(a)(1).

Moreover, although Defendant requests plain error review, "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal, not even for plain error." *State v. Wilkins*, 287 N.C. App. 343, 349, 882 S.E.2d 454, 458 (2022) (cleaned up), *disc. review denied*, 385 N.C. 313, 890 S.E.2d 903 (2023). The argument Defendant presents on appeal "is solely a constitutional one." *Id.* Thus, it is "an issue that is fully waived if not timely asserted in the trial court." *Id.* Accordingly, this argument is waived.

CONCLUSION

For the reasons stated herein, the trial court did not err by denying Defendant's motion to dismiss the charges of first-degree murder and intentional child abuse inflicting serious bodily injury, nor did the trial court commit plain error by allowing the State to present the testimony of Mr. Woods. Accordingly, we conclude that Defendant received a fair trial, free from error.

NO ERROR.

Judges STROUD and HAMPSON concur.

STATE OF NORTH CAROLINA
v.
JIMMY DAVENPORT

No. COA24-330

Filed 15 January 2025

1. Evidence—authentication—through circumstantial evidence—murder trial—Facebook messages purportedly sent by defendant to victim

In a prosecution for first-degree murder, the trial court did not err in admitting photographs of Facebook messages purportedly sent by defendant to the victim (his brother) on the day of the murder. The State properly authenticated the messages through circumstantial evidence, including: testimony from defendant's niece, who identified the victim's phone (used to retrieve the messages) in the photographs and testified that defendant communicated exclusively via Facebook Messenger; testimony from a police deputy regarding chain of custody and his process of retrieving the messages (by opening the Facebook Messenger application on the victim's phone and clicking on defendant's name); and the content of the messages, which repeatedly referenced the sibling relationship between the sender and the victim, as well as certain details about the victim's personal life.

2. Evidence—murder trial—report showing 911 call—factual relevance—distinguished from prejudicial nature of the call's contents

In a prosecution for first-degree murder, the trial court did not err in admitting a Computer-Aided-Dispatch report showing that a second 911 call was made shortly after law enforcement responded to the initial call reporting the murder. Defendant argued on appeal that the report was irrelevant and should not have been admitted where the trial court subsequently excluded the content of the call from evidence. However, the report was relevant under Evidence Rule 401 because it confirmed the time when the call was made and explained why the police officer who received the call chose to leave the crime scene. Further, the actual content of the call—which the court, in its discretion, determined was substantially more prejudicial than probative under Rule 403—was a separate evidentiary matter altogether, and the court's rulings on the factual relevance of the report and the prejudicial nature of the phone call's contents were consistent with each other.

Appeal by Defendant from Judgment entered 14 November 2023 by Judge Taylor Browne in Scotland County Superior Court. Heard in the Court of Appeals 24 September 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Marissa K. Jensen, for the State.

Marilyn G. Ozer for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jimmy Davenport (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of First-Degree Murder. The Record before us, including evidence presented at trial, tends to reflect the following:

On 10 December 2020, the victim in this case, Defendant's brother Frankie Tyrone Davenport, was at a gathering with his daughter—Shonquila Wall—as well as Defendant and Amber Bullard. That evening, Wall, Defendant, Frankie Davenport, and Bullard left the gathering together in Wall's car, and Wall dropped Defendant off on the way back to her house. Wall, Frankie Davenport, and Bullard all returned to Wall's house on Lee's Mill Road in Scotland County, North Carolina. Akeem Breese, who was Wall's boyfriend, and her niece, Gloria Malloy, were also present at Wall's house. Defendant arrived later, knocked on the

door, and told Wall he wanted Bullard to come outside. Wall left the entry area and observed Defendant and Frankie Davenport having a "back-and-forth exchange" and Defendant pacing on the porch through the front door window. Bullard, Frankie Davenport, Breese, and Wall were in the living room when they heard the sound of glass shattering from the middle of the front port. According to Wall, all of them got up and ran because they saw a gun coming through the window. Wall testified that Defendant was holding the gun when it came through the window. Wall stated that she believed she heard three gunshots. Wall also testified she heard Frankie Davenport say, "You done f'ed up now. You shot me." Wall then called 911, and she testified that she believed Breese also called 911.

Emergency Call Center records presented at trial showed a 911 call came in from Wall's address on 10 December 2020. Deputy David Blackmon with the Scotland County Sheriff's Office responded. When Deputy Blackmon arrived at the scene, Breese answered the door and reported that someone had been shot and was lying on the living room floor. Deputy Blackmon observed Frankie Davenport lying on the ground with a large pool of blood around his head.

At trial, Wall testified she had communicated with Defendant only through Facebook Messenger because Defendant did not have a phone with service. She stated she believed Frankie Davenport also communicated with Defendant exclusively through Facebook Messenger. Further, Wall stated Frankie Davenport had told her Defendant was threatening him.

During its case in chief, the State sought to introduce as evidence photographs of Defendant's Facebook messages to Frankie Davenport. Deputy Shawn Gagnon with the Scotland County Sheriff's Office testified that a cell phone was collected from the crime scene. Later, he retrieved the phone from the evidence vault, opened the Facebook Messenger application, accessed the message thread with "Jimmy Davenport", and took photographs of the messages. Deputy Gagnon identified State's Exhibit 37 as a photo of a cellphone placed on top of an evidence bag showing the case number corresponding to the underlying matter here and Frankie Davenport's name. Counsel for the State then began to question Deputy Gagnon about State's Exhibit 38—the same cellphone opened to a Facebook message from "Jimmy D."—when counsel for Defendant objected. The trial court then excused the jury.

Counsel for Defendant argued the State had not laid a proper foundation to show where the messages shown in the photographs came

from. Counsel for Defendant asserted: "The State's evidence has been that [Defendant] did not have a cell phone. And now the State is purporting to put into evidence what they are saying, I believe, is [sic] text messages from [Defendant] when their own evidence has been that he didn't have a cell phone." The State responded that the content it sought to introduce were Facebook messages from Defendant, Wall had identified the cellphone as belonging to Frankie Davenport, and Deputy Gagnon testified to the chain of custody and process of retrieving the messages in question. Further, Wall testified that Defendant communicated through Facebook Messenger. The trial court sustained the objection but allowed the State to conduct a voir dire for the exhibits.

During the voir dire, Deputy Gagnon read the contents of the messages in the exhibits at issue and identified how incoming and outgoing messages were color coded. Deputy Gagnon testified again that he had unlocked the phone shown in State's Exhibit 37, went into the Facebook Messenger application, and clicked on the name "Jimmy Davenport". Following the questioning of Deputy Gagnon, the State argued

> for authentication purposes that the content and context of – that are contained within the messages would also aid in the sense of establishing authenticity of the sender. And I'd argue to you that it would be the – I'd argue it's admissible and that any question would go to weight for the jury to determine whether or not they believe, in fact, it's – it would be Mr. Davenport, Jimmy Davenport, the defendant in this case, sending the message.

The trial court found that the State had, through voir dire, properly authenticated the messages, reversed its previous ruling, and overruled defense counsel's objection.

Additionally, during its case in chief, the State called Samantha Dutch, the Director of the Scotland County Emergency Communications Center. Dutch testified that when the Center receives a 911 call, each call is "documented in what is called a CAD system, which is basically our database system for keeping track of notes and all other information for responders and the calls themselves." During the State's direct examination, Dutch identified a State evidentiary exhibit as a CAD report from the date of the incident—10 December 2020. Defendant objected to the admission of the CAD report, and the trial court heard arguments about the admissibility of the report outside of the presence of the jury.

During the voir dire that followed, the State clarified precisely what it sought to introduce: "The State would not be introducing the audio

call because it's [sic] been purged from the system. It would just be the CAD report showing that a call was made and which may be used, I guess, later for other purposes[.]" Further, the State limited its exhibit to one page, which contained only the report of the call's occurrence:

> [State's Counsel]: And specifically, this one is a single page, I think. And can you determine whether or not there are any notes or any other comments that would be inputted by other individuals on that?
>
> [Dutch]: Yes.
>
> [State's Counsel]: Okay. And are there any other notes or any other comments?
>
> [Dutch]: Not on this page.
>
> [State's Counsel]: Okay. But there would be a separate page?
>
> [Dutch]: That's correct.
>
> [State's Counsel]: Okay. And is that — how are you able to determine that?
>
> [Dutch]: The bottom of this printout shows that this is page 1 of 2. And also being familiar with the printouts, they always show a comment section that is not here.

Counsel for Defendant objected on the basis that the CAD report was not relevant. The trial court overruled the objection and explained its reasoning: "Well, according to Rule 401, if it has any tendency. I believe the report states that a phone call was made around the relevant time. It's a 9-1-1 phone call. I suppose it does have some tendency to make the existence of a fact in consequence more probable than not." Upon resuming the direct examination of Dutch, she testified after the CAD report was admitted, consistent with the trial court's ruling and the limitations of the exhibit the State had expressed, that the CAD report reflected a call came in to the Emergency Call Center on 10 December 2020 at 3:43 a.m.

Later, the State questioned Deputy David Blackmon about his response to the incident. Deputy Blackmon testified he stayed at the crime scene after officers secured the perimeter. The State then asked: "Did you ever respond to any calls during that time?" Deputy Blackmon began to respond, "A few hours later, we had a call in reference to–". At that point, counsel for Defendant interjected to object. The trial court

sustained the objection and conducted another voir dire outside of the presence of the jury. During that voir dire, Deputy Blackmon spoke to the contents of the 911 call. Based on questioning from both parties, the trial court observed the testimony was "getting farther and farther removed," and stated: "Let me just put it on the record that the Court will sustain defense counsel's objection based on Rule 401 and 402 to the extent that the testimony is relevant. The Court finds that the danger of unfair prejudice to the defendant substantially outweighs any probative value of the proffered evidence." The trial court expressly distinguished between the CAD report, which showed only that a call had been made, and the content of the call as reported by Deputy Blackmon: "I believe [Deputy Blackmon] confirmed that another phone call came in and that he had to leave. I think that's . . . any objection to that is overruled. But to the contents of the phone call stating that his life is in danger by the defendant or the perpetrator or the suspect of the first shooting, that's sustained. . . . Contents of the conversation are off limits." When the jury returned, Deputy Blackmon testified:

> [State's Counsel]: And I think we were at the portion – I had asked did you receive any other calls for service?
>
> [Deputy Blackmon]: I did, yes.
>
> [State's Counsel]: Okay. And at that point, did you leave the location where you were?
>
> [Deputy Blackmon]: Yes.

On 14 November 2023, the jury returned a verdict finding Defendant guilty of First-Degree Murder. The trial court sentenced Defendant to life imprisonment without parole. Defendant orally gave Notice of Appeal on 14 November 2023.

Issues

The issues on appeal are whether the trial court erred by admitting: (I) photographs of Facebook messages purportedly sent by Defendant; and (II) a CAD report of a 911 call.

Analysis

I. Facebook Messages

[1] "We review *de novo* rulings on authentication issues under Rule of Evidence 901." *State v. Jones*, 288 N.C. App. 175, 187, 884 S.E.2d 782, 793 (2023) (citing *State v. Crawley*, 217 N.C. App. 509, 515-16, 719 S.E.2d 632, 637 (2011)). "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. Hicks*, 243 N.C. App. 628, 639, 777 S.E.2d 341, 348 (2015) (quoting *State v. Williams*, 362 N.C. 628, 632-33, 669 S.E.2d 290, 294 (2008)).

Rule 901 of our Rules of Evidence provides: "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). "Pursuant to Rule 901 of the North Carolina Rules of Evidence, every writing sought to be admitted must first be properly authenticated." *State v. Clemons*, 274 N.C. App. 401, 414, 852 S.E.2d 671, 679 (2020) (quoting *State v. Allen*, 258 N.C. App. 285, 288, 812 S.E.2d 192, 195 (2018)). One way our Rules of Evidence provide a writing or other piece of evidence may be authenticated is by "Distinctive Characteristics and the Like–Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." N.C. Gen. Stat. § 8C-1, Rule 901(b)(4) (2023).

Further, our Courts have acknowledged "the authorship and genuineness of letters, typewritten or other, may be proved by circumstantial evidence[.]" *State v. Davis*, 203 N.C. 13, 28, 164 S.E. 737, 745 (citation omitted), *cert. denied*, 287 U.S. 649, 53 S. Ct. 95, 77 L. Ed. 561 (1932). Additionally, "[i]t [is] not error for the trial court to admit the [evidence] if it could reasonably determine that there was sufficient evidence to support a finding that 'the matter in question is what its proponent claims.' " *State v. Wiggins*, 334 N.C. 18, 34, 431 S.E.2d 755, 764 (1993) (quoting N.C. Gen. Stat. § 8C-1, Rule 901(a)). "Importantly, the burden to authenticate under Rule 901 is not high—only a prima facie showing is required[.]" *State v. Ford*, 245 N.C. App. 510, 519, 782 S.E.2d 98, 105 (2016) (quoting *U.S. v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014) (citation and quotation marks omitted)).

This Court has concluded a trial court did not err in admitting two screenshots of a defendant's social media webpage where the account at issue was attached to a screenname that reflected the defendant's nickname and the account displayed pictures of the defendant. *Ford*, 245 N.C. App. at 521, 782 S.E.2d at 106. In *Ford*, the defendant appealed from a conviction for involuntary manslaughter where his dog attacked the victim. *Id.* at 514-15, 782 S.E.2d at 102. There, a detective testified he found photographs of the defendant and the dog in question on a MySpace page accompanying the defendant's nickname. *Id.* at 513, 782 S.E.2d at 101. The Court concluded, "[w]hile tracking the webpage directly to defendant through an appropriate electronic footprint or

link would provide some technological evidence, such evidence is not required in a case such as this, where strong circumstantial evidence exists that this webpage and its unique contents belong to defendant." *Id.* at 521, 782 S.E.2d at 106. That "strong circumstantial evidence" included photographs of the defendant, corroboration that the username was defendant's nickname, and a video with a song where the detective identified the voice in the song as the defendant's. *Id.*

In *State v. Clemons*, this Court considered whether Facebook comments posted from the victim's daughter's Facebook account were properly authenticated as belonging to the defendant. 274 N.C. App. at 415, 852 S.E.2d at 680. There, the Court concluded "the distinctive characteristics of the post in conjunction with the circumstances are sufficient to conclude [d]efendant wrote the comments." *Id.* The Court pointed to circumstantial evidence showing the defendant had access to the Facebook account, the comments began "a week or two" after the defendant was released from prison, the close relationship between the defendant and the victim's daughter, and the posts themselves which the victim testified were unlike her daughter. *Id.*

Here, two witnesses—Shonquila Wall and Deputy Gagnon—provided pertinent testimony. Wall identified the victim's cellphone in photographs during her testimony. Further, she testified she communicated with Defendant "[o]nly through Facebook [M]essenger" because he did not have a working phone. Wall further stated she knew the victim had communicated with Defendant, likewise only through Facebook Messenger because Defendant did not have a working phone. This is consistent with the type of circumstantial evidence this Court concluded was sufficient to authenticate the Facebook messages in *Clemons*. In a similar vein, while in *Clemons* the Court looked at the Facebook comments as a clear deviation from the victim's daughter's typical behavior—and thus supporting the inference that someone else wrote the comments—here, Wall's testimony was that the use of Facebook Messenger was consistent with Defendant's behavior.

Additionally, during voir dire Deputy Gagnon testified to how he retrieved the messages from the phone, which Wall had identified at the scene as belonging to Frankie Davenport. This is consistent with *Ford* in which the detective testified to how he discovered the MySpace page at issue. Further, Deputy Gagnon also read the content of the messages, which contained references and information corroborating their authenticity. In one exchange, the message from "Jimmy D." read, "I hope you enjoy your day with Jayden 'cause it just may [be] your last one with him." This is consistent with Wall's earlier testimony

that Frankie Davenport's son's name was Jayden and that Davenport was spending time with Jayden around the time of the incident. Another message read: "I'll see you tomorrow at dialysis, big bro." The State established at trial that Defendant and Frankie Davenport were brothers and Frankie Davenport was Defendant's older brother, supporting the inference Defendant had sent the message because he referred to Davenport as "big bro."

These references to the nature of the sender's relationship to Frankie Davenport, as well as to the sender's knowledge about details of Frankie Davenport's personal life, are sufficient "distinctive characteristics" to authenticate the messages. *See* N.C. Gen. Stat. § 8C-901(b)(4) (2023). Therefore, the messages were properly authenticated. Thus, the trial court did not err in admitting photos of the Facebook messages.

II. CAD Report of 911 Call

[2] Defendant contends the CAD report of a 911 call was erroneously admitted into evidence where the trial court subsequently held the content of that call was inadmissible. Specifically, Defendant argues the trial court's decisions to admit the CAD report showing a 911 call had been received approximately two hours after the incident and to exclude the content of the call were inconsistent. We disagree.

Under our Rules of Evidence, "[a]ll relevant evidence is admissible," unless otherwise provided. N.C. Gen. Stat. § 8C-1, Rule 402 (2023). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (2023). "Although the trial court's rulings on relevancy technically are not discretionary and therefore are not reviewed under the abuse of discretion standard applicable to Rule 403, such rulings are given great deference on appeal." *State v. Allen*, 265 N.C. App. 480, 489, 828 S.E.2d 562, 570 (citation omitted), *appeal dismissed, disc. rev. denied*, 373 N.C. 175, 833 S.E.2d 806 (2019). "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2023).

Here, the trial court admitted the CAD report over Defendant's objection that it was not relevant. We note at the outset that our Supreme Court has described this relevancy threshold as "relatively lax." *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988). "Moreover, '[i]n order to be relevant, evidence need not bear directly on the question in issue if it is helpful to understand the *conduct of the parties*, their

motives, or if it reasonably allows the jury to draw an inference as to a disputed fact.' " *State v. Norris*, 287 N.C. App. 302, 314, 882 S.E.2d 608, 617 (2022) (emphasis added) (quoting *State v. Miller*, 197 N.C. App. 78, 86, 676 S.E.2d 546, 551, *disc. rev. denied*, 363 N.C. 586, 683 S.E.2d 216 (2009)). First, the CAD report had a tendency to make the fact that an incident occurred in the early morning of 10 December 2020 more likely because the report showed a 911 call had been made at 3:43 a.m. Second, as the trial court articulated, the CAD report was relevant to explain why Detective Blackmon left his location. This is consistent with prior cases in which our Courts have upheld the admission of evidence to show its effect on a person involved. *See State v. McCutcheon*, 281 N.C. App. 149, 153, 867 S.E.2d 572, 577 (2021) ("Evidence 'offered to explain the conduct of a witness [is] relevant and admissible[.]' " (quoting *State v. Roper*, 328 N.C. 337, 356, 402 S.E.2d 600, 611 (1991))); *State v. Potter*, 295 N.C. 126, 132, 244 S.E.2d 397, 401-02 (1978) (witness' testimony regarding a threat to her husband admissible to explain her subsequent conduct in calling the police); *State v. Dial*, 122 N.C. App. 298, 311, 470 S.E.2d 84, 92 (1996) (witness' testimony regarding threatening statements by defendant about victim relevant and admissible to explain subsequent conduct in calling crime tip line).

Defendant points to the trial court's decision to exclude the content of the call as support for his argument the CAD report should have been excluded. The actual content of the call, however, is a separate evidentiary matter which the trial court, in its discretion, determined—even if relevant—was substantially more prejudicial than probative under Rule 403. *See State v. Grant*, 178 N.C. App. 565, 573-74, 632 S.E.2d 258, 265 (2006) ("A trial court has discretion whether or not to exclude evidence under Rule 403, and a trial court's determination will only be disturbed upon a showing of an abuse of discretion." (citing *State v. Campbell*, 359 N.C. 644, 674, 617 S.E.2d 1, 20 (2005), *cert. denied*, *Campbell v. North Carolina*, 547 U.S. 1073, 126 S. Ct. 1773, 164 L. Ed. 2d 523 (2006))). Indeed, these rulings are consistent and show an effort by the trial court to provide jurors with explanatory information as to why Detective Blackmon left Wall's house, while protecting Defendant from undue prejudice as the jury was prevented from hearing statements which might have resulted in unfair prejudice against him.

Thus, the trial court properly determined the CAD report was relevant. Therefore, the trial court did not err in admitting it into evidence. Consequently, there was no error in Defendant's trial and the trial court properly entered judgment on the jury verdict.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment.

NO ERROR.

Judges STROUD and ZACHARY concur.

JOSEPH AARON WARREN, JR. AND WIFE
LINDA BLACKBURN WARREN, PLAINTIFFS
v.
MARCELLA STRICKLAND BONNER
AND HUSBAND, JACK L. BONNER, DEFENDANTS

No. COA24-453

Filed 15 January 2025

1. Jury—voir dire—reopened after jury impaneled—peremptory challenge

In an action arising from a property dispute, the trial court erred in allowing defendants to reopen voir dire toward the end of plaintiffs' case-in-chief—to address a claim by defendants that one juror had been dishonest during the initial voir dire about his knowledge of and connection to plaintiffs—and to exercise a peremptory challenge to excuse that juror and have him replaced with an alternate juror; Supreme Court precedent prohibited a peremptory challenge—in contrast to a challenge for cause—after a juror had been passed and accepted by the parties. Accordingly, the judgment entered in favor of defendants was vacated and the matter was remanded for a new trial.

2. Appeal and Error—motion for judgment notwithstanding the verdicts—no notice of appeal from denial—no appellate jurisdiction

Plaintiffs' purported appeal from the denial of their motion for judgment notwithstanding the verdicts (JNOV) entered against them was dismissed for lack of jurisdiction where plaintiffs' notice of appeal only designated the judgment entered upon the jury's verdicts and did not specifically designate the order denying their JNOV motion.

Appeal by Plaintiffs from judgment entered 13 December 2023 by Judge Robert C. Roupe in Sampson County Superior Court. Heard in the Court of Appeals 6 November 2024.

Daughtry, Woodard, Lawrence, & Starling, by Luther D. Starling, Jr., for Plaintiffs-Appellants.

Hutchens Law Firm LLP, by J. Haydon Ellis and J. Scott Flowers, for Defendants-Appellees.

COLLINS, Judge.

This appeal arises from a property dispute between Plaintiffs and Defendants and addresses an issue of first impression on this Court: whether the trial court in a civil case may re-open jury voir dire after the jury had been impaneled and allow a party to exercise a peremptory challenge.

Plaintiffs Joseph and Linda Warren appeal from the judgment entered upon the jury's verdicts finding Defendants Marcella and Jack Bonner not liable for the negligence per se, trespass to real property, and nuisance claims asserted against them by Plaintiffs and finding Plaintiffs liable to Defendants for the counterclaims asserted against them for nuisance, trespass to real property, and trespass to personal property. Plaintiffs argue that the trial court erred by re-opening jury voir dire after the jury had been impaneled and allowing Defendants to exercise a peremptory challenge. Plaintiffs also argue that the trial court erred by denying their motion for judgment notwithstanding the verdicts.

Because the trial court erred by allowing Defendants to exercise a peremptory challenge after the jury had been impaneled, we vacate the judgment and remand the matter for a new trial. Because Plaintiffs failed to give notice of appeal from the order denying their motion for judgment notwithstanding the verdicts, we lack jurisdiction to address that order and dismiss that argument.

I. Background

The underlying property dispute is not relevant for purposes of this appeal; relevant to the issues on appeal are the following procedural facts: The matter came on for trial and the jury was impaneled. Toward the end of Plaintiffs' case-in-chief, Defendants informed the trial court that they believed juror number twelve had been dishonest during voir dire about his knowledge of and connection to Plaintiffs. Defendants

asked the trial court to inquire into the juror's relationship with Plaintiffs and whether the juror had spoken to anyone about the trial.

Plaintiffs objected on the ground that "[t]his is trying to reopen the jury[.]" The following conversation then took place about the trial court's ability to reopen jury voir dire in a civil, as opposed to criminal, case:

> THE COURT: [Defense Counsel], I'm quite familiar with the rules regarding voir dire and the Court's discretion to reopen it in the context of a criminal case; admittedly, not as such in a civil case. Do you happen to know the statute or statutes upon which you would be relying that would give me the authority to do that, sir?
>
> [DEFENSE COUNSEL]: Judge, I'm not aware of any distinction between the rules between a criminal case and a civil case when it comes to this matter. I mean, just this week in Cumberland County we had two jurors struck from a murder trial because they spoke about the trial outside of the courtroom. . . .
>
> . . . .
>
> And there's no distinction, to my knowledge, between a civil jury and a criminal jury when it comes to those legal principles.
>
> . . . .
>
> THE COURT: My entire concern about this case and the jury is I want to make sure we have people that can be fair and impartial to both sides. And so I am going to ask that we bring [juror number twelve] in. I'm going to ask him a couple of these questions, and then we will go from there.
>
> . . . .
>
> [DEFENSE COUNSEL]: Your Honor, we're not asking for a new jury. We would ask, as we stated earlier, that if you find that there is bias or impropriety, that the alternate be [impaneled] and move forward with that, with the alternate.

After questioning the juror, the trial court did not find cause to remove him. Defendants then asked the trial court if the juror's friend was an employee on Plaintiffs' farm. The trial court, in turn, asked Plaintiffs if the juror's friend was Plaintiffs' employee. Plaintiffs told the

trial court that the juror's friend is retired but does help on Plaintiffs' farm. Defendants stated, "And, based on that information, Your Honor, we move to strike this juror and [impanel] the alternate."

The trial court then announced the following:

> I am going to find that there was good cause to reopen the voir dire of [juror number twelve], that I do not believe that there's a basis for challenge for cause; however, in reading the voir dire statutes, as I am aware of them, as I know of them, I believe by so reopening, I would give either party the opportunity to exercise a peremptory on this person.

Defendants exercised a peremptory challenge on the juror; the trial court allowed the challenge and replaced the juror with an alternate. Plaintiffs again objected. The trial court excused juror number twelve and noted the decision was made in the trial court's discretion pursuant to N.C. Gen. Stat. § 15A-1214.

At the close of the evidence, Plaintiffs moved for a directed verdict; the motion was denied. The jury returned verdicts finding Defendants not liable on all three of Plaintiffs' claims and finding Plaintiffs liable on all three of Defendants' claims. The trial court entered judgment on the jury's verdicts. Plaintiffs moved for judgment notwithstanding the verdicts; the trial court denied the motion. Plaintiffs noticed appeal to this Court.

II. Discussion

A. Jury Voir Dire

[1] Plaintiffs first argue that the trial court erred by allowing Defendants to exercise a peremptory challenge after the jury had been impaneled and the trial had commenced. Plaintiffs' argument is meritorious.

Whether North Carolina's statutes governing civil litigation authorize peremptory challenges after a jury has been impaneled is an issue of law. Issues of law are reviewed de novo on appeal. *Schroeder v. City of Wilmington*, 282 N.C. App. 558, 565 (2022).

There are two ways in which a party in a civil or criminal case may challenge a juror: a challenge for cause and a peremptory challenge. "A challenge for cause is a challenge to a juror for which some cause or reason is assigned." *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 302 (1951) (citing *State v. Levy*, 187 N.C. 581 (1924)). "A peremptory challenge is a challenge 'which may be made or omitted according to the

judgment, will, or caprice of the party entitled thereto, without assigning any reason therefor, or without being required to assign a reason therefor.' " *Id.* (citations omitted).

Some provisions of Chapter 9 of our General Statutes govern processes related to selecting and impaneling a jury in both civil and criminal cases. *See, e.g.*, N.C. Gen. Stat. §§ 9-1–9-7.1 (2023) (governing "Jury Commissions, Preparation of Jury Lists, and Drawing of Panels"). Provisions in Chapter 9 also govern challenges to jurors in civil cases, whereas provisions in Chapter 15A govern challenges to jurors in criminal cases. The applicable statutory provisions and the caselaw interpreting those provisions differ from each other.

Pursuant to N.C. Gen. Stat. § 9-19, "before a jury is impaneled to try the issues in any civil suit . . . the parties, or their counsel for them, may challenge peremptorily eight jurors without showing any cause therefor, and the challenges shall be allowed by the court." N.C. Gen. Stat. § 9-19 (2023). Our Supreme Court has held that while a trial court has the discretion to allow a challenge for cause after the jurors have been passed by the parties, the trial court may not allow a peremptory challenge after a juror has been passed *and accepted* by the parties:

> After the jurors are passed by the parties any further examination of them is not a matter of right but of discretion in the court. If on such examination good challenge for cause is presented the court may allow the juror to be challenged therefor. But the reason of the thing and the precedents do not extend to the allowance of a peremptory challenge after a juror has been passed and accepted.

Dunn v. Wilmington & W. R. Co., 131 N.C. 446, 447 (1902) (citations omitted). The Court explained that "the rules governing the formation of juries are well settled and material" and that "the allowance of a peremptory challenge after the acceptance of a juror, is not only an impairment of the legal rights of the opposite party but would lead to great uncertainty in trials in a matter which has long been settled and well understood." *Id.* at 448.

The parties have cited no statute or caselaw, and we have found none, specifically addressing the trial court's authority in a civil action to reopen jury voir dire and allow challenges for cause or peremptory challenges after the jury has been impaneled. However, we find *Dunn*'s holding and reasoning persuasive and hold that after the jury has been impaneled, "any further examination of them is not a matter of right but of discretion in the court. If on such examination good challenge

for cause is presented the court may allow the juror to be challenged therefor." *Id.* at 447. However, upon the trial court's reopening the jury voir dire after the jury has been impaneled, the trial court may not allow a peremptory challenge of a juror. *See id.*

Here, the jury was duly impaneled. The trial court, in its discretion, found that there was good cause to reopen the jury voir dire. Upon examination of juror number twelve, the trial court did not find that good challenge for cause had been presented; accordingly, juror number twelve should not have been stricken. The trial court, however, erroneously allowed Defendants to exercise a peremptory challenge on juror number twelve and replaced that juror with an alternate juror. This was reversible error.

The trial court found, and Defendants argue, that N.C. Gen. Stat. § 15A-1214(g) authorized the trial court to allow Defendants' peremptory challenge after the jury had been impaneled. This is not correct.

N.C. Gen. Stat. § 15A-1214(g) provides, in pertinent part, as follows:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> > (1) The judge may examine, or permit counsel to examine, the juror to determine whether there is a basis for challenge for cause.
> >
> > (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
> >
> > (3) If the judge determines there is no basis for challenge for cause, any party who has not exhausted his peremptory challenges may challenge the juror.

N.C. Gen. Stat. § 15A-1214(g) (2023).

This statute did not provide the trial court the requisite authority for the following reasons: First, this is a criminal statute and does not apply here. Second, N.C. Gen. Stat. § 15A-1214(g) speaks only to the procedure applicable *before* the jury is impaneled. Third, the general rule in a criminal case is that "after a jury is impaneled, the parties have waived their rights to challenge peremptorily a juror." *State v. McLamb*, 313 N.C. 572, 577 (1985) (citation omitted). However, given the "significant role that the free exercise of peremptory challenges plays in a trial of a

criminal case," *id.* at 576, where liberty and life are often at stake, a body of criminal caselaw has developed allowing the trial court the discretion to re-open examination of a juror after the jury has been impaneled and, upon doing so, requiring the trial court to allow each party to exercise any remaining peremptory challenges to excuse such a juror. *See State v. Thomas*, 230 N.C. App. 127, 130 (2013); *State v. Holden*, 346 N.C. 404, 429 (1997); *State v. Womble*, 343 N.C. 667, 678 (1996). No parallel body of caselaw has developed in North Carolina as to civil actions, and the life and liberty considerations underpinning the criminal caselaw are not at issue here.

For these reasons, the trial court erred by relying on N.C. Gen. Stat. § 15A-1214 for the authority to allow Defendants' peremptory challenge after the jury had been impaneled.

B. Appeal from the JNOV

[2] Plaintiffs also argue that the trial court erred by denying their motion for judgment notwithstanding the verdicts. Because we lack jurisdiction to review this order, we dismiss Plaintiffs' appeal of this issue.

An appellant's notice of appeal "shall designate the judgment or order from which appeal is taken . . . ." N.C. R. App. P. 3(d) (2023). "An appellant's failure to designate a particular judgment or order in the notice of appeal generally divests this Court of jurisdiction to consider that order." *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 347 (2008) (citation omitted).

Here, Plaintiffs' notice of appeal filed on 11 March 2024 states as follows:

> Plaintiffs . . . hereby give notice of appeal to the North Carolina Court of Appeals from the Judgment signed on the 6th day of December, 2023 and filed in this matter on the 13th day of December, 2023 by the Honorable Robert C. Roupe in the Superior Court of Sampson County. . . .

This language plainly designates the judgment entered on the jury's verdicts filed on 13 December 2023.

Although Plaintiffs' notice of appeal also states, "This appeal is made following the denial of Plaintiffs' post-trial motions pursuant to Rules 50(b) and 59, signed by the Honorable Robert C. Roupe on the 29th day of February, 2024 and filed March 6, 2024," this language does not "designate" the denial of these motions for appeal; rather, it is apparent that this language is included to show that the notice was timely filed

within 30 days after entry of the trial court's denial of their Rule 50(b) and Rule 59 motions. *See* N.C. R. App. P. 3(c)(3) ("[I]f a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion and then runs as to each party from the date of entry of the order or its untimely service upon the party . . . .").

"Notwithstanding the jurisdictional requirements in Rule 3(d), our Court has recognized that even if an appellant omits a certain order from the notice of appeal, our Court may still obtain jurisdiction to review the order pursuant to N.C. Gen. Stat. § 1-278." *Yorke*, 192 N.C. App. at 348 (citing N.C. Gen. Stat. § 1-278 (2007) (stating that "[u]pon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment")). Review of an "intermediate order" under N.C. Gen. Stat. § 1-278 is permissible when the following three conditions are met: "(1) the appellant must have timely objected to the order; (2) the order must be interlocutory and not immediately appealable; and (3) the order must have involved the merits and necessarily affected the judgment." *Id.* (citations omitted).

Here, the order denying Plaintiffs' motion for judgment notwithstanding the verdicts does not meet all three conditions. Accordingly, we do not have jurisdiction to review this order.

III. Conclusion

The trial court erred by allowing Defendants to exercise a peremptory challenge after the jury had been impaneled. We thus vacate the trial court's judgment and remand the matter to the trial court for a new trial. Because we lack the authority to review the trial court's order denying Plaintiffs' motion for judgment notwithstanding the verdicts, we dismiss the appeal of that issue.

VACATED AND REMANDED IN PART; DISMISSED IN PART.

Judges ARROWOOD and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 15 JANUARY 2025)

CLARK v. CLARK No. 24-425	Bladen (22CVD335)	Vacated and Remanded
IN RE B.F. No. 24-175	Cumberland (19JA363) (19JA364)	Affirmed
IN RE P.G. No. 23-1039	Guilford (16JT499) (16JT500)	Affirmed
MYERS v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. No. 23-854	Swain (23CVS24)	Affirmed
MYERS v. SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. No. 23-943	Swain (23SP9)	Affirmed
SMOKY MOUNTAIN COUNTRY CLUB PROP. OWNERS ASS'N, INC. v. DUNGAN No. 24-548	Swain (20CVS000089)	Affirmed
STATE v. KING No. 22-469-2	Buncombe (19CRS90651)	Affirmed
UNITED SEWING MACH. SALES, LLC v. DIGIT. CUTTING SERVS., INC. No. 24-86	Catawba (18CVS1052)	NO PREJUDICIAL ERROR

STATE v. BOYD

[297 N.C. App. 624 (2025)]

STATE OF NORTH CAROLINA
v.
BRANDON KASON BOYD

No. COA24-36

Filed 5 February 2025

1. Constitutional Law—right to speedy trial—no order entered on defendant's motion—remand required

In a prosecution on charges including first-degree murder—arising from an October 2020 incident in which the victim died as the result of gunshot wounds received just after he was seen arguing with defendant, but which did not come on for trial until March 2023—where the trial court failed to enter an order on defendant's speedy trial motion following a hearing in November 2022, remand to the trial court was required for the entry of findings of fact and conclusions of law on the four factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972) (length of delay, reason for delay, assertion of the right, and prejudice) because the trial delay of more than two years was sufficient to establish presumptive prejudice to defendant and the court's indeterminant oral statements following the hearing were not minimally sufficient to resolve defendant's motion.

2. Jury—substitution of juror—appearing to sleep—no abuse of discretion

In a prosecution on charges including first-degree murder, where, about halfway through defendant's trial, defense counsel informed the trial court that a juror seemed to be sleeping, suggested the juror might have missed some evidence, and requested a substitution, but did not renew his objection after the trial court denied the initial request—and no further issues with the juror were raised—defendant showed no abuse of discretion by the trial court.

3. Homicide—first-degree murder—second-degree murder—distinction—jury instruction—intent to kill—no plain error

In a prosecution on charges including first-degree murder, where the trial court gave an accurate clarifying instruction distinguishing between first- and second-degree murder in response to a jury question, but omitted the "intent to kill" requirement for first-degree murder when giving the final mandate (a summary of the charge), defendant did not preserve the issue for appellate review because he failed to timely object. Nor could defendant establish plain error

where precedent held, in a similar context, that there was no fundamental error where accurate instructions were, at most, "incomplete at one important part."

Judge GRIFFIN concurring by separate opinion.

Judge STADING concurring in the majority and concurring opinions.

Appeal by Defendant from judgments entered 15 March 2023 by Judge Jerry R. Tillett in Pasquotank County Superior Court. Heard in the Court of Appeals 5 November 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Keith Clayton, for the State.

Hynson Law, PLLC, by Warren D. Hynson, for Defendant.

WOOD, Judge.

Brandon K. Boyd ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of first-degree murder, possession of a firearm by a felon, and interfering with an electronic monitoring device. On appeal, Defendant argues the trial court erred by violating his right to a speedy trial, by failing to inquire about or replace Juror 7, and by giving an erroneous clarification of jury instructions. For the reasons set forth below, we hold Defendant received a fair trial free from prejudicial error.

I. Factual and Procedural Background

On 5 February 2020 Defendant pleaded guilty pursuant to an Alford plea to common law robbery, a felony. Under the terms of his probation, Defendant was subject to electronic monitoring for six months.

On 18 October 2020 Kaleb Bilger ("Bilger") was found slumped in the front passenger seat of a gray sedan, unconscious and gunshot. He was pronounced dead at the scene. After an investigation by the Pasquotank Police Department, a warrant was issued for Defendant's arrest. On 11 November 2020, law enforcement located Defendant in Westchester County, New York. He waived extradition to North Carolina where he was indicted in Pasquotank County on charges of first-degree murder, possession of a firearm by a felon, and interfering with an electronic monitoring device.

On 5 October 2021, Defendant filed a motion for a speedy trial and reasserted his right to a speedy trial on 1 August 2022. On 25 October 2022, Defendant filed a motion to dismiss due to violation of his right to a speedy trial. The trial court denied the motion. Defendant remained in custody continuously from his arrest on 11 November 2020 until trial two years and four months later.

Defendant was tried in Pasquotank County Superior Court on 15 March 2023, and the jury found Defendant guilty on all charges.

At trial, the evidence tended to show the following:

On 18 October 2020 at approximately 2:00 p.m., Elizabeth City police officers responded to a call from River Landings Apartments reporting multiple shots fired. Officer Stokley responded to the scene and identified two separate blood trails and multiple spent shell casings in the vicinity of building 106. He set up a crime scene perimeter and began speaking with witnesses.

Stacy Waters ("Waters") reported that she saw two black males arguing near building 106, one light-skinned, the other dark-skinned and 5' 6" to 5' 7" tall. She stated the light-skinned male walked away from the dark-skinned male and then she heard multiple gun shots. She stated the dark-skinned male ran towards building 105 and could possibly be in apartment C. In her original statement Waters noted she could not see the suspect's face.

At trial Waters testified that she saw Justyn Wilson ("Wilson") and Defendant talking and that Defendant appeared agitated. A short time later she heard raised voices and observed Defendant arguing with Wilson. Wilson began walking to the breezeway near building 106 and Defendant followed. She then heard six-to-eight-gun shots. Wilson was still standing out front when Bilger came stumbling out saying he was shot and needed to get to the hospital. Another man in a silver four-door car helped Bilger into the car and drove away. Defendant tucked a small black handgun into his waistband and ran towards building 105.

When questioned during cross-examination about how she could identify Defendant two and a half years later when she had reported to investigating officers that she could not see his face, she stated she could tell today "from the back of his walk, his stance."

Vanessa Brooks ("Brooks") also testified about what she witnessed on 18 October 2020. Brooks stated she heard men arguing, looked out the window of her apartment, and called 911 because the argument was so loud. She recognized Bilger and Defendant from her time as a substitute

teacher. She also saw a third person dressed in a hoodie, whom she could not identify. The men continued to argue and move between the buildings. She turned her head to grab her phone and heard gunshots. When she looked back, she could not see Bilger anymore. Defendant was standing with his back to her and then ran towards building 106. In her statement to the police on the day of the shooting, Brooks did not name Defendant; however, in the summer of 2022, Brooks told prosecutors that Defendant was the shooter.

Officer Mateo testified that she was dispatched to the Fountain View Apartments on 18 October 2020 for suspicious conditions. When she arrived, Officer Mateo found a gray sedan parked at the entrance with blood coming from the passenger area and blood droplets on the passenger door of the vehicle. An unconscious male with blood on his face sat slumped in the front passenger seat. Emergency medical services pronounced him dead at the scene.

Officer Knowles testified that he conducted crime scene analyses at both crime scenes, River Landings Apartments and Fountain View Apartments. He collected blood samples from both scenes as well as ten shell casings from the River Landings scene. He identified the shell casings as .22-caliber. In addition, he found 8.2 pounds of a green leafy substance in a suitcase in Bilger's vehicle that he identified as marijuana. Knowles did not send the green leafy substance to the lab for identification or the shell casings for DNA or fingerprinting analysis. However, he did send the shell casings from the crime scene and the .22-caliber Federal brand bullets and Glock firearm box recovered from Defendant's bedroom to the State Crime Lab in Raleigh.

During trial defense counsel reported to the court that many people had noticed Juror number 7 appeared to be sleeping. The trial court stated, "she could have been resting her eyes or sleeping or taking a break. It was kind of a boring section." Defense counsel requested that the court replace Juror 7 with the alternate juror due to concern that Juror 7 had missed some of the evidence. The trial court denied the request stating, "I'm not inclined to do so at this juncture. I mean, as far as I know, she was resting her eyes as do I sometimes."

Defendant's probation officer Kevin Combs ("Combs") testified he received a strap tamper alert for Defendant's ankle monitor on 18 October 2020 and attempted to contact Defendant. The monitoring company reported Defendant's home as the last known location of the ankle bracelet. While on his way to Defendant's home, the Elizabeth City Police Department contacted Combs to inform him that Defendant

was a suspect in a shooting. No one was at the residence when Combs arrived. Combs' partner contacted Defendant's mother, the homeowner, and waited for her to arrive home. Defendant's mother unlocked the home and gave consent for the probation officers to enter to search for the ankle monitoring bracelet. The ankle bracelet was eventually located on the roof of the home.

When called as a State's witness, Wilson testified that Bilger had traveled to California to get a better price on marijuana. Defendant had invested $800.00 in the marijuana purchase and had been led to believe that Bilger and his partner were apprehended by police at the D.C. airport on 17 October 2020. However, Bilger pulled up to the River Landings Apartments on 18 October 2020 around noon. Wilson, a friend named DJ, and Defendant were standing outside when he arrived. Defendant approached Bilger to ask about his money, but Bilger told him he would have to wait because he had just lost fifty grand. Defendant became visibly upset and walked away while implying he was going to cut off his ankle monitoring bracelet. Approximately five minutes later, Defendant returned in a car with a man named Tyke. Defendant approached Bilger, pulled out a pistol, and loaded a bullet into the chamber. Defendant's voice cracked as he asked Bilger why he would do this after all he had done for him and repeated that he needed his money. Bilger walked away with Defendant following. As Bilger walked up the steps Defendant started shooting. Wilson pushed DJ into the closest apartment. By the time Wilson and DJ came back outside everyone was gone and only a puddle of blood remained on the ground.

After closing arguments, the trial court provided instructions to the jury for both first-degree and second-degree murder. During its instruction to the jury, the trial court stated, "[s]econd-degree murder differs from first-degree murder in that the State need not to prove a specific intent to kill, premeditation, or deliberation." After the jury began its deliberations, the jury sent a message to the trial court requesting to hear the difference between first- and second-degree murder. The trial court conferred with the prosecutor and defense attorney about the instruction that should be given, stating:

> The [c]ourt will give the instruction again generally as contained in 206.14 regarding first degree murder and the other alternative lesser included second-degree murder, and the [c]ourt will give these instructions: First degree murder is the unlawful killing of a human being with malice and with premeditation and deliberation. Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation.

> Okay? And then I will instruct all of the entire instruction including the mandate on all charges. Anybody have anything to say about that?

There were no objections. The jury returned to the court room and the trial court then delivered the clarifying instructions to the jury. The jury resumed deliberation. Thereafter, defense counsel stated to the trial court, "you said first degree murder is malice and premeditation and deliberation. You didn't say intent to kill, which is part of that." The trial court then clarified that the distinction between first- and second-degree murder was premeditation and deliberation. Defense counsel continued to argue that the instruction was too simplistic, but the trial court noted that it was the exact instruction the defense had requested and was consistent with the pattern jury instruction. After reading the instruction again defense counsel conceded that it was correct. The jury found Defendant guilty of all charges: first-degree murder, possession of a firearm by a felon, and interfering with an electronic monitoring device. Defendant gave notice of appeal in open court.

II. Analysis

Defendant raises three issues on appeal: the trial court's purported violation of his right to a speedy trial, the trial court's failure to inquire about or replace Juror 7, and the trial court's erroneous clarification of the jury instructions.

A. Right to a Speedy Trial

[1] Our Constitution guarantees criminal defendants the right to a speedy trial. "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) (citation omitted).

> The right to a speedy trial is different from other constitutional rights in that, among other things, deprivation of a speedy trial does not *per se* prejudice the ability of the accused to defend himself; it is impossible to determine precisely when the right has been denied; it cannot be said precisely how long a delay is too long; there is no fixed point when the accused is put to a choice of either exercising or waiving his right to a speedy trial; and dismissal of the charges is the only possible remedy for denial of the right to a speedy trial.

State v. McKoy, 294 N.C. 134, 140, 240 S.E.2d 383, 388 (1978) (citing *Barker v. Wingo*, 407 U.S. 514, 521, 92 S. Ct. 2182, 2187 (1972)).

In *Barker v. Wingo* the U.S. Supreme Court laid out "a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. These factors are: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant." *State v. Spinks*, 277 N.C. App. 554, 562, 860 S.E.2d 306, 314-15 (2021) (cleaned up). None of the factors are essential or required, rather they are related factors that must be considered in light of the circumstances on a case-by-case basis. The court must engage in a "difficult and sensitive balancing process." *Barker v. Wingo*, 407 U.S. 514, 533, 92 S. Ct. 2182, 2193 (1972). The U.S. Supreme Court in *Barker* determined that this process starts with the length of the delay, which "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id.* at 530, 92 S. Ct. at 2192.

The U.S. Supreme Court clarified what would constitute a delay that is "presumptively prejudicial" in their decision in *Doggett* stating,

> [d]epending on the nature of the charges, the lower courts have generally found post-accusation delay "presumptively prejudicial" at least as it approaches one year. We note that, as the term is used in this threshold context, "presumptive prejudice" does not necessarily indicate a statistical probability of prejudice; it simply marks the point at which courts deem the delay unreasonable enough to trigger the Barker enquiry.

Doggett v. U.S., 505 U.S. 647, 652 n. 1, 112 S. Ct. 2686, 2691 n. 1 (1992).

Our North Carolina Supreme Court has repeatedly quoted the language from *Doggett* and held consistent with the U.S. Supreme Court that when a delay approaches a year it may not be "enough in itself to conclude that a constitutional speedy trial violation has occurred, [yet] this delay is clearly enough to cause concern and to trigger examination of the other factors." *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994); *see also State v. Flowers*, 347 N.C. 1, 27, 489 S.E.2d 391, 406 (1997); *State v. Grooms*, 353 N.C. 50, 62, 540 S.E.2d 713, 721 (2000).

This Court has consistently relied upon the precedent set forth by the U.S. Supreme Court in *Barker* and *Doggett* as well as decisions from our North Carolina Supreme Court. In *State v. Chaplin*, we quoted our Supreme Court's decision in *State v. Webster* holding that a delay of nearly three years "[w]hile not enough in itself to conclude that a constitutional speedy trial violation has occurred, . . . [the] delay is clearly

enough to cause concern and to trigger examination of the other factors." *State v. Chaplin*, 122 N.C. App. 659, 664, 471 S.E.2d 653, 656 (1996) (quoting *State v. Webster*, 337 N.C. 674, 679, 447 S.E.2d 349, 351 (1994)). Similarly, in *State v. Washington*, we cited the U.S. Supreme Court's opinion in *Doggett v. U.S.* and held that a delay of four years and nine months was enough to trigger examination of the other *Barker* factors. *State v. Washington*, 192 N.C. App. 277, 283, 665 S.E.2d 799, 803-04 (2008).

Most recently, this Court addressed this issue in both *Wilkerson I* and *Wilkerson II*. *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081964 (2015) (unpublished) (*Wilkerson I*); *State v. Wilkerson*, 257 N.C. App. 927, 810 S.E.2d 389 (2018) (*Wilkerson II*). In *Wilkerson I* this Court noted that a delay approaching a year is presumptively prejudicial and enough to trigger all of the *Barker* factors and held that the trial court erred by failing to consider all of the *Barker* factors. *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081964 (2015) (unpublished).

On remand the trial court acknowledged the *Barker* factors finding that while the amount of time in the delay was "noteworthy" it was "not *per se* prejudicial." The delay was forty-four months. The case returned to this Court which then held the trial court erred in its finding and made it clear that no specific length of time is "*per se* prejudicial," but the analysis of this first factor was in favor of the Defendant and therefore "triggers the need for analysis of the remaining three *Barker* factors." *State v. Wilkerson*, 257 N.C. App. 927, 930, 810 S.E.2d 389, 392 (2018) (*Wilkerson II*).

It is clear, based on significant federal and North Carolina precedent, that when a delay approaches a year, it is enough to cause concern that the delay may be unreasonable and to trigger examination of all four *Barker* factors. However, the trial court's determinations are not required to be reduced to a written order.

> If a written order is not required and an oral order may be sufficient in certain circumstances, the failure to go above and beyond that which is required by law does not render an otherwise lawful order erroneous. In other words, a minimally sufficient order is still exactly that—sufficient—even if more was ordered or requested by the trial court. Given this standard, the trial court committed reversible error only if: (1) there are conflicts in the evidence that the trial court failed to resolve either orally or in writing, through an explicit factual finding, or (2) the

> trial court failed to make the necessary conclusions of law on the record.

State v. Dixon, 261 N.C. App. 676, 682, 821 S.E.2d 232, 238 (2018) (cleaned up).

On 8 November 2022 the trial court held a hearing on Defendant's Motion to Dismiss for Speedy Trial Violations. At the end of counsel's arguments the trial court stated,

> All right. I will tell you that I will make a -- I will announce and give you a forecast of my ruling today so that there won't be any delay in everybody attempting to get prepared as soon as possible. I intend to deny that motion. I will make -- I reserve the right to make full, that is, plenary findings of fact and conclusions of law. I may ask the State or one member to make a first draft of that, but I will make the final revisions and order myself, but I will consider the factors of Barker v. Wingo and its progeny in North Carolina. I do find that -- I do not determine at this juncture that there is a presumptive prejudice, but I will rule in the alternative as well considering the other factors. However, I will set this case for trial.

No written order was ever entered. The trial court noted that it "intended" to deny the motion but also clearly stated that it "will" consider the factors of *Barker* in the future, not that it already had. The only finding the trial court made was that it "[did] not determine at this juncture that there [was] a presumptive prejudice." However, the trial court qualified that finding by also stating that it "[would] rule in the alternative as well considering the other factors." Notwithstanding the trial court's reservation of its right to enter an order in accordance with its preliminary determination or its right to change its mind if it found the *Barker* factors persuasive, the trial court never entered an order.

Based on the trial court's indeterminant statements, it cannot be determined from the record evidence whether the trial court resolved the issue of presumptive prejudice. Precedent dictates that a full consideration of all four *Barker* factors is triggered when post-accusation delays approach one year; the delay in this case was two years, four months. *Doggett v. U.S.*, 505 U.S. at 652 n. 1, 112 S. Ct. at 2691 n. 1 (1992).

Additionally, the record does not reflect whether the trial court ever considered any of the *Barker* factors. Because the trial court's oral statements do not meet the "minimally sufficient" baseline this Court has set for oral orders, the issue of alleged violations of a constitutional right to

a speedy trial must be remanded to the trial court for a determination inclusive of findings of fact and conclusions of law.

B. Replacement of Juror 7

[2] Defendant contends that the failure to replace Juror 7 was both an abuse of discretion and impacted his constitutional right to a unanimous verdict. Defendant did not raise the constitutional issue at trial. He raises it for the first time on appeal. "[A] purported error, even one of constitutional magnitude, that is not raised and ruled upon in the trial court is waived and will not be considered on appeal." *State v. Anderson*, 355 N.C. 136, 142, 558 S.E.2d 87, 92 (2002). Our Supreme Court repeatedly has held "constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Garcia*, 358 N.C. 382, 415, 597 S.E.2d 724, 748 (2004); *State v. Watts*, 357 N.C. 366, 372, 584 S.E.2d 740, 745 (2003). Because Defendant failed to raise his constitutional argument at trial, and the trial court had no opportunity to hear or rule on the issue, Defendant cannot raise a constitutional argument for the first time on appeal.

"The question of whether a juror shall be excused and replaced by an alternate is left to the discretion of the trial court, whose actions are reviewed under an abuse of discretion standard." *State v. Cox*, 190 N.C. App. 714, 717, 661 S.E.2d 294, 297 (2008). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.A.M.*, 378 N.C. 64, 71, 859 S.E.2d 163, 168 (2021).

When juror misconduct is alleged, which includes a juror falling asleep or failing to attend to the proceedings, "it is the trial court's responsibility to make such investigations as may be appropriate, including examination of jurors when warranted, to determine whether misconduct has occurred and, if so, whether such conduct has resulted in prejudice to the defendant." *State v. Salentine*, 237 N.C. App. 76, 81, 763 S.E.2d 800, 804 (2014) (cleaned up). "The trial court is vested with the discretion to determine the procedure and scope of the inquiry. On appeal, we give great weight to its determinations [of] whether juror misconduct has occurred . . . ." *Id.* (cleaned up). The trial court's decision "should only be overturned where the error is so serious that it substantially and irreparably prejudiced the defendant, making a fair and impartial verdict impossible." *State v. Gurkin*, 234 N.C. App. 207, 211, 758 S.E.2d 450, 454 (2014) (cleaned up).

In the case sub judice, Defense counsel reported to the trial court approximately halfway through the trial that Juror Number 7 "seemed

to be sleeping" and he was concerned she had "missed some evidence." Defense counsel requested that the juror be replaced. The trial court responded that "she could have been resting her eyes, or sleeping, or taking a break" and that it was not inclined to replace the juror at that time because "as far as I know, she was resting her eyes." Trial testimony continued for another day and a half. Defendant did not renew his objection concerning Juror Number 7 and no further concerns were noted in the record.

Defendant alleges the trial court erred by failing to investigate the issue after it had been raised. However, "there is no absolute rule that a court must hold a hearing to investigate juror misconduct upon an allegation . . . . Further, an examination of the juror involved in alleged misconduct is not always required, especially where the allegation is nebulous." *State v. Gurkin*, 234 N.C. App. 207, 212, 758 S.E.2d 450, 454 (2014) (cleaned up). The trial court sits in the best position to evaluate the significance of the allegation against the juror and acted within its discretion in declining to conduct further inquiry. Furthermore, there is no evidence that Defendant was prejudiced in any way by Juror Number 7 having closed her eyes for a short time. The trial court did not err in its refusal to replace Juror Number 7.

C. Clarification of Jury Instructions

[3] At the close of evidence, the trial court instructed the jury with all necessary information for their consideration including the pattern jury instructions for first- and second-degree murder. After beginning deliberations, the jury sent a note to the trial court asking for clarification on the difference between first- and second-degree murder. After a conference with the parties, the trial court stated it would give pattern instruction 206.14 regarding first- and second-degree murder. During the formal clarifying instruction, the trial court gave the full and complete instruction, including all references on intent to kill. The trial court omitted, however, the intent to kill requirement when giving the final mandate, a summary of the charge, to the jury before sending them back to deliberations. Defendant concedes he did not raise further objections to the instructions or to the jury's return to deliberations.

Defendant contends alleged jury instruction errors are automatically preserved, despite a failure to object at trial. Defendant cites to this Court's decision in *Richardson* to support his contention that "[w]hen a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection." *State v. Richardson*, 270 N.C. App. 149, 153, 838 S.E.2d 470, 474 (2020). We disagree. In *Richardson*

we addressed the specific scenario of the trial court omitting verbiage from instructions during its final mandate after giving the complete instruction. We held because "the trial court did not completely fail to give the agreed-upon instruction, Defendant's argument that the trial court erroneously delivered the mandate was not preserved for appellate review without further request or objection." *Id.* at 155, 838 S.E.2d at 475 (cleaned up).

Such is the scenario here. The trial court gave the full instruction, including all references on intent to kill. The trial court omitted the intent to kill requirement only when giving the final charge to the jury. Since the trial court did not "completely fail" to give the instruction, we cannot conclude Defendant's argument was preserved for review absent objection at trial.

Failure to preserve an alleged error for review shifts our analysis to a plain error standard of review.

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

N.C. R. App. P. 10(a)(4); *see also State v. Goss*, 361 N.C. 610, 622, 651 S.E.2d 867, 875 (2007), *cert. denied*, 555 U.S. 835, 129 S. Ct. 59 (2008). "[T]he plain error standard of review applies on appeal to unpreserved instructional or evidentiary error. For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012).

Defendant contends the trial court provided inconsistent instructions in its explanation of first- and second-degree murder. We disagree. Our Supreme Court has held that when a trial court properly instructs the jury concerning all elements of first-degree murder but fails to restate the intent to kill element during the final mandate, it is not contradictory but at most "incomplete at one important point." *State v. Stevenson*, 327 N.C. 259, 266, 393 S.E.2d 527, 530 (1990). Further, the Court in *Stevenson* determined that even with an "incomplete" instruction when there is significant evidence of guilt the trial court's inadvertent omission of the intent to kill element from the final mandate does not rise to the level of plain error. *Id.* at 266, 393 S.E.2d at 531.

Here, after the jury requested clarification, the trial court properly instructed the jury on all elements of the crime including the "intent to

kill" element which it referenced at least seven times. Additionally, as in *Stevenson*, significant evidence of Defendant's guilt was presented to the jury. Therefore, the trial court's "incomplete instruction" did not create a fundamental error sufficient to breech the plain error standard.

III. Conclusion

Notwithstanding that the trial court erred when it failed to make the necessary findings and conclusions of law to constitute a lawful order on Defendant's Motion to Dismiss for alleged violation of his constitutional right to a speedy trial, we conclude the error did not negatively impact the trial process. For the foregoing reasons, we conclude Defendant received a fair trial free from prejudicial error. We remand this case to the trial court with directions as follows:

The presiding judge shall make the necessary findings and conclusions of law to support an order on Defendant's Motion to Dismiss. As in *Clark*, "if the trial court determines that defendant's right to a speedy trial was violated, then the court shall find the facts and enter an order vacating judgment, setting aside the verdict, and dismissing the indictment[s] as to [all] charges." *State v. Clark*, 201 N.C. App. 319, 330, 689 S.E.2d 553, 561 (2009). If the trial court determines that Defendant's right to a speedy trial was not violated, the court shall find the facts and conclusions of law and enter an order denying Defendant's motion to dismiss and order commitment to issue in accordance with the judgment entered at the 15 March 2023 session of Pasquotank County Superior Court. It is so ordered.

NO PREJUDICIAL ERROR IN PART; REMANDED FOR ORDER ON SPEEDY TRIAL ISSUE.

Judge GRIFFIN concurs by separate opinion.

Judge STADING concurs in the majority and the concurring opinion.

GRIFFIN, Judge, concurring.

Defendant contends the trial court erred by denying his motion to dismiss because he was denied a speedy trial. Defendant argues in the alternative, and the majority agrees, the trial court should have made findings of fact and conclusions of law in support of denying Defendant's motion. I concur with the result the majority reaches because precedent

demands it. However, I write separately to highlight inconsistent precedents which changed the applicable law.

The majority relies on *State v. Wilkerson*, to hold:

> a trial court errs when making determinations "without considering all of the *Barker* factors and making appropriate findings." *State v. Wilkerson*, 257 N.C. App. 927, 929, 810 S.E.2d 389, 391 (2018).

After reviewing the relevant precedent, it becomes apparent *Wilkerson* misapprehends and misapplies the law established in *State v. Barker*; specifically, by failing to acknowledge and give proper deference to the threshold inquiry of whether the delay is presumptively prejudicial–only after which full examination of the *Barker* factors is required.

Both the law of North Carolina and the Sixth Amendment to the United States Constitution "guarantee those persons formally accused of crime the right to a speedy trial." *State v. Avery*, 302 N.C. 517, 521, 276 S.E.2d 699, 702 (1981) (citations omitted). *See also* U.S. Const. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]"). The United States Supreme Court first recognized the right as fundamental and incorporated its protections against state actors in *Klopfer v. State of North Carolina* through the Fourteenth Amendment's Due Process Clause. 386 U.S. 213, 222–23 (1967). The Court revisited the issue in *Barker v. Wingo*, 407 U.S. 514, 522 (1972). Recognizing "the right to speedy trial is a more vague concept than other procedural rights" with an "amorphous quality" that does not lend itself to a brightline test, the Court set forth a four-factor balancing test to determine whether a defendant's Sixth Amendment right to a speedy trial has been violated. 407 U.S. 514, 521–23, 526, 529–30; *id.* at 527 ("The nature of the speedy trial right does make it impossible to pinpoint a precise time in the process when the right must be asserted or waived[.]"). The test, requiring analysis of: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) prejudice to the defendant, provides courts with a mechanism through which they may determine and weigh the respective roles which both the state and the defendant played in preventing the swift administration of justice. *Id.* at 530.

However, in addition to being one of the factors, the length of the delay "is to some extent a triggering mechanism. Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id. See also Doggett v. U.S.*, 505 U.S. 647, 651–52 (1992) ("Simply to trigger a speedy trial analysis, an

accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]" (citation omitted)). Whether the length of the delay warrants a full *Barker* analysis is fact-specific and "dependent upon the peculiar circumstances of the case," *Barker*, 407 U.S. at 530–31; the determination of which is "within the sound discretion of the trial court," *State v. Pippin*, 72 N.C. App. 387, 392, 324 S.E.2d 900, 904 (1985) (citations omitted). Nevertheless, the law allows for longer delays where the nature of the crime demands more extensive efforts by law enforcement and the State. *See Barker*, 407 U.S. at 531 ("[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."). *See also Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904 (collecting cases on the issue).

Regardless of the length of the delay, "the burden is on an accused who asserts denial of his right to a speedy trial to show the delay was due to the neglect or willfulness of the prosecution." *State v. Dietz*, 289 N.C. 488, 494–95, 223 S.E.2d 357, 361 (1976) (citations omitted). When a defendant makes this assertion based upon conjectural and conclusory allegations, "the trial court is not always required to conduct an evidentiary hearing and make findings of facts and conclusions of law." *State v. Chaplin*, 122 N.C. App. 659, 663, 471 S.E.2d 653, 656 (1996) (citing *Dietz*, 289 N.C. at 495, 223 S.E.2d at 362). Moreover, as the majority notes, a trial court is not required to enter a written order but may adjudicate the issue orally when there is no conflict in the evidence. *State v. Dixon*, 261 N.C. App. 676, 682, 821 S.E.2d 232, 238 (2018). Bookending this analysis is the fact that "[a] criminal defendant who has caused or acquiesced in a delay will not be permitted to use it as a vehicle in which to escape justice." *State v. Tindall*, 294 N.C. 689, 695–96, 242 S.E.2d 806, 810 (1978).

This Court's line of opinions in *State v. Howell*, 211 N.C. App. 613, 711 S.E.2d 445 (2011), *State v. Wilkerson*, 242 N.C. App. 253, 775 S.E.2d 925, 2015 WL 4081964 (2015) (*Wilkerson I*), and *State v. Wilkerson*, 257 N.C. App. 927, 810 S.E.2d 389 (2018) (*Wilkerson II*), misconstrue this well-established precedent.

In *Howell*, we addressed a situation in which the trial court dismissed a defendant's criminal charges after he moved for dismissal based upon various statutory violations relating to the timeliness of his trial. *Howell*, 211 N.C. App. at 614, 711 S.E.2d at 447. The trial court dismissed the case in part because the defendant's Sixth Amendment right to a speedy trial had been violated, but ultimately the grounds upon which it made its decision were unclear. *Id.* at 616–17, 711 S.E.2d at 448. Accordingly, we held "[i]n order to conclude there has been a Sixth Amendment violation

of a defendant's right to a speedy trial, the trial court must examine and consider *all* the *Barker* factors listed above." *Id.* at 618, 711 S.E.2d at 449 (citation omitted).

In *Wilkerson I*, however, we faced an inapposite situation where a defendant alleged the trial court erred by not dismissing his charges. *Wilkerson I*, 2015 WL 4081964, at *1. There, the trial court heard two separate motions alleging the defendant's constitutional rights to a speedy trial had been violated. *Id.* at *15. Ruling on the second motion following a hearing, the trial court stated "[t]he defendant has made an insufficient showing to justify a dismissal under speedy trial grounds. The motion to dismiss is denied." *Id.* at *16. Turning our precedent in *Howell* on its head, and without discussing the role the first factor plays in triggering a full *Barker* analysis, we held:

> The trial court erred by summarily denying Defendant's motion without considering all of the Barker factors and making appropriate findings. Therefore, we must remand this case to the trial court for a proper application of the *Barker* test. *See Howell*, 211 N.C. App. at 620, 711 S.E.2d at 450 (remanding motion to dismiss based on speedy trial grounds to trial court due to its failure to "conduct a full inquiry into all of the Barker factors before making its determination.").

Id. The misapplication of the law in *Wilkerson I* is obvious when considering the Supreme Court's statement in *Barker* that "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. *See also Doggett*, 505 U.S. at 651–52 ("Simply to trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from 'presumptively prejudicial' delay[.]"). Moreover, the *Wilkerson I* Court failed to appreciate the material differences between dismissing criminal charges against a defendant and denying their motion. A conclusion that a defendant's Sixth Amendment right to a speedy trial has been violated reasonably requires an in-depth and nuanced analysis as "[t]he amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived." *Barker*, 407 U.S. at 522. Ruling against a defendant's motion to dismiss for an alleged Sixth Amendment violation where there is not presumptive prejudice, however, allows our justice system to run its course efficiently and is a matter "initially within the sound discretion of the trial court." *Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904 (citations omitted).

Subsequently, in *Wilkerson II*, this Court construed the *Wilkerson I*'s holding to mean it found presumptive prejudice, despite the *Wilkerson I* Court never stating so. Specifically, the *Wilkerson II* court stated "[t]his Court had previously remanded this matter to the trial court for a full review and application of the *Barker* factors, indicating the length of delay was sufficient to trigger such a review." *Wilkerson II*, 257 N.C. App. at 392, 810 S.E.2d at 930 (citing *Wilkerson I*, 2015 WL 4081964, at *15–*16). At this point, it is worth noting the gap in logic here. If our remand in *Wilkerson I* indicated "the length of delay was sufficient to trigger" a full *Barker* analysis, then the trial court's order in the first instance also indicated the opposite: it did not find the length of delay presumptively prejudicial. In fact, the trial court initially stated "[t]he defendant has made an insufficient showing to justify a dismissal under speedy trial grounds." *Wilkerson I*, 2015 WL 4081964, *16. On remand, the trial court plainly and clearly explained its reasoning for finding the delay was not presumptively prejudicial:

> From the date of the defendant's arrest on July 2, 2010 until the beginning of trial on April 21, 2014 is over three years and nine months. This amount of time is noteworthy, but considering all of the matters necessarily involved in the preparation by the prosecution and the defense of this case involving a first degree murder charge with co-defendants, including pretrial discovery, investigation and analysis of crime scene and crime laboratory analysis, it is not *per se* prejudicial.

Again, this being a matter "initially within the sound discretion of the trial court[,]" *Pippin*, 72 N.C. App. at 392, 324 S.E.2d at 904 (citations omitted), there was "no necessity for inquiry into the other factors that go into the balance." *Barker*, 407 U.S. at 530. In contradiction to our *Wilkerson I* and *Wilkerson II* holdings, the inquiry ought to have stopped upon the initial finding that there was not presumptive prejudice. This misapprehension and misunderstanding deserves clarification so that our courts do not continue to rely on this apparent error.

Nonetheless, I concur with the result the majority reaches for two reasons. First, despite its erroneous foundations, we are bound by the precedent created by *Wilkerson I* and *II*. Second, as the majority states, because of "the trial court's indeterminant statements, it cannot be determined whether the trial court resolved the issue of presumptive prejudice." In light of the trial court's indefinite language, remanding the order solely for entry of findings on whether Defendant has shown presumptive prejudice is proper. If the trial court determines there was presumptive prejudice, then it should engage in a full *Barker* analysis.

STATE v. SPRY

[297 N.C. App. 641 (2025)]

STATE OF NORTH CAROLINA
v.
NICHOLAS JAMES SPRY

No. COA24-129

Filed 5 February 2025

1. Criminal Law—motion for appropriate relief—summary denial—factual issues unresolved—hearing required on remand

The trial court erred by summarily denying defendant's motions for appropriate relief—in which defendant challenged the voluntariness of his guilty plea on the grounds that he was never informed that he would be subject to sex offender registration or five years of post-release supervision, conditions that were added as a correction to the original judgment without prior notice to defendant or opportunity to be heard—where there was a question of fact whether defendant entered his guilty plea under a misapprehension and where the record on appeal was devoid of any verbatim transcript of the plea proceedings. The trial court's orders were vacated and the matter was remanded for the trial court to hold an evidentiary hearing, receive and consider evidence, and make additional findings of fact.

2. Sexual Offenders—registration—mandatory—effect on validity of guilty plea—collateral consequence

In a criminal matter in which defendant pled guilty to an offense compelling mandatory sex offender registration (pursuant to N.C.G.S. § 14-208.7), in evaluating defendant's claim in a motion for appropriate relief that his plea was not voluntary because he was not made aware of the registration requirement prior to pleading guilty, the trial court did not err by holding that the registration requirement was a collateral rather than a direct consequence of the guilty plea.

3. Criminal Law—guilty plea—voluntariness—extended post-release supervision added later—direct consequence of plea

Where defendant entered a plea of guilty to robbery and kidnapping charges without being made aware that he would be subjected to an extended period of post-release supervision (although defendant's initial judgment placed him on nine months of post-release supervision, that component was later amended to five years without notice to defendant or an opportunity to be heard), the trial court

erred by summarily dismissing defendant's supplemental motion for appropriate relief (MAR) challenging the voluntariness of his guilty plea. First, defendant pled sufficient facts in his initial MAR to preserve this argument in his subsequent filing. Further, since post-release supervision is a direct consequence of a guilty plea—as distinguished from satellite-based monitoring and sex offender registration—because it has a definite, immediate, and essentially automatic effect on the range of punishment, the details of such supervision must be conveyed to a defendant before entry of a guilty plea.

Appeal by defendant by writ of certiorari from orders entered 7 March 2023 and 2 June 2023 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General, Caden W. Hayes, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender, Heidi Reiner, for the defendant.

TYSON, Judge.

Nicholas James Spry ("Defendant") appeals the 7 March 2023 order denying his Motion for Appropriate Relief (MAR) and the 2 June 2023 order denying his "supplemental" MARs. We vacate and remand to the trial court to hold an evidentiary hearing regarding Defendant's MARs.

I. Background

Defendant robbed an adult employee at a restaurant in Greensboro on 25 November 2006. He was subsequently indicted for three crimes stemming from that robbery: common law robbery, second-degree kidnapping, and attempted second-degree kidnapping. The two kidnapping indictments alleged Defendant had attempted to kidnap Kate and had kidnapped Leslie, who were both "person[s] under the age of sixteen (16) years."

Defendant entered into a plea bargain and pled guilty to all three charges on 30 January 2007. Consistent with the plea arrangement, the trial court consolidated the offenses for judgment and sentenced Defendant to an active term of 25 to 39 months of imprisonment, and he was placed on nine months of post-release supervision. On the original judgment, the sentencing judge failed to check the box indicating

"the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6."

The Combined Records Section of North Carolina Department of Correction sent a letter to the trial court in February 2007 asking for clarification of the victims' ages for the kidnapping and attempted kidnapping offenses. Without prior notice nor Defendant being present, the trial court entered a "corrected" judgment on 5 March 2007, which included the now-checked box indicating "the above designated offense(s) is a reportable conviction involving a minor. G.S. 14-208.6."

Defendant originally pled guilty to second-degree kidnapping and attempted second-degree kidnapping, both in violation of N.C. Gen. Stat. § 14-39 (2005). After the "correction" of the original judgment, and although the indictment did not allege Defendant had committed a sexual offense against the purportedly minor victims, Defendant was required to register under the Sex Offender and Public Protection Registration Program pursuant to N.C. Gen. Stat. § 14-208.6(4) (2005). *See* N.C. Gen. Stat. §§ 14-208.5 to 14-208.46 (2023) (Sex Offender and Public Protection Registration Programs); *State v. Sakobie*, 165 N.C. App. 447, 453, 598 S.E.2d 615, 619 (2004) ("The language of section 14-208.6(1[m]) is clear and unambiguous: an offense against a minor includes kidnapping pursuant to N.C. Gen. Stat. § 14-39.").

Because the kidnapping offenses required Defendant to register as a sex offender, Defendant was also sentenced to five years of post-release supervision pursuant to N.C. Gen. Stat. § 15A-1368.2(c) (2005) (providing a person convicted of a class F through I felony was required to receive nine months of post-release supervision "unless the offense is an offense for which registration is required," in which case "the period of post-release supervision is five years"). In sum, the "corrected" judgment sentenced Defendant to 25 to 39 months of active imprisonment, placed him on five years of post-release supervision, and required him to register as a sex offender.

Defendant was not present when the "corrected" judgment was entered, and the record is devoid of any proof Defendant was aware of the letter sent from Combined Records. Defendant's first MAR asserts Defendant only learned of the "corrected" judgment shortly before he was released from prison in April of 2009, more than two years after the "corrected" judgment was entered.

Richard Wells ("Wells"), the counsel who represented Defendant when he entered into the plea agreement on 30 January 2007, was appointed to represent Defendant on his Petition for Termination of Sex

Offender Registration in 2022. When reviewing Defendant's court documents, Wells "noticed that [he] almost certainly didn't advise [Defendant] on sex registration." Wells noticed this, in part, because Wells had failed to instruct another defendant on mandatory sex registration in an unrelated case on 7 February 2007, merely one week after Defendant entered into his plea agreement. Wells, on his own initiative, met with Defendant and agreed to draft a MAR.

Defendant, proceeding *pro se*, filed the MAR drafted by Wells on 26 January 2023, nearly sixteen years after the "corrected" judgment was entered. The MAR sought to vacate Defendant's guilty plea, asserting Defendant was never informed he would be required to register as a sex offender or be subject to the extended post-release supervision consequences of that registration status. Defendant supported his MAR with the following: (1) his own affidavit; (2) an affidavit from his trial counsel, both of whom asserted neither sex offender registration nor extended post-release supervision were ever discussed prior to Defendant's guilty plea; and, (3) the letter from Combined Records to the court, which led to an amended judgment identifying the kidnapping as a reportable conviction involving a minor.

The trial court summarily denied Defendant's MAR on 7 March 2023 based upon its finding the "matter presents only legal issues, which may be resolved without an evidentiary hearing." The court in the order found: (1) sex offender registration constituted a collateral consequence of Defendant's guilty plea; (2) sex offender registration did not affect the voluntariness of Defendant's plea; and, (3) potential registration did not need to be disclosed by Defendant's counsel.

Although Defendant was never provided with the requested transcript of his plea, the trial court found the original sentencing judge had "asked all of the required questions and made all of the findings set forth in NCGS 15A-1022," and "the trial court's plea colloquy with Defendant was in all respects legally valid."

The trial court took judicial notice of the following facts: Defendant had filed his MAR "more than fifteen" years after he had entered his plea; Defendant had been convicted of failing to register as a sex offender on multiple occasions in 2012; Defendant pled guilty to failing to register as a sex offender in 2016; Defendant did not challenge his duty to register as a sex offender in those subsequent proceedings, either prior to his failure to register as a sex offender convictions or in postconviction MARs; and, Defendant waited to file his MAR after his request to be removed from the sex offender registration was denied. The trial court found "the unambiguous record shows Defendant was well aware of his

requirement to register as a sex offender when he entered his guilty plea in this case in 2007."

Defendant filed additional motions on 1 May and 17 May 2023, which sought relief in a "supplemental" MAR and a copy of the stenographic transcript of the plea hearing. In the first motion, Defendant again argued his plea was involuntary, emphasizing he was unaware he would be placed on post-release supervision for five years because of his sex offender registration, when he agreed to, expected to, and was originally sentenced to receive nine months post-release supervision. He also argued his first MAR was improperly denied without an evidentiary hearing. In his second motion on 17 May 2023, he contended, for the first time, that the sentencing judge had "made improper statements regarding plea and participated in plea arrangement."

The trial court denied Defendant's motions on 2 June 2023. The order treated petitioner's two filings as "supplemental" MARs and summarily denied both filings as procedurally barred, based on the denial of petitioner's original MAR. The record is devoid of any proof Defendant ever received a transcript of the original plea hearing. Defendant appeals.

II. Jurisdiction

A prior panel of this Court granted Defendant's petition for writ of *certiorari* on 31 August 2023. N.C. R. App. P. 21(a)(1). *See State v. Saldana*, 291 N.C. App. 674, 677, 896 S.E.2d 193, 196 (2023) ("Because Defendant filed the MAR 'long after the time for taking appeal had expired, he can obtain appellate review of the court's ruling only by a petition for a *writ of certiorari*.' " (quoting *State v. Isom*, 119 N.C. App. 225, 227, 458 S.E.2d 420, 421 (1995))), *review dismissed*, *cert. denied*, 901 S.E.2d 800 (2024).

III. Motions for Appropriate Relief

Defendant seeks review of the 7 March 2023 order summarily denying his original MAR and the 2 June 2023 order denying his supplemental MARs. Defendant argues the trial court erred by summarily denying his MARs and concluding his guilty plea was knowingly and voluntarily entered and the consequences thereof were collateral or indirect.

A. Standard of Review

This Court reviews *de novo* an order summarily denying an MAR. *State v. Allen*, 378 N.C. 286, 296, 861 S.E.2d 273, 281 (2021). The Court must determine "whether the evidence contained in the record and presented in [the] MAR—considered in the light most favorable to [Defendant]—would, if ultimately proven true, entitle him to relief." *Id.*

A defendant is entitled to an evidentiary hearing on his MAR "[i]f answering this question requires resolution of any factual disputes[.]" *Id.* at 297, 861 S.E.2d at 281. "By contrast, when a defendant's MAR 'presents only questions of law, including questions of constitutional law, the trial court must determine the motion without an evidentiary hearing.' " *Id.* at 296, 861 S.E.2d at 281 (quoting *State v. McHone*, 348 N.C. 254, 257, 499 S.E.2d 761, 763 (1998)).

The trial court summarily denied Defendant's MAR after finding the motion presented solely a legal question versus a factual one: whether the requirement that Defendant register as a sex offender and its consequences affected the validity of his guilty plea.

B. Analysis

"Under *Boykin*, due process, as established by the Fourteenth Amendment to the United States Constitution, requires that a defendant's guilty plea be made voluntarily, intelligently and understandingly." *State v. Bozeman*, 115 N.C. App. 658, 661, 446 S.E.2d 140, 142 (1994) (citing *Boykin v. Alabama*, 395 U.S. 238, 244, 23 L. Ed. 2d 274, 280 (1969)).

"Although a defendant need not be informed of all possible indirect and collateral consequences, the plea nonetheless must be 'entered by one fully aware of the *direct consequences*, including the actual value of any commitments made to him by the court. . . .' " *Id.* (first quoting *Brady v. United States*, 397 U.S. 742, 755, 25 L. Ed. 2d 747, 760 (1970) (emphasis supplied); then citing *State v. Mercer*, 84 N.C. App. 623, 627, 353 S.E.2d 682, 684 (1987)).

"Direct consequences are those that have a definite, immediate and largely automatic effect on the range of the defendant's punishment." *State v. Smith*, 352 N.C. 531, 551, 532 S.E.2d 773, 786 (2000) (quotation marks and citation omitted). "However, [t]he imposition of a sentence or sentences may have a number of collateral consequences, and a plea of guilty is not rendered involuntary in a constitutional sense if the defendant is not informed of *all of the possible* indirect and collateral consequences." *State v. Bare*, 197 N.C. App. 461, 479, 677 S.E.2d 518, 531 (2009) (emphasis supplied) (quotation marks and citation omitted).

Nevertheless, "[a] defendant cannot plead guilty without being informed of collateral consequences that might affect their taking the plea." *State v. Womble*, 277 N.C. App. 164, 193, 858 S.E.2d 304, 323 (2021) (citing *Padilla v. Kentucky*, 559 U.S. 356, 371, 176 L. Ed. 2d 284, 297 (2010)).

Defendant argues he was not informed and was factually unaware of two consequences when entering his guilty plea to the two kidnapping

charges: (1) sex offender registration; and, (2) the imposition of five years of post-release supervision, compared to the nine months of post-release supervision to which the parties agreed in the plea agreement and imposed in the original judgment.

1. Question of Fact

[1] Before we address whether sex offender registration or the extended post-release supervision period to which Defendant was subjected were direct or collateral consequences of Defendant's guilty plea, we must address whether the trial court erred by failing to hold an evidentiary hearing. Defendant argues the trial court erred by summarily dismissing his MARs. We agree.

A defendant is entitled to an evidentiary hearing if the trial court's ruling on a defendant's MAR requires the trial court to settle "any factual disputes[.]" *Allen*, 378 N.C. at 297, 861 S.E.2d at 281. Additionally, our General Statutes require trial courts to record and retain "[a] verbatim record of the proceedings at which the defendant enters a plea of guilty[.]" N.C. Gen. Stat. § 15A-1026 (2023). "This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor, and any responses." *Id.*

"[I]n most cases[,] reference to the verbatim record of the guilty plea proceedings will conclusively resolve all questions of fact raised by a defendant's motion to withdraw a plea of guilty and will permit a trial judge to dispose of such motion without holding an evidentiary hearing." *State v. Dickens*, 299 N.C. 76, 84, 261 S.E.2d 183, 188 (1980) (citation omitted). "[R]egardless of whether evidentiary hearings are held, the importance of protecting the innocent and [e]nsuring that guilty pleas are a product of free and intelligent choice requires that such claims be patiently and fairly considered by the courts." *Id.* (quotation omitted).

In *State v. Dickens*, our Supreme Court held the trial court should have conducted an evidentiary hearing regarding whether the defendant had agreed to a plea bargain while under a misapprehension regarding his sentence:

> We note the record on appeal in this case does not contain a verbatim record of the proceedings at which defendant entered his pleas of guilty. *See* G.S. 15A-1026. Absent such a verbatim record, we have no way of determining the import of defendant's failures to give written answers to Questions 7 and 10 in the Transcript of Plea. Nor do we know the nature of the representations, if any, made by

> defendant, defendant's trial attorney, or the prosecutor in response to mandatory inquiries by the trial court as to whether any plea bargains had been made or discussed. *See* G.S. 15A-1022(b). On this record we must conclude that defendant's allegations *raise a question of fact as to whether defendant entered the guilty pleas* under the misapprehension that a plea bargain had been made with respect to sentence. Accordingly, *an evidentiary hearing must be held* in which defendant "has the burden of proving by a preponderance of the evidence every fact essential to support the motion." G.S. 15A-1420(c)(5).

Id. at 84-85, 261 S.E.2d at 188 (emphasis supplied).

Here, as in *Dickens*, "the record on appeal in this case does not contain a verbatim record of the proceedings at which defendant entered his pleas of guilty." *Id.* at 84. The sentencing court was statutorily obligated to create such a record, pursuant to N.C. Gen. Stat. § 15A-1026, and its absence from the record on appeal limits this Court's ability to adjudicate Defendant's claims. *Id.* Although the trial court made findings of fact in its first 7 March 2023 order indicating it had reviewed the transcript of Defendant's guilty plea, the record before us is devoid of any transcript of those proceedings. Defendant's request for the transcript of entry of his pleas in his supplemental MAR was also summarily denied by the trial court on 2 June 2023.

Similar to *Dickens*, "the trial court should have held a hearing, received evidence under oath from defendant personally and from his trial counsel [Richard Wells], together with any other relevant evidence, and then made findings of fact as to whether or not defendant entered the guilty pleas under [a] misapprehension[.]" *Dickens*, 299 N.C. at 83, 261 S.E.2d at 187. For these reasons, we remand this matter to the trial court to hold an evidentiary hearing to receive, hear, and resolve factual issues regarding whether Defendant's guilt was entered into "voluntarily, intelligently and understandingly." *Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142.

2. Sex Offender Registration

[2] North Carolina appellate courts have not addressed whether the sex offender registration requirement, as outlined in N.C. Gen. Stat. § 14-208.7, should be considered a direct or collateral consequence of a guilty plea to an offense compelling mandatory sex offender registration. N.C. Gen. Stat. § 14-208.7 (2023). In *State v. Bare*, this Court rejected a defendant's argument that a related requirement, lifetime

satellite-based monitoring ("SBM"), constituted a direct consequence of the defendant's plea:

> We disagree that lifetime satellite-based monitoring was an automatic result of defendant's no contest plea. "When an offender is convicted of a reportable conviction as defined by N.C. Gen. Stat. § 14-208.6(4), during the sentencing phase," the trial court is required to separately determine whether an offender meets the criteria subjecting him to SBM. N.C. Gen. Stat. § 14-208.40A. If there has been no determination by the court whether an offender is required to enroll in SBM, the DOC makes the initial determination, schedules a hearing, notifies the offender, and the trial court determines in a separate hearing whether the offender falls under one of the categories subjecting him to SBM. N.C. Gen. Stat. § 14-208.40B (2007). Therefore, imposition of SBM was not an automatic result of his no contest plea, unlike a mandatory minimum sentence or an additional term of imprisonment.

State v. Bare, 197 N.C. App. 461, 480, 677 S.E.2d 518, 531-32 (2009).

Although Defendant acknowledges the ruling in *Bare*, Defendant argues sex offender registration differs from SBM because it is a direct and immediate consequence of pleading guilty to certain crimes. Before a defendant is subjected to SBM, a separate hearing is held after a judgment has been entered. *Id*. (explaining SBM is "not an automatic result" of a guilty plea because "the DOC makes the initial determination, schedules a hearing, notifies the offender, and the trial court determines in a separate hearing whether the offender falls under one of the categories subjecting him to SBM").

Defendant argues sex offender registration differs from SBM, because the registration requirement is an immediate consequence following a conviction for certain crimes, as indicated by the check-box option requiring mandatory sex offender registration on the front page of a criminal judgment.

This Court has held our General Assembly's intent when enacting the sex offender registration statute was nonpunitive. *State v. White*, 162 N.C. App. 183, 197, 590 S.E.2d 448, 457 (2004) ("Since North Carolina only requires registration for ten years, N.C. Gen. Stat. § 14-208.7, we hold that the registration requirements are not excessive in light of the General Assembly's nonpunitive objective.").

Other states have agreed sex offender registration is nonpunitive. *See*, *e.g.*, *State v. Legg*, 28 Kan. App. 2d 203, 207, 13 P.3d 355, 358 (2000) ("Sex offender registration is not penal in nature or a direct consequence to a plea."). Most states have concluded sex offender registration constitutes a collateral consequence, which does not impact the validity of a guilty plea. *See Magyar v. State*, 18 So. 3d 807, 812 fn. 5 (Miss. 2009) (collecting cases from twenty-eight states and holding "although we do not recognize the law of other states as controlling precedent, our decision today is nevertheless aided by the viewpoint of virtually every other jurisdiction to address the question" viewed sex offender registration as a collateral consequence of a guilty plea).

We find the research and analysis by the court in *Magyar* persuasive. The court in *Magyar* researched the way other states handled this question and found twenty-eight states have held sex offender registration is a collateral consequence of a guilty plea. *Magyar*, 18 So. 3d at 812 fn. 5. While other states' decisions are not binding upon this Court, they are persuasive. *N.C. Ins. Guar. Ass'n v. Weathersfield Mgmt.*, 268 N.C. App. 198, 203, 836 S.E.2d 754, 758 (2019) (citation omitted) ("When this Court reviews an issue of first impression, it is appropriate to look to decisions from other jurisdictions for persuasive guidance.").

We agree with the overwhelming majority of state courts and hold sex offender registration is a collateral consequence of a guilty plea to a crime requiring registration. *Id.*; *Magyar*, 18 So. 3d at 812 fn. 5. The trial court did not err by holding the requirement for Defendant to register as a sex offender is a collateral consequence of his guilty plea.

3. Extended Post-Release Supervision

[3] The trial court's first 7 March 2023 order found sex offender registration was a collateral consequence of Defendant's guilty plea. The order, however, failed to mention the extended post-release supervision period to which Defendant was subjected and which was imposed as a result of his plea.

Defendant's first "supplemental" MAR, filed on 1 May 2023 and titled "Motion to Vacate Trial Court's Order AND Supplemental Motion for Appropriate Relief," emphasized Defendant's post-release supervision argument. Defendant included the following information in this motion:

> Defendant signed a plea for 25-39 months active with the impression that he would do 25-30 months to be released on 9 months (PRS). . . . [D]efendant was not admonished that he would be subject to registration requirements or

> the lengthier 5 years PRS and its much more onerous conditions of supervision. Specifically, [D]efendant was not advised that a condition of his PRS would be that minors would not be allowed to live with him during his time on PRS. Defendant was ultimately forced to kick his own brother(s) out and into foster care. Defendant served ten months on PRS before it was revoked. He therefore spent 40 months of imprisonment, and was prejudiced by a lengthier sentence th[a]n he had agreed to.

The affidavit attached to this motion contained the following:

> 3. I was forced to kick my minor brothers out of my apartment when my PRS officer discovered they were living with me. I was not aware that a direct consequence of my plea forbid minors to live with me during my time on PRS. At the time in 2009-2010[,] my mother had been suffering from serial homelessness for years. I was aware of this, and the fact that my brothers were likely to be in need of help with housing upon my release, when I took the plea.

The trial court's 2 June 2023 order, which summarily dismissed Defendant's supplemental MARs, found this motion "essentially reargues [Defendant's] previous MAR and asks this Court to change its ruling." The trial court summarily dismissed Defendant's supplemental MARs.

On appeal, the State argues Defendant's post-release supervision argument is procedurally barred because Defendant failed to raise it in his first MAR. We disagree.

Defendant's first MAR asserted the following:

> 4. Prior to entry of the plea, and in discussion with defense counsel Richard Wells, no mention was made of the possibility of having to register under the Sex Offender and Public Protection Registration Program (Sex Registry). My guilty plea was not fully informed because it left out this very important and restrictive detail. I would then, and still now, plead guilty to the Common Law Robbery. But I would not have pled guilty to the kidnapping-related charges had I known sex registration was the result.
>
> . . .
>
> 12. In addition, it is my belief that these sex registerable kidnapping-related convictions resulted in my receiving

> 5 years of post-release supervision. This time period is different than persons convicted of crimes that do not carry sex registration. *NCGS 15A-1368.2(c)*. This additional post-release supervision was never explained to me prior to my 2007 plea[,] and I have never attended a court hearing where I had notice and a chance to address this question in a courtroom. This additional sanction of definite and potential increased time on post-release supervision is a violation of constitutional principles as noted in *Blakely v. Washington*, 542 US 296 (2004). See also "Reportable Kidnapping," Jamie Markham, NCSOG Criminal Law Blog (Feb 5th, 2015).

Defendant pled sufficient facts in this motion to preserve Defendant's post-release supervision argument.

Defendant similarly argues his plea was not knowing and voluntary because it resulted in sixty (60) months of post-release supervision, a term that only applies to sex offenders. He asserts this extended supervision was not mentioned nor agreed to during his plea negotiations or hearing. Defendant also asserts the extended post-release supervision should be considered a direct consequence, which would render his guilty plea involuntary. He argues the statute mandating sixty (60) months of post-release supervision creates "a definite, immediate and largely automatic effect on the range of the defendant's punishment." *Smith*, 352 N.C. at 551 (internal quotations and citations omitted).

a. Statutory Guidance

N.C. Gen. Stat. § 15A-1022 (2023) sets out the requirements for advising criminal defendants of the consequences of their guilty pleas. The statute does not include a requirement for a defendant to be informed of post-release supervision before the trial court may accept a defendant's guilty plea. *See id.*

N.C. Gen. Stat. § 15A-1368(a)(1) (2023) defines post-release supervision as "[t]he time for which a sentenced prisoner is released from prison before the termination of his maximum prison term[.]" N.C. Gen. Stat. § 15A-1368(a)(1). One of the purposes of post-release supervision is "to monitor and control the prisoner in the community[.]" *Id.*

b. State v. Bare

This Court in *State v. Bare* clearly distinguished SBM and sex offender registration from post-release supervision and probation:

> The sex offender registration requirements may also be imposed as a condition to probation or post-release supervision. *See* N.C. Gen. Stat. § 15A-1343(b2)(1) (2007) (registration "as required by N.C. Gen. Stat. § 14-208.7" is included as a "special condition of probation"); N.C. Gen. Stat. § 15A-1368.4(b1)(1) (2007). In *Smith*, the United States Supreme Court examined whether registration requirements for sex offenders were parallel to supervised release or probation, which are punishments for crime. 538 U.S. at 101-02, 123 S. Ct. at 1152, 155 L. Ed. 2d at 182. The Supreme Court distinguished the registration requirements from conditions imposed by probation because offenders were still "free to move where they wish and to live and work as other citizens with no supervision." *Id.* While SBM results in electronic monitoring of an offender's whereabouts, the record does not indicate that it restricts an offender's liberty in matters such as where to live and work. SBM is therefore similar to registration requirements in this regard *and is distinguishable from probation, parole, and post-release supervision. See id.*

Bare, 197 N.C. App. at 470-71, 677 S.E.2d at 526 (emphasis supplied). The reasoning in *Bare* states the classification of SBM monitoring and sex offender registration as collateral consequences does not also mean post-release supervision is also a collateral consequence. *Id.* Instead, the Court in *Bare* states post-release supervision is "distinguishable" and is a "punishment[ ] for a crime." *Id.*

The courts in New York, New Jersey, and Kansas agree with the reasoning in *Bare*. Each of those jurisdictions has found the failure to advise a pleading defendant about a mandatory term of post-release supervision renders a plea involuntary. *See People v. Catu*, 825 N.E.2d 1081 (N.Y. 2005) ("Because a defendant pleading guilty to a determinate sentence must be aware of the post[-]release supervision component of that sentence in order to knowingly, voluntarily and intelligently choose among alternative courses of action, the failure of a court to advise of post[-]release supervision requires reversal of the conviction."); *State v. Johnson*, 864 A.2d 400, 405 (N.J. 2005) (holding that being subject to a "mandatory period of parole supervision constituted a direct, penal consequence of defendant's plea" and that "because defendant was not informed about the consequences of being subject to [the] fixed period of parole supervision, . . . he is entitled to seek the vacation of his plea");

Helms v. State, 281 P.3d 180 (Kan. Ct. App. 2012) (unpublished) ("The State concedes that the district court failed to mention the mandatory post[-]release supervision requirements until Helm's sentencing hearing. Accordingly, Helm's pleas must be set aside.").

In accordance with *Bare*, we hold post-release supervision is distinguishable from SBM and sex offender registration. *Bare*, 197 N.C. App. at 470-71, 677 S.E.2d at 526 (explaining SBM is "distinguishable from probation, parole, and post-release supervision" because it does not "restrict[ ] an offender's liberty in matters such as where to live and work").

Our General Statutes also indicate the purpose of post-release supervision is "to monitor and control the prisoner in the community," and post-release supervision is not intended to be nonpunitive in nature. *Compare* N.C. Gen. Stat. § 15A-1368(a)(1) *with State v. White*, 162 N.C. App. 183, 197, 590 S.E.2d 448, 457 (2004) ("Since North Carolina only requires registration for ten years, N.C. Gen. Stat. § 14-208.7, we hold that the registration requirements are not excessive in light of the General Assembly's nonpunitive objective.").

The five years of post-release supervision to which Defendant was subjected, as opposed to the nine months to which he agreed, were a "direct consequence" of his guilty plea, because those additional months had a "definite, immediate and largely automatic effect on the range of the defendant's punishment." *Smith*, 352 N.C. at 551, 532 S.E.2d at 786 (internal quotations and citations omitted). Defendant spent an additional four years in prison after serving his agreed-upon active sentence and his post-release supervision was revoked ten months after his release simply for housing his younger brothers.

Without being aware of the direct consequences of his guilty plea, Defendant cannot be said to have made his plea "voluntarily, intelligently and understandingly." *Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142 (citing *Boykin*, 395 U.S. at 244, 23 L. Ed. 2d at 280). For Defendant's plea to be knowing and voluntary, and thus valid, Defendant must have been made aware of "the actual value of any commitments made to him by the court." *Id.* (quotations omitted).

We remand to the trial court to address Defendant's post-release supervision arguments consistent with this opinion. It is unnecessary for us to address Defendant's ineffective assistance of counsel claim. On remand, Defendant may raise his ineffective assistance of counsel claim before the trial court to determine whether the relief he seeks in his MARs, if granted, addresses and moots the relief sought in his ineffective assistance of counsel claim.

IV. Conclusion

The trial court erred by summarily denying Defendant's MARs. This matter is remanded to the trial court to hold a hearing, receive and consider evidence, and to make additional findings of fact. *See Dickens*, 299 N.C. at 83, 261 S.E.2d at 187.

The trial court's summary denials of Defendant's MARs are vacated and remanded. Consistent with the guidance and conclusions in this opinion regarding sex offender registration and post-release supervision, the trial court must determine whether Defendant's guilty plea was entered into "voluntarily, intelligently and understandingly." *See Bozeman*, 115 N.C. App. at 661, 446 S.E.2d at 142 (internal quotations and citations omitted). *It is so ordered.*

VACATED AND REMANDED.

Judges ZACHARY and FLOOD concur.

SOUTHEASTERN PUBLIC SAFETY GROUP, INC.
D/B/A SOUTHEASTERN COMPANY POLICE, PLAINTIFF
v.
NORTH CAROLINA DEPARTMENT OF JUSTICE, CRIMINAL STANDARDS DIVISION, AND RANDY MUNN, IN HIS OFFICIAL CAPACITY AS THE NORTH CAROLINA COMPANY POLICE ADMINISTRATOR, DEFENDANTS

No. COA24-191

Filed 5 February 2025

Police Officers—Company Police Act—policing a public highway during construction—scope of jurisdictional authority

In a case involving the question of whether officers with a company police agency (plaintiff)—which had been hired by a construction company to provide law enforcement services, including traffic control/enforcement, for the duration of a public-private highway construction project—had jurisdiction pursuant to N.C.G.S. § 74E-6(c) of the Company Police Act (Act) when they activated their blue lights to block free-flowing traffic lanes adjacent to the construction area, the Court of Appeals determined that the superior court properly identified the applicable standard of review (de novo) but did not apply the standard correctly because it was operating under a misunderstanding of the Act's requirements. The

superior court erred by vacating the final decision of the administrative law judge (ALJ) and entering declaratory judgment for plaintiff where its findings did not support its conclusions. The court did not reach the dispositive issue of whether the construction company had ownership or control over the highway property in question (and, thus, could have authorized plaintiff's actions) but instead focused on the applicability of various federal regulations and the effect of contract provisions on the scope of plaintiff's authority. Therefore, the court's decision and declaratory judgment were vacated and the matter was remanded for reconsideration by the ALJ.

Appeal by defendants from decision and declaratory judgment entered 10 August 2023 by Judge Steven R. Warren in Mecklenburg County Superior Court. Heard in the Court of Appeals 22 October 2024.

Everson Law Office, PLLC, by Cynthia E. Everson, for plaintiff-appellee.

Attorney General Jeff Jackson, by Solicitor General Fellows Mary Elizabeth Reed and Trey A. Ellis, Deputy Solicitor General James W. Doggett, and Assistant Attorney General Kristen Mallett, for defendants-appellants.

ZACHARY, Judge.

This case arises from the construction of express toll lanes on the I-77 interstate highway ("the I-77 HOT Lanes Project"). Sugar Creek Construction, LLC ("SCC") hired Plaintiff Southeastern Public Safety Group, Inc.—a company police agency commissioned under the Company Police Act ("the Act")—to provide policing services in conjunction with SCC's construction work on the I-77 HOT Lanes Project. During the course of construction, Defendant Randy Munn—the North Carolina Company Police Administrator—received information that Plaintiff was utilizing blue lights to block free-flowing traffic lanes on I-77. Thus arose the question of law that this case presents: did the Act authorize Plaintiff's activities?

Defendants considered Plaintiff to be in violation of the Act, and the administrative law judge agreed. Plaintiff then filed a petition for judicial review with the Mecklenburg County Superior Court; the superior court agreed with Plaintiff, vacated the administrative law judge's decision, and replaced it with the court's own order. Defendants now appeal from the decision and declaratory judgment of the superior court. After careful review, we vacate and remand.

I. Background

The facts of this case are not in dispute. We therefore recite only those facts necessary to resolve the question of law presented.

A. The Company Police Act

The Act "regulates private police agencies, giving them authority similar to municipal or county police forces." *Pinnacle Special Police, Inc. v. Scottsdale Ins. Co.*, 607 F. Supp. 2d 735, 740 (E.D.N.C. 2009); *see also* N.C. Gen. Stat. § 74E-1 *et seq.* (2023). The Act provides company police officers with limited jurisdiction, as determined by the real property owned by or in the possession and control of their employer or a party who contracted with their employer:

> Company police officers, while in the performance of their duties of employment, have the same powers as municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions on any of the following:
>
> (1) Real property owned by or in the possession and control of their employer.
>
> (2) Real property owned by or in the possession and control of a person who has contracted with the employer to provide on-site company police security personnel services for the property.
>
> (3) Any other real property while in continuous and immediate pursuit of a person for an offense committed upon property described in subdivisions (1) or (2) of this subsection.

N.C. Gen. Stat. § 74E-6(c).

Pertinent to the case before us, company police officers are prohibited—with limited exception—from utilizing blue lights to obstruct free-flowing traffic on a public highway unless they are within the jurisdiction provided by § 74E-6(c). The Office of the Attorney General has promulgated regulations that prohibit company police officers from conducting the following activities:

> (4) [A]ctivating or operating a blue light in or on any vehicle in this State except when operating a motor vehicle used primarily by company or railroad police in the performance of his official duties:

(a) when in property jurisdiction limitations specifically described under [N.C. Gen. Stat. §] 74E-6;

(b) when in continuous or immediate pursuit of a person for an offense committed upon real property owned by or in the possession or control of his employer or real property or in the possession and control of a person who has contracted with the employer to provide on-site police security personnel services for the property; or

(c) during the transportation of an arrestee, which the company police agency has taken into custody;

(5) activating or operating a siren when operating any motor vehicle used primarily by any company police agency in the performance of his official duties when outside of the property jurisdiction limitations specifically described under [N.C. Gen. Stat. §] 74E-6 unless in immediate and continuous pursuit;

. . . .

(7) impeding traffic, stopping motorists or pedestrians, or in any manner imposing or attempting to impose his will upon another person as police authority unless:

(a) he is on the property specifically described under [N.C. Gen. Stat. §] 74E-6; or

(b) when in immediate and continuous pursuit of any person for an offense which occurred within the property jurisdiction limitations specifically described under [N.C. Gen. Stat. §] 74E-6 . . . .

12 N.C. Admin. Code 2I.0304(4)–(5), (7) (2024).

B. The I-77 HOT Lanes Project

The North Carolina Department of Transportation ("NCDOT") contracted with I-77 Mobility Partners ("Mobility")—a consortium of corporate entities organized for the purpose of the I-77 HOT Lanes Project public-private partnership—to finance, design, build, operate, and maintain express toll lanes along a 26-mile stretch of I-77 between Statesville and Charlotte. The I-77 HOT Lanes Project was governed by a Comprehensive Agreement, in which NCDOT granted Mobility and its subcontractors a limited concession to enter the I-77 HOT Lanes Project

property, but expressly provided Mobility "no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind":

> **2.1.2** From and after issuance of any NTP1,[1] [Mobility] and its authorized Developer-Related Entities shall have the right to enter onto the Project Right of Way owned by, or subject to the control of, NCDOT and, with the reasonable consent of NCDOT, other lands owned by NCDOT necessary for the purposes of carrying out the NTP1 Work. From and after issuance of NTP2, [Mobility] and its authorized Developer-Related Entities shall have the right to enter onto the Project Right of Way owned by NCDOT and, with the reasonable consent of NCDOT, other lands owned by NCDOT for the purposes of carrying out its obligations under the [Comprehensive Agreement] Documents. Absent agreement by the Parties as to a later date, [Mobility]'s rights to enter and use the Project Right of Way shall automatically terminate at the end of the Term.
>
> **2.1.3** Subject to Section 2.1.2, [Mobility] has no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind in or to the Project or the Project Right of Way by virtue of this Agreement, any of the other [Comprehensive Agreement] Documents or otherwise.
>
> **2.1.4** Subject to Section 2.1.2, [Mobility]'s property interests under this Agreement are limited to contract rights constituting intangible personal property (and not real estate interests). [Mobility]'s property interests under this Agreement are solely those of an independent contracting party, and NCDOT and [Mobility] are not in a relationship of co-venturers, partners, lessor-lessee or principal-agent (except to the extent the [Comprehensive Agreement] Documents expressly appoint [Mobility] as NCDOT's agent for specified purposes).

1. The Comprehensive Agreement defines "NTP1" and "NTP2" as written notices issued by NCDOT to the developer authorizing the developer to proceed with its contracted work.

Mobility identified SCC as the Design-Build Contractor in the Comprehensive Agreement. Consistent with applicable federal guidelines, NCDOT policy for the I-77 HOT Lanes Project required each contracted developer, such as SCC, to "[f]urnish Law Enforcement Officers and marked Law Enforcement vehicles to direct traffic in accordance with the contract." Specifically, the policy required the use of "uniformed Law Enforcement Officers and marked Law Enforcement vehicles equipped with blue lights mounted on top of the vehicle, and Law Enforcement vehicle emblems to direct or control traffic as required by the plans or by the Engineer."

C. Plaintiff's Policing Services for SCC

On 19 July 2016, SCC entered into a contract with Plaintiff to provide policing services in accordance with the Act "[t]o any [NCDOT] property related to" the I-77 HOT Lanes Project in which SCC had "contracting or subcontracting authority." Plaintiff agreed to provide SCC "with policing/law enforcement services under" the Act, including "traffic control/enforcement[.]" In the project statement between SCC and Plaintiff, SCC identified the physical address of the I-77 HOT Lanes Project as: "I-77 from I-277 to Exit 36, and I-277 from I-77 to Exit 3A/B[.]"

On 27 March 2017, Defendant Munn received an email from Adam Tranum, the operations manager for a private security agency in Charlotte, "about a violation that [he] witnessed." Tranum had noticed a pair of Plaintiff's marked vehicles with flashing blue-and-red lights on the sides of the travel lanes at various points of the I-77 HOT Lanes Project construction area. Based on his experience in private security, Tranum understood this to be a violation of the Act because "company police [are] not allowed to . . . direct traffic on public roadways."

Defendant Munn began investigating Tranum's complaint and contacted both Plaintiff and SCC. Plaintiff's Chief of Police Keith Williams and SCC's Safety Manager Jim Quinn each informed Defendant Munn that Plaintiff was under contract to provide policing services, including blocking the travel lanes in the I-77 HOT Lanes Project construction area. Defendant Munn informed both Plaintiff and SCC that Plaintiff's officers were limited to working inside of any barricaded work zones of the construction area and that it would violate the Act for a company police agency to utilize blue lights to block the travel lanes on a state-maintained highway. Defendant Munn also warned that the potential punishment for such a violation could include an immediate revocation of Plaintiff's certification as a company police agency under the Act. Chief Williams "agreed . . . to pull his folks off the job until DOJ came down with a ruling."

D. Procedural History

The foregoing facts have led to multiple lawsuits in state and federal courts. On 18 December 2017, Chief Williams filed a claim for damages under the Tort Claims Act, but the Industrial Commission dismissed the matter for failure to state a claim upon which relief could be granted. *Williams v. N.C. Dep't of Justice, Crim. Standards Div.*, 273 N.C. App. 209, 210–11, 848 S.E.2d 231, 234 (2020). This Court affirmed the dismissal. *Id.* at 218, 848 S.E.2d at 239. Also, Plaintiff filed suit against Defendant Munn and others in federal court, which was likewise dismissed. *Se. Pub. Safety Grp. Inc. v. Munn*, No. 3:20-CV-00203-FDW-DCK, 2021 WL 3561184, at *1 (W.D.N.C. Aug. 11, 2021), *affirmed in part, vacated in part, and remanded*, No. 22-1114, 2024 WL 4625079 (4th Cir. Oct. 30, 2024) (unpublished).

Additionally, Chief Williams filed a foreign subpoena in Washington State directing Microsoft to produce certain logs for four DOJ email accounts. *Williams v. Custodian of Pub. Records NC Dep't of Justice*, 28 Wash. App. 2d 1022, 2023 WL 6214542, at *1 (2023) (unpublished). When Microsoft "completed its search for responsive records and found none[,]" Chief Williams filed a motion to compel and a motion for reconsideration, which were both denied. *Id.* Chief Williams's appeal was similarly unsuccessful. *Id.*

Plaintiff initiated the case before us on 20 March 2020 by filing a petition for a contested case hearing in the Office of Administrative Hearings. Plaintiff claimed that Defendant Munn deprived Plaintiff of rights and property; exceeded the scope of his authority; acted arbitrarily, capriciously, and erroneously; and failed to act as required by law.

In August 2020, the matter came on for hearing before an administrative law judge. At the hearing, the administrative law judge made a series of rulings preventing Plaintiff from engaging in certain lines of questioning, such as asking Defendant Munn about the contract between NCDOT and SCC in order to determine the boundaries of the property that Plaintiff claimed it was authorized to police. The administrative law judge reasoned that Defendant Munn could not "testify about the contract" because Plaintiff could not obtain by contract any authority that it could not lawfully obtain under the Act, such as the authority to block the travel lanes of a public highway:

> Because you cannot -- because the issue is blocking the road. And if the law says you can't block the road it doesn't matter if a contract -- if you sign a contract -- let's take this and do something imaginary. Let's say there's a law that

> says you cannot own a purple kangaroo. Okay? You can't show me a contract that says, Well, I'm giving you a purple kangaroo because the law says no. So he can't talk about the contract. He can just talk about what's in the statute that's his area of responsibility.

The administrative law judge also prevented Plaintiff from introducing into evidence certain federal regulations that Plaintiff contended would support its argument concerning the definition of the "work zone" that it had contracted to police for SCC.

On 19 November 2020, the administrative law judge entered a final decision, determining that Plaintiff "admits and the evidence shows that [it] engaged in acts that are listed as prohibited acts in [12 N.C. Admin. Code 2I.0304(4), (5), and (7)] and that [Plaintiff] failed to show that its actions on the public highway of [I-77] complied with N.C. Gen. Stat. § 74E-6(c)." Accordingly, the administrative law judge concluded that Plaintiff had failed to meet its burden of proof for its claims.

On 13 January 2021, Plaintiff filed a petition for judicial review in Mecklenburg County Superior Court. In part, Plaintiff alleged that it had discovered new evidence through a public-records request: an email sent on 17 July 2017 from Defendant Munn to his supervisor at DOJ, in which Defendant Munn detailed his phone conversation with a DOJ attorney. In this email, Defendant Munn explained that the DOJ attorney had suggested that NCDOT's contract with Mobility might allow a company police agency to perform policing services along the entire 26-mile stretch of the I-77 HOT Lanes Project; nevertheless, Defendant Munn cautioned his supervisor that DOJ attorneys had yet to fully complete their assessment. On 8 July 2021, the superior court entered an order vacating the final decision and remanding the matter to the administrative law judge to allow Plaintiff to present additional evidence related to this email.

This matter came on for hearing on remand before the administrative law judge on 2 December 2021. The additional evidence included not only the 17 July 2017 email but also an email that Defendant Munn sent to his supervisor the next day, in which Defendant Munn summarized a follow-up conversation with the DOJ attorney. In the 18 July email, Defendant Munn stated that "after much thought and conversation the conclusion is that [Plaintiff] would violate the Act if it work[ed] the I-77 construction zone and its duty included blocking travel lanes or any other police action on the [traveled] portion of the highway." The administrative law judge also admitted into evidence the portion of the Comprehensive Agreement containing definitions and diagrams, as well

as affidavits from SCC's Safety Manager Quinn and the DOJ attorney who consulted with Defendant Munn addressing the boundaries of the construction zone for the I-77 HOT Lanes Project.

On 3 February 2022, the administrative law judge entered a new final decision on remand. The administrative law judge found that the newly introduced emails were "part of an on-going discussion between [the DOJ attorney] and Defendant Munn about whether [Plaintiff] was in violation of" the Act, and that the additional evidence did "not support the argument that [Plaintiff] was not in violation of" the Act. Further, the administrative law judge determined that none of the additional evidence "refute[d] the conclusions of law" made in the previous final decision, and concluded that Plaintiff "still failed to meet its burden of proving that [Defendants] took any action that has substantially prejudiced [Plaintiff]'s rights by exceeding its authority or jurisdiction, acting erroneously, failing to use proper procedure, acting arbitrarily or capriciously, or failing to act as required by law or rule."

On 24 March 2022, Plaintiff filed a petition for judicial review of this final decision, as well as a complaint for declaratory judgment. On 10 July 2023, the matter came on for hearing in Mecklenburg County Superior Court. The superior court entered a decision and declaratory judgment in Plaintiff's favor on 10 August 2023.

The superior court first concluded that the administrative law judge erred by limiting Plaintiff's evidence and lines of questioning at the hearings, because the contract between NCDOT and SCC was necessarily relevant to determining Plaintiff's jurisdiction:

> 10. All the jurisdictional limits, and regulatory prohibitions, of company police agencies and officers are established by the real property owned or possessed and controlled by their employers or entities with whom they have contracts for law enforcement services. N.C. Gen. [Stat. § 74E-6(c)(1)–(3)].
>
> 11. At no point in [the Act] or in 12 [N.C. Admin. Code 2I.0304] are company police officers prohibited from impeding traffic, operating sirens, or operating blue lights, as long as they are within their real property jurisdictions as defined by their respective contracts.
>
> 12. It was impossible for the Administrative Law Judge to ascertain whether Plaintiff was complying with the provisions of Chapter 74E without admitting the full contract between . . . NCDOT and SCC, to determine

> whether . . . NCDOT had possession and control over I-77 and whether . . . NCDOT relinquished that possession and control to SCC for purposes of completion of the construction project between Exits 36 and 3A/3B on I-77.
>
> 13. The Administrative Law Judge's refusal to admit and consider the contract between . . . NCDOT and SCC, as well as her refusal to allow Plaintiff to question Defendant Munn about his review of the contract, was arbitrary and capricious, and was further based on unlawful procedure, since the contract itself sets forth the real property jurisdictional boundaries of Plaintiff and its law enforcement officers.

Because the administrative law judge considered the DOJ attorney's opinion "about the language of the contracts at issue, without admitting the actual primary contract itself," the superior court concluded that the administrative law judge's decision "violated Plaintiff's rights to Due Process and Equal Protection, was arbitrary and capricious, was an abuse of discretion, violated the best evidence rule of civil procedure, and was further based on unlawful procedure."

The superior court further concluded that the federal regulations proffered by Plaintiff were relevant and material to this case, and thus the administrative law judge's "refusal to consider federal law violated Plaintiff's rights to Due Process and Equal Protection, was arbitrary and capricious, and was further based on unlawful procedure." The superior court then concluded that Defendant Munn improperly interfered with Plaintiff's contract, due to his failure to consider the contract and the federal regulations:

> The uncontroverted evidence in the record is that Defendant Munn told Plaintiff that it could not block travel lanes in the project area on I-77 because, without consideration of the [federal regulations], he believed the parameters of the work zone were limited to the barricaded areas, despite his review of the contract language indicating otherwise. Since blocking travel lanes was required by Plaintiff's contract with SCC, Plaintiff was unable to continue working and, thus, lost property in that it ceased earning revenue on this and other NCDOT projects because of Defendant Munn's interpretation of Chapter 74E.

The superior court consequently determined that Plaintiff was an "aggrieved party" for purposes of the North Carolina Administrative Procedure Act ("APA"), and that the administrative law judge's conclusion otherwise was "unsupported by substantial evidence, [wa]s arbitrary and capricious, and was an abuse of discretion." Additionally, the superior court determined that "[n]othing in Chapter 74E gives Defendant Munn the authority to interpret or invalidate a contract. As such, he acted outside the scope of his authority in interpreting the contracts at issue in this case and telling Plaintiff that its contract with SCC was invalid."

As to whether Plaintiff violated the Act, the superior court concluded that the Act (1) "does not prohibit company police agencies and officers from providing contract law enforcement services on streets, roads, or highways, as long as those streets, roads, or highways are within the ownership or possession and control of the entities with whom they have contracts for law enforcement services"; and (2) "does not prohibit company police agencies and officers from providing contract law enforcement services on federally-funded NCDOT work zones, including the free-flowing travel lanes, as long as those lanes are within the actual work zone as defined by the" Code of Federal Regulations ("CFR"). Finally, the superior court concluded that the pertinent federal regulations apply in this case:

> In interpreting Chapter 74E, Defendant Munn must defer to the definitions included in the [CFR] for federally-funded highway construction projects. As long as the company police agencies and its officers are working within the work zone as defined in the CFR, they are within their jurisdiction, and Defendant Munn cannot take any investigative or other action against them for this work.

Consequently, the superior court vacated the administrative law judge's final opinion in its entirety, and entered a new order "replac[ing]" the administrative law judge's decision. Defendants timely filed notice of appeal.

II. Discussion

On appeal, Defendants argue that the superior court erred by concluding that Plaintiff did not violate the Act. Specifically, Defendants contend that Plaintiff's "officers acted outside of their jurisdictional bounds," and that "[c]ontrary to the superior court's understanding, no federal law gave [Plaintiff] or its contractor [SCC] the possession and control of the highway needed for [Plaintiff] to have jurisdiction."

For the reasons that follow, we agree with Defendants that the superior court's findings of fact do not support its conclusions of law regarding Plaintiff's alleged violations of the Act. Consequently, we vacate the superior court's decision and declaratory judgment.

Further, although Plaintiff raised additional procedural and evidentiary issues before the superior court, on appeal, Defendants only challenge the superior court's ultimate conclusions of law concerning whether Plaintiff violated the Act. Therefore, we remand to the superior court with instructions that the case be remanded to the administrative law judge for consideration of (1) the contract between NCDOT and SCC, and (2) the federal regulations, to the extent that they apply.

A. Standard of Review

A party aggrieved by the final decision of an administrative law judge in a contested case has a right to judicial review by the superior court. N.C. Gen. Stat. § 150B-43. On review of a final decision of an administrative law judge, the superior court has a limited scope of review under the APA. *Id.*

The APA sets the boundaries of the superior court's review of a final decision:

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

Id. § 150B-51(b).

The APA provides a reviewing court with two different standards of review, depending on the nature of the challenge being addressed:

> With regard to asserted errors pursuant to subdivisions (1) through (4) of subsection (b) of this section, the court shall conduct its review of the final decision using the de novo standard of review. With regard to asserted errors pursuant to subdivisions (5) and (6) of subsection (b) of this section, the court shall conduct its review of the final decision using the whole record standard of review.

Id. § 150B-51(c).

When applying de novo review to alleged errors of law, a reviewing court "considers the matter anew and freely substitutes its own judgment for that of the" administrative law judge. *Blackburn v. N.C. Dep't of Pub. Safety*, 246 N.C. App. 196, 207, 784 S.E.2d 509, 518 (citation omitted), *disc. review denied*, 368 N.C. 919, 786 S.E.2d 915 (2016). "Under the whole record test, the reviewing court must examine all competent evidence to determine if there is substantial evidence to support the administrative [law judge]'s findings and conclusions." *Id.* at 207, 784 S.E.2d at 517–18 (citation omitted).

"A party to a review proceeding in a superior court may appeal to the appellate division from the final judgment of the superior court as provided in [N.C. Gen. Stat. §] 7A-27." N.C. Gen. Stat. § 150B-52. "The scope of review to be applied by the appellate court under this section is the same as it is for other civil cases. In cases reviewed under [N.C. Gen. Stat. §] 150B-51(c), the [superior] court's findings of fact shall be upheld if supported by substantial evidence." *Id.*

"[O]ur appellate courts have recognized that the proper appellate standard for reviewing a superior court order examining a final agency decision is to examine the order for errors of law." *Harnett Cnty. Bd. of Educ. v. Ret. Sys. Div., Dep't of State Treasurer*, 291 N.C. App. 14, 20, 894 S.E.2d 275, 280 (2023) (cleaned up), *disc. review denied*, 386 N.C. 348, 901 S.E.2d 790 (2024). "[T]his twofold task involves: (1) determining whether the [superior] court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly." *Id.* (cleaned up).

B. Analysis

As an initial matter, we note that the superior court appears to have applied the correct standard of review—de novo—to the question of whether Plaintiff violated the Act by utilizing blue lights to block free-flowing traffic on a public highway, an alleged error of law. *See* N.C. Gen. Stat. § 150B-51(c). However, because the superior court did not

correctly interpret the Act and its application to the facts of this case, we cannot say that the superior court properly applied the de novo standard of review. *See Harnett Cnty. Bd. of Educ.*, 291 N.C. App. at 20, 894 S.E.2d at 280.

Fundamentally, this case concerns the jurisdictional provisions of the Act. There is no dispute that if Plaintiff exceeded its jurisdictional limits, as specifically set forth in the Act, then it would have been engaged in policing activities prohibited by 12 N.C. Admin. Code 2I.0304. Thus, the crux of the matter is whether Plaintiff acted within the real-property jurisdiction limitations of the Act.

In that Plaintiff has never claimed that it owned or had possession and control of the relevant portion of I-77, this case necessarily hinges upon whether the party with whom Plaintiff contracted—namely, SCC—owned or had possession and control of that property. *See* N.C. Gen. Stat. § 74E-6(c)(1)–(2). Significantly, however, the superior court never expressly found or concluded that SCC had such ownership, possession, or control, although the court made a series of findings and conclusions regarding other important procedural and legal issues in this matter.

Rather than focusing on the dispositive issue of whether Plaintiff or SCC owned, possessed, or controlled the free-flowing traffic lanes of the pertinent portion of I-77, as required by N.C. Gen. Stat. § 74E-6(c)(1)–(2) in order to determine whether Plaintiff's actions violated 12 N.C. Admin. Code 2I.0304, the superior court instead focused primarily on two decisions below: the administrative law judge's failure (1) to allow Plaintiff to question Defendant Munn about the contract between NCDOT and SCC, and (2) to consider the various federal regulations proffered by Plaintiff in support of its jurisdictional argument. However, the superior court's analysis of these procedural issues—which Defendants do not challenge on appeal and therefore is not before us—is insufficient on its own to resolve the dispositive question of law and indicates that the superior court may have misinterpreted the jurisdictional requirements of the Act.

1. Federal Regulations

By the express terms of the Comprehensive Agreement that governs the I-77 HOT Lanes Project, NCDOT granted Mobility a concession. *See Concession*, *Black's Law Dictionary* (12th ed. 2024) (defining a "concession" as a "government grant for specific privileges"). Pursuant to this concession, Mobility and its subcontractors obtained a right of entry to designated areas of the I-77 HOT Lanes Project work zone.

Nevertheless, the Comprehensive Agreement plainly states that the I-77 HOT Lanes Project property—including both the existing I-77 right-of-way and the additional property purchased for the project—is "owned by, or subject to the control of, NCDOT" and that Mobility received "no fee title, leasehold estate, possessory interest, permit, easement or other real property interest of any kind in or to" the highway property. This language strongly suggests that neither Mobility nor SCC, as Mobility's design-build contractor, obtained the rights of ownership, possession, or control over the I-77 HOT Lanes Project that the Act requires in order to sanction Plaintiff's policing activity in this case.

However, the superior court accurately recognized that the Act "does not define real property[.]" Consequently, the superior court turned to the host of federal regulations proffered by Plaintiff to assist in its analysis and determined that they were relevant to this issue. The superior court then summarized these regulations in its conclusions of law:

> 16. For federally-funded highway constructions projects, the real property interest acquired by the contractor from the State department of transportation or other entity "must be adequate to fulfill the purpose of the [project]." 23 C.F.R. § 710.305(b).
>
> 17. For federally-funded highway constructions projects, a Right of Way Agreement must exist between the grantee of the federal funds, usually a State department of transportation, and any contractors or subcontractors. 23 C.F.R. § 710.405. These agreements must provide safety measures. One of those measures is a traffic management plan. 23 C.F.R. § 630.1012(b).
>
> 18. The cost of providing and paying uniformed law enforcement officers is generally to be borne by the contractor on the highway construction project. 23 C.F.R. § 630.1108(d)(2).

These conclusions concerning the applicability of the federal regulations to the case at bar formed the basis of the superior court's conclusion that the "refusal to consider federal law violated Plaintiff's rights to Due Process and Equal Protection, was arbitrary and capricious, and was further based on unlawful procedure." But the superior court neglected to extend its analysis to reach the dispositive issue of whether (or how) federal law vested SCC with the necessary ownership, possession, or control of the highway property in question.

Indeed, it is not readily apparent how germane these conclusions of law regarding the federal regulations are to the legal question of whether Plaintiff exceeded its lawful jurisdiction under the Act. As Defendants observe in their appellate brief, "none of these cited regulations gave away NCDOT's possessory interests in the land or required NCDOT to do so."

For instance, Defendants note that the requirement that the contractor obtain an adequate property interest from NCDOT was satisfied by the concession granted to Mobility and its subcontractors, thereby entitling them to a right of entry to perform their contractual duties. But that concession was merely a right of entry, and by its own terms would not include any possessory interest that Mobility could have granted to SCC in turn. More to the point, the superior court never concluded that the application of this federal regulation to the facts of this case vested SCC with the ownership, possession, or control over the free-flowing traffic lanes of I-77 at issue necessary to authorize Plaintiff's actions under the Act.

Similarly, the fact that the federal regulations required NCDOT to have a Right of Way Agreement setting forth a traffic management plan does not, in and of itself, provide blanket authorization for a *company police agency* to provide that traffic management, if providing such a service would violate the Act. As Defendants explain: "Because these regulations do not demand the use of *private* law enforcement agencies, the court erred in holding that they somehow required that [Plaintiff] be allowed to manage traffic." The superior court did not square the federal requirement for a traffic management plan with the Act's jurisdictional limitations when it evidently—but implicitly—concluded that Plaintiff had not exceeded its jurisdiction under § 74E-6(c).

The superior court's findings of fact do not explain whether or how the federal regulations proffered by Plaintiff could vest either SCC or Plaintiff with the ownership, possession, or control over the pertinent area of I-77 and therefore provide Plaintiff with the jurisdiction necessary to satisfy § 74E-6(c). Nor could the regulations provide an alternative basis for Plaintiff to satisfy the jurisdictional requirements of the Act, as explained above. Accordingly, the superior court's findings of fact regarding the cited federal regulations do not support the implicit conclusion that Plaintiff did not violate the Act.

2. Contracts

Just as the superior court's analysis of the federal regulations failed to resolve the dispositive question of law, so too did the superior court's

contractual analysis. The superior court reasoned that Defendant Munn's admonition to Plaintiff that its officers "could not block the free-flowing travel lanes on I-77 but were restricted to working in the barricaded-off areas" was apparently "inconsistent with Plaintiff's contractual obligations to SCC and essentially gutted the contract" between Plaintiff and SCC, because "under SCC's contract with . . . NCDOT and the governing federal regulations, SCC was required to provide traffic control on the free-flowing travel lanes of I-77 in the project area."

The same gap in the superior court's logic discussed above applies here: SCC's contractual obligation to provide traffic control does not furnish blanket authorization for *any agency with whom SCC contracted* to provide that traffic control. If a company police agency was engaged to provide such services, it would still have to comply with the limited jurisdictional authority granted by the Act. Accordingly, it does not necessarily follow that the contract did (or could) authorize Plaintiff's actions in this case.

It is well settled that a contract cannot authorize a party to violate the law. *See*, *e.g.*, *Duke Power Co. v. Blue Ridge Elec. Membership Corp.*, 253 N.C. 596, 602, 117 S.E.2d 812, 816 (1961) ("When called upon to interpret a contract, courts seek to ascertain and give effect to the intent of the parties if that intent does not require the performance of an act prohibited by law."). Because Plaintiff's actions would have violated 12 N.C. Admin. Code 2I.0304(4)–(5) and (7) if the jurisdictional provisions of N.C. Gen. Stat. § 74E-6(c) were not satisfied, the only relevance of any contract in this matter would be to aid the tribunal in determining whether SCC obtained the requisite ownership, possession, or control over the 26-mile stretch of I-77 at issue. But the superior court made no such determination; rather, it only concluded that the "refusal to admit and consider the contract between . . . NCDOT and SCC, as well as [the] refusal to allow Plaintiff to question Defendant Munn about his review of the contract, was arbitrary and capricious" and "based on unlawful procedure, since the contract itself sets forth the real property jurisdictional boundaries of Plaintiff and its law enforcement officers." This conclusion—and particularly, any blanket assertion that a contract alone might define a company police agency's jurisdictional limitations without determining whether the agency or its employer had sufficient ownership, possession, or control of the property that the agency was hired to police—does not resolve this case's dispositive question of law: namely, Plaintiff's jurisdiction under § 74E-6(c).

Ultimately, neither the federal regulations nor any contract can overcome the jurisdictional requirements set out by the plain text of

the Act. Consequently, the superior court erred as a matter of law when it concluded:

> The uncontroverted evidence in the record is that Defendant Munn told Plaintiff that it could not block travel lanes in the project area on I-77 because, without consideration of the [federal regulations], he believed the parameters of the work zone were limited to the barricaded areas, despite his review of the contract language indicating otherwise. Since blocking travel lanes was required by Plaintiff's contract with SCC, Plaintiff was unable to continue working and, thus, lost property in that it ceased earning revenue on this and other NCDOT projects because of Defendant Munn's interpretation of Chapter 74E.

This conclusion—along with others like it in the superior court's decision and declaratory judgment—demonstrates a flawed reading of the Act and the effects, if any, that regulations and contracts have on the jurisdictional requirements of N.C. Gen. Stat. § 74E-6(c). The polestar of the jurisdictional analysis for the question presented by this case is whether SCC had the requisite ownership, possession, or control of the I-77 HOT Lanes Project work zone sufficient for SCC to permit Plaintiff to provide the policing services in question consistent with the Act. Because the superior court did not answer this question and, as a result, demonstrated a misunderstanding of the law at issue in this case, we cannot say that the court properly applied the de novo standard of review. *See Harnett Cnty. Bd. of Educ.*, 291 N.C. App. at 20, 894 S.E.2d at 280.

III. Conclusion

In sum: although the superior court applied the proper de novo standard of review upon review of the administrative law judge's decision, we cannot say that the superior court applied that standard of review *correctly*. *See id.* The superior court's findings of fact and conclusions of law are insufficient to support its determination that Plaintiff was an "aggrieved party" under the APA. N.C. Gen. Stat. § 150B-43. And because the superior court erred as a matter of law in interpreting the Act, the superior court's decision and declaratory judgment must be vacated and remanded.

In light of the superior court's unchallenged determinations regarding the administrative law judge's evidentiary and procedural rulings, however, the proper disposition is for the superior court to further

remand this matter to the administrative law judge for reconsideration. On remand, the administrative law judge shall consider the contract between NCDOT and SCC, as well as the applicable federal regulations, in determining the scope of Plaintiff's jurisdiction pursuant to N.C. Gen. Stat. § 74E-6(c).

We therefore vacate the superior court's decision and declaratory judgment, which itself vacated the final decision of the administrative law judge, and remand to the superior court with instructions that the matter be remanded to the administrative law judge for further proceedings consistent with this opinion.

VACATED AND REMANDED.

Judges ARROWOOD and GORE concur.

IN THE MATTER OF N.R.R.N. AKA N.R.N.

No. COA24-403

Filed 5 February 2025

1. Child Abuse, Dependency, and Neglect—adjudication—sufficiency of evidence and findings—testimony verifying truth of petition allegations

The trial court's findings of fact in its order adjudicating a child neglected and abused were based on clear, cogent, and convincing evidence—including a prior adjudication and disposition of the child's older sibling—and reflected the trial court's processes of logical reasoning and independent evaluation of the ultimate facts of the case rather than a mere verbatim recitation of the allegations contained in the juvenile petition. Further, the sworn testimony of an investigator for the department of social services verifying that the allegations in the petition were true constituted competent evidence. In addition, neither mother nor father objected to the introduction of the petition, presented evidence in opposition to the petition and its allegations, or availed themselves of the opportunity to conduct a cross-examination of the investigator.

2. Child Abuse, Dependency, and Neglect—neglect—injurious environment—prior abuse of sibling from non-accidental injuries

The trial court properly adjudicated a child as neglected based on evidence that the child's older sibling had been abused and neglected from sustaining non-accidental injuries, for which the parents had not provided an explanation, and that the parents had not acknowledged the injurious environment created for the sibling or taken steps to remedy the environment to prevent future harm to the child subject to the current juvenile petition.

3. Child Abuse, Dependency, and Neglect—abuse—lack of evidentiary support—prior abuse of sibling insufficient

The trial court's order adjudicating a child as abused was reversed where the only evidence of abuse pertained to the child's older sibling—whose prior adjudication of abuse and neglect resulted from having sustained serious injuries through non-accidental means while in her parents' care—and where there was no evidence that the child subject to the current juvenile petition had ever been subjected to physical harm by the parents or that the parents had directly placed the child in a substantial risk of harm.

4. Child Abuse, Dependency, and Neglect—effective assistance of counsel—juvenile petition—failure to advocate during adjudication—pending felony child abuse charges

In an adjudication proceeding on a juvenile petition alleging abuse and neglect, neither parent received ineffective assistance of counsel where their counsels' decisions to "stand mute" or not object to the submission of the juvenile petition constituted permissible strategic decisions in light of the pending felony child abuse charges both parents faced for the alleged child abuse of their older child and the fact that counsel for each parent actively participated in the dispositional phase of the hearing. Further, neither parent could show they were deprived of a fair hearing given the sufficiency of the evidence to conclude that the child was a neglected juvenile.

5. Child Abuse, Dependency, and Neglect—initial disposition—ceasing reunification efforts—statutory requirements

In a juvenile abuse and neglect proceeding, the trial court properly ordered the department of social services to cease reunification efforts with the parents at the initial disposition hearing pursuant to N.C.G.S. § 7B-901(c)(3)(iii) after determining, as a "court of competent jurisdiction," that the parents had committed a felony assault resulting in serious bodily injury to the child's sibling. However, the court's order ceasing reunification efforts pursuant to N.C.G.S. § 7B-901(c)(1)(f) was vacated for lack of sufficient findings of the existence of "other" aggravated circumstances, since the facts that

gave rise to the adjudication could not also serve as the "other act, practice, or conduct" for purposes of disposition.

Appeal by respondent-parents from order entered 21 February 2024 by Judge David E. Sipprell in District Court, Forsyth County. Heard in the Court of Appeals 5 November 2024.

Deputy County Attorney Theresa A. Boucher for petitioner-appellee Forsyth County Department of Social Services.

Michelle FormyDuval Lynch for the guardian ad litem.

Edward Eldred for respondent-appellant mother.

Marion K. Parsons for respondent-appellant father.

STROUD, Judge.

Respondent-Parents appeal from an order entered 21 February 2024 adjudicating their infant child abused and neglected and relieving Petitioner Forsyth County Department of Social Services of efforts to reunify Respondent-Parents with the child. We affirm the trial court's adjudication of the infant child to be a neglected juvenile and affirm in part and vacate in part the trial court's disposition ceasing reunification efforts.

I. Background

Respondent-Parents Karema Coleman ("Mother") and Patrick Nicholson ("Father") (collectively, "Parents") are the mother and father of minor child Nora,[1] born January 2024. Two days after Nora's birth, Forsyth County Department of Social Services ("DSS") filed a Juvenile Petition alleging Nora to be an abused and neglected juvenile. An order for non-secure custody was granted that same day. The petition's allegations, and the trial court's order finding Nora to be abused and neglected, were based mostly on Parents' treatment of Nora's older sister, Nan.

Born at twenty-seven weeks gestation in January 2023, Nan[2] remained in neonatal intensive care until she was released to the care of

1. Stipulated pseudonyms are used to protect the identity of minor children. *See* N.C. R. App. P. 42.

2. Also a stipulated pseudonym.

Parents on 12 April 2023. Only one week later, Parents returned to the hospital to admit Nan for a "near fatality event." Nan was diagnosed with three skull fractures, a large bilateral subdural hematohygroma, extensive fluid and bleeding around her spinal cord, and more. A doctor determined:

> This constellation of injuries without any accidental explanation is highly concerning for abusive head trauma. These significant concerns are heightened by the information we have regarding very concerning behaviors by [Nan]'s father which were documented while [Nan] was in the NICU. We would consider this a near-fatality for [Nan] and she likely would have died without lifesaving resuscitation in the ED.

In accordance with these findings and others, a trial court adjudicated Nan an abused and neglected juvenile by order filed on 27 October 2023. Further, on 28 September 2023, both Mother and Father were charged with Felony Intentional Child Abuse Inflicting Serious Physical Injury and Felony Intentional Child Abuse Inflicting Serious Bodily Injury. At the time of Nora's adjudication hearing on 12 February 2024, Mother had been released on bond for these charges, while Father remained in the Forsyth County Detention Center awaiting trial.

Parents previously appealed Nan's adjudication to this Court, in which we concluded the trial court did not err in finding Nan an abused and neglected juvenile. *See In re N.N.*, 296 N.C. App. 159, 907 S.E.2d 430 (2024).

As for Nora and the case at hand, the trial court adjudicated her abused and neglected given both Mother and Father's felony child abuse charges, finding Nora to be "at substantial risk of harm based upon the serious physical abuse inflicted on her sibling which injuries occurred while [Nan] was 3 months old, and she had only been in the care of [Mother] and [Father] for one week."

Mother filed notice of appeal on 21 February 2024. Father filed notice of appeal on 15 March 2024.

II. Standard of Review

In juvenile adjudications of abuse and neglect,

> [a]n appellate court reviews a trial court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support

> the conclusions of law. Where no exception is taken to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal. Conclusions of law made by the trial court are reviewable de novo on appeal. An appeal de novo is one in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings. Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court.

In re K.S., 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (citations, quotation marks, brackets, and footnotes omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by 'clear, cogent, and convincing evidence' the existence of one or more grounds for termination under section 7B-1111(a) of the General Statutes." *In re A.U.D.*, 373 N.C. 3, 5-6, 832 S.E.2d 698, 700 (2019) (quoting N.C. Gen. Stat. § 7B-1109(f)).

"It is well established that 'clear and convincing' and 'clear, cogent, and convincing' describe the same evidentiary standard." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984). This evidentiary standard is an intermediate standard "greater than the preponderance of the evidence standard required in most civil cases, but not as stringent as the requirement of proof beyond a reasonable doubt required in criminal cases." *Id.* at 109-110, 316 S.E.2d at 252 (citing *Santosky v. Kramer*, 455 U.S. 745, 71 L. Ed. 2d 599 (1982)).

III. Analysis

Mother and Father present similar arguments on appeal. First, both challenge the findings of fact based on the claims that the evidence presented at adjudication was insufficient because DSS presented the verified petition and testimony from DSS investigator Natasha Price who verified the petition was true. Second, Parents contend the findings of fact do not support the adjudication of abuse as they would "[a]t most" support a conclusion that Nora was only *at risk* of abuse, and therefore neglected. Third, Parents contend they were denied their right to effective assistance of counsel during the 12 February 2024 adjudication hearing. Finally, Parents argue the trial court erred by ceasing reunification efforts during the initial disposition. We address each issue in turn.

A. Sufficiency of the Evidence

[1] Both Mother and Father challenge the sufficiency of the evidence relied on by the trial court in adjudicating Nora to be an abused and

neglected juvenile. Specifically, Parents contend the trial court's findings of fact "[were] not supported by clear, cogent, and convincing evidence where the only evidence was the verified petition and the verifier's testimony that the information in the petition was true."

1. Findings of Fact

On appeal, Father argues ten of the fifteen substantive findings made by the trial court during the adjudicatory phase were insufficient to support abuse and neglect under the standard of clear and convincing evidence because they were "verbatim recitations" of the petition's allegations. In making this argument, Father cites to this Court's opinion in *In re M.K.*, which stated

> [r]egurgitated allegations do not reflect a reconciliation and adjudication of all the evidence by the trial court to allow this Court to determine whether sufficient findings of fact are supported by clear, cogent and convincing evidence. Without adjudicated findings of fact this Court cannot conduct a meaningful review of the conclusions of law and test the correctness of the trial court's judgment.

In re M.K., 241 N.C. App. 467, 470-71, 773 S.E.2d 535, 538 (2015) (citations, brackets, and quotation marks omitted). As noted in *In re M.K.*, this Court has "strongly discouraged" verbatim recitation of "the allegations from the petition." *Id.* at 471, 773 S.E.2d at 539. However, this Court in *In re M.K.* ultimately reviewed the other "substantive findings of fact, which form[ed] the basis for the trial court's adjudication of neglect[,]" *id.*, and concluded that "[t]he trial court's evidentiary and adjudicatory findings of fact [were] supported by clear, cogent and convincing evidence[,]" *id.* at 476, 773 S.E.2d at 541.

This Court has also made it clear

> it is not *per se* reversible error for a trial court's fact findings to mirror the wording of a petition or other pleading prepared by a party. Instead, this Court will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings are taken verbatim from an earlier pleading.
>
> . . . .

> [I]t would impose an impossible burden on trial court judges if we were to hold that any findings "cut-and-pasted" from a party's pleading automatically warranted reversal of the order. If a trial court, after carefully considering the evidence, finds that the facts are exactly as alleged in a party's pleading, there is nothing wrong with repeating those same words in an order. The purpose of trial court orders is to do justice, not foster creative writing.

In re J.W., 241 N.C. App. 44, 48-49, 772 S.E.2d 249, 253 (2015).

In *In re J.W.*, this Court concluded the trial court "through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to support its conclusions of law," even though some findings had been "cut-and-pasted" wording from the juvenile petition. *Id.* at 49, 772 S.E.2d at 254. In support of these findings being ultimate facts, this Court noted the trial court heard four days of testimony corroborating the allegations before making its final adjudication. *See id.* "Accordingly, we will only consider those findings that are, in fact, supported by evidence in the record regardless of whether they mirror the language used in the petition." *In re L.C.*, 253 N.C. App. 67, 71, 800 S.E.2d 82, 86 (2017).

Mother also argues that the findings of fact were not supported by clear, cogent and convincing evidence. Mother contends that in reviewing findings of fact which must be based upon clear, cogent, and convincing evidence, the appellate court should "account for the 'level of confidence' the trial court's standard of proof demands[,]" basing her argument on a case from the California Supreme Court which clarified "how an appellate court is to review the sufficiency of the evidence associated with a finding made by the trier of fact pursuant to the clear and convincing standard." *See Conservatorship of O.B.*, 9 Cal. 5th 989, 995, 470 P.3d 41, 44 (2020). The California Supreme Court in *O.B.* stated:

> We now dispel this uncertainty over the proper manner of appellate review by clarifying that an appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a

> reasonable trier of fact could have made the finding of high probability demanded by this standard of proof.

Id. at 1005, 470 P.3d at 50-51 (footnote omitted).

Mother contends "California's analysis is instructive and persuasive" and that "no North Carolina case performs such an exhaustive analysis[.]" Mother may be correct that no North Carolina case addresses how an appellate court should review findings as extensively as *O.B.*, but this Court is still bound to follow North Carolina law. The California Supreme Court's extensive analysis was required by splits of authority in cases decided by different divisions of the intermediate appellate courts in California: "There is a split of opinion over how an appellate court should address a claim of insufficient evidence such as the one advanced here." *Id.* at 995, 470 P.3d at 44. But North Carolina has no such split of authority to address, and this Court is bound by precedent from our Supreme Court. *See State v. Ledbetter*, 243 N.C. App. 746, 751, 779 S.E.2d 164, 168 (2015) ("We are bound by the decisions of our Supreme Court and by prior decisions of another panel of our Court addressing the same question, unless overturned by an intervening decision from a higher court." (citation omitted)).

Mother's main substantive argument based on North Carolina law is that DSS's reliance on the allegations of the petition cannot meet the standard of clear, cogent, and convincing evidence. In *In re Z.G.J.*, our Supreme Court held that the evidence was sufficient to support adjudication of grounds for termination of parental rights where DSS presented the petition and testimony from a DSS representative "adopting the allegations" of the petition:

> In this case, DSS called Johnson as a witness and tendered her to give testimony. While Johnson's testimony was not extensive, she orally reaffirmed, under oath, all of the allegations from the termination petition. Respondent was given the opportunity to cross-examine Johnson with respect to any of these allegations, and she declined to do so. In light of Johnson's testimony, the trial court conducted a proper adjudication hearing in accordance with N.C.G.S. § 7B-1109(e), and it did not err by relying on Johnson's testimony adopting the allegations in the termination petition when it entered its adjudication order.

In re Z.G.J., 378 N.C. 500, 508, 862 S.E.2d 180, 187 (2021). Mother tries to distinguish this case from *In re Z.G.J.* by arguing that here, Ms. Price "did not adopt the petition's allegations as her testimony. She merely

testified the information in the petition was true." Also, Mother claims the respondent in *In re Z.G.J.* did not challenge the sufficiency of the evidence to support the findings of fact.

Mother is correct that the social workers who testified in *In re Z.G.J.* did not use the exact same words as the witness in this case to confirm that they had verified the petitions and that the information in the petitions was true, but there is no substantive difference in the meaning of their testimony. The Court in *In re Z.G.J* did not hold that social workers must use magic words to testify in support of the contents of the petition. In both *In re Z.G.J.* and this case, the testifying social workers confirmed that the information in the petitions were true and accurate, and, in both cases, the petition was then received into evidence with no objection. *See id.* at 507, 862 S.E.2d at 186. There is no substantive difference between this case and *In re Z.G.J.* as to the testimony of the social worker who verified the petitions.[3]

Mother then tries to distinguish *In re Z.G.J.* by arguing respondent in that case "did not challenge the sufficiency of the evidence to support the findings[]" beyond her challenge to the presentation of evidence by the social worker's testimony confirming the petition. But Mother likewise presents no substantive challenge to the findings of fact other than claiming the trial court should not have relied on the petition's allegations. Father also presents no substantive challenges to the findings beyond contending only five of the findings "are not verbatim recitations of the petition's contents" and two others are really conclusions of law, not findings of fact.

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3. In *In re Z.G.J.*, the Supreme Court remanded because the issues in that case required findings addressing circumstances at the time of the hearing, but the social worker's testimony and allegations of the petition addressed only events as of the date of filing of the petition:

> However, the only evidence offered by DSS at adjudication was Johnson's testimony adopting the termination petition, which was filed on 21 August 2018. The termination hearing did not occur until more than thirteen months later, on 24 September 2019. Thus, the allegations in the petition do not shed any light on respondent's fitness to care for Ann at the time of the termination hearing, and the trial court erred by relying on the stale information in the petition as its only support for this ground.

In re Z.G.J., 378 N.C. at 509-10, 862 S.E.2d at 188 (citation omitted). Here, the adjudication was properly based upon facts as of the date of the filing of the petition, and Ms. Price testified that the petition was "still true and accurate today as it was on the day [she] filed the petition." Ms. Price also testified that neither parent had provided "an explanation as to how [Nan] had received her non-accidental trauma injuries in April of 2023."

Here, after examination of the entire record before us, we are satisfied the trial court independently found the ultimate facts of the case based on sufficient evidence, even though many of its substantive findings were verbatim recitations of the wording in the petition. During the hearing, the court heard testimony from Ms. Price, the Forsyth County DSS worker who signed and filed the juvenile petition relating to Nora. Ms. Price testified to the truth and accuracy of the allegations within the petition at the time of filing and attested to their truth and accuracy at the time of trial. Ms. Price also testified neither Mother nor Father ever provided any explanation to DSS as to how Nan received her injuries in April of 2023. Following this testimony, neither counsel for Mother nor Father objected to the admission of the juvenile petition into evidence, presented any evidence opposing the petition and its allegations, nor elected to cross-examine Ms. Price. The trial court noted the absence of objection and presentation of evidence opposing the petition in its substantive adjudicatory findings of fact.

The trial court exercised logical reasoning and the competent evidence supported its findings of fact. Along with the sworn testimony of Ms. Price, the record on appeal also indicates the trial court relied on the prior adjudication and disposition of Nan. The prior order regarding the abuse and neglect of Nan was part of the evidence supporting the trial court's findings regarding Nora. Where a prior order adjudicates a sibling to be abused and neglected, and DSS relies upon the prior order in allegations regarding another sibling's risk of being subjected to similar harms, the trial court may rely upon this evidence in making its findings of fact. *See In re N.G.*, 186 N.C. App. 1, 9, 650 S.E.2d 45, 50 (2007). Father's argument the trial court's findings are insufficient because some are verbatim recitations of the petition's wording is without merit.

Father also argues two of the trial court's findings are actually conclusions of law. Specifically, Father challenges Findings 18 and 29, which read:

> 18. The Court finds that [Nora] is an abused and neglected juvenile as pursuant to N.C.G.S. 7B-101(1) and 7B-101(15).
>
> . . . .
>
> 29. Based upon the foregoing, the Court finds by clear, cogent and convincing evidence that [Nora] is an abused and neglected juvenile in that her parents have created or allowed to be created a substantial risk of serious physical injury by other than accidental means. Also, the parents of

> [Nora] have created or allowed to be created a living environment that is injurious to the child's welfare.

Our Supreme Court has recently reiterated the distinction between ultimate facts and conclusions of law:

> There are two kinds of facts: Ultimate facts, and evidentiary facts. Ultimate facts are the final facts required to establish the plaintiff's cause of action or the defendant's defense; and evidentiary facts are those subsidiary facts required to prove the ultimate facts.
>
> Ultimate facts are those found in that vaguely defined area lying between evidential facts on the one side and conclusions of law on the other. In consequence, the line of demarcation between ultimate facts and legal conclusions is not easily drawn. An ultimate fact is the final resulting effect which is reached by processes of logical reasoning from the evidentiary facts. Whether a statement is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by an application of fixed rules of law.
>
> When the statements of the judge are measured by this test, it is manifest that they constitute findings of ultimate facts, i.e., the final facts on which the rights of the parties are to be legally determined.

In re G.C., 384 N.C. 62, 66, n. 3, 884 S.E.2d 658, 661, n. 3 (2023) (citation, quotation marks, and ellipses omitted).

We agree with Father's contention that Finding 18 is a conclusion of law but Finding 29 is a finding of ultimate fact. *See id.* at 67, 884 S.E.2d at 662 ("Here, the trial court specifically found that Glenda 'lived in an environment injurious to [her] welfare; and that [she] does not receive proper care, supervision, or discipline from [her] parent, guardian, [or] custodian.' These findings are properly characterized as ultimate findings and satisfy the statutory definition of neglected juvenile. The ultimate findings of fact that Glenda does not receive proper care, supervision, or discipline from her parents is supported by the trial court's evidentiary findings of fact and reached by natural reasoning from the evidentiary findings of fact." (brackets in original)). The mislabeling of conclusions of law as findings of fact, however, does not defeat the issue for appellate review. *See City of Charlotte v. Health*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946) ("The label of fact put upon a conclusion

of law will not defeat appellate review."); *see also Stan D. Bowles Distributing Co. v. Pabst Brewing Co.*, 69 N.C. App. 341, 344, 317 S.E.2d 684, 686 (1984) ("If the finding of fact is essentially a conclusion of law, however, it will be treated as a conclusion of law which is reviewable on appeal." (citations omitted)). Father makes no argument beyond those already addressed as to Finding 29, and this finding is supported by evidentiary findings and by the evidence. We will address Finding 18 below as a conclusion of law.

2. Conclusions of Law

We next address Parents' challenges to the trial court's conclusions of law that Nora was a neglected and abused juvenile. Mother essentially concedes that the findings of fact would support the conclusion that "Nora was at risk of being abused; i.e., that she was neglected[]" and both Parents focus most of their argument upon the adjudication of Nora's status as an abused juvenile. We will first address the trial court's conclusion of law that Nora was a neglected juvenile.

a. Neglect Adjudication

[2] Our North Carolina General Assembly has defined a neglected juvenile to include a minor whose parent, guardian, or caretaker "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." N.C. Gen. Stat. § 7B-101(15)(e) (2023).

> A court may not adjudicate a juvenile neglected solely based upon previous Department of Social Services involvement relating to other children. Rather, in concluding that a juvenile lives in an environment injurious to the juvenile's welfare, the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile.

In re J.A.M., 372 N.C. 1, 9, 822 S.E.2d 693, 698 (2019) (citations and quotation marks omitted). "The neglect statute neither dictates how much weight should be given to a prior neglect adjudication, nor suggests that a prior adjudication is determinative. Rather, the statute affords the trial judge some discretion in determining the weight to be given such evidence." *Id.* (citations and quotation marks omitted).

Here, Parents argue the trial court improperly relied on the prior adjudication of Nan in concluding Nora to also be a neglected and abused juvenile, contending there were no other factors to support such conclusions. Our Supreme Court in *In re A.J.L.H.* explained

> [a]lthough a trial court cannot rely solely on abuse of another child in the home as a basis for a neglect adjudication, we have emphasized that a trial court need not wait for actual harm to occur to the child if there is a substantial risk of harm to the child in the home. This is particularly true for very young children, where the evaluation must of necessity be predictive in nature, as the trial court must assess whether there is a substantial risk of future abuse or neglect of a child based on the historical facts of the case.

In re A.J.L.H., 384 N.C. 45, 55, 884 S.E.2d 687, 694 (2023) (citations and quotation marks omitted).

We agree with Parents' claim the prior adjudication of Nan, standing alone, cannot serve as grounds to adjudicate Nora as a neglected juvenile. We disagree, however, with their claims that no other factors were present to support the trial court's conclusion of Nora to be a neglected juvenile. As our Supreme Court in *In re A.J.L.H.* further explained:

> When determining the weight to be given to a finding of abuse of another child in the home, a critical factor is whether the respondent *indicates a willingness to remedy the injurious environment that existed with respect to the older child*. Facts that can demonstrate a parent's unwillingness to remedy the injurious environment include failing to acknowledge the older child's abuse or insisting that the parent did nothing wrong when the facts show the parent is responsible for the abuse.

Id. at 56, 884 S.E.2d at 694-95 (emphasis added). In *In re A.J.L.H.*, our Supreme Court affirmed a trial court's adjudication of a neglected juvenile, based on past abuse of a sibling, on grounds that "[t]he key 'other factor' in this case, beyond the abuse of [the fellow sibling], is respondents' inability to recognize that it was abuse, and their corresponding inability to commit to never repeating it." *Id.* (emphasis in original).

Here, the trial court's findings indicated neither Mother nor Father had acknowledged the injurious environment created for Nan, nor had they taken any steps to remedy this environment to ensure any potential future harm to Nora. Specifically, in Finding 24, the trial court found "[d]uring the period from April 12-19, 2023, [Nan] was in the exclusive care custody and control of her parents[.] Neither parent has provided an explanation for the child's injuries consistent with the medical findings." The unwillingness to acknowledge the abuse and take steps to

ensure it will never happen again is further supported by the trial court's finding that, during the hearing, Parents stood mute to the allegations of the petition and presented no evidence in opposition.

Under precedent established by our Supreme Court, here, the trial court did not have to wait for Nora to be subjected to similar harms faced by her sister before adjudicating her neglected. *See id.* ("[T]he trial court was not required to wait for Chris and Anna to reach the same age as Margaret before determining that they, too, face a substantial risk of harm from these cruel and inappropriate disciplinary measures."). According to the trial court's findings, Nan was only in the care of her parents a little over a week following her birth before she was immediately re-admitted to the hospital for her life-threatening injuries. Following Nora's birth, a little over a year after Nan's, Parents had still provided no explanation for Nan's injuries. As Nora was around the same age as Nan when Nan sustained her injuries, there was a substantial risk of physical harm to Nora, and the trial court is not required to wait for this harm to occur before adjudicating Nora to be a neglected juvenile. We affirm the trial court's adjudication of Nora as a neglected juvenile.

b. Abuse Adjudication

[3] Along with the trial court's adjudication of Nora to be a neglected juvenile, the trial court also determined her to be an abused juvenile under North Carolina General Statute Section 7B-101(1). Parents argue, as they did with the neglect adjudication, the evidence was insufficient to support the adjudication of Nora to be an abused juvenile. We agree.

Section 7B-101(1) defines an "abused" juvenile as one whose "parent, guardian, custodian, or caretaker:"

> a. Inflicts or allows to be inflicted upon the juvenile a serious physical injury by other than accidental means;
>
> b. Creates or allows to be created a substantial risk of serious physical injury to the juvenile by other than accidental means;
>
> c. Uses or allows to be used upon the juvenile cruel or grossly inappropriate procedures or cruel or grossly inappropriate devices to modify behavior;
>
> d. Commits, permits, or encourages the commission of a violation of [one or more of the included sexual offenses] by, with, or upon the juvenile . . . ;

> e. Creates or allows to be created serious emotional damage to the juvenile . . . ; or
>
> f. Encourages, directs, or approves of delinquent acts involving moral turpitude committed by the juvenile.

N.C. Gen. Stat. § 7B-101(1) (2023). As noted by our Supreme Court in *In re M.G.*, "[t]here is a commonality present in these criteria. Each definition states that a juvenile is abused when a caretaker harms the juvenile in some way, allows the juvenile to be harmed, or allows a substantial risk of harm." *In re M.G.*, 363 N.C. 570, 573, 681 S.E.2d 290, 292 (2009). As for the harm faced by a juvenile, or a substantial risk of harm, "[t]he harm may be physical, *see* N.C.G.S. § 7B-101(1)(a), (b); emotional, *see id.* § 7B-101(1)(e), (f); or some combination thereof, *see id.* § 7B-101(1)(c), (d)." *Id.*

The trial court, here, found Nora to be an abused juvenile "in that her parents have created or allowed to be created a substantial risk of serious physical injury by other than accidental means." In making this determination, similar to the neglect adjudication, the trial court relied heavily on the earlier actions of Parents that resulted in the non-accidental injuries sustained by Nora's sister. As already discussed above, a history of juvenile abuse and neglect can serve as sufficient grounds for adjudicating a sibling as presently neglected if there are some "other" factors present. However, we have no caselaw supporting the notion that past abuse of a sibling—either standing alone or joined with some other factors—can serve as sufficient grounds for *also* finding a sibling presently abused.

As for a substantial risk of harm, this Court has upheld abuse adjudications where the actions of caretakers directly creates a substantial risk of harm to the child, *see In re K.B.*, 253 N.C. App. 423, 801 S.E.2d 160 (2017), or when the caretakers are aware of a substantial risk of harm and they take no action to remedy this risk, *see In re W.C.T.*, 280 N.C. App. 17, 867 S.E.2d 14 (2021). For example, this Court in *In re K.B.* upheld an abuse adjudication of a special needs child where evidence tended to show the respondents could not maintain the child's medication regimen and were further unable to supervise the child to prevent him from harming himself. *See In re K.B.*, 253 N.C. App. at 429-36, 801 S.E.2d at 165-68. Though there were also some actual, measurable physical injuries sustained by the child in *In re K.B.*, the grounds for concluding a substantial risk of harm arose from findings tending to show that failure to supervise the child and administer his medication directly increased the child's likelihood of harming himself due to his special

needs. *See id.* at 434, 801 S.E.2d at 167-68 ("These findings show that despite being aware of Kirk's mental health and behavior issues, [the] respondents failed to provide adequate supervision and properly maintain Kirk's medication which caused his unbalanced behavior in early November. Even if inflicted by Kirk on himself, the injuries were nevertheless the result of physical harm 'by other than accidental means' that [the] respondents allowed to occur due to their failure to maintain Kirk's medication and provide adequate supervision to meet Kirk's special needs."). Additionally, in *In re K.B.*, the trial court found the child "did not experience any substantial injuries in any of the placements outside of respondents' home. This finding shows that Kirk's other placements were able to provide proper supervision and prevent Kirk from causing any self-harm." *Id.* at 434-35, 801 S.E.2d at 168.

In *In re W.C.T.*, this Court affirmed a trial court's abuse adjudication where evidence tended to show the respondent-parents allowed the paternal grandmother to supervise the child, knowing she suffered from mental health and behavioral issues. *See In re W.C.T.*, 280 N.C. App. at 37, 867 S.E.2d at 28. This Court noted that the trial court's findings

> [tended to] show [the r]espondent-[m]other knew of the paternal grandmother's unstable behavior, which necessitated medication, and the substantial risk of physical injury her volatile conduct posed to the children. Despite this risk, [the r]espondent-[m]other allowed the paternal grandmother to continue to care for her children, and she failed to take steps to ensure her children were properly supervised and protected.

Id. at 37-38, 867 S.E.2d at 28 (citations omitted).

But in *In re K.L.*, this Court reversed and remanded a trial court's abuse adjudication where there was "nothing to bridge the evidentiary gap between the [juvenile's] unexplained injuries . . . and the conclusion that [his parents] inflicted them[.]" *See In re K.L.*, 272 N.C. App. 30, 46, 845 S.E.2d 182, 194 (2020). In *In re K.L.*, however, the juvenile had sustained actual physical injury, and whether the parents inflicted such injuries was central to the adjudication of abuse. *See id.* at 46-47, 845 S.E.2d at 194-95.

Here, the trial court made no findings of fact indicating Nora had been subjected to any physical harm at the hands of Parents nor that their actions and/or inactions directly placed Nora in a substantial risk of harm. The only findings of harm are those pertaining to the injuries sustained by Nora's older sister, Nan. The physical injuries sustained

by Nan, along with Parents' inability to explain them, is not enough to presently adjudicate Nora to be an abused juvenile. There must be some evidence and findings to suggest Nora had been subjected to harm at the hands of Parents or that she faced a substantial risk of harm due to Parent's care and supervision of *her*; not her sister. Because the trial court made no such findings, the trial court's findings do not support the conclusion as to abuse. We reverse the trial court's adjudication of Nora as an abused juvenile.

B. Ineffective Assistance of Counsel

[4] Both Mother and Father argue on appeal they were denied their right to effective assistance of counsel during the hearing on 12 February 2024. It should be noted Parents presented the same argument on appeal of Nan's adjudication, alleging they were denied effective assistance of counsel. *See In re N.N.*, 296 N.C. App. 169, 907 S.E.2d 430. Here, like our conclusions in the appeal of Nan's adjudication, *see id.*, we disagree with Parents' argument they received ineffective assistance of counsel.

In the appeal of Nan's adjudication, this Court explained:

> Parents have a statutory right to counsel in an abuse, neglect, or dependency case, N.C. Gen. Stat. § 7B-602(a) (2023), which encompasses the right to the effective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a parent must show counsel's performance was deficient or fell below an objective standard of reasonableness that denies the parent a fair hearing. Thus, to prevail, a parent must demonstrate prejudice—a reasonable probability that counsel's deficient performance led to a different result in the proceedings.
>
> . . .
>
> It is well established that attorneys have a responsibility to advocate on the behalf of their clients. However, counsel's failure to advocate for a respondent-parent is not necessarily an indication of ineffective assistance of counsel. In some cases, such a choice by counsel may be the result of strategy or because resourceful preparation revealed nothing positive to be said for the respondent-parent in a particular hearing. There is a strong presumption that counsel's conduct falls within the range of reasonable professional assistance. Counsel is given wide latitude in matters of strategy, and the burden to show that counsel's

> performance fell short of the required standard is a heavy one for a party to bear.

Id. at 169-70, 907 S.E.2d at 438-39 (citations, quotation marks, and brackets omitted).

Here, Mother contends her counsel failed to object to the submission of the juvenile petition into evidence, did not move to dismiss at the close of DSS's evidence, and overall remained "mute" throughout the adjudicatory proceedings. Father contends his counsel "failed to object to the entry of the petition into evidence," "offered no evidence in opposition" to the petition's allegations, "did not cross-examine" DSS's witness, and further "posed no questions and called no witnesses of his own."

In the appeal of Nan's adjudication, we discussed the likelihood of counsels' decisions to "stand mute" as being influenced by Parents having pending felony charges relating to the alleged child abuse of Nan. *See id.* at 170, 907 S.E.2d at 439. Relevant to these proceedings, Parents were still awaiting disposition of these charges at the time of the 12 February 2024 hearing. Like counsels' previous decision to remain mute during some of Nan's proceedings, the decision to remain mute during certain parts of Nora's proceedings was likely, again, a strategic decision to not offer any evidence that may incriminate Parents on their felony child abuse charges.

Although counsel for Parents participated little during the adjudication phase, they actively participated during the dispositional hearing. For example, counsel for Mother actively participated during disposition by cross-examining Fialisa Pickard, social worker for DSS assigned to Nora. Counsel for Mother and Father presented their own, individual arguments during disposition as to why the trial court should not cease reunification efforts. Specifically, counsel for Mother argued the trial court should not cease reunification efforts as Mother was still seeking employment and more suitable living arrangements and has shown active involvement during her visitations with Nora. Counsel for Mother also urged the trial court to increase the scheduled visitations between Mother and Nora from one hour to two hours, as Mother and Nora are "in a critical time period where a mother/child bond can be formed." Further, Father's counsel urged the trial court to not cease reunification based on Father's constitutionally protected rights as a parent and because Father had not yet been found guilty of any specific acts causing Nan's harm in the pending felony child abuse charge.

In arguing ineffective assistance of counsel, Mother contends this Court should find the facts of this case consistent with the facts and

holdings in *In re T.D.*, No. COA15-1393, 248 N.C. App. 366, 790 S.E.2d 752 (2016) (unpublished). In *In re T.D.*, this Court remanded to the trial court, holding counsel "made absolutely no contribution to the proceedings and in no way advocated on her behalf at the hearing" in "either the adjudication or the disposition stage of the hearing[.]" *Id.*, slip op. at 5-6. We do not agree with Mother's claim that the holdings of *In re T.D.* should be applied in this case. Here, counsel for both Mother and Father, unlike counsel in *In re T.D.*, actively participated during the dispositional phase of the hearing to advocate for their clients.

As in the appeal from Nan's adjudication, our review of the hearing transcript suggests counsels' silence during the adjudicatory stage of Nora's hearing was a permissible strategic decision and is not ineffective assistance of counsel requiring remand. Also, even if we assumed the silence of Parents' counsel at adjudication was deficient performance, Parents cannot show they were deprived of a "fair hearing" or that but for counsel's performance, there would have been a "different result in the proceedings." *See In re C.B.*, 245 N.C. App. 197, 213, 783 S.E.2d 206, 217 (2016) (citations and quotation marks omitted). Even if either counsel presented a motion to dismiss, as Mother argues should have been done, the trial court should not have dismissed the petition and the motion would not have resulted in a different outcome in the proceedings. There was sufficient evidence presented for the trial court to conclude Nora to be a neglected juvenile based on Nan's previous adjudication, along with the presence of an unwillingness of either parent to acknowledge Nan's harm and to ensure this harm will not occur again. Parents' ineffective assistance of counsel arguments are overruled.

C. Reunification Efforts

[5] Finally, Parents contend the district court erred and abused its discretion by not requiring DSS to continue reunification efforts at the initial disposition hearing. We agree with Parents' argument as it relates to the trial court's determination under North Carolina General Statute Section 7B-901(c)(1)(f) of the Juvenile Code, but disagree as to the trial court's determinations made under Section 7B-901(c)(3)(iii). We affirm in part and vacate in part the trial court's dispositional order relating to the cessation or reunification efforts.

If a trial court ceases reunification efforts during an initial disposition, "the trial court . . . [must] make written findings pertaining to one of the circumstances listed" in Section 7B-901(c). *See In re L.N.H.*, 382 N.C. 536, 546, 879 S.E.2d 138, 145 (2022) (citation omitted). Section 7B-901(c) reads:

> If the disposition order places a juvenile in the custody of a county department of social services, the court shall direct that reasonable efforts for reunification as defined in G.S. 7B-101 shall not be required if the court makes written findings of fact pertaining to any of the following, unless the court concludes that there is compelling evidence warranting continued reunification efforts:
>
> (1) A court of competent jurisdiction determines or has determined that aggravated circumstances exist because the parent has committed or encouraged the commission of, or allowed the continuation of, any of the following upon the juvenile:
>
> a. Sexual abuse.
>
> b. Chronic physical or emotional abuse.
>
> c. Torture.
>
> d. Abandonment.
>
> e. Chronic or toxic exposure to alcohol or controlled substances that causes impairment of or addiction in the juvenile.
>
> **f. Any other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect.**
>
> (2) A court of competent jurisdiction terminates or has terminated involuntarily the parental rights of the parent to another child of the parent.
>
> (3) A court of competent jurisdiction determines or has determined that (i) the parent has committed murder or voluntary manslaughter of another child of the parent; (ii) has aided, abetted, attempted, conspired, or solicited to commit murder or voluntary manslaughter of the child or another child of the parent; **(iii) has committed a felony assault resulting in serious bodily injury to the child or another child of the parent**; (iv) has committed sexual abuse against the child or another child of the parent; or (v) has been required to register as a sex offender on any government-administered registry.

N.C. Gen. Stat. § 7B-901(c) (2023) (emphasis added). Here, in Nora's initial disposition, the trial court ordered DSS to cease reunification efforts under both Sections 7B-901(c)(1)(f) and 7B-901(c)(3)(iii). Specifically, the trial court ordered

> 3. Pursuant to NCGS 7B-901(c)(1)(f) and 7B-901(c)(3)(iii), the Forsyth County Department of Social Services shall be relieved of reunification efforts with [Mother] and [Father] based upon the aggravated circumstances which exist. The aggravated circumstances include the determination by a court of competent jurisdiction that [Father] and [Mother] have abused [Nan] and inflicted or allowed to be inflicted on her serious bodily injury by other than accidental means and have failed to disclose the manner and cause of [her] injuries. Additionally, [Father] and [Mother] have by their actions and their failure to disclose the manner and cause of [Nan's] injuries have increased the enormity and added to the injurious consequences of the Abuse and Neglect to both of their children, [Nan] and [Nora].

On appeal, neither Mother nor Father specifically challenge any particular findings made by the trial court during initial disposition as being unsupported by the evidence; they argue the trial court essentially did not make *enough* findings to support its conclusion as to the existence of aggravating circumstances under Section 7B-901, and thus, abused its discretion in ceasing reunification efforts with Nora.

> This Court reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision.
>
> . . . .
>
> The trial court's findings of fact are conclusive on appeal if supported by any competent evidence, notwithstanding contrary evidence in the record. The trial court's conclusions of law are reviewed de novo.

In re N.T., 289 N.C. App. 149, 152, 888 S.E.2d 231, 234 (2023) (citations and quotation marks omitted).

Under Section 7B-901(c)(1)(f), our Supreme Court in *In re L.N.H.* noted the language of "any *other* act, practice, or conduct," *In re L.N.H.*, 382 N.C. at 547-48, 879 S.E.2d at 146 (emphasis in original), implicates a requirement that the actions of the respondent-parents giving rise to

the cessation of reunification must be "in addition to the facts that rise to the initial disposition of abuse and/or neglect[,]" *id.* at 548, 879 S.E.2d at 146 (citations omitted). This means the trial court cannot rely on the same facts to adjudicate a juvenile as abused or neglected as the "other act, practice, or conduct that increased the enormity or added to the injurious consequences of the abuse or neglect[]" for purposes of disposition. N.C. Gen. Stat. § 7B-901(c). Here, Parents specifically argue the trial court erred in ceasing reunification efforts during disposition while relying on the same actions of Parents used in adjudicating Nora to be abused and neglected.

The trial court relied heavily on Parents' failure to reveal the cause of Nan's injuries in determining Nora to be an abused and neglected juvenile under a theory of substantial risk of future harm. During the dispositional phase, however, these are the same grounds on which the trial court considers it appropriate to cease reunification efforts under Section 7B-901(c)(1)(f). In the dispositional findings, the only finding supporting this conclusion is Finding 16, which reads: "[Father] also stated that he wants to do the right thing for his girls to be back home with [Mother], so he explained to his attorney what caused the injuries to [Nan]. [Father] advised that he could not share the information with the DSS social worker at that time." Though this finding is separate and distinct from the adjudicatory findings, it still falls into the same realm of which Nora was adjudicated neglected, being a substantial risk of future harm because of Parents' failure to explain how Nora was injured. Put differently, the finding is not an "other" act increasing the enormity or adding to the injurious consequences of the abuse or neglect of Nora, as it is the same basis relied on by the trial court in its initial adjudication of Nora. We vacate the trial court's determination to cease reunification under Section 7B-901(c)(1)(f).

Further, the trial court determined reunification efforts were not required under Section 7B-901(c)(3)(iii), which allows for the cessation of reunification efforts when a parent "has committed a felony assault resulting in serious bodily injury to the child *or another child of the parent*[.]" N.C. Gen. Stat. § 7B-901(c)(3)(iii) (emphasis added). Mother challenges the cessation of reunification on these grounds, contending the trial court was not a "court of competent jurisdiction" to determine whether a felony assault on a child had occurred. We disagree with this argument and conclude the trial court did not err in ceasing reunification efforts as to both Mother and Father under Section 7B-901(c)(3)(iii).

As correctly noted in Mother's brief on appeal, our North Carolina General Assembly recently amended the language of Section 7B-901(c)(3)

in 2018. Before the amendment, the statute allowed for the cessation of reunification efforts when "[a] court of competent jurisdiction *has* determined" a felony assault on a child *had* occurred. *See* N.C. Gen. Stat. § 7B-901(c)(3) (2016) (emphasis added). As this Court noted in *In re G.T.*, "this tense indicates that the determination must have already been made by a trial court—either at a previously-held adjudication hearing or some other hearing in the same juvenile case, or at a collateral proceeding in the trial court." *In re G.T.*, 250 N.C. App. 50, 57, 791 S.E.2d 274, 279 (2016). This Court also held the term "court of competent jurisdiction" supported the proposition that the determination of felony child assault must have been made by a separate tribunal before a court could cease reunification efforts. *See id.* ("Use of this term implies that another tribunal in a collateral proceeding could have made the necessary determination, so long as it is a court of competent jurisdiction.").

The language was changed in 2018, however, to include that a trial court could cease reunification when a "court of competent jurisdiction *determines* or has determined" a felony assault on a child has occurred. *See* N.C. Gen. Stat. § 7B-901(c)(3) (2018) (emphasis added). The primary effect of this amendment and the changing of language tense is to allow a "court of competent jurisdiction" the present ability to cease reunification based on its determination that a felony child assault had occurred. A court of competent jurisdiction need not wait for a separate or collateral tribunal to determine the occurrence of a felony child assault before ceasing reunification efforts.

Mother contends the trial court here was not a "court of competent jurisdiction" to presently determine the occurrence of a felony child assault in stopping reunification efforts. In advancing this argument, Mother directs us to Section 7B-101 of the Juvenile Code, highlighting this section separately defines a "court" and a "court of competent jurisdiction." As defined within the Juvenile Code, the "court" is a "district court division of the General Court of Justice," but a "court of competent jurisdiction" is "[a] court having the power and authority of law to act at the time of acting over the subject matter of the cause." N.C. Gen. Stat. §§ 7B-101(6)-(7). Mother specifically contends "[a] civil district court exercising jurisdiction pursuant to the Juvenile Code is not a 'court of competent jurisdiction' to adjudicate felonies any more than a criminal superior court exercising criminal jurisdiction pursuant to the Criminal Code is 'a court of competent jurisdiction' to adjudicate abuse or neglect."

In her brief on appeal, Mother cites to our Supreme Court's decision in *In re L.N.H.*, which addresses the issue of a trial court's ability

to cease reunification efforts under Section 7B-901(c)(3)(iii). *See In re L.N.H.*, 382 N.C. at 548, 879 S.E.2d at 147. In that case, our Supreme Court stated:

> In our view, the record developed before the trial court contains ample evidence that tends, if believed, to show that [the] respondent-mother's actions in burning Lea's feet involved the commission of a felonious assault upon the child that resulted in serious bodily injury. Although the trial court did not make the findings necessary to permit the cessation of reunification efforts with [the] respondent- mother based upon N.C.G.S. § 7B-901(c)(3)(iii), it certainly could have done so had it chosen to make such a determination.

Id. In presenting this case, Mother argues this statement by our Supreme Court is only dicta as the trial court in that case did not cease reunification efforts under Section 7B-901(c)(3)(iii), and serves only to suggest what the trial court "could have done." We disagree. Though the trial court in that case did not cease reunification under Section 7B-901(c)(3)(iii), specifically, the cessation of reunification efforts was a central issue presented on appeal, and our Supreme Court reviewed the entire record to determine whether competent evidence supported the trial court's conclusions. *See id*. at 546, 879 S.E.2d at 145-46. In reviewing the entire record, our Supreme Court determined there was sufficient evidence to support the cessation of reunification efforts under Section 7B-901(c)(3)(iii) and reversed and remanded to this Court for further proceedings consistent with the opinion. *See id*. at 549, 879 S.E.2d at 147. This language from the Supreme Court is not dicta as it is necessary to the decision and central to the issues. *See Trustees of Rowan Tech. Coll. v. J. Hyatt Hammond Assocs., Inc.*, 313 N.C. 230, 242, 328 S.E.2d 274, 281 (1985) ("Language in an opinion not necessary to the decision is *obiter dictum* and later decisions are not bound thereby." (citations omitted)).

Based on our Supreme Court's holdings in *In re L.N.H.*, a trial court conducting a juvenile adjudication and disposition for neglect and/or abuse *is* a "court of competent jurisdiction" to weigh the evidence in determining the existence of felony child assault for the purpose of ceasing reunification efforts. Further, the Supreme Court in *In re L.N.H.* specifically used the language "if believed" when discussing the "ample evidence" tending to show the respondent-mother's actions involved felonious assault upon her child and remanded to the trial court to allow it to make additional findings. *See In re L.N.H.*, 382 N.C. at 548, 879 S.E.2d at 147. *In re L.N.H.* supports the intention of the General Assembly's amendment of the Juvenile Code to allow trial courts, in conducting

juvenile proceedings, the present ability to determine whether to cease reunification without waiting for the felony assault charges to be adjudicated by a Superior Court. So long as a trial court acting under the Juvenile Code has ample evidence to find by clear, cogent, and convincing evidence the existence of a felony child assault, it may make the appropriate findings of fact and this may serve as grounds to cease reunification under Section 7B-901(c)(3)(iii).

We disagree with Mother's argument the trial court is not a "court of competent jurisdiction" to presently determine the existence of a felony child assault for the sole purpose of ceasing reunification. The trial court's findings of fact support the trial court's cessation of reunification efforts under 7B-901(c)(3)(iii). Similar to the facts presented in *In re L.N.H.*, here, both Mother and Father have been charged with felony child abuse inflicting serious injury due to the severe, unexplained, non-accidental injuries sustained by Nan while in the care of Parents. *See id.* at 538, 879 S.E.2d at 141.

We vacate the trial court's order as it relates to the cessation of reunification efforts under Section 7B-901(c)(1)(f), as the trial court did not make sufficient findings to support the existence of any "other" aggravated circumstances, separate from those relied on by the trial court during the initial adjudication of Nora. Otherwise, the trial court did not err by ordering cessation of reunification efforts as to both Mother and Father under Section 7B-901(c)(3)(iii) because the trial court found the existence of a felonious child assault against Nan.

IV. Conclusion

We conclude the trial court did not err in adjudicating Nora to be a neglected juvenile and did not err in ceasing reunification efforts as to both Mother and Father under Section 7B-901(c)(3)(iii). We reverse the trial court's adjudication of Nora as an abused juvenile. We also conclude neither Mother nor Father was denied their right to effective assistance of counsel.

AFFIRMED IN PART AND VACATED IN PART.

Judges CARPENTER and STADING concur.

IN THE MATTER OF Z.A.N.L.W.C., K.E.N.S., J.J.A.W.-S., H.O.J.-W

No. COA24-418

Filed 5 February 2025

Appeal and Error—notice of appeal—jurisdictional defect—not signed by respondent—appeal dismissed

An appeal from the trial court's orders terminating respondent-mother's parental rights to her children was dismissed for lack of jurisdiction because respondent did not sign the notice of appeal as required by N.C.G.S. § 7B-1001(c); although the notice of appeal was filed on respondent's behalf and signed by her attorney and guardian ad litem (who had been appointed pursuant to Civil Procedure Rule 17), there was no indication in the record that respondent had been adjudicated incompetent or that she wished to pursue an appeal.

Appeal by respondent-appellant mother from orders entered 1 February 2024 by Judge Resson O. Faircloth in District Court, Johnston County. Heard in the Court of Appeals 14 January 2025.

Senior Assistant County Attorney Mariamarta T. Conrad for petitioner-appellee Johnston County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Laura M. Merriman and Stephen V. Carey, for the guardian ad litem.

Robert W. Ewing for respondent-appellant mother.

STROUD, Judge.

Respondent-mother appeals from the trial court's order terminating her parental rights as to her four minor children. As Respondent-mother did not sign the notice of appeal of the termination order, this Court does not have jurisdiction and we therefore dismiss the appeal.

I. Background

Respondent-mother ("Mother") has four minor children born during the years of 2017 to 2021. The Johnston County Department of Social Services ("DSS") first filed juvenile petitions as to the oldest

two children, Zack and Kate,[1] on 2 October 2019 alleging the children were neglected and dependent "due to concerns with substance use, . . . [M]other's mental health, and improper care." On 6 November 2019, the trial court filed a continuance order for the initial adjudication hearing of Zack and Kate and appointed a guardian *ad litem* ("GAL") for Mother, noting "rule 17 GALs were appointed for [Mother] . . . . [Mother] is scheduled to give birth on [redacted] and additional time [is] required for healing and preparation for the hearing" but did not further explain the appointment of the GAL. On 3 December 2019, DSS alleged Mother's third child, Jack, was neglected and dependent, noting Mother did not currently have custody of Zack or Kate and other similar concerns involving substance use, Mother's mental health, and improper care. On 10 March 2020, Zack, Kate, and Jack were ultimately adjudicated dependent and were placed in DSS's custody. In early 2021, Mother's fourth child, Holly, was born and she tested positive for marijuana at birth. Upon Holly's discharge from the hospital, she was placed with temporary care providers and DSS soon filed a juvenile petition also alleging she was neglected and dependent, again based on allegations of Mother's substance use and mental health. On 20 July 2021, the trial court adjudicated Holly as dependent and ordered she remain in DSS's custody.

On 17 October 2022, DSS filed petitions for termination of parental rights as to all four children. The matters came on for hearing on 6 September 2023. On 1 February 2024, the trial court entered orders terminating Mother's parental rights, concluding there were grounds for termination under North Carolina General Statute Sections 7B-1111(a)(2), (a)(6), and (a)(7) as to Zack, Kate, and Jack, and (a)(2) and (a)(6) as to Holly. The trial court determined it was in the best interests of the children to terminate Mother's parental rights and ordered the children to remain in DSS's custody, granting DSS the authority to consent to adoption of the children. On 28 February 2024, Mother's trial counsel and Rule 17 GAL filed a notice of appeal on behalf of Mother, but Mother's signature was not included on the notice of appeal.

II. Jurisdiction

While Mother's attorney and Rule 17 GAL signed the notice of appeal, Mother did not. The termination order notes Mother was not in attendance at the hearing, but the record does not reveal any reason for her absence. Mother's counsel told the trial court he has not "had contact

1. Pseudonyms are used to protect the identities of the minor children.

with [Mother] since the last time she was in court, which was sometime ago" and moved to continue the case, but the trial court denied the motion. Further, on appeal, Mother's counsel does not address Mother's failure to sign the notice of appeal of the termination orders. However, even where neither party addresses jurisdiction, "it is well-established that the issue of a court's jurisdiction over a matter may be raised at any time, even for the first time on appeal or by a court *sua sponte*." *In re M.C.*, 244 N.C. App. 410, 413, 781 S.E.2d 70, 73 (2015) (citation, quotation marks, and brackets omitted).

North Carolina General Statute Section 7B-1001 governs the "[r]ight to appeal" a juvenile matter and states "[n]otice of appeal shall be signed *by both the appealing party* and counsel for the appealing party, if any." N.C. Gen. Stat. § 7B-1001(c) (2023) (emphasis added). North Carolina General Statute Section 7B-1002 also identifies "[p]roper parties for appeal" and states:

> Appeal from an order permitted under G.S. 7B-1001 may be taken by:
>
> (1) A juvenile acting through the juvenile's guardian ad litem previously appointed under G.S. 7B-601.
>
> (2) A juvenile for whom no guardian ad litem has been appointed under G.S. 7B-601. If such an appeal is made, the court shall appoint a guardian ad litem pursuant to G.S. 1A-1, Rule 17 for the juvenile for the purposes of that appeal.
>
> (3) A county department of social services.
>
> (4) A parent, a guardian appointed under G.S. 7B-600 or Chapter 35A of the General Statutes, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party.
>
> (5) Any party that sought but failed to obtain termination of parental rights.

N.C. Gen. Stat. § 7B-1002 (2023).

This Court has previously discussed the failure of a parent to sign a notice of appeal in a termination of parental rights case:

> [A]ppellate Rule 3 governing notice of appeal for civil cases is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed. Similarly, when a criminal defendant has not properly

> given notice of appeal pursuant to Rule 4 governing notice of appeal for criminal cases, this Court is without jurisdiction to hear the appeal. Because Appellate Rules 3, 3A, and 4 all concern how and when appeals are to be taken, Rule 3A is similarly jurisdictional, and if not complied with, the appeal must be dismissed.
>
> Because we hold that a GAL's signature on the notice of appeal is not sufficient to grant this Court jurisdiction, we cannot address the merits of the appeal. Accordingly, we dismiss the matter.

In re L.B., 187 N.C. App. 326, 331-32, 653 S.E.2d 240, 244 (2007) (citations, quotation marks, and brackets omitted), *aff'd per curiam*, 362 N.C. 507, 666 S.E.2d 751 (2008). We note that *In re L.B.* was interpreting a prior version of North Carolina General Statute Section 7B-1101.1, which discusses a parent's right to a GAL in a juvenile matter. *See id.* at 328-29, 653 S.E.2d at 242. A large part of this Court's discussion involved a comparison of a Rule 17 GAL and a "guardian [appointed] pursuant to Chapter 35A[,]" and whether the GAL in *In re L.B.* was to "assist" or "replace" the parent's "authority to undertake acts of legal import themselves." *Id.* at 330-31, 653 S.E.2d at 243 (citations omitted). Still, we concluded

> although it is appropriate for the GAL to *assure* that the notice of appeal—or other pleading or legal document—is filed properly with the parents' signatures as required by North Carolina Rules of Appellate Procedure 3A(a), it is not appropriate for the GAL to sign the notice of appeal in place of the parents.

Id. at 331, 653 S.E.2d at 242 (emphasis in original).

In re L.B. separately discussed North Carolina General Statute Section 7B-1002, and noted that a parent's GAL is not a "proper party" who may give notice of appeal:

> Furthermore, pursuant to North Carolina General Statutes, section 7B-1001(b), written notice of appeal is to be given "by a proper party as defined in G.S. 7B-1002." N.C. Gen. Stat. § 7B-1001(b) (2005). Such proper parties are (1) a juvenile who is acting through his GAL; (2) a juvenile without a GAL, in which case "the court shall appoint one pursuant to G.S. 1A-1, Rule 17"; (3) DSS; (4) "a parent, a guardian appointed under G.S. 7B-600 for a juvenile or Chapter 35A of the General Statutes for a

> parent, or a custodian as defined in G.S. 7B-101 who is a nonprevailing party"; and (5) any party who was unsuccessful in obtaining a termination of parental rights. N.C. Gen. Stat. § 7B-1002 (2005). *Nowhere in section 7B-1002 is a parent's GAL designated as a "proper party" who may give written notice of appeal pursuant to section 7B-1001.*

Id. at 331, 653 S.E.2d at 243 (emphasis added) (brackets omitted). Unlike North Carolina General Statute Section 7B-1101.1, North Carolina General Statute Section 7B-1002 has not been amended since this Court issued its opinion in *In re L.B. See id.*; *see also* N.C. Gen. Stat. § 7B-1002.

Further, our Supreme Court again reiterated in *In re J.L.F.*, where the father did not sign the notice of appeal "that was filed on his behalf in this case as required by N.C.G.S. § 7B-1001(c) (2019) and N.C. R. App. P. 3.1(b)[,]" the requirement that both the parent and the GAL, if any, sign the notice of appeal was jurisdictional:

> On the other hand, however, [the] respondent-father's trial counsel did attach a letter that he had received from [the] respondent-father, who remained in the custody of the Division of Adult Correction, in which [the] respondent-father indicated that he wished to note an appeal from the trial court's termination order. Although a parent's failure to sign the relevant notice of appeal has been held to constitute a jurisdictional defect, *see In re L.B.*, 187 N.C. App. 326, 332, 653 S.E.2d 240 (2007), *aff'd per curiam*, 362 N.C. 507, 666 S.E.2d 751 (2008), we conclude that the decision by [the] respondent-father's trial counsel to attach [the] respondent-father's letter to the notice of appeal resulted in substantial compliance with the signature requirement delineated in N.C.G.S. § 7B-1001(c) and N.C. R. App. P. 3.1(b), particularly given that neither DSS nor the guardian ad litem have sought to have [the] respondent-father's appeal dismissed.

In re J.L.F., 378 N.C. 445, 448, n. 4, 861 S.E.2d 744, 747, n. 4 (2021).

Here, our record does not include an order appointing the GAL for Mother; our record indicates in a continuance order dated 6 November 2019 that a GAL was appointed for Mother but does not explain the reasons for the appointment. According to several of the court reports in the record, Mother was "appointed [a GAL] to represent [her] through the court process. This was due to the concern for [her] comprehension

and understanding of the court." One of the disposition hearing court reports states that Mother was assigned a GAL "due to [her] cognitive limitations." There is no indication in the record that Mother had been adjudicated incompetent under Chapter 35A of the North Carolina General Statutes. The termination order indicates that Mother did not appear for the hearing, although she was served with notice and her attorney and "Rule 17-GAL Brooks Carter" were present at the hearing. Mother had appeared for some hearings in 2019 and 2020, before the petitions for termination were filed, but she did not file an answer to the termination petitions "due to a lack of contact between [Mother] with her [c]ourt-appointed attorney." The evidence indicated, and the trial court found, Mother had "cognitive limitations" as well as several mental health diagnoses and issues with substance abuse. But the trial court also found that "[M]other has had the ability to make reasonable progress to correct the conditions which led to the child's placement in foster care but did not do so."[2] Therefore, the information in our record indicates Mother was not incompetent as defined by North Carolina General Statute Section 35A-1101(7) and her "Rule 17 GAL" was not a proper party to file notice of appeal under North Carolina General Statute Section 7B-1002. *See* N.C. Gen. Stat. § 7B-1002. Mother was therefore required to sign the notice of appeal under North Carolina General Statute Section 7B-1001(c). *See In re L.B.*, 187 N.C. App. at 331-32, 653 S.E.2d at 244.

This case also differs from *In re J.L.F.* since not only was there nothing in our record from Mother "in which [she] indicated that [s]he wished to note an appeal from the trial court's termination order[,]" the record also shows Mother did not attend the termination hearing, her counsel did not give a reason Mother was not present, and on appeal she does not address her failure to sign the notice of appeal. *Id.* There is nothing in our record to suggest, as in *In re J.L.F.*, that Mother made any attempt to sign the notice of appeal, and as reiterated by our Supreme Court, her failure to sign the notice of appeal is a jurisdictional defect. *See id.* Thus, since the party appealing the termination order, Mother, did not sign the notice of appeal herself, nor was she in "substantial compliance with the signature requirement[,]" and this requirement is jurisdictional, we must dismiss the case. *Id.*; *see also In re L.B.*, 187 N.C. App. at 331, 653 S.E.2d at 242.

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2. These facts are not in dispute. Mother did not challenge any of the findings of fact as to adjudication in her appellate brief; the only issue raised on appeal was the trial court's abuse of discretion in the disposition portion of the order.

III. Conclusion

As Mother did not sign the notice of appeal as required by North Carolina General Statute Section 7B-1001(c), we must dismiss the appeal since this Court does not have jurisdiction.

DISMISSED.

Judges CARPENTER and GRIFFIN concur.

COURTNEY ROY OBO G.E.M., PLAINTIFF
v.
BENJAMIN FREEMAN MARTIN, DEFENDANT

No. COA24-428

Filed 5 February 2025

Domestic Violence—protective order—on behalf of parties' child—good cause for renewal—child's continued, legitimate fear of father—sufficiency of evidence

In a case involving unmarried parents sharing joint custody of their thirteen-year-old daughter, the trial court erred in renewing a domestic violence protective order (DVPO) entered against the father on the child's behalf, where there was no competent evidence showing that the child had a continued, legitimate fear of her father as required to establish good cause for renewal. The court's findings of fact incorporated many allegations from the mother's original complaint seeking the DVPO, including that the father had recorded the child while she undressed, forced her to sleep in the same bed as him, and monitored her electronic devices. However, these allegations could not serve as the basis for renewing the DVPO because: (1) they were not supported by evidence presented at the renewal hearing; (2) after multiple investigations, neither the department of social services nor law enforcement found any evidence substantiating the allegations; and (3) because the DVPO was entered as a consent order without findings of fact or conclusions of law (pursuant to N.C.G.S. § 50B-3(b1)), it did not establish any facts alleged in the complaint as proven. Furthermore, the court failed to make findings about the child's actual subjective fear of the father, relying instead on the mother's unproven allegations and the child's vague and inconsistent testimony on that key issue.

ROY v. MARTIN

[297 N.C. App. 704 (2025)]

Appeal by defendant from order entered 15 December 2023 by Judge Jimmy L. Love Jr., in Johnston County District Court. Heard in the Court of Appeals 6 November 2024.

Walsh Estate & Family Law, PLLC, by Sean N. Walsh, for defendant-appellant.

The Green Firm, PLLC, by Bonnie Keith Green, for plaintiff-appellee.

FLOOD, Judge.

Defendant Benjamin Freeman Martin appeals from the trial court's order renewing Plaintiff Courtney Roy's domestic violence protective order ("DVPO") against Defendant, on behalf of G.M.,[1] a minor child. Defendant argues the trial court's order for renewal was not supported by competent evidence of good cause. Upon review, we conclude the trial court's order was not supported by competent evidence of good cause, and accordingly, we reverse the order.

I. Factual and Procedural Background

Defendant and Plaintiff are the biological parents of G.M., who was born in March 2009. In June 2012, the Wake County District Court entered a Chapter 50 custody order ("Custody Order") governing the custody and visitation rights of the parties as to G.M. Under the Custody Order, Plaintiff and Defendant shared "joint 50/50 custody" of G.M.

On 12 April 2022, Plaintiff filed a complaint against Defendant, seeking an *ex parte* DVPO for the benefit of G.M., which the trial court entered based solely on the allegations of Plaintiff's complaint, and the *ex parte* DVPO was entered before Defendant was served. Defendant was served with the summons, complaint, and *ex parte* DVPO on 13 April 2022.

The *ex parte* DVPO set the case for a return hearing on 22 April 2022. On 22 April 2022, both parties consented to continue the hearing to 6 May 2022; on 6 May, they consented to continue the hearing again to 27 May 2022. On 27 May 2022, the case was continued again, to 8 July 2022, to allow time for both parties' counsel to obtain and review records of investigations that had been conducted by the Johnston

1. A pseudonym is used to protect the identity of the minor child and for ease of reading. *See* N.C. R. App. P. 42(b).

County Department of Social Services ("Johnston County DSS") based on multiple allegations over a period of years that had been made by Plaintiff against Defendant.

Plaintiff's motion for the *ex parte* DVPO contained three allegations:

> (1) On each of the child's weekly visits from March 2022 since the child's date of birth, Defendant has been recording the minor child while she is naked, and also in various states of dress and undress while changing clothes, through a video camera which [Defendant] has access to and which displays a bright blue light whenever he is recording her, which the minor child is aware of. The minor child has asked the Defendant on multiple occasions to stop recording her, but it continues to occur each time she spends the night at his home.
>
> (2) Despite having his own bed, Defendant requires that the minor child (13 years old) physically sleep in her [own] bed with the Defendant [45 year old] alongside her. . . each night she has an overnight visit. The minor child sleeps in an oversized t-shirt only. The minor child has also seen the Defendant naked[.]
>
> (3) On each of the child's weekly visits from March 2022 since the child's date of birth. Defendant has placed recording devices on the minor child's electronics and cell phone provided by Defendant, which records video and audio of everything the minor child is doing. The minor child has been forced to leave these electronics in her room when she showers and use[s] the bathroom, so that [she is] not being watched by Defendant.

The motion also noted that there was, as to Defendant, a "pending investigation being conducted by [Johnston County DSS]" regarding the allegations.

On 6 June 2022, the trial court entered an order requiring Johnston County DSS to submit the "juvenile CPS[2] records" regarding G.M. to the trial court for in camera inspection, providing that the trial court would review the records, and if the file "contains relevant information to the current pending custody [sic] action[,]" the trial court would order disclosure or use of the information to counsel for the parties, with specific

2. We understand this to mean "Child Protective Services."

protective provisions. On 8 July 2022, counsel for the parties again consented to continue the hearing until 15 July 2022.

The trial court never held a hearing on the domestic violence complaint, but instead, on 15 July 2022, the parties entered into a domestic violence protective consent order ("Consent DVPO"). In the Consent DVPO, Defendant agreed to have no contact with Plaintiff or G.M.; not to "assault, threaten, abuse, follow, harass (by telephone, visiting the home or workplace, or other means), or interfere with [G.M.]"; and to stay away from "any place where [Plaintiff] works" and "[G.M.]'s school." The parties stipulated that "no findings of fact and conclusions of law will be included in this consent protective order." The Consent DVPO set an expiration date of 14 July 2023.

On 29 June 2023, the parties entered into a Consent Order to Modify Custody in Johnston County File No. 22CVD002221-500, in which Defendant was prohibited from having any communication or visitation with G.M., and Plaintiff was granted sole legal and physical custody of G.M.[3]

On 6 July 2023, Plaintiff moved to renew the *ex parte* DVPO. In her motion to renew, Plaintiff repeated the same allegations as quoted above from the original complaint. Plaintiff did not allege any violation of the DVPO by Defendant, but she added the following allegations since the entry of the Consent DVPO:

> [T]he minor child remains in fear of continued harassment that rises to such a level as to inflict substantial emotional distress, and which is detrimental to her safety, health and wellbeing, in that:
>
> 4. The minor child continues to experience intense anxiety over the fear that Defendant will attempt contact, communication of any kind, and show up at her school or home.
>
> 5. On April 13 2023[,] the minor child had to be rushed to two emergency therapy sessions due to distress caused by a letter and subpoena she received from [Defendant's] attorney regarding the parties' previous chapter 50 custody matter. The letter was addressed to her personally which made her feel threatened. The minor child did not

3. Our Record does not include information on whether the original Wake County Chapter 50 custody case was moved to Johnston County or if this Consent Order was entered in another Chapter 50 custody proceeding.

> test well in school the following day due to receiving the letter[, which] caused further distress for her. The minor child reports that she feels sad, annoyed, scared and wants nothing to do with [Defendant], and she wishes he would just leave her alone.
>
> 6. The minor child continues to fear that her electronics are being hacked by [Defendant]; and
>
> 7. The minor child is afraid to see [Defendant].

On 7 September 2023, the trial court entered another Protective Order for CPS records directing that Johnston County Child Protective Services[4] ("Johnston County CPS") produce records of investigations regarding G.M. for in camera review, so the trial court could determine whether the records contained relevant information. A hearing was held on 15 December 2023. Both parties testified at the hearing, and portions of records from the Johnston County CPS investigations were produced to the trial court.

The Johnston County CPS records indicated generally that Plaintiff made multiple reports of some form of abuse or neglect by Defendant to Johnston County CPS since 2014; each report was investigated, and Johnston County CPS closed each case without taking any action. During this time, Plaintiff and Defendant shared joint custody of G.M., and G.M. spent half of the time with each parent. Plaintiff first reported "concerns for the child when she is with [Defendant]" when G.M. was about five years old, in 2014. Plaintiff reported vague concerns that Defendant "has a lot of different girlfriends and marriages and a bunch of children," and that Plaintiff did not know "how [G.M.] is being taken care of with [Defendant]." Plaintiff reported that G.M. may be wearing clothes that were too small or inappropriate for the weather in the summer and that Defendant gives G.M. "ice cream for breakfast." After an investigation involving speaking with various people knowledgeable about G.M., including medical and therapy personnel who provided care for her, Johnston County CPS concluded that: there was no maltreatment, were no safety issues, were no significant assessed risk factors;

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4. The Order also refers at one point to Wake County Child Protective Services ("Wake County CPS"). It is not clear if this is a typographical error in the order. The records included in the 9(d) supplement to the Record were produced by Johnston County DSS but also included some records from Wake County CPS. Because Defendant lived in Wake County, social workers from Wake County DSS assisted Johnston County DSS in the investigation.

and that G.M. was not in need of Johnston County CPS services. The first case was closed on 14 October 2014.

On 23 October 2014, Plaintiff again made a report to Johnston County CPS regarding Defendant. The social worker noted that Plaintiff was "a little upset" and "she first wanted to know why the case before this one was closed" and "she feels nothing is being done." Plaintiff repeated her general complaints regarding G.M.'s care by Defendant. Again, Johnston County CPS investigated Plaintiff's claims, including examination of G.M. for signs of abuse and consultations with G.M.'s medical and therapy providers and school. Ultimately, Johnston County CPS again concluded there was no need for CPS services.

On 31 March 2022, prior to Plaintiff filing the complaint in this matter, Plaintiff made another report regarding Defendant to Johnston County CPS. Plaintiff reported "that [Defendant] has watched [G.M.] undress and dress in her room previously and made [G.M.] uncomfortable." Again, Johnston County DSS did an extensive investigation, including interviews of the parties and others with knowledge about G.M., as well as a Child Medical Evaluation by the Cary Police Department. The case report noted there had been "multiple reports on this family, all of them were unsubstantiated or SNR."[5] Ultimately, Johnston County CPS concluded there were no safety concerns, and the case was closed with "services not recommended." In summary, the Johnston County CPS records indicated that Plaintiff's allegations of Defendant's actions as stated in the complaint for the DVPO were without any factual basis.

At the hearing on renewal of the DVPO, the testimony presented by both Defendant and G.M. also failed to support Plaintiff's allegations. Regarding the first allegation that Defendant recorded G.M. while she was naked, Defendant denied ever recording G.M. No recording or record of Defendant's recording G.M. was introduced into evidence. The only evidence as to this allegation came from DSS's report, which stated, G.M. "says she reported cameras in the room, but it was years ago." Johnston County CPS records indicate this claim was investigated and not substantiated. Defendant informed Johnston County CPS that he had used a "nanny cam" in his home for about three months when G.M. was about ten years old. Johnston County CPS found no other indication of camera use or recording of G.M.

As to the second allegation that Defendant required G.M. to allow him to sleep in her bed, Defendant testified, "[a]t night, [G.M.] wanted

5. In context of the report, "SNR" means "services not recommended."

me to come down and hum a song. We had a song. It's called Boadicea by Enya. I would hum the song and say good night[,] and I was married, so I would walk upstairs and sleep next to my wife." G.M. testified on direct examination:

> Q. Anything uncomfortable ever happen when you guys were sleeping in the same bed?
>
> A. Not that I remember, no.
>
> Q. Okay. And was this [Defendant']s idea to sleep in bed with him or who[se] idea was it?
>
> A. Well, I was still sort of clinging on to like -- I was at the age of still wanted to sleep, so --
>
> Q. Sure.

G.M. later testified on cross-examination:

> Q. And you also told them that nothing had ever happened with your father around the bed; is that right?
>
> A. Not that I remember, no.
>
> Q. And in fact, what you told the social workers was that you just wanted your own space. Does that sound right?
>
> A. Yes.

As to the third, and final, allegation that Defendant was surveilling G.M.'s electronic devices, G.M. testified:

> Q. Okay. Other than recording, anything else that happened with dad that made you uncomfortable that makes you still afraid today?
>
> A. He would listen in on my conversations on my technology and he would, like get in my business on the technology and stuff. So sometimes I could tell he was on my -- so I'd be on my computer and you could tell he was on there watching me.

Defendant testified to this allegation, stating, "[w]ell, I pay the bill and she has a tendency of trying to watch Youtube videos quietly that were not age appropriate. So I blocked them like any parent."

On direct examination, G.M. was questioned on whether she was afraid of Defendant, and she explained that she is "scared that he's going

to try to do something, like try to come up with something and stuff." When pressed on this answer, she testified:

> Q. Okay. You said – you just said something about afraid he's going to try to something. Can you tell me what it is that you're – like what kind of scenarios are you afraid may happen with your dad?
>
> A. I'm afraid he's going to convince me to come back or he's going to be sorry or something and do – he's best at manipulating.
>
> Q. Do you have any fear of physical harm from your dad?
>
> MR. WALSH: I'm going to object to that, Your Honor. That's a leading question.
>
> MS. VAN PATTEN: It's a yes or no.
>
> JUDGE LOVE: Overruled. I'll allow it.
>
> A. Yes.
>
> Q. Okay. What kind of physical harm are you afraid of?
>
> A. Scared that he's going to get mad at me and – 'cause why I did this, and I'm scared he's going to hurt me or something.

When G.M. was questioned on cross-examination as to whether she remained afraid of Defendant, she testified:

> Q. [G.M.], you said you're worried your – what you're afraid is that your dad might convince you to come back. Is that what you told the Court before?
>
> A. Yes, sir.
>
> Q. And you're afraid that your dad would get mad at you?
>
> A. Yes.
>
> Q. Okay, but yet, he's never done anything physically violent to you; is that right?
>
> A. Not that I remember.

After the hearing, the trial court rendered its ruling to renew the DVPO, but indicated that the meaning of "good cause" was not clear, stating that:

> Well, there's not a lot of case law on 50(c)'s[6] and [G.M.] did testify she's afraid of the Defendant, that would be afraid to see him and so that's the question. So I guess the Court of Appeals [or] Supreme Court will have to decide is whether that – and I know what your argument is, Mr. Walsh, but whether that's irrational or you know, not based on facts or what. But you know, use this for good cause showing she's still scared. I mean, I – I'm going to grant the renewal and – and I'm hoping you'll take it up because I want somebody to tell me, give us some guidelines on this. Because I mean, the way it is now, good cause shown doesn't mean a whole lot.

The trial court entered an order renewing the DVPO. The order included findings regarding the procedural history of the case. The trial court also found as follows:

> 6. In the *[e]x [p]arte* DVPO Order, the [trial c]ourt made the following relevant findings of fact regarding danger to the minor child [G.M.]:
>
> a. That [Defendant] has placed the minor child in fear of continued harassment that rises to such a level as to inflict substantial emotional distress;
>
> b. That the minor child is exposed to a substantial risk of emotional injury and it is in the best interest of and is necessary for the safety of the minor child that [D]efendant stay away from the minor child and not remove the minor child from [Plaintiff];
>
> c. The minor child disclosed to [Plaintiff] on or about April 7th 2022, that as recently as March 1-7 2022, that:
>
> d. On each of the child's weekly visits from March 1-7, 2022, since the child's date of birth, [Defendant] has been recording the minor child while she is naked, and also in various states of undress while changing clothes, through a video camera which he has access to and which displays a bright blue light whenever he is recording her, which the minor child is aware of. The minor child has asked the

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6. Plaintiff sought renewal of the Chapter 50B DVPO under N.C.G.S. § 50B-3(b). No claim was made under Chapter 50C, so we assume the reference to Chapter 50C was a *lapsus linguae*.

> [Defendant] on multiple occasions to stop recording her, but it continues to occur each time she spends the night at his home;
>
> e. Despite having his own bed, Defendant requires that the minor child (13 years old) physically sleep in her [own] bed with the Defendant [45 year old] alongside her . . . each night she has an overnight visit. The minor child sleeps in an oversized t[-]shirt only. The minor child has also seen [Defendant] naked; and
>
> f. On each of the child's weekly visits from March 1-7 2022, since the child's date of birth, [Defendant] has placed recording devices on the minor child's electronics and cell phone provided by [Defendant], which records video and audio of everything the minor child is doing. The minor child has been forced to leave these electronics in her room when she showers and use[s] the bathroom, so that she is not being watched by [Defendant].

The trial court also found as follows:

> 11. That within the [trial c]ourt's discretion, the [trial c]ourt has hereby found that good cause exists to grant Plaintiff's Motion to Renew the July 15 2022 [DVPO], for reasons including but not limited to the following:
>
> a. Plaintiff minor child testified that she remains in fear of Defendant for her and her family;
>
> b. Plaintiff minor child testified that she remains in fear of seeing the Defendant out in public for fear of what he may do or say to her; and
>
> c. Plaintiff minor child testified that she remains afraid of receiving physical harm at the hands of Defendant.

Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review a final judgment from a district court, pursuant to N.C.G.S. § 7A-27(b)(2) (2023).

III. Standard of Review

"The standard of review of a trial court's order renewing a [DVPO] is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence[,]" and "whether

those factual findings in turn support the judge's ultimate conclusions of law." *Ponder v. Ponder*, 247 N.C. App. 301, 306 (2016) (citation omitted). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Real Time Resols., Inc. v. Cole*, 293 N.C. App. 632, 635 (2024) (citation omitted) (cleaned up).

"The trial court's conclusions of law are reviewable *de novo*." *Id.* at 635 (citation omitted) (cleaned up). "Under a *de novo* review, th[is C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Craig v. New Hanover Cnty. Bd. of Educ.*, 363 N.C. 334, 337 (2009) (citations and internal quotation marks omitted).

IV. Analysis

On appeal, Defendant argues there is no competent evidence to support the trial court's findings of fact, and contends Plaintiff failed to show good cause to renew the DVPO, by failing to demonstrate a continued legitimate fear of Defendant on the part of G.M. We agree.

"For a [trial] court to renew a protective order, a plaintiff seeking the renewal must show good cause." *Ponder*, 247 N.C. App. at 306 (citation and internal quotations omitted); *see also* N.C.G.S. § 50B-3(b) (2023) ("The court may renew a protective order for good cause."); *see also* N.C.G.S. § 50B-1 (2023) (providing a DVPO is appropriate in situations where a person "attempt[s] to cause bodily injury, or intentionally caus[es] bodily injury[,]" or places one in "fear of imminent serious bodily injury or continued harassment," or commits "any act defined in [N.C.G.S. §] 14-27.21 through [N.C.G.S. §] 14-27.33").

Per prior North Carolina appellate caselaw, a showing of good cause requires a plaintiff to demonstrate the minor child's continued, legitimate fear of the defendant. *See*, *e.g.*, *Comstock v. Comstock*, 244 N.C. App. 20, 25 (2015) (affirming there was good cause to renew the DVPO based on the trial court's findings regarding the plaintiff's continued fear of the defendant, where the defendant "continued to harass and threaten" the plaintiff even with the DVPO in effect); *see also Jabari v. Jabari*, 283 N.C. App. 513, 520–21 (2022) (affirming there was good cause to support the finding that the plaintiff "remains in fear of [the d]efendant" where, among other things, the defendant "had been stalking [her and the children]," and the defendant had been "charged with felony witness intimidation because he 'just was threatening' her").

Additionally, "[t]he plain language used by our legislature does not require a trial court to attempt to determine whether the plaintiff's actual subjective fear is objectively reasonable under the circumstances."

Brandon v. Brandon, 132 N.C. App. 646, 655 (1999). The trial court must, however, make a finding that the trial court believes the plaintiff is in actual fear of the defendant to issue a DVPO. *Id.* at 654 (providing that "[a]lthough [the p]laintiff testified that she was afraid of [the d]efendant . . . the trial court made no finding regarding [the p]laintiff's subjective fear[,]" and "[w]e therefore cannot know whether the trial court believed [the p]laintiff actually feared [the d]efendant[.]" Thus, "this conclusion cannot provide grounds for issuance of the DVPO").

In *Forehand v. Forehand*, we affirmed the renewal of a DVPO for good cause, where the trial court found that "good cause" existed to renew the DVPO based on:

> (1) [the] defendant's emails with "vulgar and angry language"; (2) the fact that [the] "plaintiff continues to be in fear of the [defendant] due to his angry attitude —particularly surrounding custody issues"; (3) the "poor exchange" of the drug test results required in their Chapter 50 action which has "heighten[ed the] plaintiff's anxiety and fear"; (4) [the] defendant's past attempts to cause bodily injury to plaintiff in September 2012; (5) [the] defendant's past conduct that placed plaintiff in fear of imminent serious bodily injury; (6) the threats [the] defendant made while he was hospitalized at WakeMed hospital in September 2012; (7) [the] defendant's past threats to commit suicide and commitments based on his attempts to commit suicide; and (8) [the] defendant's past issues with drug use.

238 N.C. App. 270, 274 (2014). Upon review, we concluded that there was competent evidence in support of a finding of good cause, "based on [the] defendant's past conduct in addition to [the] plaintiff's continued fear of [the] defendant." *Id.* at 275.

Forehand, however, is different from this case in another important way. In *Forehand*, the trial court had issued the original DVPO with findings of fact and conclusions of law, but renewed the DVPO after making new findings of facts. We addressed this situation of *Forehand* in *Ponder*, explaining:

> In *Forehand*, the trial court made eight findings of fact supporting its conclusion that "good cause" existed to renew the original DVPO. This Court held the fact that the findings of fact to support renewal of the DVPO rested, in large part, on acts which also served as the basis for issuance of the original DVPO in the first place was immaterial.

> The findings of fact in an original DVPO may provide the basis for "good cause" to renew the DVPO, but only if the trial court makes new findings of fact, at the time the renewal order is entered, to support its conclusion that the "good cause" to renew is based upon the findings in the original DVPO. [In *Ponder*,] the trial court incorporated by reference the original DVPO, but did not find as fact that these, or any other, acts which supported the original DVPO demonstrated "good cause" to renew the DVPO.

Ponder, 247 N.C. App. at 307.

Here, there were no findings of fact in the "original DVPO" that could provide "good cause" to renew the DVPO, nor was there any evidence which tended to support Plaintiff's allegations in the original complaint or in the motion to renew the DVPO. We first note that the trial court's Finding of Fact No. 6 is a quote of the allegations in the original complaint described as the "*relevant findings of fact* regarding danger to the minor child [G.M]" in the *ex parte* DVPO. The *allegations* quoted in Finding of Fact No. 6, however, were not binding findings of fact made by any trial court; these are a quote of Plaintiff's allegations in her original complaint. The *ex parte* DVPO issued on 12 April 2022 – before Defendant was served with the complaint and before any adversarial hearing – simply incorporated the allegations of Plaintiff's complaint.

To the extent the trial court relied upon these allegations as "relevant findings of fact," the trial court erred, and there was no evidence presented at the renewal hearing to support these allegations. In the Consent DVPO entered on 15 July 2022, the parties stipulated that "*no findings of fact* and conclusions of law will be included in this consent protective order."

N.C.G.S. § 50B-3(b1) allows entry of a DVPO with no findings of fact or conclusions of law, providing:

> A consent protective order may be entered pursuant to this Chapter without findings of fact and conclusions of law if the parties agree in writing that no findings of fact and conclusions of law will be included in the consent protective order. The consent protective order shall be valid and enforceable and shall have the same force and effect as a protective order entered with findings of fact and conclusions of law.

N.C.G.S. § 50B-3(b1) (2023).

Although the Consent DVPO was effective as a DVPO, it did not establish any facts as proven, and none of the evidence presented at the hearing on renewal supported these allegations. The allegations of the complaint seeking the DVPO, as incorporated into the *ex parte* DVPO, were not transformed into findings of fact by entry of the Consent DVPO where the DVPO was entered pursuant to N.C.G.S. § 50B-3(b1) with *no* findings of fact. *See* N.C.G.S. § 50B-3(b1). Therefore, Finding of Fact 6 is not supported by the evidence where the trial court made no new findings of fact. *See Ponder*, 247 N.C. App. at 307.

Finding of Fact No. 11 is also not supported by the evidence. Here, there is no competent evidence to support the finding that G.M. has a continued legitimate fear of Defendant regarding the need for a protective order against a violent offense. *See* N.C.G.S. § 50B-1. G.M. did not testify that she was afraid or in fear of Defendant for any of the reasons alleged in the original complaint for the *ex parte* DVPO or as repeated in the motion to renew the DVPO. There was no evidence of Defendant ever recording G.M. The Johnston County DSS report was based solely on the allegations Plaintiff and G.M. stated to them, but ultimately there was no evidence whatsoever that Defendant had ever recorded G.M. in any inappropriate manner. Plaintiff had alleged Defendant had been recording G.M. "*on each of the child's weekly visits* from March 2022 since the child's date of birth"—a period of 13 years—and during this time, G.M was spending half of the time with Defendant, but multiple CPS and law enforcement investigations confirmed no such recording had occurred.

The only evidence introduced before the trial court that G.M. had any sort of continued "fear" was G.M.'s testimony that she was "afraid [Defendant is] going to convince me to come back or he's going to be sorry or something and do—he's best at manipulating[,]" and, after being directly asked about physical harm, that she was "[s]cared that he's going to get mad at me and—'cause why I did this, and I'm scared he's going to hurt me or something." Despite this testimony, G.M. later admitted she never recalled Defendant ever physically hurting her before.

G.M. was also fearful that Defendant would "listen in on my conversations on my technology and he would, like get in my business on the technology and stuff." Defendant acknowledged that he monitored G.M.'s computer and use of social media—as any responsible parent would for a thirteen-year-old child. Although appropriate parental monitoring of a child's use of her computer or cell phone may irritate the

child or even make her fearful, this is simply not the type of "fear" that can constitute "good cause" for a DVPO.[7] Moreover, the trial court made no findings regarding its actual belief of G.M.'s fear of Defendant; the trial court only restated G.M.'s testimony, which is not enough to issue a DVPO. *See Brandon*, 132 N.C. App. at 654 (holding there was not enough evidence to support the trial court's conclusion where it made findings of fact only as to the plaintiff's testimony of fear, but did not make any findings regarding the plaintiff's subjective fear).

Per the relevant law, delineated above, there was no "competent evidence" to show good cause to renew a DVPO, since: there was no Record evidence of violence by Defendant as to G.M., G.M. did not testify as to any actual fear of physical harm, and no findings were made regarding G.M.'s actual subjective fear of Defendant. *See Real Time Resols.*, 293 N.C. App. at 635 (requiring competent evidence to support findings of fact); *see also* N.C.G.S. § 50B-1 (providing a DVPO is appropriate in situations where a person "attempt[s] to cause bodily injury, or intentionally caus[es] bodily injury[,]" or places one in "fear of imminent serious bodily injury or continued harassment"); *Brandon*, 132 N.C. App. at 654 (requiring findings of fact regarding the plaintiff's subjective fear). G.M.'s vague testimony, without more, is not "adequate to support the finding" that she has a continued legitimate fear of Defendant, *see Real Time Resols.*, 293 N.C. App. at 635, and we accordingly reverse and vacate the trial court's order renewing the DVPO against Defendant.

V. Conclusion

Upon review, we conclude the trial court's order renewing the DVPO against Defendant was not supported by competent evidence, as the Record evidence failed to demonstrate good cause, which is required for a showing of continued, legitimate fear on the part of G.M. We therefore reverse the trial court's order.

REVERSED.

Judges GORE and STROUD concur.

7. We note that monitoring of use of electronic devices of an adult by another adult presents a very different situation than that of a *parent* supervising a minor child.

STATE OF NORTH CAROLINA
v.
ROGER DALE NOBLES

No. COA24-458

Filed 5 February 2025

Jury—juror misconduct—discussing the case outside the courtroom—investigation by trial court—no abuse of discretion—no showing of prejudice

In a prosecution for first-degree murder, the trial court did not abuse its discretion in removing a juror and an alternate juror who had allegedly discussed the facts of the case outside of the courtroom, where, after an eyewitness reported the alleged misconduct, the trial court promptly held a hearing and conducted a thorough investigation, during which it determined that the evidence—including testimony from the eyewitness and from the jurors involved, as well as video footage (taken by the eyewitness) showing part of the jurors' out-of-court conversation—substantiated the allegations of juror misconduct. The court properly acted within its discretion to ensure an impartial jury; furthermore, defendant failed to demonstrate any prejudice resulting from the jurors' removal or that the second alternate juror whom the court selected to replace the removed juror was incompetent or biased.

Appeal by defendant from judgment entered 23 August 2023 by Judge Gale M. Adams in Cumberland County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General J. Blake Norman, for the State.

Ryan Legal Services, PLLC, by John E. Ryan III, for defendant.

ARROWOOD, Judge.

Roger Nobles ("defendant") appeals the jury verdict of guilty of first-degree murder and subsequent imposition of a life sentence without the possibility of parole. For the following reasons, we find the defendant received a fair trial free from prejudicial error.

I. Background

A. Commission of the Crime

During the trial, the witness' and defendant's testimony tended to show the following. On 3 January 2022, a motorcyclist, Steven Addison ("Addison"), and defendant were stopped at an intersection in Fayetteville, North Carolina. Addison split two of the lanes approaching the traffic light and stopped next to defendant's truck. Defendant told Addison he was breaking the law, and Addison and defendant's son began to argue. Both parties proceeded through the intersection before stopping at the next intersection. Addison and defendant's son continued to argue with each other; Addison left his bike and defendant's son exited the vehicle. Defendant testified that he was worried about what could happen to his son "because of his [son's] temper." Defendant then pulled his gun out of its holster, showed Addison that he had a gun, then fired, killing Addison. Defendant then left the scene and went home, where the sheriff's department was waiting for him.

B. Juror Misconduct

On 22 August, the court conducted a hearing on juror misconduct. The court announced that "some jurors were overheard discussing the case in contradiction of the jury instructions that they were given not to discuss the case." The court first brought in Juror 9, who stated that he had not discussed the case with anyone outside the courtroom or jury deliberation room. Alternate Juror 1[1] was called and likewise denied speaking about the case. The court then put on record that it had received information that Jurors 9 and 13 had been at the snack bar discussing how the facts could support a lesser charge. The court heard testimony from Rhonda Shirley ("Ms. Shirley"), a volunteer with the Fayetteville Police Community Accountability Task Force ("PACT"), who stated that she observes cases to learn how to be a private investigator. She testified that she was getting lunch in the deli and sat near two jurors who began discussing details of the case for which they were jurors. Once she heard them discussing the details, she began recording their conversation. They discussed how they could "line up the evidence to maintain [defendant's] innocence." On cross-examination, the State questioned Ms. Shirley on the relationship between the president of the Fayetteville PACT, Chilleko Hurst ("Mr. Hurst"), and the family of the victim. Hurst had a relationship with Addison's family and had been

1. This juror is referred to as Juror 13 in portions of the transcript and as such in defendant's brief.

attempting to provide them with support. Ms. Shirely testified that she had never discussed the case with Mr. Hurst, nor had he ever expressed his opinion on the case to her. She stated that while she did ask Mr. Hurst, in general terms, how to handle a situation such as the one she had just encountered, he instructed her to speak with the former president of PACT, Kathy Greggs, who provided her with the steps to follow.

The hearing continued on the following day, when the recording taken by Ms. Shirley was played. Judge Adams noted that the court had had the opportunity to review the video, and stated that it showed three jurors at the table: Juror 6, Juror 9, and Alternate Juror 1. Juror 6 was called, who denied discussing the case with anyone, or overhearing anyone discussing the case. Judge Adams ultimately ruled that audio quality from the recording rendered it unhelpful, and that the decision would turn on witness testimony. Judge Adams dismissed Juror 9 and Alternate Juror 1, with Alternate Juror 2 taking Juror 9's place, and made the following statement:

> The Court has considered the testimony of the witness under oath and has also considered the statements made by all three jurors in making this determination. The conversation that was recorded was between juror number 9 and juror number 13. Juror number 6 was not included as having been involved in the conversation at all, and the juror number 6 as so indicated that not only did they not participate in such a conversation but also that they did not overhear such a conversation. In my discretion I am going to remove those two jurors.

Defendant's counsel opposed the trial court's exercise of its discretion, arguing that either the defense should have an opportunity to exercise a preemptory challenge as to Juror 6, or that if Juror 6 was not to be excused, none of the jurors should have been excused. The trial court noted the objections for the record, while also noting "that throughout this entire process the Court has acted within its discretion."

Defendant was subsequently found guilty of first-degree murder and sentenced to life in prison without the possibility of parole. Defendant gave notice of appeal in open court.

II. Discussion

Defendant raises one issue on appeal, whether the trial court abused its discretion by dismissing Juror 9 and Alternate Juror 1. For the following reasons, we find that the trial court did not abuse its discretion.

"Due process guarantees defendants a panel of impartial jurors, and the trial court has a duty to ensure the jurors 'remain impartial and uninfluenced by outside persons.' " *State v. Galbreath*, 906 S.E.2d 514, 517 (N.C. Ct. App. 2024) (quoting *State v. Rutherford*, 70 N.C. App. 674, 677 (1984)). Upon an allegation of juror misconduct, the trial court must make appropriate investigations "to determine if misconduct has occurred and if the defendant has been prejudiced." *Id.* (citing *State v. Drake*, 31 N.C. App. 187, 191 (1976)). The trial court's determination on the existence and extent of jury misconduct is given great weight and deference on appeal, as these determinations and the effect of possible misconduct "depend on facts and circumstances specific to the case." *Id.* (citing *Drake*, 31 N.C. App. at 190). "[A] mistrial is a drastic remedy, warranted only for such serious improprieties as would make it impossible to attain a fair and impartial verdict." *State v. Jones*, 241 N.C. App. 132, 138 (2015) (quotation marks and citation omitted).

Accordingly, this court reviews the decision to dismiss a juror, and the determination to remove a juror for misconduct, for abuse of discretion. *See State v. Davis*, 325 N.C. 607, 621–22 (1989); *State v. Drake*, 31 N.C. App. 187, 190 (1976). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *Davis v. Davis*, 360 N.C. 518, 523 (2006) (internal quotation marks and citation omitted).

"In sum, where the trial court has made a 'careful, thorough' investigation and concluded the conduct has not prejudiced the jury on any key issue, we have generally declined to find it abused its discretion." *Galbreath*, 906 S.E.2d at 517 (citation omitted).

In this case, the trial court became aware of possible juror misconduct between Juror 9 and Alternate Juror 1. The trial court promptly conducted a hearing on the allegations and made a thorough investigation, hearing testimony from witnesses and reviewing video footage of the alleged misconduct. Following the investigation and hearing, the trial court determined, in its discretion, that Juror 9 and Alternate Juror 1 should be removed.

Defendant presents a somewhat novel argument as the first part of his appeal, as is evidenced by his lack of citations to cases that contain a similar factual scenario as his own. Cases concerning juror misconduct generally involve an appeal by a defendant that a juror was not properly investigated, or was not removed when their presence prejudiced the defendant. *See, e.g.*, *State v. Salentine*, 237 N.C. App. 76 (2014) (no abuse of discretion in declining to find a mistrial and conduct further

investigation into juror misconduct given the deference due the trial court); *State v. Harris*, 145 N.C. App. 570 (2001) ("Not every violation of a trial court's instruction to jurors is such prejudicial misconduct as to require a mistrial.")

By contrast, defendant argues that the removal of a juror, which he contends was arbitrary, prejudiced him *per se* when the trial court refused to reopen *voir dire*. At no point, however, does defendant argue that the initial *voir dire* process suffered from any fatal defect; rather, he appears to attack the system of alternate jurors itself. Defendant cites to *State v. McKenna*: "[s]o long as the jurors who are actually empaneled are competent and qualified to serve, defendant may not complain . . . ." 289 N.C. 668, 681 (1976). Defendant also cites to *State v. Gell*: "The goal of jury selection is to ensure that a fair impartial jury is empaneled." 351 N.C. 192, 200 (2000) (citations omitted). Defendant follows this citation by stating that "[s]uch a jury was empaneled in this case – and it included Juror 9 and Juror 13."

However, the fair and impartial jury *also* included Alternate Juror 2, who replaced Juror 9. Defendant makes no argument that Alternate Juror 2 was incompetent to serve as a juror, or that they would be unfair or partial towards one side. If defendant did not wish there to be any possibility that Alternate Juror 2 serve on the jury, his opportunity to have that juror removed was during *voir dire*, which he failed to do.

More importantly, defendant has failed to show how he was prejudiced by the removal of Juror 9 and Alternate Juror 1. The trial court promptly conducted a hearing on the alleged misconduct, investigated the allegations and evidence, and in its discretion excused those jurors. Defendant has failed to show " 'such serious improprieties as would make it impossible to attain a fair and impartial verdict.' " *Jones*, 241 N.C. App. at 138 (quoting *State v. Dye*, 207 N.C. App. 473, 481–82 (2010)). Therefore, we hold that the trial court did not abuse its discretion in removing Juror 9 and Alternate Juror 1.

III. Conclusion

For the foregoing reasons, we find that the trial court exercised its discretion in removing the juror and alternate and that defendant received a fair trial.

NO ERROR.

Judges COLLINS and STADING concur.

IN RE D.E.-E.Y.

[297 N.C. App. 724 (2025)]

IN THE MATTER OF D.E.-E.Y., L.E.P., T.R.Y.

No. COA24-564

Filed 5 February 2025

Termination of Parental Rights—appointed counsel—withdrawal permitted at start of termination hearing—no inquiry—abuse of discretion

In a proceeding for termination of a mother's parental rights to her minor children, the district court abused its discretion in allowing an oral motion by respondent-mother's appointed counsel to withdraw at the start of a termination hearing—on the basis of appointed counsel's assertion that he had no contact with respondent-mother in over a year—where respondent-mother was not present and there was no further inquiry by the court into counsel's efforts to contact respondent-mother to provide her with notice of his intention to withdraw. The termination order entered was vacated, and the matter was remanded to the district court for a hearing, after adequate notice to respondent-mother, to determine whether appointed counsel had attempted to contact respondent-mother regarding his intent to withdraw and whether he had justifiable cause to make such a request.

Judge ARROWOOD concurring by separate opinion.

Judge STADING dissenting.

Appeal by Respondent-Mother from orders entered 4 March 2024 by Judge Christopher A. Freeman in Rockingham County District Court. Heard in the Court of Appeals 15 January 2025.

Robert W. Ewing for Respondent-Appellant Mother.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, L.L.P., by Amelia L. Serrat, for Petitioner-Appellee Guardian ad Litem.

No brief filed for Petitioner-Appellee Rockingham County Department of Health and Human Services.

COLLINS, Judge.

IN RE D.E.-E.Y.

[297 N.C. App. 724 (2025)]

Mother appeals from the trial court's orders terminating her parental rights to her minor children, Larry, Donna, and Tina.[1] Mother contends that the trial court erred by allowing Mother's counsel to withdraw from representing her at the beginning of the termination hearing. Because the record contains no indication that Mother's counsel had made any effort to notify, much less actually notified, Mother of his intention to seek leave of court to withdraw from representing her, the trial court abused its discretion by allowing her counsel's motion. *See In re D.E.G.*, 228 N.C. App. 381, 387 (2013). The termination orders are vacated and the case remanded to the Rockingham County District Court for further proceedings.

I. Background

Mother is the biological parent of Larry (born in 2015), Donna (born in 2020), and Tina (born in 2021). On or about 30 October 2021, Rockingham County Department of Health and Human Services ("DHHS") received a neglect report regarding Larry, Donna, and Tina. According to the report, a fourth child of Mother was "observed with marks and bruises on his chest, stomach[,] and sides."[2]

DHHS filed a petition alleging that Larry, Donna, and Tina were abused, neglected, and dependent juveniles. A hearing for nonsecure custody was held on 4 November 2021. At this hearing, Mother was served with a Juvenile Summons and Notice of Hearing, which indicated that attorney James Reaves had been temporarily assigned to represent her. Both Mother and Reaves were present at this hearing. Reaves was present and Mother was absent for a pre-adjudication hearing on 7 December 2021. Both Reaves and Mother were present for another pre-adjudication hearing on 22 December 2021.

The children were adjudicated to be neglected and dependent on 12 January 2022. A dispositional hearing was held the same day, and the children were ordered to remain in DHHS custody. Reaves and Mother were present for both hearings.

Reaves was present for permanency planning hearings on the following dates: 7 April 2022, 2 June 2022, 29 August 2022, 17 November 2022, 15 December 2022, 19 January 2023, 6 July 2023, and 27 November 2023. Mother was present for the June 2022, August 2022, and January 2023

1. We use pseudonyms to protect the identity of minor children. *See* N.C. R. App. P. 42.

2. This child has since been placed in the custody of his biological father and is not a subject of this appeal.

hearings. A permanency planning hearing was also held on 5 May 2022, at which neither Reaves nor Mother were present.

DHHS filed motions on 12 October 2023 to terminate Mother's parental rights to Larry, Donna, and Tina. A termination hearing was held on 19 February 2024. Reaves was present at the hearing; Mother was not. At the beginning of the hearing, Reaves orally moved to withdraw as Mother's counsel, stating that he had not had contact with Mother in "over a year." Over no objection from opposing counsel and without further inquiry from the trial court, Reaves' motion was allowed.

A DHHS foster care social worker testified at the termination hearing that Mother had made no effort to correct her identified areas of need to successfully reunify with the children. Since 12 October 2023, Mother had not performed any drug screens and had only seen the children in person once. The social worker also expressed concern over the continuing domestic violence disputes between Mother and her fiancée. The children's guardian ad litem testified that it would be in the children's best interests to terminate Mother's parental rights and clear the children to be adopted. All three children had been living with the same foster family and had formed a bond with the family. The trial court concluded that grounds existed to terminate Mother's parental rights and that termination would be in the children's best interests.

The trial court entered judgments terminating Mother's parental rights to Larry, Donna, and Tina on 4 March 2024. Mother appeals.

II. Discussion

Mother argues that the trial court erred by allowing her appointed counsel to withdraw on the day of the termination hearing without having notified Mother of his intention to withdraw.

A. Standard of Review

"A trial court's decision to grant or deny an attorney's motion to withdraw is reviewed on appeal for an abuse of discretion." *In re T.A.M.*, 378 N.C. 64, 71 (2021) (citation omitted). An abuse of discretion results "where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re T.L.H.*, 368 N.C. 101, 107 (2015) (citation omitted).

B. Analysis

"Parents have a right to counsel in all proceedings dedicated to the termination of parental rights." *In re L.C.*, 181 N.C. App. 278, 282 (2007) (quotation marks and citation omitted); *see also* N.C. Gen. Stat.

§ 7B-1101.1 (2023). "After making an appearance in a particular case, an attorney may not cease representing [their] client in the absence of (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court." *In re D.E.G.*, 228 N.C. App. at 386 (quotation marks, brackets, and citation omitted).

While the trial court has discretion to allow or deny an attorney's motion when there is justifiable cause and prior notice to the client, when an attorney "has given his client no prior notice of an intent to withdraw, the trial judge has no discretion and must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Id.* (quotation marks and citations omitted).

> As a result, before allowing an attorney to withdraw or relieving an attorney from any obligation to actively participate in a termination of parental rights proceeding when the parent is absent from a hearing, the trial court must inquire into the efforts made by counsel to contact the parent in order to ensure that the parent's rights are adequately protected.

Id. at 386-87 (citation omitted).

Here, Reaves was appointed to represent Mother in November 2021, immediately after DHHS filed its petition alleging that the children were abused, neglected, and dependent. Although Mother's attendance at subsequent hearings was inconsistent, Reaves was Mother's counsel of record and represented her from November 2021 until the termination hearing on 19 February 2024. At the beginning of the termination hearing, Reaves orally moved to withdraw as Mother's counsel. Without further inquiry, the trial court allowed the motion. Because the record contains no indication that Mother's counsel had made any effort to notify, much less actually notified, Mother of his intention to seek leave of court to withdraw from representing her, the trial court abused its discretion by allowing Reaves' motion. *See id.* at 387.

The guardian ad litem contends that the trial court did not err because it acted pursuant to N.C. Gen. Stat. § 7B-1101.1(a), which, it argues, required the trial court to dismiss Reaves as Mother's counsel given her failure to appear at the termination hearing. This same argument has been raised and rejected by this Court in similar situations. *See*, *e.g.*, *In re D.E.G.*, 228 N.C. App. at 387-88.

When a termination of parental rights petition is filed, "unless the parent is already represented by counsel, the clerk shall appoint

provisional counsel for each respondent parent named in the petition[.]" N.C. Gen. Stat. § 7B-1101.1(a). If the respondent parent fails to appear at "the first hearing after service upon the respondent parent, the court shall dismiss the provisional counsel." *Id.*

Here, the guardian ad litem's argument "rests upon the basic legal principle that termination proceedings are independent from any underlying abuse, neglect[,] or dependency proceeding," and assumes that Mother was being represented by provisional counsel at the beginning of the termination hearing. *In re D.E.G.*, 228 N.C. App. at 388 (citation omitted). This assumption, however, is misguided; the appointment of provisional counsel "is unnecessary in the event that the parent is already represented by counsel." *Id.* (quotation marks omitted); N.C. Gen. Stat. § 7B-1101.1(a). At the time DHHS filed its termination of parental rights petition on 12 October 2023, Reaves had been representing Mother for approximately two years. Because Reaves was not provisional counsel at the termination proceeding that Mother failed to attend, the trial court was not required to dismiss Reaves pursuant to N.C. Gen. Stat. § 7B-1101.1(a).

Accordingly, in light of the trial court's erroneous decision to allow Reaves' motion to withdraw from his representation of Mother, the termination order must be vacated and the case remanded to the Rockingham County District Court. On remand,

> the trial court should, after providing [Mother] with adequate notice, conduct a hearing for the purpose of determining the extent, if any, to which [Mother's] trial counsel had attempted to notify [Mother] of his intentions to seek leave of court to withdraw from his representation of [Mother] and whether he had justifiable cause for making that request. In the event that adequate notice was given to [Mother] and in the event that [Mother's] trial counsel had justifiable cause for being relieved of any obligation to continue representing [Mother], the trial court should allow the withdrawal motion and reinstate the termination order[s], with [Mother] having the right to seek appellate review of the trial court's determination with respect to [her] trial counsel's withdrawal motion by noting an appeal from the reinstated termination order[s]. If the trial court determines that [Mother's] trial counsel did not provide his client with adequate notice of his intention to seek leave of court to withdraw from his representation of [Mother] or that [Mother's] trial counsel failed to show

> adequate justification for the allowance of that request, the trial court should conduct a new termination hearing and enter [] new order[s] addressing the issues raised by the [DHHS] termination [motions].

In re D.E.G., 228 N.C. App. at 389.

III. Conclusion

The trial court abused its discretion by allowing Mother's counsel to withdraw because Mother's counsel neither provided actual notice nor attempted to provide notice of his intention to withdraw from Mother's representation. Accordingly, the termination orders must be vacated and the case remanded to the Rockingham County District Court for further proceedings.

VACATED AND REMANDED.

Judge ARROWOOD concurs by separate opinion.

Judge STADING dissents by separate opinion.

ARROWOOD, Judge, concurring.

I concur fully with the opinion that the judgment must be vacated because the record is devoid of evidence of what, if any, efforts appointed counsel made to contact the appellant prior to being allowed to withdraw from representation.

I write separately, however, to note that in my opinion, the Record contains sufficient evidence to support findings and conclusions that the appellant has failed to be involved with her children's lives to the extent that parental rights would be subject to termination. "[A]n adjudication of any single ground in N.C.G.S. § 7B-1111(a) is sufficient to support a termination of parental rights." *In re A.S.D.*, 378 N.C. 425, 428 (2021) (quoting *In re E.H.P.*, 372 N.C. 388, 395 (2019)). Here, the trial court found that grounds for termination existed pursuant to N.C.G.S. § 7B-1111(a)(1), (2), and (6). Although the result of this appeal is determined by the issue of representation, respondent-mother's failure to take the steps necessary to make adequate progress on her case plan with DSS to remedy the issues of neglect and dependency, together with her failure to attend the court dates regarding the children's future, would in other circumstances be sufficient to support termination of parental rights.

STADING, Judge, dissenting.

In re T.A.M. instructs us to consider the trial court's actions not only through the lens of whether it "respected the sanctity of [a parent's] statutory right to counsel," but also whether "it reasonably balanced and honored the purpose and policy of this State to promote finding permanency for the juvenile at the earliest possible age and to put the best interest of the juvenile first where there is a conflict with those of a parent." 378 N.C. 64, 75, 859 S.E.2d 163, 170 (2021) (citing N.C. Gen. Stat. § 7B-1100(2)–(3) (2019)). An application of this standard leads me to dissent from the majority opinion.

This case is marked by Mother's lack of participation and persistent absence. "[S]uch cases as these are fact-specific and hence dependent on the unique facts. . . ." *In re T.A.M.*, 378 N.C. at 74, 859 S.E.2d at 170. Here, Mother made minimal efforts to correct her identified areas of need to successfully reunify with her children. She did not attend permanency planning hearings in April 2022, November 2022, December 2022, July 2023, or November 2023. Nor had Mother submitted to any drug screens since January 2023. In fact, as a result of a positive drug screen on 29 November 2022, Mother's unsupervised visits with the children were terminated. To that end, Mother also has not consistently participated in visitation. For example, from July 2023 to November 2023, Mother was "offered four possible visits with the children and [she] only exercised one . . . ."

In its order, the trial court found that the attorney "made a preliminary motion to withdraw as attorney of record . . . due to lack of contact as [the attorney] has not had contact with [Mother] in close to a year and [the attorney] has no updated contact information on [Mother]." The attorney indicated his ability to "advocate" was frustrated by Mother's lack of communication over the course of the previous year. *See Dunkley v. Shoemate*, 350 N.C. 573, 578, 515 S.E.2d 442, 445 (1999) ("[A] lawyer cannot properly represent a client with whom he has no contact."). Thus, the trial court faced a dilemma of either leaving an attorney in place who could not provide effective assistance, continuing the matter and appointing another attorney which would further delay the proceedings, or releasing the attorney unable to provide effective assistance and moving forward with the hearing. *See id.* at 577–78, 515 S.E.2d at 445. Given its choices, the trial court "put the best interest of the juvenile first where there [was] a conflict with those of [the] parent" and did not abuse its discretion. *In re T.A.M.*, 378 N.C. at 75, 859 S.E.2d at 170. I would thus affirm the trial court's termination order.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 FEBRUARY 2025)

ANDERSON v. WMCI CHARLOTTE II, LLC No. 24-476	Mecklenburg (23CVS015937)	Reversed and Remanded
CAMERON v. NEWMAN No. 23-1120	Wake (21SP1929)	Affirmed and Remanded
IN RE A.R.B. No. 24-515	Henderson (20JT000172)	Affirmed
IN RE I.G.J. No. 24-655	Cabarrus (22JT000171)	Affirmed
IN RE J.L.W. No. 24-620	Forsyth (22JT000070)	Affirmed
IN RE L.-A.S.N.-C. No. 24-622	Mecklenburg (22JT000190-590)	Affirmed
IN RE L.L.A. No. 24-560	Wilkes (23JT000127)	Affirmed.
IN RE Z.C.H. No. 24-554	Sampson (18JT000029) (18JT000030)	Affirmed
PETER MILLAR, LLC v. SHAW'S MENSWEAR, INC. No. 24-370	Durham (19CVS1958)	Reversed In Part and Remanded; Dismissed In Part.
STATE v. AGUILAR No. 24-457	Wake (21CR211824-910) (21CR211825-910) (21CR211826-910)	No Error
STATE v. CLARK No. 23-1156	Union (18CRS54471) (18CRS54472)	Affirmed
STATE v. DAVIS No. 24-408	Mecklenburg (19CRS228105) (20CRS2479)	Dismissed In Part; Dismissed Without Prejudice In Part.
STATE v. GAUSE No. 24-576	Mecklenburg (07CRS211736-38)	Dismissed

STATE v. METCALF No. 24-415	Wake (19CR223713-910) (19CR223714-910) (21CR208217-910) (21CR208222-910) (21CR212920-910)	Vacated and Remanded
STATE v. WARD No. 24-574	Hoke (19CRS000477) (19CRS050253)	No Error.
STATE v. WEBB No. 24-625	Pasquotank (20CR051323) (21CR000745)	No Error

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