297 N.C. App.—No. 4 Pages 733-898

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

SEPTEMBER 24, 2025

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COURT OF APPEALS

CASES REPORTED

FILED 19 FEBRUARY 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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her daughter—first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest—the trial court did not commit plain error when instructing the jury on aiding and abetting by a parent where, given the plethora of evidence of not only defendant's presence during the incidents at issue but also her verbal statements and actions indicating her consent and contribution to the commission of the crimes against her daughter, defendant failed to show that, absent any alleged error, the jury probably would have reached a different result. **State v. Velasco, 885.**

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generally nonviolent. Defendant's related constitutional argument was not preserved for appellate review because he did not argue that he was being denied his right to present a complete defense when the evidence was excluded. **State v. Greenfield, 832.**

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children, the district court's determination that the statutory ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) existed was upheld where: (1) the court's findings of fact pertaining to the six months immediately preceding the filing of the petitions—the relevant period under subsection 7B-1111(a)(7) and during which respondent-father was incarcerated—were supported by uncontradicted evidence that the juveniles received no visits, letters or other communications, or financial contributions from respondent-father, even though he knew the address where the juveniles resided with their mother and had been able to send money and two letters during an earlier period of incarceration; and (2) those findings of fact in turn supported the court's conclusions of law that respondent-father willfully abandoned the juveniles by voluntarily withholding his care and affection from them. **In re X.I.F., 799.**

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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.

FISH v. STETINA

[297 N.C. App. 733 (2025)]

JOHN M. FISH, PLAINTIFF
v.
WAYNE DOUGLAS STETINA, DEFENDANT

No. COA23-1115

Filed 19 February 2025

1. Collateral Estoppel and Res Judicata—issue preclusion—distinguished from law-of-the-case—alienation of affection—admission of evidence—potentially probative of previously litigated issue

In plaintiff's second lawsuit bringing the same alienation of affection claim against defendant, where defendant's motion for summary judgment in the first lawsuit was granted as to plaintiff's criminal conversation claim, the trial court did not err in admitting into evidence certain phone calls and data from a location-sharing app placing defendant and plaintiff's ex-wife at the same hotel during the same time period. Defendant's argument—that plaintiff violated the law-of-the-case doctrine where, by introducing this evidence, he improperly relitigated the issue of pre-separation sexual intercourse—lacked merit for two reasons: first, because two separate lawsuits were involved, the proper doctrine for analyzing the argument was that of issue preclusion, not law-of-the-case; second, although the court in the first lawsuit necessarily determined at summary judgment that defendant did not have pre-separation sexual intercourse with plaintiff's ex-wife, issue preclusion principles did not bar plaintiff from introducing evidence that may have been probative of pre-separation sexual intercourse.

2. Appeal and Error—preservation of issues—admission of evidence—different objections stated at trial and on appeal

In an alienation of affection case, defendant failed to preserve for appellate review his objection to evidence (placing him and plaintiff's ex-wife at the same hotel during the same time period) on hearsay grounds where, at trial, he explicitly objected to the evidence's admission on the ground that no foundation for the evidence had been laid, and he did not specifically object to the evidence as lacking the requisite foundation for satisfying the business record exception to the hearsay rule (which was the argument he put forth on appeal). Although defendant did preserve his general foundation objection for appeal, he abandoned any argument to that effect by failing to argue it in his appellate brief.

3. Alienation of Affections—motion for directed verdict—malice—sufficiency of evidence

In an alienation of affection case, the trial court properly denied defendant's motion for a directed verdict where plaintiff had presented sufficient evidence that defendant acted with malice, including phone records and location data documenting numerous interactions between defendant and plaintiff's ex-wife prior to her separation from plaintiff. To be sure, the doctrine of issue preclusion prevented the jury from considering the phone and location records as proof that defendant and plaintiff's ex-wife engaged in pre-separation sexual intercourse, since that particular issue had already been determined (in the negative) in a prior lawsuit. However, a reasonable jury could still conclude that defendant's repeated phone conversations and visits with plaintiff's ex-wife amounted to "intentional conduct that would probably affect the marital relationship" between the spouses.

4. Damages and Remedies—alienation of affection—punitive damages—proof of aggravating circumstances beyond malice—sufficiency

The trial court in an alienation of affection case properly submitted the issue of punitive damages to the jury, where plaintiff presented sufficient evidence of aggravating circumstances beyond the malice required to prove alienation of affection and to support an award of compensatory damages. Specifically, plaintiff introduced evidence showing that defendant intentionally deleted all of his text messages with plaintiff's ex-wife upon learning that he might be sued, which constituted spoliation of evidence and was the type of intentional conduct that went beyond the implied malice necessary for establishing alienation of affection.

5. Alienation of Affections—evidence of out-of-state conduct—where alienation of affection is not a recognized tort—admissibility

In an alienation of affection case, where defendant's alleged conduct spanned multiple states of which North Carolina was the only one that recognized the tort of alienation of affection, plaintiff's evidence of defendant's out-of-state conduct was still admissible, since it was relevant to the issue of where the tortious injury occurred. Even if the location of the injury had not been disputed by the parties or presented to the jury, the evidence was still relevant, as defendant's out-of-state conduct made it more likely to be true

that defendant "produced the loss of [plaintiff and his ex-wife's] love and affection."

Appeal by Defendant from judgment entered 3 April 2023 by Judge Nathaniel J. Poovey in Catawba County Superior Court. Heard in the Court of Appeals 13 August 2024.

Wesley E. Starnes, PC, by Wesley E. Starnes, for Defendant-Appellant.

Pope McMillan, P.A., by Clark D. Tew, for Plaintiff-Appellee.

CARPENTER, Judge.

Wayne Douglas Stetina ("Defendant") appeals a jury award of compensatory and punitive damages in favor of John M. Fish ("Plaintiff") on his alienation of affection claim. On appeal, Defendant argues the trial court erred by: (1) admitting certain evidence that was barred by the law-of-the-case doctrine; (2) allowing Plaintiff to present evidence from Life360 (the "App"); (3) denying Defendant's motion for directed verdict; (4) submitting the issue of punitive damages to the jury; and (5) admitting evidence of Defendant's out-of-state conduct. After careful review, we discern no error.

I. Factual and Procedural Background

On 29 June 2020, Plaintiff sued Defendant on claims of alienation of affection and criminal conversation in Catawba County Superior Court. In his complaint, Plaintiff requested compensatory and punitive damages. Among his other allegations, Plaintiff alleged that Defendant had sexual intercourse with Plaintiff's wife ("Wife") before Plaintiff and Wife separated.

On 26 July 2020, Defendant moved for summary judgment on both claims. On 8 November 2020, Defendant amended and refiled his summary judgment motion. On 23 February 2022, the trial court filed an order (the "Order") granting Defendant summary judgment on the criminal conversation claim and denying summary judgment on the alienation of affection claim. In the Order, the trial court "conclude[d] that there [was] no genuine issue as to any material fact related to Plaintiff's claim for criminal conversation." The trial court did not further explain its grant of summary judgment. Plaintiff did not appeal the Order.[1]

1. Because Plaintiff did not appeal from the Order, we will not opine on the Order.

On 21 March 2022, Plaintiff voluntarily dismissed his 29 June 2020 complaint. On 4 May 2022, Plaintiff filed a new complaint against Defendant asserting only a claim for alienation of affection.[2] On 6 March 2023, Plaintiff's case proceeded to trial and the evidence tended to show the following.

On 16 January 1998, Plaintiff and Wife married. During their marriage, Wife became involved in a charity bicycling organization called Ride to Recovery ("R2R"). Through her involvement with R2R, Wife met Defendant, a former Olympic bicyclist. Defendant, who lived in California, and Wife, who lived in North Carolina, began exchanging phone calls sometime in 2016. Wife maintained, however, that their phone conversations only concerned R2R.

Over time, Defendant and Wife's phone conversations increased in both frequency and duration. In January 2016, Defendant and Wife spoke on the phone 9 times for a total of 188 minutes. Similarly, in February 2016, Defendant and Wife spoke on the phone 10 times for a total of 213 minutes. In August 2016, Defendant and Wife spoke on the phone 47 times for a total of 776 minutes. Finally, by March 2017, Defendant and Wife spoke on the phone 138 times for a total of 2,234 minutes. Prior to separating from Wife, Plaintiff was not aware of Defendant. Defendant, on the other hand, knew Wife was married to Plaintiff.

Using the App, a global-positioning-system application, Plaintiff learned Wife was at a hotel in Boone, North Carolina in early July 2017. Defendant was at the hotel at the same time as Wife, and the two did not call each other during this period. When Plaintiff testified concerning the App, Defendant's counsel objected, asserting lack of foundation.

In late July and early August of 2017, Wife traveled to Nevada and Colorado. Defendant also traveled to Colorado during the same period but denied seeing Wife during his trip. From late July until 2 August 2017, there were no phone calls between Wife and Defendant. Other than the trip to Boone in early July 2017, when Wife was in Colorado, this was the only time in July and August 2017 in which Defendant and Wife did not call each other.

Plaintiff and Wife separated on 17 August 2017. On that day, Wife left the marital home to live in Plaintiff and Wife's vacation home (the "mountain home") in Blowing Rock, North Carolina. Plaintiff and Wife

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2. The docket number of the "original lawsuit" was 20 CVS 1640. The docket number of the "present lawsuit" is 22 CVS 931. *See Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011).

gave conflicting testimony concerning the inner workings of their marriage and why they eventually separated.

In December 2017, phone records showed that wife was in Irvine, California, where Defendant worked. Again, from 7 December 2017 until 11 December 2017, there were no phone calls between Defendant and Wife. In January 2018, Defendant traveled to North Carolina and stayed with Wife in the mountain home.

Wife denied she and Defendant had sexual relations prior to her separation from Plaintiff. Wife admitted that Defendant stayed with her at the mountain home in January 2018, but she maintained that all of her interactions with Defendant were platonic. Wife testified that she and Defendant began dating in 2018, and that the pair was still a couple as of the trial.

On 6 February 2018, Plaintiff filed for divorce. After the divorce litigation, the trial court ordered Plaintiff to pay Wife $764,000 in alimony. When Defendant learned that Plaintiff might sue him, he deleted all of his text messages with Wife. He did not, however, delete any other text conversations.

At the close of Plaintiff's alienation of affection case, Defendant moved for a directed verdict. The trial court denied Defendant's motion. At the close of the evidence, Defendant again moved for a directed verdict, which the trial court denied. When instructing the jury, the trial court did not tell the jury that they could or should consider any pre-separation sexual intercourse between Defendant and Wife. The trial court's only mention of "sex" when instructing the jury concerned the sexual relationship between Plaintiff and Wife during their marriage.

On 14 March 2023, the jury found Defendant liable for alienation of affection. The jury awarded Plaintiff $804,000 in compensatory damages and $500,000 in punitive damages. On 3 April 2023, the trial court entered judgment accordingly. On 10 April 2023, Defendant moved for judgment notwithstanding the verdict, and, in the alternative, a new trial. On 10 May 2023, the trial court denied Defendant's motion. On 12 May 2023, Defendant filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(1) (2023).

III. Issues

The issues are whether the trial court erred by: (1) admitting certain evidence that was barred by the law-of-the-case doctrine; (2) allowing

Plaintiff to present evidence from the App; (3) denying Defendant's motion for directed verdict; (4) submitting the issue of punitive damages to the jury; and (5) admitting evidence of Defendant's out-of-state conduct.

IV. Analysis

A. Evidence of Alleged Pre-Separation Sexual Contact

[1] Defendant's first and primary argument on appeal is that the trial court erred by admitting certain evidence because it was barred by the law-of-the-case doctrine. According to Defendant, the Order necessarily concluded, as a matter of law, that Defendant and Wife did not have pre-separation sexual intercourse. Defendant maintains the Order precluded Plaintiff from introducing evidence of phone calls and location data from the App because the evidence was probative of pre-separation sexual intercourse between Defendant and Wife. We agree with Defendant that the Order concluded he did not have pre-separation sexual intercourse with Wife and that Plaintiff was barred from re-litigating this issue in the present case. However, we disagree with Defendant that the issue was re-litigated by virtue of Plaintiff offering evidence of the phone calls and location data from the App.

1. Standard of Review

Whether the law-of-the-case doctrine applies is a question of law. *Royster v. McNamara*, 218 N.C. App. 520, 529–30, 723 S.E.2d 122, 129 (2012). Similarly, whether a trial court "is barred from hearing a specific claim or issue is a question of law unrelated to any specific facts of a case." *Bluebird Corp. v. Aubin*, 188 N.C. App. 671, 678, 657 S.E.2d 55, 61 (2008). This Court reviews questions of law de novo. *State v. Khan*, 366 N.C. 448, 453, 738 S.E.2d 167, 171 (2013) (citing *In re Greens of Pine Glen Ltd.*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens*, 356 N.C. at 647, 576 S.E.2d at 319).

This Court " 'review[s] a trial court's rulings . . . on the admission of evidence for an abuse of discretion.' " *Ingram v. Henderson Cnty. Hosp. Corp., Inc.*, 259 N.C. App. 266, 290, 815 S.E.2d 719, 734 (2018) (quoting *State v. Hernendez*, 184 N.C. App. 344, 348, 646 S.E.2d 579, 582 (2007)). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988) (citing *State v. Parker*, 315 N.C. 249, 337 S.E.2d 497 (1985)).

2. Criminal Conversation and Alienation of Affection

There are two causes of action relevant to Defendant's law-of-the-case argument: criminal conversation and alienation of affection. Criminal conversation requires a plaintiff to prove that there was an " 'actual marriage between the spouses and sexual intercourse between defendant and the plaintiff's spouse during the coverture.' " *Nunn v. Allen*, 154 N.C. App. 523, 535, 574 S.E.2d 35, 43 (2002) (quoting *Brown v. Hurley*, 124 N.C. App. 377, 380, 477 S.E.2d 234, 237 (1996)).

Alienation of affection, on the other hand, requires a plaintiff to prove: " '(1) there was a marriage with love and affection existing between the husband and wife; (2) that love and affection was alienated; and (3) the malicious acts of the defendant produced the loss of that love and affection.' " *Id.* at 532–33, 574 S.E.2d at 41–42 (quoting *Pharr v. Beck*, 147 N.C. App. 268, 271, 554 S.E.2d 851, 854 (2001)). "Malice is conclusively presumed by a showing that the defendant engaged in sexual intercourse with the plaintiff's spouse," *Rodriguez v. Lemus*, 257 N.C. App. 493, 495–96, 810 S.E.2d 1, 3 (2018), but malice does not require proof of sexual intercourse, *id.* at 497, 810 S.E.2d at 4 (explaining "[t]his Court has held that intentional acts by a defendant other than sexual intercourse satisfied the malice element of alienation of affection").

The date of separation is critical to both claims as "[n]o act of the defendant shall give rise to a cause of action for alienation of affection or criminal conversation that occurs after the plaintiff and the plaintiff's spouse physically separate with the intent of either the plaintiff or plaintiff's spouse that the physical separation remain permanent." N.C. Gen. Stat. § 52-13(a) (2023).

3. Issue Preclusion and Law-of-the-Case Doctrine

First, we must determine which doctrine applies to this case: law-of-the-case or issue preclusion. Although both doctrines generally bar re-litigating issues, they operate differently. On appeal, Defendant urges this Court to apply the law-of-the-case doctrine. For the reasons outlined below, we conclude issue preclusion, not law-of-the-case, is the applicable doctrine.

Issue preclusion, also known as "collateral estoppel" and "estoppel by judgment," prohibits re-litigation of an issue resolved in a final judgment " 'involving identical parties or parties in privity with a party or parties to the prior suit.' " *State v. Safrit*, 145 N.C. App. 541, 552, 551 S.E.2d 516, 523–24 (2001) (quoting *Masters v. Dunstan*, 256 N.C. 520, 524, 124 S.E.2d 574, 576 (1962)). Issue preclusion requires: "(1) a prior suit resulting in a final judgment on the merits; (2) identical issues

involved; (3) the issue was actually litigated in the prior suit and necessary to the judgment; and (4) the issue was actually determined." *McDonald v. Skeen*, 152 N.C. App. 228, 230, 567 S.E.2d 209, 211 (2002).

" '[A]n issue is actually litigated, for purposes of collateral estoppel or issue preclusion, if it is properly raised in the pleadings or otherwise submitted for determination and [is] in fact determined.' " *See Williams v. Peabody*, 217 N.C. App. 1, 6, 719 S.E.2d 88, 93 (2011) (quoting *City of Asheville v. State*, 192 N.C. App. 1, 17, 665 S.E.2d 103, 117 (2008)). Concerning the second element, "[a] very close examination of matters actually litigated must be made in order to determine if the underlying issues are in fact identical. If they are not identical, then the doctrine of collateral estoppel does not apply." *Beckwith v. Llewellyn*, 326 N.C. 569, 574, 391 S.E.2d 189, 191 (1990).

Although the law-of-the-case doctrine is similar to issue preclusion in that it prevents re-litigation of an issue, *see Royster*, 218 N.C. App. at 529–30, 723 S.E.2d at 129, the two doctrines differ in one key respect: issue preclusion prevents re-litigation in a *future* lawsuit, *see Safrit*, 145 N.C. App. at 552, 551 S.E.2d at 523–24 (emphasis added), while the law-of-the-case doctrine prevents re-litigation of an issue in the *same* lawsuit, *see Royster*, 218 N.C. App. at 529–30, 723 S.E.2d at 129. "Lawsuits" are distinguished by their trial-court docket numbers. *See Williams*, 217 N.C. App. at 3–6, 719 S.E.2d at 91–93 (analyzing issue preclusion and referring to the "original lawsuit" and the "present lawsuit" by their distinct trial-court docket numbers).

Here, Plaintiff did not appeal from the Order granting summary judgment in favor of Defendant for the criminal conversation claim. Instead, after the trial court issued the Order, Plaintiff filed a notice of voluntary dismissal and subsequently filed a new complaint asserting only an alienation of affection claim. Because Plaintiff voluntarily dismissed his original lawsuit after the trial court issued the Order, and he did not appeal from the Order, it is a final judgment concerning criminal conversation. *See Green v. Dixon*, 137 N.C. App. 305, 310, 528 S.E.2d 51, 55 (2000) ("In general, a cause of action determined by an order for summary judgment is a final judgment on the merits."); *Veazy v. City of Durham*, 231 N.C. 357, 361, 57 S.E.2d 377, 381 (1950) ("A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.").

The Order concerned the original lawsuit, docketed as 20 CVS 1640, and this appeal concerns Plaintiff's subsequent lawsuit, docketed as 22 CVS 931. So issue preclusion, not law-of the-case, is the applicable

doctrine since we are dealing with two separate lawsuits: the "original lawsuit" and the "present lawsuit." *See Williams*, 217 N.C. App. at 3–6, 719 S.E.2d at 91–93. Therefore, we assess Defendant's assertions through the issue-preclusion framework.

As an aside, we note that the applicable voluntary dismissal principles under Rule 41 do not change our conclusion that issue preclusion is the appropriate doctrine to apply here. The procedural posture of this case is rather unusual and is unlikely to be duplicated. Because Plaintiff filed his notice of voluntary dismissal after presenting arguments on both of his claims at the summary judgment hearing, Plaintiff "rest[ed] his case" within the meaning of Rule 41(a)(1)(i). *See* N.C. R. Civ. P. 41(a)(1)(i) (providing a plaintiff may dismiss an action or claim "by filing a notice of dismissal at any time *before the plaintiff rests his case*") (emphasis added); *see also Troy v. Tucker*, 126 N.C. App. 213, 216, 484 S.E.2d 98, 99 (1997) (concluding "[the] plaintiff's filing of her voluntary dismissal was unauthorized" because she "had rested her case at the summary judgment hearing"). Therefore, Plaintiff's notice of voluntary dismissal was unauthorized and Defendant could have asserted, in his responsive pleading to Plaintiff's new complaint, that Plaintiff's voluntary dismissal was with prejudice and barred Plaintiff from pursuing the alienation of affection claim in his new lawsuit. *See Pardue v. Darnell*, 148 N.C. App. 152, 157, 557 S.E.2d 172, 176 (2001) (holding where the plaintiff rested his case at trial and then attempted to take a voluntary dismissal, the dismissal operated as a dismissal with prejudice "barring [the plaintiff] from refiling suit against [the] defendant" and entitling defendant "to judgment as a matter of law" in a later-filed action based on the same claim or claims). But Defendant did not assert the affirmative defense of claim preclusion, otherwise known as res judicata, in his responsive pleading to Plaintiff's new complaint. *See Smith v. Polsky*, 251 N.C. App. 589, 595, 796 S.E.2d 354, 359 (2017) ("[A] voluntary dismissal with prejudice is, by operation of law, a final judgment on the merits implicating the doctrine of res judicata."); *Cnty. of Rutherford By & Through Child Support Enf't Agency ex rel. Hedrick v. Whitener*, 100 N.C. App. 70, 73, 394 S.E.2d 263, 264 (1990) ("[R]es judicata is an affirmative defense and must be set forth affirmatively in the pleadings."); *see also* N.C. Gen. Stat. § 1A-1, Rule 8(c) (2023). Thus, Plaintiff's alienation of affection claim properly proceeded to trial.

4. Discussion

Now equipped with the appropriate doctrine, we turn to the facts. Here, the Order granted Defendant summary judgment concerning criminal conversation. Although the Order did not explain its grant of

summary judgment beyond concluding "that there [was] no genuine issue as to any material fact" for the criminal conversation claim, it necessarily determined, as a matter of law, that Defendant did not have pre-separation sexual intercourse with Wife.

First, the issue of pre-separation sexual intercourse was "submitted for determination" in the original lawsuit, since Plaintiff alleged it in his complaint. *See Williams*, 217 N.C. App. at 6, 719 S.E.2d at 93. Second, pre-separation sexual intercourse is an element of criminal conversation, which Plaintiff also alleged in his complaint. *See Nunn*, 154 N.C. App. at 535, 574 S.E.2d at 43. Finally, Defendant admitted that Plaintiff and Wife's marriage was valid. Thus, the only disputed element of criminal conversation was Defendant's alleged pre-separation sexual intercourse with Wife. *See id.* at 535, 574 S.E.2d at 43. Accordingly, since the Order granted Defendant summary judgment concerning criminal conversation, the trial court concluded that Defendant did not have pre-separation sexual intercourse with Wife. *See id.* at 535, 574 S.E.2d at 43.

Because the issue of pre-separation sexual intercourse was resolved by the trial court in the Order, a final judgment, *see Green*, 137 N.C. App. at 310, 528 S.E.2d at 55, and was necessary to the judgment, *see McDonald*, 152 N.C. App. at 230, 567 S.E.2d at 211, issue preclusion principles applied. Accordingly, the parties were precluded from re-litigating the issue of whether Defendant and Wife had pre-separation sexual intercourse.

Here, the trial court complied with issue-preclusion principles and did not re-litigate the issue of whether Defendant and Wife had pre-separation sexual intercourse. The trial court did not instruct the jury to consider pre-separation sexual intercourse and the only mention of "sex" in the instructions concerned the sexual relationship between Plaintiff and Wife.

Defendant, however, argues that issue preclusion entitles him to more. Defendant asserts that issue preclusion prohibited Plaintiff from offering any evidence that *may* be probative of pre-separation sexual intercourse between Defendant and Wife. According to Defendant, Plaintiff was precluded from introducing evidence of Defendant and Wife's phone calls and their locations via the App because such evidence could have persuaded the jury that Defendant and Wife had pre-separation sexual intercourse, which the Order already rejected. In Defendant's view, by introducing this evidence, Plaintiff was "relitigating" the issue. We disagree with Defendant.

Issue preclusion does indeed prevent the re-litigation of issues, but issues and evidence are not the same. Prohibiting re-litigation means that certain legal theories are predetermined, as a matter of law. *See*

McCallum v. North Carolina Coop. Extension Serv. of N.C. State Univ., 142 N.C. App. 48, 56, 542 S.E.2d 227, 234 (2001). It does not mean, however, that Plaintiff's evidence was inadmissible because it *may* have been probative of whether Defendant and Wife had pre-separation sexual intercourse. The relevant inquiry is whether pre-separation sexual intercourse was indeed litigated in the subsequent action. *See Safrit*, 145 N.C. App. at 552, 551 S.E.2d at 523–24 (quoting *Masters*, 256 N.C. at 524, 124 S.E.2d at 576). In the instant case, as indicated above, it was not.

Under Defendant's approach, trial courts would need to examine each piece of evidence to discern whether it is probative of an already litigated issue. Which begs the question: How probative? We decline to open Pandora's box. Accordingly, the trial court did not violate the doctrine of issue preclusion by admitting Plaintiff's phone-call and location evidence from the App that may have been probative of pre-separation sexual intercourse. *See McDonald*, 152 N.C. App. at 230, 567 S.E.2d at 211.

B. Location Evidence from the App

[2] Next, Defendant argues that the trial court erred by admitting evidence from the App because the evidence lacked foundation for admission as a business record and was thus inadmissible hearsay. Defendant argues that he objected to the App evidence "on the grounds that this evidence was hearsay." We disagree with Defendant and dismiss his argument as unpreserved.

"In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298–99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(b)(1)); *see State v. Harris*, 253 N.C. App. 322, 327, 800 S.E.2d 676, 680 (2017) ("The specific grounds for objection raised before the trial court must be the theory argued on appeal because the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].") (internal quotation marks and citations omitted). In order to preserve an issue, the objection must "clearly present[] the alleged error to the trial court." N.C. Gen. Stat. § 8C-1, Rule 103(a)(1) (2023).

Additionally, "[i]t is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) (citing N.C. R. App. P. 28(b)(6)); *see State v. Evans*, 251 N.C. App. 610, 625, 795 S.E.2d 444, 455 (2017) (deeming an argument abandoned because the appellant did "not set forth any legal argument or citation to authority").

Here, Plaintiff offered evidence from the App to prove that Defendant and Wife were simultaneously in the same location. Below is the relevant testimony:

> **Plaintiff's Counsel**: So let's talk about what happened in July of 2017. What occurred in that month?
>
> . . . .
>
> **Plaintiff**: I looked at Life360 and I thought—
>
> **Defense Counsel**: Objection.
>
> **Plaintiff**: – isn't it odd –
>
> **Defense Counsel**: No foundation laid for Life360.
>
> **Trial Court**: Sustained.
>
> **Plaintiff's Counsel**: Okay. Let's talk about this for a second. You have an application on your phone that you've discussed called Life360; correct?
>
> **Plaintiff**: Correct.
>
> **Plaintiff's Counsel**: What is that application?
>
> **Plaintiff**: It's an application that allows family members or whoever to track one another's location. We primarily had it for the safety of our children.
>
> **Plaintiff's Counsel**: How long had you and [Wife] used Life360?
>
> **Plaintiff**: Four or five years or more.
>
> **Plaintiff's Counsel**: Okay. And did [Wife] –
>
> **Plaintiff**: Probably once they started driving.
>
> **Plaintiff's Counsel**: Did [Wife] have access to Life360 on her phone as well?
>
> **Plaintiff**: Yes.
>
> **Plaintiff's Counsel**: Was Life360, this application, something that tracked both your location and [Wife's] location?
>
> **Plaintiff**: Yes.
>
> **Defense Counsel**: Objection.
>
> **Plaintiff's Counsel**: As well as your daughters?
>
> **Plaintiff**: Yes.
>
> **Defense Counsel**: Object for the record.
>
> **Trial Court**: Overruled.
>
> **Plaintiff's Counsel**: How would this application send you notifications, or why would this application send you notifications?

Defense Counsel: Objection.

Trial Court: Overruled.

Defendant specifically objected to the App evidence for lack of foundation. Defendant later lodged several general objections without specifying a basis. Now Defendant argues that his "foundation" objection concerned the requisite foundation to satisfy the business-record exception to the hearsay rule.

Usually, objections for lack of foundation concern the "authentication or identification" necessary to show that the proposed evidence "is what its proponent claims." *See* N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). Here, Defendant's counsel merely objected to the App based on lack of "foundation." Defendant's counsel did not mention hearsay. Without specifying that a "foundation" objection actually concerns a hearsay exception, the objection does not "clearly present[]" a hearsay question to the trial court. *See id.*, Rule 103(a)(1). Therefore, Defendant did not preserve a hearsay argument, *see id.*, and he cannot "swap horses" and make a hearsay argument on appeal, *see Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

Further, any authentication argument under Rule 901 is now abandoned. On appeal, Defendant's sole argument about the App concerns hearsay and the business-record exception, and he only cites hearsay authorities. Therefore, because Defendant cites no authority and makes no argument concerning authentication, he abandoned his only preserved argument. *See Evans*, 251 N.C. App. at 625, 795 S.E.2d at 455; *see* N.C. R. App. P. 28(b)(6).

C. Motion for Directed Verdict

[3] In his third argument, Defendant asserts that the trial court erred by denying his motion for a directed verdict because Plaintiff offered no evidence of malice. Defendant echoes his first argument here, asserting that evidence of Defendant and Wife's phone call and location records must be precluded, and thus Plaintiff offered no evidence of malice. We disagree with Defendant.

We review directed-verdict rulings de novo. *Yorke v. Novant Health, Inc.*, 192 N.C. App. 340, 351, 666 S.E.2d 127, 135 (2008) (citing *Denson v. Richmond Cty.*, 159 N.C. App. 408, 411, 583 S.E.2d 318, 320 (2003)). A directed verdict "is appropriate only when the issue submitted presents a question of law based on admitted facts where no other conclusion can reasonably be reached." *Ferguson v. Williams*, 101 N.C. App. 265, 271, 399 S.E.2d 389, 393 (1991) (citing *Seaman v. McQueen*, 51 N.C. App. 500, 503, 277 S.E.2d 118, 120 (1981)). In making this determination:

> the trial court must view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 369, 329 S.E.2d 333, 337–38 (1985) (citing *Farmer v. Chaney*, 292 N.C. 451, 452–53, 233 S.E.2d 582, 584 (1977)).

Concerning alienation of affection, "[a] malicious act has been loosely defined to include any intentional conduct that would probably affect the marital relationship." *Beavers v. McMican*, 385 N.C. 629, 635, 898 S.E.2d 690, 696 (2024) (quoting *Rodriguez*, 257 N.C. App. at 495, 810 S.E.2d at 1).

Here, as detailed above, the trial court did not err by admitting evidence of Defendant and Wife's phone call and location records. The jury could not have concluded this evidence proved that Defendant and Wife had pre-separation sexual intercourse, because issue preclusion prevented that issue from being presented to the jury for determination. Nonetheless, when viewed "in the light most favorable to" Plaintiff, *see Bryant*, 313 N.C. at 369, 329 S.E.2d at 337–38, a reasonable jury could still conclude that Defendant and Wife's telephone conversations and repeated visits amounted to "intentional conduct that would probably affect the marital relationship" between Plaintiff and Wife, *see Beavers*, 385 N.C. at 635, 898 S.E.2d at 696. Therefore, the trial court did not err by denying Defendant's motion for a directed verdict. *See Ferguson*, 101 N.C. App. at 271, 399 S.E.2d at 393.

D. Punitive Damages

[4] In his next argument, Defendant asserts that the trial court erred by submitting the issue of punitive damages to the jury. We disagree with Defendant.

We review the legality of jury instructions de novo. *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010). For a jury to award punitive damages under an alienation of affection theory, "there must be evidence of circumstances of aggravation beyond the proof of malice necessary to satisfy the elements of the tort to sustain a recovery of compensatory damages." *Nunn*, 154 N.C. App. at 538, 574 S.E.2d at 44–45 (quoting *Ward v. Beaton*, 141 N.C. App. 44, 49–50, 539 S.E.2d 30, 34 (2000)). "Evidence of [pre-separation] 'sexual relations' has been held

to satisfy this requirement." *Id*. at 538, 574 S.E.2d at 45 (citing *Ward*, 141 N.C. App. at 49–50, 539 S.E.2d at 34). In the absence of such evidence, a plaintiff faces a greater challenge in submitting the punitive-damages question to the jury. *See Cottle v. Johnson*, 179 N.C. 426, 431, 102 S.E. 769, 771 (1920) (ordering a new trial where plaintiff received punitive damages for alienation of affection in a case where the plaintiff did not prove criminal conversation).

For example, evidence of "problems caused in [a] marriage and increase[ed] amount[] of time spent with plaintiff's wife," in the absence of evidence of pre-separation sexual intercourse, was held to be insufficient to send the punitive-damages question to the jury. *Chappell v. Redding*, 67 N.C. App. 397, 403, 313 S.E.2d 239, 243 (1984).

Here, as detailed above, the Order settled the question of whether Defendant and Wife had pre-separation sexual intercourse: The trial court determined they did not. *See Nunn*, 154 N.C. App. at 535, 574 S.E.2d at 43; *McDonald*, 152 N.C. App. at 230, 567 S.E.2d at 211. Nonetheless, Plaintiff still offered sufficient evidence to send the punitive-damages question to the jury.

Specifically, Plaintiff offered evidence that Defendant deleted all of his text messages with Wife upon learning that he might be sued, thereby intentionally spoliating evidence. Such evidence goes beyond "the malice implied by law from the conduct of defendant in alienating the affections between the spouses." *Chappell*, 67 N.C. App. at 403, 313 S.E.2d at 243.

Thus, Plaintiff established sufficient evidence of aggravation to send the punitive-damages question to the jury even in the absence of evidence of pre-separation sexual relations. Accordingly, the trial court did not err by sending the punitive-damages question to the jury.

E. Out-of-State Conduct

[5] In his final argument, Defendant asserts that the trial court erred by admitting evidence purporting to show that he met with Wife in Nevada, a state that does not recognize the tort of alienation of affection. According to Defendant, Plaintiff should have been barred from introducing such evidence because the question of where the tortious injury occurred was not at issue in this case and the jury was permitted to find alienation of affection based upon actions that occurred in Nevada. We disagree with Defendant.

To support his argument, Defendant cites two cases: *Darnell v. Rupplin*, 91 N.C. App. 349, 371 S.E.2d 743 (1988) and *Jones v. Skelley*,

195 N.C. App. 500, 673 S.E.2d 385 (2009). Defendant's reliance on these cases, however, is misplaced. Defendant's challenge is an evidentiary one. The rules Defendant cites from *Darnell* and *Jones* concern the trial court's determination of what substantive law applies in an alienation of affection case and whether a plaintiff can establish a valid cause of action for the same. *See Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745; *Jones*, 195 N.C. App. at 506, 673 S.E.2d at 389–90. Choice of law concepts are distinct from admissibility of evidence. Consequently, we focus our attention on the relevant inquiry—whether the evidence was admissible.

" 'The standard of review for admission of evidence over objection is whether it was admissible as a matter of law, and if so, whether the trial court abused its discretion in admitting the evidence.' " *State v. James*, 224 N.C. App. 164, 166, 735 S.E.2d 627, 629 (quoting *State v. Bodden*, 190 N.C. App. 505, 512, 661 S.E.2d 23, 27 (2008)). An abuse of discretion occurs where the trial court's " 'ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *James*, at 166, 735 S.E.2d at 629 (quoting *State v. Elliot*, 360 N.C. 400, 419, 628 S.E.2d 735, 748 (2006)).

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). "Irrelevant evidence is evidence 'having no tendency to prove a fact at issue in the case.' " *State v. Davis*, 287 N.C. App. 456, 465, 883 S.E.2d 98, 105 (2023) (quoting *State v. Hart*, 105 N.C. App. 542, 548, 414 S.E.2d 364, 368 (1992)). Generally, relevant evidence is admissible, unless the Constitution, the legislature, or the Rules of Evidence provide otherwise. *See* N.C. Gen. Stat. § 8C-1, Rule 402 (2023). Additionally, under Rule 403, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023).

In *Darnell* and *Jones*, each of the defendant's out-of-state conduct was relevant to the issue of where the tortious injury occurred—a necessary determination to establish a valid cause of action and to ascertain which state's law applies. *See Hayes v. Waltz*, 246 N.C. App. 438, 443, 784 S.E.2d 607, 613 (2013) (explaining that a plaintiff must show that the alienating conduct occurred in either North Carolina or another state that recognizes the tort to establish a valid cause of action for alienation of affection); *see also Jones*, 195 N.C. App. at 506, 673 S.E.2d at 389–90

(explaining that the law of the state where the tortious injury occurred, that is, where the alleged alienating conduct took place, is the applicable substantive law).

Specifically, in *Darnell*, the jury considered evidence of the defendant's acts occurring in four jurisdictions: North Carolina, Maryland, Virginia, and Washington, D.C. 91 N.C. App. at 351, 371 S.E.2d at 745. Of these, North Carolina was the only jurisdiction that recognized alienation of affection. *Id.* at 351, 371 S.E.2d at 745. On appeal, the defendant contended that a material issue of fact existed concerning in which jurisdiction the tort of alienation of affection took place and argued that this issue should have been submitted to the jury for determination. *Id.* at 350, 371 S.E.2d at 744. We held that "it is for the jury, *considering all the evidence*, to determine in which [jurisdiction] plaintiff's injury occurred." *Id.* at 354, 371 S.E.2d at 747 (emphasis added). Notably, we did not hold, or in any way indicate, that the evidence of the defendant's conduct occurring in Maryland, Virginia, and Washington, D.C. was inadmissible.

Similarly, in *Jones*, the defendant's alleged alienating conduct occurred in two states: North Carolina and South Carolina. 195 N.C. App. at 505–08, 673 S.E.2d at 389–90. Of the two, North Carolina was the only state that recognized alienation of affection. *Id.* at 505, 673 S.E.2d at 389. In *Jones*, we concluded that the trial court improperly granted summary judgment in favor of the defendant, explaining "a material question of fact exists as to whether the alleged alienation of [spouse's] affections occurred in North Carolina or South Carolina . . . ." *Id.* at 507–08, 673 S.E.2d at 389–90. Similarly, we did not hold, or in any way indicate, that the evidence of the defendant's South Carolina conduct was inadmissible.

Based on these cases, it is clear to us that in alienation of affection cases where the defendant's conduct spans multiple states, the question of where the injury occurred is, in most instances, at issue. Therefore, it is a question for the jury "*considering all the evidence*." *See Darnell*, 91 N.C. App. at 371, 354 S.E.2d at 747 (emphasis added). In such cases, all of the defendant's alleged alienating acts, including those acts occurring in states that do not recognize the tort, are potentially relevant for determining where the injury occurred.

Defendant, however, contends that "no such issue existed in the present case for the jury to determine." In other words, Defendant suggests that there was no dispute over whether Plaintiff's injury occurred in North Carolina, so the evidence of his Nevada conduct should have been excluded because it could not support Plaintiff's claim. By doing

so, Defendant necessarily concedes that the injury took place in North Carolina. But Defendant's assertion overlooks a critical point: the evidence of his out-of-state conduct was admissible, regardless of whether an issue existed as to where the injury occurred.

Here, as in *Darnell* and *Jones*, Defendant's conduct spanned multiple states: North Carolina, Nevada, and Colorado. Like in *Darnell* and *Jones*, North Carolina is the only state that recognizes alienation of affection. *Darnell*, 91 N.C. App. at 351, 371 S.E.2d at 745; *Jones*, 195 N.C. App. at 505, 673 S.E.2d at 389. So, it was Plaintiff's burden to prove that the tortious injury, the alienating conduct, occurred in North Carolina. *See Bassiri v. Pilling*, 287 N.C. App. 538, 546, 884 S.E.2d 165, 171 (2023) (explaining that if the defendant's conduct spans multiple states and North Carolina is the only state involved that recognizes the tort of alienation of affection "the sufficiency of the claim . . . [is] dependent upon whether the alleged injury occurred in North Carolina"). Consequently, the jury was tasked with determining in which state the tortious injury occurred. Therefore, the evidence of Defendant's out-of-state conduct was admissible for this purpose. *See Darnell*, 91 N.C. App. at 371, 354 S.E.2d at 747.

If we were to indulge the argument that the question of where the injury occurred was not at issue in this case, the evidence was, nonetheless, admissible because it was relevant and not otherwise barred. *See* N.C. Gen. Stat. § 8C-1, Rules 401 and 402. Defendant's Nevada conduct, "makes the existence of any fact that is of consequence to the determination of [alienation of affection] more or less probable than it would be without the evidence." *See* N.C. Gen. Stat. § 8C-1, Rule 401. Stated differently, Defendant's Nevada conduct makes it more likely to be true that Defendant "produced the loss of [Plaintiff and Wife's] love and affection." *See Nunn*, 154 N.C. App. at 533, 574 S.E.2d 35, 41–42 (citations omitted). Therefore, the evidence was relevant and because there was no existing rule barring the evidence, it was admissible, subject to any Rule 403 concerns. *See* N.C. Gen. Stat. § 8C-1, Rules 402 and 403. The trial court considered the applicable law and, in its discretion, determined the probative value of the evidence was not "substantially outweighed" by the risk of "unfair prejudice, confusion of the issues, or misleading the jury . . . ." N.C. Gen. Stat. § 8C-1, Rule 403.

If Defendant was concerned that the jury would improperly base its verdict on acts that would not support a claim for alienation of affection, Defendant should have requested a limiting instruction to this end; Defendant did not do so. *See State v. Coffey*, 326 N.C. 268, 286, 389 S.E.2d 48, 59 (1990) ("The admission of evidence which is competent

for a restricted purpose without limiting instructions will not be held to be error in the absence of a request by the defendant for such limiting instructions."). Accordingly, the trial court did not abuse its discretion by admitting the evidence.

V. Conclusion

In sum, the trial court did not violate the doctrine of issue preclusion by admitting Plaintiff's phone-call and location evidence, did not err by denying Defendant's motion for a directed verdict, did not err by sending the punitive-damages question to the jury, and did not err by admitting evidence of Defendant's out-of-state conduct. The issue of whether the trial court erred by admitting evidence from the App is not preserved for our review.

NO ERROR.

Judges ZACHARY and WOOD concur.

CHAD GARDNER, LISA GARDNER, LONNIE NORTON, HOPE NORTON, THE TOWN OF DOBBINS HEIGHTS AND THE CITY OF HAMLET, PLAINTIFFS
v.
RICHMOND COUNTY, DEFENDANT

No. COA21-600-2

Filed 19 February 2025

Zoning—standing—allegations sufficient—pleading of special damages not required

In a declaratory action brought by four individual and two municipal plaintiffs (a city and a town)—seeking a determination that the county's rezoning of certain property (from primarily residential to wholly heavy industrial) was void—the trial court erred in allowing defendant county's motion to dismiss as to the town on the basis of lack of standing. The town's complaint sufficiently alleged a direct and adverse effect from the rezoning decision, including that it implicated a public water supply system installed in a creek proximate to the subject property that served the town. Further, unlike challenges to quasi-judicial rezoning, challenges to legislative rezoning—such as the act of the county's board of commissioners at issue in this case—do not require a pleading of special damages.

Appeal by plaintiff Town of Dobbins Heights from order entered 14 June 2021 by Judge Dawn M. Layton in Superior Court, Richmond County. Heard in the Court of Appeals 5 April 2022 and opinion filed 2 May 2023. Remanded to this Court by order of the North Carolina Supreme Court 18 October 2024.

The Brough Law Firm, PLLC, by T.C. Morphis, Jr. and Brady N. Herman, for plaintiff-appellant.

McGuireWoods LLP, by Henry L. Kitchin, Jr. and Caroline E. Keen, for defendant-appellee.

STROUD, Judge.

Plaintiff-Appellant Town of Dobbins Heights ("Plaintiff") appeals from the part of the trial court's order granting Defendant-Appellee Richmond County's 12(b)(1) motion to dismiss due to Plaintiff's lack of standing. Because Plaintiff made sufficient allegations to establish standing to bring a declaratory judgment action and did not need to further plead special damages, we reverse the trial court's order as is applied to Plaintiff.

I. Background

On 3 December 2020, four individual plaintiffs and two municipal plaintiffs filed a verified complaint in Superior Court, Richmond County "seeking a declaratory judgment that the rezoning" of certain property "by the Richmond County Board of Commissioners on [8 October 2020] is void and of no effect[.]" The municipal plaintiffs included the City of Hamlet and Plaintiff Town of Dobbins Heights.

Plaintiffs allege that in August 2020, the Seaboard Coastline Railroad Company ("CSX") submitted a rezoning application to the Richmond County Board of Commissioners seeking to rezone about 167 acres of property ("the Property") owned by CSX in southeastern Richmond County from "Rural-Residential" and "Agricultural Residential" to "Heavy Industrial." These residential zoning districts were established in about 2003 under a "Zoning Ordinance" adopted by Defendant that "govern[ed] and regulate[d] the use of land in Richmond County located outside municipal corporate limits." The complaint alleged "[t]he Property is [located] approximately one and a half miles from Hamlet's extraterritorial jurisdiction, and approximately two and [a] half miles from both Hamlet's and Dobbins Heights['s] corporate limits." Located "less than 2,500 feet" from the Property is the "Marks Creek Property," a

parcel that holds "a body of water that both the Town of Dobbins Heights and the City of Hamlet use as their primary source of drinking water."

CSX sought to rezone the Property to allow an Ohio-based corporation, International Tie Disposal, LLC, to construct and operate a biochar production facility. This facility, as stated in the "Air Quality Construction Permit Application" submitted by International Tie to the North Carolina Department of Environmental Quality, would " 'cook[]' untreated lumber and creosote-treated railroad ties through a pyrolysis process" to produce charcoal. The complaint alleges "creosote is a known carcinogen, and the burning of carcinogens can create harmful toxins and air pollution that are detrimental to the health of humans and animals." The "pyrolysis process" would also allegedly emit air pollutants such as "nitrogen oxide, carbon monoxide, volatile organic compounds (including methanol), . . . particulate matter[,] . . . benzene, methylene chloride, chloroform, tetrachloroethylene ('PCE'), and trichloroethylene ('TCE')."

On 8 September 2020, the Richmond County Planning Board met to consider CSX's rezoning application and "unanimously voted to recommend approval to the County" Board of Commissioners, the entity responsible for granting or denying zoning amendments. On 6 October 2020, the Board of Commissioners met and held a public hearing to consider the rezoning application. At this hearing, Board of Commissioners' staff presented emails and letters submitted by local residents expressing their concerns about the application and proposed biochar facility. These residents expressed concerns about "decreasing property values, financial declines in nearby businesses, increasing air and water pollution, increasing traffic and noise, and . . . significant environmental impacts to wildlife and the surrounding area." The Nortons, individual plaintiffs in this action, expressed concerns about the quality of community drinking water because of the close proximity of the proposed site to the Marks Creek Property.

The Board of Commissioners reconvened on 8 October 2020 to vote on CSX's rezoning application. Board of Commissioners' staff presented additional emails and letters submitted within 24 hours after the close of the 6 October 2020 public hearing. After hearing and considering the final rounds of public comments, the Board of Commissioners voted to approve CSX's rezoning application; the Property was rezoned to Heavy Industrial.

The municipal plaintiffs alleged they have standing to challenge the rezoning "because International Tie's proposed biochar production

facility plant will have a significant negative impact" on the water supply and "general quality of life for the residents[.]" Specifically, they contend: they have "a specific personal and legal interest in the subject matter affected by the Rezoning and are directly and adversely affected thereby"; International Tie's use of the Property would be "an invasion of a legally protected interest that is concrete, particularized, actual and imminent"; and that an infringement on this interest would be "fairly traceable to the Rezoning, and it is likely as opposed to merely speculative that these injuries will be redressed by a decision in this case that is favorable to the Municipal Plaintiffs."

Plaintiffs first claim Defendant failed to comply with the statutory requirements for consistency statements under North Carolina General Statute Section 153A-341(b) (repealed and recodified in North Carolina General Statute Section 160D-605 (2023)).[1] Second, Plaintiffs claim Defendant failed to consider all permissible uses allowed in the Heavy Industrial zoning district, and thus "the [r]ezoning is void and of no effect under the doctrine established in *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971)[,] and more recently articulated in *Hall v. City of Durham*, 323 N.C. 293, 372 S.E.2d 564 (1988)." Plaintiffs requested the trial court to declare the zoning amendment "void and of no effect," among other relief.

On 5 February 2021, Defendant served upon Plaintiffs a motion to dismiss under Rules of Civil Procedure 12(b)(1) and 12(b)(6), contending a lack of standing and that Plaintiffs failed to assert any claims upon which relief could be granted. Defendant's motion asserted the municipal plaintiffs lacked standing to bring a declaratory judgment action because a declaratory judgment action could only be challenged "by a person who has a specific personal and legal interest in the subject

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1. Chapters 153A and 160A of the General Statutes were repealed, rewritten, and reenacted in Chapter 160D by North Carolina Session Laws 2019-111 and 2020-25 (amending Session Law 2019-111) in June 2020. *See* 2019 N.C. Sess. Law 111, § 2.2; 2020 N.C. Sess. Law 25. North Carolina General Statute Section 160D-605, governing statements of consistency, became effective 19 June 2020, shortly before the complaint was filed in this case. *See* N.C. Gen. Stat. § 160D-605 (2020). However, the Session Law enacting North Carolina General Statute Section 160D-605 stated "[v]alid local government development regulations" in effect when the amendments became effective "remain in effect but local governments shall amend those regulations to conform to the provisions of" the amendments "on or before July 1, 2021[;]" in other words, local governments had approximately one year to comply with the amendments. *See* 2020 N.C. Sess. Laws 25, § 51(b). Here, both parties and the trial court relied on North Carolina General Statute Section 153A-341(b) in the proceeding below, and no party addresses whether Defendant's zoning ordinance is compliant with North Carolina General Statute Section 160D-605.

matter affected by the zoning ordinance and who is directly and adversely affected thereby." Defendant also argued the municipal plaintiffs must show special damages "distinct from the rest of the community."

On 24 May 2021, the trial court held a hearing on Defendant's motion to dismiss. As to the first claim regarding North Carolina General Statute Section 153A-341(b), the trial court allowed Defendant's motion and dismissed the claim as to all parties, stating "[t]he [c]ourt finds that the consistency statement adopted by the Richmond County Board of Commissioners is sufficient under N.C. Gen. Stat. § 153A-341(b) and is, therefore, not subject to further review by the [c]ourt." As to the second claim that the Board of Commissioners "failed to consider all permissible uses in the Heavy Industrial zoning district[,]" the trial court denied the motion to dismiss. Further, the trial court denied Defendant's motion to dismiss for lack of standing under Rule 12(b)(1) as to the City of Hamlet, but granted the motion as to lack of standing as applied to Plaintiff.

On 6 July 2021, Plaintiff timely appealed "the portion of the [trial court's] Order granting the Motion to Dismiss as to the Town of Dobbins Heights for lack of standing pursuant to N.C. R. Civ. P. 12(b)(1)."

Originally, this Court dismissed Plaintiff's appeal as interlocutory, holding Plaintiff "failed to demonstrate a substantial right that would be impacted by this Court's failure to immediately hear its appeal[.]" *See Gardner v. Richmond Cnty.*, No. COA21-600, 288 N.C. App. 637, 885 S.E.2d 862, slip op. at 3 (2023) (unpublished). On discretionary review, our Supreme Court held Plaintiff "did more than baldly assert a right of immediate appeal under *Creek Pointe*[,]" and "adequately explained why the particular facts of this case satisfy the substantial rights test based on the holding in *Creek Pointe*." *Gardner v. Richmond Cnty.*, 386 N.C. 594, 595, 906 S.E.2d 464, 464 (2024) (per curiam) (citation omitted). Our Supreme Court reversed and remanded to this Court to "address the parties' competing arguments regarding the issue of standing." *Id.*

II. Standing

Plaintiff argues it has standing to challenge Defendant's rezoning amendment under the North Carolina Declaratory Judgment Act ("DJA"), N.C. Gen Stat. § 1-253 (2023), as well as the standard established by our Supreme Court's holding in *Committee to Elect Dan Forest v. Employees Political Action Committee (EMPAC)*, 376 N.C. 558, 853 S.E.2d 698 (2021). Defendant argues, however, Plaintiff "mischaracterizes the standing analysis in *Committee to Elect Dan Forest*" and has not "satisf[ied] the DJA's requirements to bring a claim under the Act."

Further, Defendant also argues Plaintiff was required to allege special damages that were separate and distinct from the rest of the community to have standing. We reverse the trial court's order granting Defendant's motion to dismiss as Plaintiff's allegations assert standing to challenge Defendant's rezoning decision and it was not required to plead special damages.

"Standing is properly challenged by a 12(b)(1) motion to dismiss, or 12(b)(6) motion to dismiss for a failure to state a claim upon which relief may be granted." *Fairfield Harbour Prop. Owners Ass'n, Inc. v. Midsouth Golf, LLC*, 215 N.C. App. 66, 72, 715 S.E.2d 273, 280 (2011) (citation omitted). This Court reviews a trial court's granting of a motion to dismiss for lack of standing *de novo*:

> A ruling on a motion to dismiss for want of standing is reviewed de novo. In our de novo review of a motion to dismiss for lack of standing, we view the allegations as true and the supporting record in the light most favorable to the non-moving party. In our analysis of standing, we also consider that North Carolina is a notice pleading jurisdiction, and as a general rule, there is no particular formulation that must be included in a complaint or filing in order to invoke jurisdiction or provide notice of the subject of the suit to the opposing party.

Metcalf v. Black Dog Realty, LLC, 200 N.C. App. 619, 625, 684 S.E.2d 709, 714 (2009) (citations and quotation marks omitted).

In *Taylor v. City of Raleigh*, our Supreme Court determined a party has standing to challenge a rezoning ordinance when they have "a specific personal and legal interest in the subject matter affected by the zoning ordinance and . . . is directly and adversely affected thereby." 290 N.C. 608, 620, 227 S.E.2d 576, 583 (1976) (citations omitted). Following *Taylor*, in light of the Supreme Court of the United States' decision in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 119 L. Ed. 2d 351 (1992), this Court applied a three-part test in determining whether a party had standing to challenge legislative rezoning decisions:

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

Morgan v. Nash Cnty., 224 N.C. App. 60, 65, 735 S.E.2d 615, 619 (2012) (citations and quotation marks omitted). The North Carolina Supreme Court further discussed statutorily conferred standing in *Committee to Elect Dan Forest*:

> In summary, our courts have recognized the broad authority of the legislature to create causes of action, such as "citizen-suits" and "private attorney general actions," even where personal, factual injury did not previously exist, in order to vindicate the public interest. *In such cases, the relevant questions are only whether the plaintiff has shown a relevant statute confers a cause of action and whether the plaintiff satisfies the requirements to bring a claim under the statute.* There is no further constitutional requirement because the issue does not implicate the concerns that motivate our standing doctrine. The existence of the legal right is enough.

Comm. to Elect Dan Forest, 376 N.C. at 599, 853 S.E.2d at 727-28 (emphasis added) (citation omitted). Our Supreme Court held the North Carolina Constitution does not impose a requirement to allege an "injury in fact" when challenging the validity of a statute, but instead that limit is imposed as "a rule of prudential self-restraint" in cases challenging the constitutionality of government action to ensure our courts only address actual controversies. *Id.* at 608, 853 S.E.2d at 733. As to establishing a specific claim under a statute:

> When a person alleges the infringement of a legal right arising under a cause of action at common law, a statute, or the North Carolina Constitution, however, the legal injury itself gives rise to standing. The North Carolina Constitution confers standing to sue in our courts on those who suffer the infringement of a legal right, because "every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law." N.C. Const. art. I, § 18, cl. 2. Thus, when the legislature exercises its power to create a cause of action under a statute, *even where a plaintiff has no factual injury and the action is solely in the public interest*, the plaintiff has standing to vindicate the legal right so long as he is *in the class of persons on whom the statute confers a cause of action.*

Id. (emphasis added) (citation, quotation marks, and footnote omitted). As to showing a plaintiff was among "the class of persons on whom the

statute confers a cause of action[,]" *see id.*, the Court further explained *via* a footnote:

> Showing a party falls within the class of persons on whom the statute confers a cause of action may require a showing of some special injury depending on the statutory terms. For instance, our zoning statutes confer standing to maintain a cause of action in the nature of certiorari appealing a quasi-judicial zoning action on certain classes of persons, including persons who will suffer special damages as the result of the decision being appealed. In certain cases, a cause of action may be implied from the statutory scheme. For example, to be entitled to administrative hearing under the NCAPA, a petitioner must show they are a "party aggrieved" by agency action, but where the underlying organic statute does not expressly create a right to a hearing, we have nevertheless held that those who alleged sufficient injury in fact to interests within the zone of those to be protected and regulated by the underlying statute, would have a right to an administrative hearing under the NCAPA as a "person aggrieved."

Id. at 608 n. 51, 853 S.E.2d at 733 n. 51 (citations, quotation marks, and brackets omitted).

Under our Supreme Court's decision in *Committee to Elect Dan Forest*, a two-step analysis determines whether a plaintiff has standing to challenge a legislative zoning amendment. First, it must be determined whether an alleged statute confers a cause of action to a plaintiff. *See id.* at 599, 853 S.E.2d at 727. If a statutory cause of action is conferred, it must then be determined whether the plaintiff has satisfied and sufficiently alleged the statutory requirements in bringing a claim. *See id.*

Defendant does not challenge the first step in the analysis, conceding the DJA *does* confer a legal right and cause of action on a Plaintiff. As for the second step in the analysis, whether Plaintiff has "satisfie[d] the requirements to bring a claim under the statute[,]" *id.*, the DJA provides:

> Any person . . . whose rights, status or other legal relations are *affected* by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder.

N.C. Gen. Stat. § 1-254 (2023) (emphasis added). Under the DJA, so long as Plaintiff sufficiently alleged it was "affected by" Defendant's decision to rezone the Property, Plaintiff is within the class of persons upon whom the DJA confers a cause of action, and Plaintiff is "guarantee[d] standing to sue" and seek a declaratory judgment to clarify its legal rights and relations. *See Comm. to Elect Dan Forest*, 376 N.C. at 607, 853 S.E.2d at 733. Defendant contends Plaintiff is not among the class of persons sufficiently "affected by" the rezoning ordinance and does not have standing to challenge the ordinance.

As to whether Plaintiff has sufficiently alleged it was "affected by" the rezoning decision, Plaintiff refers this Court to the allegations of the complaint and argues the allegations sufficiently allege the infringement of a legal right. Defendant, however, argues the holding in *Taylor* is still the sole test to determine whether a plaintiff is sufficiently "affected by" a zoning decision and that *Committee to Elect Dan Forest* does not abrogate *Taylor*. Defendant contends, under *Taylor*, Plaintiff has not met the standard in alleging it was "directly and adversely affected" by the zoning decision. *See Taylor*, 290 N.C. at 620, 227 S.E.2d at 583.

To an extent, we agree with Defendant's argument that *Committee to Elect Dan Forest* does not abrogate *Taylor*; instead, it lays out a broader framework within which *Taylor* fits. In *Taylor*, our Supreme Court determined municipal zoning ordinances may only be challenged through the DJA "by a person who has a specific personal and legal interest in the subject matter affected by the zoning ordinance and who is directly and adversely affected thereby." *Id.*

In *Taylor*, the plaintiff landowners challenged a rezoning ordinance that would allow the defendant to construct new apartment buildings and townhomes. Our Supreme Court held "[t]he undisputed evidence discloses that the impact of the rezoning ordinance on any of the plaintiffs was minimal." *Id.* In support of this holding, the Court noted "[t]he property of [the] plaintiffs Dunn on Boxwood Drive is one-half mile or more from the northern (closest) boundary of the rezoned 39.89 acres and the property of the other plaintiffs is farther from said northern boundary." *Id.* Additionally, "[p]rior to the bringing of this action neither [the] plaintiffs nor any of those who protested the rezoning of the entire 85-acre tract had attacked, by protest or by lawsuit, the rezoning of the 39.89 acres farthest from them." *Id.* The rezoning amendment at issue also "did not, for the first time, authorize multi-family dwellings in the area; it merely increased the permissible types and units of dwellings." *Id.* at 621, 227 S.E.2d at 583-84. The *Taylor* Court concluded:

> On this record we would be unwilling to hold that plaintiffs have established that they are persons aggrieved by the rezoning ordinance. However, in the circumstances here involved, we do not base decision solely on the ground [the] plaintiffs are not sufficiently directly and adversely affected by the rezoning ordinance to entitle them to attack it. Rather, we treat [the] plaintiffs' tenuous standing as a circumstance in considering whether [the] plaintiffs' belated attack on the rezoning ordinance is barred by laches.

Id. at 621, 227 S.E.2d at 584 (citation omitted).

We believe the facts presented here, and the allegations in Plaintiff's complaint, taken as true and in the light most favorable to Plaintiff are distinguishable from those present in *Taylor*. Here, unlike *Taylor*, the proposed rezoning ordinance would completely change the permitted uses of the Property at issue from primarily residential to wholly Heavy Industrial. *See id.* This rezoning would explicitly allow for the erection of International Tie's biochar production facility, an operation entirely different from residential land use.

In the complaint, Plaintiff clearly alleges how the erection of this biochar facility would directly and negatively impact the community, such as the burning of carcinogens, releasing a number of "toxic and harmful air pollutants," potential contamination to local water supply, and "traffic from industry" that "would disproportionally affect the road network of" Plaintiff. We note the only differences between the allegations of the municipal plaintiffs are that the City of Hamlet owns the public water supply system installed in Marks Creek, even though this system "serves over 10,000 people, including the residents of the City of Hamlet" *and* Plaintiff, and that there is a small difference between the proximity of each municipality's borders to the Property.

Plaintiff has satisfied the requirements to bring a claim under the DJA in sufficiently alleging it was "affected by" Defendant's rezoning ordinance. The DJA establishes a "legal right" for Plaintiff to challenge Defendant's rezoning ordinance, and the assertion of an "injury in fact" was not required for Plaintiff to have standing to challenge the ordinance. *See Comm. to Elect Dan Forest*, 376 N.C. at 608, 853 S.E.2d at 733. Further, even in applying the standard in *Taylor*, Plaintiff has sufficiently alleged a direct and adverse effect from the rezoning amendment.

As for Defendant's second argument asserting Plaintiff was required to allege special damages, separate and distinct from the rest

of the community, we do not agree. In *Village Creek Property Owners' Association Inc. v. Town of Edenton*, this Court considered whether "a party seeking to challenge a zoning ordinance by way of a declaratory judgment action is required to allege special damages[.]" 135 N.C. App. 482, 485, 520 S.E.2d 793, 795 (1999). In *Village Creek*, the "[d]efendants argue[d] [the p]laintiffs' complaint was properly dismissed for lack of standing because [the p]laintiffs failed to allege special damages in their complaint." *Id.* (footnote omitted). This Court disagreed, concluding:

> A party has standing to challenge a zoning ordinance in an action for declaratory judgment only when it has a specific personal and legal interest in the subject matter affected by the zoning ordinance and is directly and adversely affected thereby. The standing requirement for a declaratory judgment action is therefore similar to the requirement that a party seeking review of a municipal decision by writ of certiorari suffer damages distinct from the rest of the community. When a party seeks review by writ of certiorari, however, our courts have imposed an additional requirement that the party allege special damages in its complaint. This requirement arises from N.C. Gen. Stat. § 160A-388(b) and N.C. Gen. Stat. § 160A-388(e), which allow only "aggrieved" persons to seek review by writ of certiorari.
>
> In contrast, the Declaratory Judgment Act, authorizing the filing of declaratory judgment actions, does not require a party seeking relief be an "aggrieved" person or to otherwise allege special damages. Furthermore, our courts have not previously held that special damages must be alleged in a declaratory judgment action.
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> . . . .
>
> Because the zoning statute (the source of the requirement that special damages be alleged in the context of writ of certiorari petitions) does not require parties to be "aggrieved" in order to file a declaratory judgment action and because the Declaratory Judgment Act does not require a pleading of special damages, we hold it is not required. [The p]laintiffs' complaint should therefore not be dismissed for lack of standing based on [the p]laintiffs' failure to allege special damages.

Id. at 485-86, 520 S.E.2d at 795-96 (citations, quotation marks, ellipses, emphasis, and footnote omitted).

Further, this Court in *Village Creek* noted:

> We are aware of this Court's opinion in *Davis v. City of Archdale*, 81 N.C. App. 505, 508, 344 S.E.2d 369, 371 (1986), which states a party challenging a rezoning ordinance via a declaratory judgment action "must allege and show damages distinct from the rest of the community." *Id.* (citing *Heery*, 61 N.C. App. at 612, 300 S.E.2d at 869). The North Carolina Supreme Court addressed the *Davis* opinion in *County of Lancaster v. Mecklenburg County*, 334 N.C. 496, 503–04 n. 4, 434 S.E.2d 604, 610 n. 4 (1993), and, without deciding the issue, noted that *Davis* "alludes to a requirement for 'special damages' distinct from those of the rest of the community to confer standing to challenge a rezoning." *Id.* The *Lancaster* court also noted, however, that the test for standing provided in *Davis* was taken from cases challenging standing in quasi-judicial, rather than legislative, actions. *Id.* We therefore do not read *Davis* as requiring a party challenging a legislative zoning decision in a declaratory judgment action to allege special damages in its complaint.

Id. at 486 n.4, 520 S.E.2d at 796 n.4. Therefore, challenges to quasi-judicial zoning decisions require a pleading of special damages, but challenges to legislative zoning decisions do not. *See id.* In distinguishing quasi-judicial zoning decisions from legislative zoning decisions, this Court in *Kerik v. Davidson County* explained:

> [W]e recognize that zoning decisions regarding conditional use and special use permits are quasi-judicial in nature, and thus require judicial review[.]
>
> . . . .
>
> However, in the case *sub judice*, we are dealing with a Board of Commissioners' rezoning decision.
>
> . . . .
>
> Accordingly, adoption, amendment, or repeal of a zoning ordinance is a legislative decision that must be made by the elected governing board—the city council or the county board of commissioners[.] In other words, rezoning is a legislative act[.]

145 N.C. App. 222, 227-28, 551 S.E.2d 186, 190 (2001) (citations, quotations marks, original brackets, and emphasis omitted).

Here, Defendant's rezoning amendment was a legislative act decided by the Board of Commissioners. Because this amendment was legislative, not quasi-judicial, Plaintiff was *not* required to allege special damages within its complaint, separate and distinct from the general community.

For the foregoing reasons, Plaintiff sufficiently alleged it was "affected by" Defendant's rezoning ordinance. Plaintiff is within the "class of persons" upon which the DJA has conferred a legal right and cause of action to challenge the ordinance. This alleged "infringement of a legal right" was sufficient for Plaintiff to obtain standing, and Plaintiff was not further required to allege an "injury in fact," nor special damages.

III. Conclusion

Plaintiff's complaint sufficiently alleged it was "affected by" Defendant's rezoning ordinance, allowing it standing under the DJA to bring its declaratory judgment action. Because Plaintiff has sufficiently asserted standing, the trial court erred in granting Defendant's 12(b)(1) motion to dismiss. We reverse the trial court's order granting Defendant's motion to dismiss as applied to Plaintiff and remand.

REVERSED AND REMANDED.

Judges TYSON and ZACHARY concur.

HANSLEY v. HANSLEY

[297 N.C. App. 764 (2025)]

CURTIS HANSLEY AND WIFE, MARJORIE J. HANSLEY, PLAINTIFFS
v.
JAMES HANSLEY, JR., ZANETTA GRANT, TERRI DONNELL, JOSEPH POLLOCK, JOHN POLLOCK, CARL HANSLEY, MYRNA HANSLEY, ANDREA HANSLEY, GLENDA HANSLEY, OLIVER HANSLEY, SR., DESIREE HANSLEY, CHARLES MCKOY, GERALDINE POLLOCK, RICHARD T. RODGERS, IN HIS APPOINTED CAPACITY AS COMMISSIONER, AND HAMPSTEAD INVESTMENTS, LLC, DEFENDANTS

No. COA24-267

Filed 19 February 2025

Civil Procedure—Rule 60—partition order—void for lack of personal jurisdiction—abuse of discretion

In a special proceeding initiated by the filing of a petition to partition real property, where the clerk of court entered an order of default allowing the petition without requiring proof of service of the summons and petition on appellee respondents—who failed to appear in the proceeding—the trial court abused its discretion in denying the Civil Procedure Rule 60 motion for relief filed by appellee respondents because N.C.G.S. § 1-75.11 (regarding proof of service required before entering judgment against defendants who failed to timely appear in an action) rather than N.C.G.S. § 1-75.10 (regarding proof of service required before entering judgment against defendants who appear in an action but challenge service) was applicable, and no affidavit or other evidence was filed in the superior court to establish grounds for personal jurisdiction, as mandated by section 1-75.11.

Appeal by Plaintiffs from orders entered 18 May 2023 and 28 July 2023 by Judge G. Frank Jones in Pender County Superior Court. Heard in the Court of Appeals 9 October 2024.

Q Byrd Law, by Quintin D. Byrd, Esq., for Plaintiffs-Appellants.

Blackburn & Ording, PLLC, by Kenneth Ording, Esq., for Defendants-Appellees.

COLLINS, Judge.

The dispositive issue on appeal is whether the clerk had jurisdiction to enter an order granting a petition to partition real property. This case is governed by N.C. Gen. Stat. § 1-75.11 and controlled by *Hill v. Hill*,

11 N.C. App. 1 (1971).[1] Because the clerk failed to require proof of service of the summons and petition upon respondents, who failed to appear in the proceeding, before entering the order, the order was void for lack of personal jurisdiction. Accordingly, the trial court abused its discretion by denying Plaintiffs relief pursuant to Rule 60.

I. Background

A special proceeding in 2022 SP 155 was commenced on 30 August 2022 by James Hansley ("James")[2] filing a Petition to Partition Real Property. A Certificate of Service signed by James' attorney on 31 August 2022 certifies that a "copy of the foregoing Petition was served upon the Respondents via USPS Certified first class mail postage paid return receipt requested" and lists all the respondents' names and addresses, including Curtis Hansley and Marjorie J. Hansley ("the Hansleys").[3] The Certificate of Service is file stamped, but the stamp is illegible.

James filed an Amended Petition to Partition Real Property on 9 September 2022. A Certificate of Service signed by James' attorney on that date certifies that a "copy of the foregoing Petition was served upon the Respondents via USPS Certified first class mail postage paid return receipt requested" and lists all the respondents' names and addresses, including the Hansleys.

James also caused an Amended Summons to be issued on 9 September 2022. In the section designated for the names of the respondents is the typed notation, "See Attached List." The second page of the Amended Summons where Return of Service is intended to be noted is blank. The attached list lists the names and addresses of all the respondents, including the Hansleys.

On 9 November 2022, James filed a Notice of Hearing on his Petition to Partition Property for 1 December 2022 before the Pender County Clerk of Court. The Notice of Hearing included a Certificate of Mail signed by James' attorney which certifies that a "copy of the foregoing Notice of Hearing was served upon the Respondents via USPS first class mail requested" and lists the names and addresses of all the respondents, including the Hansleys.

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1. Neither authority was cited by either party to this Court or to the trial court.

2. James Hansley is Petitioner in the special proceeding and Defendant in the present action.

3. Curtis Hansley and Marjorie J. Hansley are Respondents in the special proceeding and Plaintiffs in the present action.

Also on 9 November 2022, the Deputy Assistant Clerk of Superior Court entered an Entry of Default allowing James' Motion of Entry of Default[4] and stating,

> [T]he Court has reviewed the record herein and has determined that the Respondents have been served with summons and complaint and have failed to plead or appear with the time allowed by the Rules of Civil Procedure, or that Respondents are otherwise subject to default judgment as provided by the Rules, and that Petitioner is entitled to Entry of Default against Respondents.

The Petition to Partition Real Property was heard by the Clerk on 1 December 2022. None of the respondents, including the Hansleys, were present. On 14 December 2022, the Clerk entered an Order granting the Petition ("Partition Order"), ordering the subject property partitioned via private sale, and ordering James' costs and attorney fees be paid out of the sales proceeds.

The Clerk found, in pertinent part:

> 5. All Respondents in this proceeding have been duly served with the Petition to Partition Real property and the amended Petition and the Special Proceeding Summons.
>
> 6. None of the Respondents have answered the Petition and an entry of default was entered on November 9, 2022.

The Clerk appointed Richard Rodgers to sell the Property. The Clerk further ordered the sales proceeds be divided between the respondents according to their interests.

A Certificate of Mail was signed by James' attorney on 16 December 2022 and filed with the Court on 19 December 2022 certifying that a "copy of the foregoing Order[5] was served upon the Respondents via USPS first class mail requested" and listing the names and addresses of all the respondents, including the Hansleys.

On 27 January 2023, Rodgers filed a Report of Sale stating that, in accordance with the Partition Order, he had offered the Property at a private sale and had received a bid from Hampstead Investment Group, LLC ("Hampstead") in the amount of $230,000. A Certificate of

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4. This document is not included in the Record but is referenced in the Entry of Default.

5. Presumably the Partition Order.

Service signed by Rodgers and filed with the Court on 27 January 2023 states, "This signature below is a certification that on the date below, the Petitioner(s), by and through its attorney, served upon the below Petitioner and Respondents a Report of Sale by depositing the same into the custody of the United States Postal Service, postage pre-paid, addressed to:" and lists the names and addresses of all the respondents, including the Hansleys. The Hansleys allege that this was their first notice of the partition proceeding.

On 20 February 2023, copies of United States Postal Service Return Receipts For Certified Mail were filed with the Pender County Clerk of Superior Court. Included with the filing were copies of two Return Receipts addressed to "Curtis & Marjorie Hansley." The first Return Receipt indicates that it was delivered on 2 September 2022. In the section designated to be completed upon delivery, the signature is illegible and the box for "agent" is checked. The second Return Receipt indicates that it was delivered on 15 September 2022. In the section designated to be completed upon delivery, the signature is illegible and the box for addressee is checked.

The bidding on the Property continued until 17 April 2023 when Hampstead entered the winning bid of $489,195. Rodgers filed a Motion for Confirmation of this bid on 20 April 2023. On 1 May 2023, the Clerk entered an Order for Confirmation, ordering Rodgers to deliver a deed to Hampstead.

On 4 May 2023, the Hansleys filed a Complaint for Mandatory Injunctive Relief and Set Aside of Court's Order against James, all other respondents to the special proceeding, Rodgers, and Hampstead. The basis of the Hansleys' complaint was an alleged lack of personal jurisdiction over them for lack of service of the Petition, Amended Petition, or Amended Summons.

James filed a Pre-Answer Motion to Dismiss on 11 May 2023. On 12 May 2023, James filed an Answer and Motion to Dismiss and also filed an Affidavit averring the following:

> 1) that a copy of the summons and complaint in the action entitled James Hansley, Jr. vs Curtis Hansley et al, File # 22SP155, was deposited in the post office for mailing by registered or certified mail, return receipt requested;" (sic)
>
> 2) that it was in fact received as evidenced by the attached registry receipt.
>
> 3) Copy of receipt and green card attached.

This matter was heard on 15 May 2023 in superior court. On 18 May 2023, the trial court denied the Hansleys relief pursuant to Rule 60(b) and dismissed their complaint with prejudice. The Hansleys timely filed a Rule 59 Motion for New Trial, asserting that they had discovered new evidence indicating that they had not been served with the petition and summons. The Rule 59 Motion came on for hearing on 25 July 2023; the trial court dismissed the Motion by order entered 28 July 2023.

On 28 August 2023, the Hansleys filed and served Notice of Appeal from both the 18 May 2023 order and the 28 July 2023 order.

II. Discussion

The Hansleys argue solely that the trial court abused its discretion by denying them relief pursuant to Rule 60(b)[6] because the Partition Order was void for lack of personal jurisdiction.

The standard of review of a trial court's denial of relief pursuant to Rule 60(b) is abuse of discretion. *Harris v. Harris*, 307 N.C. 684, 690 (1983). A trial court abuses its discretion when it makes an error of law. *Da Silva v. WakeMed*, 375 N.C. 1, 5 n.2 (2020).

Our General Statutes allow a court to "relieve a party . . . from a final judgment, order, or proceeding" where "[t]he judgment is void." N.C. Gen. Stat § 1A-1, Rule 60(b)(4) (2023). A judgment is void where the court lacks personal jurisdiction over the defendant. *See Hill*, 11 N.C. App. at 10.

Personal jurisdiction over a defendant may only be obtained in two ways: (1) "the issuance of summons and service of process by one of the statutorily specified methods," *Fender v. Deaton*, 130 N.C. App 657, 659 (1998) (citation omitted), or (2) the defendant's voluntary appearance or consent to the court's jurisdiction. *Grimsley v. Nelson*, 342 N.C. 542, 545 (1996) (citations omitted). "[W]ithout such jurisdiction, a judgment against [a] defendant is void." *Freeman v. Freeman*, 155 N.C. App. 603, 606-07 (2002) (citations omitted).

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6. Rule 60(b) applies to a final judgment, order, or proceeding entered by the trial court while Rule 60(c) applies to the same entered by the clerk. The Hansleys incorrectly alleged under Rule 60(b), instead of Rule 60(c), that the Partition Order was void for lack of personal jurisdiction over them. Regardless, this Court conducts the same analysis under both Rule 60(b) and (c). *See Flinn v. Laughinghouse*, 68 N.C. App. 476, 478 (1984) ("The procedure for obtaining any relief from a judgment, order, or proceeding shall be by motion as prescribed in these rules or by an independent action. [N.C. Gen. Stat. §] 1A-1, Rule 60(b). Rule 60(c) incidentally establishes the same power in judges with respect to judgments rendered by the clerk.").

Rule 4 of the North Carolina Rules of Civil Procedure provides the methods of service of a summons and complaint to obtain personal jurisdiction over a defendant. Rule 4(j)(1)(c) permits service by certified mail "[b]y mailing a copy of the summons and of the complaint, . . . return receipt requested, addressed to the party to be served, and delivering to the addressee." N.C. Gen. Stat. § 1A-1, Rule 4(j)(1)(c) (2023).

"In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of [N.C. Gen. Stat. §] 1A-1, Rule 55, as well as [N.C. Gen. Stat. §] 1-75.11." *Hill*, 11 N.C. App. at 6-7. Pursuant to Rule 55, "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead . . . and that fact is made to appear by affidavit, motion of attorney for the plaintiff, or otherwise, the clerk shall enter his default." N.C. Gen. Stat. § 1A-1, Rule 55(a) (2023). "[E]ntry of default does not require submission of jurisdictional proof." *Silverman v. Tate*, 61 N.C. App. 670, 673 (1983) (citations omitted); *see* N.C. Gen. Stat. § 1A-1, Rule 55(a).

Unlike entry of default, however, "[w]here a defendant fails to appear in the action within apt time the court shall, *before entering a judgment against such defendant*, require proof of service of the summons in the manner required by [N.C. Gen. Stat. §] 1-75.10 . . . ." N.C. Gen. Stat. § 1-75.11 (2023) (emphasis added). Additionally, "[w]here a personal claim is made against the defendant, the court shall require proof by affidavit or other evidence, *to be made and filed*, of the existence of any fact not shown by verified complaint which is needed to establish grounds for personal jurisdiction over the defendant. . . ." N.C. Gen. Stat. § 1-75.11(1) (emphasis added).

Under N.C. Gen. Stat. § 1-75.10, where service of process is alleged to have been made by registered or certified mail pursuant to Rule 4(j)(1)(c), proof of service shall be by affidavit of the serving party averring:

> a. That a copy of the summons and complaint was deposited in the post office for mailing by registered or certified mail, return receipt requested;
>
> b. That it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee; and
>
> c. That the genuine receipt or other evidence of delivery is attached.

N.C. Gen. Stat. § 1-75.10(a)(4) (2023).

Here, on James' motion, the Clerk entered default. This complied with Rule 55(a) and did not require jurisdictional proof. However, *before entering judgment*, the Clerk failed to "require proof of service of the summons." N.C. Gen. Stat. § 1-75.11. The Clerk concluded in the Partition Order that it had personal jurisdiction over the parties based on the following finding: "All Respondents in this proceeding have been duly served with the Petition to Partition Real property and the amended Petition and the Special Proceeding Summons." But there is no evidence in the record to support this finding at the time the Partition Order was entered – such evidence was filed months after the Partition Order was entered.

Approximately two months after the Partition Order was entered, on 20 February 2023, copies of United States Postal Service Return Receipts For Certified Mail were filed with the Clerk. Included with the filing were copies of two Return Receipts addressed to "Curtis & Marjorie Hansley." Approximately five months after the Partition Order was entered, on 12 May 2023, James' attorney filed an affidavit averring that service had been made. As the Clerk failed to "require proof of service of the summons" before entering the Partition Order, the Partition Order was void for lack of personal jurisdiction over the Hansleys. *See* N.C. Gen. Stat. § 1-75.11.

In his answer to the Hansleys' lawsuit and in his appellate brief, James asserts that he was not required to file an affidavit averring proof of service because he did not move for entry of default judgment.[7] This reflects a misapprehension of the law.

It is true that "[b]efore judgment by default may be had on service by registered or certified mail, [or] signature confirmation . . . , the serving party shall file an affidavit with the court showing proof of such service in accordance with the requirements of [section] 1-75.10(a)(4), 1-75.10(a)(5), or 1-75.10(a)(6), as appropriate." N.C. Gen. Stat. § 1A-1, Rule 4(j2)(2) (2023). However, applicable in this case is N.C. Gen. Stat. § 1-75.11, titled "Judgment against nonappearing defendant, proof of jurisdiction," which requires proof of service of the summons in the manner required by section 1-75.10 before judgment is entered against a nonappearing defendant, even where a plaintiff has not moved for default judgment. N.C. Gen. Stat. § 1-75.11.

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7. James' attorney also filed a "Motion to Strike Plaintiffs-Appellants' Reply Brief" with this Court on 12 September 2024. We deny the motion to strike.

James also argues, "[T]he filing of the Affidavit and the green, return-receipt cards was only triggered when [the Hansleys] commenced their lawsuit and challenged the service of summons, then section 1-75.10(a) and 1-75.10(a)(4) of the North Carolina General Statutes make it necessary for the filing of those documents and only because the [Hansleys] challenged the service." This too reflects a misapprehension of the law.

Section 1-75.10 governs proof of service of summons when a defendant appears in an action and challenges proof of service upon him. On the other hand, Section 1-75.11 governs proof of service of summons "[w]here a defendant fails to appear in the action within apt time," N.C. Gen. Stat. § 1-75.11, and a judgment is entered against them. In this case, the Hansleys failed to appear in the partition action. Default was entered by the Clerk and judgment was ultimately entered against them. Contrary to James' argument, the Hansleys' present action was not an appearance in the special proceeding for purposes of challenging jurisdiction.

III. Conclusion

Because the Clerk failed to require proof of service of the summons and petition in the manner required by N.C. Gen. Stat. §§ 1-75.10 and 1-75.11 before entering the Partition Order, the Partition Order is void for lack of personal jurisdiction. Accordingly, the trial court abused its discretion by denying the Hansleys' Rule 60(b) motion. The trial court's order denying the Hansleys relief pursuant to Rule 60(b) is reversed, the Clerk's Partition Order entered 14 December 2022 is vacated, and the matter is remanded to the trial court for remand to the Clerk for further proceedings.[8]

VACATED IN PART; REVERSED AND REMANDED IN PART.

Chief Judge DILLON and Judge CARPENTER concur.

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8. We note that N.C. Gen. Stat. § 1-108 provides that title to property acquired by a third party in good faith through a partition sale cannot be affected by a Rule 60 order setting aside the judgment ordering the sale. However, we further note that no party makes any argument under this statute, and there is nothing in the record indicating that title to the property subject to this action ever passed to Hampstead Investments, the high bidder at the partition sale.

IN RE G.B.G.

[297 N.C. App. 772 (2025)]

IN THE MATTER OF G.B.G. & R.J.W.
NO. COA24-473

Filed 19 February 2025

1. Appeal and Error—appellate jurisdiction—child neglect matter—proper party to sign notice of appeal—authorized representative

The notice of appeal in a child neglect and dependency matter—from an order dismissing allegations of neglect and dependency—was sufficient to confer jurisdiction on the appellate court where the notice was signed by a social worker as the authorized representative of the director of the county department of social services, as allowed by statute. Therefore, the appellate court denied respondent-parents' motion to dismiss the appeal and dismissed the department's petition for writ of certiorari as moot.

2. Appeal and Error—interlocutory order—child neglect matter—temporary dispositional order—appeal dismissed

A trial court's order dismissing an allegation that a child was a dependent juvenile was interlocutory because it was a temporary dispositional order; although the trial court also adjudicated the child as a neglected juvenile, the trial court's dismissal did not fully resolve the dependency claim because the order only contained an interim disposition and the matter had been scheduled for a disposition hearing. Therefore, the county department of social services' appeal challenging the temporary dispositional order was dismissed without prejudice.

3. Appeal and Error—appeal in child neglect matter—motion to strike guardian ad litem brief—proper party

In an appeal in a child neglect matter, in which the trial court dismissed allegations of neglect and dependency, the appellate court denied respondent-parents' motion to strike the guardian ad litem's brief, since the guardian ad litem (GAL) was a proper party in the matter. Although respondents argued that the GAL had not appealed and that it was merely standing in the stead of the county department of social services, which had appealed, respondents failed to cite to any binding authority or to a violation of a specific rule in support of their argument.

4. Child Abuse, Dependency, and Neglect—neglect allegation dismissed—lack of injurious environment—neglect of sibling differentiated

The trial court did not err by dismissing a county department of social services' allegation that respondent-parents' one-and-a-half-year-old baby was neglected, where the court's findings of fact were supported by evidence and, in turn, supported the court's conclusions. Although respondent-mother's fifteen-year-old daughter, who had recently joined the household, was adjudicated neglected (based on the teen's untreated mental health issues and attempts at self-harm, and respondent-mother's inadequate response), the teenager's situation was sufficiently different from the younger child's to warrant differing results on allegations of neglect. Similarly, there was no evidence that any arguments between respondent-father and the teenager (who was not his biological daughter) or respondent-father's prior usage of alcohol—for which respondent-father had sought treatment—had any adverse effect on the younger child or put her at substantial risk of impairment. Finally, the trial court had discretion to draw inferences from the evidence about whether conditions of the home rendered it an injurious environment for the younger child.

5. Child Abuse, Dependency, and Neglect—dependency allegation dismissed—at least one parent able to care for child

The trial court did not err by dismissing a county department of social services' allegation that a child was a dependent juvenile where, because there was evidence that at least one parent was able to provide care for the child, the trial court had no reason to consider whether respondent-parents had alternative childcare.

Appeal by Petitioner Watauga County Department of Social Services from order entered 21 February 2024 by Judge Matthew Rupp in Watauga County District Court. Heard in the Court of Appeals 8 October 2024.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky Brammer for the respondent-appellee mother.

Attorney Anne C. Wright for the petitioner-appellant Watauga County DSS.

Robinson & Lawing, L.L.P., by Attorney Christopher M. Watford for the respondent-appellee father.

Guardian ad Litem Program, by Staff Counsel Michelle FormyDuval Lynch for the respondent-appellee Guardian ad Litem.

STADING, Judge.

The Watauga County Department of Social Services ("WCDSS" or "Petitioner") appeals the trial court's dismissal of its petition alleging that R.J.W. ("Rose")[1] was a dependent and neglected juvenile. Additionally, Petitioner appeals from the interlocutory order after the trial court: (1) adjudicated G.B.G. ("Gemma") a neglected juvenile; and (2) dismissed its petition alleging that Gemma was a dependent juvenile. After careful review, we dismiss part of the appeal and affirm the trial court.

I. Background

Respondent-Mother ("Mother") and Respondent-Father ("Father") (collectively, "Respondents") lived together with their one-year-old biological daughter, Rose. In early 2023, the Columbus County Department of Social Services ("CCDSS") reached out to Mother and asked if her fifteen-year-old child by another father—Gemma—could come live with her and Father.[2] Mother notified CCDSS that she "was not ready, [her] house was a mess, [and that she] didn't know how to take care of [the] mental problems that [Gemma] was having." Nevertheless, Mother "consented" to this request in February 2023.

Soon thereafter, Respondents faced difficulties managing Gemma's behavior. The record reflects that Gemma would become "aggravated really easy with [Rose]," Mother, and Father. Gemma "would start throwing things[,] [s]he would not listen[,] [and] she . . . got violent with [Rose] . . . ." Mother, concerned with Gemma's behavior and wellbeing, sought assistance from Daymark Recovery Services due to Gemma being "on a lot of medications when [Mother] got her."

During the summer of 2023, Respondents arranged for Gemma to attend group therapy sessions, but "the class did not work with [their] schedule because [Gemma] didn't get home sometimes until after six . . . ." At the same time, Father battled alcohol addiction. Mother conceded "there was yelling, there [was] name calling, . . . and that [Father] was bipolar and needed medication." Mother stated that Father "had punched walls and thrown things when he was drinking, and . . . that she ha[d] told [Gemma] over and over to stay in her room, but that [Gemma]

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

2. Mother and Father are the biological parents of Rose, but Mother and a non-party are the biological parents of Gemma.

trie[d] to get in the middle" of these altercations. Gemma also engaged in self-harm behaviors. One incident involved Gemma cutting herself with scissors, and the second incident involved cutting herself with a butterknife. In response, Mother took Gemma to the hospital for treatment.

On 5 September 2023, WCDSS received a report indicating concerns about Gemma and Rose due to Father's ongoing alcohol addiction, fighting in the home, and Gemma's mental health. On 8 September 2023, a social worker visited the home and investigated these allegations. The social worker observed that the family home was in disarray. There were piles of trash, debris blocking the back entryway, clutter making it difficult to move within the home, dirty dishes, and dead bugs in the kitchen.

Upon speaking with Mother, the social worker learned that Father consumed alcohol regularly, suffered from bipolar disorder, called Mother names, and punched holes in the wall. Father told the social worker he struggled with alcohol addiction and mental health issues, but that Mother also "had mental health issues." He stated, "he had tried everything for his drinking," but still consumed "four to five [drinks] a day and dr[ank] almost every single day." Father said "he was going to go to detox but that he really wasn't willing to go beyond that because he needed to work and that as long as he was working[,] he would maintain sobriety." After the walkthrough and interviews, WCDSS requested that Mother place the children with a temporary safety provider, which she did.

On 11 September 2023, Mother and the social worker engaged in a follow-up discussion. According to the social worker:

> [Mother] indicated to me that she knew that things that were occurring in the home were not okay, that she had grown up in a home where there was a lot of fighting and her mom had addiction issues. And she does not want this for her kids. She knows the whole situation is not good and admits that they do need help. I thanked her for being honest with me . . . . She says that she cannot separate from [Father]. She would push him further, but at the same time, she would make sure that she and [Father] . . . will do what is needed to change the situation because she does not want to lose her children.

On 14 September 2023, WCDSS filed petitions alleging that Gemma and Rose were dependent and neglected juveniles. That same day, WCDSS was granted nonsecure custody of Gemma and Rose. On 21 February

2024, the trial court determined Gemma was a neglected juvenile, dismissed WCDSS's petition as to Rose, and dismissed the allegation of dependency as to Gemma.

With respect to Rose, the trial court's order stated:

> 5. Dismissal of Petition as to Juvenile [Rose]. As to [Rose], the Court concludes, as a matter of law, that [WCDSS] did not meet its burden of proof of showing by clear, cogent, and convincing evidence that the Juvenile was Neglected or Dependent. The Court bases this conclusion on the following findings of fact:
>
> - [ ] Mother and [ ] Father resided with [Rose] in a home cluttered with personal belongings. No evidence was presented tending to show that [Rose] was affected by the cluttered home or that such personal belongings created the potential of injury to [Rose].
> - [ ] Mother and [ ] Father left household cleaning products on countertops and the kitchen stove. No evidence was presented tending to show that such cleaning products were accessible and/or dangerous to [Rose]. Such cleaning products are commonplace in homes in this community.
> - [ ] Father testified that he suffers from alcohol addiction and entered alcohol rehabilitation twice in 2023. [ ] [Father] also testified that he no longer drinks alcohol and attends AA meetings 2-3 times per week. This testimony was uncontroverted. Furthermore, no evidence was presented showing that any alcohol consumption by [ ] [Father] affects his child, [Rose].
> - Finally, [ ] Mother and [ ] Father [ ] engage in arguments in the household. Such arguments have become less frequent since [ ] [Father] has been actively engaging in alcohol abstinence and attending AA meetings. No evidence was presented showing that [Rose] was present during such arguments nor that she was affected by such arguments in any way.

As for Gemma's dependency allegation, the trial court dismissed it because: (1) Respondents "have stable housing" and have lived together "in the same home . . . for four years"; (2) Father "attempted to be a father figure to [Gemma]"; and (3) both have provided "supervision to [Gemma]" despite her "behavioral health issues."

The trial court made the following findings to determine that Gemma was a neglected juvenile:

> a. [Gemma] suffers from untreated mental health issues, and Respondents have done very little, if anything, to treat such issues.
>
> b. Respondent[s] . . . have been aware of [Gemma's] mental health issues since at least March 2023 without taking appropriate steps to address them.
>
> c. Respondents have acknowledged that [Gemma] needs inpatient treatment before she can return home.
>
> d. [Gemma] used scissors to cut her arms and a butter knife to cut her throat in the fall of 2023. Respondent[s] . . . did not take sufficient measures to address these issues. After this incident, [ ] Mother failed to take [Gemma] to an important mental health appointment because [ ] Mother overslept. Exacerbating matters, [ ] Mother the failed to reschedule the appointment for her daughter.
>
> e. [ ] Mother provided no justifiable reasons for not attending nor ensuring [Gemma] attends online appointments to address the Juvenile's mental health needs.
>
> f. Respondent[s] . . . have engaged in name-calling and yelling in the presence of [Gemma]. [Gemma] has attempted to break up these arguments between Respondent[s] . . . .
>
> g. [Gemma] has also been present when such arguments have escalated to the point where [ ] [Father] has punched walls in their shared home, causing holes in the walls. [ ] [Father] also broke an interior door during one of these incidents during which [Gemma] was present.

Petitioner entered its notice of appeal on 29 February 2024. Respondents moved to dismiss the appeal since the notice of appeal lacked the signature of WCDSS's director. Petitioner responded to the motion to dismiss and alternatively petitioned for a writ of *certiorari* ("PWC") concerning the lack of the director's signature. Respondents also moved to strike the Guardian *ad Litem*'s ("GAL") brief for failure to timely file its notice of appeal because the GAL was, in effect, standing in the shoes of the appellant. In response, the GAL moved to disregard

or strike Respondents' motion, and in the alternative, moved to align with the Petitioner.

II. Jurisdiction

[1] We first address this Court's jurisdiction to consider Petitioner's appeal in view of: (1) Respondents' motion to dismiss; (2) Petitioner's PWC; and (3) whether the adjudication and dismissal pertaining to Gemma is interlocutory. For the reasons below, we deny Respondents' motion to dismiss the appeal. We also dismiss Petitioner's PWC as moot given that their notice of appeal properly conferred jurisdiction for the dismissal of the petition concerning Rose. We further decline review of the allegations pertaining to Gemma because the trial court's order is a temporary dispositional order.

"[T]o confer jurisdiction on the state's appellate courts, appellants of lower court orders must comply with the requirements of Rule 3 of the North Carolina Rules of Appellate Procedure." *Bailey v. N.C. Dep't of Revenue*, 353 N.C. 142, 156, 540 S.E.2d 313, 322 (2000). "The provisions of Rule 3 are jurisdictional, and failure to follow the rule's prerequisites mandates dismissal of an appeal. In addition, the rules of the Supreme Court that regulate appeals, such as Rule 3, are mandatory and must be observed." *Putman v. Alexander*, 194 N.C. App. 578, 582, 670 S.E.2d 610, 614 (2009) (cleaned up). Rule 3(b) provides that "[a]ny party entitled to an appeal under N.C. [Gen. Stat.] § 7B-1001(a) may take appeal by filing notice of appeal with the clerk of superior court in the time and manner set out in N.C. [Gen. Stat.] § 7B-1001(b) and (c) . . . ." N.C. R. App. P. 3(b) (2023). Turning to Section 7B-1001, the notice of appeal "shall be signed by both the appealing party and counsel for the appealing party." N.C. Gen. Stat. § 7B-1001(c) (2023).

In their motion to dismiss, Respondents argue that Petitioner's notice of appeal is defective because it "was signed only by DSS trial counsel, DSS appellate counsel, and a social worker supervisor." Specifically, Respondents contend that "[b]ecause [Petitioner's] notice of appeal was not signed by the Watauga County DSS director, the appeal must be dismissed." Our statute provides, "[t]he director may delegate to one or more members of his staff the authority to act as his representative." *Id.* § 108A-14(b) (2023). The notice of appeal was signed by the social worker as "Supervisor and Authorized Representative of Director of Watauga County Department of Social Services." Consequently, Petitioner's notice of appeal is sufficient to confer jurisdiction on this Court for Rose's petition. We therefore dismiss Petitioner's PWC as moot.

[2] While we have jurisdiction to address Petitioner's appeal concerning the dismissal of Rose's petition, we decline to review the dismissal of Gemma's dependency allegation since this order is a temporary dispositional order. *See* N.C. Gen. Stat. § 7B-1001(a)(3) (2023). "As a general matter, there is no right of immediate appeal from an interlocutory order, 'which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy.' " *Matter of T.E.*, 252 N.C. App. 427, 797 S.E.2d 386 (2017) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 362, 57 S.E.2d 377, 381 (1950)). "N.C. Gen. Stat. § 7B–1001(a)(3) specifies that an adjudication order may only be appealed along with a corresponding disposition order, which is lacking in this case." *In re P.S.*, 242 N.C. App. 430, 432, 775 S.E.2d 370, 371 (2015). *See In re C.M.*, 183 N.C. App. 207, 215, 644 S.E.2d 588, 595 (2007) ("Section 7B–1001 specifically delineates the juvenile orders that may be appealed and does not provide that a party may appeal a temporary dispositional order.").

Here, the trial court's order is captioned as the following: "ORDER ON ADJUDICATION AND INTERIM DISPOSITION[.]" Moreover, the last line of the trial court's order reads: "Next [h]earing. This matter shall be set for Disposition during the February 19-20, 2024, Juvenile Session of Watauga County District Court or as soon thereafter as it may be heard." Though the trial court disposed of Petitioner's dependency claim concerning Gemma by dismissal, it did not fully resolve that matter since the adjudication of neglect only contained an interim disposition and was scheduled for a disposition hearing. *See In re P.S.*, 242 N.C. App. at 432, 775 S.E.2d at 372. Therefore, the appeal challenging the temporary dispositional order for Gemma is dismissed without prejudice.

III. Motion to Strike GAL's Brief

[3] Respondents' move this Court to strike the GAL's brief. Citing unpublished authority, Respondents contend this Court should disregard the GAL's brief because "despite not appealing, [the] GAL is essentially operating as an appellant by tacitly endorsing [WC]DSS'[s] request for reversal of the trial court's order." However, the GAL is a party to this matter and absent reference to a violation of a specific rule or binding authority, we decline to strike its brief.

IV. Analysis

Having resolved jurisdiction, two issues remain for our consideration: whether the trial court committed error by (1) failing to determine that Rose was a neglected juvenile; and (2) failing to determine

that Rose was a dependent juvenile. After careful review, we affirm the trial court.

"When reviewing a trial court's order adjudicating a juvenile abused, neglected, or dependent, this Court's duty is 'to determine (1) whether the findings of fact are supported by clear and convincing evidence, and (2) whether the legal conclusions are supported by findings of fact.' " *In re F.C.D.*, 244 N.C. App. 243, 246, 780 S.E.2d 214, 217 (2015) (quoting *In re T.H.T.*, 185 N.C. App. 337, 343, 648 S.E.2d 519, 523 (2007)). "It is well settled that in a non-jury neglect adjudication, the trial court's findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings." *In re J.A.M.*, 372 N.C. 1, 8, 822 S.E.2d 693, 698 (2019). "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." *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (quoting *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

We have a two-step process for abuse and neglect petition proceedings: an adjudicatory stage and a dispositional stage. *In re K.W.*, 272 N.C. App. 487, 493, 846 S.E.2d 584, 589 (2020). "If the trial court finds at adjudication that the allegations in a petition have been proven by clear and convincing evidence and concludes based on those findings that a juvenile is abused, neglected, or dependent, the court then moves on to an initial disposition hearing." *Id.* at 493, 846 S.E.2d at 589 (citing N.C. Gen. Stat. § 7B-901 (2019)). At the dispositional stage, "the trial court, in its discretion, determines the child's placement based on the best interests of the child." *In re K.W.*, 272 N.C. App. at 493, 846 S.E.2d at 589.

A. Neglect

[4] Petitioner first contends the trial court erred by failing to determine that Rose was a neglected juvenile at the adjudication phase. Specifically, Petitioner asserts that Rose is a neglected juvenile and that the trial court erred by not adjudicating her as such based on: (1) "the domestic violence in the home"; (2) the fact that Gemma was adjudicated neglected and lived in the same home; (3) the fact that the trial court considered improper evidence of Father's abstention and treatment for alcohol abuse; and (4) "the unsafe conditions of the home." *See* N.C. Gen. Stat. § 7B-101(15)(e) (2023).

A neglected juvenile is:

> Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15

> or (ii) whose parent, guardian, custodian, or caretaker does any of the following:
>
> a. Does not provide proper care, supervision, or discipline.
>
> b. Has abandoned the juvenile, except where that juvenile is a safely surrendered infant as defined in this Subchapter.
>
> c. Has not provided or arranged for the provision of necessary medical or remedial care.
>
> d. Or whose parent, guardian, or custodian has refused to follow the recommendations of the Juvenile and Family Team made pursuant to Article 27A of this Chapter.
>
> e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.
>
> f. Has participated or attempted to participate in the unlawful transfer of custody of the juvenile under G.S.14-321.2.
>
> g. Has placed the juvenile for care or adoption in violation of law.
>
> In determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another juvenile has died as a result of suspected abuse or neglect or lives in a home where another juvenile has been subjected to abuse or neglect by an adult who regularly lives in the home.

Id. § 7B-101(15)(a)-(g) (2023). "Our review of the numerous cases where 'neglect' or a 'neglected juvenile' has been found shows that the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003). "In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile *or a substantial risk of such impairment* as a consequence of the failure to provide proper care, supervision, or discipline." *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698 (citation and internal quotation marks omitted).

1. Domestic Violence

To support their contention, Petitioner first argues that since "Rose was in the home . . . when domestic violence was occurring," she was exposed to an "injurious environment." Yet when looking at the trial court's findings, nothing suggests that Rose was affected. Rather, the record shows that Gemma tried to intervene against Mother's wishes. *See In re Montgomery*, 311 N.C. 101, 110–11, 316 S.E.2d 246, 252–53 (1984) ("[O]ur appellate courts are bound by the trial courts' findings of fact where there is some evidence to support those findings, even though the evidence might sustain findings to the contrary.").

The record also lacks sufficient evidence that Rose was at risk moving forward because of this activity. The findings instead indicate that "[s]uch arguments have become less frequent since [ ] [Father] has been actively engaging in alcohol abstinence and attending AA meetings." *See In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592 (citations omitted) ("[T]o adjudicate a child to be neglected, the failure to provide proper care, supervision, or discipline must result in some type of physical, mental, or emotional impairment or a substantial risk of such impairment."). We therefore hold that the trial court's findings are supported by clear, cogent, and convincing evidence and its findings support its conclusion of dismissal. *See id.* (quoting *In re McLean*, 135 N.C. App. 387, 395, 521 S.E.2d 121, 126 (1999) ("Section 7B-101(15) affords the trial court some discretion in determining whether children are at risk for a particular kind of harm given their age and the environment in which they reside.").

2. Differing Neglect Adjudications – Rose vs. Gemma

Petitioner next argues that because Gemma was adjudicated a neglected juvenile, it was error not to reach the same conclusion for Rose. *E.g.*, *In re Q.A.*, 245 N.C. App. 71, 74–75, 781 S.E.2d 862, 865 (2016) (holding that the trial court erred by adjudicating only two out of five children to be neglected where they were exposed to the same injurious environment including a lack of plumbing, electricity, and food.).

Our statute provides, "[i]n determining whether a juvenile is a neglected juvenile, it is relevant whether that juvenile lives in a home where another . . . has been subjected to abuse or neglect by an adult who regularly lives in the home." N.C. Gen. Stat. § 7B-101(15). But here, the facts surrounding Gemma's adjudication and Rose's dismissal are inherently different, especially given that Gemma was fifteen years old while Rose was one-and-a-half years old. The findings of the trial court demonstrate that Gemma suffered from "untreated mental health

issues[,]" that Respondents provided no reasonable treatment, and that Gemma engaged in self-harm twice. *See In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984) ("In determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent."). Moreover, the findings demonstrate exposure to an injurious environment specific to Gemma, given that she was exposed to and participated in domestic conflicts within the home. A court "may not adjudicate a juvenile neglected solely based upon previous [DSS] involvement relating to other children. Rather, in concluding that a juvenile lives in an [injurious environment], . . . the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re A.W.*, 377 N.C. 238, 248, 856 S.E.2d 841, 850 (2021) (quoting *In re J.A.M.*, 372 N.C. at 9, 822 S.E.2d at 698). Thus, we see no similarities between Rose's and Gemma's situation that would warrant adjudicating both as neglected. *See In re A.W.*, 377 N.C. at 248, 856 S.E.2d at 850; *see also In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592.

3. Improper Evidence – Father

Petitioner next contends that the trial court improperly considered evidence of Father's abstention from alcohol as well as his Alcoholics Anonymous ("AA") meeting attendance when adjudicating Rose because this conduct occurred after the filing of the petition.

Adjudication hearings "shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition." N.C. Gen. Stat. § 7B-802 (2023). To that end, "the conditions underlying determination of whether a juvenile is an abused, neglected, or dependent juvenile are fixed at the time of the filing of the petition. This inquiry focuses on the status of the child at the time the petition is filed, not the post-petition actions of a party." *In re L.N.H.*, 382 N.C. 536, 543, 879 S.E.2d 138, 144 (2022). "When, however, ample other findings of fact support an adjudication of neglect, erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

Here, the trial court found that Father suffered from alcohol addiction and entered rehabilitation twice in 2023. The record shows that Father began abstaining from alcohol following removal of the children on 8 September 2023 but was "in detox prior to [the WCDSS social worker's] initiation." In other words, the record shows Father's abstention from alcohol occurred before the filing of Rose's petition on 14 September 2023. This testimony "was uncontroverted, so the

[c]ourt accept[ed] the same as fact." *In re B.S.O.*, 234 N.C. App. at 708, 760 S.E.2d at 62 (cleaned up) ("An appellant is bound by any unchallenged findings of fact."). We therefore overrule this argument by Petitioner.

4. Unsafe Conditions

Petitioner last contends that the trial court committed error by dismissing Rose's neglect petition because there were "unsafe conditions" in the home. Specifically, Petitioner asserts that the trial court erroneously determined that "no evidence was presented tending to show that [the] household cleaning products left on countertops and the stove were accessible and/or dangerous to [Rose]."

"The trial court determines the weight to be given the testimony and the reasonable inferences to be drawn therefrom. If a different inference may be drawn from the evidence, the trial court alone determines which inferences to draw and which to reject." *In re M.M.*, 272 N.C. App. 55, 69, 845 S.E.2d 888, 898 (2020) (citation omitted).

Here, the trial court found that Respondents "left household cleaning products on countertops and the kitchen stove" and that "no evidence was presented tending to show such cleaning products were accessible and/or dangerous to [Rose]." The record contains two photographs submitted into evidence that show a bottle of bug spray on the back of the stove, a bottle of Lysol on the back part of the stove, and a bottle of Mr. Clean left on a countertop. At the hearing, the social worker who took those pictures testified "it's possible" Rose could access the cleaning products. Accordingly, the trial court's finding is supported by clear, cogent, and convincing record evidence. *See In re C.M.*, 183 N.C. App. at 210, 644 S.E.2d at 592.

Petitioner next contends that the "cluttered and dirty condition of the home" indicated that the environment was injurious to Rose. However, the trial court found that "[n]o evidence was presented tending to show that [Rose] was affected by the cluttered home or that such personal belongings created the potential of injury to [Rose]." Since the trial court was free to determine which inferences to draw from the evidence, we see no basis to disturb this finding. *See In re K.J.B.*, 248 N.C. App. 352, 354, 797 S.E.2d 516, 518 (2016) ("[I]n order for a court to find that the child resided in an injurious environment, evidence must show that the environment in which the child resided has resulted in harm to the child or a substantial risk of harm."); *see also Matter of M.M.*, 272 N.C. App. 55, 69, 845 S.E.2d 888, 898 (2020) ("[T]he trial court alone determines which inferences to draw and which to reject.").

B. Dependency

[5] Petitioner contends that the trial court committed error by failing to determine that Rose was a dependent juvenile. Specifically, Petitioner argues dismissal was improper because Respondents failed to provide an alternative childcare arrangement—which the trial court also failed to consider. Because the record shows that at least one parent could take care of Rose, we cannot say the trial court failed to consider whether Respondents had alternative childcare. Furthermore, Respondents are not required to provide evidence concerning an alternative child care arrangement since it is the responsibility of DSS to provide evidence they needed such arrangement and did not have one.

A "dependent juvenile" is one "in need of assistance or placement because (i) the juvenile has no parent, guardian, or custodian responsible for the juvenile's care or supervision or (ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative childcare arrangement." N.C. Gen. Stat § 7B-101(9). In determining dependency, "the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). Findings of fact addressing both prongs must be made before a juvenile may be adjudicated as dependent, and the court's failure to make these findings will result in a reversal of the court. *In re K.D.*, 178 N.C. App. 322, 328, 631 S.E.2d 150, 155 (2006). For dependency determinations, "a child cannot be adjudicated dependent" if they have at least one parent capable of "provid[ing] or arrang[ing] for adequate care and supervision." *In re Q.M.*, 275 N.C. App. 34, 42, 852 S.E.2d 687, 693 (2020) (citation omitted).

Here, the trial court made findings that Mother and Father lived with Rose in a home that, although cluttered, did not present a danger to her. Likewise, while cleaning supplies were left on countertops, nothing in the record suggests these items were accessible or hazardous to Rose. Father acknowledged past struggles with alcohol and mental health; yet he testified—without contradiction—that he stopped drinking and attended AA meetings multiple times per week. The trial court determined there was no evidence "showing that any alcohol consumption by [Father] affect[ed] his child, [Rose]." Though Mother admitted arguments occurred in the home, the trial court found no indication that Rose was present or harmed by them and that these incidents diminished once Father addressed his drinking. On these facts, we glean that at least one parent was able to supervise or care for Rose. *See id.*

Accordingly, the trial court correctly concluded that Rose was not a dependent juvenile.

V. Conclusion

We deny Respondents' motion to dismiss Petitioner's appeal as to each child. Petitioner's PWC is thus rendered moot. We also deny Respondents' motion to strike the GAL's brief. Since the trial court's order concerning Gemma's petition is a temporary dispositional order, Petitioner's appeal is interlocutory and dismissed without prejudice. Last, after considering the trial court's dismissal of Rose's petition, we affirm the trial court's disposition.

DISMISSED IN PART; AFFIRMED IN PART.

Judges ARROWOOD and WOOD concur.

IN THE MATTER OF K.J.P.W.

No. COA24-497

Filed 19 February 2025

Termination of Parental Rights—grounds for termination—willful abandonment—willfulness—Rule 17 guardian appointment not dispositive

In a termination of parental rights action brought by a child's legal guardians, the trial court properly terminated respondent-mother's rights based on willful abandonment (N.C.G.S. § 7B-1111(a)(7)), where the trial court's determination that respondent acted willfully was supported by the unchallenged findings of fact and, further, was not precluded by respondent's having been appointed a guardian pursuant to Civil Procedure Rule 17, which did not constitute per se evidence of incompetency. The trial court was not required to make specific findings on willful intent regarding whether respondent's deficient behavior constituted a manifestation of severe mental illness or otherwise make further inquiry into respondent's competency, since there was no evidence or argument that respondent suffered from mental illness. In fact, respondent's counsel argued that respondent's prior mental health report was not relevant; further, respondent admitted that her failure to seek visitation for seven months was due to problems with her phone and social media account.

Judge TYSON dissenting.

Appeal by respondent-mother from judgment entered 5 March 2024 by Judge Curtis Stackhouse in Lenoir County District Court. Heard in the Court of Appeals 15 January 2025.

White & Allen, P.A., by Delaina Davis Boyd and Christopher J. Waivers, for the petitioners-appellees.

Edward Eldred, for the respondent-appellant mother.

FLOOD, Judge.

Respondent-Mother appeals from the trial court's order terminating her parental rights. On appeal, Respondent-Mother argues the trial court could not terminate her parental rights under N.C.G.S. § 7B-1111(a)(7) for any "willful" action where it granted a Rule 17 guardian for her, and thus, she was incompetent to do anything "willfully." Respondent-Mother additionally argues the trial court could not terminate her parental rights under N.C.G.S. § 7B-1111(a)(3) for failing to pay for the care of the minor child where the minor child was not in foster care but was living with legal guardians. Upon review, we conclude the trial court properly found Respondent-Mother acted "willfully," supporting grounds to terminate her parental rights under N.C.G.S. § 7B-1111(a)(7), despite having a Rule 17 guardian appointment, and we do not reach her additional argument.

I. Factual and Procedural Background

Respondent-Mother is the biological mother of the minor child, Koda.[1] On 30 August 2019, the Lenoir County Department of Social Services ("DSS") petitioned for non-secure custody of Koda when he was ten days old, after Koda's maternal grandmother reported to DSS the conditions of Respondent-Mother's home, identifying the conditions as being extremely cluttered, lacking in any baby formula supplies, and having cockroaches crawling around. Koda was placed in the care of Petitioners that same day.

Additionally, on that same day, Petitioners filed a petition of neglect, and Koda was adjudicated to be a neglected juvenile. Respondent-Mother

1. The parties stipulated to use a pseudonym for the minor child to protect his identity, pursuant to N.C. R. App. P. 42.

was granted visitation and ordered to follow DSS' recommendations, including having a mental health assessment done, taking parental responsibility classes, participating in anger management classes, and obtaining and maintaining stable housing.[2] The case was removed from the active docket on 15 June 2021, after guardianship was awarded to Petitioners, and reunification was eliminated as part of the case plan.

On 18 April 2023, Petitioners filed a petition to terminate Respondent-Mother's parental rights in Koda. Petitioners alleged, in relevant part, that Respondent-Mother has: "had no contact with the minor child since August 2022"; "[w]illfully failed, without justification, to pay for the care, and support of the minor child since the birth of the minor child for a period of more than one year"; and "[f]ailed to have consistent contact with the minor child, also constituting abandonment[,]" despite the fact "[t]hat at all relevant times, Respondent[-]Mother has had the ability to maintain communication with the minor child and to pay child support."

On 23 June 2023, Respondent-Mother's counsel filed a motion to appoint a Rule 17 guardian to assist Respondent-Mother in the proceedings, and the trial court granted the motion without further inquiry. Respondent-Mother thereafter appealed to this Court based on the trial court's lack of additional inquiry when granting her a Rule 17 guardian, and in an unpublished opinion, this Court held the trial court did not abuse its discretion when it did not conduct an additional inquiry into Respondent-Mother's competency. *See In re K.W.*, 282 N.C. App. 734 (2022) (unpublished) (hereinafter "*In re K.W.*"). On 5 March 2024, the trial court held a termination of parental rights hearing, and that same day, entered an order terminating Respondent-Mother's parental rights. The trial court found that Respondent-Mother: "had one visit [with Koda] during a 14-month period"; was not "incompetent[,] neither suffers any legal disability"; worked "at Bojangles at various times"; failed to maintain communication with Koda even though Respondent-Mother had "the ability to"; "increased the frequency of her visits [with Koda]" after Petitioners filed their petition to terminate her parental rights; and "failed to provide any gifts, cards, or anything for [Koda,] even for holidays and birthdays." Additionally, the trial court noted that Respondent-Mother claimed in an email written on 15 June 2022 to Petitioners that she could not visit Koda because her other child was sick in the hospital, but ultimately found that "even after Respondent-Mother's other child was no

2. Although the Record before us does not include a copy of the order, Respondent-Mother testified she was ordered to take several types of classes after DSS determined her house was "nasty."

longer in the hospital, Respondent-Mother failed to consistently visit with [Koda]."

The trial court concluded that Respondent-Mother willfully abandoned Koda under N.C.G.S. § 7B-1111(a)(7) "for at least six consecutive months immediately preceding the filing" of Petitioner's petition to terminate Respondent-Mother's parental rights, and that Respondent-Mother "willfully failed, without justification, to pay for the care, and support of [Koda] since the birth of [Koda] for a period of more than one year and such lack of support constitutes abandonment" under N.C.G.S. § 7B-1111(a)(3). The trial court entered its order terminating Respondent-Mother's parental rights, and Respondent-Mother timely appealed.

II. Jurisdiction

This Court has jurisdiction over an appeal by a non-prevailing parent from an order terminating her parental rights, pursuant to N.C.G.S. §§ 7A-27(b)(2) and 7B-1001(a)(7) (2023).

III. Standard of Review

This Court reviews a termination of parental rights to determine "whether the findings of fact are supported by clear, cogent and convincing evidence and whether these findings, in turn, support the conclusions of law." *In re M.J.S.M.*, 257 N.C. App. 633, 636 (2018) (citation omitted). This Court reviews de novo a trial court's conclusions of law. *See In re K.J.M.*, 288 N.C. App. 332, 339 (2023). "Under a de novo review, this Court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Id.* at 339 (citation omitted) (cleaned up). "If unchallenged on appeal, findings of fact are deemed supported by competent evidence and are binding upon this Court." *In re M.J.S.M.*, 257 N.C. App. at 636 (citation omitted).

IV. Analysis

On appeal, Respondent-Mother argues the trial court could not terminate her parental rights for any "willful" action where the trial court granted a Rule 17 guardian for her, and thus she was incompetent to do anything "willfully." Respondent-Mother additionally argues the trial court could not terminate her parental rights under N.C.G.S. § 7B-1111(a)(3) (2023) for failing to pay for the care of Koda because Koda was not in foster care, as is required by the statutory language in mandating payment for the care of a child, but rather was staying with legal guardians. Because we conclude the trial court correctly terminated Respondent-Mother's parental rights for willful abandonment

under N.C.G.S. § 7B-1111(a)(7), we do not reach Respondent-Mother's second argument.

A trial court may terminate parental rights under N.C.G.S. § 7B-1111(a)(7) if "[t]he parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition [to terminate parental rights.]" N.C.G.S. § 7B-1111(a)(7). "In the context of abandonment, willfulness is more than an intention to do a thing; there must also be purpose and deliberation." *In re D.M.O.*, 250 N.C. App. 570, 572–73 (2016) (citation omitted) (cleaned up).

An appointment of a Rule 17 guardian is not based on a person's legal incompetence. *See In re Q.B.*, 375 N.C. 826, 836 (2020). Our Supreme Court has explained that "neither mental health limitations nor a low IQ constitute per se evidence of a lack of competency for purposes of Rule 17[,]" but rather, a Rule 17 guardian is to be appointed only after determining "whether the parent is able to comprehend the nature of the proceedings and aid her attorney in the presentation of her case." *Id.* at 836. The Court contrasted a Rule 17 guardian from that of a Chapter 35A guardian:

> Adjudications of adult incompetency are governed by Chapter 35A[.] An adult guardian appointed under Chapter 35A generally has a broad range of powers with respect to the ward's person and property . . . whereas the duties of a [guardian] under Rule 17 appointed solely for purposes of assisting a parent during a particular juvenile proceeding are much more limited.

Id. at 836.

As to the Rule 17 appointment, Respondent-Mother argues that "the trial court's finding that [Respondent-Mother] was *not* incompetent and did *not* suffer any legal disability is plainly unsupported by the evidence" because "[t]he trial court *necessarily* found [Respondent-Mother] was incompetent—that is, she lacked sufficient capacity to manage her own affairs and to communicate important decisions concerning her family—because the trial court may only appoint a Rule 17 guardian if the parent is 'incompetent.' " This argument is without merit, as a Rule 17 guardian appointment does not establish that Respondent-Mother is legally incompetent, as explained above. *See id.* at 836.

Respondent-Mother does not challenge any of the trial court's findings of fact that support willful abandonment, and thus, these findings are binding on appeal. *See In re M.J.S.M.*, 257 N.C. App. at 636. The trial court found, in relevant part, that Respondent-Mother failed

to maintain communication with Koda even though she "had the ability to[,]" and that Respondent-Mother "had one visit [with Koda] during a 14-month period[,]" including a finding that Respondent-Mother "had no visits with [Koda] in September 2022, October 2022, November 2022, December 2022, January 2023, February 2023, March 2023, [and] April 2023[.]" These facts, deemed binding on appeal, *see id.* at 636, in turn support the trial court's conclusion of law that Respondent-Mother willfully abandoned Koda "for at least six consecutive months immediately preceding the filing" of Petitioner's petition, pursuant to N.C.G.S. § 7B-1111(a)(7). *See* N.C.G.S. § 7B-1111(a)(7); *see also In re M.J.S.M.*, 257 N.C. App. at 636. Thus, under our de novo review, the trial court properly terminated Respondent-Mother's parental rights under N.C.G.S. § 7B-1111(a)(7). *See In re K.J.M.*, 288 N.C. App. at 339.

We distinguish this case from *In re A.L.L.* 376 N.C. 99 (2020). In *In re A.L.L.*, the respondent's parental rights were terminated after the trial court found she willfully abandoned her child. *See id.* at 110. During the determinative six-month window required for abandonment, the respondent suffered "from delusions and struggles with reality, persisted in her refusal to take prescribed medications, and became easily agitated, delusional, and incoherent during a visit with [the minor child.]" *Id.* at 110 (internal quotation marks omitted). On appeal, our Supreme Court reversed the trial court's termination of the respondent's parental rights, explaining: "the evidence show[ed] that [the] respondent's deficient conduct as a parent was largely, if not entirely, a manifestation of her severe mental illnesses[,]" and therefore, the respondent did not act *willfully* in abandoning her child. *Id.* at 111. This was the only evidence the trial court found regarding the respondent's willful intent to abandon her child. *See id.* at 111-12. The Court held: "at a minimum, a trial court presented with evidence indicating that a mentally ill parent has willfully abandoned his or her child must make specific findings of fact to support a conclusion that such behavior illustrated the parent's willful intent rather than symptoms of a parent's diagnosed mental illness." *Id.* at 111-12. In making this holding, the Court reasoned:

> [J]ust as incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision, . . . behavior emanating from a parent's mental health conditions may supply grounds for terminating parental rights only upon an analysis of the relevant facts and circumstances, such as the severity of the parent's condition and the extent to which the parent's behavior is consistent with recognizable symptoms of an illness.

Id. at 112 (citation omitted) (cleaned up).

Unlike the respondent in *In re A.L.L.* who could not be found to have willfully abandoned her child without specific findings as to willful intent, due to the evidence showing only "that [the] respondent's deficient conduct as a parent was largely, if not entirely, a manifestation of her severe mental illnesses[,]" *see id.* at 111, the trial court here was not required to make any specific findings as to Respondent-Mother's deficient conduct, as her conduct was not evidenced nor argued to be a manifestation of any severe mental illness.

During the hearing on termination of Respondent-Mother's parental rights, Respondent-Mother's counsel stated twice that the only mental health report in the record was "not relevant" to the hearing:[3]

> MS. DURANT: Objection as to any reference to [the mental health] report. That's been like three or four years. It's not relevant.
>
> . . . .
>
> MS. DURANT: It is not relevant to this trial, to this termination of parental rights. I think her report was admitted in abuse and neglect, but we have different parties. We now have a Guardian Ad Litem. That report was done like in 2020. It's old. It pre-dates the conclusion of the abuse and neglect case, so I'm strenuously objecting to anything regarding [her mental health report].

The trial court overruled the objection, clarifying that Petitioners' counsel was not seeking to discuss anything of *substance* in the mental health report, but was instead asking Respondent-Mother what she was ordered to do for reunification after the trial court adjudicated Koda neglected, which included being given a mental health assessment, among other things, such as taking parenting classes and maintaining stable housing. There was no discussion in the hearing regarding any content of Respondent-Mother's mental health report.

Respondent-Mother testified that, along with her income from working at Bojangles, she was receiving Supplemental Security Income ("SSI") because she had "some issues[,]" but when asked what issues, she responded: "[I] don't know." Respondent-Mother's mother testified that she was Respondent-Mother's payee for SSI because Respondent-Mother was "delayed," but that she gave Respondent-Mother the funds

3. The Record before us does not contain a copy of Respondent-Mother's mental health assessment report.

because "[Respondent-Mother] does what she needs to do with it." Respondent-Mother's mother also testified as to the changes she had seen in Respondent-Mother in the past four years:

> Q. Describe to the [c]ourt, in detail, what changes you have seen.
>
> A. She's been keeping her house up like she's supposed to. She's been going to her appointments like she's supposed to. She's found her a job. Go to work.

Additionally, the following conversation took place between Respondent-Mother and Petitioner's counsel, with Respondent-Mother agreeing she did not visit Koda for seven months:

> Q. So, can you explain to the Court why you missed the seven months of visits at the end of 2022 to 2023?
>
> A. Don't remember.
>
> Q. Do you agree you did?
>
> A. Yes.

Respondent-Mother later explained that she did not reach out for visitation with Koda for seven months due to Facebook and phone problems:

> Q. Okay. And so after that e-mail in August 2022, you didn't reach out again; correct, until April of 2023? Is that right?
>
> A. That's correct.
>
> Q. So, why is that?
>
> A. Well one, my Facebook got hacked. That's why I couldn't reach out. The other one, I have phone problems.
>
> Q. Do you think that's a good reason not to see your child for seven months 'cause your Facebook got hacked or you had phone problems?
>
> A. I mean, I was going to reach out.

Her mother also testified regarding Respondent-Mother missing visitation with Koda during a previous five-month period, prior to the seven-month period described above, stating that Respondent-Mother takes care of her other "two year old" child, who during that five-month period was "back and forth in the hospital."

In their petition to terminate Respondent-Mother's parental rights, Petitioners made no reference to any mental illness or concerns for

Respondent-Mother, but merely alleged she failed to visit or pay support to Koda. Further, as discussed above, a Rule 17 guardian appointment does not invoke evidence of mental health illness, *see In re Q.B.*, 375 N.C. at 836, and this Court previously held the trial court did not err in granting the motion to appoint a Rule 17 guardian without holding a further inquiry for Respondent-Mother. *See In re K.W.* at 739.

Accordingly, the trial court was not required to make specific findings of fact as to Respondent-Mother's deficient conduct being due to any severe mental illness, as her conduct was not argued nor evidenced to be a manifestation of any severe mental illness. Moreover, Respondent-Mother admitted her failure to reach out for visitation was due to experiencing Facebook and phone problems for seven months.

Because a trial court may terminate parental rights as long as one ground is met under N.C.G.S. § 7B-1111(a), and we conclude under our de novo review that the trial court properly determined that Respondent-Mother willfully abandoned Koda under N.C.G.S. § 7B-1111(a)(7), we need not address Respondent-Mother's additional argument. *See In re P.L.P.*, 173 N.C. App. 1, 8 (2005) (determining that "where the trial court finds multiple grounds on which to base a termination of parental rights, and an appellate court determines there is at least one ground to support a conclusion that parental rights should be terminated, it is unnecessary to address the remaining grounds" (citation and internal quotation marks omitted)). Accordingly, we affirm the trial court's termination of Respondent-Mother's parental rights under N.C.G.S. § 7B-1111(a)(7).

V. Conclusion

Upon review, we conclude the trial court properly found Respondent-Mother acted willfully, notwithstanding her Rule 17 guardian appointment, and thus the trial court properly terminated Respondent-Mother's parental rights under N.C.G.S. § 7B-1111(a)(7). Because we hold the trial court met one ground for termination under N.C.G.S. § 7B-1111(a), we do not address Respondent-Mother's additional argument.

AFFIRMED.

Judge WOOD concurs.

Judge TYSON dissents in a separate opinion.

TYSON, Judge, dissenting.

The trial court's findings of fact are not supported by clear, cogent, and convincing evidence. These unsupported findings do not support the trial court's conclusion to terminate Respondent's parental rights based upon willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7) (2023) or willful failure to pay a reasonable portion of the cost of childcare under § 7B-1111(a)(3) (2023). The trial court erred when it terminated Respondent's parental rights without supported findings and conclusions. I respectfully dissent.

I. Standard of Review

This Court reviews a trial court's order terminating parental rights "to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Montgomery*, 311 N.C. 101, 111, 316 S.E.2d 246, 253 (1984) (citation omitted). The trial court's conclusions of law are reviewed *de novo*. *In re C.B.C.*, 373 N.C. 16, 19, 832 S.E.2d 692, 695 (2019) (citation omitted).

Petitioner bears the burden of proving "by clear, cogent, and convincing evidence the existence of one or more grounds for termination under [N.C. Gen. Stat. § 7B-1111(a)]" at the adjudicatory stage. *In re J.A.E.W.*, 375 N.C. 112, 116, 846 S.E.2d 268, 271 (2020) (citation omitted). Petitioner failed to carry or meet its burden under the statute and our case law. *Id.*

II. Termination for Willful Failure to Pay a Reasonable Portion of the Cost of Childcare and Willful Abandonment

A. Willful Abandonment

The district court and the majority's opinion wrongfully terminate Petitioner's parental rights for willful abandonment.

Our statutes provide a trial court may terminate parental rights upon a supported finding and conclusion "[t]he parent has *willfully abandoned* the juvenile for at least six consecutive months immediately preceding the filing of the petition or motion[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (emphasis supplied). Our Supreme Court held: "abandonment requires a purposeful, deliberative and manifest willful determination to forego all parental duties and relinquish all parental claims to the child." *In re L.M.M.*, 375 N.C. 346, 349, 847 S.E.2d 770, 773 (2020) (citation and quotation marks omitted). "The word 'willful' encompasses more than an intention to do a thing; there must also be purpose and deliberation." *In re Adoption of Searle*, 82 N.C. App. 273, 275,

346 S.E.2d 511, 514 (1986). Petitioners carry and maintain the burden of proving Respondent had "acted willfully in abandoning [her] child." *In re L.M.N.*, 375 N.C. 346, 353, 847 S.E.2d 770, 776 (2020).

"To find that a parent has willfully abandoned his or her child, the trial court must find evidence that the parent deliberately eschewed his or her parental responsibilities in their entirety." *In re A.L.L.*, 376 N.C. 99, 110, 852 S.E.2d 1, 9 (2020) (citation and quotation marks omitted). "[A]lthough the trial court may consider a parent's conduct outside the six-month window in evaluating a parent's credibility and intentions, the determinative period for adjudicating willful abandonment is the six consecutive months preceding the filing of the petition." *In re B.R.L.*, 379 N.C. 15, 18, 863 S.E.2d 763, 767 (2021); *see* N.C. Gen. Stat. § 7B-1111(a)(7).

B. Willful Failure to Provide Material Support

The statutes also provide a district court may terminate parental rights where "[t]he juvenile has been placed in the custody of a county department of social services . . . , and the parent for a continuous period of six months next preceding the filing of the petition or motion, has willfully failed for such period to pay a reasonable portion of the cost of care for the juvenile although physically and financially able to do so." N.C. Gen. Stat. § 7B-1111(a)(3). To support this ground, a district court is required to make a supported finding the "parent has [the] ability to pay support[.]" *In re Ballard*, 311 N.C. 708, 716-17, 319 S.E.2d 227, 233 (1984). "Although what is within a parent's ability to pay or what is within the means of a parent to pay is a difficult standard which requires great flexibility in its application, the requirement of N.C. Gen. Stat. § 7B-1111(a)(3) applies irrespective of the parent's wealth or poverty." *In re T.D.P.*, 164 N.C. App. 287, 290, 595 S.E.2d 735, 738 (2004) (citation and quotation marks omitted).

C. *In re A.L.L.*

Our Supreme Court examined a parent's mental health conditions in *In re A.L.L.*, 376 N.C. at 101-02, 852 S.E.2d at 4, wherein a parent's medical records showed she "had previously been diagnosed with schizophrenia, obsessive compulsive disorder, bipolar disorder, and an eating disorder, a doctor from the hospital conducted a mental health assessment and confirmed a primary diagnosis of schizophrenia."

1. Willful Abandonment

Respondent's parental rights were terminated for willful abandonment under N.C. Gen. Stat. § 7B-1111(a)(7). The Supreme Court held: "Evidence that respondent acted in a manner consistent with the

symptoms of her severe mental illness is not, standing alone, evidence that she willfully intended to abandon her child." *Id.* at 111, 852 S.E.2d at 10. Our Supreme Court further held: "Thus, at a minimum, a trial court presented with evidence tending to show that a mentally ill parent has willfully abandoned his or her child must make specific findings of fact to support a conclusion that such behavior illustrated the parent's willful intent rather than symptoms of a parent's diagnosed mental illness." *Id.* at 111-12, 852 S.E.2d at 10.

Respondent was diagnosed with a moderate intellectual disability, mild persistent depressive disorder, and low intellectual functioning and adaptive skills. The district court failed to make any findings as is required by *In re A.L.L.* The district court only found: "That neither Petitioners nor Respondent Father nor Respondent Mother is an infant or incompetent and neither suffers any legal disability." While Respondent has not been adjudicated as incompetent, she has been diagnosed with mental illness. The evidence and record do not show, and the district court failed to make, specific findings of fact to support a conclusion such behaviors proved Respondent's willful intent, rather than symptoms of a parent's diagnosed mental illness. *Id.*

2. Failure to Provide Support

In the case of *In re A.L.L.*, the Court addressed abandonment, but also contains other specific language, which is applicable here and has been applied to other putative grounds. *See In re E.G.R.*, 288 N.C. App. 191, 844 S.E.2d 181 (2023) (unpublished). While this Court's opinion in *In re E.G.R.* is unpublished, the opinion persuasively addresses the issue of a parent's mental illness in a termination proceeding asserting her willful failure to make reasonable progress. The opinion in *In re A.L.L.* provides:

> [J]ust as incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision, behavior emanating from a parent's mental health conditions may supply grounds for terminating parental rights *only upon an analysis* of the relevant facts and circumstances, *such as the severity of the parent's condition and the extent to which the parent's behavior is consistent with recognizable symptoms of an illness*.

In re A.L.L., 376 N.C. at 112, 852 S.E.2d at 10-11 (citations and quotation marks omitted) (emphasis supplied). These required findings were not made. Contrary to Respondent's assertions, her alleged mental illness and incompetence is not an outright bar on termination under either

ground found below. However, despite the majority's purported distinction, the appointment of a Rule 17 guardian for Respondent does not invoke evidence of her mental illness or establish willfulness. The district court failed to make required fundings and must comply with *In re A.L.L. Id.*

In their petition to terminate Respondent's parental rights, Petitioner made no reference to any mental illness or concerns for Respondent, despite her own counsel previously requesting an evaluation after Respondent was diagnosed with a moderate intellectual disability, mild persistent depressive disorder, and low intellectual functioning and adaptive skills. *Id.*

D. Disposition

Our Supreme Court set forth the procedure to be used "when an appellate court determines that the trial court's findings of fact are insufficient" and held:

> the court must examine whether there is sufficient evidence in the record that could support the necessary findings. If so, the appropriate disposition is to vacate the trial court's order and remand for entry of a new order. This permits the trial court, as finder of fact, to decide whether to enter a new order with sufficient findings based on the record or to change its conclusions of law because the court cannot make the necessary findings.

In re A.J., 386 N.C. 409, 417, 904 S.E.2d 707, 715 (2024) (internal citations omitted).

The trial court's order terminating parental rights is properly vacated and remanded for further findings on Respondent's capacity and competence for willful conduct and for further proceedings. *Id.*

III. Conclusion

The trial court's unsupported findings and conclusions terminating Respondent's parental rights for willful failure to provide material support and for willful abandonment are unsupported and affected by errors on essential elements. The order is properly vacated and remanded for further evidence, findings and proceedings. *Id.* I respectfully dissent.

IN RE X.I.F.

[297 N.C. App. 799 (2025)]

IN THE MATTER OF X.I.F., J.R.F., C.D.F. MINOR CHILDREN

No. COA24-675

Filed 19 February 2025

1. **Termination of Parental Rights—grounds for termination—neglect—evidence of willful abandonment at time of hearing—unsupported by findings**

In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court erred in determining that the statutory ground of neglect (N.C.G.S. § 7B-1111(a)(1)) by means of willful abandonment existed where the court's findings of fact did not address evidence showing neglect at the time of the termination hearing, as required by precedent.

2. **Termination of Parental Rights—grounds for termination—dependency—juveniles in legal and physical custody of other parent—unsupported by findings**

In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court erred in determining that the statutory ground of dependency (N.C.G.S. § 7B-1111(a)(6)) existed where the juvenile petitions alleged, and the court found as fact, that the juveniles were in the legal and physical custody of their mother at the time the petitions were filed and, thus, were not in need of assistance or placement as required under the pertinent definition of "dependent" (N.C.G.S. § 7B-101(9)).

3. **Termination of Parental Rights—grounds for termination—willful abandonment—findings of fact supported by evidence—conclusions of law supported by findings**

In a proceeding that resulted in the termination of respondent-father's parental rights to three minor children, the district court's determination that the statutory ground of willful abandonment (N.C.G.S. § 7B-1111(a)(7)) existed was upheld where: (1) the court's findings of fact pertaining to the six months immediately preceding the filing of the petitions—the relevant period under subsection 7B-1111(a)(7) and during which respondent-father was incarcerated—were supported by uncontradicted evidence that the juveniles received no visits, letters or other communications, or financial contributions from respondent-father, even though he

knew the address where the juveniles resided with their mother and had been able to send money and two letters during an earlier period of incarceration; and (2) those findings of fact in turn supported the court's conclusions of law that respondent-father willfully abandoned the juveniles by voluntarily withholding his care and affection from them.

Appeal by respondent-father from orders entered 25 April 2024 by Judge Lora T. Baker in Henderson County District Court. Heard in the Court of Appeals 16 January 2025.

Rebekah W. Davis, for respondent-appellant father.

Krista S. Peace, for petitioner-appellee mother.

FREEMAN, Judge.

Respondent-father appeals from orders terminating his parental rights as to X.I.F. ("Xia"), J.R.F. ("Janet"), and C.D.F. ("Cody").[1] On appeal, respondent-father contends the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. §§ 7B-1111(a)(1), (6), and (7). After careful review, we agree the trial court's findings do not support its conclusions that grounds existed under subsections (a)(1) and (a)(6). However, because we conclude the trial court did not err in concluding grounds existed to terminate respondent-father's parental rights under subsection (a)(7), and because only one ground is necessary to support termination of parental rights, we vacate in part and affirm in part.

I. Factual and Procedural Background

Petitioner-mother and respondent-father are the biological parents of Xia, Janet, and Cody. The parties lived together from 2007 until their "on-again, off-again" relationship ended in either 2012 or 2013. After the parties separated, the children have continuously resided with petitioner-mother.

Respondent-father was incarcerated for "a good bit of" the period from 2013 to 2018. During respondent-father's incarceration, petitioner-mother "tr[ied] to make it to where he could communicate with the kids" by depositing funds into his prison account to

1. Pursuant to N.C. R. App. P. 42(b), pseudonyms are used to protect the juveniles' identities.

facilitate phone calls that occurred "once, maybe twice a week." Upon respondent-father's release, petitioner-mother "told him if he ever went to jail again, [she] would no longer put money on his books to contact his children and [she] would be done."

Respondent-father "didn't have much of a relationship with the children" when he was not incarcerated. Petitioner-mother made multiple arrangements for the children to see respondent-father, but apart from one visit in 2018 when he brought petitioner-mother money to purchase shoes for the children, respondent-father did not see them. About three weeks after that visit, respondent-father began serving a sentence of incarceration for drug trafficking with an expected release date of 2027.

As petitioner-mother had previously indicated, she stopped "trying to encourage or arrange [a] relationship or visitation" between the children and respondent-father upon his 2018 incarceration. Specifically, petitioner-mother stopped depositing funds into respondent-father's prison account to fund phone calls. Respondent-father attempted to use a third party to facilitate communication prior to 2022, but eventually "the third party said that [petitioner-mother] was no longer responding or sending my letters back." However, petitioner-mother did not change her phone number or address, and even though respondent-father knew her address, the only communication between respondent-father and his children since 2018 consisted of two letters he sent in 2022.

When asked whether she had tried to prevent respondent-father from seeing the children, petitioner-mother stated:

> Yes, I have. . . . That was when he first got incarcerated and I told him that I wasn't doing this no more because I felt like the only time he contacted his children and wanted anything to do with these children is when he was incarcerated.

According to petitioner-mother, she "never stopped him from writing" and "never stopped the children from writing," but she felt "[i]t's not up to me to make a relationship."

In 2016, petitioner-mother began a relationship with David Maynor. Mr. Maynor and petitioner-mother began living together in 2018 and were married in 2019. At some point, petitioner-mother's oldest child suggested that Mr. Maynor adopt the children.

On 14 November 2023, petitioner-mother filed petitions to terminate respondent-father's parental rights as to Xia, Janet, and Cody. The petitions alleged, as is relevant here, that:

7. The facts warranting the determination that grounds exist for termination of the parental rights of the Respondent pursuant to N.C. Gen. Stat. § 7B-1111 are as follows:

a. The Respondent has not seen the minor child since 2016 . . . .

b. The actions of the Respondent constitute a willful abandonment of the minor child for a period in excess of six (6) months next preceding the filing of this Petition as described in N.C. Gen. Stat. § 7B-1111(a)(7), in that Respondent has had, at his own election, has had no contact of any nature whatsoever, with the minor child since 2016 when he briefly saw the minor child, and three years ago when he sent a letter to the minor child. The Respondent has had no in person contact with the minor child since 2016. . . . The Respondent has made no other efforts to contact the minor child.

c. The Respondent has not provided any direct or formal support for the minor child since the separation of the parents in 2012.

d. The Respondent is a convicted felon and is currently serving time in prison for trafficking schedule II with a potential release date of October 28, 2027.

f. The Respondent has had zero communication with the minor child in three years.

g. The Respondent has sent no birthday presents nor birthday cards to the minor child since the separation of the parents.

h. The Respondent has sent no Christmas presents nor Christmas cards to the minor child since the separation of the parents.

i. The Respondent has sent no cards, no clothing, no toys and no gifts to the minor child.

j. The Respondent has had a complete lack of involvement with the child for more than three years establishing a pattern of abandonment and neglect.

k. The Respondent has neglected and abandoned the minor child for the six-month period immediately preceding the filing of the petition.

> l. The Respondent has willfully failed to pay a reasonable portion of the cost of the child's care since the separation of the parents and for the six-month period immediately preceding the filing of this petition.
>
> m. The Respondent lacks the ability to care for the minor child since he is incarcerated and lacked the ability to care for the minor child prior to his incarceration.
>
> n. The conduct of the father has been such as to demonstrate that he will not promote the child's healthy and orderly physical and emotional well-being.[2]

The termination hearing took place before Judge Lora T. Baker in Henderson County District Court on 28 March 2024. After reviewing the petitions and hearing testimony from respondent-father, petitioner-mother, and Mr. Maynor, the trial court orally announced its dispositional ruling:

> Petition filed by petitioner alleges or requests termination of parental rights for respondent father based off of 7B-1111(a)(7) which shows that the parent has willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition or the parent has voluntarily abandoned an infant. We're clearly not in the infant situation. So by my math the time period we're talking about is—the petition was filed November 14, 2023. So that time period would be May 14, 2023 to November 14 2023.
>
> I find by clear and convincing evidence that father has willfully abandoned the juvenile for those six consecutive months preceding the filing of the petition. I find no communication, no letters, no phone calls, no visitation, no financial support, nothing that would evidence an intent to maintain a relationship with the minor children during that relevant six-month period.
>
> Looking outside that six-month period, just in relation to father's intent, I will find that he sent two letters, the last being 2022. That he sent money in the amount of $90 for the children in 2018. That was accompanied by a five-minute visit with the minor children. That clearly

2. The petitions contained no subpart 7(e).

> incarceration has been an impediment to the father trying to reach out to the children and to establish and maintain a relationship, and I am taking that into consideration that that clearly does impose issues with father's attempt to maintain the relationship. But just due to the fact that he had sent letters in the past, he had the ability and wherewithal to do so. The mother hadn't changed her address during that relevant time period, hadn't changed her phone number during that relevant time period. So he had the means and opportunity to at least sent letters and make phone calls even though physical visitation was not possible.

The trial court further orally concluded that it would be in the children's best interest to terminate respondent-father's parental rights. On 25 April 2024, the trial court entered three orders terminating respondent-father's parental rights to each of the three children. As is relevant here, the orders stated:

> 7. That facts warranting the determination that grounds exist for the termination of the parental rights of the Respondent pursuant to N.C. Gen. Stat. § 7B-1111 are as follows:
>
> a. The Respondent has not seen the minor child since 2016
>
> . . . .
>
> b. The actions of Respondent constitute a willful abandonment of the minor child for a period in excess of six (6) months next preceding the filing of this Petition as described in N.C. Gen. Stat. § 7B-1111(a)(7), in that Respondent has had no contact of any nature whatsoever, with the minor child during the relevant period from November 14, 2023 through May 14, 2024.
>
> c. Clear and convincing evidence exists that the father willfully abandoned the minor child for six consecutive months prior to the filing of the petition.
>
> d. The court finds that there was no communication between the father and the minor child, no letters, no visits, no financial support nor anything that would indicate an intent to maintain a relationship with the minor child during the relevant period.
>
> e. Looking outside the relevant time period in relation to the father's intent, the court finds that the father sent

> $30.00 to pay for the minor's shoes in 2018 and that he sent two letters in 2022.
>
> f. The mother had the same address where the father dropped off the $30.00 and sent the two letters and the mother had the same phone number since the father has been incarcerated.
>
> g. The father's incarceration may have been an impediment to the father's ability to reach out and maintain a relationship, however, the father clearly had the ability and knowledge to communicate with the minor child. The father testified that he maintained phone contact with another minor child and he has previously sent this minor child letters so he had the ability to maintain contact despite his incarceration.
>
> h. Previous to this most recent incarceration, the father made little attempt to maintain a relationship with the minor child.
>
> i. The father has displayed a pattern of conduct indicating his lack of intent to maintain a relationship with the minor child.

The orders concluded that "Respondent's parental rights with the minor child[ren] should be permanently terminated on the grounds stated in N.C. Gen. Stat. §§ 7B-1111[(a)](1)(6) and (7), and taking into account the best interest of the child[ren]." Respondent-father timely appealed to this Court, arguing that the trial court erred by terminating his parental rights under N.C.G.S. §§ 7B-1111(a)(1), (6), and (7).

II. Jurisdiction

This Court has jurisdiction to review "[a]ny order that terminates parental rights or denies a petition or motion to terminate parental rights." N.C.G.S. § 7B-1001(a)(7) (2023).

III. Standard of Review

A termination of parental rights proceeding involves two different stages that trigger two distinct standards of review on appeal. At the first stage, the adjudicatory stage, "the party petitioning for the termination must show by clear, cogent, and convincing evidence that grounds authorizing the termination of parental rights exist." *In re Young*, 346 N.C. 244, 247 (1997). "If a trial court's finding of fact is supported by clear, cogent, and convincing evidence, it will be deemed conclusive even if the record contains evidence that would support a contrary

finding." *In re S.R.*, 384 N.C. 516, 520 (2023) (cleaned up). "A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding of fact." *In re G.C.*, 384 N.C. 62, 65 (2023) (cleaned up). We review de novo whether the trial court's properly supported findings of fact in turn support its conclusions of law. *Id.* at 66.

At the second stage of a termination of parental rights proceeding, the dispositional stage, the trial court considers whether termination of the respondent's parental rights would be in the child's best interest. "The trial court's assessment of a juvenile's best interests at the dispositional stage is reviewed solely for abuse of discretion," and we "review the trial court's dispositional findings of fact to determine whether they are supported by competent evidence." *In re C.B.*, 375 N.C. 556, 560 (2020) (citations omitted).

Respondent-father's arguments in this matter focus solely on the adjudicatory stage of the proceeding. Accordingly, we review whether the trial court's factual findings are supported by clear, cogent, and convincing evidence and whether the supported factual findings in turn support the trial court's conclusions of law.

IV. Analysis

[1] On appeal, respondent-father argues: (1) the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1); (2) the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6); and (3) the evidence and findings did not support the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7). We address each argument in turn.

A. N.C.G.S. § 7B-1111(a)(1)

Section 7B-1111 of our General Statutes provides that a court may terminate an individual's parental rights "upon a finding of one or more" of eleven statutory grounds. N.C.G.S. § 7B-1111(a) (2023). The first statutory ground contemplates termination where the parent "has abused or neglected the juvenile" within the meaning of those terms provided in section 7B-101. N.C.G.S. § 7B-1111(a)(1) (2023).

Respondent-father argues that the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(1) because the petitions failed to provide notice of this ground for termination and because the trial court's conclusion "was not supported by the findings or the evidence." As we agree with

respondent-father's substantive argument regarding the trial court's conclusion, we decline to reach his notice argument.

Though willful abandonment of a child may support termination of parental rights under either N.C.G.S. § 7B-1111(a)(1) or (7), the analytical framework for reaching such conclusion differs meaningfully between each ground. Under N.C.G.S. § 7B-1111(a)(7), the court must make proper factual findings supporting a conclusion that the respondent "has willfully abandoned the juvenile for *at least six consecutive months* immediately preceding the filing of the petition[.]" N.C.G.S. § 7B-1111(a)(7) (2023) (emphasis added). In contrast, "[a] finding of neglect sufficient to terminate parental rights" under N.C.G.S. § 7B-1111(a)(1) "must be based on evidence showing neglect *at the time of the termination proceeding*." *In re Young*, 346 N.C. at 248 (emphasis added).

> Thus, in order to terminate a parent's rights on the ground of neglect by abandonment, the trial court must make findings that the parent has engaged in conduct which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child as of the time of the termination hearing.

In re C.K.C., 263 N.C. App. 158, 164 (2018) (cleaned up).

Here, the trial court's factual findings refer to respondent-father's conduct in 2018, 2022, and in the six-month period prior to the filing of the petition. Because the trial court failed to make any findings regarding respondent-father's conduct demonstrating neglect by abandonment "at the time of the termination hearing," *In re Young*, 346 N.C. at 248, its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(1) is unsupported. Accordingly, we vacate that portion of the trial court's orders.

B. N.C.G.S. § 7B-1111(a)(6)

[2] Respondent-father next argues that the trial court erred in concluding that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6). That subsection permits termination of parental rights when the petitioner demonstrates that the respondent "is incapable of providing for the proper care and supervision of the juvenile, such that the juvenile is a dependent juvenile within the meaning of G.S. 7B-101, and that there is a reasonably probability that the incapability will continue for the foreseeable future." N.C.G.S. § 7B-1111(a)(6) (2023).

A "dependent juvenile within the meaning of G.S. 7B-101" is a juvenile "in need of assistance or placement" because either "(i) the juvenile

has no parent, guardian, or custodian responsible for the juvenile's care or supervision," or "(ii) the juvenile's parent, guardian, or custodian is unable to provide for the juvenile's care or supervision and lacks an appropriate alternative child care arrangement." N.C.G.S. § 7B-101(9) (2023). Our Supreme Court has reasoned that a juvenile is "not 'in need of assistance or placement' at the time [a] petition [is] filed" if the juvenile is "in the legal and physical custody of her mother." *In re K.R.C.*, 374 N.C. 849, 860 (2020) (quoting N.C.G.S. § 7B-101(9) (2019)).

Here, respondent-father argues the trial court erred in concluding grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(6) because the petitions failed to provide notice of this ground and because the findings and evidence did not support such a conclusion. As we agree with respondent-father's substantive argument regarding the trial court's conclusion, we decline to reach his notice argument.

It is undisputed that the juveniles were in the custody of petitioner-mother at the time the petitions were filed. The petitions specifically alleged—and the trial court specifically found—that "[p]etitioner . . . is the biological mother of the minor child[ren] and resides with the minor child[ren]" at petitioner-mother's home. Because the juveniles were "in the legal and physical custody of [their] mother" at the time the petitions were filed, they were not " 'dependent juvenile[s] within the meaning of G.S. 7B-101' as required to terminate respondent's parental rights pursuant to N.C.G.S. § 7B-111(a)(6)." *In re K.R.C.*, 374 N.C. at 860 (quoting N.C.G.S. § 7B-101(9) (2019)). Accordingly, we vacate that portion of the trial court's orders.

C. N.C.G.S. § 7B-1111(a)(7)

[3] Finally, respondent-father argues that the evidence and factual findings did not support the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7). That subsection permits a trial court to terminate an individual's parental rights when the petitioner demonstrates the respondent has "willfully abandoned the juvenile for at least six consecutive months immediately preceding the filing of the petition[.]" N.C.G.S. § 7B-1111(a)(7).

1. Factual Findings

Here, respondent-father argues that "[t]he findings and evidence did not show a willful intent to abandon Cody, Janet, and Xia." Specifically, respondent-father challenges the trial court's findings of fact 7(b), (c), (d), (g), (h), and (i).

Respondent-father first contends that the trial court misidentified the relevant time period in finding (b). We agree. Because the petitions were filed on 14 November 2023, the relevant six-month period was 14 May 2023 to 14 November 2023, not 14 November 2023 to 14 May 2024. However, a review of the record and transcripts in this case demonstrates that the trial court's characterization of the relevant time period was a scrivener's error which had no substantive impact on its reasoning or conclusions. Respondent-father does not contend, and we do not believe, that this error is ground for reversal of the orders.

Next, relying on *In re N.D.A.*, 373 N.C. 71 (2019), respondent-father argues that "[m]any of the findings" in (b), (c), (g), (h), and (i) "were ultimate findings and conclusions of law" and that the "ultimate findings were not explained by evidentiary findings of fact, which is a requirement of Rule 52(a)(1)." While we agree that findings (b) and (c) are properly classified as conclusions of law, respondent-father's argument misapprehends the current state of the law and the fact-finding duties imposed on trial courts.

Rule 52(a)(1) provides that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C.G.S. § 1A-1, Rule 52(a)(1) (2023). Contrary to respondent-father's contention that trial courts are required to expressly explain ultimate findings with evidentiary findings, our Supreme Court has stated that:

> Rule 52(a) does not require a recitation of the evidentiary and subsidiary facts required to prove the ultimate facts, it does require *specific findings* of the ultimate facts established by the evidence, admissions and stipulations which are determinative of the questions involved in the action and essential to support the conclusions of law reached.

Quick v. Quick, 305 N.C. 446, 452 (1982), *superseded in part by statute on other grounds as stated in State v. Brice*, 370 N.C. 244, 251 (2017).

Respondent-father's reliance on *In re N.D.A.* is similarly misplaced. Although *In re N.D.A.*'s statement that "an ultimate finding is a conclusion of law or at least a determination of a mixed question of law and fact," *In re N.D.A.*, 373 N.C. at 76 (cleaned up), would require that ultimate findings be expressly explained by evidentiary findings, our Supreme Court has clarified that *In re N.D.A.* "misused the term 'ultimate fact[.]' " *In re G.C.*, 384 N.C. at 65 n.3. That is why our Supreme Court "overturn[ed] [its] prior caselaw to the extent it misuses the term

'ultimate fact,' " and clarified that "an ultimate finding is a finding supported by other evidentiary facts reached by natural reasoning." *Id.*

In contrast, "any determination requiring the exercise of judgment or the application of legal principles is more properly classified as a conclusion of law." *In re Helms*, 127 N.C. App. 505, 510 (1997) (citations omitted). Where a trial court mislabels "conclusions of law as findings of fact, findings of fact which are essentially conclusions of law will be treated as such on appeal." *In re J.O.D.*, 374 N.C. 797, 807 (2020) (cleaned up).

Here, findings (b) and (c) state in relevant part that "[t]he actions of Respondent constitute a willful abandonment of the minor child[ren]" and that "[c]lear and convincing evidence exists that the father willfully abandoned the minor child[ren.]" The determination of whether a parent has willfully abandoned their child under N.C.G.S. § 7B-1111(a)(7) requires "the exercise of judgment" and "the application of legal principles" and is therefore a conclusion of law, not a finding of fact. As "findings" (b) and (c) are both essentially the trial court's legal conclusion that grounds existed to terminate respondent-father's parental rights for willful abandonment under N.C.G.S. § 7B-1111(a)(7), we review that conclusion in the subsequent section.

Our review of the properly classified findings of fact examines "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." *In re J.N.J.*, 286 N.C. App. 599, 605 (2022) (quoting *In re J.W.*, 241 N.C. App. 44, 48–49 (2015)). "If a trial court's finding of fact is supported by clear, cogent, and convincing evidence, it will be deemed conclusive even if the record contains evidence that would support a contrary finding." *In re S.R.*, 384 N.C. at 520 (cleaned up). "Unchallenged findings are deemed to be supported by the evidence and are binding on appeal." *In re S.C.L.R.*, 378 N.C. 484, 487 (2021).

Here, our review of the record demonstrates that the following portions of the trial court's findings are either properly supported or unchallenged on appeal:

> d. The court finds that there was no communication between the father and the minor child, no letters, no visits, no financial support nor anything that would indicate an intent to maintain a relationship with the minor child during the relevant period.
>
> e. Looking outside the relevant period in relation to the father's intent, the court finds that the father sent $30.00

> to pay for the minor's shoes in 2018 and that he sent two letters in 2022.
>
> f. The mother had the same address where the father dropped off the $30.00 and sent the two letters and the mother had the same phone number since the father has been incarcerated.
>
> g. The father's incarceration may have been an impediment to the father's ability to reach out and maintain a relationship, however, the father clearly had the ability and knowledge to communicate with the minor child. . . . .
>
> h. Previous to this most recent incarceration, the father made little attempt to maintain a relationship with the minor child.
>
> i. The father has displayed a pattern of conduct indicating his lack of intent to maintain a relationship with the minor child.

Finding (d), that there was no communication, letters, visits, or financial support during the relevant time period, is supported by uncontroverted evidence. All the evidence, including respondent-father's testimony, demonstrated that there was no communication, letters, visits, or financial support in the relevant six-month period. Findings (e) and (f) are unchallenged and are therefore binding. *See In re S.C.L.R.*, 378 N.C. at 487 ("Unchallenged findings are deemed to be supported by the evidence and are binding on appeal.").

The portion of finding (g) discussing respondent-father's "ability and knowledge to communicate with the minor child[ren]" is supported by clear, cogent, and convincing evidence. Both petitioner-mother and respondent-father testified that he had previously sent letters to the children at petitioner-mother's address and respondent-father testified he still knew where to send letters to communicate with the children. Based on this evidence, and considering the unchallenged finding (f) that petitioner-mother "had the same address where the father . . . sent the two letters," the ultimate finding that respondent-father had the ability and knowledge to communicate with the children is naturally reached through the process of logical reasoning. *See In re J.N.J.*, 286 N.C. App. at 605.

Respondent-father specifically challenges the second portion of finding (g): "*The father testified that he maintained phone contact with another minor child* and he has previously sent this minor child

letters so he had the ability to maintain contact despite his incarceration." We agree with respondent-father that the italicized portion of finding (g) does not qualify as a factual finding because it merely recites respondent-father's testimony absent any indication that the trial court deemed such testimony credible. *See In re A.E.*, 379 N.C. 177, 185 (2021) ("[R]ecitations of the testimony of each witness *do not* constitute *findings of fact* by the trial judge absent an indication concerning whether the trial court deemed the relevant portion of the testimony credible." (cleaned up)). However, as described above, the unitalicized portion of this finding is supported by clear, cogent, and convincing evidence.

Finally, findings (h) and (i) are supported by petitioner-mother's testimony regarding respondent-father's conduct prior to and during his most recent incarceration. To the extent that finding (i) constitutes an ultimate finding, it is a finding naturally reached by the process of logical reasoning based upon the evidentiary facts before the trial court. Accordingly, we conclude that findings (d), (h), (i), and all but the recitation of testimony portion of finding (g) are properly supported and conclusive on appeal.

2. Conclusions of Law

Based on these factual findings, the trial court concluded that "[t]here are grounds to terminate the parental rights of Respondent father, including willful abandonment for six months" and that petitioner-mother "has proved by clear and convincing evidence the facts stated above, and Respondent's parental rights with the minor child[ren] should be permanently terminated on the grounds stated in N.C. Gen. Stat. §§7B-1111[a](1)(6) and (7)." As we have concluded that the trial court's conclusions as to N.C.G.S. § 7B-1111(a)(1) and (6) must be vacated, we address only the trial court's conclusion under N.C.G.S. § 7B-1111(a)(7). We review this conclusion of law de novo. *See In re K.N.*, 381 N.C. 823, 827 (2022).

Respondent-father argues that the trial court's conclusion that grounds existed to terminate his parental rights under N.C.G.S. § 7B-1111(a)(7) is unsupported because: (1) "the factual findings do not explain or provide the basis for terminating Father's parental rights"; (2) "the findings did not reflect the evidence that Mother did not want Father to maintain a relationship with the children"; (3) "[c]ontrary to the court's findings about Father's abilities and intentions, if the ability to communicate and retain some type of relationship had existed during the present incarceration, Father would gladly work on parental duties and claims"; and (4) "[i]n this case, just as in *In re D.E.M.*, the findings

which were supported by evidence failed to show that Father willfully abandoned Cody, Janet, and Xia." We address each argument in turn.

Respondent-father's first contention—that the supported factual findings do not provide a basis for terminating his parental rights—is without merit. Willful abandonment is a ground for terminating parental rights, *see* N.C.G.S. § 7B-1111(a)(7), and "[d]espite incarceration, a parent *failing to have any contact* [during the determinative six-month period] can be found to have willfully abandoned the child[.]" *In re D.J.D.*, 171 N.C. App. 230, 241 (2005) (cleaned up) (emphasis added).

> Abandonment implies conduct on the part of the parent which manifests a willful determination to forego all parental duties and relinquish all parental claims to the child. Willful intent is an integral part of abandonment and this is a question of fact to be determined from the evidence. If a parent withholds that parent's presence, love, care, the opportunity to display filial affection, and willfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

In re S.R., 384 N.C. at 526 (cleaned up).

A parent's withholding of love and care must be voluntary and willful to support a conclusion of abandonment. Because the respondent-parent's willfulness is the touchstone of this analysis, our relevant case law distills into two questions: (1) what options did the respondent-parent have to display parental affection during the six-month period, and (2) did the respondent-parent exercise those options. If the absence of such parental affection is caused by "one parent actively thwart[ing] the other parent's ability to have a relationship with their child," either by eliminating the other parent's options or by frustrating their ability to exercise them, then a trial court does not err in concluding no grounds exist to terminate parental rights under N.C.G.S. § 7B-1111(a)(7). *Id.* at 527.

Where the respondent-parent is incarcerated during the determinative six-month period prior to the filing of the petition, "the circumstances attendant to a parent's incarceration are relevant when determining whether a parent willfully abandoned his or her child, and this Court has repeatedly acknowledged that the opportunities of an incarcerated parent to show affection for and associate with a child are limited." *In re D.M.O.*, 250 N.C. App. 570, 575 (2016). "Our precedents are quite clear—and remain in full force—that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision."

In re D.E.M., 257 N.C. App. 618, 621 (2018) (quoting *In re M.A.W.*, 370 N.C. 149, 153 (2017)).

"Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in his child's welfare by whatever means available*." *Id.* (cleaned up). Under these circumstances a trial court must "address, in light of his incarceration, what other efforts [respondent-father] could have been expected to make to contact [mother] and the juvenile." *Id.*

Here, because respondent-father was incarcerated during the determinative six-month period, the trial court was required to enter factual findings that addressed "in light of his incarceration, what other efforts [he] could have been expected to make to contact" petitioner-mother and the juveniles. *Id.* The trial court's relevant unchallenged or supported findings are:

> d. The court finds that there was no communication between the father and the minor child, no letters, no visits, no financial support nor anything that would indicate an intent to maintain a relationship with the minor child during the relevant period.
>
> e. Looking outside the relevant period in relation to the father's intent, the court finds that the father sent $30.00 to pay for the minor's shoes in 2018 and that he sent two letters in 2022.
>
> f. The mother had the same address where the father dropped off the $30.00 and sent the two letters and the mother had the same phone number since the father has been incarcerated.
>
> g. The father's incarceration may have been an impediment to the father's ability to reach out and maintain a relationship, however, the father clearly had the ability and knowledge to communicate with the minor child. . . . [H]e has previously sent this minor child letters so he had the ability to maintain contact despite his incarceration.

These findings—though by no means exhaustive, comprehensive, or even thorough—adequately address: (1) in light of his incarceration, what options respondent-father had to show interest in his children's welfare, and (2) whether respondent-father exercised those options. The trial court acknowledged that respondent-father's options were limited due to his incarceration but that he could have continued to send

letters as he had previously. Because respondent-father failed to exercise that option, he failed to "*show[ ] interest in his child's welfare by whatever means available*," *In re D.E.M.*, 257 N.C. App. at 621 (cleaned up), and the trial court's factual findings support its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7).

Respondent-father's second contention, that "the findings did not reflect the evidence that Mother did not want Father to maintain a relationship with the children," is misplaced. While petitioner-mother's statements that she had "tried to prevent him from seeing the children . . . when he first got incarcerated" and that she was "not willing to put money on [his] books to speak to the kids," could support a finding that petitioner-mother did not want respondent-father to maintain a relationship with the children, the trial court was not required to make any such finding. Whatever petitioner-mother *wanted* is largely irrelevant to resolving the issue of whether respondent-father willfully abandoned his children in the six-month period prior to the filing of the petition. *See* N.C.G.S. § 7B-1111(a)(7). Because petitioner-mother testified that she "never stopped him from writing" and "never stopped the children from writing," her admissions that she "tried to prevent him from *seeing* the children" and stopped funding his prison account do not amount to "actively thwarting the other's parent's *ability* to have a relationship with their child." *In re S.R.*, 384 N.C. at 527 (emphasis added).

Respondent-father's third argument, that "if the ability to communicate and retain some type of relationship had existed during the present incarceration, [he] would gladly work on parental duties and claims," similarly amounts to a contention that petitioner-mother actively thwarted his ability to communicate and retain a relationship with his children. The clear, cogent, and convincing evidence and the trial court's supported factual findings demonstrate that respondent-father: (1) knew the children's address, (2) was capable of sending letters to the children at that address, (3) sent at least two letters to the children since his 2018 incarceration began, and (4) did not send letters or otherwise attempt communication with the children in the determinative six-month period. "Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in his child's welfare by whatever means available*." *In re D.E.M.*, 257 N.C. App. at 621 (cleaned up).

Finally, respondent-father argues that "[i]n this case, just as in *In re D.E.M.*, the findings which were supported by evidence failed to show that Father willfully abandoned Cody, Janet, and Xia." We disagree.

In *In re D.E.M.*, this Court vacated an order terminating the respondent's parental rights in part because the trial court's findings did "not address, in light of his incarceration, what other efforts [respondent] could have been expected to make to contact [the mother] and the juvenile." *Id.* In doing so, this Court relied on our precedent in *In re D.M.O.* where we vacated and remanded a similar order in part because the trial court "made no findings indicating that it considered the limitations of respondent-mother's incarceration, or that respondent-mother was able but failed to provide contact, love, or affection to her child while incarcerated." *Id.* (quoting *In re D.M.O.*, 250 N.C. App. at 578).

As described in detail above, the orders here do not suffer from the same defect present in the orders in *In re D.E.M.* and *In re D.M.O.* The trial court's findings expressly addressed respondent-father's incarceration, the limitations such incarceration placed upon his ability to show interest in his children, and the options he could have—but did not—exercise to show such interest. Accordingly, we affirm the trial court's conclusion that grounds existed to terminate respondent-father's parental rights for willful abandonment under N.C.G.S. § 7B-1111(a)(7).

V. Conclusion

The trial court's findings do not support its conclusions that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(1) or (6) and we therefore vacate those portions of the three orders. However, because the trial court's supported factual findings in turn support its conclusion that grounds existed to terminate respondent-father's parental rights under N.C.G.S. § 7B-1111(a)(7), we affirm those portions of the three orders.

VACATED IN PART, AFFIRMED IN PART.

Judges HAMPSON and GORE concur.

STATE OF NORTH CAROLINA
v.
WALLACE BELFIELD, DEFENDANT

No. COA24-640

Filed 19 February 2025

Satellite-Based Monitoring—order imposing 25-year term—on remand—trial court's additional findings—supported by competent evidence

In defendant's second appeal from an order imposing a 25-year term of satellite-based monitoring (SBM) after his conviction for indecent liberties with a child, the order was affirmed because the trial court's additional findings of fact—made on remand from the first appeal—were supported by competent evidence. In making these additional findings, the court properly considered evidence beyond the Static-99 risk assessment scoring defendant as a "four," which placed him at an "above average" risk for recidivism and served as the court's original basis for imposing SBM, including: defendant's admission that he was living in a halfway house when he committed the charged crime; testimony from a chief probation officer expressing concerns about being able to locate defendant given his unstable living conditions and frequent use of halfway houses; the relevant recidivism rates for offenders with a score of four; and the chief probation officer's recommendation that defendant receive the highest level of supervision.

Appeal by defendant from order entered 11 October 2023 by Judge Timothy W. Wilson in Nash County Superior Court. Heard in the Court of Appeals 30 January 2025.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Sonya Calloway-Durham, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender James R. Grant, for defendant-appellant.

FLOOD, Judge.

Defendant Wallace Belfield appeals from the trial court's order, which imposed on Defendant a twenty-five-year term of satellite-based monitoring ("SBM"). On appeal, Defendant argues the trial court's order

imposing this term of SBM was in error, where Defendant was not at high risk to reoffend, and the trial court's additional findings of fact—unsupported by the evidence—did not support its conclusion that Defendant requires the highest level of supervision and monitoring. Additionally, Defendant contends that some of the State's testimonial evidence was "speculative" and therefore incompetent. Upon review, we conclude the trial court's additional findings of fact were supported by competent evidence, such that the trial court had proper justification to impose on Defendant the highest level of supervision and monitoring. We further conclude Defendant failed to preserve for our review any argument that the State's evidence was speculative, and Defendant's argument to that effect is therefore dismissed.

I. Factual and Procedural Background

The following facts are derived in part from those set forth in the opinion of *State v. Belfield*, 289 N.C. App. 720 (2023) (unpublished) (hereinafter, "*Belfield I*"), filed following Defendant's prior appeal to this Court.

On 19 August 2020, this matter was heard in Nash County Superior Court, and that same day, Defendant pled guilty to, *inter alia*, one count of indecent liberties with a child. Defendant was sentenced as a prior record Level VI with twenty-six points, to a presumptive range of 33 to 49 months' imprisonment, and to a second presumptive range of 20 to 23 months' imprisonment.

On 27 October 2020, the State and Defendant appeared for an SBM hearing. The State provided that Defendant, while on post-release supervision for a different offense, pled guilty to another count of indecent liberties. In making this guilty plea, Defendant stipulated to the context under which he committed this offense; namely, that the underaged victim sneaked into the "halfway house" in which Defendant was staying and had sexual relations with Defendant. Additionally, the State presented Defendant's Static-99 sheet—a risk assessment tool used by the North Carolina Department of Adult Correction to assess a criminal defendant's likelihood of reoffending—where he scored a risk level of five. Defendant, however, contended the Static-99 contained irregularities regarding the name of the person being evaluated, and the trial court continued the matter to allow the State an opportunity to correct the Static-99.

On 21 July 2021, the trial court reconvened to determine whether Defendant required SBM (the "initial hearing"). Dr. Vernon Ted Jamison, the State's witness and a psychologist who conducted the new Static-99 assessment, testified that Defendant's score was actually four, which is a

"moderate-high" or "above average risk" of recidivism. Dr. Jamison noted he was unaware of any prior sexual offenses on Defendant's record, and Dr. Jamison attributed Defendant's "moderate-high" Static-99 score to Defendant's criminal record related to violent crimes.

The State next called as a witness Ron West, who is a chief probation officer and sex offender supervisor in Nash County. During his testimony, Mr. West read aloud a relevant portion of the Static-99, which stated that offenders with a score of four "have been found to sexually recidivate at 6.1 to 12.2 percent after five years." The State then asked Mr. West what his "normal recommendation" would be for an offender with a score of four, to which Mr. West replied, "[t]hat the offender definitely be placed on SBM." The State also asked Mr. West if there were any additional factors that would contribute to the higher risk level that are not factored into the Static-99 test. Mr. West replied that, upon review of Defendant's criminal history,

> [Mr. West's] major concern with [Defendant] would be locating him, based upon his frequent use of halfway houses and not having a stable place to live. The primary use of the SBM is just being able to locate an offender that has sex offenses. With a person that does not have a stable residence, it's very important to know where they're at.

After Defendant testified on his own behalf, Defendant's counsel objected to the entry of a finding that SBM is required. After allowing Defendant to make a final statement, the trial court orally ordered that Defendant submit to twenty-five years of SBM, and specifically provided that:

> The Static-99, having revealed that . . . Defendant is a Level [four] for the purposes of determination of [SBM], the Court makes the following findings to support a decision that the use of [SBM] is not cruel and unusual punishment as defined by the State of North Carolina Constitution or the United States Federal Constitution; therefore, the use of this instrument does not violate either the State or Federal Constitution.
>
> In addition, the Court finds that the use of [SBM] reduces recidivism and is a reliable instrument for the stated purpose therein.
>
> The Court orders that . . . Defendant be enrolled in a[n SBM] program for a . . . period of [twenty-five] years

> upon his release from the Department of North Carolina Public Safety.

The trial court entered its written order on the AOC-CR-615 (11/18) form (the "initial order"), concluding Defendant requires "the highest possible level of supervision and monitoring" and requiring Defendant to enroll in SBM for twenty-five years upon release from imprisonment. The initial order provided that the trial court's conclusion was based on the risk assessment contained in the Static-99. Further, a checkbox was marked in the initial order, denoting that the trial court's conclusion was also based on "additional findings [found] on the attached [form 618]."

Defendant appealed to this Court, and on 18 July 2023, a prior panel of this Court issued an opinion, where we provided that, while the State presented evidence that "would have supported a finding that Defendant required the highest level of supervision and monitoring[,]" the form 618 was not included in the record on appeal, and the record did "not evince the trial court made the requisite findings of fact." *Belfield I*, at *3. The record on appeal, however, demonstrated that the State presented "evidence at the SBM hearing that would support the highest level" of supervision and monitoring, and this Court therefore vacated and remanded the trial court's order, for the trial court to "consider the evidence and make findings of fact regarding the imposition of SBM." *Id.* at *3 (citation and internal quotation marks omitted).

On 9 October 2023, this matter came on before the trial court for remand hearing. The trial court heard no new evidence, considered the evidence presented during the 21 July 2021 hearing, and on 11 October 2023, entered the following, written "Additional Findings":

> 1. On August 9, 2020, Defendant pled guilty to taking indecent liberties with a child in exchange for the State dismissing one count of statutory rape of a person who is [fifteen] years old or younger and habitual felon.
>
> 2. Taking indecent liberties with a child is a sexually violent offense and did involve the physical, mental or sexual abuse of a minor.
>
> 3. Defendant had [twenty-six] prior record points for felony sentencing. (See attached State's Exhibit 618-A.)
>
> 4. On July 21, 2021, Dr. Ted Jamison, a psychologist who conducted a Static-99 assessment on Defendant, testified that Defendant's score was four, which is "moderate-high"

or "above average risk of recidivism." Dr. Jamison attributed Defendant's "moderate-high" Static-99 score to Defendant's criminal record related to violent crimes.

5. On July 21, 2021, Mr. Ron West, chief probation officer and sex offender supervisor in Nash County, testified that he recommended Defendant be placed on SBM.

6. Per the Static-99R risk reporting statements[,] . . . offenders with a Static-99 score of four have been found to sexually recidivate at 6.1 to 12.2 percent after five years. Mr. West testified to this portion of the Static-99 risk reporting statements at said hearing.

7. Mr. West also testified at said hearing that he recommend[s] SBM . . . due to Defendant's Static-99 score and Mr. West's concern about being able to locate Defendant [upon release from prison] based on Defendant's frequent use of halfway houses and Defendant not having a stable place to live. When a person does not have a stable residence, it is very important to know where they are. The primary use of SBM is being able to locate an offender, who has been convicted of sex offenses.

8. When Defendant committed said offense in the above captioned file number, Defendant was residing in a halfway house and was on post-release supervision for a different offense.

9. Based on Mr. West's testimony regarding his recommendation, recidivism rates from the Static-99R risk reporting statements, his concerns about locating . . . Defendant upon release from prison and additional factors that would contribute to a higher risk level, which are not factored into the Static-99, this court finds that Defendant requires the highest level of supervision and monitoring.

Therefore, the court's order for [SBM] . . . post-assessment entered herein on July 21, 2021, is re-adopted by the undersigned and is, along with the judicial finding set forth on form AOC-CR-615, incorporated herein by reference as though again fully set forth with these additional findings.

Defendant timely appealed.

II. Jurisdiction

"[T]his [C]ourt has jurisdiction to consider appeals from SBM monitoring determinations under N.C.[G.S.] § 14-208.40B [(2023)] pursuant to N.C.[G.S.] § 7A-27 [(2023)]." *State v. Singleton*, 201 N.C. App. 620, 626 (2010).

III. Analysis

Defendant argues on appeal that the trial court's order imposing the twenty-five-year term of SBM was in error, where Defendant was not at high risk to reoffend, and the trial court's Additional Findings were insufficient to support its conclusion that Defendant requires the highest level of supervision and monitoring. We disagree.

On appeal from an order imposing SBM, "we review the trial court's findings of fact to determine whether they are supported by competent record evidence, and we review the trial court's conclusions of law for legal accuracy and to ensure that those conclusions reflect a correct application of law to the facts found." *State v. Kilby*, 198 N.C. App. 363, 367 (2009) (quoting *State v. Garcia*, 358 N.C. 382, 391 (2004)). "The trial court's findings of fact are conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Blankenship*, 270 N.C. App. 731, 735 (2020) (citation and internal quotation marks omitted).

The purpose of SBM "is to supervise certain offenders whom the legislature has identified as posing a particular risk to society[,]" *State v. Morrow*, 200 N.C. App. 123, 131 (2009) (citation and internal quotation marks omitted), and the procedure for SBM hearings is found in N.C.G.S. §§ 14-208.40A and 14-208.40B (2023). When a defendant has been convicted of an applicable offense, and the trial court has not previously determined during the sentencing phase whether SBM is required, N.C.G.S. § 14-208.40B applies. *See* N.C.G.S. § 14-208.40B(a). Here, Defendant had been convicted of indecent liberties with a child, an applicable offense, and the trial court did not make an SBM determination when Defendant was sentenced; N.C.G.S. § 14-208.40B therefore governs. *See* N.C.G.S. § 14-208.40B; *see also Morrow*, 200 N.C. App. at 131.

In making an SBM determination, based on the results of a defendant's risk assessment and any other evidence presented by the State or the defendant, the trial court must decide whether the defendant requires "the highest possible level of supervision and monitoring." *See* N.C.G.S. § 14-208.40B; *see also Kilby*, 198 N.C. App. at 367 n.2 ("The highest level of supervision and monitoring simply refers to SBM." (internal

quotation marks omitted)). If the trial court determines that the defendant is eligible for SBM, "the State shall bear the burden of proving that the [SBM] program is reasonable." S*tate v. Greene*, 255 N.C. App. 780, 783 (2017) (citation and internal quotation marks omitted). Moreover, "the State must present additional evidence to support a determination that the offender requires the highest possible level of supervision and monitoring[,]" and such additional evidence cannot be as to matters already addressed in the defendant's Static-99 risk assessment, such as the defendant's underlying offense. *State v. Thomas*, 225 N.C. App. 631, 633–34 (2013).

Absent a "high risk" Static-99 score, in addition to the State offering additional evidence, the trial court must "make additional findings[] in order to justify a maximum SBM sentence." *Id.* at 634; *see also Kilby*, 198 N.C. App. at 369. While such additional findings cannot be based solely on matters already addressed in a defendant's Static-99 risk assessment, *see Thomas*, 225 N.C. App. at 634, "the trial court may consider the context under which the crimes occurred, revealed in the factual basis for [a d]efendant's guilty plea, when making additional findings as to the level of supervision required of a defendant[.]" *Blankenship*, 270 N.C. App. at 737 (citation and internal quotation marks omitted).

Regarding the trial court's additional findings of facts, in *State v. Green*, this Court considered the defendant's appeal from the trial court's SBM order imposing the highest level of supervision and monitoring. 211 N.C. App. 599, 600 (2017). Upon review, this Court upheld the trial court's order, and provided that, although the defendant had been assessed in the "moderate-low" risk range, "based on the facts that the victims were very young and that [the defendant] did not receive any sex offender treatment[,]" the trial court properly determined that the defendant required the highest level of supervision. *Id.* at 604–05. Likewise, in *State v. Smith*, this Court upheld an SBM order where the bases of the trial court's additional findings were "the age of the alleged victims, the temporal proximity of the events, and [the] defendant's increasing sexual aggressiveness." 240 N.C. App. 73, 76 (2015). By contrast, in *State v. Jones*, this Court reversed the trial court's SBM order where the State failed to present any evidence, other than the defendant's Static-99 risk assessment score, to support a finding that he required the highest level of supervision and monitoring. 234 N.C. App. 239, 246–47 (2024).

Here, the Record demonstrates that, in making its Additional Findings and in accordance with our opinion in *Belfield I*, the trial court considered the following, additional evidence presented by the State: (1) that, per Defendant's stipulation to the factual basis of the underlying

offense, Defendant was residing in a halfway house at the time he committed indecent liberties with a child; (2) Mr. West's testimony, where he expressed concern about being able to locate Defendant, due to "Defendant's frequent use of halfway houses and Defendant not having a stable place to live[,]" and explained that "[t]he primary use of SBM is being able to locate an offender, who has been convicted of sex offenses"; (3) the relevant recidivism rates; and (4) Mr. West's recommendation that Defendant receive the highest level of supervision. This is competent evidence—beyond evidence of matters already addressed in Defendant's Static-99 risk assessment—in support of the trial court's Additional Findings 5, 6, 7, and 8. *See Green*, 211 N.C. App. at 604–05; *see also Smith*, 240 N.C. App. at 76; *Jones*, 234 N.C. App. at 246–47; *Blankenship*, 270 N.C. App. at 735, 737; *Kilby*, 198 N.C. App. at 369. As these Additional Findings are supported by competent evidence, they are binding on appeal. *See Blankenship*, 270 N.C. App. at 735.

Defendant, however, contends the trial court's Additional Findings do not legally justify its imposition of the highest level of supervision and monitoring, as these findings were based on the trial court's consideration of improperly duplicative evidence of matters already addressed in Defendant's Static-99 risk assessment. We find Defendant's contention unpersuasive. As explained above, while the trial court's additional findings cannot be based solely on matters already addressed in the Static-99 risk assessment, because Additional Findings 5, 6, 7, and 8 are supported by competent evidence other than that of a defendant's risk assessment, they are binding on appeal. *See Blankenship*, 270 N.C. App. at 735; *see also Jones*, 234 N.C. App. at 246–47. Assuming, *arguendo*, Additional Findings 1 through 4 are based on evidence duplicative of matters addressed in Defendant's Static-99 risk assessment, the State—as in *Green* and *Smith*, and unlike in *Jones*—met its evidentiary burden of additional evidence in support of Additional Findings 5 through 8. *See Green*, 211 N.C. App. at 604–05; *see also Smith*, 240 N.C. App. at 76; *Jones*, 234 N.C. App. at 246–47. Moreover, Additional Finding 9—where the court articulates its conclusion that Defendant requires the highest level of supervision and monitoring—is based expressly on the evidentiary considerations indicated in Additional Findings 5 through 8. *See* N.C.G.S. § 14-208.40B; *see also Kilby*, 198 N.C. App. at 367 n.2; *Greene*, 255 N.C. App. at 783.

Accordingly, upon our review, we conclude that: the context of Defendant committing a sexual offense in the halfway house; the concern of not being able to locate Defendant, who still makes "frequent use" of halfway houses and does not have "a stable place to live"; the

primary purpose of the SBM program being "to locate an offender that has sex offenses"; the relevant recidivism rates; and the recommendation of Mr. West—a chief probation officer tasked with implementing the SBM program—that Defendant receive the highest level of supervision and monitoring, collectively justify the trial court's conclusion that such level of supervision and monitoring is required for Defendant. *See Kilby*, 198 N.C. App. at 367; *see also Thomas*, 225 N.C. App. at 634. We therefore affirm the trial court's SBM order.

Defendant also contends Mr. West's testimony regarding Defendant's frequent use of halfway houses was "speculative," and as such, Additional Finding 7 is not supported by competent evidence. Defendant, however, failed to object at the initial hearing to the introduction of this allegedly speculative evidence. As such, per Rule 10 of the North Carolina Rules of Appellate Procedure, Defendant failed to preserve for our review his argument regarding Mr. West's testimony, and we decline to invoke Rule 2 to consider this contention. *See* N.C. R. App. P. 10(a)(1) ("In order to preserve an issue for appellate review, a party must have presented to the trial court a timely . . . objection, . . . stating the specific grounds for the ruling the part desired the court to make[.]"); *see also* N.C. R. App. P. 2. This argument is therefore dismissed.

IV. Conclusion

Upon review, we conclude the trial court's additional findings of fact were supported by competent evidence, such that the trial court had proper justification to impose on Defendant the highest level of supervision and monitoring. We further conclude Defendant failed to preserve for our review any argument concerning competency of the State's testimonial evidence, and Defendant's argument to that effect is therefore dismissed.

AFFIRMED In Part, and DISMISSED In Part.

Judges HAMPSON and STADING concur.

STATE OF NORTH CAROLINA
v.
GRIFFIN ALEXANDER CURTIS

No. COA24-204

Filed 19 February 2025

1. Appeal and Error—petition for certiorari—criminal sentencing error—conceded by State—extraordinary circumstances—plea agreement containing waiver of right to appeal

In an appeal from judgments entered upon defendant's guilty plea to criminal charges arising from a fatal car accident, where defendant's plea agreement included a waiver of "all right to appeal," defendant's petition for a writ of certiorari was allowed in the event that the waiver was in fact enforceable—an issue that the appellate court declined to address. The State did not oppose defendant's petition, even conceding that a sentencing error was committed in the trial court. Further, extraordinary circumstances justified issuing a writ of certiorari where, because of the trial court's error, defendant was serving four aggravated consecutive sentences that were not supported by the evidence at sentencing.

2. Sentencing—failure to find mitigating factor—stipulated in plea agreement—reversible error—request for different judge on remand denied

After defendant pleaded guilty to felony death by vehicle and other charges arising from a fatal car accident, the trial court committed reversible error at sentencing by failing to find a statutory mitigating factor that the State had stipulated to in defendant's plea agreement. Consequently, defendant's criminal judgments were vacated and the case was remanded for resentencing. However, defendant's request for a different judge to conduct his resentencing hearing was denied, since defendant failed to show that, absent a different judge, he would not be guaranteed the opportunity to receive the benefit of his plea agreement on remand.

Appeal by defendant by writ of certiorari from judgments entered 25 August 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorneys General Christopher W. Brooks and Kathryne E. Hathcock, for the State.

Ellis & Winters LLP, by Kelly Margolis Dagger, Michelle A. Liguori, and Chelsea A. Pieroni, for defendant-appellant.

ZACHARY, Judge.

Defendant Griffin Alexander Curtis appeals from judgments entered upon his guilty plea to two counts of felony death by vehicle, three counts of felony serious injury by vehicle, and one count of driving while impaired. Defendant does not challenge his convictions; he only challenges the trial court's sentencing upon those convictions. After careful review, we vacate and remand for resentencing.

I. Background

This case arises from a fatal automobile collision on 9 January 2022, in which Defendant drove his vehicle head-on into an oncoming vehicle. The collision resulted in the deaths of two passengers in the oncoming vehicle, as well as serious injuries to three additional passengers between both vehicles. Inside the wreckage of Defendant's vehicle, law enforcement officers discovered dozens of used containers of nitrous oxide, along with hundreds of unused containers. Defendant also admitted that he had consumed alcohol and marijuana that evening.

Defendant was arrested and charged with two counts of felony death by vehicle, and one count each of felony serious injury by vehicle, driving while impaired, driving left of center, possession of marijuana up to one-half ounce, and driving with an open container after consuming alcohol. On 24 January 2022, a Wake County grand jury returned indictments formally charging Defendant with the same offenses; three months later, the grand jury returned another indictment charging Defendant with two additional counts of felony serious injury by vehicle.

On 25 August 2023, Defendant entered a guilty plea pursuant to a plea agreement. Defendant agreed to plead guilty to two counts of felony death by vehicle, three counts of felony serious injury by vehicle, and one count of driving while impaired, with the judgment to be arrested on the latter conviction. Defendant also agreed to waive his right of appeal and stipulated to the aggravating factor for sentencing that he "knowingly created great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." In exchange, the State agreed not to seek further indictments for second-degree murder or felony assault with a deadly weapon inflicting serious injury, and to dismiss the three remaining misdemeanor charges. The State also stipulated to the mitigating factor for

sentencing that Defendant "has accepted responsibility for [his] criminal conduct."

The trial court accepted Defendant's guilty plea and entered a series of judgments upon the plea. For the two felony death by vehicle convictions, the trial court sentenced Defendant in the aggravated range for a prior record level I offender to consecutive terms of 80 to 108 months' imprisonment in the custody of the North Carolina Department of Adult Correction. For one of the felony serious injury by vehicle convictions, the court sentenced Defendant in the aggravated range to a term of 20 to 33 months' imprisonment, which the court again set to run consecutively. The court consolidated Defendant's remaining two convictions for felony serious injury by vehicle and sentenced Defendant to another consecutive prison term of 20 to 33 months. Consistent with the plea agreement, the trial court arrested judgment on Defendant's conviction for driving while impaired and dismissed the remaining misdemeanor convictions.

On 1 September 2023, Defendant timely filed notice of appeal.

II. Appellate Jurisdiction

[1] With limited statutory exceptions, a "defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2023). Because Defendant received sentences in the aggravated range, Defendant is entitled by statute to a limited right of appeal:

> A defendant who has . . . entered a plea of guilty . . . to a felony, is entitled to appeal as a matter of right the issue of whether his or her sentence is supported by evidence introduced at the trial and sentencing hearing only if the minimum sentence of imprisonment does not fall within the presumptive range for the defendant's prior record or conviction level and class of offense.

Id. § 15A-1444(a1).

Additionally, this case presents the threshold issue of an appeal waiver. Defendant filed notice of appeal from the judgments entered in this case despite his waiver of "all right to appeal" pursuant to his plea agreement. Defendant now contends that "this appeal waiver is unenforceable."

We need not address that issue, however, because Defendant filed a petition for writ of certiorari contemporaneous with his appellate brief

in the event that this Court should determine that the waiver "may be enforceable in whole or in part to take away his right to appeal."

"Certiorari is a discretionary writ, to be issued only for good and sufficient cause shown." *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959) (italics omitted), *cert. denied*, 362 U.S. 917, 4 L. Ed. 2d 738 (1960). Allowing a petition for writ of certiorari "is an extraordinary measure. Accordingly, a petitioner must satisfy a two-part test before we will issue the writ." *State v. Barton*, 295 N.C. App. 182, 186, 905 S.E.2d 230, 234 (2024) (citation omitted). "First, a writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below. Second, a writ of certiorari should issue only if there are extraordinary circumstances to justify it." *Id.* (cleaned up). "An extraordinary circumstance generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice." *Id.* (cleaned up).

The State concedes that error was committed below and does not oppose Defendant's petition. As for showing extraordinary circumstances, Defendant observes that he "is serving four consecutive aggravated sentences that are not supported by the evidence presented at sentencing (including a stipulated mitigating factor)." In our discretion, we allow Defendant's petition for writ of certiorari and proceed to the merits of his appeal.

III. Discussion

[2] On appeal, Defendant raises a series of arguments concerning his sentencing; however, the dispositive issue is whether the trial court failed to find the mitigating factor to which he and the State stipulated in the plea agreement. The State concedes that this constitutes reversible error, and we agree. Therefore, we vacate and remand for resentencing.

A. Standard of Review

"This Court reviews alleged sentencing errors for whether the sentence is supported by evidence introduced at the trial and sentencing hearing." *State v. Bacon*, 228 N.C. App. 432, 434, 745 S.E.2d 905, 907 (2013) (cleaned up). "A trial court's weighing of mitigating and aggravating factors will not be disturbed on appeal absent a showing that there was an abuse of discretion." *State v. Morston*, 221 N.C. App. 464, 473, 728 S.E.2d 400, 408 (2012) (citation omitted). "The balance struck by the sentencing judge in weighing the aggravating against the mitigating factors, being a matter within his discretion, will not be disturbed unless it is manifestly unsupported by reason, or so arbitrary that it could not

have been the result of a reasoned decision." *Id.* at 473–74, 728 S.E.2d at 408 (citation omitted).

B. Analysis

Defendant argues that "[t]he trial court's failure to find mitigating factor 15 in the face of the parties' stipulation and supporting evidence was reversible error." The State concedes error, and we agree.

Under the Structured Sentencing Act, the trial "court shall consider evidence of aggravating or mitigating factors present in the offense that make an aggravated or mitigated sentence appropriate, but the decision to depart from the presumptive range is in the discretion of the court." N.C. Gen. Stat. § 15A-1340.16(a). "The State bears the burden of proving beyond a reasonable doubt that an aggravating factor exists, and the offender bears the burden of proving by a preponderance of the evidence that a mitigating factor exists." *Id.* Additionally, it is "clearly established that the sentencing judge has a duty to find a statutory mitigating factor when the evidence in support of a factor is uncontradicted, substantial and manifestly credible." *State v. Spears*, 314 N.C. 319, 321, 333 S.E.2d 242, 244 (1985) (original emphasis omitted).[1]

"[E]vidence is credible as a matter of law when the non-movant establishes [the] proponent's case by admitting the truth of the basic facts upon which the claim of the proponent rests." *State v. Albert*, 312 N.C. 567, 579, 324 S.E.2d 233, 241 (1985) (cleaned up). Thus, when the State stipulates to the facts supporting the finding of a mitigating factor, "the trial court err[s] in failing to find this fact in mitigation." *Id.* at 580, 324 S.E.2d at 241.

In the present case, it is undisputed that *Albert* is the controlling precedent. As part of the plea agreement, the State stipulated to the statutory mitigating factor that Defendant "has accepted responsibility for [his] criminal conduct." N.C. Gen. Stat. § 15A-1340.16(e)(15). By stipulating to this mitigating factor, the State "admitt[ed] the truth of the basic facts upon which the [factor] rest[ed]." *Albert*, 312 N.C. at 579, 324 S.E.2d at 241. Accordingly, it was error for the trial court to fail to find this mitigating factor. *See id.* at 580, 324 S.E.2d at 241; *see also Spears*, 314 N.C. at 321, 333 S.E.2d at 244.

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1. Although *Spears* and other cases cited in this opinion were decided prior to the enactment of the Structured Sentencing Act, "this Court has repeatedly applied the logic of cases decided under the Fair Sentencing Act to cases arising under the Structured Sentencing Act." *State v. Vaughters*, 219 N.C. App. 356, 360, 725 S.E.2d 17, 21, *cert. denied*, 366 N.C. 402, 735 S.E.2d 321 (2012).

"[W]henever there is error in a sentencing judge's failure to find a statutory mitigating circumstance and a sentence in excess of the presumptive term is imposed, the matter must be remanded for a new sentencing hearing." *State v. Daniel*, 319 N.C. 308, 315, 354 S.E.2d 216, 220 (1987). This principle holds "true in proceedings involving guilty pleas and plea agreements." *State v. Braswell*, 269 N.C. App. 309, 317, 837 S.E.2d 580, 586 (2020). Consequently, we must remand for a resentencing hearing.

Although the parties agree that this matter must be remanded for resentencing, they disagree regarding one aspect of the disposition: whether Defendant is entitled to a resentencing hearing before a different trial judge.

Defendant principally relies upon *State v. Rodriguez*, in which this Court remanded for resentencing because the State "breached the provision of the plea agreement promising that the prosecution would 'take no position on sentencing on the assault charge.' " 111 N.C. App. 141, 143–44, 431 S.E.2d 788, 789 (1993). The State's breach of the plea agreement resulted in the trial court receiving information about several nonstatutory aggravating factors regarding one of the offenses to which the defendant pleaded guilty. *Id.* at 143, 431 S.E.2d at 789. The court then referenced one of these nonstatutory aggravating factors when entering the statutory maximum sentence for the affected conviction. *Id.* We remanded for resentencing due to this error, and instructed that a different judge was to conduct the hearing upon remand. *Id.* at 148, 431 S.E.2d at 792 ("While we have every confidence in the distinguished trial judge's ability to afford [the] defendant a fair and impartial hearing on remand, . . . we also direct that [the] defendant's new sentencing hearing be conducted before a different trial judge." (citing *Santobello v. New York*, 404 U.S. 257, 30 L. Ed. 2d 427 (1971))).

In the instant case, Defendant asserts that, pursuant to *Rodriguez*, we must also direct that a different trial judge conduct his resentencing hearing on remand. We disagree.

Defendant's reliance on *Rodriguez* is misplaced. The trial court in *Rodriguez* improperly received information regarding nonstatutory aggravating factors that it otherwise would not have received pursuant to the terms of the plea agreement between the defendant and the State. *Id.* at 143, 431 S.E.2d at 789. That bell could not be unrung. Moreover, due to the egregious nature of the State's breach of the agreement, the *Rodriguez* Court determined that it was immaterial whether the defendant's sentence was impacted to his detriment. *Id.* at 147, 431 S.E.2d at

791. As this Court emphasized, the defendant could not be guaranteed the opportunity to receive the benefit of his plea agreement unless a different trial judge—one unaffected by the State's breach—conducted the resentencing hearing on remand. *Id.* at 148, 431 S.E.2d at 792.

Unlike *Rodriguez*, no additional prejudicial information—beyond that already provided in the plea agreement—was disclosed to the trial court here. Accordingly, Defendant is unable to demonstrate any similar risk to his opportunity to receive the benefit of his bargained-for plea agreement on remand. *Rodriguez* is thus inapplicable, and Defendant's request for a different trial judge on remand is denied.

IV. Conclusion

For the foregoing reasons, we vacate and remand to the trial court for resentencing pursuant to the plea agreement. In light of our disposition, we need not address Defendant's remaining arguments.

VACATED AND REMANDED FOR RESENTENCING.

Judges TYSON and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TYLER DEION GREENFIELD, DEFENDANT

No. COA23-597

Filed 19 February 2025

1. Homicide—first-degree murder—jury instructions—felony murder—transferred intent—no error

In a first-degree felony murder prosecution arising from defendant having shot and killed a man from whom he was attempting to buy marijuana, with the man's female companion also having been shot but surviving—where the assault with intent to kill inflicting serious injury on the female victim served as the underlying felony for the murder charge—the trial court did not err by denying defendant's request, made after the jury had retired but before it began deliberations, for a special instruction on the application of the doctrine of transferred intent to felony murder. While defendant's request was timely, the instructions as given regarding both felony murder and transferred intent were legally correct; namely, that the

jury was told it could only find defendant guilty of felony murder if it found that: defendant intentionally committed one of the enumerated assaults on the female victim, the male victim was killed as a result, and defendant's assault was the proximate cause of death.

2. Criminal Law—prosecutor's closing argument—mention of charge for which defendant was acquitted—not grossly improper

In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, the trial court did not abuse its discretion in failing to intervene ex mero motu when the prosecutor referred to defendant's intent to rob the victim, despite defendant having been acquitted of attempted robbery in his first trial on charges related to the incident. Defendant's rights against double jeopardy were not violated because robbery was mentioned to explain the chain of events that led to the shooting, and, moreover, the challenged comments were made during the State's rebuttal—after defendant's counsel argued in his closing that defendant had no plan to commit any crime. Defendant's related argument that the trial court erred in allowing a State's witness to testify about the attempted robbery was not preserved; defendant had more than one occasion to object to the testimony, including when it was offered at trial, but failed to do so.

3. Evidence—character of homicide victim—peaceable nature—conformity with habit or routine practice—no abuse of discretion

In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, the trial court did not abuse its discretion in excluding evidence about the victim's prior convictions, gang affiliation, tattoo, and gun habits—which defendant argued were admissible to show the victim was the aggressor and to rebut evidence of the victim's peaceable nature—where: (1) as to the victim being the aggressor, the gang, tattoo, and firearm evidence did not involve "specific instances of conduct" as required for admission under Evidence Rule 405(b), and the prior convictions were excluded pursuant to Evidence Rule 403; and (2) none of the evidence defendant sought to rebut—that the victim was in the military, had a family, cared for his children, was hardworking, and sounded scared during his encounter with defendant—concerned whether the victim had a peaceable character or was generally nonviolent. Defendant's related constitutional argument was not preserved for appellate

review because he did not argue that he was being denied his right to present a complete defense when the evidence was excluded.

4. Evidence—witness testimony—prosecutor opinions—credibility and guilt—plain error not shown

In a first-degree murder prosecution arising from defendant having fatally shot a man from whom he was attempting to buy marijuana, defendant failed to establish plain error by the trial court in allowing certain testimony from a law enforcement witness and certain remarks by the prosecutors during closing arguments—which defendant characterized as impermissible opinions on credibility and guilt. The officer's testimony did not concern any ultimate issue before the jury or the credibility of defendant or any other witness, but rather served to explain the officer's investigation and his line of questioning of defendant; accordingly, its admission was not error. The prosecutors' references to robbery (a charge for which defendant was acquitted in an earlier trial) were made to explain the context of the shooting, and thus were not improper. The prosecutors' insinuations that defendant was lying and that the victim's partner was telling the truth about how the shooting occurred, even if considered to be improper opinions regarding credibility, were not prejudicial as defendant admitted to changing his story about the incident eight times.

Appeal by defendant from judgment entered 17 June 2022 by Judge Thomas R. Wilson in Superior Court, New Hanover County. Heard in the Court of Appeals 2 April 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Teresa M. Postell, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for defendant-appellant.

STROUD, Judge.

Defendant appeals the judgment convicting him of first-degree murder. Defendant contends he is entitled to a new trial since the trial court's jury instructions allowed the jury to convict him of first-degree murder under the felony murder rule without finding the required intent. Defendant also argues the trial court improperly allowed the State to contend a robbery had occurred when he was acquitted of robbery in a previous trial; the trial court improperly excluded evidence of the

victim's "prior convictions, gang affiliation, 'Thug' tattoo, and possession of assault rifles[;]" and the trial court committed plain error in not intervening during the State's allegedly improper closing arguments. For the following reasons, our review discerns, and we conclude there was no error.

I. Background

The State and Defendant each presented evidence at trial depicting different versions of events. However, it is undisputed that Defendant and a friend went to Jon and Beth's[1] apartment ("the Apartment") on 2 February 2015 to buy marijuana from Jon. After Defendant and his friend arrived at the Apartment, an altercation began involving at least three handguns. The State and Defendant differ as to what had occurred in the Apartment once Defendant and his friend arrived.

Beth testified on behalf of the State that she knew Jon sold marijuana and Defendant contacted Jon on the night of 2 February 2015 to buy marijuana from him, but she had told Jon she did not want Defendant coming to the Apartment to buy it, so if Jon was going to sell the marijuana to Defendant, it needed to be somewhere other than at the Apartment. But after Beth went to sleep, she was awakened by voices in the living room. Beth testified she heard Defendant and Jon speaking, and "it sounded like [Defendant] was getting aggressive, and [Jon's] . . . voice started to become very . . . high-pitched and scared." Beth stated she had a hard time making out what exactly was being said, but she heard Defendant "say something to the effect of, [w]here's the money? Where's the guns?" and Jon responded "[w]hat money? I don't have any money."

At this point, Beth got out of bed to see what was happening in the living room, and she saw Jon "with his hands up . . . at his waist, and . . . [Defendant] had him at gunpoint." Beth saw a gun in the bedroom and grabbed the gun; Defendant's friend came into the bedroom with a bag asking for the money, but was "caught off guard" when he realized Beth had a gun so he "turned around and walked back out of the doorway[.]" Beth then heard Defendant say "something to the effect of, [b]ring the gun out here, or I'm going to shoot him right in the head." Beth put the gun down on a table in the living room and Defendant's friend picked it up. After putting the gun down, Beth moved and was standing in front of Jon until Jon started "trying to slide [Beth] from in front of him[.]" Beth "started hearing . . . gunfire . . . closed [her] eyes," and "could feel pain on

1. We use pseudonyms to identify the victims in this case.

the side of [her] face and [she] could smell gunpowder . . . and burning flesh," at which point she "blacked out."

Beth testified Defendant was the person who had pulled the trigger. Beth then woke back up and saw "blood everywhere[;]" Beth saw Jon swaying and fall to the floor with blood pooling underneath him. Beth started screaming, tried to go to a neighbor's apartment for help, and called 911. Jon died as a result of the gunshots. Beth was shot through her left arm, under her ear, and on top of her head. Beth's injuries took about a year to heal since her gunshot wounds got infected and is permanently scarred.

On the other hand, Defendant testified in his defense and gave a much different version of events than Beth. Defendant stated while he, his friend, and Jon were in Jon's living room, he "made a decision, a dumb decision, to pick up the gun that was laying on the table." After picking up the gun, Defendant testified Jon "recognized this, and [stood] up, and [Jon] had a problem with it" but before Defendant could give the gun back to Jon or put it down, he heard his friend say "[s]he got a gun" at which point he "point[ed] the gun." Defendant stated he thought he was "about to die" since Beth was pointing a gun at him. Defendant pointed the gun at Beth and then pointed the gun at Jon "like, [p]ut the gun down, or I'm going to shoot him. . . . I'm going to shoot him in the head." Then, Defendant stated Jon pulled a gun out, shot Defendant, and "[o]nce [he] felt [him]self get hit, [he] pulled the trigger on that gun as many times as [he] could[.]"

Defendant essentially testified he did not bring a gun when he went to the Apartment to buy marijuana and he had used a gun he found "laying on the table" there to shoot Jon and Beth in self-defense after they had pointed guns at him. At least, this was the version of events Defendant testified to at trial. The evidence also showed Defendant changed his story at least eight times in his interviews with law enforcement before giving his final version of events. He testified at trial that he had lied in the interviews. After being asked on cross-examination "[e]very time [law enforcement] pokes holes in your story, you change it, correct[,]" Defendant answered "yes[.]"

An audio recording of the altercation was captured after Defendant accidentally called Jon's cellphone and left a voicemail recording of the events. Again, Defendant and the State's witnesses gave different interpretations of this voicemail. The State's witnesses argued Defendant said "where's the money" while Defendant argues Jon was the one saying "where's the money" as part of the drug transaction. In response, a voice is heard saying "I ain't got no money" which Defendant contends

was his friend speaking and Beth states it was Jon speaking. There is no dispute the voicemail captured Defendant saying he was going to shoot Jon in the head if Beth did not put the gun down.

On 26 May 2015, Defendant was indicted for first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). The State filed superseding indictments for the same charges on 31 October 2016. The case was tried in February 2017 and Defendant was convicted of all charges except attempted robbery and attempted first-degree murder; he appealed and was granted a new trial by our Supreme Court on 25 September 2020 as "the trial court erred by failing to give [D]efendant's proposed instructions on self-defense and transferred intent for the assault charge[.]" *State v. Greenfield*, 375 N.C. 434, 447, 847 S.E.2d 749, 758-59 (2020).

Defendant's retrial was initially set to begin in August 2021 before Judge Tiffany Powers. Before the retrial, the State filed a motion on 30 July 2021 "to prevent the [d]efense from making reference to victim [Jon's] prior criminal convictions, gang ties, and 'Thug' tattoo located across the victim's upper abdomen[,]" and "to preclude the [d]efense from making reference to or admitting into evidence any of the firearms found at [Jon's] residence . . . not capable of firing the casings or projectiles recovered [from] the residence." On 16 August 2021, Judge Powers entered orders excluding evidence of Jon's past criminal convictions, evidence of Jon's gang affiliation and membership, evidence of the "Thug" tattoo on Jon's abdomen, and evidence of the firearms not capable of being used in the shooting.

Defendant also filed a motion *in limine* on 2 August 2021 "to preclude the Prosecutor or any witnesses from making reference to or admitting into evidence any statements concerning an armed robbery" since Defendant was acquitted of attempted robbery in his first trial. Judge Powers denied Defendant's motion on 16 August 2021. Defendant's retrial before Judge Powers ended in mistrial due to the COVID-19 pandemic. The trial court in Defendant's June 2022 trial adopted the "previous orders from [Judge] Powers from August 16th of 2021" which included the ruling on Defendant's motion.

The trial court, in accord with our Supreme Court's holding in *Greenfield*, 375 N.C. 434, 847 S.E.2d 749, instructed the jury on self-defense. The trial court also instructed the jury on first-degree felony murder with the underlying felony being AWDWIKISI. Because Defendant was acquitted of attempted robbery in his first trial, robbery was not used as the underlying felony for the first-degree felony murder

charge. While the defense did not request a jury instruction on transferred intent for purposes of the felony murder charge during the charge conference, after the jury charge was given, the defense requested the trial judge give the following instruction on transferred intent:

> In order for you to find . . . [D]efendant guilty of first degree felony murder, you would need to find that the decedent, [Jon], was killed as a result of . . . [D]efendant's felonious assault on [Beth]. If you so find that the - - that [Jon] died as a result of . . . [D]efendant's intentional killing of [Jon], you would be required to find him not guilty of first degree felony murder.

The State objected to this proposed instruction as untimely since it was not first requested at the charge conference and was inaccurate. The trial judge denied the request to use the proposed instruction.

On or about 17 June 2022, the jury returned a verdict of guilty of first-degree murder of Jon under the felony murder rule with the underlying felony being AWDWIKISI of Beth and guilty of AWDWIKISI of Beth. The trial court entered judgment on or about 17 June 2022 arresting judgment on the AWDWIKISI charge of Beth and sentencing Defendant to life imprisonment without the possibility of parole. Defendant entered oral notice of appeal in open court.

II. Jury Instructions

[1] Defendant first argues "a new trial is required because the court's instructions permitted the jury to find [Defendant] guilty of felony murder without the requisite intent." (Capitalization altered). Specifically, Defendant argues "[t]he instructions that were given improperly allowed the jury to find felony murder even if it concluded that [Defendant] was aiming for [Jon] and only accidentally shot [Beth]."

A. Standard of Review

Defendant argues this Court should review this issue *de novo* since he made a request to the trial court for the proposed jury instructions. The instruction was not requested during the charge conference but was requested after the trial court read the instructions to the jury and before the jury started deliberations. While the State concedes " '[*d*]*e novo*' " review is the correct standard when the request was timely[,]" the State contends Defendant "concedes it was not." The State argues "Defendant is not entitled to either *de novo* or plain error review of any instructional issue because he failed to timely object to the instructions and failed to allege and argue plain error in his principal brief." In his reply

brief, Defendant contends he did not concede the request was untimely, and states "[t]he correct standard of review is de novo because trial courts must instruct on substantial and essential features of a case, even absent any specific request by" Defendant. Both sides agree that since Defendant submitted the proposed instruction after the trial judge had read the other instructions to the jury, our standard of review would be abuse of discretion if we determine the standard should not be *de novo*.

"Trial courts have a duty to instruct the jury on all substantial features of the case arising from the evidence and must properly instruct the jury as to all essential elements of the offense charged." *State v. Harper*, 285 N.C. App. 507, 518, 877 S.E.2d 771, 781 (2022) (citation and quotation marks omitted).

> Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states the general rule that "to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make" and must "obtain a ruling upon the party's request, objection, or motion." Rule 10(a)(2) specifically addresses challenges to jury instructions and provides that:
>
> > A party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects *thereto before the jury retires to consider its verdict*, stating distinctly that to which objection is made and the grounds of the objection; provided that opportunity was given to the party to make the objection out of the hearing of the jury, and, on request of any party, out of the presence of the jury.
>
> . . . .
>
> Rule 21 [of the General Rules of Practice] also requires that:
>
> > At the conclusion of the charge and *before the jury begins its deliberations*, and out of the hearing, or upon request, out of the presence of the jury, counsel shall be given the opportunity to object on the record to any portion of the charge, or omission therefrom, stating distinctly that to which he objects and the grounds of his objection.

Geoscience Grp., Inc. v. Waters Const. Co., Inc., 234 N.C. App. 680, 686-87, 759 S.E.2d 696, 700-01 (2014) (emphasis added).

Here, while Defendant did not request this jury instruction at the charge conference, once the trial judge read the instructions to the jury, and before the jury started deliberations, Defendant requested an instruction on intent. The transcript shows counsel for Defendant and the State approached the bench in an off-the-record bench conference after the instructions were read, then the trial judge instructed the jury to select its foreperson, stating:

> After reaching the jury room, your first order of business is to select your foreperson. You may begin your deliberations when the bailiff delivers the verdict forms to you. Your foreperson should lead the deliberations. When you have unanimously agreed upon a verdict as to each charge and are ready to announce them, your foreperson should record your verdicts, sign and date the verdict forms, and notify the bailiff by knocking on the jury room door. You will be returned to the courtroom and your verdict will be announced.

Then, after further discussing courtroom procedure with the remaining alternate jurors, the trial judge released the alternates and stated "[o]ur 12 jurors have left to elect their foreperson. Anything regarding - - before we address [Defendant's counsel], as to additional instructions, anything on the instructions as issued?" The State then asked for a brief clarification before Defendant's counsel requested the proposed instruction. Thus, the record shows the jury had retired to the jury room but had not yet selected the foreperson, so they had not yet begun deliberations. The trial court instructed the jury and followed the procedure as laid out in North Carolina Pattern Jury Instruction 101.35. *See* N.C.P.I. – Crim. 101.35.

Defendant timely requested the additional jury instruction before the jury began deliberations, in accord with our Rules of Appellate Procedure and Rules of General Practice. *Geoscience Grp., Inc.*, 234 N.C. App. at 686-87, 759 S.E.2d at 700-01. Thus, we conclude Defendant made a timely objection to the jury instructions and we review his challenge *de novo*. *See id.* ("When a challenge to the trial court's instructions to the jury raises a legal question, it is subject to review *de novo*." (citation omitted)).

B. Proposed Jury Instruction

Defendant argues the trial court's denial to give the proposed instruction was error since "[u]nder the merger doctrine, where a

defendant assaults and kills a single victim, that assault cannot be the underlying felony to support first degree felony murder." Defendant recognizes "[o]rdinarily, if there are two assault victims, the intentional assault of one victim may be used to support a felony murder charge of the second victim" but contends "evidence supported the conclusion that [Defendant] intended to shoot [Jon] and only hit [Beth] by mistake" and thus "[u]nder the merger doctrine, assault of [Beth], by transferred intent, was not a permissible basis for felony murder of [Jon]."

> This Court reviews jury instructions contextually and in its entirety. The charge will be held sufficient if it presents the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed. It is not enough for the appealing party to show that error occurred in the jury instructions; rather, it must be demonstrated that such error was likely, in light of the entire charge, to mislead the jury.

State v. Clagon, 279 N.C. App. 425, 433, 865 S.E.2d 343, 348 (2021) (citation omitted). Felony murder is "a murder . . . which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnapping, burglary, or other felony committed or attempted with the use of a deadly weapon[.]" N.C. Gen. Stat. § 14-17(a) (2023). Our Supreme Court has noted that

> [a]lthough this Court has expressly disavowed the so-called "merger doctrine" in felony murder cases involving a felonious assault on one victim that results in the death of another victim, cases involving a single assault victim who dies of his injuries have never been similarly constrained. In such cases, the assault on the victim cannot be used as an underlying felony for purposes of the felony murder rule.

State v. Carroll, 356 N.C. 526, 535, 573 S.E.2d 899, 906 (2002) (citation omitted).

Here, the trial court gave an instruction as to transferred intent, stating "[i]f . . . [D]efendant intended to harm one person but instead harmed a different person, the legal effect would be the same as if . . . [D]efendant had harmed the intended victim." Then, as to felony murder, the trial court instructed:

> [D]efendant has been charged with the first degree murder of [Jon] in perpetration of a felony. Under the law and the evidence in this case, it is your duty to return one of

the following verdicts: Guilty of first-degree murder in perpetration of one of the described felonies against [Beth] if perpetration of one of those felonies proximately caused the death of [Jon]; guilty of second degree murder of [Jon]; guilty of voluntary manslaughter of [Jon]; or not guilty.

First degree murder under the first degree felony murder rule is the killing of a human being in the perpetration of the assault with a deadly weapon with intent to kill inflicting serious injury of an individual other than the deceased, or assault with a deadly weapon inflicting serious injury of an individual other than the deceased, or assault with a deadly weapon with intent to kill with a deadly weapon of a victim other than the deceased. . . .

For you to find . . . [D]efendant guilty of first degree murder in perpetration of a felony, the State must prove four things beyond a reasonable doubt. First: That . . . [D]efendant, either acting by himself or acting together with other persons, committed the crime of assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth], and . . . [D]efendant had intent to commit the crime of assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth]. Intent is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred. You arrive at the intent of a person by such just and reasonable deductions from the circumstances proven as a reasonably prudent person would ordinarily draw therefrom.

Second: That while committing, either by himself or acting together with other persons, the crime of assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth], . . . [D]efendant, either acting by himself or acting together with other persons, killed [Jon] with a deadly weapon.

> Third: That . . . [D]efendant, either acting by himself or acting together with other persons, committed an act that was a approximate (sic) cause of [Jon's] death. A approximate (sic) cause is a real cause, a cause without which [Jon's] death would not have occurred.
>
> And fourth: That the assault with a deadly weapon with intent to kill inflicting serious injury of [Beth], or assault with a deadly weapon inflicting serious injury of [Beth], or assault with a deadly weapon with intent to kill [Beth] was committed with the use of a deadly weapon. A firearm is a deadly weapon.

Thus, the trial court gave correct instructions on transferred intent and felony murder, and Defendant does not contend these instructions are erroneous. Defendant instead argues that under this "convoluted theory" that Defendant "had some independent reason to shoot and harm [Beth], and in the course of committing that felony, . . . shot [Jon] too[,]" "the instructions that were given improperly allowed the jury to find felony murder even if it concluded that [Defendant] was aiming for [Jon] and only accidentally shot [Beth]."

However, this is not a case where the assault of a single victim resulted in the death of the same single victim; instead, Beth and Jon were both shot and Jon died as a result of his wounds. As stated in *Carroll*, the assault with a deadly weapon of one victim can be a basis for felony murder of a separate victim. *See id.* As the State notes, "[h]ere, there are . . . multiple assaults, multiple victims, multiple injuries and multiple crimes." The trial judge gave an instruction on transferred intent and then gave specific instructions as to felony murder. These instructions stated that to find Defendant guilty of felony murder, the jury would have to find Defendant intentionally committed one of the enumerated types of assault on Beth; that while committing the assault on Beth, Jon was shot and killed as a result; and that the act was a proximate cause of Jon's death. While Defendant may disagree with the jury's interpretation of the evidence, after reviewing the instructions "contextually and in [their] entirety[,]" the instructions "present [ ] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Clagon*, 279 N.C. App. at 433, 865 S.E.2d at 348 (citation omitted).

III. The State's Contention Regarding Robbery

[2] Defendant next contends "because [Defendant] was acquitted of robbery at his prior jury trial, the trial court erred by allowing the State

to contend that a robbery occurred." (Capitalization altered.) Defendant argues "the trial court's ruling that allowed evidence and argument about the robbery charge violated double jeopardy and rendered the trial fundamentally unfair."

The State argues this argument was not properly preserved for appeal since "[w]hen this trial began before the Honorable Thomas R. Wilson, [D]efendant did not object, despite two opportunities, when the trial court stated it was adopting" the "previous orders from [Judge] Powers from August 16th of 2021" which addressed Defendant's motion and "Defendant also did not object during evidence or argument in this trial." Defendant responds in his reply brief that

> [t]he State is correct that defense counsel did not object during trial to the law enforcement witnesses' statements that this was a robbery, nor to the State's closing arguments. However, the trial court's ruling at issue was not a specific ruling on a piece of evidence, but a global ruling based on principles of double jeopardy and collateral estoppel regarding the State's ability to argue that a robbery occurred.

Defendant further states in his reply brief that his

> argument focuses mainly on the State's contentions during its closing argument that a robbery occurred. Even if the double-jeopardy/estoppel objection was not preserved by the pretrial motion, the trial court nevertheless had an independent duty to intervene in grossly improper argument by the State, and it did not do so.

This Court has consistently determined

> [u]nder our Rules of Appellate Procedure, "in order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). The objection must be made in the presence of the jury. *See State v. Snead*, 368 N.C. 811, 816, 783 S.E.2d 733, 737 (2016) ("An objection made only during a hearing out of the jury's presence prior to the actual introduction of the testimony is insufficient." (citation and quotation marks omitted)). But if the party made a specific objection

> outside the presence of the jury, a general objection in the presence of the jury can be sufficient when it is clear from context the party was renewing the same objection made outside the presence of the jury. *See State v. Rayfield*, 231 N.C. App. 632, 637-38, 752 S.E.2d 745, 751 (2014) (holding an issue was preserved for appellate review when the defendant made an objection at trial that did not state the grounds for the objection because it was "clear from the context" the defendant was renewing an earlier objection made in a pretrial motion to suppress).

State v. Jones, 288 N.C. App. 175, 180, 884 S.E.2d 782, 788-89 (2023) (brackets omitted). Although Defendant originally filed a pretrial motion *in limine* as to the State's reference to robbery before the 2021 mistrial, when the trial court in this trial stated it would be adopting the ruling, Defendant did not object. Further, Defendant's initial pretrial objection did not preserve for appeal the State's witness's testimony as to whether a robbery had occurred since Defendant did not object to this testimony at trial. And as Defendant did not argue plain error in his initial brief, we are likewise unable to review his argument under the plain error standard. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("To have an alleged error reviewed under the plain error standard, the defendant must 'specifically and distinctly' contend that the alleged error constitutes plain error." (citations omitted)). Still, we review Defendant's argument the trial court should have intervened in the State's closing arguments when the State argued a robbery occurred. *See State v. Parker*, 377 N.C. 466, 471, 858 S.E.2d 595, 599 (2021) ("When [the] defendant does not object to comments made by the prosecutor during closing arguments, only an extreme impropriety will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken." (citation, quotation marks, and ellipses omitted)). But since the State's references to the alleged robbery were not improper, this argument is without merit.

Under the Fifth Amendment to the United States Constitution, "[n]o person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb[.]" U.S. Const. amend. V. Citing *Dowling v. United States*, 493 U.S. 342, 107 L. Ed. 2d 708 (1990), this Court stated

> evidence is inadmissible under the Double Jeopardy Clause only when it falls within the scope of the collateral estoppel doctrine. That doctrine provides that "when an

> issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."

State v. Bell, 164 N.C. App. 83, 89, 594 S.E.2d 824, 828 (2004) (citation and quotation marks omitted).

In *Dowling*, "a man wearing a ski mask and armed with a small pistol robbed the First Pennsylvania Bank[.]" 493 U.S. at 344, 107 L. Ed. 2d at 715. The defendant was later charged with "federal crimes of bank robbery . . . and armed robbery . . . and with various crimes under Virgin Islands law." *Id.*

> During [the defendant's] third trial [for robbing the bank], the Government, over [the defendant's] objection, called a woman named Vena Henry to the stand. Ms. Henry testified that a man wearing a knitted mask with cutout eyes and carrying a small handgun had, together with a man named Delroy Christian, entered her home in Frederiksted approximately two weeks after the First Pennsylvania Bank robbery. Ms. Henry testified that a struggle ensued and that she unmasked the intruder, whom she identified as [the defendant]. Based on this incident, [the defendant] had been charged under Virgin Islands law with burglary, attempted robbery, assault, and weapons offenses, but had been acquitted after a trial held before his third trial in the bank robbery case.

Id. at 344-45, 107 L. Ed. 2d at 715.

> After a hearing, the District Court characterized the testimony as highly probative circumstantial evidence and ruled that it was admissible under Rule 404(b). When Henry left the stand, the District Court instructed the jury that [the defendant] had been acquitted of robbing Henry, and emphasized the limited purpose for which Henry's testimony was being offered. The court reiterated that admonition in its final charge to the jury.

Id. at 345-46, 107 L. Ed. 2d at 716. On appeal, the defendant contended the government should not have been allowed to use evidence of the robbery of Ms. Henry in the defendant's third trial for the bank robbery since he was previously acquitted of robbing Ms. Henry. *Id.* at 348, 107 L. Ed. 2d at 716-17. The Supreme Court determined "the prior acquittal did not determine an ultimate issue in the present case." *Id.* This was "[b]ecause a jury might reasonably conclude that [the defendant] was

the masked man who entered Henry's home, even if it did not believe beyond a reasonable doubt that [the defendant] committed the crimes charged at the first trial, the collateral-estoppel component of the Double Jeopardy Clause is inapposite." *Id.* at 348-49, 107 L. Ed. 2d at 718.

In *State v. Agee*, the defendant was acquitted of misdemeanor possession of marijuana, but the trial court allowed admission of evidence of possession of marijuana in the defendant's subsequent trial for possession of LSD despite the defendant's previous acquittal. *See* 326 N.C. 542, 548, 391 S.E.2d 171, 174 (1990). Our Supreme Court upheld the trial court's decision allowing the evidence of marijuana possession, stating

> [e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context, motive and set-up of the crime, is properly admitted if linked in time and circumstances with the charged crime, or if it forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury.

Id. (brackets omitted).

The holding in *Agee* is similar to this case since both cases involve a continuous series of events that resulted in an acquittal for one charge at a prior trial, but in the later trial evidence was presented about the same series of events addressed in the earlier trial. *See id.* The State's theory here was that Defendant had intentionally shot at Beth and that assault with a deadly weapon resulted in the death of Jon. The State's discussion of robbery was only used to explain the chain of events that led to the intentional shooting of Beth and Jon. As the State notes, the portion of the argument cited by Defendant as improper is in the State's rebuttal after Defendant argued in his closing argument that "[t]here's no evidence that there was any plan or purpose to commit any crime when" Defendant and his friend were in the Apartment. Therefore, in accord with our Supreme Court and the Supreme Court of the United States, whether or not a robbery occurred, the evidence was without objection and tended to explain the chain of events leading to the shooting. The trial court did not abuse its discretion by not intervening in the State's closing argument. *See Dowling*, 493 U.S. at 348-49, 107 L. Ed. 2d at 718; *see also Agee*, 326 N.C. at 548, 391 S.E.2d at 174.

IV. The Victim's Prior Convictions, Gang Affiliation, Tattoo, and Firearms

[3] Defendant argues "the trial court's exclusion of evidence of [Jon's] prior convictions, gang affiliation, 'Thug' tattoo, and possession of assault rifles, particularly after the State opened the door to the

evidence, was reversible error." (Capitalization altered.) Defendant's arguments address North Carolina Rules of Evidence 404, 405(b), and 406. Defendant breaks this argument into two sections: (1) "[e]vidence of [Jon's] violent character was relevant to determining whether he was the aggressor" and (2) "[t]he same evidence was admissible to rebut the State's evidence of [Jon's] peaceable character and [Beth's] testimony about their gun habits." We will address each argument in turn.

"The standard of review for assessing evidentiary rulings is abuse of discretion. A trial court may be reversed for an abuse of discretion only upon a showing that its ruling was so arbitrary that it could not have been the result of a reasoned decision." *See State v. Combs*, 182 N.C. App. 365, 375, 642 S.E.2d 491, 499 (2007) (citations and quotation marks omitted).

North Carolina Rule of Evidence 404 states

> (a) Character evidence generally. - Evidence of a person's character or a trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:
>
> . . . .
>
> (2) Character of victim. - Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor[.]

N.C. Gen. Stat. § 8C-1, Rule 404(a)(2) (2023). North Carolina Rule of Evidence 405(b) provides "Specific instances of conduct. – In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of his conduct." N.C. Gen. Stat. § 8C-1, Rule 405(b) (2023). North Carolina Rule of Evidence 406 states

> [e]vidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

N.C. Gen. Stat. § 8C-1, Rule 406 (2023).

A. Admissibility of the Evidence to show Jon was the Aggressor

We first address Defendant's argument asserting the evidence should have been admitted to show Jon was the aggressor. Defendant contends "evidence of the victim's character may be admissible for two reasons: 'to show [the] defendant's fear or apprehension was reasonable or to show the victim was the aggressor' " but recognizes "[h]ere, [Defendant] was not aware of [Jon's] violent reputation, so the first prong is inapplicable. However, the proffered evidence was admissible because it tended to show [Jon] was an aggressor."

> Well-settled exceptions to the general rule are recognized in cases where there is a plea of self-defense. In such a case, evidence of a deceased's violent or dangerous character is admissible where (1) such character was known to the accused, or (2) the evidence of the crime is all circumstantial or the nature of the transaction is in doubt.

State v. Winfrey, 298 N.C. 260, 262, 258 S.E.2d 346, 347 (1979) (citation omitted). Defendant only argues here that "the nature of the transaction is in doubt." Further, Defendant only contends the evidence could be used as specific instances of conduct under Rule 405(b), not general reputation evidence of Jon's violent character under Rule 405(a). However, this Court previously addressed this exact argument in Defendant's prior appeal:

> We conclude that the evidence concerning Jon's gang membership, his possession of firearms, and his tattoo do not involve "specific instances of conduct" admissible under Rule 405(b). Therefore, we conclude that the trial court did not err by excluding this evidence. Further, we note that there was evidence presented to the jury that Jon was a drug dealer and possessed multiple guns in his residence at the time of the shooting.

State v. Greenfield, 262 N.C. App. 631, 637, 822 S.E.2d 477, 482 (2018), *rev'd on other grounds*, 375 N.C. 434, 847 S.E.2d 749 (2020). And while Defendant notes "prior evidentiary rulings are not binding" and the testimony as a whole was different in Defendant's second trial, this contention mostly goes to Defendant's next argument, that Defendant should have been allowed to rebut the State's evidence of Jon's peaceable character. And Defendant again argues here that this evidence was admissible only as specific instances of conduct, not as reputation evidence, so the same reasoning applies.

As to Jon's "prior conviction for armed robbery[,]" this Court also addressed this issue in Defendant's prior appeal:

> Regarding the victim's prior conviction for armed robbery, the trial court specifically ruled that the evidence was inadmissible under Rule 403, based on its conclusion that unfair prejudice outweighed the probative value of the evidence. . . . Whether otherwise admissible evidence should be excluded under Rule 403 is left to the sound discretion of the court. Here, Defendant has made no argument that the trial court erred in excluding Jon's prior conviction under Rule 403. Therefore, we conclude that Defendant failed to meet his burden on appeal as to this issue.

Id. (citation omitted). Again, despite this being a separate trial, the same reasoning applies here. First, the trial court again based its ruling regarding Jon's prior convictions on "the balancing test established by Rule 403 of the North Carolina Rules of Evidence." And on appeal Defendant briefly mentions Rule 403 in his discussion about the standard of review, but Defendant does not further argue the convictions should be allowed under Rule 403. Therefore, this Court's previous rationale about evidence of Jon's prior convictions applies here since the trial court again excluded the convictions under Rule 403, and Defendant does not argue in this section of his brief that the convictions should be admissible to show Jon was the aggressor.

Defendant's argument that the evidence of Jon's prior convictions, gang affiliation, tattoo, and possession of firearms should have been admitted to show Jon was the aggressor is overruled. However, we must still address whether the same pieces of evidence should have been admitted to "rebut the State's evidence of [Jon's] peaceable character and [Beth's] testimony about their gun habits."

B. Admissibility of the Evidence to Rebut the State's Evidence

Defendant argues the evidence should have been allowed "as rebuttal because the State opened the door by offering evidence of [Jon] and [Beth's] good and peaceable character and their gun habits."

1. Jon's Firearms

We first address whether the trial court erred in excluding evidence of Jon's firearms. We note here that Defendant's brief does not distinguish that evidence of some of Jon's firearms was excluded but the trial court allowed evidence of others; specifically, the trial court's order was an "order excluding evidence of [Jon's] firearms *not of [the] type used*

in [the] alleged offense." (Emphasis added.) The trial court made findings regarding Jon's firearms:

> 1. During a search of [Jon's] residence . . . six firearms were located and seized by investigators of the Wilmington Police Department.
>
> 2. Four of those firearms . . . were capable of firing casings and projectiles recovered from the crime scene.
>
> . . . .
>
> 6. The two firearms not tested by the state crime lab, a Diomandback model DB-15 rifle and the Sporter caliber 7.62 x 39 rifle are incapable of firing the projectiles and cartridges found at the scene[.]

The trial court ruled that allowing the two rifles into evidence "would be both irrelevant and unfairly prejudicial" and allowed the four handguns to be introduced at trial while excluding evidence of the two rifles recovered at the scene.

Defendant cites *State v. Johnston*, 344 N.C. 596, 476 S.E.2d 289 (1996), to contend he should have been allowed to introduce evidence of the rifles to show Jon and Beth's gun habits. However, *Johnston* involved a witness's testimony that "she had never known the victim to carry any type of weapon and that to her knowledge, the victim was not carrying a weapon on the night of his murder." *Id.* at 605, 476 S.E.2d at 294. Our Supreme Court concluded the "testimony was relevant and admissible to show that the victim was unarmed when he was murdered" and "[e]vidence that a victim was peaceful and unarmed at the time of his murder is relevant to prove that the victim did not provoke the defendant and that the murder was committed with premeditation and deliberation." *Id.*

Here, Beth did not testify at any point that Jon did not own weapons, but she testified he typically did not have weapons out in the open. The evidence showed Beth grabbed a handgun in the bedroom before she went out to the living room and she put the gun on the table in the living room, where Jon was. There is a dispute as to which person fired the first shot, but the testimony for the State and Defendant tended to show Defendant had a gun, although Defendant testified the gun was Jon's, and there was a gun near Beth and Jon. While the facts in *Johnston* involved testimony that the victim never carried a gun and did not have a gun on the night of his murder, this case presents a very different situation. *See id.* Instead, there was evidence presented that Jon owned guns

and that there was a gun on the table near Jon. At trial, Defendant testified that the handgun he used to shoot Jon was Jon's handgun, while Beth disputed this point in her testimony. And as the trial court noted, the two rifles excluded from evidence could not have been involved in the shooting since the projectiles and casings came from handguns. Thus, *Johnston* is inapposite to this case. *See id.*

Further, Defendant did not argue in his response to the State's motion to exclude evidence of the rifles nor at trial that evidence should be admitted regarding the rifles as habit evidence under Rule 406. We will thus not address Defendant's argument as to Rule 406 as habit evidence. *See State v. Sharpe*, 344 N.C. 190, 194, 473 S.E.2d 3, 5 (1996) ("This Court has long held that where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the Supreme Court." (citations and quotation marks omitted)). And as Defendant was allowed to testify about handguns Jon had, Beth testified about handguns belonging to either her or Jon in the Apartment, and the rifles that were excluded were not used in the commission of a crime, we conclude this argument has no merit. *See State v. Patterson*, 284 N.C. 190, 194, 200 S.E.2d 16, 19 (1973) ("The general rule is that weapons may be admitted in evidence where there is evidence tending to show that they were used in the commission of a crime." (citation and quotation marks omitted)).

2. Jon's Prior Convictions, Tattoo, and Gang Affiliation

Defendant argues that since the State "presented favorable character evidence for [Jon] and [Beth] starting with its first witness, [Jon's] sister[,]" including "a photograph of [Jon] in his military uniform and . . . a photograph of [Jon] with family[;]" testimony from "neighbors who testified that [Jon] and [Beth] were 'pleasant and nice' 'very busy' and 'hardworking[;]' " and Beth's testimony that "I genuinely know from [Jon's] character that in that situation, he did not only not want any conflict for himself or want to get shot, but, as well, he would not want this conflict for [Defendant]." We conclude there was no error.

We reiterate

> [character] evidence may be admitted, however, when testimony regarding a *pertinent character* trait of the victim (here, the decedent) is offered by the defendant in a criminal case. N.C. Gen.Stat. § 8C-1, Rule 404(a)(2). In cases where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when (1) such character was known to

> the accused, or (2) the other evidence of the crime is *all circumstantial* or the nature of the transaction is in doubt.

State v. McGrady, 232 N.C. App. 95, 108, 753 S.E.2d 361, 371 (2014) (emphasis in original) (citations, quotation marks, and brackets omitted).

Again, as Defendant did not know of Jon's past convictions, gang affiliations, or tattoo and does not argue the evidence was circumstantial, character evidence regarding Jon must be based on "the nature of the transaction [being] in doubt." *Id.* Defendant argues that since there were different accounts of the incident by Defendant and the State's witnesses, the nature of the transaction was in doubt.

In *McGrady*, the defendant attempted to present evidence from a doctor who had interviewed the victim:

> Dr. Brittain testified that the [victim] was angry and frustrated with many "areas" of his life. By his second meeting with the [victim], Dr. Brittain had begun "to surmise" that the decedent was dealing with "aggression," "thoughts of violence," and "conflict that he had with the people that were around him." In that meeting, Dr. Brittain and the [victim] discussed "the violence," and Dr. Brittain stressed the need for the [victim] to avoid being either the victim or the perpetrator in a confrontation. Dr. Brittain also referred to the [victim] as "a very angry man," but noted that he was taking his medication, "had not perpetrated violence," and, in the [victim's] words, was "trying to not become angry and harm someone." When asked about the source of the [victim's] anger, Dr. Brittain testified that it "permeated all of his life," but noted that the source was not specifically related to [the d]efendant, who was not discussed during the meetings.

Id. at 107, 753 S.E.2d at 370-71 (brackets omitted). The trial court excluded this evidence under Rule 404(a) as improper character evidence. *See id.* at 107, 753 S.E.2d at 371. This Court concluded the trial court's exclusion of the evidence was not error since

> Dr. Brittain's testimony—as the trial court noted in excluding it under Rule 404(a)—does not constitute evidence of the [victim's] character for violence. When asked about his meetings with the [victim], Dr. Brittain testified to the fact that the [victim] was an angry person who had thoughts of violence. He did not, however, testify to his opinion that

> the decedent was, inherently, a man of violent character or even a violent person as distinguished from others.

Id. at 109, 753 S.E.2d at 372.

Here, the testimony Defendant contends opened the door to the evidence about Jon's tattoo, gang affiliation, and past convictions was: (1) a photograph of Jon in his military uniform; (2) a photograph of Jon with his family; (3) testimony from Jon's sister that "he maintained contact with his children and supported them financially[;]" (4) testimony from Jon's neighbor that he was "pleasant and nice," "very busy," and "hardworking[;]" (5) testimony from Beth that "knowing [Jon] . . . hearing him that night, you know '[y]ou don't have to do this man' . . . and '[p]lease don't' it sounded like he was begging" which Defendant contends portrayed Jon as a scared victim; and (6) testimony from Beth which stated

> I genuinely know from [Jon's] character that in that situation, he did not only not want any conflict for himself or want to get shot, but, as well, he would not want this conflict for [Defendant]. [Jon] would not want something like this, this situation right now, to happen to [Defendant].

However, under *McGrady*, none of this evidence concerns any of Jon's "pertinent character trait[s]" or character of his peacefulness. *Id.* at 108, 753 S.E.2d at 371. Testimony tending to show Jon was in the military, had a family, maintained contact with his children and supported them financially, and was "very busy" and "hardworking" does not go to Jon's character for peacefulness and are not pertinent character traits as to whether Jon was violent. *See id.* Further, testimony from Beth that it sounded like Jon was begging for his life in that moment likewise does not go to Jon's character for peacefulness. Even assuming Defendant's assertion that this testimony made Jon out to be a scared victim is correct, this evidence does not indicate whether Jon was generally peaceful or non-violent.

Testimony from Jon's neighbor that Jon and Beth were "pleasant and nice" is perhaps a closer call than the testimony referenced above; however, it does not explicitly or implicitly contend Jon was peaceful, considering this Court's discussion in *McGrady* where we concluded a witness's testimony that the victim was "an angry person who had thoughts of violence" but the witness "did not, however, testify to his opinion that the [victim] was, inherently, a man of violent character or even a violent person as distinguished from others." *Id.* at 109, 753 S.E.2d at 372.

As we previously decided testimony that a victim was an angry person was not the same as testifying the victim was violent, we do not consider testimony that Jon was "pleasant and nice" as being the same as testifying Jon was peaceful. *See id.* Finally, Beth's testimony that "from [Jon's] character that *in that situation*, he did not only not want any conflict for himself or want to get shot, but . . . he would not want this conflict for [Defendant]" does not discuss Jon's character for being peaceful in general. Beth was specifically discussing the situation at hand, and simply using the word "character" does not mean Beth was testifying about Jon's general character for being peaceful. We conclude the trial court did not err by excluding evidence of Jon's gang affiliation, prior convictions, and tattoo as the testimony cited by Defendant does not open the door to rebuttal evidence of Jon's character for violence. This argument is overruled.

C. Constitutional Argument

Defendant also briefly argues that he had a constitutional right to present a complete defense and the evidence should have been admitted for that reason. "This Court reviews constitutional issues *de novo*." *State v. Williams*, 261 N.C. App. 516, 518, 820 S.E.2d 521, 523 (2018) (citation omitted). However, while Defendant raised his constitutional right to a complete defense in his written pretrial motion, he did not raise this issue again during trial. Defendant properly preserved his objections to this evidence under the Rules of Evidence since he made an offer of proof at trial, but his objections and offer of proof were based only on the Rules of Evidence. Defendant did not argue his constitutional right to a complete defense in his objections or offer of proof. Therefore, this constitutional issue is not properly preserved and we will not address it further. *See Jones*, 288 N.C. App. at 180, 884 S.E.2d at 788-89; *see also State v. Mills*, 232 N.C. App. 460, 466, 754 S.E.2d 674, 678 (2014) ("Our appellate courts will only review constitutional questions raised and passed upon at trial." (citations omitted)).

V. Opinions Regarding Credibility and Guilt

[4] Finally, Defendant argues "the trial court committed plain error by allowing Detective Odham and the Prosecutors to give improper and prejudicial opinions on credibility and guilt." (Capitalization altered.) As Defendant did not object to the officer's testimony during trial, we review only for plain error. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334 ("Because [the] defendant did not object at trial, we review for plain error. To establish plain error, [the] defendant must show that the erroneous jury instruction was a fundamental error—that the error had a

probable impact on the jury verdict."). Further, as to closing arguments, Defendant again did not object, therefore

> [t]he standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord and: (1) precluded other similar remarks from the offending attorney; and/or (2) instructed the jury to disregard the improper comments already made.

Parker, 377 N.C. at 471, 858 S.E.2d at 599 (citation omitted).

A. Officer's Testimony

Defendant contends Detective Odham gave improper opinion testimony when he "testified he never believed [Defendant] was using self-defense" and when he "said the voicemail answered an ultimate issue in the case, that Jon and Beth 'were being robbed by [Defendant]' " and his friend.

Rule 701 of the North Carolina Rules of Evidence states

> [i]f the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue.

N.C. Gen. Stat. § 8C-1, Rule 701 (2023). Rule 704 of the North Carolina Rules of Evidence provides, "[t]estimony in the form of an opinion or inference is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." N.C. Gen. Stat. § 8C-1, Rule 704 (2023). In interpreting these two rules, this Court has stated

> Rule 704 does allow admission of lay opinion evidence on ultimate issues, but to qualify for admission the opinion must be helpful to the jury. Meaningless assertions which amount to little more than choosing up sides' are properly excludable as lacking helpfulness under the Rules.

> Furthermore, while opinion testimony may embrace an ultimate issue, the opinion *may not* be phrased using a legal term of art carrying a specific legal meaning not readily apparent to the witness.

State v. Elkins, 210 N.C. App. 110, 124, 707 S.E.2d 744, 754 (2011) (emphasis in original) (citations, quotation marks, and brackets omitted).

Here, the full context of Detective Odham's testimony is as follows:

> Q. And it does indicate in the records that [Defendant] did sleep in the night that evening, correct?
>
> A. It does.
>
> Q. And you said it's your philosophy to trust and verify a witness until you have reason not to, or until it could be -- to see if it can be corroborated; is that fair to say?
>
> A. Yes, sir.
>
> Q. And did, in fact, your later investigation corroborate [Beth's] story?
>
> A. Yes.
>
> Q. And how did it do so?
>
> A. Well, the investigation itself, the ballistics, right up until we received the voicemail, that painted a clear picture of what had transpired in that house on February 2nd, 2015. That detailed through that voicemail that [Jon] and [Beth] were being robbed by [Defendant] and [Defendant's friend].
>
> Q. And you brought up self-defense to . . . [D]efendant in the first interview; is that correct?
>
> A. I did.
>
> Q. He never mentioned that prior to that?
>
> A. No.
>
> Q. Again, what was the purpose of you bringing that up?
>
> A. To get him to continue to talk.
>
> Q. Did you believe at any point in time that [Defendant] was utilizing self-defense inside that residence?
>
> A. No.

We first note since Defendant was previously acquitted of robbery, he was not facing a robbery charge in this case either independently or as a basis for first-degree murder under the felony murder rule. As whether Defendant was, in fact, committing a robbery here is not an element of any of the crimes submitted to the jury, it is not an ultimate issue in this case. *See State v. Daye*, 83 N.C. App. 444, 445-46, 350 S.E.2d 514, 515-16 (1986) (discussing whether a witness's use of the term "concealing" when "willful concealment of merchandise" was "an essential element of the offense" was error).

Further, Detective Odham was not testifying as to the credibility of Beth as Defendant contends; he was testifying that his investigation corroborated Beth's version of events based on his own perception of the evidence, especially since Detective Odham interviewed Defendant before discovery of the audio recording and would have been familiar enough with Defendant's voice to form an opinion as to whose voice was on the audio recording. *See State v. Crabtree*, 249 N.C. App. 395, 402-03, 790 S.E.2d 709, 715 (2016) (concluding a witness's statement that " 'we have sort of five categories all the way from, you know, we're really sure sexual abuse didn't happen to yes, we're really sure that sexual abuse happened' and her reference to the latter category as 'clear disclosure' or 'clear indication' of abuse, in conjunction with her identification of that category as the one assigned to L.R.'s 23 December 2013 interview, crosses the line from a general description of the abuse investigation process into impermissible vouching" (brackets omitted)); *see also State v. Hill*, 247 N.C. App. 342, 347, 785 S.E.2d 178, 182 (2016) (determining the trial court did not abuse its discretion in allowing officer testimony that two officer's identified the defendant from surveillance video since they had previous interactions with the defendant and thus "the officers' testimony was rationally based on their special knowledge of [the defendant's] appearance and was helpful to the jury's determination of whether [the defendant] was the person seen in the video").

As to Detective Odham's testimony regarding self-defense, Detective Odham first testified that he brought up self-defense during the questioning to get Defendant to keep talking to law enforcement. The first statements made by Detective Odham explaining why he brought up self-defense were not error since he was not testifying whether he believed Defendant was acting in self-defense; Detective Odham was testifying as to why he first brought up the issue of self-defense. Earlier in his testimony, Detective Odham similarly explained after being asked "[w]as there any mention of self-defense at all prior to you bringing it up in this interview" that there was not and he brought it up "[t]o

literally, like I told him, to give him an out, to give him a reason for being there and a reason for what happened, to keep him talking. Several reasons." Thus, in context, when Detective Odham was asked whether he believed at any point Defendant was acting in self-defense and Detective Odham replied no, Detective Odham was not necessarily commenting on whether Defendant acted in self-defense but was explaining why he brought that up in his interviews with Defendant. Detective Odham's testimony regarding self-defense was not error.

B. Closing Arguments

As to the State's closing arguments, Defendant contends the State improperly argued that Beth "was truthful, that [Defendant] was lying, that this was a robbery, that [Jon] would 'never' have behaved in certain ways." As we addressed the State's closing arguments as to robbery above, we will not address that issue again.

Our Supreme Court has explained "[a] lawyer's function during closing argument is to provide the jury with a summation of the evidence[.]" *State v. Tart*, 372 N.C. 73, 80, 824 S.E.2d 837, 842 (2019) (citation omitted).

> Regarding closing arguments made to the jury during criminal trials, the North Carolina General Statutes provide that an attorney may not: (1) become abusive, (2) express his personal belief as to the truth or falsity of the evidence, (3) express his personal belief as to which party should prevail, or (4) make arguments premised on matters outside the record. Through our precedent, this Court has elaborated on the statutory provisions governing closing arguments and emphasized that closing arguments must: (1) be devoid of counsel's personal opinion; (2) avoid name-calling and/or references to matters beyond the record; (3) be premised on logical deductions, not on appeals to passions or prejudice; and (4) be constructed from fair inferences drawn only from evidence properly admitted at trial.

Id. (citations and quotation marks omitted).

Here, much of the argument cited by Defendant is the State reviewing each of the nine versions of events Defendant told to law enforcement, which Defendant admitted were lies in his testimony. The State does repeatedly refer to these many statements as lies, and then states

> [h]e's lying about the number of times he's lied.

> Members of the jury: I submit to you, you cannot believe anything that comes out of that man's mouth. He gets caught in a lie, and what does he do? He changes his story. He changes his story to fit what he knows the officer's already know.

As to Beth, the State argued

> [j]ust like Detective Odham told you, [Beth's] story has not changed since day one. She has maintained this entire time that two men came to her apartment, tried to rob her and her boyfriend, and that they shot her and they shot and killed her boyfriend, and they did so after they disarmed her.
>
> . . . .
>
> [Beth] gave an account completely consistent with an audio recording of what happened. . . . That's corroboration. That proves [Beth] isn't lying.

Our Supreme Court recently addressed the issue of calling a defendant a "liar" or insinuating a defendant was lying during closing arguments:

> [The] defendant argues the prosecutor's repeated statements insinuating that [the] defendant lied were improper. Over the course of his argument, the prosecutor used some variation of "lie" at least thirteen times, though never directly calling [the] defendant a liar. "Innocent men don't lie" appeared to be the State's theme: the prosecutor used it at the beginning of his closing argument and again when beginning his rebuttal. The prosecutor also referred to [the] defendant's claim of self-defense as "just not a true statement." The prosecutor commented that the unidentified man involved in the shooting scenario was "imaginary" and "simply made up." The prosecutor also asserted [the] defendant engaged in "the act of lying" and "tried to hide the truth from you all." Relying on *Hembree*, [the] defendant argues that even though the prosecutor did not directly call [the] defendant a liar, the effect and intimations of his statements are also improper. 368 N.C. at 19-20, 770 S.E.2d at 89.
>
> A prosecutor is not permitted to insult a defendant or assert the defendant is a liar. *See Jones*, 355 N.C. at 133-34,

> 558 S.E.2d at 107; *Miller*, 271 N.C. at 659, 157 S.E.2d at 345 ("A prosecutor can argue to the jury that they should not believe a witness, but he should not call him a liar."). A prosecutor is permitted to address a defendant's multiple accounts of the events at issue to suggest that the defendant had not told the truth on several occasions and the jury could find from this that he had not told the truth at his trial. In this case there is no doubt the prosecutor's statements directed at [the] defendant's credibility are improper. Statutorily, the prosecutor is not permitted to inject his opinion as to the truth or falsity of the evidence or comment on a defendant's guilt or innocence during his argument. Here the prosecutor injected his own opinion that [the] defendant was lying, stopping just short of directly calling [the] defendant a liar, and his theme, "innocent men don't lie," insinuated that because [the] defendant lied, he must be guilty. The focus of the prosecutor's argument was not on presenting multiple conflicting accounts and allowing the jury to come to its own conclusion regarding [the] defendant's credibility. Rather, the State's argument appeared to overwhelmingly focus on attacking [the] defendant's credibility through the prosecutor's personal opinion.

State v. Huey, 370 N.C. 174, 181-82, 804 S.E.2d 464, 470-71 (2017) (citations, quotation marks, and brackets omitted). Despite concluding the prosecutor's statements in *Huey* were improper, the Court determined the defendant had failed to show prejudice. *See id.*

In *State v. Solomon*, our Supreme Court also addressed a situation where the defendant had given differing accounts of the events, and the prosecutor argued he was "*lying his head off* about what happened[;]" the defendant "*c[a]me up with a cock and bull story*[;]" the defendant "expect[s] you to brush away everything that's been said and every untruth he's ever told like you're suppose to say, we'll [sic] *let's give him best one out of four*[;]" and "[t]he thing about [the defendant] is he has not dealt with the truth in so long that he's forgot what it is. . . . He wants to boldly come in here *after giving what he says are three untruthful statements* and pull the wool over your eyes." 340 N.C. 212, 218, 456 S.E.2d 778, 783 (1995) (emphasis in original) (ellipsis omitted). The Court concluded "[c]learly, in light of the defendant's own testimony, the prosecutor did not inject his own beliefs, personal opinions or knowledge into his jury argument. Rather, the prosecutor's remarks

were consistent with the facts in evidence from the defendant himself and the reasonable inferences drawn therefrom" and "[a]ssuming *arguendo* that the statements which the defendant now complains of were improper, the impropriety was not so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*." *Id.* at 220, 456 S.E.2d at 784.

Here, the State never explicitly called Defendant a liar, but stated "you cannot believe anything that comes out of that man's mouth" and other comments insinuating Defendant was lying. But Defendant admitted at trial to changing his story eight times to law enforcement before giving his ninth and final version, so even if the State's arguments were improper, they were certainly not "so gross or excessive that we would conclude the trial court abused its discretion by failing to intervene *ex mero motu*." *Solomon*, 340 N.C. at 220, 456 S.E.2d at 784; *see also Huey*, 370 N.C. at 181-82, 804 S.E.2d at 470-71. Similarly, explaining Beth's story did not change throughout the investigation and trial is not the same as claiming Beth was a truthful person. Defendant's arguments as to the State insinuating Defendant was lying and that Beth's story did not change are overruled.

Finally, as to Defendant's argument about the State discussing how Jon would behave, the State argued

> [Jon] is a former Marine. He would never keep a gun laying out on a table, especially when he is about to sell weed. He would never.
>
> In the almost two years that [Beth] was with him, she had never seen a gun laying out in the living room anywhere, and if you think back to the other handguns that were recovered in this case, where were they?

Defendant's argument in this issue focuses more on Defendant's and Beth's versions of events and the State's remarks about Defendant lying or Beth telling the truth. Defendant does not show how the State arguing Jon would or would not behave in a certain way is improper. And as the State supports the argument that Jon would not leave a gun out on the table while selling marijuana with Beth's testimony that she had "never seen a gun laying out in the living room[,]" it was a reasonable inference for the State to argue Jon would not have left a gun out on the table. *See State v. Campbell*, 359 N.C. 644, 686, 617 S.E.2d 1, 27 (2005) ("The State's argument was that [the] defendant had victimized trusting people on previous occasions and that this occasion was no different. A closing argument may include the facts in evidence, as well as

any reasonable inferences which arise therefrom. This argument is a reasonable inference, given [the] defendant's history of crime." (citation omitted)). This argument is overruled. Defendant has not demonstrated that the trial court erred by not intervening during the State's closing arguments.

VI. Conclusion

We conclude the trial court did not err in denying Defendant's requested instruction as the instructions given accurately stated the law and would not mislead the jury as to whether Defendant had the requisite intent for felony murder. Further, the trial court did not err in allowing the State to argue a robbery occurred despite Defendant's previous acquittal of robbery since Defendant was not charged with robbery in this case directly or as a basis for felony murder, and collateral estoppel does not apply. We also conclude the trial court did not err in excluding evidence of Jon's firearms, prior convictions, "Thug" tattoo, and gang affiliation. Finally, the trial court did not err, much less plainly err, in allowing Detective Odham's testimony or by not intervening in the State's closing argument *ex mero motu*.

NO ERROR.

Judges TYSON and GORE concur.

STATE OF NORTH CAROLINA
v.
NICHOLAS DALTON NANES, DEFENDANT

No. COA24-487

Filed 19 February 2025

1. Constitutional Law—firearm regulation—possession of firearm by felon statute—facial and as-applied challenges

In defendant's first-degree murder trial, the trial court did not err by denying defendant's motion to dismiss a charge of possession of a firearm by a felon where the statute under which defendant was charged, N.C.G.S. § 14-415.1, was not unconstitutional, either on its face or as applied to defendant, under either section 30 of the North Carolina Constitution or the Second Amendment to the U.S. Constitution. The firearm regulation was within the tradition and history of disallowing individuals who posed a threat of safety to

others to possess a firearm, and defendant failed to show that there were no circumstances under which the statute would be invalid. Moreover, defendant's predicate felony, larceny of a dog and animal cruelty, constituted a felony of a violent nature sufficient to trigger the disarmament requirement; even if it did not, defendant had a demonstrated history of committing violent crimes against others.

2. Evidence—murder trial—statements made by defendant in phone call—racial animus—relevance—lack of prejudice

In defendant's first-degree murder trial, the trial court did not abuse its discretion by admitting into evidence portions of a phone call between defendant and his mother after his arrest, in which defendant indicated he had obtained a firearm because of "racist black people." The statement was relevant under Evidence Rule 401 because it shed light on the State's theory of defendant's motive for committing the two murders, where one of the two victims was black and the other was Indian with a dark complexion. Further, the trial court carefully balanced the probative value of the evidence with its potential to have a prejudicial effect pursuant to Evidence Rule 403, particularly in light of the trial court's decision to exclude more detailed statements by defendant showing racial animus, and in light of the overwhelming evidence that defendant committed both murders.

Appeal by Defendant from judgment entered 31 October 2023 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Mary Carla Babb, for the State.

Sarah Holladay for Defendant.

GRIFFIN, Judge.

Defendant Nicholas Dalton Nanes appeals from the trial court's judgment entered upon a jury verdict finding him guilty of two counts of first-degree murder and one count of possessing a firearm while a felon. Defendant raises two issues on appeal. First, whether section 14-415.1 of the North Carolina General Statutes, which prohibits convicted felons from possessing firearms, is constitutional. Second, whether the trial court erred by admitting Defendant's own statements into evidence.

We hold section 14-415.1 is constitutional and Defendant received a fair trial, free from error.

I. Factual and Procedural Background

Between 7 August 2020 and 27 August 2020, Defendant shot and killed two people whom he had never met. The evidence presented at trial tended to show the following:

In the early morning of 7 August 2020, Raleigh Police Officers responded to a report of gunshots at the Montecito West Apartment complex in north Raleigh. Officers discovered the body of Bobby Lucas lying in the parking lot with five gunshot wounds to the back of his head. Mr. Lucas was a developmentally disabled black man who required assistance to live on his own. No shell casings were found at the scene.

Three weeks later, on 27 August 2020 at approximately 4:00 p.m., the Cary Police Department received a report of gunshots at the Somerset neighborhood pool in Cary. The caller reported hearing five gunshots and observing an individual running through their backyard. Upon arriving, officers discovered the body of Selva Vellingiri, an Indian man who lived with his family in the neighborhood. Cary Police Officers recovered video footage from the Somerset pool building depicting Defendant walking through the pool parking lot at 3:15 p.m. to where Mr. Vellingiri's body would later be located. The video also showed Defendant running from the scene approximately forty-one minutes later—around 4:06 p.m. Law enforcement used a still of Defendant from the video to distribute a "be on the look out" notice, from which Defendant's probation officer recognized him.

One day later, on 28 August 2020, law enforcement contacted Defendant's mother who gave them Defendant's address. Officers executed a search warrant at Defendant's residence and seized clothing which matched what the individual in the Somerset pool footage was wearing. Defendant was arrested by the Cary Police Department for possession of a firearm by a felon. While in custody, law enforcement allowed Defendant to speak with his mother on the phone while being recorded.

A Wake County grand jury indicted Defendant for the murders of both Mr. Lucas and Mr. Vellingiri as well as possession of a firearm by a felon on 14 September 2020. Defendant's matter came on for trial in Wake County Superior Court on 23 October 2023. The jury returned verdicts finding Defendant guilty of both murders and possessing a firearm. Defendant timely appeals.

II. Analysis

Defendant raises two issues on appeal. First, Defendant contends the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon because, he alleges, North Carolina's statute criminalizing possession of a firearm by a felon is unconstitutional. Second, Defendant argues the trial court erred by admitting statements he made during the phone call to his mother into evidence. We disagree.

A. Possession of a Firearm by a Felon

[1] Defendant challenges section 14-415.1 as both facially unconstitutional and unconstitutional as applied to him under both Section 30 of the State Constitution and the Second Amendment to the United States constitution. Specifically, Defendant contends the United States Supreme Court's decisions in *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), render section 14-415.1 unconstitutional. As we explain below, it is not.

We review a constitutional challenge to a criminal statute de novo. *See State v. Grady*, 372 N.C. 509, 521–22, 831 S.E.2d 542, 553 ("Whether a statute is constitutional is a question of law that this Court reviews de novo." (citation omitted)). When conducting "de novo review, we consider the matter anew and substitute our judgment for that of the trial court[,]" *Parks v. Johnson*, 282 N.C. App. 124, 127–28, 870 S.E.2d 290, 283 (2022) (citations omitted); however, "we presume that laws enacted by the General Assembly are constitutional, and we will not declare a law invalid unless we determine that it is unconstitutional beyond a reasonable doubt," *Grady*, 372 N.C. at 521–22, 831 S.E.2d at 553 (citations omitted).

1. Second Amendment

The Second Amendment of the United States constitution provides, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The right to keep and bear arms is a fundamental right and is protected against state action through the Fourteenth Amendment's Due Process Clause. *See McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 750 (2010) (holding the Fourteenth Amendment incorporates the Second Amendment's protections against the states). This right, however, is not unlimited. *Rahimi*, 602 U.S. at 690–91 (citing *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). The federal and state governments may regulate firearms, but "when the Second Amendment's plain text covers an individual's conduct, the [c]onstitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. When

a party challenges a firearm restriction, "the government must affirmatively prove [the] regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 19. Only after the government has made this showing "may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.' " *Id.* at 17 (quoting *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10 (1961)).

Therefore, in determining the constitutionality of a firearm regulation, we "must ascertain whether the new law is 'relevantly similar' to laws that our tradition is understood to permit, 'applying faithfully the balance struck by the founding generation to modern circumstances.' " *Rahimi*, 602 U.S. at 692 (quoting *Bruen*, 597 U.S. at 29). "Why and how the regulation burdens the right are central to this inquiry." *Id.* Accordingly, "if laws at the founding regulated firearm use to address particular problems, that will be a strong indicator that contemporary laws imposing similar restrictions for similar reasons fall within a permissible category of regulations." *Id.* However, even if the regulation is passed for a permissible reason, the scope of the modern regulation may not extend "beyond what was done at the founding." *Id.*

This analysis requires the government to show the regulation "comport[s] with the principles underlying the Second Amendment, but [the regulation] need not be a 'dead ringer' or a 'historical twin.' " *Id.* (quoting *Bruen*, 597 U.S. at 30). Statutes prohibiting convicted felons and the mentally ill from possessing firearms are presumptively lawful. *Heller*, 554 U.S. at 626–27, n.26; *see also McDonald*, 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill[.]' "); *Rahimi*, 602 U.S. at 699 ("[*Heller*] stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' " (quoting *Heller*, 554 U.S. at 626–27, n.26)).

a. Facial Challenge

A facial challenge is the most onerous challenge a party may make to the constitutionality of a statute "because it requires a defendant to establish that no set of circumstances exists under which the [statute] would be valid." *Rahimi*, 602 U.S. at 693 (quoting *U.S. v. Salerno*, 481 U.S. 739, 745 (1987)). Thus, the State must only show that section 14-415.1 "is constitutional in some of its applications." *Id.*

At the outset, we note that section 14-415.1 undoubtedly regulates conduct that the Second Amendment's plain text covers as it revokes an

individual's right to keep and bear arms following a felony conviction. Resultingly, "the [c]onstitution presumptively protects that conduct." *Bruen*, 597 U.S. at 17. Regardless of this presumption, section 14-415.1 is sufficiently analogous to historical laws to show that prohibiting convicted felons from possessing firearms is within the nation's history and tradition of firearm regulation.

The United States Supreme Court held in *Rahimi* that "[s]ince the founding, our Nation's firearm laws have included provisions preventing individuals who threaten physical harm to others from misusing firearms." *Rahimi*, 602 U.S. at 690. There, the defendant was subject to a domestic violence protection order, which, under 18 U.S.C. § 922(g)(8), prohibited him from possessing or using a firearm. *Id.* at 684–87. The defendant, despite this restriction, committed a series of firearm-related crimes resulting in his arrest. *Id.* at 687. Following his arrest, law enforcement discovered multiple other firearms at his residence, after which a grand jury indicted him for violating section 922(g)(8). *Id.* at 687–88. On appeal, the defendant argued section 922(g)(8) impermissibly infringed upon his Second Amendment right to keep and bear arms. *Id.* at 689.

Surveying the nation's historical legal landscape, the Court cited numerous firearm regulations as evidence that "[a]n individual found by a court to pose a credible threat to the physical safety of another may be temporarily disarmed consistent with the Second Amendment." *Id.* at 693–99, 702. Specifically, the Court analyzed surety laws requiring "those persons, [of] whom there is a probable ground to suspect of future misbehaviour, to stipulate with and to give full assurance . . . that such offence . . . shall not happen, by finding pledges or securities." *Id.* at 695 (quoting 4 W. Blackstone, Commentaries on the Laws of England 251 (10th ed. 1878)). These laws "could be invoked to prevent all forms of violence." *Id.* Stated differently, where there was a reasonable belief that an individual posed a danger to others, the law could require those individuals to post a bond which would be forfeited upon breaching the peace. *Id.* Alternatively, if the individual failed to post a bond, they would be imprisoned and, in consequence, disarmed. *Id.*

Additionally, the Court surveyed "going armed" and "affray" laws which prohibited individuals from using firearms to terrorize people—violation of which was punished by imprisonment and forfeiture of the arms. *Id.* at 697 (citing 4 Blackstone 149). Together, these laws represent a tradition of "what common sense suggests: [w]hen an individual poses a clear threat of physical violence to another, the threatening individual may be disarmed." *Id.* at 687.

Defendant argues the Court's holding in *Rahimi* does not apply here because the statute at issue there included a provision requiring a court to find that an individual poses "a credible threat to the physical safety" of another individual and, even then, would eventually allow him to regain his firearms license. *Rahimi* at 693. On the other hand, section 14-415.1, Defendant contends, forecloses firearm possession for any individual convicted of a felony regardless of the violent nature of the crime and does so without limiting the duration of the prohibition.[1] This argument misstates the substance of section 14-415.1 and is without merit.

Section 14-415.1(a) states that "[i]t shall be unlawful for any person who has been convicted of a felony to purchase, own, possess, or have in his custody, care, or control any firearm. . . ." N.C. Gen. Stat. § 14-415.1(a) (2023). Contrary to Defendant's categorical assertion that "all criminal defendants in North Carolina are automatically and permanently deprived of their Second Amendment rights upon conviction of nearly any felony" is section 14-415.4. Section 14-415.4, entitled "Restoration of firearm rights" provides for a "procedure that allows a North Carolina resident who was convicted of a single nonviolent felony . . . to petition the court to remove the petitioner's disentitlement under [section] 14-415.1 and to restore the person's firearms rights in this State." N.C. Gen. Stat. § 14-415.4(b) (2023). Pursuant to this statute, an individual previously convicted of a single non-violent felony who has their civil rights restored may regain their firearm rights after twenty years, N.C. Gen. Stat. § 14-415.4(d) (2023), thus undermining Defendant's arguments regarding the duration of the prohibition and the violent nature of the underlying felony.

Accordingly, sections 14-415.1 and 14-415.4, when read *in pari materia*, provide for temporary disarmament of non-violent felons initially but allow restoration of firearm rights if the individual is not a violent felon and has been a law-abiding citizen for a period of twenty years. These regulations fit comfortably within the nation's tradition of disarming dangerous individuals and substantively reflect the Court's holding in *Rahimi*. *See U.S. v. Canada*, 123 F.4th 159, 161 (4th. Cir. 2024) ("No federal appellate court has held that [the federal felon in possession of a firearm statute] is facially unconstitutional[.]").

Moreover, the United States Supreme Court has consistently reaffirmed that statutes prohibiting possession of firearms by felons and the

1. Section 14-415.1 also excepts some white-collar felonies from its prohibition; however, that aspect of the statute is not at issue here.

mentally ill are "presumptively lawful." *Heller*, 554 U.S. at 626–27, n.26; *McDonald*, 561 U.S. at 786 ("We made it clear in *Heller* that our holding did not cast doubt on such longstanding regulatory measures as 'prohibitions on the possession of firearms by felons and the mentally ill[.]' "); *Rahimi*, 602 U.S. at 699 ("In fact, our opinion stated that many such prohibitions, like those on the possession of firearms by 'felons and the mentally ill,' are 'presumptively lawful.' "). To this end, the Court in *Rahimi* upheld the constitutionality of section 922(g)(8) despite the fact that section 922(g)(8) "did not require a previous criminal conviction." *Canada*, 123 F.4th at 160–61 (citing *Rahimi*, 602 U.S. at 699). Here, unlike section 922(g)(8), section 14-415.1 affirmatively *requires* a felony conviction prior to revoking an individual's firearm rights. N.C. Gen. Stat. § 14-415.1(b)(1) (2023).

In sum, Defendant's facial challenge to the constitutionality of section 14-415.1 fails as the regulation is within the Nation's tradition and history of disarming individuals who pose a threat to the safety of others. Moreover, section 14-415.1 has a "plainly legitimate sweep" and can be applied constitutionally to numerous circumstances. For example, section 14-415.1's prohibition applies to individuals convicted of assault with a deadly weapon. *See* N.C. Gen. Stat. § 14-32(a)–(c) (2023) (criminalizing assault with a deadly weapon in various forms as a felony). Accordingly, Defendant's facial challenge to section 14-415.1 under the United States constitution is without merit.

b. As-Applied Challenge

An as-applied challenge requires a defendant to show the statute at issue is unconstitutional as applied to the facts of his specific case. *See Maryland Shall Issue, Inc. v. Moore*, 116 F.4th 211 (4th Cir. 2024) ("In an as-applied challenge, the court focuses on the circumstances of the particular [party] and whether, in light of those circumstances, the challenged law was unconstitutionally applied to *those* [parties]." (emphasis in original) (internal marks and citations omitted)).

Defendant argues section 14-415.1 is unconstitutional under the Second Amendment to the United States constitution as applied to him. Specifically, Defendant contends the predicate felony which triggered his violation of section 14-415.1, larceny of a dog and animal cruelty, are not violent crimes against people and therefore disarming him is not within the nation's tradition of disarming individuals who pose a violent threat to others. This argument is without merit.

Defendant was convicted of felony animal cruelty for stealing his parent's pet dog and then using a knife to decapitate the dog—certainly

a violent crime. Even if this were not a violent felony, the record reflects Defendant has previously been convicted of other violent crimes. Specifically, the record reflects Defendant has a history of victimizing others resulting in convictions for: assault on a government official or employee, simple assault, simple assault again, assault inflicting serious injury, assault on a handicapped person, and assault and battery. *See State v. Davis*, 68 N.C. App. 238, 244, 314 S.E.2d 828, 832 (1984) ("An assault is an overt act or an attempt, or the unequivocal appearance of an attempt, *with force and violence*, to do some immediate physical injury to the person of another . . . sufficient to put a reasonable person in fear of immediate bodily harm." (cleaned up)).

Simply put, as Defendant has a demonstrated history of violence towards others, applying section 14-415.1 against him and revoking his firearm rights is again well within this nation's tradition and history of disarming individuals who pose a threat of violence towards others.

2. Section 30

In addition to Defendant's challenges under the federal constitution, Defendant contends section 14-415.1 also violates section 30 of the North Carolina State Constitution, both facially and as applied to him. Again, it does not.

Section 30 of the State Constitution states, *inter alia*, that, "[a] well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed[.]" N.C. Const. art. I, § 30. Our Supreme Court has held it is within the General Assembly's police power to regulate the right to bear arms so long as the regulation is "at least reasonable and not prohibitive, and [the regulation] must be a fair relation to the preservation of the public peace and safety." *Britt v. State*, 363 N.C. 546, 549, 681 S.E.2d 320, 322 (2009) (citation and internal marks omitted).

Constitutional challenges under our State Constitution mirror those made under the federal constitution. To succeed on a facial challenge, a defendant "must establish that no set of circumstances exists under which the act would be valid." *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (cleaned up). "[A]ny act promulgated by the General Assembly" enjoys a presumption of constitutionality and we resolve all doubt in favor of constitutionality. *State v. Harris*, 242 N.C. App. 162, 164, 775 S.E.2d 31, 33–34 (2015) (citing *State v. Fowler*, 197 N.C. App. 1, 13, 676 S.E.2d 523, 536 (2009)). An as-applied challenge, on the other hand, "represents a party's protest against how a statute was applied in the particular context in which the party acted or proposed

to act[.]" *Lakins v. W. N.C. Conf. of United Methodist Church*, 283 N.C. App. 385, 393, 873 S.E.2d 667 (2022) (cleaned up). While the General Assembly has modified section 14-415.1 on numerous occasions, we have nonetheless upheld its constitutionality as applied to other individuals. *State v. Fernandez*, 256 N.C. App. 539, 548, 808 S.E.2d 362, 369 (2017) (holding section 14-415.1 constitutional as applied to the defendant); *State v. Bonetsky*, 246 N.C. App. 640, 648, 784 S.E.2d 637, 643 (2016) (holding the same).

We apply five factors to the specific facts of the case when a defendant challenges the application of section 14-415.1 to them:

> (1) the type of felony convictions, particularly whether they involved violence or the threat of violence, (2) the remoteness in time of the felony convictions; (3) the felon's history of law-abiding conduct since the crime, (4) the felon's history of responsible, lawful firearm possession during a time period when possession of firearms was not prohibited, and (5) the felon's assiduous and proactive compliance with the 2004 amendment.

Bonetsky, 246 N.C. App. at 644, 784 S.E.2d at 640 (citing *State v. Whitaker*, 201 N.C. App. 190, 205, 689 S.E.2d 395, 404 (2009)); *see also Britt*, 363 N.C. at 549–50, 681 S.E.2d at 322–23 (setting forth the factor test for as-applied challenges to section 14-415.1). Pertinent to this analysis is whether the individual challenging application of section 14-415.1 voluntarily disarms themselves prior to seeking vindication of their right to bear arms or waits until they are disarmed by law enforcement and then subsequently seeks vindication. *Bonetsky*, 246 N.C. App. at 644–45, 784 S.E.2d at 640–41.

Defendant contends the *Britt* factors are inapplicable to his challenge as they were first applied in a challenge to the 2004 amendment of section 14-415.1. In 2004, the General Assembly amended a previous version of the law, which allowed convicted felons to possess firearms in their homes or businesses, to foreclose possession in all circumstances. *See Johnson v. State*, 224 N.C. App. 282, 286–88, 735 S.E.2d 859, 864–65 (2012) (discussing the history of amendments to section 14-415.1). In *Britt*, the plaintiff sought declaratory judgment that the 2004 amendment was unconstitutional as applied to him because both his civil and firearm rights had been restored prior to the amendment. *Britt*, 363 N.C. at 549–50, 681 S.E.2d at 322–23. There, the plaintiff was convicted of one felony count of possession with intent to sell and deliver a controlled substance in 1979. *Id.* The plaintiff thereafter lived a law-abiding life and

ultimately disarmed himself of the firearms he had acquired following the restoration of his rights when he learned of the 2004 amendment. *Id*. The Supreme Court, weighing the facts of the plaintiff's case, determined application of section 14-415.1 to him was "an unreasonable regulation, not fairly related to the preservation of public peace and safety." *Id*. at 550, 681 S.E.2d at 323.

While Defendant's argument is persuasive because the factual circumstances underlying the challenges are materially different, a change in the standard utilized to adjudicate these challenges must come from the General Assembly or a higher court as binding precedent requires us to apply the *Britt* factors when a defendant challenges section 14-415.1 as applied to them. *See Fernandez*, 256 N.C. App. at 547–48, 808 S.E.2d at 368–69 (utilizing the *Britt* factors to analyze an as-applied challenge to section 14-415.1 where the predicate felony was committed after 2004); *see also In re O.D.S.*, 247 N.C. App. 711, 721–22, 786 S.E.2d 410, 417 (2016) ("One panel of this Court cannot overrule a prior panel of this Court, or our Supreme Court." (citing *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989)).

Here, regarding Defendant's previous felony convictions, on 8 November 2017 he was convicted of animal cruelty because he stole and then used a knife to decapitate his parent's dog while on post-release supervision for another crime. Defendant was also convicted of larceny of a motor vehicle in 2019, although the record does not reflect whether Defendant used violence or the threat of violence when committing this offense. "In addition to his felony convictions, [D]efendant has demonstrated a blatant disregard for the law as he has been convicted of numerous misdemeanors:" disorderly conduct by abusive language in 2010, assault on a government employee or official in 2010, simple assault in 2010, larceny in 2010, simple assault again in 2015, assault inflicting serious injury in 2015, assault on a handicapped person in 2017, assault and battery in 2017, larceny of a dog in 2017 as mentioned previously, intoxicated and disruptive behavior in 2019, and finally first-degree trespassing in 2019. *Whitaker*, 201 N.C. App. at 206, 689 S.E.2d at 404.

Both of Defendant's felonies were proximate in time to Defendant's convictions in the present case and are evidence of Defendant's continuous willingness to violate the rights of others. Furthermore, Defendant's behavior does not reflect a history of responsible gun ownership. Rather, the first known instance of Defendant possessing a gun was when he utilized a revolver to kill two people in the present case. Lastly, Defendant did not voluntarily surrender a firearm to law enforcement as part of an effort to comply with the law. Instead, Defendant was charged with

possession of a firearm by a felon after acquiring a revolver, posting pictures on social media with said revolver, and then utilizing the revolver to murder two individuals.

At bottom, the *Britt* factors undoubtedly weigh in favor of upholding the application of section 14-415.1 against Defendant as he has a demonstrated history of violence, victimizing others, and disregarding the law. Moreover, doing so is reasonable and consistent with the tradition of disarming individuals who pose a threat of violence towards others. *See Whitaker*, 201 N.C. App. at 206–07, 689 S.E.2d at 405 ("It is not unreasonable to prohibit a convicted felon who has violated the law on numerous occasions . . . from possessing firearms in order to preserve 'public peace and safety.' " (citations omitted)).

Accordingly, we hold section 14-415.1 was constitutionally applied to Defendant. Being so, we hold section 14-415.1 is facially constitutional as well because Defendant has failed to show that there are "no set of circumstances under which the act would be invalid." *Bryant*, 359 N.C. at 564, 614 S.E.2d at 486 (citations and internal marks omitted).

B. Phone Call

[2] Defendant argues the trial court abused its discretion by admitting statements Defendant made during a phone call with his mother into evidence. Specifically, Defendant contends his statements were not relevant to any fact in question and were unduly prejudicial. We disagree.

1. Rule 401

Rule 401 of the North Carolina Rules of Evidence states that "relevant evidence means 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. R. Evid. 401 (2023) (cleaned up). Irrelevant evidence is inadmissible while "[a]ll relevant evidence is admissible unless otherwise provided by the [c]onstitution of the United States, by the Constitution of North Carolina, by Act of Congress, by Act of the General Assembly, or by the Rules of Evidence." *State v. Washington*, 386 N.C. 265, 268, 900 S.E.2d 657, 659 (2024) (cleaned up). This threshold to admissibility is "relatively lax[,]" *State v. McElrath*, 322 N.C. 1, 13, 366 S.E.2d 442, 449 (1988), and we review the trial court's decision de novo, *State v. Triplett*, 368 N.C. 172, 175, 775 S.E.2d 805, 807 (2015). Moreover, the party challenging the evidence as improperly admitted must "show both error and that he was prejudiced by its admission." *State v. Anderson*, 200 N.C. App. 216, 220, 684 S.E.2d 450, 454 (2009) (internal marks omitted) (quoting *State v. Gappins*, 320 N.C. 64, 68, 357 S.E.2d 654, 657 (1987)).

Here, the trial court admitted over Defendant's objection portions of a phone call between Defendant and his mother during which Defendant states "[t]his is a hard time for our country, and you've got racist black people out here." In context, Defendant made this statement while his mother questioned his reasons for possessing and posting on social media a picture of a firearm despite his status as a felon.

The State's theory of the case was that, because both victims were peaceful individuals whom Defendant had never met that happened to be people of color, the murders were committed out of racial animus on Defendant's part. In support of its theory, the State pointed towards Defendant's statements and that one of the victims, Mr. Lucas, was black while the other victim, Mr. Vellingiri, was Indian but had a dark complexion—in fact, law enforcement thought he may have been black upon arrival at the scene.

Stated differently, the State argued, and we agree, Defendant's statements reflecting that he obtained a firearm because of "racist black people" were probative of his motive for committing the murders. *See State v. Fleming*, 350 N.C. 109, 130, 512 S.E.2d 720, 735 (1999) ("Evidence is 'relevant when it reveals a circumstance surrounding one of the parties and is necessary to understand properly their conduct or motives or if it allows the jury to draw a reasonable inference as to a disputed fact.' "). Moreover, "[i]n the context of a murder, evidence is relevant if it tends to shed light upon the circumstances surrounding the killing[.]" *State v. Garcia*, 358 N.C. 382, 416, 597 S.E.2d 724, 748 (2004) (citations and internal marks omitted). Thus, Defendant's statements shed light on the circumstances surrounding his purchase of a firearm and the subsequent murders he committed using the firearm.

Accordingly, Defendant's argument that his statements were irrelevant is without merit. Having determined so, we now review the trial court's determination that the statements probative value was not substantially outweighed by its prejudicial value. *Triplett*, 368 N.C. at 175, 775 S.E.2d at 807.

2. Rule 403

Even if evidence is admissible under Rule 401, it may still "be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. Gen. Stat. § 8C-1, Rule 403 (2019) (cleaned up). Generally, "evidence which is probative in the State's case will have a prejudicial effect on the defendant; the question is one of degree." *State v. Washington*, 141 N.C. App. 354, 367, 540 S.E.2d 388, 397 (2000) (citations and internal marks omitted). Rather, evidence will

be excluded under Rule 403 where it has "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, on an emotional one." *State v. Baldwin*, 240 N.C. App. 413, 418, 770 S.E.2d 167, 171 (2015) (cleaned up).

The decision to include or "exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court," *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citation omitted), which we review for an abuse of discretion, *State v. Gillard*, 386 N.C. 797, 816, 909 S.E.2d 226, 248 (2024); *see also Triplett*, 368 N.C. at 175, 775 S.E.2d at 807 ("We review relevancy determinations by the trial court de novo before applying an abuse of discretion standard to any subsequent balancing done by the trial court."). An abuse of discretion occurs where the trial court's decision is " 'manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *Id.* (quoting *State v. Richardson*, 385 N.C. 101, 133, 891 S.E.2d 132, 163 (2023)). Moreover, a defendant must show "there is a reasonable possibility that, had the error not been committed, a different result would have been reached at the trial[.]" N.C. Gen. Stat. § 15A-1443 (2023).

Here, the record reflects the trial court's decision to admit Defendant's statement was not unsupported by reason or arbitrary, but rather the result of carefully balancing the statement's probative and prejudicial values. As explained above, Defendant's statements supported the State's theory of Defendant's motive for killing Mr. Lucas and Mr. Vellingiri. Additionally, the recording of Defendant's phone call with his mother contained numerous other statements, including more detailed statements showing potential racial animus, such as that there were "racist people out there killing white people all over the place[,]" which the trial court did not admit because they would have been unduly prejudicial. *See State v. Miller*, 197 N.C. App. 78, 91, 676 S.E.2d 546, 554–55 (2009) ("This Court will not intervene where the trial court properly appraises the probative and prejudicial values of evidence under Rule 403." (citations omitted)).

Even assuming it was error to admit Defendant's statements, he cannot show prejudice because the State presented substantial and overwhelming evidence that Defendant committed the two murders. Specifically, the State showed Defendant purchased a revolver which was consistent with the firearm used in both murders as no shell casings were recovered, went to the scenes of both murders when they were committed, had gun-powder residue on his belongings, and likely had one victim's blood on his hat. In the face of this evidence, we cannot say there is a reasonable possibility that the jury would have reached

a different verdict had the trial court not admitted Defendant's own statements as evidence of his motive. *See* N.C. Gen. Stat. § 15A-1443 ("A defendant is prejudiced . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial[.]").

Accordingly, the trial court did not err in determining the probative value of Defendant's statements was not substantially outweighed by their prejudicial value.

III. Conclusion

For the aforementioned reasons, we hold section 14-415.1 of the North Carolina General Statutes is both facially constitutional and constitutional as applied to Defendant. Additionally, we hold Defendant received a fair trial, free from error.

NO ERROR.

Judges STROUD and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
CHARLES DOMINICK REAVES

No. COA24-663

Filed 19 February 2025

Assault—with a deadly weapon inflicting serious injury—serious injury—sufficiency of evidence

In a prosecution arising from a domestic violence incident, the trial court properly denied defendant's motion to dismiss a charge of assault with a deadly weapon inflicting serious injury where the State presented sufficient evidence that defendant had inflicted "serious injury" upon his girlfriend, including that: defendant repeatedly hit her with his fists and his gun, then kicked her in the mouth and struck her with a curtain rod; the girlfriend escaped defendant's attack by jumping from the second-floor balcony of his apartment, since he had blocked her escape by door; she suffered bruising, swelling, bleeding, and lacerations on different parts of her body, and her fingernail was torn off; she felt a "throbbing" pain throughout her body, for which she was taken to the hospital, given

strong pain medication, and monitored for several hours; her pain and bruising took weeks to heal; and she still had scars on her body at the time of defendant's trial.

Appeal by Defendant from judgments entered 19 January 2024 by Judge L. Lamont Wiggins in Durham County Superior Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General M. Lynne Weaver, for the State.

New Hanover County Public Defender by Assistant Public Defender Max E. Ashworth III, for Defendant.

WOOD, Judge.

Charles Reaves ("Defendant") appeals from judgments entered upon a jury verdict finding him guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a convicted felon. Defendant argues the trial court erred in denying his motion to dismiss for insufficiency of the evidence on the charge of assault with a deadly weapon inflicting serious injury. For the reasons stated herein, we hold Defendant received a fair trial free from error.

I. Factual and Procedural Background

In 2021, Defendant met Emily Brownstein through the dating app "Tinder." Shortly thereafter, Brownstein moved into Defendant's apartment; however, in February 2022, she ended the relationship and moved out. A few months later Defendant reached out to Brownstein wanting to reconnect and resume their relationship. Ultimately, she moved back into Defendant's apartment in early August 2022. Defendant and Brownstein were twenty-three years old at the time.

During the first few days following Brownstein's move-in, their relationship was "pretty good" and "everything was fine." Not long after, they began to argue frequently, and Defendant became "verbally, physically, and mentally" abusive. Defendant insulted, degraded, criticized, and physically assaulted Brownstein with his fists, a curtain rod, and the butt of his handgun. During one argument, Defendant hit her on the head with his gun, causing her head to split open and bleed profusely. The laceration required ten staples. These altercations reportedly occurred "every single day" that she lived with Defendant.

Their final altercation occurred on 3 September 2022. That day, Brownstein awoke in the early afternoon to find Defendant was in a "bad mood" because he was upset over an argument they had the previous night. Following a brief conversation, while she remained seated on their bed, Defendant struck Brownstein on the head and face with his fists and kicked her in the mouth. Defendant hit her with his gun. Eventually, Brownstein escaped from the bed and grabbed a pillow to use in an attempt to shield herself from Defendant. Defendant then grabbed a curtain rod that lay on the floor nearby and hit her with it.

Brownstein ran toward the front door of the apartment to escape Defendant. As she opened the door, Defendant grabbed her, threw her to the ground, and shut and locked the door. Defendant pointed his gun at her and threatened to shoot her while stating that if she tried to get away or told anyone about what he had done, he would kill her.

In fear for her life, Brownstein ran towards the apartment's balcony while Defendant had his back turned. She slid open the door, climbed over the railing, and jumped from the second-floor balcony. She fell approximately ten to fifteen feet landing in bushes on the ground level. Brownstein ran to a mail carrier that was nearby and asked her to call 911, explaining to the carrier that she was "scared that he was going to kill [her]," he had a gun, and she needed help. While she spoke with the 911 dispatcher, Defendant exited the apartment and tried to convince her not to call the cops and to leave with him. Unsuccessful, Defendant left.

Two law enforcement officers responded and took a statement from Brownstein. Durham County EMS arrived shortly after and examined her injuries. She reported pain in her head, nose, lip, legs, and feet. The paramedic noted Brownstein's injuries in the report: bruising and swelling to her left arm; bruising around her cheekbones, with most bruising on the cheek where the gun hit her; bruising and swelling behind her left ear and left thigh; bleeding near her nose ring and earrings; lacerations on her scalp, upper lip, right shin; and a fingernail torn off. The paramedic additionally observed injuries from Defendant's previous attacks including, old bruising, medical staples in her scalp, bruising from strangulation attempts, and lacerations. The treatment provided to her at the scene consisted of bandages, ice packs, ibuprofen, and Tylenol.

Brownstein was transported by ambulance to the hospital for further evaluation, arriving at 3:37 p.m. Upon arrival, she reported her pain level as a "5" out of "10," increasing to a "6" after a few hours. She described it as a "ringing in [her] head," her arms and legs were "pulsating," and her body was "throbbing." The treating nurse provided Brownstein with

a "very strong pain medication," which decreased her pain level to a "0" in the span of approximately one hour. The hospital's report contained similar findings as the EMS report, documenting the bruising, swelling, and tenderness on her body. She was discharged from the hospital around 11:30 p.m. with instructions to take Tylenol and ibuprofen as needed. Following this incident, her pain lasted one to two weeks, the bruising took two to four weeks to heal, and she had scarring on her leg and head. Brownstein provided a written statement to law enforcement the day after her discharge from the hospital.

Defendant was indicted for first-degree kidnapping, assault with a deadly weapon inflicting serious injury, and possession of a firearm by a convicted felon and was subsequently arrested on 7 November 2022. Defendant's trial was conducted on 16 January 2024 through 19 January 2024. At trial, Brownstein testified about the assault that occurred on 3 September 2022, as well as the injuries she sustained in the weeks prior. Additionally, law enforcement officers, the assisting paramedic, and one of the nurses that treated Brownstein at the hospital testified. The State introduced, *inter alia*, photographs taken on 3 September 2022 of Brownstein's injuries, a recording of the 911 call, the EMS and hospital reports, and Brownstein's written statement to law enforcement. At the close of the State's evidence, Defense counsel moved to dismiss the assault with a deadly weapon inflicting serious injury charge. Defendant argued there was insufficient evidence from which the jury could find Brownstein suffered "serious injury" from the assault that occurred on 3 September 2022. The trial court denied Defendant's motion to dismiss.

The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury and possession of a firearm by a convicted felon. Defendant was found not guilty of first-degree kidnapping. On 19 January 2024, the trial court entered judgments sentencing Defendant to two consecutive terms of 33 to 52 months of imprisonment and 17 to 30 months of imprisonment, respectively. Defendant entered oral notice of appeal at the conclusion of sentencing.

II. Analysis

Defendant asserts one argument on appeal. Defendant contends the trial court erred when it denied Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury because Brownstein's injuries were not serious injuries pursuant to N.C. Gen. Stat. § 14-32(b).

Upon a defendant's motion to dismiss, the trial court must examine "whether there is substantial evidence (1) of each essential element of

the offense charged, and (2) that the defendant is the perpetrator of the offense." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citations omitted). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " *State v. Summey*, 228 N.C. App. 730, 733, 746 S.E.2d 403, 406 (2013) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Miles*, 267 N.C. App. 78, 82, 833 S.E.2d 27, 30 (2019) (citation omitted). Further, "[w]hen ruling on a motion to dismiss, the trial court should be concerned only about whether the evidence is sufficient for jury consideration, not about the weight of the evidence." *State v. Fritsch*, 351 N.C. 373, 379, 526 S.E.2d 451, 455–56 (2000) (citation omitted). It is well-established that "[i]n borderline or close cases, our courts have consistently expressed a preference for submitting issues to the jury." *State v. Blagg*, 377 N.C. 482, 489, 858 S.E.2d 268, 273 (2021) (citation omitted).

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *Smith*, 186 N.C. App. at 62, 650 S.E.2d at 33. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. McVay*, 287 N.C. App. 293, 296, 882 S.E.2d 598, 602 (2022) (citation omitted). This Court must affirm the trial court's denial of a motion to dismiss if, when taking the evidence in the light most favorable to the State, the record "discloses substantial evidence of all material elements constituting the offense for which the accused was tried." *Id.*

When ruling on a defendant's motion to dismiss, the trial court must consider whether the State presented substantial evidence that the defendant committed "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Webster*, 291 N.C. App. 392, 397, 895 S.E.2d 898, 902 (2023) (citations omitted); *see also* N.C. Gen. Stat. § 14-32(b). On appeal, Defendant's sole argument is that the State did not present sufficient evidence of the third element, "inflicting serious injury," to allow the question to reach the jury. Specifically, Defendant argues "[b]ruising and throbbing pain that are treated with Tylenol do not amount to serious injury."

Serious injury is "physical or bodily injury, but not death, resulting from an assault with a deadly weapon." *State v. Allen*, 233 N.C. App. 507, 513, 756 S.E.2d 852, 858 (2014) (cleaned up). Apart from this definition, our courts have "declined to define serious injury" under N.C. Gen. Stat.

§ 14-32, as "further definition seems neither wise nor desirable." *State v. Walker*, 204 N.C. App. 431, 446, 694 S.E.2d 484, 495 (2010) (citation omitted). For these reasons, "[w]hether serious injury has been inflicted depends on the particular facts of each case and is a question for the jury." *Allen*, 233 N.C. App. at 513, 756 S.E.2d at 858 (citation omitted). It has been consistently held that, "as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *State v. Alexander*, 337 N.C. 182, 189, 446 S.E.2d 83, 87 (1994). Although this determination is made on a case-by-case basis and is a fact-specific inquiry, this Court has outlined the following relevant considerations: "(1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work." *State v. Morgan*, 164 N.C. App. 298, 303, 595 S.E.2d 804, 809 (2004) (citation omitted).

In arguing that the trial court erred when it denied his motion to dismiss, Defendant cites two prior decisions by this Court and our Supreme Court. First, in *State v. Brunson*, the defendant picked up the victim from work and pulled a gun out, putting it against her head as he continued to drive. *State v. Brunson*, 180 N.C. App. 188, 190, 636 S.E.2d 202, 203 (2006). Eventually, the defendant parked in a deserted area, forced the victim out of the vehicle, and beat her with his hands and feet. He then tore off the victim's clothes and raped her. The victim did not seek medical assistance for two days following the incident; however, she felt "pain . . . all over" as the defendant beat her and she suffered from "bruising, swelling, and scratches." *Id.* at 194, 636 S.E.2d at 206. Further, the nurse and law enforcement officer observed that the victim had "swollen, black eyes; bruises on her neck, arms, back and inner thighs; and redness on her vagina." *Id.* As in the present case, the defendant in *Brunson* argued the State failed to present sufficient evidence of serious injury. In light of the victim's injuries, this Court held that the question of whether the defendant inflicted serious injury was properly submitted to the jury. Moreover, the Court emphasized that "our common law does not otherwise define 'serious injury' but leaves it to the jury to decide under appropriate instructions from the trial court." *Id.*

Second, in *State v. Ramseur*, the defendant beat the victim in the head with the bottom of his gun and struck the victim in the shoulder with an air compressor. *State v. Ramseur*, 338 N.C. 502, 507–08, 450 S.E.2d 467, 471 (1994). The victim was hospitalized for several hours, received treatment on his shoulder and fifteen stitches on his head. He sustained bruising to his shoulder and could not properly move his arm for a few days. On appeal, the defendant argued that the State failed to

present sufficient evidence that the victim's shoulder injury was a serious injury because of the defendant's assault with the air compressor. The defendant contended that the injury could not be considered "serious" because the victim drove to the police station after the altercation, the skin on his shoulder was not broken by the blow, and he did not endure great pain or lingering disability. The Court in *Ramseur* held that the defendant's arguments were unpersuasive and there was substantial evidence of serious injury. Accordingly, the charge was properly submitted to the jury. *Id.* at 508, 450 S.E.2d at 471.

In the case *sub judice*, Defendant acknowledges that Brownstein was bruised, suffered pain, and went to the hospital. However, Defendant argues, unlike the victims in *Brunson* and *Ramseur*, she did not need medical treatment; rather, she went to the hospital and received Tylenol. Similarly, Defendant asserts, unlike the victim in *Brunson*, she did not have a black eye, swollen limbs, and did not need a rape kit examination. Further, in distinguishing *Ramseur*, she did not require stitches in her head and was not immobilized for any period of time. In sum, Defendant urges this Court to conclude that *Brunson* and *Ramseur* stand for the proposition that a serious injury, at a minimum, requires medical attention that goes beyond a mere cursory examination.

Contrary to Defendant's position, our courts have consistently declined to define serious injury, aside from the requirement that the victim sustain physical or bodily injury resulting from an assault by the defendant. *See State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962) ("Further definition seems neither wise nor desirable"); *see also Walker*, 204 N.C. App. at 446, 694 S.E.2d at 495 ("The courts of this [S]tate have declined to define serious injury for purposes of assault prosecutions."). Thus, to agree with Defendant's argument, would be to adopt a threshold requirement contrary to longstanding case law.

At trial, the evidence tended to show that Defendant repeatedly hit Brownstein with his fists and his gun, kicked her in the mouth, and struck her with a curtain rod. To escape his attack, Brownstein jumped from the second-floor balcony of Defendant's apartment after he barred her escape by door. She immediately felt pain in her head, nose, lip, legs, and feet. Upon examination, the EMS paramedic reported bruising and swelling to her left arm, cheekbones, left ear, left thigh; blood near her nose ring and earrings; lacerations on her scalp, upper lip, and right shin; and her fingernail was torn off. Subsequently, she was evaluated at the hospital and monitored for several hours. Brownstein classified her pain as a "5" and "6," her body as "throbbing," and she received strong pain medication for her injuries. Her pain lasted between one

to two weeks, the bruising took two to four weeks to heal, and she was scarred at the time of trial.

After careful review of the record evidence, we hold the trial court did not err by denying Defendant's motion to dismiss. The State presented sufficient evidence to allow the jury to decide whether Defendant inflicted serious injury upon Brownstein. *See Morgan*, 164 N.C. App. at 303, 595 S.E.2d at 809 ("Relevant factors in determining whether serious injury has been inflicted include, but are not limited to: (1) pain and suffering; (2) loss of blood; (3) hospitalization; and (4) time lost from work.").

Further, as discussed *supra*, "as long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, *it is for the jury to determine the question of whether the injury was serious*." *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87 (emphasis added); *see also State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 374 (1978) (because there was evidence of "physical or bodily injury to the victim, the question of the nature of these injuries was . . . properly submitted to the jury."). It is a "factual determination within the province of the jury[.]" *State v. McLean*, 211 N.C. App. 321, 325, 712 S.E.2d 271, 275 (2011) (citation omitted). Accordingly, consistent with *Alexander* and *Joyner*, because the State presented evidence that Brownstein sustained physical injuries because of the assault by Defendant, it was within the province of the jury to determine the nature of those injuries.

III. Conclusion

The trial court did not err in denying Defendant's motion to dismiss the charge of assault with a deadly weapon inflicting serious injury. The State presented sufficient evidence from which the jury could find Brownstein suffered serious injury from the assault that occurred on 3 September 2022. Defendant received a fair trial free from error.

NO ERROR.

Chief Judge DILLON and Judge MURRY concur.

STATE v. VELASCO

[297 N.C. App. 885 (2025)]

STATE OF NORTH CAROLINA
v.
ZUAMMETT VELASCO

No. COA24-333

Filed 19 February 2025

1. Appeal and Error—preservation of issues—jury instructions — failure to object at trial—failure to argue plain error—waiver

In a trial for rape, forcible sexual offense, sexual servitude of a child victim, and incest, where defendant did not object to the trial court's instruction to the jury on flight, defendant failed to properly preserve any alleged error with the instruction as required by Appellate Rule 10. Further, defendant did not specifically and distinctly argue on appeal that the instruction amounted to plain error; therefore, the issue was waived and dismissed.

2. Criminal Law—jury instructions—aiding and abetting—parent's presence during daughter's rape—plain error analysis

In defendant's trial for multiple offenses against her daughter—first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest—the trial court did not commit plain error when instructing the jury on aiding and abetting by a parent where, given the plethora of evidence of not only defendant's presence during the incidents at issue but also her verbal statements and actions indicating her consent and contribution to the commission of the crimes against her daughter, defendant failed to show that, absent any alleged error, the jury probably would have reached a different result.

Appeal by defendant from judgment entered 3 February 2023 by Judge Rebecca W. Holt in Johnston County Superior Court. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Sherri Horner Lawrence, for the State.

Mark Montgomery, for the defendant-appellant.

TYSON, Judge.

Zuammett Velasco ("Defendant") appeals from judgment entered upon the jury's verdicts finding her guilty of first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest of her daughter. We dismiss her waived first argument concerning pattern jury instructions on flight and discern no plain error in her remaining argument on appeal.

I. Background

Katy was born on 23 December 2002. *See* N.C. R. App. P. 42(b) (pseudonyms used to protect the identity of all minors and victims). Defendant is Katy's biological mother. Defendant and Katy's father procreated five children. Defendant was married to Katy's father until 2018. When Katy's parents divorced, Defendant left the family home.

In 2020, Katy lived with her biological father, stepmother, and three of her siblings, including her younger sister, Penny. Katy's older sibling, Zoey, had reached the age of majority, moved out, and was living with her boyfriend, Roman. Defendant married Gamaliel Hernandez Velasco ("Gamaliel"), who is between ten and twenty years younger than Defendant, in 2020 or 2021.

Katy had first met Gamaliel when she was celebrating her birthday with Defendant in 2018. Defendant had picked out a dress for Katy to wear. Gamaliel touched and complimented Katy's hair and told Katy how much her appearance resembled Defendant. Defendant told Katy to dance with Gamaliel. Katy agreed, despite feeling uneasy about the situation. While dancing, Gamaliel rubbed his knee outside her clothing against the area of Katy's vagina.

Defendant drove Katy back to her father's house that evening. Katy sat in the front passenger seat, and Gamaliel rode in the backset. Gamaliel touched Katy's hair and inserted his finger inside of Katy's mouth while Defendant was driving. The next day, Defendant called and Katy told her about this incident over the phone. Defendant asked Katy why she had waited to tell her. Katy explained she was "just scared" because she knew Defendant's relationship with Gamaliel "was tough" and she did not "want to get hurt or see [Defendant] get hurt in front of [her]." Defendant told Katy she was not on good terms with Gamaliel.

On 28 August 2020, Katy and her younger sister, Penny, snuck out of their father's house to spend time with Defendant. Defendant had told Penny she wanted to see her. Katy and Penny walked through their neighbor's yard, where Defendant was waiting for them in her car with Gamaliel. Katy and Penny were confused when they saw Gamaliel sitting inside the vehicle, because they were not expecting him to be there.

Defendant planned to consume alcohol and "party" with her daughters that evening. Defendant gave Penny and Katy a marijuana gummy while in the car. When they arrived at the house, Defendant gave them shots of tequila and vodka. The two girls also left Defendant's house with Defendant to purchase more alcohol at a gas station, although Katy was outside the gas station when the alcohol was purchased.

At some point after midnight, Katy started to feel sick. Katy testified: "I felt dizzy. Not really dizzy, but the room was like spinning to me. So I felt really nauseous, and I went to the bathroom, and I had to throw up." Eventually, Penny and Defendant joined Katy in the bathroom. Defendant told Penny and Katy to clean their vaginas, and she washed her own in the bathtub.

Penny went to Defendant's room to go to sleep, but Katy was taken to Gamaliel's bedroom to lie down. Gamaliel started cuddling Katy and rubbing the clothing over her vagina with his hand. Katy tried to tell Gamaliel to stop, but he would not stop. He stopped for a moment, and Defendant entered the room. Katy grabbed Defendant's hand and asked for some water, although she did not want Defendant to leave the room. Katy testified, "I just looked at her in her eyes, and I squeezed her hand to mean[,] that was me telling her that I need her, and then she left, and she came back with more drinks. With two shot glasses. And I started crying and I told her no." Katy did not drink either of the liquor shots.

When Defendant left the room, Gamaliel inserted his hand underneath Katy's underwear and inserted his fingers inside her vagina and inside her rectum. He also started touching her breasts. At some point, Defendant returned to the room. Defendant performed oral sex on Gamaliel with Katy present.

At some point, Defendant brought scissors into the bedroom. Defendant told Gamaliel, "I know you want to. You can do it." Defendant left the bedroom. When Defendant left the room, Gamaliel used the scissors to cut off Katy's clothing. Gamaliel performed oral sex on Katy. He also "suck[ed] on [her] neck."

Defendant returned to the room with Gamaliel's cellphone. Gamaliel asked Defendant to take pictures. Katy saw the flashes, even though her eyes were closed. When Gamaliel's phone battery started to die, Defendant used her cellphone to take more pictures.

While Defendant was taking pictures, Gamaliel inserted his penis inside of Katy's vagina. He touched Katy everywhere on her body and "kissed" her. Katy testified, "And then next thing he did was put me on top of him, and controlled me that way. And then he – my mom

came back to the room, and he laid me back down and continued. He continued. I don't know how long it went for." Defendant eventually told Gamaliel to stop. Defendant brought Katy different clothes and dressed her.

Defendant and Gamaliel drove Katy and Penny to their neighbor's backyard and dropped them off. Katy realized she had lost her house keys, so she texted her brother and asked him to let them into the house. Katy decided to lie on the grass while she waited for her brother to unlock the door. After her brother let Katy and Penny inside the house, Katy slept for a couple of hours. Katy did not say anything to her brother or to Penny about what Gamaliel and Defendant had done.

When Katy awoke, she went downstairs and cried alone on the floor. After she composed herself, she went to the bathroom and saw a mark on her neck in the mirror. Katy called her older sister, Zoey. When Zoey did not answer the phone, she called Zoey's boyfriend, Roman, and told him what had happened.

Zoey and Roman met Katy at her father's house, and Katy told Zoey of the assaults by Gamaliel and Defendant. Zoey angrily called Defendant and spoke with her on the phone. During that phone conversation, Zoey threatened to notify law enforcement. Defendant denied anything had happened to Katy. Defendant contacted Katy by texting Penny's cell phone, because Katy had blocked Defendant on her cell phone and social media. Katy sent Defendant text messages using Penny's cell phone.

Zoey and Roman drove Katy and Penny to the fire department. After speaking to a sheriff's deputy for approximately thirty minutes, she was transported to WakeMed. Katy called her father, while she was on the way to the hospital, and he met her there. Katy was worried her father would be angry at her for sneaking out, but he was not angry and instead "he held [her], and said it's going to be all right." Katy was initially examined at WakeMed and then referred to a sexual assault center for further testing.

Defendant did not return to work after 28 August 2020, the night of the events and allegations. Before Defendant and Gamaliel could be arrested, they fled from Johnston County. They were located and arrested a month later in Indio, California, and returned to North Carolina.

On 16 May 2022, Defendant was indicted for first-degree forcible rape, first-degree forcible sexual offense, sexual servitude of a child victim, and incest. A trial was held on 23 January 2023. Katy, Katy's Father, Penny, Zoey, Roman, and Defendant testified at trial.

Zoey, Katy's older sister, was born in 1997 and was twenty-five years old at the time of trial. She testified as a character witness and corroborated Katy's testimony, and she also recounted the events that occurred after Katy had told Roman and her about Gamaliel's assaults and the crimes committed against her.

Zoey continued to have a good relationship with Defendant after Defendant had moved out of the family home. When Zoey was twenty-one years old, Zoey visited Defendant at her apartment in Knightdale, and she met Gamaliel for the first time. Zoey went to see Defendant because she was upset after she had failed to pass her phlebotomy examination. Defendant picked Zoey up from her biological father's house and took her back to her Knightdale apartment. Defendant gave Zoey her first alcoholic drink, which was multiple shots of Vodka. Defendant and Zoey danced to Spanish music. To Zoey's surprise, Gamaliel walked into the apartment. Gamaliel told Zoey she resembled Defendant and inquired about her age as they continued to drink Vodka shots.

Zoey and Defendant danced together until Defendant asked Zoey to dance with Gamaliel. Zoey agreed and danced with him. Zoey used her cellphone to reply to a SnapChat message with a video, which revealed she was dancing with Gamaliel. At some point, Zoey's friends told her they were coming to pick her up.

Zoey felt dizzy and decided to lie down on Defendant's bed. Defendant walked out of the room as Gamaliel walked into the room, and Gamaliel lay down on the bed with Zoey. Gamaliel cuddled Zoey and started rubbing her thighs and reaching for her breasts. Zoey pushed Gamaliel away and called for Defendant. Defendant entered the room, and Gamaliel sat up. Defendant brought Zoey some water.

Zoey's boyfriend and biological father started looking for Zoey by banging on random doors in Defendant's apartment complex. While Zoey was waiting, Gamaliel asked Zoey, "Do you want to f*ck me?" Zoey replied "no", got up, went to the door, and told Defendant she had to go. Zoey left Defendant's apartment and found her biological father and her then-boyfriend downstairs. Zoey told Defendant the next day what had happened with Gamaliel and how it had made her feel uncomfortable. Defendant was upset, but told Zoey not to worry about it because she would handle it.

A few months later, Zoey visited Defendant at her apartment because she wanted to maintain a relationship with her mother. Defendant had told Zoey that Gamaliel would not be there, but he was present. After Zoey and Defendant spent the day drinking together at the pool, Gamaliel

came to the apartment after work. While Zoey was talking to Roman on the phone, Gamaliel asked Zoey, in an angry tone, who she was talking to and why she was talking to them. Zoey told Gamaliel to leave her alone and not to touch her, because he had brushed her hair. Gamaliel grabbed Zoey's phone and hung up on Roman. After this encounter, Zoey again told Defendant she did not feel comfortable being around Gamaliel. Defendant again assured Zoey she would talk to Gamaliel and deal with it.

Other individuals outside of Katy's family also testified: the Sheriff's Sergeant with whom Katy had first reported the assault; the detective who had met with Katy at WakeMed; the nurse practitioner at WakeMed, who had examined Katy; the sexual assault nurse who had met with Katy at the sexual assault center; several other detectives, who investigated the case and collected evidence; and several expert witnesses, who collected DNA evidence and completed the requisite testing.

Beatriz Pujols ("Pujols"), a forensic scientist in the forensic biology section of the North Carolina State Crime Laboratory, testified as an expert in bodily fluid identification, DNA analysis, and DNA interpretation. Pujols conducted a DNA analysis of the sexual assault evidence collection kit containing multiple body swabs, hair samples, and underpants from Katy. The profile obtained from collections of Katy's right breast swabs and left neck swabs matched Gamaliel's DNA profile. Notably, these swabs were collected after Katy had changed her clothes, been driven back to her father's home, waited in the yard for her brother to let her into the house, had slept for several hours, spoken with Zoey and Roman, given her testimony to the Sheriff, and finally been escorted to the hospital.

Pujols opined Gamaliel Hernandez Velasco was the second contributor to the profile generated from Katy's left neck swab: "The partial DNA profile obtained from the right breast swab is approximately 199 quintillion times more likely it originated from [Katy] and Hernandez Gamaliel Velasco, than it originated from [Katy] in an unknown, unrelated individual." Pujols further opined: "[T]he statistics for this item are the DNA profile obtained from the left neck swab is approximately 1.16 nonmillion times more likely it originated from [Katy] and Hernandez Gamaliel Velasco, than it originated from [Katy] [and] an unknown, unrelated individual."

Detective C.J. House ("Det. House") searched Defendant's and Gamaliel's apartment. Det. House found "a pair of blue in color panties that obviously had been damaged or cut" and "a pair of pants that were obviously cut" in Defendant's trash can. At least ten empty bottles

of alcohol were found in Defendant's trash can, and more alcohol was found in the refrigerator.

The jury found Defendant guilty of all four crimes of which she was indicted. Defendant was sentenced as a prior record level I offender to 240 to 348 months for first-degree forcible rape, 240 to 348 months for first-degree forcible sexual offense to run consecutively to her first-degree forcible rape sentence, and to 73 to 148 months for incest and sexual servitude, which were both consolidated and set to run concurrently to Defendant's prior two sentences. Each of Defendant's sentences were within the presumptive range. Defendant entered oral notice of appeal in open court.

II. Jurisdiction

This Court possesses jurisdiction to review a final judgment entered in a criminal case pursuant to N.C. Gen. Stat. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Issues

Defendant argues the trial court erred by: (1) omitting a parenthetical phrase from the pattern jury instructions for flight; and, (2) instructing the jury on aiding and abetting because she is Katy's biological mother and was present in the home when the alleged incidents occurred.

IV. Jury Instruction on Flight

[1] Defendant argues the trial court erred by omitting the parenthetical phrase from the first sentence of the pattern jury instruction on flight, which states: "The State contends (and the Defendant denies) that the defendant fled." N.C.P.I.–Crim. 104.35 (June 2021).

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure requires: "In order to preserve an issue for appellate review, the appellant must have raised that specific issue before the trial court to allow it to make a ruling on that issue." *Regions Bank v. Baxley Com. Props., LLC*, 206 N.C. App. 293, 298-99, 697 S.E.2d 417, 421 (2010) (citing N.C. R. App. P. 10(a)(1)).

In criminal cases, this Court may review unobjected-to instructional and evidentiary errors for plain error. *State v. Lawrence*, 365 N.C. 506, 512-16, 723 S.E.2d 326, 330-33 (2012) (explaining "[u]npreserved error in criminal cases, on the other hand, is reviewed only for plain error" and "plain error review in North Carolina is normally limited to instructional and evidentiary error" (citations omitted)).

A defendant must "specifically and distinctly" argue "an issue that was not preserved by objection . . . amount[ed] to plain error." N.C. R. App. P. 10(a)(4). Additionally, "[a] party may not make any portion of the jury charge or omission therefrom the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict, stating distinctly that to which objection is made and the grounds of the objection[.]" N.C. R. App. P. 10(b)(2).

Failure to allege plain error regarding an unpreserved issue waives all appellate review. *State v. Benner*, 380 N.C. 621, 638, 869 S.E.2d 199, 210 (2022); *Davignon v. Davignon*, 245 N.C. App. 358, 361, 782 S.E.2d 391, 394 (2016) ("It is well-settled that arguments not presented in an appellant's brief are deemed abandoned on appeal." (citing N.C. R. App. P. 28(b)(6)).

Here, Defendant failed to preserve her argument asserting the trial court should have included the parenthetical phrase "(and the defendant denies)" in the jury instruction on flight. Defendant failed to "specifically and distinctly" contend the issue she purportedly raised on appeal "amount[ed] to plain error." N.C. R. App. P. 10(a)(4). Defendant presents this argument for the first time on appeal. N.C. R. App. *Id.*; *Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421; *State v. Richardson*, 328 N.C. 505, 514, 402 S.E.2d 401, 407 (1991). Defendant's argument regarding this issue is waived and dismissed. *Benner*, 380 N.C. at 638, 869 S.E.2d at 210; *Davignon*, 245 N.C. App. at 361, 782 S.E.2d at 394; N.C. R. App. P. 28(b)(6).

V. Jury Instruction on Aiding and Abetting

[2] Defendant next argues the trial court erred by instructing the jury on aiding and abetting. Defendant argues the trial court's inclusion of this instruction was based solely on her being Katy's biological mother and being present in the home when the alleged incidents occurred.

A. Standard of Review

This Court reviews unpreserved instructional errors using the plain error standard of review. *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330. A defendant has failed to preserve an issue for appellate review if the argument was not raised before the trial court. *See Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421 (citing N.C. R. App. P. 10(a)(1)).

"The specific grounds for objection raised before the trial court must be the theory argued on appeal because 'the law does not permit parties to swap horses between courts in order to get a better mount in the [appellate court].' " *State v. Harris*, 253 N.C. App. 322, 327, 800

S.E.2d 676, 680 (2017) (quoting *Weil v. Herring*, 207 N.C. 6, 10, 175 S.E. 836, 838 (1934)).

In appeals of criminal cases, this Court may review unobjected-to instructional and evidentiary errors for plain error. *Lawrence*, 365 N.C. at 512-16, 723 S.E.2d at 330-33. As noted, Defendant must "specifically and distinctly" argue "an issue that was not preserved by objection . . . amount[ed] to plain error." N.C. R. App. P. 10(a)(4).

Plain error is defined as:

> a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done, or where the error is grave error which amounts to a denial of a fundamental right of the accused, or the error has resulted in a miscarriage of justice or in the denial to appellant of a fair trial[,] or where the error is such as to seriously affect the fairness, integrity[,] or public reputation of judicial proceedings[,] or where it can be fairly said the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citations, quotation marks, and alterations omitted). "To show that an error was fundamental, a defendant must establish prejudice." *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

"Under the plain error rule, defendant must convince this Court not only that there was error, but that absent the error, the jury probably would have reached a different result[.]" *State v. Jordan*, 333 N.C. 431, 440, 426 S.E.2d 692, 697 (1993) (citation omitted).

Here, Defendant failed to object and preserve her argument on appeal. At trial, Defendant objected to a specific portion of the jury instructions for the crime of first-degree forcible rape (multiple assailants). N.C.P.I.–Crim. 207.10A (June 2020). The second element of that crime requires the State to prove beyond a reasonable doubt "that the defendant **aided and abetted** another to use or threatened to use force sufficient to overcome any resistance the alleged victim might make." The State asked for the following jury instructions to be included:

> Constructive force can be inferred from a parent-child relationship between the defendant and the victim. State v. Etheridge, 319 N.C. 34 (1987); State v. Mueller, 184 N.C. App. 553, 567-69 (2007); Locklear, 172 N.C. App. 249; State

> v. Corbett, 154 N.C. App. 713 (2002); State v. Hardy, 104 N.C. App. 226 (1991).
>
> Constructive force may also be inferred when one engages in sex acts with a person who is unable to consent due to mental incapacity or physical helplessness. See State v. Washington, 131 N.C. App. 156 (1998); State v. Dillard, 90 N.C. App. 318, 368 S.E.2d 442, 1988 N.C. App. LEXIS 529 (1988).

(citations and format original). Defendant presented arguments before the trial court challenging the inclusion of this language in the jury instruction for the second element of first-degree forcible rape.

Aside from the second element of aiding and abetting in first-degree forcible rape, the jury was also instructed on aiding and abetting concerning each of the four crimes Defendant was being tried for. After the jury was instructed on the elements for each of those crimes, a separate section was provided entitled "Aiding and Abetting – Parent." Those instructions, which were discussed during the jury charge conference and later read four times to the jury, included the following:

> The failure of a parent who is present to take all steps reasonably possible to protect his or her child from attack or sexual assault by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime[,] and thus is sufficient to support a conviction based on aiding and abetting. State v. Walden, 306 N.C. 466 (1982); State v. Ainsworth, 109 N.C. App. 136 (1993).

(citations and format original). Defendant failed to object to these instructions.

On appeal, Defendant presents arguments concerning the latter aiding and abetting jury instruction, and Defendant's brief cites the above jury instruction *verbatim*. Defendant does, however, also argue the trial court committed plain error if the Court concludes her argument was not preserved at trial. We review Defendant's argument for plain error. N.C. R. App. P. 10(a)(1)-(2), (4); *Lawrence*, 365 N.C. at 512, 723 S.E.2d at 330; *Regions Bank*, 206 N.C. App. at 298-99, 697 S.E.2d at 421 (citing N.C. R. App. P. 10(b)(1)); *Harris*, 253 N.C. App. at 327, 800 S.E.2d at 680.

B. Analysis

Defendant must demonstrate "that absent the error, the jury probably would have reached a different result[.]" *Jordan*, 333 N.C. at 440, 426

S.E.2d at 697 (citation omitted). The Court in *State v. Walden* addresses whether a parent has a duty to protect their child from the commission of a crime and, if so, what actions are sufficient to support a conviction for aiding and abetting. 306 N.C. 466, 293 S.E.2d 780 (1982). Our Supreme Court explained the "trial court was, of course, correct in perceiving that whether a general legal duty of parents exists in such cases is a question of law to be determined by the trial court and stated to the jury, rather than a question of fact for the jury." *Id.* at 474, 293 S.E.2d at 785 (citation omitted). Thus, instructing the jury on a parent's duty to protect their children is a legal question and not a factual one. *Id.*

The Court in *Walden* further held "to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent." *Id.* at 475, 293 S.E.2d at 786. This duty "has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute." *Id.* While parents do not have a "legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children[,]" they "do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children." *Id.*

Walden also provided a final caveat:

> It remains the law that one may not be found to be an aider and abettor, and thus guilty as a principal, solely because he is present when a crime is committed. It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution.

Id. at 476, 293 S.E.2d at 786-87 (citations omitted).

Even if the trial court's omission of the final caveat in *Walden* was error, Defendant has failed to demonstrate the trial court committed plain error. *See Odom*, 307 N.C. at 660-61, 300 S.E.2d at 378. The State presented a plethora of evidence at trial tending to show Defendant "said or did something showing h[er] consent to the criminal purpose and contribution to its execution." *Walden*, 306 N.C. at 476, 293 S.E.2d at 786-87.

Katy testified she heard Defendant tell Gamaliel, "I know you want to. You can do it." Defendant brought scissors to Gamaliel to cut off Katy's underwear and outer clothing and allegedly took photos while Gamaliel was raping her. Defendant helped Katy sneak out of her father's

house, served her alcohol while underage, and provided her with marijuana gummies, all of which made her nauseous, dizzy, disoriented and made it easier for Gamaliel to sexually abuse Katy. Defendant has failed to show error or plain error to establish, "absent [any purported] error, the jury probably would have reached a different result." *Jordan*, 333 N.C. at 440, 426 S.E.2d at 697.

VI. Conclusion

Defendant received a fair trial, free from plain and prejudicial errors she preserved and argued on appeal. She has failed to show plain error by failing to demonstrate "the jury probably would have reached a different result[.]" *Id.* We discern no prejudicial or reversible error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges CARPENTER and FREEMAN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 FEBRUARY 2025)

IN RE A.W. No. 24-371	Cumberland (22JB15)	Dismissed
IN RE C.C.B. No. 24-870	Cumberland (19JT000162) (19JT000163)	Affirmed
IN RE J.D.S. No. 24-569	Union (20JT000143)	Affirmed
IN RE L.M.H. No. 24-656	Pitt (23JT000076)	Affirmed
IN RE R.S.M-M. No. 24-851	Gaston (22JT000217)	Affirmed
OXFORD HOUS. AUTH. v. CHURCH No. 23-917	Granville (22CVD716)	Reversed and Remanded
STATE v. BARRETT No. 24-597	Pasquotank (21CRS050580)	No Error
STATE v. BELL No. 24-511	Gaston (20CRS054904) (20CRS054905) (20CRS055980) (20CRS055981)	No Plain Error
STATE v. BOLES No. 24-542	Catawba (20CRS003466) (20CRS054797)	No Error
STATE v. BREWINGTON No. 24-327	Alamance (18CRS2270) (18CRS2272)	Vacated and Remanded
STATE v. CARR No. 24-423	Yancey (23CRS232540) (23CRS59)	Vacated and Remanded
STATE v. CURL No. 24-858	Brunswick (23CRS353928)	Affirmed
STATE v. DAVIS No. 24-275	Wayne (19CRS1990-2009) (21CRS1235-36)	REVERSED IN PART AND REMANDED, NO PLAIN ERROR IN PART

STATE v. FINGER No. 24-495	Watauga (22CRS050371)	Affirmed.
STATE v. GRIER No. 24-383	Cleveland (22CRS1088) (22CRS260238)	No Error
STATE v. LOCKLEAR No. 24-741	Scotland (00CRS000022) (00CRS000023)	Affirmed
STATE v. LONG No. 24-531	Guilford (20CRS078860)	New Trial
STATE v. MOORE No. 24-585	McDowell (22CRS000306) (22CRS000307) (22CRS050792) (22CRS050793)	No Error
STATE v. NOBLITT No. 24-860	Catawba (23CRS209515)	Dismissed
STATE v. PICA No. 24-502	Surry (20CRS000297) (21CRS052538)	No Plain Error
STATE v. ROBERTSON No. 24-356	Stokes (19CRS22) (19CRS700059-60)	Affirmed In Part, and No Plain Error In Part
STATE v. SHIPMAN No. 24-167	Bladen (16CRS51564) (19CRS368-69)	No Error
STATE v. WASHINGTON No. 24-529	Cabarrus (20CRS000580) (20CRS053767)	No Error
SULLIVAN v. PENDER CNTY. No. 24-545	Pender (20CVS000752)	Affirmed

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