298 N.C. App.—No. 1 Pages 1-133

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 1, 2025

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

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OF
NORTH CAROLINA

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[1] Sworn in 1 January 2025. [2] Sworn in 1 January 2025. [3] Died 20 January 2025.
[4] Term ended 31 December 2024. [5] Term ended 31 December 2024.

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COURT OF APPEALS

CASES REPORTED

FILED 5 MARCH 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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APPEAL AND ERROR

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Preservation of issues—criminal case—due process violation—substitute judge's authority to sign written order—In a criminal case where defendant moved to dismiss a charge for embezzlement, arguing that the State's more than ten-year delay in prosecuting her violated her Fifth Amendment due process rights, and where the order denying her motion was signed by a substitute judge after the judge who originally presided over the case had retired, defendant preserved for appellate review: (1) the Fifth Amendment issue, by filing her motion to dismiss, presenting evidence in support of her motion at a hearing, and receiving an oral ruling on the motion (from the original judge); and (2) her argument challenging the substitute judge's authority to sign the order, by filing a "Notice of Exception" to the order, renewing her motion to dismiss at trial, and timely filing her notice of appeal from

violent sexual encounter with defendant) attached to her complaint and an exhibit (showing a text message exchange between the parties) that she introduced at the hearing on her DVPO motion, since the court also heard and considered testimony from both parties at the hearing. Even though plaintiff's exhibit was later determined to have been altered, the court specifically found that it was not done to willfully mislead the court and, even if the exhibit were stricken from the record, there was still ample evidence supporting the entry of a DVPO. **Jay v. Jay, 50.**

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Lay witness testimony—visual identification by law enforcement officer—marijuana versus hemp—plain error not shown—In a prosecution on numerous drug-related charges, the trial court did not err, let alone commit plain error, in allowing lay opinion testimony from a law enforcement officer that, based on his training and experience, certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. The case cited by defendant in support of his position—*State v. Ward*, 364 N.C. 133 (2010)—concerned expert testimony admitted pursuant to Evidence Rule 702 rather than lay opinion

MORTGAGES AND DEEDS OF TRUST

Non-judicial foreclosure—home equity line of credit—valid debt and right to foreclose—forged signatures on loan documents—ratification of debt and deed of trust—In a non-judicial foreclosure proceeding following the default on a home equity line of credit (HELOC), which was secured by a deed of trust encumbering a property owned by a married couple until they divorced, at which point the wife (respondent) was awarded sole title to both the property and the HELOC, the trial court erred in finding that the HELOC was not a valid debt and that the holder of the HELOC note (petitioner) had no right to foreclose on the property based on respondent's testimony that her signatures on the HELOC loan documents were forged. Despite respondent's claims of forgery, petitioner still met its burden of showing that the HELOC and the deed of trust were valid by introducing evidence that respondent ratified both by: acknowledging the HELOC as a valid marital debt in her verified complaint for divorce and equitable distribution, making several monthly payments on the HELOC loan, entering into (and benefitting from) subordination agreements related to the HELOC, and using the HELOC debt to satisfy a prior loan. **In re Foreclosure of Godfrey, 29.**

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Extraneous information from prosecutor—not considered by trial court—permissible considerations—Defendant failed to show that, in sentencing him on convictions for trafficking in heroin by transportation, the trial court considered extraneous information presented by the prosecutor—that someone had died as a result of the drug transaction underlying the trafficking charges—in deciding to impose consecutive, as opposed to concurrent, sentences. During sentencing, the trial court expressly stated that it was not considering the death (or a potential death by distribution charge) in imposing sentences on the trafficking convictions. Further, challenged remarks made by the trial court during sentencing—such as discussing "peddling dope that kills people"—referenced permissible considerations within the court's discretion, such as the societal impact and severity of the crimes. **State v. Ruffin, 104.**

Marijuana—convictions for both selling and delivering—consolidation and concurrent sentencing—any error harmless—Following defendant's convictions on numerous drug-related charges, arising from defendant selling controlled substances—including marijuana—to a confidential informant, any error in defendant being sentenced for both selling and delivering marijuana as part of the same transaction (a matter the appellate court assumed without deciding) was harmless because the court consolidated those convictions and set their sentences to run concurrently with the longer sentence defendant received on his conviction on a trafficking charge; accordingly, defendant's term of imprisonment was not affected by the sale and delivery sentences. **State v. Ruffin, 104.**

Second-degree murder—aggravated sentence—mitigating factors—no finding of mental illness—In sentencing defendant in the aggravated range after he was convicted of the second-degree murder of his girlfriend (who he stabbed and cut over 160 times), the trial court did not err by declining to find defendant's proposed mitigating factor, pursuant to N.C.G.S. § 15A-1340.16(e)(3), that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability. Although a forensic psychiatrist testified that he had diagnosed defendant with schizophrenia while evaluating defendant for the sole purpose of determining his competency to stand trial, that evidence did not

constitute substantial, uncontradicted, and manifestly credible evidence that, at the time of the murder: (1) defendant suffered from schizophrenia, and (2) that his illness significantly contributed to the murder; therefore, defendant failed to meet his burden. **State v. Rojas, 95.**

TERMINATION OF PARENTAL RIGHTS

Denial of motion to change venue—trial court's discretion—statutory findings not required—In a termination of parental rights (TPR) matter, the trial court did not abuse its discretion by denying the guardian ad litem's (GAL's) motion to change venue from the county in which the TPR petition was filed (Brunswick) to the county where an underlying juvenile case was pending (Cumberland). Regardless of which transfer of venue provision applied—N.C.G.S. § 7B-900.1(a) in the Juvenile Code for post-adjudication transfers, or N.C.G.S. § 1-83(2) in the Civil Procedure statutes—there was no showing that the ends of justice demanded a change of venue or that failure to transfer venue would deny the GAL a fair trial. The GAL's concerns about having to travel to Brunswick County for the TPR proceedings did not rise to the level of requiring a change of venue and, further, the minor child, the child's guardian, and other witnesses all resided in Brunswick County. Finally, the trial court was not required to make statutory findings when denying a motion to transfer venue. **In re S.W., 39.**

Grounds for termination—willful abandonment—complete lack of contact—The trial court properly terminated a mother's parental rights to her son based on willful abandonment where there was clear, cogent, and convincing evidence that, during the relevant six-month period, the mother: had no contact or communication of any sort with her son; did not request visitation; did not send any cards, gifts, or letters to her son; did not provide any financial support for her son; and failed to respond to a letter written to her by her son. The court's findings were supported by the evidence and, despite the mother's argument to the contrary, showed the court's consideration of the mother's history and circumstances; together, the evidence and findings demonstrated the mother's lack of any parental concern for her son and, in turn, supported the court's conclusion that termination based on willful abandonment was warranted. **In re D.R.W., 18.**

Jurisdiction—underlying juvenile case in different county—statutory requirements met—prior pending action doctrine inapplicable—The Brunswick County district court had jurisdiction over a termination of parental rights action even though an underlying juvenile proceeding remained pending in Cumberland County (where a guardian had been appointed for the minor child). A trial court's jurisdiction over an abuse, neglect, or dependency action is distinct from jurisdiction over a termination of parental rights action and, here, the jurisdictional requirements in N.C.G.S. § 7B-1101 for a termination petition had been met; therefore, Cumberland County did not have exclusive, original jurisdiction over the termination action, which had been filed in Brunswick County where the minor child, the child's guardian, and other witnesses resided. Further, the prior pending action doctrine was inapplicable because the subject matter, issues, and relief sought were different between the underlying juvenile proceeding and the termination proceeding. Therefore, the Brunswick County court did not err by denying the guardian ad litem's motions to dismiss the petition for lack of jurisdiction and to hold the matter in abeyance. **In re S.W., 39.**

Motion to continue—extraordinary circumstances and necessity for the proper administration of justice not shown—no abuse of discretion—In a termination of parental rights proceeding, the district court did not abuse its discretion in denying respondent-mother's counsel's motion to continue the hearing—filed when respondent did not appear—because the juvenile petition had been pending for 90 days and respondent's counsel did not make any argument regarding extraordinary circumstances or the necessity of a continuance in order to secure the proper administration of justice. Under those circumstances, no balancing of respondent's need for the continuance with the potential harm that might arise was required. Further, respondent's counsel did not raise any notice or due process arguments in the district court, and, thus, respondent waived appellate review of any alleged constitutional violations. **In re C.A.D., 1.**

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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.

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

IN THE MATTER OF C.A.D., A MINOR CHILD

No. COA24-619

Filed 5 March 2025

Termination of Parental Rights—motion to continue—extraordinary circumstances and necessity for the proper administration of justice not shown—no abuse of discretion

In a termination of parental rights proceeding, the district court did not abuse its discretion in denying respondent-mother's counsel's motion to continue the hearing—filed when respondent did not appear—because the juvenile petition had been pending for 90 days and respondent's counsel did not make any argument regarding extraordinary circumstances or the necessity of a continuance in order to secure the proper administration of justice. Under those circumstances, no balancing of respondent's need for the continuance with the potential harm that might arise was required. Further, respondent's counsel did not raise any notice or due process arguments in the district court, and, thus, respondent waived appellate review of any alleged constitutional violations.

Appeal by respondent-mother from order entered 12 April 2024 by Judge Scott D. Conrad in Catawba County District Court. Heard in the Court of Appeals 11 February 2025.

Maranda W. Stevens for petitioner-appellee Catawba County Department of Social Services.

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

Peter Wood for respondent-appellant mother.

ZACHARY, Judge.

Respondent-Mother appeals from the trial court's order[1] terminating her parental rights to her minor child, "Charlie."[2] After careful review, we affirm.

I. Background

Charlie was born in November 2019. On 26 February 2023, the Catawba County Department of Social Services ("DSS") assumed temporary emergency custody of Charlie. The next day, DSS filed a juvenile petition alleging Charlie to be neglected and dependent.

As set forth in the petition, Respondent-Mother and Charlie presented at Catawba Valley Medical Center Emergency Department on 26 February 2023 when Respondent-Mother was experiencing suicidal ideations. Respondent-Mother "had a bizarre affect, was hallucinating, heard someone calling her name, heard phantom crying, and was falling asleep during conversations." She completed a 5-panel drug screen and tested positive for amphetamines and marijuana. Charlie had two burn marks on his left hand—injuries Respondent-Mother reported Charlie incurred from "grabbing a burning stick next to a hot burn barrel." Respondent-Mother then attempted to flee the hospital but was detained. As a social worker tried to gather information, Respondent-Mother "did not communicate coherently and appeared to doze off at times."

In its juvenile petition, DSS also detailed Respondent-Mother's history of drug use and manufacturing, which had led to her first child's adjudication as neglected and dependent, and eventually, the termination of Respondent-Mother's parental rights to the child.

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1. The file numbers on the documents in the appellate record vary; in some documents, the file number is 23 JA 33 and in other documents, the file number is 23 JT 33. Because the order from which Respondent-Mother appeals uses file number 23 JA 33, we will use this file number as well.

2. We use the pseudonym to which the parties stipulated for ease of reading and to protect the juvenile's identity. In addition, we note that Respondent-Father has not appealed from the trial court's order, which also terminated his parental rights to Charlie. Accordingly, he is not a party to this appeal.

On 27 February 2023, the trial court entered an order placing Charlie in the custody of DSS. In March 2023, the court appointed a guardian ad litem to represent Charlie.

The juvenile petition came on for an adjudication and disposition hearing in Catawba County District Court on 24 April 2023. The trial court entered an adjudication and disposition order on 22 May 2023, in which it adjudicated Charlie to be a neglected and dependent juvenile and determined that maintaining Charlie's placement with DSS was in Charlie's best interests. The court ordered that Respondent-Mother enter into and comply with a case plan that required her to:

> a. Complete a psychological evaluation and parenting capacity evaluation and cooperate with all recommended mental health services;
>
> b. Complete a substance abuse assessment and cooperate with all recommended services;
>
> c. Sign a release of information to DSS and any other treatment providers of any substance abuse assessments and/or treatment;
>
> d. Complete drug screen[s] when requested by DSS;
>
> e. Obtain and maintain employment, and provide proof of employment;
>
> f. Obtain and maintain stable housing appropriate for [Charlie]; and
>
> g. Demonstrate a consistent and improved capability to care for [Charlie] safely, and to protect [Charlie] from others who are unsafe (using drugs, criminal activity, etc.)[.]

This matter came on before the trial court for permanency planning hearings on 17 July 2023 and 9 October 2023. On 12 December 2023, DSS filed a motion in the cause seeking to terminate parental rights to Charlie. DSS alleged that Respondent-Mother's parental rights should be terminated on the grounds of (1) neglect; (2) willful failure to pay a reasonable portion of the cost of Charlie's care; (3) dependency; and (4) Respondent-Mother's inability or unwillingness to establish a safe home for Charlie following the termination of her parental rights to another one of her children. *See* N.C. Gen. Stat. § 7B-1111(a)(1), (3), (6), (9) (2023).

The motion for termination of parental rights came on for hearing on 12 March 2024. At that hearing, Respondent-Mother was not present. Her counsel made a motion to continue based on her absence which

DSS opposed. The trial court denied the motion. On 12 April 2024, the court entered a "Consolidated Judgment and Order" terminating both parents' rights to Charlie. The court concluded, *inter alia*, that grounds for terminating Respondent-Mother's parental rights existed under N.C. Gen. Stat. § 7B-1111(a)(1), (6), (7), and (9). Respondent-Mother filed timely notice of appeal.

II. Discussion

On appeal, Respondent-Mother argues that "[t]he trial court abused its discretion when it failed to conduct the proper balancing test before denying the motion to continue the termination hearing when [she] had not appeared in court." We disagree.

A. Standard of Review

"Because counsel did not assert a constitutional basis for the requested continuance, we review denial of the motion to continue for abuse of discretion." *In re L.A.J.*, 381 N.C. 147, 149, 871 S.E.2d 697, 699 (2022). "An abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *Id.* (citation omitted). "Moreover, regardless of whether the motion raises a constitutional issue or not, a denial of a motion to continue is only grounds for a new trial when [a respondent] shows both that the denial was erroneous, and that he suffered prejudice as a result of the error." *In re J.E.*, 377 N.C. 285, 291, 856 S.E.2d 818, 822 (2021) (cleaned up).

B. Analysis

"In reviewing for an abuse of discretion, we are guided by the Juvenile Code, which provides that continuances that extend beyond 90 days after the initial petition shall be granted only in extraordinary circumstances when necessary for the proper administration of justice." *Id.* at 291, 856 S.E.2d at 822–23 (cleaned up); *see also* N.C. Gen. Stat. § 7B-1109(d). "Furthermore, continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it. The chief consideration is whether granting or denying a continuance will further substantial justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (cleaned up).

At the commencement of the termination hearing, Respondent-Mother was not present. Her counsel made a motion to continue:

> [COUNSEL]: . . . [Respondent-Mother] is not present. I did speak with her on multiple occasions, but most recently late last week to remind her that she does have a court

> date this morning, 9:00 a.m. I asked her to be here because she was wanting to contest this action.
>
> Typically, when she is late for court, she will contact my office to have them give me some information about what her arrival time is. She has not contacted my office this morning to advise that she's going to be late . . . . But I would make a motion to continue the matter given the fact that she's not here, or at least hold it open until she can be here. . . .

The trial court heard from counsel for DSS and then denied the motion to continue:

> THE COURT: . . . [T]here was a notice of hearing for pretrial and for the termination of parental rights filed in this matter.
>
> On January the 8th, 2024, the pretrial was had on January the 29th setting the court date, and . . . that court date was set for today . . . .
>
> [Respondent-Mother] was at that pretrial conference. That order set the court date for March the 12th at nine o'clock in the morning, which is today. It's now 9:25. [Respondent-Mother] is not here. Since she has been in contact with you, it's obvious that she was aware of the court date today, and nobody ha[s] heard any reason why she's not here at nine o'clock, or here today at all at this point. I'm going to deny your motion to continue.

Respondent-Mother never appeared in court that day. Now, on appeal, she contends that "[t]he need for [her] continuance outweighed any need to hold the hearing immediately." Particularly, she states that "[s]ince [DSS] did not allege any harm from granting the continuance, the interests of the party opposing the continuance did not weigh against a continuance." However, Respondent-Mother has mischaracterized the applicable standard for the trial court's consideration of her motion to continue.

In the instant case, if the trial court had granted the motion to continue—because the termination petition was filed on 12 December 2023 and the termination hearing was held on 12 March 2024—this matter would have been continued beyond the 90-day deadline provided in the Juvenile Code. *See* N.C. Gen. Stat. § 7B-1109(d). It is well settled that "continuances that extend beyond 90 days after the initial petition shall

be granted only in extraordinary circumstances when necessary for the proper administration of justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 822–23 (cleaned up); *see also* N.C. Gen. Stat. § 7B-1109(d). Thus, DSS was not required to forecast any harm that might arise were the trial court to grant the continuance. Rather, Respondent-Mother was required to show the existence of "extraordinary circumstances" together with the necessity of the continuance to ensure "the proper administration of justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (citation omitted). This, she did not do. Instead, counsel simply "ma[d]e a motion to continue the matter given the fact that [Respondent-Mother was] not here."

Further, to the extent that Respondent-Mother claims that her constitutional rights were violated, we note that Respondent-Mother was represented by counsel and no due-process argument was raised. "There [wa]s no mention of the need to continue due to a lack of notice or in order to ensure due process." *Id.* at 290, 856 S.E.2d at 822. A review of the transcript shows that the only basis for the motion to continue was Respondent-Mother's absence. Constitutional "arguments not raised at a termination hearing may not be raised for the first time on appeal." *In re A.L.L.*, 254 N.C. App. 252, 264 n.7, 802 S.E.2d 598, 607 n.7 (2017). Thus, Respondent-Mother "has waived any argument that the denial of the motion to continue violated [her] constitutional rights." *J.E.*, 377 N.C. at 290–91, 856 S.E.2d at 822.

Indeed, the facts before us are quite similar to those presented to our Supreme Court in *J.E.* There, the respondent-father failed to appear at the termination hearing, with which the trial court proceeded after denying counsel's motion to continue. *Id.* at 289–90, 856 S.E.2d at 822. The respondent-father offered no explanation for his absence either before the trial court or on appeal. *Id.* at 290, 856 S.E.2d at 822. Our Supreme Court reviewed the denial of the respondent-father's motion to continue and was "satisfied the trial court did not abuse its discretion in determining [the] respondent[-father]'s unexplained absence did not amount to an extraordinary circumstance, as required by [N.C. Gen. Stat.] § 7B-1109(d), to merit continuing the termination hearing further beyond the 90-day timeframe set forth in the Juvenile Code." *Id.* at 291–92, 856 S.E.2d at 823.

"Continuances are not favored, and motions to continue ought not to be granted unless the reasons therefor are fully established." *L.A.J.*, 381 N.C. at 151, 871 S.E.2d at 700 (cleaned up). As DSS notes in its brief, "[t]his motion to continue was solely based on [Respondent-Mother]'s failure to appear. . . . There was no indication of any other reason for the continuance." Therefore, "[h]aving offered no legitimate reason

for being unable to attend the hearing, [R]espondent-[M]other failed to establish extraordinary circumstances requiring another continuance far beyond the ninety-day deadline." *Id.*

Respondent-Mother has failed to argue, let alone establish, the existence of any "extraordinary circumstances" or the necessity of a continuance in order to secure "the proper administration of justice." *J.E.*, 377 N.C. at 291, 856 S.E.2d at 823 (citation omitted); *see also* N.C. Gen. Stat. § 7B-1109(d). Further, in light of Respondent-Mother's "counsel's advocacy on behalf of [Respondent-Mother] at the termination hearing and the unchallenged findings of fact supporting the termination of h[er] parental rights . . . , we believe it is unlikely that the result of the termination proceedings would have been different had the hearing been continued." *J.E.*, 377 N.C. at 292, 856 S.E.2d at 823. As such, the trial court did not abuse its discretion in denying counsel's motion to continue.

III. Conclusion

Accordingly, we affirm the trial court's order terminating Respondent-Mother's parental rights.

AFFIRMED.

Judges CARPENTER and MURRY concur.

IN THE MATTER OF D.E.

No. COA24-289

Filed 5 March 2025

Child Abuse, Dependency, and Neglect—permanency planning—specific visitation not in juvenile's best interest—supervised visitation left to foster parents' discretion—order affirmed

In a neglect proceeding involving a child who tested positive for methamphetamine at birth and whose parents had a long history of domestic violence, the district court did not err by giving the juvenile's foster parents discretion over whether the juvenile's father could exercise supervised visitation with the child where the court made findings of fact—including that the father had not participated in substance abuse or mental health treatment; had multiple positive drug screens and missed others; was terminated from a domestic violence education program for failure to comply with

drug screening; continued to engage in domestic violence against the child's mother, leading to a charge of assault on a female; did not take advantage of visitation opportunities for approximately 10 months before the permanency planning hearing; and blocked the foster parents from texting him—that supported its conclusion of law that it was not in the child's best interest to order specific visitation with the father, determinations that were sufficient to permit the denial of visitation for the father entirely.

Appeal by respondent-father from order entered 22 December 2023 by Judge Resson O. Faircloth in District Court, Harnett County. Heard in the Court of Appeals 13 February 2025.

Staff Attorney Duncan B. McCormick for petitioner-appellee Harnett County Department of Social Services.

Ward and Smith, P.A., by Mary V. Cavanagh, for guardian ad litem.

Garron T. Michael for respondent-appellant father.

STROUD, Judge.

Respondent-Father appeals from the trial court's permanency planning order granting guardianship of the minor child to foster parents and ceasing reunification efforts with Father. Father contends the trial court abused its discretion by failing to order a minimum frequency of visitation and leaving supervised visitation in the discretion of Foster Parents. Because the trial court made sufficient findings of fact and conclusions of law to deny visitation to Father entirely and concluded that it was not in the child's best interest to order specific visitation for Father, it did not err by authorizing Foster Parents to allow supervised visitation as agreed between them and Father. We affirm the trial court's permanency planning order.

I. Background

On 29 December 2021, the Johnston County Department of Social Services ("JCDSS") filed a juvenile petition alleging the minor child, "Devin,"[1] was a neglected and dependent juvenile. That same day, an

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

order was entered placing Devin in the nonsecure custody of JCDSS. In a hearing on 5 January 2022, the trial court in Johnston County found Devin had been living in Harnett County with one or both of his parents since his removal on 29 December 2021. The trial court entered an order transferring jurisdiction to Harnett County.

On 7 January 2022, a subsequent juvenile petition was filed by the Harnett County Department of Social Services (hereinafter "DSS"), also alleging Devin to be a neglected and dependent juvenile. The trial court in Harnett County issued an order granting DSS nonsecure custody of Devin that same day. Devin was placed in the home of Foster Parents on 4 March 2022, "pending further proceedings."

An adjudication and disposition hearing was held on 11 March and 25 March 2022. On 4 January 2023, the trial court entered an order adjudicating Devin to be a neglected juvenile. As grounds for this adjudication, the trial court made these relevant findings of fact:

> 35. [Devin's] meconium screen was positive for methamphetamines and amphetamines.
>
> 36. The mother tested positive for amphetamines on September 23, 2021, November 12, 2021, and November 24, 2021.
>
> 37. The mother reported taking Sudafed almost daily during the pregnancy.
>
> 38. The mother at this hearing testified that she used methamphetamines during the pregnancy.
>
> 39. The mother used methamphetamine as recently as one week prior to [Devin's] birth.
>
> . . . .
>
> 42. The mother and [F]ather have a significant history of domestic violence[.]
>
> . . . .
>
> 46. On December 7, 2021, a social worker made contact with the mother. The mother reported that she and . . . [F]ather had a history of physical and verbal altercations. She acknowledged a history of obtaining domestic violence protective orders against . . . [F]ather.
>
> . . . .

> 52. The parents had a verbal altercation at the Johnston County Courthouse on January 5, 2022. A Johnston County social worker observed this altercation.
>
> . . . .
>
> 54. [Devin] lived in an environment injurious to his welfare in the care of the parents. [Devin] would have lived in an environment injurious to his welfare if placed in the care of the parents at the time of the filing of the January 7, 2022 juvenile petition in Harnett County.

In its dispositional order, the trial court concluded "[i]t is in the best interests of [Devin] to award legal and physical custody to [DSS]" and further "in the best interests of [Devin]" to maintain placement with Foster Parents. The trial court also granted both parents supervised visitation of a minimum of two hours per week to be supervised by either Foster Parents, DSS, or "an adult approved by DSS and the GAL."

The trial court held a permanency planning hearing on 17 October 2023. Neither the mother nor Father were present for this hearing, but were both represented by counsel. Following this hearing, the trial court entered an order on 22 December 2023 awarding primary care and guardianship to Foster Parents. Father timely appealed this permanency planning order on 17 January 2024. The mother did not appeal.

II. Permanency Planning Order

On appeal, Father challenges the trial court's permanency planning order as it relates to his visitation rights. Father does not challenge any of the trial court's nearly nine single-spaced pages of findings of fact, so the findings are binding on appeal. *See In re J.M.*, 384 N.C. 584, 591, 887 S.E.2d 823, 828 (2023) ("Uncontested findings of fact are . . . binding on appeal." (citation omitted)). First, Father challenges one of the trial court's conclusions as being unsupported by the evidence and "directly in contradiction to the trial court's own findings." Second, Father argues the trial court's decree failed to comply with North Carolina General Statute Section 7B-905.1 in not establishing a "minimum frequency of visitation." Finally, he argues the trial court impermissibly awarded Foster Parents excessive power and control in determining Father's ability to exercise visitation with Devin. We disagree and affirm the trial court's permanency planning order.

A. Standard of Review

This Court "review[s] disposition orders, including visitation determinations, for abuse of discretion. When reviewing for abuse of

discretion, we defer to the trial court's judgment and overturn it only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision." *In re K.W.*, 272 N.C. App. 487, 495, 846 S.E.2d 584, 590 (2020) (citations omitted). Further, "[a]ppellate review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and the findings support the conclusions of law." *In re R.A.H.*, 182 N.C. App. 52, 57-58, 641 S.E.2d 404, 408 (2007) (citation and quotation marks omitted). "Unchallenged findings of fact are binding on appeal. Whether the trial court's findings of fact support its conclusions of law is reviewable *de novo*. If the trial court's uncontested findings of fact support its conclusions of law, we must affirm the trial court's order." *Isom v. Duncan*, 279 N.C. App. 171, 175, 864 S.E.2d 831, 836 (2021) (citations and quotation marks omitted).

B. Visitation

Father challenges the trial court's Conclusion of Law 10 as being unsupported by competent evidence and "in contradiction" to the trial court's findings. Conclusion of Law 10 reads: "It is not in the best interests of [Devin] to award . . . [F]ather a minimum period or a minimum frequency of visitation. Supervised visitation and contact should be authorized as set forth in the decretal." Father's argument focuses on the evidence more than the trial court's findings of fact, and Father challenged none of the findings of fact as unsupported by the evidence. Under our standard of review, we must determine if the trial court's unchallenged findings support its conclusion of law. *See id.*

Under North Carolina General Statute Section 7B-905.1, "[a]n order that removes custody of a juvenile from a parent . . . or that continues the juvenile's placement outside the home shall provide for visitation that is in the best interests of the juvenile consistent with the juvenile's health and safety, *including no visitation*." N.C. Gen. Stat. § 7B-905.1(a) (2023) (emphasis added). Further, "the court may prohibit visitation or contact by a parent when it is in the juvenile's best interest consistent with the juvenile's health and safety." *In re J.L.*, 264 N.C. App. 408, 421, 826 S.E.2d 258, 268 (2019) (citations omitted).

In making his argument, Father directs us to the testimony of Ms. Taylor, social worker for DSS. Ms. Taylor testified Father, generally, "pays attention to [Devin's] needs[]" and that "there does appear to be a bond between [Devin and Father]." Further, when asked if DSS's "recommendation is that there be no visits?" Ms. Taylor responded "[n]ot that there are not visits, just that the foster parent and the parent could work out visit times." Father argues "[n]othing contained in Ms. Taylor's testimony, [n]or any other evidence presented for that matter, indicated

any concerns or any justification to curtail Father's ongoing visitation." We note that the trial court found Father had not exercised his "ongoing visitation" established in the prior order since January 2023. And the trial court's findings of fact provide abundant justification for curtailing Father's visitation.

This Court has upheld limitations on parental visitation rights when a trial court's findings support its conclusions that visitation would be inconsistent with the best interests of the juvenile. *See In re N.L.M.*, 283 N.C. App. 356, 373, 873 S.E.2d 640, 650 (2022). Findings that a parent did not make adequate progress with their case plan, including the resolution of issues pertaining to domestic violence and substance abuse, support a conclusion that visitation would not be in the best interests of a juvenile. *See In re J.L.*, 264 N.C. App. at 422, 826 S.E.2d at 268.

Here, the trial court made a finding consistent with Ms. Taylor's testimony that "[t]here is a bond [between Devin and Father]." In this finding, however, the trial court also noted "[F]ather has difficulty consoling [Devin] when [Devin] cries." In non-jury proceedings, the trial court is required to "weigh and consider all competent evidence[]" in making its ultimate determinations. *In re Whisnant*, 71 N.C. App. 439, 441, 322 S.E.2d 434, 435 (1984) (citation omitted). "Moreover, the trial court's decisions as to the weight and credibility of the evidence, and the inferences drawn from the evidence, are not subject to appellate review." *In re J.M.*, 384 N.C. at 591, 887 S.E.2d at 828 (citation, quotation marks, and brackets omitted).

In support of its conclusion as to Father's visitation rights, the trial court also made the following relevant findings:

> ss. . . . [F]ather has not participated in any substance abuse or mental health treatment.
>
> tt. . . . [F]ather tested positive for marijuana, amphetamines, and methamphetamines on April 26, 2022.
>
> uu. . . . [F]ather missed screens on March 22, May 31, June 28, September 27, and November 1, 2022.
>
> vv. . . . [F]ather declined to cooperate with a hair follicle screen on January 9, 2023. He cooperated with an oral swab screen, which was negative.
>
> ww. . . . [F]ather missed screens on January 24, February 23, and March 13, 2023.

xx. . . . [F]ather cooperated with an oral swab screen on March 28, 2023. He tested positive for marijuana.

yy. . . . [F]ather declined to cooperate with a hair follicle screen on March 28, 2023.

zz. . . . [F]ather did not show for a drug screens (sic) on July 25 and September 25, 2023.

. . . .

ccc. . . . [F]ather started the HALT domestic violence education program. He was terminated from HALT for failure to comply with their drug screening.

. . . .

iii. . . . [F]ather told a DSS social worker that he was working in construction. He has not provided DSS or the court with any proof of employment.

jjj. In August 2022, . . . [F]ather was charged with assault on a female. The mother was the alleged victim. The incident happened on July 29, 2022. Law enforcement saw the mother bleeding from her knee and elbow. Law enforcement had to separate the parents due to them arguing. The mother told officers that . . . [F]ather threw the mother in the road and drug her across the road. She said that the argument started early in the morning.

. . . .

mmm. On May 8, 2023, the mother told a social worker that she and . . . [F]ather had gotten into an argument. . . . [F]ather hit and bit the mother. The mother charged . . . [F]ather with assault on a female. The mother later asked the State to drop the charge. The State took a voluntary dismissal.

. . . .

qqq. Pursuant to Section 7B-906.2(d), the court finds:

> . . . .
>
> D. The parents' failure to make significant progress is conduct that is inconsistent with the health and safety of [Devin].

. . . .

> uuu. By clear, cogent, and convincing evidence, the court finds that the parents neglected [Devin] and acted inconsistently with their respective parental rights (including constitutional rights), duties, and obligations.

In addition to the above findings regarding Father's lack of progress with his case plan, the trial court also found there were existing communication and coordination issues between Father and Foster Parents. The trial court took judicial notice of the disposition order entered on 4 January 2023 based on a hearing held in March 2022; this order originally established supervised visitation for both parents. The trial court found that Foster Parents had begun supervising visitation for both the mother and Father on 4 March 2022 under the previous order. Father was granted a minimum of 2 hours per week visitation "if supervised by" Foster Parents. The order also authorized specific minimum visitation which could be supervised by either DSS or "an adult approved by DSS and the GAL." However, the trial court found Foster Parents "have not supervised any visits with . . . [F]ather since January 2023. They do not have a relationship with . . . [F]ather. . . . [F]ather has blocked . . . [Foster Parents] from texting him. [Foster Parents] are not willing to supervise . . . [F]ather's visitation or contact."

Father did not challenge these findings and such "[u]ncontested findings of fact are . . . binding on appeal." *See In re J.M.*, 384 N.C. at 591, 887 S.E.2d at 828 (citation omitted). Under these findings, the trial court did not abuse its discretion in concluding "[i]t is not in the best interests of [Devon] to award . . . [F]ather a minimum period or a minimum frequency of visitation." Though the trial court found some bond exists between Father and Devin, the trial court's other findings as to Father's lack of progress with his case plan, and continued issues with substance use and domestic violence, and his failure to take advantage of the supervised visitation he had been granted support limiting his visitation rights in accordance with Devin's best interests.

Father next argues the trial court's decretal failed to comply with North Carolina General Statute Section 7B-905.1(c) in that it "specifically denied both a minimum period and frequency for [Father's] visitation." Specifically, Father contends he "did not forfeit his right to visitation[,]" and absent such findings, Father was entitled to a provision in the order specifically outlining his minimum visitation rights. We disagree.

When a trial court revokes parental custody or continues placement of the juvenile outside the parent's home, the trial court's order must

"establish a visitation plan for parents unless the trial court finds that the parent has forfeited their right to visitation *or that it is in the child's best interest to deny visitation*." *In re M.S.*, 289 N.C. App. 127, 145, 888 S.E.2d 242, 253 (2023) (emphasis added) (citation and quotation marks omitted).

> In the absence of findings that the parent has forfeited his or her right to visitation or that it is in the child's best interest to deny visitation, the court should safeguard the parent's visitation rights by a provision in the order defining and establishing the time, place, and conditions under which such visitation rights may be exercised.

Id. (citation, quotation marks, and brackets omitted). The trial court did not find Father had forfeited his right to visitation, but it did conclude "[i]t is not in the best interests of [Devin] to award . . . [F]ather a minimum period or a minimum frequency of visitation." The trial court also found "[b]y clear, cogent, and convincing evidence" Father "acted inconsistently with [his] parental rights (including constitutional rights), duties, and obligations." Accordingly, under North Carolina General Statute Section 7B-905.1(c), the trial court here was not required to "safeguard . . . [Father]'s visitation rights[,]" *id.*, by outlining a "minimum frequency and length of . . . visits" as it would be inconsistent with the best interests of Devin. *See* N.C. Gen. Stat. § 7B-905.1(c).

Finally, Father argues the trial court erred in delegating authority to set visitation to Foster Parents. As a general rule, we agree with Father's contention it is improper for a trial court to award custodians of a child full authority to determine a parent's ability to exercise their visitation rights – but this rule applies only if the trial court has granted the parent visitation. Here, the trial court did not grant Father any visitation but only authorized Foster Parents to allow Father to see Devin, as long as the visit was supervised and Father was "not under the influence of an impairing substance."

This Court has held it to be improper for a trial court to "delegate its authority to set visitation to the custodian of the child[.]" *In re N.K.*, 274 N.C. App. 5, 11, 851 S.E.2d. 389, 394 (2020) (citation omitted).

> We do not think that the exercise of this judicial function [in determining visitation rights] may be properly delegated by the court to the custodian of the child. Usually those who are involved in a controversy over the custody of a child have been unable to come to a satisfactory mutual agreement concerning custody and visitation rights. To

> give the custodian of the child authority to decide when, where and under what circumstances a parent may visit his or her child could result in a complete denial of the right and in any event would be delegating a judicial function to the custodian.

In re Custody of Stancil, 10 N.C. App. 545, 552, 179 S.E.2d 844, 849 (1971).

"*If the district court orders visitation*, the court 'shall specify the minimum frequency and length of the visits and whether the visits shall be supervised.' " *In re N.K.*, 274 N.C. App. at 11, 851 S.E.2d at 394 (emphasis added) (quoting N.C. Gen. Stat. § 7B-905.1(d)). In *In re N.K.*, this Court determined "the district court neither completely denied visitation nor set out terms for visitation but instead delegated both the authority to allow visitation and the terms of that visitation to three therapists who worked with [the] respondent-mother and each child." *Id.* at 12, 851 S.E.2d at 394.

Here, as discussed above, the trial court *did* find it in the best interests of Devin to deny Father's visitation, distinguishing the present case from *In re N.K.* where the district court did not "completely den[y] visitation[.]" *See id.* The trial court also found that Father had acted "inconsistently with [his] parental rights (including constitutional rights), duties, and obligations."

In *Routten v. Routten*, our Supreme Court held

> that in light of the trial court's authority to deny *any* visitation to [the] defendant pursuant to N.C.G.S. § 50-13.5(i), any delegation of discretion to [the] plaintiff to allow *some* visitation is mere surplusage, albeit admittedly confusing. The trial court had already determined that it was not in the children's best interests to have visitation with [the] defendant. Although it is curious that the trial court would afford an opportunity for [the] defendant to have visitation with the children at the discretion of [the] plaintiff after denying visitation rights to her, nonetheless we choose to interpret the trial court's openness to the potential prospect of [the] defendant's ability to see her children as a humane accommodation rather than as an error of law.

374 N.C. 571, 579, 843 S.E.2d 154, 159-60 (2020) (emphasis in original) (citation and quotation marks omitted).

Here, the trial court's order specifically outlines that "[Foster Parents] are *authorized*, *but not required*, to arrange for supervised

visitation and contact[.]" (Emphasis added.) As did our Supreme Court in *Routten*, we consider this authorization of Foster Parents to allow supervised visitation "as a humane accommodation rather than an error of law." *Id.* at 579, 843 S.E.2d at 160. The trial court made sufficient findings to support the conclusion of denying Father's visitation rights as being in the best interests of Devin. Based on the trial court's findings and conclusions, the trial court was not required to grant Father *any* opportunity for visitation. But the trial court graciously awarded Father the opportunity to try to improve his relationship with Foster Parents and authorized them to allow supervised visitation. And even if Foster Parents remain unwilling to supervise visitation, Father still has the opportunity to file a motion for review of visitation in the future.

III. Conclusion

The trial court did not abuse its discretion in denying Father "a minimum period or a minimum frequency of visitation" but authorizing Foster Parents to allow supervised contact. The trial court made sufficient findings to support its conclusion that this limitation would be in the best interests of Devin. Further, the trial court did not abuse its discretion by authorizing Foster Parents to allow Father supervised visitation if he and Foster Parents agree to do so. We affirm the trial court's permanency planning order.

AFFIRMED.

Judges ARROWOOD and FREEMAN concur.

IN RE D.R.W., JR.

No. COA24-623

Filed 5 March 2025

Termination of Parental Rights—grounds for termination—willful abandonment—complete lack of contact

The trial court properly terminated a mother's parental rights to her son based on willful abandonment where there was clear, cogent, and convincing evidence that, during the relevant six-month period, the mother: had no contact or communication of any sort with her son; did not request visitation; did not send any cards, gifts, or letters to her son; did not provide any financial support for her son; and failed to respond to a letter written to her by her son. The court's findings were supported by the evidence and, despite the mother's argument to the contrary, showed the court's consideration of the mother's history and circumstances; together, the evidence and findings demonstrated the mother's lack of any parental concern for her son and, in turn, supported the court's conclusion that termination based on willful abandonment was warranted.

Appeal by Respondent-Mother from orders entered 26 March 2024 by Judge J. Calvin Chandler in Columbus County District Court. Heard in the Court of Appeals 12 February 2025.

Jane R. Thompson for Petitioner-Appellee Columbus County Department of Social Services.

Administrative Office of the Courts, by Matthew D. Wunsche, for Guardian ad Litem.

Robinson & Lawing, L.L.P., by Christopher M. Watford, for Respondent-Appellant Mother.

COLLINS, Judge.

Respondent-Mother appeals from the trial court's termination of her parental rights to her minor child based on the grounds of willful abandonment and willful failure to make reasonable progress in correcting the conditions that led to the minor child's removal. Mother challenges two adjudicatory findings of fact as being unsupported by clear,

cogent, and convincing evidence and argues that the trial court failed to make certain findings of fact regarding Mother's willfulness. Mother does not challenge the trial court's dispositional conclusion that it was in the minor child's best interest to terminate Mother's parental rights. We affirm.

I. Background

Mother is the biological mother of David,[1] a minor child born in 2013. On 17 February 2022, Columbus County Department of Social Services ("CCDSS") filed a petition alleging that David was neglected and dependent, stating that Mother did not have housing for herself or David, did not take David to school, used drugs in front of David, frequently dropped David off at "several people's houses," and frequently gave "temporary guardianship" of David to other people. CCDSS learned that Mother was on probation and contacted her probation officer; Mother was directed to drive to the CCDSS office and was immediately drug tested. Mother "tested positive for amphetamine, buprenorphine, THC, methamphetamine, and fentanyl." When asked by CCDSS where David was located, Mother first reported that he was in another county and unreachable, but a CCDSS social worker found David in Mother's car in the parking lot. Mother agreed to a kinship placement of David with her sister and granted CCDSS non-secure custody of David; CCDSS began efforts to contact David's biological father.[2] CCDSS conducted a hair follicle drug test of David, and he tested positive for amphetamines and methamphetamines.

On 29 June 2022, Mother stipulated to the following facts:

> [T]he respondent mother had a substance abuse issue. The respondent mother's substance abuse led to the respondent mother and the juvenile having unstable housing and the respondent mother being unable to take the juvenile to school. The respondent mother placed the juvenile with various people for varying amounts of time without a definitive time to return to pick up the minor child. During one of these temporary placements, the juvenile was exposed to and tested positive for amphetamines and methamphetamines.

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1. We use a pseudonym to protect the identity of the minor child. *See* N.C. R. App. P. 42.

2. Respondent-Father's parental rights to David were also terminated, but he is not a party to this appeal.

. . . .

> [T]he respondent parents agree to include the following as components of a case plan for reunification: (1) completion of approved parenting classes; (2) completion of a substance abuse assessment and following recommended treatment; (3) completion of a mental health assessment and following recommended treatment; (4) submitting to random drug screens; and (5) obtaining the means to adequately provide for the juvenile's food, clothing, and shelter.
>
> The parties acknowledge that from these facts the Court may enter an adjudication.

The trial court proceeded to an adjudication hearing, adjudicating David neglected based on the stipulated facts and dismissing the allegation of dependency. As part of the adjudication order, Mother again agreed to the components of the case plan outlined in the stipulation. On 11 August 2022, the trial court proceeded to the disposition hearing and entered a disposition order, finding that Mother had entered into a case plan with CCDSS; Mother was incarcerated at the time of the disposition hearing due to a probation violation and could not visit with David; and, prior to her incarceration, Mother had only visited with David one time. The trial court maintained David's custody with CCDSS and found that reunification was in his best interest. The trial court again ordered Mother to comply with and satisfy the conditions of her case plan with CCDSS and ordered Mother to contact CCDSS to arrange supervised visits with David when she was released from incarceration.

The trial court held permanency planning hearings in September and December 2022. In its December 2022 permanency planning hearing order, the trial court found that: David was doing well in his foster placement and felt secure; Mother had recently contacted CCDSS and "her mental health therapy and substance abuse counseling seem to be ongoing"; Mother had "not done inpatient therapy and parenting classes"; Mother did not have suitable housing; Mother tested positive for various illegal drugs during screenings at Coastal Horizons on 25 October and 15 November 2022; and Mother had one virtual visit with David in May 2022 for seven minutes. The trial court found that "continued efforts of reunification with respondent parents would clearly be futile, unsuccessful and inconsistent with [David's] health, safety, and need for a safe, permanent home within a reasonable period of time." It ceased reunification efforts and adopted a primary permanent plan of adoption with a secondary plan of guardianship with a caretaker for David.

On 30 May 2023, CCDSS filed a petition to terminate Mother's parental rights ("TPR Petition"). The TPR Petition alleged grounds of abuse or neglect "within the meaning of G.S. 7B-101"; willful failure to make reasonable progress in correcting the conditions that led to David's removal; willful failure to pay a reasonable portion of the cost of David's care; and willful abandonment.

On 2 June 2023, the trial court held another permanency planning hearing. In its June 2023 permanency planning hearing order, the trial court found that: David remained in foster care placement, was "thriving," and felt "secure"; Mother was "afforded the opportunity to participate in in-patient drug treatment . . . and she declined to participate"; Mother "has not had a visit with [David] since" the December 2022 permanency planning hearing; Mother had "maintained minimal contact with CCDSS since the inception of this case"; and Mother did not have appropriate housing or the ability to provide for David's needs. The trial court further found that Mother was not making adequate progress on her case plan, was not actively participating in the plan for David, and was not cooperating with CCDSS or the guardian ad litem ("GAL"). The trial court found that it was in David's best interest that CCDSS continue its efforts to implement the permanent plan of adoption with a secondary plan of guardianship with a court-approved caretaker. The trial court further found that, if Mother wanted to request visitation, she was "required to give one week's notice to the CCDSS so that proper measures can be taken so that the visitation can be made safely[.]"

On 26 September 2023, the trial court held a final permanency planning hearing. It again found that David had been adjudicated neglected based on the stipulations made by Mother; David was in a foster home for adoptive placement and making positive strides and thriving; David desired no contact with Mother; Mother had not completed "any components" of her case plan; Mother was currently incarcerated for heroin and meth possession; and that the best permanent plan for David was the primary plan of adoption with a secondary plan of guardianship with a court-approved caretaker. The trial court concluded that it was in David's best interest to remain in CCDSS custody and in his foster home, and it decreed that there shall be no visits between David and Mother until ordered by the trial court.

On 1 December 2023, Mother filed a pro se motion requesting visitation with David and asking the trial court to appoint a new attorney to her case. She stated that she was enrolled in recovery services and had been sober for six months. She also stated that she did "not want [her] parental rights terminated." The trial court entered an order allowing

Mother's attorney to withdraw and appointed her a new attorney, but it did not address Mother's request for visitation.

The TPR Petition came on for hearing on 25 January 2024. During the adjudication phase of the TPR hearing, the trial court took judicial notice of the prior adjudication order and disposition order. A social worker with CCDSS testified about Mother's case plan and Mother's inaction on her case plan, testifying that Mother: attended only three mental health counseling sessions; refused every drug screen requested by CCDSS during the twelve months prior to the filing of the TPR Petition; admitted to CCDSS that she was living in South Carolina and absconding from probation; provided no financial support for David; failed to complete any component of her case plan; did not contact CCDSS to have contact with David; had a single, two-minute phone call with David on 30 May 2023; and failed to write a letter to David or respond to the letter that David wrote to her.

Mother also testified at the TPR hearing, testifying that: she had no documentation to prove that she completed any mental health counseling between February 2022 and May 2023; she lived with friends and had experienced periods of homelessness and incarceration; she did not have a job; she had not been in David's presence since his removal from her care; she had only briefly spoken to David one time over the phone in May 2023; she knew how to communicate with her social worker through CCDSS; and, as of May 2023, she had not worked to complete "any component" of her case plan with CCDSS. Mother also testified that she pled guilty to possession with intent to manufacture, sell, and deliver methamphetamine in May 2023 and was at the Rose House drug treatment center as a condition of her plea agreement.

The trial court adjudicated grounds to terminate Mother's parental rights to David based on willful abandonment and willful failure to make reasonable progress in correcting the conditions that led to David's removal. The trial court moved to the disposition phase of the TPR hearing, and it found that the termination of Mother's parental rights would further the permanent plan of adoption of David and that it was in David's best interest to terminate Mother's parental rights. The trial court entered the adjudication and disposition orders on 26 March 2024. Mother timely filed notice of appeal from the orders on 1 April 2024.

II. Discussion

Mother argues that (1) the trial court erred in concluding that she willfully abandoned David because the trial court "failed to make findings regarding [Mother's] limitations during the relevant six-month

period to determine if [Mother] had the ability to maintain contact with" David and (2) the trial court erred in concluding that Mother willfully failed to make reasonable progress in correcting the conditions that led to David's removal when "the trial court's findings of a lack of reasonable progress were made under a misapprehension of law."

"Termination of parental rights involves a two-stage process." *In re L.H.*, 210 N.C. App. 355, 362 (2011) (citation omitted). "At the adjudicatory stage, the petitioner bears the burden of proving by clear, cogent, and convincing evidence the existence of one or more grounds for termination under" N.C. Gen. Stat. § 7B-1111(a). *In re D.C.*, 378 N.C. 556, 559 (quotation marks and citation omitted). "[A]n adjudication of any single ground in [N.C. Gen. Stat.] § 7B-1111(a) is sufficient to support a termination of parental rights." *In re E.H.P.*, 372 N.C. 388, 395 (2019) (citations omitted). "If the petitioner meets its evidentiary burden with respect to a statutory ground and the trial court concludes that the parent's rights may be terminated, then the matter proceeds to the disposition phase, at which the trial court determines whether termination is in the best interests of the child." *In re H.N.D.*, 265 N.C. App. 10, 13 (2019) (citation omitted). At the dispositional stage, if the trial court determines that it is in the child's best interests, the trial court may, in its discretion, terminate the parent's rights. *In re Howell*, 161 N.C. App. 650, 656 (2003).

In reviewing a trial court's adjudication of grounds for termination, this Court must "determine whether the findings are supported by clear, cogent and convincing evidence and [whether] the findings support the conclusions of law" that one or more grounds for termination exist. *In re E.H.P.*, 372 N.C. at 392 (quotation marks and citations omitted). "If clear, cogent, and convincing evidence supports a trial court's findings which support its determination as to the existence of a particular ground for termination of a respondent's parental rights, the resulting adjudication of the ground for termination will be affirmed." *In re J.R.F.*, 380 N.C. 43, 47 (2022) (citation omitted). This Court reviews "only those [challenged] findings necessary to support the trial court's determination that grounds existed to terminate" a parent's rights, and the unchallenged findings are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407 (2019) (citations omitted). The trial court's conclusions of law are reviewed de novo. *In re C.B.C.*, 373 N.C. 16, 19 (2019).

A trial court may terminate parental rights pursuant to N.C. Gen. Stat. § 7B-1111(a)(7) upon a finding that the parent has "willfully abandoned the juvenile for at least six consecutive months immediately preceding

the filing of the petition[.]" N.C. Gen. Stat. § 7B-1111(a)(7) (2023). "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 (2020) (quotation marks and citation omitted). "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." *In re Young*, 346 N.C. 244, 251 (1997) (quotation marks and citation omitted). "[T]he '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 (2021) (quotation marks and citations omitted).

A parent's incarceration during the relevant six-month period does not preclude a finding of the ground of willful abandonment. *In re E.H.P.*, 372 N.C. at 394. Our Courts have made "quite clear . . . that incarceration, standing alone, is neither a sword nor a shield in a termination of parental rights decision." *In re A.G.D.*, 374 N.C. 317, 320 (2020) (quotation marks, brackets, and citations omitted). "Although a parent's options for showing affection while incarcerated are greatly limited, a parent *will not be excused from showing interest in the child's welfare by whatever means available*." *Id.* (emphasis in original). Thus, while our Courts "recognize the limitations for showing love, affection, and parental concern" that incarcerated parents experience, they are still required "to do what they can to exhibit the required level of concern for their children." *Id.* (citation omitted).

Mother first argues that the trial court erred in concluding that she willfully abandoned David because the trial court "failed to make findings regarding [Mother's] limitations during the relevant six-month period to determine if [Mother] had the ability to maintain contact with" David. Mother specifically challenges two adjudicatory findings of fact, findings 57 and 58, as being unsupported by clear, cogent, and convincing evidence. The challenged adjudicatory findings of fact state:

> 57. During the six month period prior to the filing of the petition in this case, [Mother's] . . . conduct in not visiting with [David], not communicating with [David], not completing any component of [her] reunification plan as ordered by the court, not providing any financial support for [David], and not making any appreciable progress in remedying the conditions that led to the removal of [David] evidence a willful intent to forego all parental duties and relinquish all parental claims with respect to [David].

> 58. [Mother] . . . [has] willfully abandoned [David] for at least six consecutive months immediately preceding the filing of the petition in this case.

The trial court also made the following relevant, unchallenged adjudicatory findings of fact:

> 22. On 29 July 2022, an order was filed in Columbus County file number 22 JA 16 finding [David] to be a neglected juvenile based on abandonment and living in an environment injurious to [David's] welfare. The adjudication was based on stipulations made by [Mother] and [Father]. . . .
>
> 23. On 11 August 2022, this Court filed a disposition order continuing legal and physical custody of [David] with CCDSS and ordering [Mother] and [Father] to enter into, and complete, reunification plans designed to address the conditions that led to the removal of [David] from his home. The disposition order required [Mother] and [Father] to:
>
> > a. Submit to a substance abuse and mental health assessment.
> >
> > b. Complete any treatment recommended following the substance abuse and mental health assessments.
> >
> > c. Submit to random drug screenings.
> >
> > d. Enroll in, and complete, parenting classes.
> >
> > e. Obtain and maintain appropriate, safe, and stable housing.
> >
> > f. Obtain and maintain financial responsibility to allow them to appropriately provide for [David].
>
> . . . .
>
> 31. [Mother] quit school following completion of the 8th grade.
>
> 32. [Mother] has been living on her own since she was 16 years old. She is currently 33 years old.
>
> 33. [Mother] has not seen or visited with [David] since the day that he was taken into the custody of CCDSS.

34. From 17 February 2022 until 16 May 2022, [Mother] did not visit with [David], nor did she request to visit with [David].

35. On 16 May 2022, a CCDSS employee provided [Mother] with a method to contact [David] and [Mother] contacted [David] that day by phone. The telephone contact lasted approximately two minutes.

36. From 17 May 2022 through 30 May 2023 [Mother] did not have any visitations with [David], did not have any telephone contact with [David], and did not communicate with [David] in any other manner.

37. Since [David] was taken into the custody of CCDSS, [Mother] has not had a job, has not had a valid driver's license, and no reliable transportation.

38. From the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case, [Mother] was a regular user and abuser of illegal controlled substances.

39. [Mother] did enter into a reunification plan with CCDSS with requirements as set forth in [finding] #23 above.

40. [Mother] did attend approximately three appointments at Coastal Horizons for mental health treatment and did receive some substance abuse counseling as part of those appointments.

41. [Mother] did not comply with the requirement that she obtain a mental health assessment and complete any recommended treatment.

42. [Mother] did not comply with the requirement that she obtain a substance abuse assessment and complete any recommended treatment.

43. [Mother] did not appear for drug screenings requested by CCDSS at any time between 17 February 2022 and 30 May 2023. However, [Mother] admits that she tested positive for illegal controlled substances on multiple drug screenings at Coastal Horizons during the time she attended there.

44. [Mother] did not complete an approved parenting class.

45. From the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case, [Mother] did not have stable housing. [Mother] was homeless for periods of time, lived with friends and family for periods of time, and was incarcerated for periods of time.

46. [Mother] was incarcerated at various times from the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case.

47. [Mother] was incarcerated at the time that the petition was filed in this case. She has since been released and is currently living at the Rose House (a residential treatment facility located in Brunswick County, North Carolina) pursuant to a term of her supervised probation.

48. From the date that [David] came into the custody of the CCDSS through the date that the petition was filed in this case, [Mother] did not provide any financial support for [David].

49. [Mother] has not had, and still does not have, a valid driver's license or reliable transportation.

50. From 21 February 2022 until 30 May 2023, there were 14 court hearings conducted in Columbus County file # 22 JA 16. [Mother] attended four of those hearings . . . .

51. Following a hearing in December 2022, [Mother] did indicate that she would like to visit with [David]. [Mother] was asked to write a letter to [David]. [Mother] did not write a letter to [David] prior to the filing of the petition in this case.

52. [David] wrote a letter to [Mother] on 6 April 2023. A CCDSS employee gave the letter to [Mother]. As of the filing of the petition in this case, [Mother] did not respond to [David].

53. From the time that [David] came into the custody of CCDSS through the date of the filing of the petition in this case, neither [Mother] or [Father] provided any gifts, cards, or letters to [David].

54. For the six-month period prior to the filing of the petition in this case, neither [Mother] nor [Father] attended any child and family team meetings that were held to

> discuss issues related to [David]. Notices of the meetings were mailed to [Mother] and [Father] at the last address that CCDSS had on file and it is unlikely that either actually received any of those notices due to the instability of their living arrangements.
>
> . . . .
>
> 56. [Mother] and [Father] had the ability to take appropriate action to make reasonable progress under their circumstances to correct the conditions that led to the removal of [David].

The above unchallenged findings of fact "are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. at 407. These findings show that, during the relevant six-month period prior to the filing of the petition, Mother: "had not seen or visited [David]"; did not request any visits with David; "did not have any telephone contact with [David] and did not communicate with [David] in any other manner"; failed to respond to a letter written to her by David; did not provide any gifts, cards, or letters to David; provided no financial support for David; "was a regular user and abuser of illegal controlled substances"; failed to appear for drug screenings when requested by CCDSS; admitted to testing positive for illegal controlled substances on multiple drug screenings at Coastal Horizons; and failed to complete the majority of her case plan with CCDSS. These unchallenged findings of fact support the challenged findings of fact 57 and 58. Additionally, there is clear, cogent, and convincing record evidence, in the form of court reports from CCDSS, court reports from the GAL, and testimony from the CCDSS social worker and Mother to support the challenged findings of fact 57 and 58.

Moreover, contrary to Mother's assertion that the trial court failed to consider her limitations and failed to make findings regarding those limitations, the trial court's unchallenged adjudicatory findings 31, 32, 35, 39, 40, 43, 45, 47, and 54 show that the trial court appropriately considered Mother's history and circumstances. The clear, cogent, and convincing record evidence, along with the trial court's adjudicatory findings of fact, support that Mother made no effort to contact David in any manner during the relevant six-month period and took no action to show any "love, affection, and parental concern" for David. *In re A.G.D.*, 374 N.C. at 320.

As Mother's behavior evinces a "complete failure to show any interest" in David, *In re L.L.M.*, 375 N.C. 346, 353 (2020), the trial court

thus properly determined that she willfully abandoned David and terminated Mother's parental rights. Because the trial court properly terminated Mother's parental rights on one ground, we need not address her arguments as to the ground of willful failure to make reasonable progress in correcting the conditions that led to David's removal. *See In re B.S.D.S.*, 163 N.C. App. 540, 546 (2004) ("Having concluded that at least one ground for termination of parental rights existed, we need not address the additional ground . . . found by the trial court.").

III. Conclusion

The trial court's challenged findings of fact that are supported by clear, cogent, and convincing evidence, together with the unchallenged findings of fact, support the trial court's conclusion of law that Mother willfully abandoned David for the six-month period of time preceding CCDSS's filing of the TPR Petition. Mother does not challenge the trial court's conclusion that it was in David's best interest to terminate Mother's parental rights. We thus affirm the trial court's orders.

AFFIRMED.

Chief Judge DILLON and Judge FLOOD concur.

IN RE FORECLOSURE OF REAL PROPERTY UNDER DEED OF TRUST FROM VIRGINIA LEE GODFREY AND HARRY CRAIG DEES, II A/K/A H. CRAIG DEES, II, IN THE ORIGINAL AMOUNT OF $150,000.00, PAYABLE TO RBC CENTURA BANK, DATED OCTOBER 31, 2003 AND RECORDED ON NOVEMBER 11, 2003 IN BOOK RB 3260 AT PAGE 103, ORANGE COUNTY REGISTRY, TRUSTEE SERVICES OF CAROLINA, LLC, SUBSTITUTE TRUSTEE

No. COA24-100

Filed 5 March 2025

Mortgages and Deeds of Trust—non-judicial foreclosure—home equity line of credit—valid debt and right to foreclose—forged signatures on loan documents—ratification of debt and deed of trust

In a non-judicial foreclosure proceeding following the default on a home equity line of credit (HELOC), which was secured by a deed of trust encumbering a property owned by a married couple until they divorced, at which point the wife (respondent) was awarded sole title to both the property and the HELOC, the trial

court erred in finding that the HELOC was not a valid debt and that the holder of the HELOC note (petitioner) had no right to foreclose on the property based on respondent's testimony that her signatures on the HELOC loan documents were forged. Despite respondent's claims of forgery, petitioner still met its burden of showing that the HELOC and the deed of trust were valid by introducing evidence that respondent ratified both by: acknowledging the HELOC as a valid marital debt in her verified complaint for divorce and equitable distribution, making several monthly payments on the HELOC loan, entering into (and benefitting from) subordination agreements related to the HELOC, and using the HELOC debt to satisfy a prior loan.

Judge HAMPSON dissenting.

Appeal by petitioner from an order entered 30 May 2023 by Judge Alyson Grine in Orange County Superior Court. Heard in the Court of Appeals 23 October 2024.

Brock & Scott, PLLC, by Alan M. Presel, for petitioner-appellant Paper Profits, LLC.

Buckmiller, Boyette & Frost, PLLC, by Joseph Z. Frost, for respondent-appellee Virginia Lee Godfrey.

DILLON, Chief Judge.

I. Background

Trustee Services of Carolina, LLC, (the "Trustee") is the substitute trustee on a deed of trust encumbering a homestead consisting of approximately sixty acres in Orange County (the "Property"). This deed of trust was purportedly executed in 2003 by the Property owners, Borrowers Virginia Lee Godfrey and Harry Craig Dees, II, for the purpose of securing a home equity line of credit (a "HELOC"). Petitioner Paper Profits LLC is the holder of the HELOC note secured by the deed of trust.

In 1998, Borrowers purchased the Property as tenants by the entirety. Five years later, in 2003, Borrowers purportedly obtained a HELOC secured by the deed of trust described in the paragraph above. In 2018, Ms. Godfrey brought a separate action against Mr. Dees for

divorce and equitable distribution. In 2020, Ms. Godfrey was awarded sole title to the Property and to the HELOC debt in that domestic action.

In 2021, Petitioner initiated this foreclosure based on a default in payment on the 2003 HELOC. After a hearing on the matter, the trial court concluded that Petitioner had no right to foreclose, based on Ms. Godfrey's contention asserting that her signatures on the 2003 HELOC loan documents were forged. Petitioner appeals from an order denying its right to foreclose.

II. Analysis

A non-judicial foreclosure under Section 45-21.16 of our General Statutes may not be ordered unless the clerk or judge finds the existence of all six elements set forth in subsection (d) of that Section. Otherwise, it is the duty of the clerk or judge to deny foreclosure.

In reviewing a superior court's order under N.C.G.S. § 45-21.16(d1), "this Court first determines whether the superior court applied the proper scope of review. If so, then this Court decides only whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings." *In re Garvey*, 241 N.C. App. 260, 263–64 (2015) (citations and quotation marks omitted). On appeal, conclusions of law are reviewable *de novo*. *In re Bass*, 366 N.C. 464, 467 (2013).

Pursuant to Section 45-21.16(d),

> If the clerk finds the existence of **(i) valid debt** of which the party seeking to foreclose is the holder, (ii) default, **(iii) right to foreclose** under the instrument, (iv) notice to those entitled to such under subsection (b), (v) that the underlying mortgage debt is not a home loan as defined in G.S. 45-101(1b), or if the loan is a home loan under G.S. 45-101(1b), that the pre-foreclosure notice under G.S. 45-102 was provided in all material respects, and that the periods of time established by Article 11 of this Chapter have elapsed, and (vi) that the sale is not barred by G.S. 45-21.12A, then the clerk shall authorize the mortgagee or trustee to proceed under the instrument, and the mortgagee or trustee can give notice of and conduct a sale pursuant to the provisions of this Article.

(Emphasis added).

Based on Ms. Godfrey's testimony that she did not sign the HELOC note in 2003, the court did not find the existence of a valid debt under subsection (i). And based on her testimony that she did not sign the HELOC deed of trust, the court did not find that the Trustee had a right to foreclose under subsection (iii).

On appeal, Petitioner argues, in part, that even if it failed to prove that Ms. Godfrey, herself, had signed the HELOC note and deed of trust in 2003, she is still bound under those documents based on the evidence that she "ratified" the 2003 HELOC through her subsequent actions. Indeed, our Supreme Court adopted a dissent from our Court, which reasoned that a party may ratify an agreement (s)he may not have signed by retroactively authorizing or otherwise approving it, either expressly or by implication. *See Goodwin v. Webb*, 357 N.C. 40 (2003) (adopting the dissenting opinion from our Court). Specifically, the dissenting judge, whose opinion was adopted by our Supreme Court, stated:

> A party ratifies an agreement by retroactively authorizing or otherwise approving it either expressly or by implication. Thus, ratification can occur where a party accepts benefits and performs under an agreement. The act only constitutes ratification if it is done with full knowledge that the acceptance of benefits or the performance arises pursuant to the agreement and is done so without any duress.

Goodwin v. Webb, 152 N.C. App. 650, 656–57 (2002) (Greene, J., dissenting) (citations and quotation marks omitted). *See also Link v. Link*, 278 N.C. 181, 197 (1971) (party bound by agreement she ratifies even if originally procured by fraud or duress).

Before considering Petitioner's "ratification" argument, we first address Ms. Godfrey's contention that an argument based on ratification is not appropriate for a foreclosure hearing held pursuant to N.C.G.S. § 45-21.16. Ms. Godfrey contends that an argument based on "ratification" is *equitable* in nature and, therefore, is not appropriate for consideration in a Section 45-21.16 hearing before the clerk (or before the superior court on review). Rather, she contends, equitable arguments may only be considered in a separate proceeding brought directly before a superior court judge under Section 45-21.34, which provides the procedure to seek an order to enjoin a foreclosure sale on equitable grounds.

It is true, as stated by our Supreme Court, that "[e]quitable defenses to foreclosure . . . may not be raised in a hearing pursuant to N.C.G.S. § 45-21.16 or on appeal therefrom but must be asserted in an action to

enjoin the foreclosure sale under N.C.G.S. § 45-21.34." *In re Foreclosure of Goforth Props., Inc.*, 334 N.C. 369, 374 (1993). We note that our Supreme Court has described "ratification" as equitable in nature at times, *see Maynard v. Moore*, 76 N.C. 158, 164–65 (1877) (stating that "this defense is purely equitable"), and as legal in nature at times, *see Branch Banking & Trust Co. v. Gill*, 293 N.C. 164, 193 (1977) (describing ratification as "a doctrine of the common law, not of equity.").

But we conclude that it makes no difference whether Petitioner's ratification argument is equitable in nature or legal in nature, as Petitioner is not seeking to enjoin the foreclosure. Rather, it is Petitioner who is seeking an order to allow the foreclosure to proceed. And Petitioner is merely trying to meet its burden of demonstrating that the 2003 HELOC note and deed of trust are valid through evidence that Ms. Godfrey either signed those documents or otherwise ratified her signatures thereon placed by someone else, perhaps by her then-husband Mr. Dees. And we have held it is appropriate for a trustee/lender in meeting its burden in a Section 45-21.16 hearing, to show the existence of a valid debt and deed of trust to offer evidence that the borrower ratified the documents (s)he claims (s)he did not actually sign. *See, e.g.*, *Espinosa v. Martin*, 135 N.C. App. 305, 308–10 (1999) (considering a bank's ratification argument in the context of an appeal from a Section 45-21.16 hearing); *In re Davis*, 266 N.C. App. 240, *16 (2019) (unpublished) (holding deed of trust was valid in the context of a Section 45-21.16 hearing based on ratification). Accordingly, we hold it is proper for Petitioner to meet its burden of demonstrating the validity of the HELOC note and deed of trust based on evidence that Ms. Godfrey ratified those documents in a Section 45-21.16 hearing.

Petitioner argues that several items in the record point to Ms. Godfrey's ratification of the 2003 HELOC.

First, Petitioner points to Ms. Godfrey's filings in her 2018 domestic proceeding against Mr. Dees. In her *verified* 2018 domestic complaint, she avers and swears to the court that there were "two jointly held debt obligations secured by the [Property]; a home mortgage [obtained from Carolina Farm Credit in 2013] with . . . a current outstanding balance of $660,845.29 . . . and [the 2003 HELOC] held by [RBC Centura's successor entity] with a current outstanding balance of $150,000." In that verified complaint, she requested the district court to divest Mr. Dees of his interest in the marital Property, including the marital HELOC debt. The court eventually agreed and awarded Ms. Godfrey the Property, including the HELOC debt. This evidence is Ms. Godfrey's sworn testimony affirming the HELOC debt was a valid debt and was a marital debt. It shows her

acknowledgement that the $150,000 was advanced to Ms. Godfrey and her then-husband for their use in the marriage. Also, she represented in that proceeding that she had personally made several monthly payments due on the HELOC note. In sum, this evidence is proof of ratification.

Additionally, there is evidence in the record tending to show that Ms. Godfrey and her then-husband requested that RBC Centura subordinate its 2003 HELOC deed of trust to deeds of trust subsequently recorded to secure term mortgage loans. For instance, in 2007, Borrowers' 2002 term mortgage loan came due. They refinanced that debt with a new term mortgage loan, which appeared to be conditioned by the new lender on the 2003 HELOC deed of trust being subordinated to the new 2007 term mortgage loan. Indeed, the record reflects that RBC Centura did subordinate its 2003 HELOC deed of trust to Borrowers' 2007 term loan for Borrowers' benefit. RBC Centura's successor, again, subordinated its 2003 HELOC deed of trust in 2013 when Borrowers again refinanced its term mortgage loan, this time with Carolina Farm Credit.

Further, there is evidence in the record that shows that the proceeds of a previous HELOC loan was satisfied with the 2003 HELOC, representing evidence that Ms. Godfrey benefited from the 2003 HELOC.

Ms. Godfrey does not deny the validity of these other loans.

In sum, we view the evidence as *conclusively* establishing that Ms. Godfrey, through her actions, ratified the 2003 HELOC note and deed of trust, such that she is bound by those documents, notwithstanding that she might not have actually signed those documents herself.

III. Conclusion

We conclude that the superior court erred by failing to find the existence of a valid debt against Ms. Godfrey and of Petitioner's right to foreclose. We, therefore, reverse the order of the superior court and remand with instructions to enter an order authorizing foreclosure under the 2003 HELOC deed of trust.

REVERSED.

Judge TYSON concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

Both the Clerk of Orange County Superior Court and—following a *de novo* hearing in Superior Court—the trial court found there was insufficient evidence to support a conclusion Respondent ratified the Deed of Trust or the HELOC Debt. Properly applying the standard of review in this case, the trial court's findings are supported by evidence in the Record and, in turn, support the conclusion Respondent did not ratify the HELOC Debt. *See In re Garvey*, 241 N.C. App. 260, 263-64, 772 S.E.2d 747, 750 (2015) (Where the trial court properly undertakes a de novo review, "this Court decides only 'whether competent evidence exists to support the trial court's findings of fact and whether the conclusions reached were proper in light of the findings.' " (quoting *In re Foreclosure of Gilbert*, 211 N.C. App. 483, 487, 711 S.E.2d 165, 169 (2011)) (internal quotation marks omitted)).

Ultimately, in this case, the dispositive issue is whether there is evidence which supports the trial court's conclusion Respondent did not ratify the HELOC Debt and Deed of Trust. This is so even presuming—without deciding—ratification is validly raised in these proceedings by Petitioner. The trial court directly addressed this very question, finding even if ratification was applicable:

> 11. The doctrine of ratification, raised by [Petitioner], does not bar or preclude [Respondent] from challenging and contesting the validity of the indebtedness evidenced by, and the ability of [Petitioner] to foreclose under, the Loan Documents.
>
> 12. There is no evidence, in the record or otherwise, that [Petitioner] ratified the transaction evidenced by the Loan Documents through her actions, conduct, or otherwise. Specifically, there is no evidence that [Petitioner] (i) received, directly or indirectly, any portion of the proceeds from the Loan, (ii) was aware—and had knowledge—of her forged signature on the Loan Documents prior to the commencement of the above-captioned special proceeding, and (iii) benefitted—directly or indirectly—from the transaction evidenced by the Loan Documents. No portion of the proceeds generated and extended pursuant to the Loan were utilized to purchase the Property.

Indeed, the trial court's Findings generally track similar findings made by the trial court and relied on by this Court in *Espinosa*:

> The superior court found no evidence that any portion of the loan proceeds passed to the Espinosas, or that they knew of the loan transactions until the foreclosure was instituted and those findings are supported by competent evidence. Further, there was no evidence that Charles E. Cagle acted as agent of the Espinosas in obtaining the loan secured by their real property, and no evidence that any legal obligation of the Espinosas was satisfied from the loan proceeds. Further, the trial court found that none of the loan proceeds were used to purchase the real property deeded to the Espinosas, and that they did not directly or indirectly benefit from the loan transactions in any way. Those additional findings are also supported by competent evidence of record. The trial court concluded that the Bank failed to prove by the greater weight of the evidence that "Jaime [sic] and Cheri Espinosa, or either of them, knew all of the facts material to the loans in question prior to the time of the institution of this foreclosure proceeding." Further, the trial court concluded that the Espinosas "did not ratify any of the transactions or documents associated with the loans in question."
>
> . . . .
>
> Here, there is no finding that Charles E. Cagle, or anyone else, acted as an agent for the Espinosas in the loan transactions; nor that they received, directly or indirectly, any of the loan proceeds; nor that they had any knowledge that anyone had signed their names on the loan documents until the foreclosure proceeding was instituted against them.

Espinosa v. Martin, 135 N.C. App. 305, 309-10, 520 S.E.2d 108, 111-12 (1999). There, this Court held these findings—themselves supported by evidence—supported the determination the Espinosas had not ratified the loan transactions in that case. I would conclude, here, the trial court's findings also support its conclusion Respondent did not ratify the loan and deed of trust in this case.

Moreover, the evidence in the Record supports the trial court's Findings in the case *sub judice*. Indeed, the majority takes no direct issue with any of the trial court's Findings in this regard. Instead, the majority points to two items in the Record it asserts are "conclusive proof of ratification." However, reliance on either item is unavailing.

Certainly neither item is conclusive proof—separately or together—justifying overturning the trial court's role as fact-finder.

First, reliance on the subsequent subordination agreements is a red herring. Respondent is not contesting the subsequent loans that were given priority over the HELOC. The Record is clear Respondent was *not* a signatory to the subordination agreements themselves. Petitioner points to no evidence Respondent was even aware of the subordination agreements. Moreover, nothing about the subordination of the HELOC Debt provides any determination as to its validity or demonstrates the unequivocal intent by Respondent to affirm the subordinated Debt. *See Espinosa*, 135 N.C. App. at 309, 520 S.E.2d at 111 ("[T]o constitute ratification as a matter of law, the conduct must be consistent with an intent to affirm the unauthorized act and inconsistent with any other purpose." (internal quotations and citation omitted) (alteration in original)).

Petitioner, and the majority, also relies on the earlier equitable distribution proceedings—such as they were. Petitioner argues those proceedings constitute an affirmation the HELOC Debt was both a valid debt and marital debt. However, the equitable distribution proceedings established no such thing, and this contention is wholly unsubstantiated by the Record.

Again, the trial court also addressed this issue in the context of Petitioner's estoppel claims, in part noting specifically: "The issues [] raised, determined, and actually litigated in the Domestic Action did not include: (1) whether the indebtedness arising under the Loan Documents was valid[.]" The trial court further found Respondent "has not taken any position inconsistent with any position previously taken or maintained in the Domestic Action" and "did not assert, during the Domestic Action or otherwise, that she signed and executed the Loan Documents, or that the Loan Documents and indebtedness arising therefrom, were valid, enforceable, and complied with the applicable requirements of North Carolina law[.]"

Review of the equitable distribution proceeding documents in the Record before us underscores the trial court's findings. First, it is clear there was no allegation, proof, or judicial determination in the equitable distribution proceeding that the HELOC was a "valid" debt. The issue of the debt's validity or invalidity was plainly not at issue.

Crucially, moreover, there is no determination in the equitable distribution proceeding the HELOC Debt is "marital debt." To the contrary, the verified pleading, interim distribution, ultimate equitable distribution judgment, and order transferring the property each only describe

the debt as "jointly held." This is significant because the mere fact debt is "jointly held" does not automatically mean the debt constitutes marital debt. It is fundamental that "[t]itle is not controlling in determining whether an asset is marital property[.]" *Hill v. Hill*, 229 N.C. App. 511, 518, 748 S.E.2d 352, 358 (2013); *Richter v. Richter*, 271 N.C. App. 644, 659, 845 S.E.2d 99, 109 (2020) ("[T]reatment of property for tax purposes or in another legal context may not control its classification for purposes of equitable distribution." (citation omitted)).[1]

To the contrary, the facts of this case all point to the conclusion the "jointly held" HELOC Debt was not, in fact, marital debt. " 'Regardless of who is legally obligated for the debt, for the purpose of an equitable distribution, a marital debt is defined as a debt incurred during the marriage for the *joint benefit* of the parties.' " *Wornom v. Wornom*, 126 N.C. App. 461, 465, 485 S.E.2d 856, 859 (1997) (emphasis in original) (quoting *Geer v. Geer*, 84 N.C. App. 471, 475, 353 S.E.2d 427, 429 (1987)). Here, there is no evidence of any joint benefit received by the marital estate—or even Respondent herself—from the HELOC Debt. Rather, there have been a number of judicial fact-finding determinations there was no such joint benefit or benefit to Respondent.

Thus, the evidence of Record supports the trial court's factual Findings. Those Findings, in turn, support the trial court's Conclusion Respondent did not ratify the HELOC Debt or Deed of Trust securing the debt. Consequently, the trial court's order denying foreclosure under N.C. Gen. Stat. § 45-21.16(d) on the basis there was insufficient evidence of a valid debt or a right to foreclose under the Deed of Trust is properly affirmed. Accordingly, I respectfully dissent.

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1. This, to be sure, was likely a product of how the equitable distribution proceeding arose in the first place. Respondent's former husband allegedly abandoned her and made his whereabouts unknown contemporaneously to being investigated by the Securities and Exchange Commission for misappropriating funds from his company. Respondent's former husband did not appear in the equitable distribution action. The result was quite limited fact-finding in the equitable distribution action. Respondent required the marital home which secured the debt be distributed to her in order to refinance or extinguish any debts allegedly secured by that property. This is a far cry from ratifying the HELOC Debt. To the contrary, the pleadings and orders in the equitable distribution reflect an intent to expressly not resolve the issue of whether the HELOC was marital debt or not.

IN RE S.W.

[298 N.C. App. 39 (2025)]

IN THE MATTER OF S.W.

No. COA24-737

Filed 5 March 2025

1. Appeal and Error—interlocutory orders—denial of motion to abate action—immediately appealable—related issues reviewed by writ of certiorari

In a termination of parental rights action, although the trial court's orders denying a guardian ad litem's (GAL's) motions to dismiss, transfer venue, and hold the matter in abeyance and denying respondent-mother's motion to dismiss were interlocutory (because they were made during the pendency of the case and did not dispose of the case), the appellate court determined that it would reach the merits of the arguments raised against the trial court's orders. First, a refusal to abate an action was immediately appealable; second, where the GAL challenged the trial court's jurisdiction by raising the prior pending action doctrine, which was interrelated to the GAL's other arguments on appeal, the appellate court elected to treat the GAL's brief and record on appeal as a petition for writ of certiorari and to grant the writ in order to address the merits of all claims raised.

2. Termination of Parental Rights—jurisdiction—underlying juvenile case in different county—statutory requirements met—prior pending action doctrine inapplicable

The Brunswick County district court had jurisdiction over a termination of parental rights action even though an underlying juvenile proceeding remained pending in Cumberland County (where a guardian had been appointed for the minor child). A trial court's jurisdiction over an abuse, neglect, or dependency action is distinct from jurisdiction over a termination of parental rights action and, here, the jurisdictional requirements in N.C.G.S. § 7B-1101 for a termination petition had been met; therefore, Cumberland County did not have exclusive, original jurisdiction over the termination action, which had been filed in Brunswick County where the minor child, the child's guardian, and other witnesses resided. Further, the prior pending action doctrine was inapplicable because the subject matter, issues, and relief sought were different between the underlying juvenile proceeding and the termination proceeding. Therefore, the Brunswick County court did not err by denying the guardian ad litem's motions to dismiss the petition for lack of jurisdiction and to hold the matter in abeyance.

3. Termination of Parental Rights—denial of motion to change venue—trial court's discretion—statutory findings not required

In a termination of parental rights (TPR) matter, the trial court did not abuse its discretion by denying the guardian ad litem's (GAL's) motion to change venue from the county in which the TPR petition was filed (Brunswick) to the county where an underlying juvenile case was pending (Cumberland). Regardless of which transfer of venue provision applied—N.C.G.S. § 7B-900.1(a) in the Juvenile Code for post-adjudication transfers, or N.C.G.S. § 1-83(2) in the Civil Procedure statutes—there was no showing that the ends of justice demanded a change of venue or that failure to transfer venue would deny the GAL a fair trial. The GAL's concerns about having to travel to Brunswick County for the TPR proceedings did not rise to the level of requiring a change of venue and, further, the minor child, the child's guardian, and other witnesses all resided in Brunswick County. Finally, the trial court was not required to make statutory findings when denying a motion to transfer venue.

Appeal by guardian ad litem from orders entered 16 May 2024 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 12 February 2025.

Administrative Office of the Courts, by GAL Appellate Counsel Matthew D. Wunsche, and GAL Staff Attorney Hope Connie Wertz, for appellant guardian ad litem.

No brief filed for petitioner-appellee.

No brief filed for respondents-appellees.

FLOOD, Judge.

The guardian ad litem (the "GAL") appeals from the trial court's orders denying the GAL's: motion to dismiss Petitioner's petition to terminate Respondent-Mother's parental rights (the "Petition"), motion to transfer venue, and motion to hold the matter in abeyance. On appeal, the GAL argues: (A) the trial court erred in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Cumberland County maintains exclusive, continuing jurisdiction, and the prior pending action doctrine prevents the Brunswick County trial court (the "Brunswick court") from hearing the Petition; and (B) the trial court abused its discretion in failing to transfer venue

from Brunswick to Cumberland County. Upon review, we conclude the Brunswick court did not err in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Brunswick County properly has jurisdiction over the termination action, and the prior pending action doctrine is inapplicable. We further conclude the Brunswick court did not abuse its discretion in denying the GAL's motion to transfer venue because the Brunswick court was not required to make statutory findings.

I. Factual and Procedural Background

On 4 December 2017, Cumberland County Department of Social Services ("DSS") filed a petition alleging the minor child, S.W. ("Sutton"),[1] was neglected and dependent, and that same day, Sutton was placed in DSS custody. On 6 March 2018, the Cumberland County district court (the "Cumberland court") entered an order adjudicating Sutton a dependent juvenile.

On 15 March 2019, the Cumberland court placed Sutton in the custody and guardianship of Sutton's paternal grandmother. On 27 January 2022, the paternal grandmother filed a motion for review, seeking to dissolve the guardianship and have Petitioner, Sutton's "godmother," be granted guardianship of Sutton. In an order entered 7 June 2022 (the "June 2022 Order"), the Cumberland court appointed Petitioner as Sutton's guardian. The Cumberland court waived further review hearings but retained jurisdiction.

On 9 February 2023, Petitioner filed, in the Brunswick court, the first petition to terminate Respondent-Mother's and Respondent-Father's (collectively, "Respondent-Parents") parental rights in Sutton (the "First Petition"). On 28 August 2023, Respondent-Mother filed a motion to dismiss the First Petition based on a lack of subject matter jurisdiction and improper venue, arguing in relevant part that the June 2022 Order did not terminate the proceedings or transfer jurisdiction to the Brunswick court.[2]

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1. A pseudonym is used to protect the juvenile's identity, pursuant to N.C. R. App. P. 42(b).

2. On 6 September 2023, Respondent-Mother filed a motion for review with the Cumberland court, seeking to modify visitation with Sutton, and on 10 October 2023, filed an amended motion for review with the Cumberland court, alleging Petitioner had misled the trial court and she was not fit to be Sutton's guardian, and requested the guardianship be dissolved. The matter was heard on 7 October 2024, but no written order had been entered by the time the GAL's brief was filed, and no written order is contained in the Record on appeal.

On 11 October 2024, the Brunswick court entered an order denying Respondent-Mother's motion to dismiss the First Petition, finding in relevant part that: Respondent-Parents were properly served with the First Petition; at the time the First Petition was filed, Sutton lived in Brunswick County; Brunswick County had proper subject matter jurisdiction; and Brunswick County was the proper venue for the termination action. On 21 November 2023, DSS filed a motion with the Brunswick court to intervene and change venue to Cumberland County. DSS argued, in relevant part, that there was a pending action pre-existing the First Petition in the Cumberland court over which Cumberland County had jurisdiction, and Petitioner had misinformed the Brunswick court in her First Petition that no other custody order regarding Sutton existed.

The next day, on 22 November 2023, the GAL filed motions with the Brunswick court to be appointed as representative of Sutton, and to consolidate the existing Cumberland court case and the Brunswick court termination action to be heard in the Cumberland court. The GAL argued, in relevant part, that Cumberland County had retained jurisdiction, and no party had sought to transfer jurisdiction or venue. On 13 December 2023, the GAL filed a Rule 60 motion seeking relief from the Brunswick court's denial of Respondent-Mother's motion to dismiss the First Petition.

On 18 December 2023, Petitioner: filed motions to dismiss DSS's motion to change venue and motion to intervene, the GAL's motion to consolidate, and the Rule 60 motion; and filed an amended petition, acknowledging the Cumberland court case concerning her guardianship of Sutton. On 16 January 2024, the GAL was appointed to represent Sutton in the Brunswick court termination action. Subsequently, on 18 January 2024, the GAL filed a motion to change venue to Cumberland County, and filed another Rule 60 motion.

On 7 February 2024, Petitioner took "a voluntary dismissal without prejudice of" the First Petition, and that same day, filed the Petition, which also acknowledged the Cumberland County proceedings. On 20 March 2024, Respondent-Mother filed a motion to dismiss the Petition, and the GAL filed a motion to dismiss the Petition and motion to transfer venue. In their motions, both parties reiterated their prior arguments as to subject matter jurisdiction and venue that they had made in response to the First Petition.

The Brunswick court held a hearing on the motions on 27 March 2024. The GAL argued, in relevant part, that: jurisdiction over the prior pending child welfare action in Cumberland County had not been

terminated, which deprived the Brunswick court of jurisdiction to hear the termination petition; it was in Sutton's best interests to hear the case in Cumberland County; and travel from Cumberland County to Brunswick County would be inconvenient.[3] The GAL requested the Brunswick court hold the termination action in abeyance due to the prior pending action doctrine. In response, Petitioner argued that: guardians frequently move to terminate parental rights in counties other than the county where guardianship is awarded, and it was in Sutton's best interests to hear the termination action in Brunswick County because "[a]ll of the witnesses, all of the individuals that actually have anything to do with" Sutton lived in Brunswick County.

On 16 May 2024, the Brunswick court entered orders denying the GAL's motions to dismiss, transfer venue, and hold the matter in abeyance; and denying Respondent-Mother's motion to dismiss. The GAL timely appealed.

II. Jurisdiction

[1] As a preliminary matter, the orders from which the appeal is taken are interlocutory, because the orders were "made during the pendency of an action and d[id] not dispose of the case, but instead l[eft] it for further action by the trial court in order to settle and determine the entire controversy[.]" *Carriker v. Carriker*, 350 N.C. 71, 73 (1999). "As a general proposition, there is no right of immediate appeal from interlocutory orders and judgments." *Jesse v. Jesse*, 212 N.C. App. 426, 431 (2011) (citation and internal quotation marks omitted).

> A trial court's refusal to abate an action based upon the prior pending action doctrine is . . . immediately appealable. On the other hand, a trial court order's refusal to dismiss a complaint for lack of subject matter jurisdiction is not subject to appellate review on an interlocutory basis as a matter of right.

Id. at 431.

Here, "given the necessity for us to address the 'prior pending action' issue on the merits[,]" and "given the interrelated nature" of the GAL's challenges to the trial court's orders, this Court elects to treat the Record on appeal and the GAL's brief as a petition for writ of certiorari with

3. Respondent-Mother argued that the Petition failed to recognize the Cumberland court case was still pending, and that the law did not allow a private party to file a termination petition in one county while a child welfare case was pending in another county.

respect to the exclusive jurisdiction issue "in order to reach the merits of [Petitioner's] challenges to the trial court's order[s,]" and will address Petitioner's claims on the merits. *See id.* at 431.

III. Analysis

On appeal, the GAL argues: (A) the trial court erred in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Cumberland County maintains exclusive, continuing jurisdiction, and the prior pending action doctrine prevents the Brunswick court from hearing the Petition; and (B) the trial court abused its discretion in failing to transfer venue from Brunswick to Cumberland County. We address each argument, in turn.

A. Motion to Dismiss

[2] The GAL first argues the Brunswick court erred in denying its motion to dismiss and motion to hold the matter in abeyance because the Cumberland court retains exclusive, continuing jurisdiction under the Juvenile Code, and the prior pending action doctrine prevents the Brunswick court from hearing the Petition. We disagree.

"A Rule 12(b)(6) motion tests the legal sufficiency of the pleading." *Kemp v. Spivey*, 166 N.C. App. 456, 461 (2004) (citation omitted). "[T]his Court reviews *de novo* whether, as a matter of law, the allegations of the complaint are sufficient to state a claim upon which relief may be granted." *Lovett v. Univ. Place Owner's Ass'n*, 285 N.C. App. 366, 368 (2022) (citation omitted) (cleaned up). "This Court considers the allegations in the complaint as true, construes the complaint liberally, and only reverses the trial court's denial of a motion to dismiss if the plaintiff is entitled to no relief under any set of facts which could be proven in support of the claim." *Id.* at 368 (citation omitted) (cleaned up).

"Whether a trial court has subject-matter jurisdiction is a question of law, reviewed de novo on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511 (2010). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Kassel v. Rienth*, 289 N.C. App. 173, 183 (2023) (citation and internal quotation marks omitted). We first consider the GAL's argument that the Cumberland court retains exclusive, continuing jurisdiction.

1. Exclusive District Court Jurisdiction

Under Chapter 7B of the Juvenile Code, the trial court "has exclusive, original jurisdiction over any case involving a juvenile who is alleged to be abused, neglected, or dependent." N.C.G.S. § 7B-200(a)

(2023). Such "jurisdiction shall continue until terminated by order of the court or until the juvenile reaches the age of 18 years or is otherwise emancipated, whichever occurs first." N.C.G.S. § 7B-201(a) (2023). Separate and apart from these provisions, the trial court also has "exclusive original jurisdiction to hear and determine any petition or motion relating to termination of parental rights to any juvenile who resides in . . . the district at the time of filing of the petition or motion." N.C.G.S. § 7B-1101 (2023); *see also In re O.E.M.*, 379 N.C. 27, 35 (2021) ("A petitioner or movant must satisfy distinct requirements to vest a trial court with jurisdiction to conduct a juvenile proceeding on the one hand and a termination proceeding on the other.").

Our Supreme Court, in recent opinions, has provided that a trial court's jurisdiction over abuse, neglect, or dependency proceedings is distinct from a trial court's jurisdiction over termination of parental rights proceedings. In *In re A.L.L.*, after the Davidson County trial court entered an order adjudicating the minor child a dependent juvenile, the Davidson County trial court appointed the petitioners as the minor child's legal guardians. 376 N.C. 99, 102–03 (2020). The petitioners thereafter "filed a petition seeking to terminate [the] respondent's parental rights in [the trial court.]" *Id.* at 103. On appeal, the respondent-parents argued that the trial court lacked subject matter jurisdiction over the termination of parental rights case, where the Davidson County trial court had previously entered an order establishing the petitioners as the minor child's guardians. *Id.* at 103. Our Supreme Court rejected the respondent-parents' arguments, holding that the requirements of N.C.G.S. § 7B-1101 were satisfied, such that subject matter jurisdiction over the termination of parental rights case was conferred to the trial court. *Id.* at 105. The Court explained that "although the Juvenile Code permits [the] petitioners to seek termination in the same district court that is simultaneously adjudicating an underlying abuse, neglect, or dependency petition, the statutory language does not mandate filing in a single court." *Id.* at 105. The Court then explained that "if the requirements of N.C.G.S. § 7B-1101 have been met in one county, then a district court in that county has jurisdiction, even if an abuse, neglect, or dependency action *is pending in another county*." *Id.* at 105 (emphasis added).

Our Supreme Court reached an identical result in *In re M.J.M.*, 378 N.C. 477 (2021). Relying on its reasoning in *In re A.L.L.*, the Court concluded that: where a termination of parental rights petition was filed in Robeson County, while Wake County "obtained and retained" jurisdiction over the underlying juvenile case, "the requirements of N.C.G.S. § 7B-1101 were satisfied so as to confer jurisdiction over the termination

petition in the [d]istrict [c]ourt in Robeson County." *See In re M.J.M.*, 378 N.C. at 479–81. Finally, in *In re O.E.M.*, our Supreme Court reiterated that a trial court's "jurisdiction does not continue from the underlying juvenile proceeding to a subsequent termination proceeding." 379 N.C. at 37. The Court provided, in relevant part, that "[t]here is nothing anomalous about requiring a party to establish that the trial court possessed jurisdiction to conduct a termination proceeding even when the court previously had jurisdiction to conduct a juvenile proceeding—it is simply what our juvenile code requires." *Id.* at 37.

Here, the facts are analogous to those in *In re A.L.L.* Just like in *In re A.L.L.*, where an abuse, neglect, or dependency action was pending in one county and the petition to terminate parental rights was filed in another county, Petitioner was granted custody of Sutton in Cumberland County, where Sutton's underlying juvenile case is pending, and the Petition was filed in a different county, Brunswick County. 376 N.C. at 102–03. Further, just like in *In re A.L.L.*, the jurisdictional requirements of N.C.G.S. § 7B-1101 were met for Brunswick County to obtain jurisdiction over the Petition.[4] *Id.* at 105; *see also* N.C.G.S. § 7B-1101. Just as our Supreme Court explained that, so long as the requirements of N.C.G.S. § 7B-1101 are satisfied, "a district court in that county has jurisdiction, even if an abuse, neglect, or dependency action *is pending in another county*[,]" so here does Brunswick County have jurisdiction over the Petition, even though the underlying juvenile case is pending in Cumberland County. *See In re A.L.L.*, 376 N.C. at 105 (emphasis added); *see also In re M.J.M.*, 378 N.C. at 479–81.

The GAL, however, cites *McMillan v. McMillan*, 267 N.C. App. 537 (2019), to argue that Brunswick County lacks jurisdiction to hear the Petition because the Cumberland court was required to terminate its jurisdiction under N.C.G.S. §§ 7B-200 and 7B-201(a). The GAL's reliance on *McMillan* is misplaced. In *McMillan*, the issue concerned whether the trial court had jurisdiction over a civil child custody action under Chapter 50 where there was a pending neglect proceeding under Chapter 7B. *Id.* at 542–43. This Court concluded that where the trial court retained jurisdiction over a neglect proceeding, it would need to either terminate jurisdiction under N.C.G.S. § 7B-201, or transfer the Chapter 7B action to a Chapter 50 action under N.C.G.S. § 7B-911, because child custody actions are automatically stayed when there is a pending Chapter 7B juvenile case. *See id.* at 543–46; *see also* N.C.G.S.

4. Brunswick County's jurisdiction over the Petition, pursuant to N.C.G.S. § 7B-1101, is not contested on appeal.

§ 7B-200(c)(1); N.C.G.S. §§ 50-13.1(i), 7B-911(a) (2023) ("Upon placing custody with a parent or other appropriate person, the court shall determine whether or not jurisdiction in the juvenile proceeding should be terminated and custody of the juvenile awarded to a parent or other appropriate person pursuant to [Chapter 50].").

Here, unlike in *McMillan*, both the underlying juvenile case and the Petition involve different jurisdictional statutes under Chapter 7B, and do not involve a child custody action under Chapter 50. 267 N.C. App. at 542–43; *see also* N.C.G.S. §§ 7B-200, -1101. As our Supreme Court has established, jurisdiction for the underlying juvenile case is distinct from jurisdiction for the Petition; thus, even had the Petition been filed in the Cumberland court, jurisdiction to hear the Petition would have to have been established separately under N.C.G.S. § 7B-1101. *See In re O.E.M.*, 379 N.C. at 35, 37; *see also* N.C.G.S. §§ 7B-200, -1101; *In re A.L.L.*, 376 N.C. at 105 ("[A] trial court lacks jurisdiction over a termination petition if the requirements of N.C.G.S. § 7B-1101 have not been met, even if there is an underlying abuse, neglect, or dependency action concerning that juvenile in the district in which the termination petition has been filed."). Because the Petition does not involve a Chapter 50 child custody case, there is nothing contradictory in Cumberland County having jurisdiction over the underlying juvenile case while Brunswick County has jurisdiction over the termination action. *See In re A.L.L.*, 376 N.C. at 105. The Cumberland court therefore did not have "exclusive, original jurisdiction" over the termination action stemming from the Petition. *See* N.C.G.S. § 7B-200(a).

2. Prior Pending Action Doctrine

"Under the law of this state, where a prior action is pending between the same parties for the same subject matter in a court within the state having like jurisdiction, the prior action serves to abate the subsequent action." *Eways v. Governor's Island*, 326 N.C. 552, 558 (1990). "The ordinary test for determining whether or not the parties and causes are the same for the purpose of abatement by reason of the pendency of the prior action is this: Do the two actions present a substantial identity as to parties, subject matter, issues involved, and relief demanded?" *Cameron v. Cameron*, 235 N.C. 82, 84 (1952); *see also Jesse*, 212 N.C. App. at 438.

Here, there is no basis for requiring the Brunswick court to abate the termination of parental rights case under the prior pending action doctrine. The subject matter and issues are completely different: the underlying juvenile case in Cumberland County involves questions of guardianship for Sutton, while the termination of parental rights

case in Brunswick County involves the question of termination of Respondent-Parents' parental rights. Likewise, the relief demanded is distinct. The relief demanded under the underlying juvenile case involves only who will be the appointed guardian of Sutton; the relief demanded under the Petition involves the termination of all of Respondent-Parents' parental rights in Sutton. Because the subject matter, issues involved, and relief demanded in each action are distinct, the prior pending action doctrine does not serve to abate the termination of parental rights action. *See Cameron*, 235 N.C. at 84; *see also Eways*, 326 N.C. at 558.

Accordingly, because Cumberland County does not have "exclusive, original jurisdiction" over the termination action in Brunswick County, and the prior pending action doctrine is inapplicable under these facts, the trial court did not err in denying the GAL's motion to dismiss the Petition. *See* N.C.G.S. § 7B-200(a); *see also In re A.L.L.*, 376 N.C. at 105; *Cameron*, 235 N.C. at 84.

B. Motion to Transfer Venue

[3] The GAL next argues the Brunswick court abused its discretion in denying its motion to transfer venue because the Brunswick court did not consider the required statutory factors to transfer venue. We disagree.

"Whether to transfer venue . . . is a matter firmly within the discretion of the trial court and will not be overturned unless the court manifestly abused that discretion." *Smith v. Barbour*, 154 N.C. App. 402, 407 (2002) (citation omitted); *see also Godley Constr. Co. v. McDaniel*, 40 N.C. App. 605, 607 (1979).

The Juvenile Code provides that:

> At any time after adjudication, the court on its own motion or motion of any party may transfer venue to a different county, regardless of whether the action could have been commenced in that county, if the court finds that the forum is inconvenient, that transfer of the action to the other county is in the best interest of the juvenile, and that the rights of the parties are not prejudiced by the change of venue.

N.C.G.S. § 7B-900.1(a) (2023). Similarly, under our Civil Procedure statutes, venue may be changed "[w]hen the convenience of witnesses and the ends of justice would be promoted by the change." N.C.G.S. § 1-83(2) (2023). In light of these requirements, an abuse of discretion occurs when "the ends of justice will not merely be promoted by, but in addition demand, the change of venue[,]" or a "failure to grant the change of

venue will deny the movant a fair trial." *See Godley Constr. Co.*, 40 N.C. App. at 608–09 (citing N.C.G.S. §§ 1-84, -85 (2023)).

Here, regardless of whether the post-adjudication transfer of venue provision under our Juvenile Code, or the venue transfer provision under our general statutes, is binding, there is no showing that the "ends of justice . . . demand" a change of venue, nor that a failure to grant the change of venue will deny the GAL a fair trial. *See id.* at 608–09. The GAL's concerns about travel from Cumberland County to Brunswick County being inconvenient do not rise to the level that the "ends of justice . . . demand[ing]" a change of venue, nor is there any indication such inconvenience will deny the GAL a fair trial. *See id.* at 608–09. Further, the trial court's findings that Sutton had lived in Brunswick County for at least two years prior to the Petition, where all of the witnesses resided, and where the trial court could "hear from who's been involved in this child's life in the last two years[,]" supports that the trial court's denial of the GAL's motion to transfer venue does not rise to an abuse of discretion. *See Smith*, 154 N.C. App. at 407.

On appeal, the GAL argues that the Brunswick court did not consider the factors under N.C.G.S. § 7B-900.1(a) as to "whether the forum was inconvenient, whether transfer of the action to the other county was in [] Sutton's best interest, and whether the rights of the parties would not be prejudiced by the change of venue[,]" and did not consider any of the factors under N.C.G.S. § 1-83(2). Under N.C.G.S. § 7B-900.1(a), however, the trial court must make certain findings only if it decides to transfer venue, and not when it denies a motion to transfer venue. *See* N.C.G.S. § 7B-900.1(a). Similarly, N.C.G.S. § 1-83(2) provides for those instances when the trial court "may" change venue, but does not provide for what the trial court must consider when denying a motion to transfer venue. *See* N.C.G.S. § 1-83(2). The GAL's argument, therefore, is without merit.

Accordingly, because there is no showing the "ends of justice . . . demand" a change of venue, nor that a failure to grant the change of venue will deny the GAL a fair trial, and the Brunswick court was not required to make statutory findings, the Brunswick court did not abuse its discretion in denying the GAL's motion to transfer venue. *See Godley Constr. Co.*, 40 N.C. App. at 608–09; *see also Smith*, 154 N.C. App. at 407. We therefore affirm the Brunswick court's orders.

IV. Conclusion

Upon review, we conclude the Brunswick court did not err in denying the GAL's motion to dismiss the Petition and motion to hold the matter in abeyance, because Brunswick County properly has jurisdiction

over the termination action, and the prior pending action doctrine is inapplicable. We further conclude the Brunswick court did not abuse its discretion in denying the GAL's motion to transfer venue because the Brunswick court was not required to make statutory findings. Accordingly, we affirm the Brunswick court's orders.

AFFIRMED.

Chief Judge DILLON and Judge COLLINS concur.

YANLI JAY, Plaintiff-Appellee
v.
GARY WAYNE JAY, Defendant-Appellant

No. COA24-145

Filed 5 March 2025

Domestic Violence—protective order—findings of fact—competency of evidence—trial court's fact-finding duty

The issuance of a one-year domestic violence protective order (DVPO) against defendant on behalf of his ex-wife (plaintiff) was affirmed where competent evidence supported the trial court's findings of fact—which supported its conclusion that defendant committed acts of domestic violence against plaintiff—including that defendant committed second-degree rape when, on at least one occasion, he forced plaintiff to engage in rough sexual intercourse with him that caused her physical injury. When making its findings, the court did not delegate its fact-finding duty to plaintiff by relying on her typewritten statement (describing a violent sexual encounter with defendant) attached to her complaint and an exhibit (showing a text message exchange between the parties) that she introduced at the hearing on her DVPO motion, since the court also heard and considered testimony from both parties at the hearing. Even though plaintiff's exhibit was later determined to have been altered, the court specifically found that it was not done to willfully mislead the court and, even if the exhibit were stricken from the record, there was still ample evidence supporting the entry of a DVPO.

Judge CARPENTER dissenting.

JAY v. JAY

[298 N.C. App. 50 (2025)]

Appeal by defendant from order entered 17 August 2023 by Judge James T. Hill in Durham County District Court. Heard in the Court of Appeals 29 August 2024.

Law Offices of Matthew Charles Suczynski, by Matthew C. Suczynski, for defendant-appellant.

No brief filed for plaintiff-appellee.

ARROWOOD, Judge.

On 17 August 2023, the trial court entered a Domestic Violence Protective Order ("DVPO") in favor of Yanli Jay ("plaintiff") against her husband Gary Jay ("defendant"). Defendant filed notice of appeal on 15 September 2023.

I. Background

The parties were originally married on 15 April 2016 and separated in August 2022. Plaintiff filed a complaint and motion for DVPO on 7 June 2023, complaining of sexual abuse on several occasions, including 2 May and 9 May 2023, April 2023, 28 March 2023, 2 March 2023, and August 2022. A hearing on the motion took place on 17 August 2023, at which both parties testified.

Plaintiff stated that on 28 March 2023, defendant came to her house and without her approval, took his pants off in the living room and said "he was going to have sex with [her]." Plaintiff said "No, you can't do that[,]" but defendant "stuck his hand into [her] vagina[,]" which made plaintiff bleed. Plaintiff further stated that defendant "squeeze[d] [her] nipples[,]" which continued to hurt for two weeks. Plaintiff stated that defendant was violent "[e]very time we had the sex, it wasn't like we were husband and wife. It was like he was venting something, and it makes – it really hurt me." Plaintiff also testified that defendant rarely called her by her name, instead referring to her as "idiot, moron, bullshit, stupid, full of baloney." Plaintiff's Exhibit 1 was admitted as evidence and included the following text message exchange:

Plaintiff:	Celebrate Chinese New Year
Defendant:	You are looking better
	Now if you only really liked learning and were really interested in a real sex life
	See my sentence above- that is what I need aside from the beauty of the woman I married

Defendant testified that he had never sexually assaulted plaintiff in any way. Defendant confirmed that he had been with plaintiff on a number of the aforementioned dates, and that he had sex with her "[t]hree or four" times in the spring of 2023, but he described different circumstances than plaintiff's testimony. Defendant stated that the "[l]ast two years of the marriage were essentially nil. We had had sexual relations . . . six times in a year for two years. That's what, when I talk to patients, we call a dead bedroom." Despite this, defendant testified that he wanted to get back together with plaintiff and took her out to dinner in early April 2023. Defendant stated that after dinner, plaintiff suggested having sex and said "I did not treat you well. I want to treat you better now."

Defendant described subsequent dates in the following weeks: he averred that plaintiff sent him a text after one date "stating that she loved [him] and cherished [him] and all those things[,]" and gave him a pair of slippers after another. On a fourth date, however, defendant stated they did not have sex because he "was very depressed because [he] had been scammed on the computer and . . . lost a good bit of money from it[.]" Defendant stated that on 2 May he "just made love to her; she did not make love to me at all[,]" and on 9 May, plaintiff told him that she did not want to talk to or see him again. Defendant testified that he brought her a bouquet of roses and left.

After closing statements, the trial court found by the greater weight of the evidence that plaintiff had proven her case and subsequently entered the DVPO, effective for one year until 17 August 2024. The order included as attachments a typewritten statement by plaintiff signed on 7 May 2023 and plaintiff's Exhibit 1.

On 28 August 2023, defendant filed a motion to set aside the order and to show cause, arguing that plaintiff had presented altered evidence at trial. Defendant attached a screenshot of the text message exchange between the parties from Exhibit 1 with two messages that had been omitted from the exhibit:

> Plaintiff: Celebrate Chinese New Year
>
> [Smile Emoji]
>
> Defendant: You are looking better
>
> Now if you only really liked learning and were really interested in a real sex life
>
> Plaintiff: Gary, I still love you.
>
> Defendant: See my sentence above- that is what I need aside from the beauty of the woman I married

Following a hearing on 15 September 2023, the trial court denied defendant's motion. In the order denying the motion to set aside, the trial court found that "[i]t does appear that plaintiff's evidence regarding text was not completely accurate. Court is not convinced that it was done by plaintiff to willfully mislead the court. Even if this evidence is stricken, there is still ample evidence for the entry of the DVPO." Regarding defendant's motion to show cause, the trial court found that "[e]ven though the text given by plaintiff and testified to by plaintiff was not a complete and accurate text, the court does not feel the conduct was willful."

Defendant filed notice of appeal on 15 September 2023.

II. Discussion

Defendant argues there was insufficient evidence to support the findings made by the trial court in the DVPO. We disagree.

In reviewing a DVPO, we must determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Burress v. Burress*, 195 N.C. App. 447, 449–50 (2009) (citation omitted).

"To support entry of a DVPO, the trial court must make a conclusion of law 'that an act of domestic violence has occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223 (2012) (quoting N.C.G.S. § 50B-3(a)). N.C.G.S. § 50B-1(a) defines domestic violence as any of the following acts between parties who have shared a "personal relationship":

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

N.C.G.S. § 50B-1(a) (2022). Under N.C.G.S. § 50B-3, a trial court judge is required to issue a DVPO whenever it determines an act of domestic violence has occurred. *See D.C. v. D.C.*, 279 N.C. App. 371, 373–74 n.2 (2021) ("[I]f a trial court determines that an act qualifying as domestic violence occurred the trial court is required to issue a DVPO.").

Here, in its DVPO the trial court found that on 2 May 2022, defendant committed acts towards plaintiff satisfying all three categories under G.S. 50B-1(a). The trial court found that on 2 May 2022, defendant caused or attempted to cause bodily injury to plaintiff, placed her in fear as to inflict substantial emotional distress, and that defendant committed acts constituting second-degree rape under N.C.G.S. § 14-27.22.

In making its findings, the trial court relied on plaintiff's written statement attached to her initial complaint, in which she described how defendant forced her against her will to allow him to engage in rough sex with her on 2 May 2022 that left her injured. The trial court attached this written statement to its DVPO as an exhibit. The trial court also considered plaintiff's testimony at trial, in which she described the events. She described a sexual encounter with defendant which occurred on 28 March 2022 which would support the granting of the DVPO, including an act of sexual intercourse with defendant against her will resulting in injury. She also testified that the sex they had was "never normal" and always took a violent form that "really hurt" her and often consisted of acts plaintiff did not want to partake in.

The dissent cites *Hensey v. Hennessy*, 201 N.C. App. 56 (2009) for the proposition that this Court has approved of incorporating by reference allegations from a complaint as findings of fact in an *ex parte* DVPO, but not in a one-year DVPO. The dissent contends that the trial court effectively delegated its fact-finding duty to plaintiff by relying on plaintiff's typewritten statement and Exhibit 1, which was later found to have been altered.

However, in *Hensey*, this Court did address a one-year DVPO, specifically noting that an *ex parte* DVPO and a one-year DVPO were "independent of one another[.]" *Id.* at 66. The Court proceeded to review under N.C.G.S. § 50B-3, and "whether there was competent evidence to support the trial court's findings of fact[.]" *Id.* at 67 (citing *Burress*, 195 N.C. App. at 449–50). This Court reversed the one-year DVPO "as no evidence was presented before the trial court at the 10 March 2008 hearing[.]" *Id.* at 69.

Here, unlike *Hensey*, the trial court *was* presented with evidence to support the findings in the DVPO. In addition to the documentary evidence, the trial court heard testimony from both parties. Plaintiff stated that on 28 March 2023, defendant came to her house and without her approval, took his pants off in the living room and said "he was going to have sex with [her]." Plaintiff said "No, you can't do that[,]" but defendant "stuck his hand into [her] vagina[,]" which made plaintiff bleed.

Plaintiff further stated that defendant "squeeze[d] [her] nipples[,]" which continued to hurt for two weeks. Plaintiff stated that defendant was violent "[e]very time we had the sex, it wasn't like we were husband and wife. It was like he was venting something, and it makes – it really hurt me." Plaintiff also testified that defendant rarely called her by her name, instead referring to her as "idiot, moron, bullshit, stupid, full of baloney."

"Where the trial court sits as the finder of fact, 'and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial [court].' " *Brandon v. Brandon*, 132 N.C. App. 646, 651 (1999) (quoting *Electric Motor & Repair Co. v. Morris & Associates*, 2 N.C. App. 72, 75 (1968)).

> [This Court] can only read the record and, of course, the written word must stand on its own. But the trial judge is present for the full sensual effect of the spoken word, with the nuances of meaning revealed in pitch, mimicry and gestures, appearances and postures, shrillness and stridency, calmness and composure, all of which add to or detract from the force of spoken words.

Id. (quoting *State v. Sessoms*, 119 N.C. App. 1, 6 (1995)). The trial court's findings "turn in large part on the credibility of the witnesses, [and] must be given great deference by this Court." *Id.* at 652 (citation omitted). Accordingly, where the trial court's findings of fact are supported by competent evidence, they are binding on appeal. *Id.*

The trial court received evidence and heard testimony from both parties and had ample opportunity to consider the credibility of both parties. Although Exhibit 1 was determined to have been altered, the trial court specifically found that it was "not convinced that it was done by plaintiff to willfully mislead the court[,]" and even if the exhibit were entirely stricken from the record, "there is still ample evidence for the entry of the DVPO."

Based on the foregoing, we conclude that there was competent evidence to support the trial court's findings of fact and order through plaintiff's written statement and testimony at trial.

III. Conclusion

For the foregoing reasons, we affirm the trial court's order.

AFFIRMED.

Judge WOOD concurs.

Judge CARPENTER dissents by separate opinion.

CARPENTER, Judge, dissenting.

The events Plaintiff alleged in her typewritten statement are deeply troubling. As deplorable as Plaintiff's allegations are, it remains our duty as an error-correcting court to ensure that our trial courts adhere to established legal principles and faithfully execute their responsibilities. Anything less would be a disservice to the citizens of North Carolina. Were we to approve of the trial court's incorporation and adoption of Plaintiff's unverified statement as its findings of fact, as the majority implicitly does, we will be incentivizing behavior that violates the North Carolina Rules of Civil Procedure. What we permit, we promote. Therefore, I respectfully dissent.

The majority concludes there was competent evidence to support the trial court's findings which, in turn, support the conclusion that an act of domestic violence occurred. In reaching this conclusion, my colleagues place considerable emphasis on Plaintiff's testimony which, in their view, supported issuance of the DVPO (the "Order"). I agree with my colleagues that the evidence, viewed in isolation, could have supported findings identifying the basis for an act of domestic violence. Instead, I take issue with the trial court's purported findings themselves; not in terms of their evidentiary support but rather their sufficiency under Rule 52.

Although this Court has previously approved of a trial court incorporating by reference allegations from a *verified* complaint as findings of fact in an *ex parte* DVPO, due to the need for an expedited resolution, we have yet to address whether this practice is permissible in an order issuing a one-year DVPO. *See Hensey v. Hennessy*, 201 N.C. App. 56, 64, 685 S.E.2d 541, 547 (2009) (emphasis added).

Under the facts and circumstances of this case, the trial court failed to demonstrate that it genuinely engaged in the fact-finding process as dictated by Rule 52. The trial court's incorporation of Plaintiff's allegations from her unverified complaint into the Order constitute an improper delegation of its fact-finding duty, impeding our review under the applicable standard of review. *See In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004), *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 25 (N.C. 2013).

Simply put, the trial court adopted Plaintiff's statement as its findings of fact, instead of making findings of its own based on the evidence. In my view, the trial court's "findings" should not be considered findings at all. Therefore, this Court is not in a position to even consider whether Plaintiff's testimony supports the findings because the trial court improperly delegated its fact-finding duty. Accordingly, I would vacate the Order and remand this matter for additional findings in compliance with Rule 52.

I. Background

On 7 June 2023, Plaintiff sought an emergency *ex parte* DVPO against Defendant by filing an unverified complaint and motion for DVPO for events Plaintiff alleged occurred throughout March and May of 2023. Plaintiff attached to her Complaint a typewritten statement alleging Defendant sexually, physically, and emotionally abused her in the two years before she and Defendant separated, as well as on several occasions in the months before Plaintiff filed her complaint. Specifically, Plaintiff alleged that she and Defendant engaged in non-consensual, violent intercourse on 2 May 2023, which caused Plaintiff physical pain. The trial court issued the *ex parte* DVPO on 7 June 2023. On 17 August 2023, the trial court conducted a hearing to determine whether to issue the one-year DVPO.

Plaintiff sought to admit a screenshot of a text message exchange between Plaintiff and Defendant. While laying the foundation for authentication of the screenshot, Plaintiff testified that the image had *not* been modified in any way and was a fair and accurate depiction of the conversation she had with Defendant. Defense counsel objected, stating, "I'm going to object. I have a transcript of that conversation, and there is a line missing." Counsel consulted regarding the screenshot and then, when Plaintiff's counsel moved to enter the screenshot into evidence, defense counsel objected again stating, "I'm going to object and ask questions later, Your Honor."

The screenshot Plaintiff presented at trial depicted the following text exchange between Plaintiff and Defendant.

> **Plaintiff:** [Image] Celebrate Chinese New Year
>
> **Defendant:** You are looking better
>
> **Defendant:** Now if you only really liked learning and were really interested in a real sex life
>
> **Defendant:** See my sentence above- that is what I need aside from the beauty of the woman I married.

At the close of the hearing, before issuing its final ruling on the matter, the trial court informed the parties that it had "marked up a -- I've got a copy of the findings of fact -- or the facts alleged by the plaintiff I've marked -- Xed out to make additional findings." The trial court orally found, by the greater weight of the evidence, that Plaintiff had proven her case and then stated, "here is the order."

Using a pre-printed form, the trial court entered the Order. In the Order, the trial court concluded, by checking the corresponding boxes, that Defendant committed four acts of domestic violence on 2 May 2023. Specifically, the trial court concluded that Defendant: (1) attempted to cause bodily injury to Plaintiff, (2) placed Plaintiff in fear of imminent serious bodily injury, (3) placed Plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress, and (4) committed second-degree rape as defined in N.C. Gen. Stat. § 14-27.22.

The Order includes a section intended for the trial court to: "describe defendant's conduct." In this section, the trial court made the following finding of fact: "Violent sexual contact. [Defendant] has caused physical injury to [Plaintiff]. Exhibit A is attached for further findings of fact by the court." Using a pen, the trial court struck through various sections of Plaintiff's typewritten statement, leaving the majority of her allegations intact, and purported to incorporate the lined-through typewritten statement by reference.

After the hearing, defense counsel sent Plaintiff's counsel a screenshot of the same text message exchange. Unlike the image Plaintiff offered and authenticated at the hearing, however, this image included an additional message from Plaintiff as well as a response from Plaintiff to Defendant. The screenshot provided by defense counsel depicted the following text exchange:

> **Plaintiff:** [Image] Celebrate Chinese New Year
>
> ***Plaintiff:*** *[Smiley face emoji]*
>
> **Defendant:** You are looking better
>
> **Defendant:** Now if you only really liked learning and were really interested in a real sex life
>
> ***Plaintiff:*** *Gary, I still love you.*
>
> **Defendant:** See my sentence above- that is what I need aside from the beauty of the woman I married.

After receiving this information, Plaintiff's counsel confirmed that Plaintiff had altered the text message exchange before taking the screenshot that she presented to the trial court as Plaintiff's Exhibit 1.

Then, on 28 August 2023, Defendant filed a motion to set aside the Order and to show cause. On 15 September 2023, the trial court conducted a hearing on Defendant's motion. At the hearing, Plaintiff admitted to modifying the text exchange. The trial court denied Defendant's motion to set aside the Order and made the following finding:

> It does appear that plaintiff's evidence regarding text was not completely accurate. Court is not convinced that it was done by plaintiff to willfully mislead the court. Even if this evidence is stricken, there is still ample evidence for the entry of the DVPO.

In the order dismissing Defendant's motion to find Plaintiff in contempt, the trial court made the following finding:

> Even though the text given by plaintiff and testified to by plaintiff was not a complete and accurate text, the court does not feel the conduct was willful.

On 15 September 2023, Defendant filed notice of appeal.

II. Discussion

"When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544 (alteration in original).

As a general rule, "[i]n all actions tried upon the facts without a 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. Gen. Stat. § 1A–1, Rule 52(a)(1) (2023). In *Hensey*, however, this Court determined that an *ex parte* DVPO "need not contain findings and conclusions that fully satisfy the requirements of [Rule 52]." 201 N.C. App. at 63, 685 S.E.2d at 547.

In *Hensey*, the trial court issued an *ex parte* DVPO incorporating by reference the allegations found in the plaintiff's *verified* complaint. *Id.* at 64, 685 S.E.2d at 547 (emphasis added). Although we noted the trial court's "reference" to the plaintiff's complaint was not the preferred practice, we nonetheless determined that the trial court's incorporation was permissible given the "fundamental nature and purpose of an *ex parte* DVPO, which is intended to be entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm." *Id.* at 63, 685 S.E.2d at 547.

A one-year DVPO, unlike an *ex parte* DVPO, lacks the same sense of urgency necessitating an expedited and swift decision-making process, as an emergency *ex parte* order "[is] intended to provide a method for trial court judges or magistrates to quickly provide protection from the risks of acts of domestic violence by means of a process which is readily accessible to *pro se* complainants." *Id.* at 63, 685 S.E.2d at 546–47 (citing N.C. Gen. Stat. § 50B–2 (2007)). Additionally, a one-year DVPO does not present the same timing constraints as an *ex parte* DVPO. *Id.* at 63, 685 S.E.2d at 547 (noting that for an *ex parte* DVPO "there is simply not sufficient time to enter an order that is fully compliant with the requirements of N.C. Gen. Stat. §1A-1, Rule 52"); *see also* N.C. Gen. Stat. § 50B–3 (providing the trial court is required to conduct a hearing "within 10 days from the date of issuance of the [*ex parte* DVPO] or within seven days from the date of service of process on the other party, whichever occurs later"). Further, *ex parte* orders will generally remain in effect pending a hearing and entry of a one-year DVPO. Finally, when determining whether to issue a one-year DVPO, the trial court conducts a full adversarial hearing; a hearing for which both parties are given advance notice and an opportunity to present evidence. Accordingly, I would conclude that the trial court in this matter, as in any other civil bench trial, was required to comply with the provisions of Rule 52 when issuing the one-year DVPO because the emergent considerations discussed in *Hensey* were not implicated here. *See Hensey*, 201 N.C. App. at 62, 685 S.E.2d at 546 (noting that the Rules of Civil Procedure apply in "all actions and proceedings of a civil nature" including an action brought under Chapter 50B).

In *Hensey*, the one-year DVPO issued by the trial court was also challenged on appeal; a fact which my colleagues correctly acknowledge. *Id.* at 66, 685 S.E.2d at 548. The majority states that *ex parte* DVPOs and one-year DVPOs are "independent of one another[.]" *Id.* at 66, 685 S.E.2d at 548. I do not disagree. But this Court's discussion surrounding the one-year DVPO in *Hensey* did not concern the adequacy of the trial court's findings under Rule 52. Instead, our Court reversed the one-year DVPO because the "plaintiff presented absolutely no evidence before the trial court." *Id.* at 67, 685 S.E.2d at 549. It is on this basis that the majority seeks to distinguish this case from *Hensey*.

I agree with the majority that this case is distinguishable from *Hensey* as far as the one-year DVPO is concerned. Here, unlike in *Hensey*, Plaintiff did present evidence at the DVPO hearing, including testimony concerning the allegations in her complaint. Such evidence could have supported findings describing an act of domestic violence; however, our inquiry under our standard of review does not end with the sufficiency

of the evidence. *See id.*, at 59, 685 S.E.2d at 544. Ultimately, the majority's attempt to distinguish *Hensey*, does not undermine my conclusion that the trial court failed to find the facts in accordance with Rule 52. My discussion of *Hensey* is limited to considering its *ex parte* DVPO reasoning and logically extending it into the one-year DVPO arena.

In light of this preliminary conclusion, I next consider whether the trial court made sufficient findings of fact to support its conclusion that Defendant committed an act of domestic violence. In my view, the answer to this question is no. Rather, the trial court failed to demonstrate that it genuinely engaged in the fact-finding process as dictated by Rule 52. Furthermore, unlike the *ex parte* DVPO in *Hensey*, Plaintiff's complaint was unverified, lacking any guarantee of reliability and trustworthiness.

Specifically, "[t]o support entry of a DVPO, the trial court must make a conclusion of law 'that an act of domestic violence has occurred.' " *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (quoting N.C. Gen. Stat. § 50B–3(a) (2011)). "The conclusion of law must be based upon the findings of fact." *Id.* at 223, 726 S.E.2d at 196. "While the trial court need not set forth the evidence in detail it does need to make findings of ultimate fact which are supported by the evidence; *the findings must identify the basis for the 'act of domestic violence*.' " *Id.* at 223, 726 S.E.2d at 196 (quoting N.C. Gen. Stat. § 50B–3(a) (2011)) (emphasis added).

In *Coble v. Coble*, the North Carolina Supreme Court emphasized the core rationale behind Rule 52, stating:

> The purpose of the requirement that the court make findings of those specific facts which support its ultimate disposition of the case is to allow a reviewing court to determine from the record whether the judgment and the legal conclusions which underlie it represent a correct application of the law. The requirement for appropriately detailed findings is thus not a mere formality or a rule of empty ritual; it is designed instead "to dispose of the issues raised by the pleadings and to allow the appellate courts to perform their proper function in the judicial system."

300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (quoting *Montgomery v. Montgomery*, 32 N.C. App. 154, 158, 231 S.E.2d 26, 29 (1977)). As a result,

> Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial

> judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble, 300 N.C. at 714, 268 S.E.2d at 190.

Therefore, to comply with Rule 52, the trial court is required to "find the ultimate facts essential to support the conclusions of law," by utilizing "processes of logical reasoning, based on the evidentiary facts." *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (citations omitted). "[B]road incorporat[ion]" of complaints and other written reports from "outside sources as [] findings of fact" potentially usurps this process and may constitute an improper delegation of the trial court's fact-finding duty. *In re J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660.

Here, the trial judge usurped the process of logical reasoning required by Rule 52 by adopting Plaintiff's statement as its findings of fact. *See* N.C. Gen. Stat. § 1A-1, Rule 52. Instead of reducing its findings to writing, the trial court largely delegated this duty to an "outside source," a party who admittedly altered evidence before presenting it to the trial court and arguably perjured herself by testifying that the screenshot of the text exchange was an accurate representation of the conversation that took place between Plaintiff and Defendant. *See In re J.S.*, 165 N.C. App. at 511, 598 S.E.2d at 660. The typewritten statement attached to the Order as "Exhibit A" did have certain portions struck through, evidencing at least a cursory review. But these minor adjustments, in my view, were not sufficient to demonstrate the process of logical reasoning required by Rule 52. *See Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. By simply attaching Plaintiff's typewritten statement to the Order, the trial court did not "make findings of these specific facts which support its ultimate disposition of the case." *See Coble*, 300 N.C. at 712, 268 S.E.2d at 189. Moreover, if the trial court had complied with Rule 52, the findings would be phrased in third person from the perspective of the trial court, not in first person from the perspective of Plaintiff.

Compounding the issue, Plaintiff's complaint was unverified. "An unverified complaint is not an affidavit or other evidence," *Hill v. Hill*, 11 N.C. App. 1, 10, 180 S.E.2d 424, 430 (1971), and "cannot be relied upon as sworn testimony," *Draughon v. Harnett Cnty. Bd. of Educ.*, 158 N.C. App. 705, 709, 582 S.E.2d 343, 345 (2003). Thus, the trial court's reliance on Plaintiff's typewritten statement, which she attached to her

unverified complaint, further undermines the viability of the trial court's purported findings.

These discrepancies illustrate the pitfalls of a trial court simply adopting written allegations prepared outside of court and not admitted into evidence as an exhibit, and thus delegating its fact-finding duty. Ultimately, the trial court's near verbatim reliance on the written statement as its findings of fact does not survive appellate review.

Finally, I note that my colleagues correctly observe that it is the trial court's role, not ours, to consider the credibility of the parties when engaging in the fact-finding process. I wholly agree. If the trial court had made findings in accordance with Rule 52 in the instant case, I would defer to the trial court's credibility assessment, as the majority does. My position is that the trial court's findings are inadequate, and we are unable to reach the question of whether they were supported by competent evidence.

III. Conclusion

In my view, the trial court failed to specifically find the facts in accordance with Rule 52. The trial court's reference-based approach to fact-finding is not only a disfavored practice, it is a shortcut compromising quality and impeding appellate review. It is not unreasonable to require the trial court to take the time necessary to reduce its findings to writing as required by Rule 52. I would hold the trial court's incorporation of Plaintiff's unverified, typed statement in the Order as support for its conclusion that Defendant committed an act of domestic violence was an improper delegation of the trial court's fact-finding duty. The trial court's remaining findings—that Defendant engaged in "violent sexual contact" with Plaintiff and "caused physical injury to [Plaintiff,]"—are conclusory. Without more links in the chain of reasoning, these findings are insufficient to determine whether the Order was warranted. Accordingly, I would vacate the Order and remand for additional findings as required by Rule 52 of the North Carolina Rules of Civil Procedure. I respectfully dissent.

PARADIGM PARK HOLDINGS, LLC, PLAINTIFF
v.
GLOBAL GROWTH HOLDINGS, INC., A DELAWARE CORPORATION,
F/K/A ACADEMY ASSOCIATION, INC., DEFENDANT

No. COA24-482

Filed 5 March 2025

1. Contracts—commercial lease dispute—breach of contract—nonpayment of rent—implied waiver by conduct

In a breach of contract action brought by a commercial landlord (plaintiff) against a business tenant (defendant) for nonpayment of rent, the trial court erred by granting summary judgment to plaintiff where genuine issues of material fact existed regarding whether plaintiff waived its right to collect rent from defendant. Where evidence was presented that plaintiff accepted other payments defendant made on its behalf—including nearly fifty mortgage payments and maintenance and operational expenses—in lieu of formal rental payments for approximately four years, plaintiff's acceptance of the arrangement constituted an intentional, albeit implied, waiver which led defendant to believe that its payments were a satisfactory substitute for monthly rent. Therefore, the trial court erred by granting summary judgment in favor of plaintiff on its breach of contract claim.

2. Unjust Enrichment—counterclaim—commercial lease dispute—nonpayment of rent—extra-contractual payments and services—dismissal inappropriate

In a breach of contract action brought by a commercial landlord (plaintiff) for nonpayment of rent against its tenant (defendant), where the trial court had erroneously granted summary judgment in favor of plaintiff on the breach of contract claim, the trial court also erred by dismissing defendant's counterclaim for unjust enrichment. Although there was a valid contract between the parties, under which defendant was obligated to make monthly rental payments, where defendant alleged that it had conferred benefits on plaintiff—mortgage payments, payment of maintenance and other expenses, and additional services accepted by plaintiff in lieu of rent for nearly four years—beyond what was required by the lease and which, thus, were extra-contractual, in the event defendant was found to be in breach of the lease, it was entitled to present evidence of the benefits accepted by plaintiff in support of the equitable remedy of unjust enrichment.

Appeal by Defendant from judgments entered 1 February 2024 and 13 March 2024 by Judge Brian C. Wilks in Durham County Superior Court. Heard in the Court of Appeals 28 January 2025.

Longleaf Law Partners, by Benjamin L. Worley, for the plaintiff-appellee.

Fox Rothschild LLP, by Matthew Nis Leerberg, and Condon Tobin Sladek Thornton Nerenberg PLLC, by Aaron Z. Tobin and Jared T.S. Pace, Pro Hac Vice, for the defendant-appellant.

WOOD, Judge.

Paradigm Park Holdings, LLC ("Paradigm Park") initiated this action against Global Growth Holdings, Inc. ("Global Growth"), alleging Global Growth did not pay rent according to the parties' lease agreement. Paradigm Park sued for breach of contract, and alternatively, *quantum meruit*. Global Growth asserted defenses and filed a counterclaim for unjust enrichment. Following cross summary judgment motions, the trial court granted Paradigm Park's motion, dismissed Global Growth's counterclaim, and awarded attorneys' fees to Paradigm Park. Global Growth appeals, arguing the trial court erred by granting summary judgment in favor of Paradigm Park and by dismissing its counterclaim for unjust enrichment. For the reasons discussed below, we reverse the trial court's judgment.

I. Factual and Procedural Background

On 9 February 2018, Paradigm Park was formed as a North Carolina limited liability company. Global Growth, previously Academy Association, Inc., is a Delaware corporation with a principal place of business in Durham County, North Carolina. Paradigm Park and Global Growth were affiliated entities, both owned and controlled by Greg Lindberg. Mr. Lindberg was the sole manager of Paradigm Park and was the president of Global Growth.

Paradigm Park was established as a single-purpose entity to own a property comprising two office buildings in Durham County (the "Property"). It existed solely to hold the Property, and the revenue generated from its management. To purchase the Property, Paradigm Park borrowed funds from Fifth Third Bank (the "Bank") and thereafter provided the Bank with a promissory note and Deed of Trust on the Property. At the time of purchase, part of the Property was subject to two leases with existing tenants. As a condition of financing, the Bank

required Paradigm Park to secure an additional tenant. Subsequently, Mr. Lindberg caused Global Growth to enter into a lease agreement for the remaining portion of the Property.

On 11 May 2018, Paradigm Park executed a "Commercial Lease Agreement" (the "Lease") with Global Growth for a five-year term from May 2018 to May 2023. The Lease consisted, *inter alia*, of the following terms: Paradigm Park, as the landlord, would lease 141,441 square feet of the Property to Global Growth; Global Growth, as the tenant, would pay $3,182,422.50 per year, or $265,201.88 per month, in rent to Paradigm Park. Mr. Lindberg signed the Commercial Lease Agreement on behalf of both entities.

Under the terms of the Lease, Paradigm Park was responsible for "capital repairs and replacements" on the Property, including repairs to the roof, foundation, structural supports, and exterior walls. Likewise, Paradigm Park was required to maintain the heating, ventilation and air condition systems, and as necessary, pay for repairs to the units. Global Growth was required, at its expense, to maintain the condition of the Property, including general landscaping. Paradigm Park was also responsible for the payment of taxes on the Property, as well as payment for commercial, general liability, and other necessary insurance. Global Growth was required to reimburse Paradigm Park for the respective insurance payments within fifteen days of receipt of notice of amounts due. The Lease did not specify which entity was responsible for utilities, janitorial services, trash services, the sprinkler system, pest control, or other miscellaneous items for the Property.

During the term of the Lease, Global Growth did not make any rent payments to Paradigm Park. Instead, in lieu of rent payments, Global Growth paid Paradigm Park's monthly mortgage payments to the Bank from approximately May 2018 to April 2022. Additionally, Global Growth paid the Property's operating and maintenance expenses for Paradigm Park, notwithstanding the terms of the Lease agreement. This arrangement continued for several years.

In September 2020, new management took over control of Paradigm Park and the parties to the Lease became unaffiliated entities.[1] Upon

1. On 30 June 2017, PB Life and Annuity Co., Ltd. ("PBLA") created the "PBLA ULICO 2017 TRUST" (the "Trust"), pursuant to a "Reinsurance Trust Agreement" ("RTA"), between PBLA, as the grantor, Universal Life Insurance Company ("ULICO"), as the sole beneficiary, and TMI Trust Company ("TMI") as the trustee. According to the RTA, PBLA was required to maintain a threshold amount of funds in the Trust in order for ULICO to make payments to its policyholders. At that time, PBLA was owned by Mr. Lindberg.

reviewing the Lease and associated records, the new management discovered Global Growth had not been making rent payments. On 24 January 2022, Paradigm Park sent Global Growth a notice of default because of its failure to make rent payments according to the terms of the Lease. The notice acknowledged Global Growth's monthly mortgage payments in lieu of rent, but alleged Global Growth owed an outstanding balance of $9,239,563.89 because the monthly mortgage payment was less than the monthly rent payment. After receiving the notice of default, Global Growth did not make any payments. On 16 February 2022, Paradigm Park notified Global Growth of the termination of the Lease and its intent to take possession of the Property. On 25 March 2022, Durham County Magistrate's Court granted Paradigm Park's motion for summary ejectment, and Global Growth was evicted on 18 April 2022.

On 18 May 2022, Paradigm Park sent another demand for payment, but Global Growth did not respond. On 15 June 2022, Paradigm Park filed the current action, asserting claims for breach of contract, and alternatively, *quantum meruit*. In its breach of contract claim, Paradigm Park alleged Global Growth breached the Lease by failing to pay rent payments totaling $14,308,971.80. In its alternative claim of *quantum meruit*, Paradigm Park alleged Global Growth owed $8,209,325.69 for the value of the services it provided while Global Growth occupied the Property during the period of May 2018 through April 2022. Additionally, Paradigm Park asserted claims for attorney's fees pursuant to the terms of the Lease. On 29 August 2022, Global Growth filed an answer asserting numerous defenses and a counterclaim for unjust enrichment. In its counterclaim, Global Growth asserted it provided benefits valued at $8,200,000.00 to Paradigm Park in the form of mortgage payments, property management costs, and other maintenance expenses for the upkeep of the Property during the time at issue. Accordingly, Global Growth sought to recover from Paradigm Park the full amount of these benefits.

On 8 September 2023, Paradigm Park moved for partial summary judgment on its breach of contract claim and on Global Growth's counterclaim for unjust enrichment. Global Growth filed a cross-motion for summary judgment. By order entered 10 January 2024, the trial court

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In December 2018, the assets in the Trust had taken a loss. To recover, Global Growth conveyed one hundred percent of the common ownership and fifty percent of the preferred equity in Paradigm Park to PBLA. PBLA then transferred its ownership interests in Paradigm Park to the Trust. PBLA subsequently entered liquidation proceedings in Bermuda. The appointed provisional liquidators for PBLA thereafter assumed control of the proceedings and the authority to act on behalf of Paradigm Park.

granted Paradigm Park's partial motion for summary judgment for breach of contract and denied Global Growth's motion for summary judgment. The trial court found Global Growth breached the Lease, there were no material issues of fact concerning Global Growth's liability pursuant to the breach of contract claim, and Paradigm Park was entitled to judgment as a matter of law. The trial court dismissed Global Growth's counterclaim for unjust enrichment.

Subsequently, the parties entered into a consent stipulation regarding damages resulting from Global Growth's breach of contract, with Global Growth reserving its right to appeal from the trial court's judgment. The parties stipulated to damages in the amount of $8,500,000.00. Accordingly, on 1 February 2024, the trial court entered summary judgment awarding Paradigm Park $8,500,000.00, pursuant to the parties' stipulation regarding damages resulting from the breach of contract claim. The trial court further allowed Paradigm Park to notice a motion for consideration of attorneys' fees.

The parties stipulated to reasonable attorneys' fees in the amount of $120,000.00 for Paradigm Park. Thereafter, the trial court entered an amended judgment on 13 March 2024, consistent with the stipulation on attorneys' fees. The amended judgment awarded Paradigm Park $4,860.85 in costs; $120,000.00 in attorney's fees; $1,425,205.48 in pre-judgment interest, accruing at the rate of $1,863.01 per day until judgment is entered; and post-judgment interest at the rate of eight percent per annum from the date of judgment until paid in full.

Global Growth filed written notice of appeal on 1 March 2024 from the trial court's judgment entered on 1 February 2024. On 11 April 2024, Global Growth filed a notice of appeal on the trial court's amended judgment entered on 13 March 2024.

II. Analysis

On appeal, Global Growth challenges the trial court's granting of partial summary judgment in favor of Paradigm Park and dismissal of its counterclaim for unjust enrichment. Specifically, Global Growth argues: (1) summary judgment on Paradigm Park's breach of contract claim was improper because there are material issues of fact as to its affirmative defense of waiver; (2) the trial court erroneously dismissed its counterclaim for unjust enrichment; and (3) the trial court lacked jurisdiction when it entered the amended judgment because it was entered after Global Growth filed notice of appeal to this Court.

"Summary judgment is appropriate if 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *Forbis v. Neal*, 361 N.C. 519, 523-24, 649 S.E.2d 382, 385 (2007) (citation omitted). A party satisfies this burden by: "(1) proving that an essential element of the plaintiff's case is nonexistent, or (2) showing through discovery that the plaintiff cannot produce evidence to support an essential element of his or her claim, or (3) showing that the plaintiff cannot surmount an affirmative defense which would bar the claim." *James v. Clark*, 118 N.C. App. 178, 180-81, 454 S.E.2d 826, 828 (1995) (citation omitted).

A genuine issue of material fact exists when "the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Mace v. Utley*, 275 N.C. App. 93, 98-99, 853 S.E.2d 210, 214 (2020) (citations omitted). Stated differently, it is "one which can be maintained by substantial evidence." *Id*. The trial court is not permitted to resolve issues of fact, and the evidence must be viewed in the light most favorable to the nonmoving party. *Neal*, 361 N.C. App. at 524, 649 S.E.2d at 385.

"Our standard of review of an appeal from summary judgment is *de novo*; such judgment is appropriate only when the record shows that 'there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.' " *McLennan v. Josey*, 234 N.C. App. 45, 47, 758 S.E.2d 888, 890 (2014) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Smith v. Cnty. of Durham*, 214 N.C. App. 423, 430, 714 S.E.2d 849, 854 (2011) (cleaned up).

A. Waiver

[1] Global Growth first argues the trial court erred by granting Paradigm Park's motion for summary judgment when issues of material fact on whether Paradigm Park waived its right to collect rent from Global Growth existed. Global Growth asserts Paradigm Park waived this right by its conduct of accepting mortgage payments, and other payments and services in lieu of formal rent for approximately four years.

Waiver is defined as "an intentional relinquishment or abandonment of a known right or privilege." *Bombardier Cap., Inc. v. Lake Hickory Watercraft, Inc.*, 178 N.C. App. 535, 540, 632 S.E.2d 192, 196 (2006) (cleaned up). This Court has defined the elements of waiver as: "(1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit." *Demeritt v. Springsteed*, 204 N.C. App. 325, 328-29, 693 S.E.2d 719,

721 (2010) (citation omitted). Further, "[a] waiver may be express or implied." *Medearis v. Trustees of Meyers Park Baptist Church*, 148 N.C. App. 1, 11, 558 S.E.2d 199, 206 (2001) (citation omitted). It is undisputed that Paradigm Park did not expressly waive the right to collect rent from Global Growth; rather, the issue here is whether there was an implied waiver by conduct.

Whether a waiver is express or implied, "[t]here must always be an *intention* to relinquish a right, advantage, or benefit." *In re Pedestrian Walkway Failure*, 173 N.C. App. 254, 265, 618 S.E.2d 796, 804 (2005). The intention to waive may be implied "when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.' " *Medearis*, at 12, 558 S.E.2d at 206-07 (citation omitted). The elements for implied waiver are:

> (1) The waiving party is the innocent, or non-breaching party, and
>
> (2) The breach does not involve total repudiation of the contract so that the nonbreaching party continues to receive some of the bargained-for consideration. . . .
>
> (3) The innocent party is aware of the breach, and
>
> (4) The innocent party intentionally waives his right to excuse or repudiate his own performance by continuing to perform or accept the partial performance of the breaching party.

Wheeler v. Wheeler, 299 N.C. 633, 639, 263 S.E.2d 763, 766-67 (1980).

Global Growth and Paradigm Park agree that the first three elements of implied waiver are met. Therefore, we turn our attention to whether the fourth element is met, namely did Paradigm Park intentionally waive its right to collect rent payments from Global Growth under the Lease agreement when it accepted Global Growth's payments of mortgage, maintenance and operational expenses in lieu of rent for approximately four years?

In support of its argument, Global Growth cites a recent decision of this Court, *Town of Forest City v. Florence Redevelopment Partners, LLC*, 292 N.C. App. 86, 896 S.E.2d 653 (2024). There, the Town of Forest City ("Town") contracted with Florence Redevelopment Partners ("Florence") to purchase the Florence Mill building, a historic property located in the Town. *Id.* at 88, 896 S.E.2d at 655. The contract contained an "inspection period" provision whereby Florence was required to deliver to the Town

a "Notice of Suitability" prior to the expiration of the inspection period. The Notice of Suitability served as notice to the Town that Florence was satisfied with the results of the inspections of the building. If Florence failed to deliver the Notice of Suitability to the Town prior to the expiration of the inspection period, the contract automatically terminated. Subsequently, Florence delivered its Notice of Suitability twenty-eight days after the "inspection period" contract deadline. Despite Florence's late notice, the Town continued to fulfil its obligations under the contract until more than a year later, it sent Florence a notice of termination.

The trial court granted summary judgment in favor of the Town, reasoning that the contract had automatically terminated upon Florence's failure to deliver timely Notice of Suitability. *Id.* at 91, 896 S.E.2d at 656-57. Florence appealed, and this Court contemplated whether the Town waived the Notice of Suitability deadline when it continued to perform under the contract. This Court first noted, "[i]t has long been the law in North Carolina that '[t]he provisions of a written contract may be modified *or waived* . . . by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived.' " *Id.* at 95, 896 S.E.2d at 658. The undisputed facts in *Town of Forest City* showed that the Town accepted Florence's notice twenty-eight days after the deadline passed; after acceptance, the Town "continued to perform and accept Florence's performance *for more than a year after the deadline*[;]" the parties maintained contact with one another and negotiated matters concerning the building; and more than one year after the Town accepted the untimely notice, the Town sent the notice of termination to Florence. This Court concluded, "The undisputed facts establish conduct that naturally would lead Florence to believe that the Town had dispensed with its right to insist that the Notice of Suitability be delivered by [the expiration of the inspection period]. Accordingly, the trial court erred by granting the Town summary judgment[.]" *Id.* at 96, 896 S.E.2d at 659.

Global Growth argues the present case is analogous to *Town of Forest City*. We agree. First, Paradigm Park did not seek to collect rent from Global Growth per the Lease agreement from May 2018 to January 2022, when it sent the notice of default. During this time, Global Growth made approximately fifty mortgage payments on behalf of Paradigm Park. Second, Paradigm Park was required to keep the building in "good order" and make "capital" repairs; however, because Paradigm Park did not have employees, Global Growth's employees maintained the building and paid for its upkeep. Global Growth paid for the Property's sprinkler system; it paid for pest control; it spent a substantial amount of

money repairing the Property's sewer line; and it installed a security system on the Property. Likewise, Global Growth paid for utilities and service contracts, and other expenses necessary to maintain the Property, even though it was not obligatory.

Lastly, from 2018 to 2022, Paradigm Park appeared to accept this arrangement, as it continuously accepted the benefits provided by Global Growth and never demanded what was agreed upon in the Lease. As in *Town of Forest City*, the undisputed facts establish conduct that naturally would lead Global Growth to believe Paradigm Park had dispensed with its right to collect monthly rent payments. Paradigm Park accepted Global Growth's payments of the mortgage, maintenance and operational expenses, and overall upkeep of the Property in lieu of rental payments for *several years*.

On the other hand, Paradigm Park contends that the record contains no evidence of an intent to waive the right to collect rent. It points to several email exchanges between Mr. Lindberg and other executives, where certain expenses and payments were discussed. Additionally, Paradigm Park directs this Court to its own cash flow statement, which reflected an intercompany receivable in the amount of $265,201.88 per month, the rental payment under the Lease. None of this evidence addresses Paradigm Park's *conduct* of allowing Global Growth to continue making monthly payments on the mortgage, and performing costly maintenance on the Property, for years in lieu of rent.

Contrary to Paradigm Park's position, waiver is "is a question of intent, which may be inferred from a party's conduct." *Harris & Harris Const. Co. v. Crain & Denbo, Inc.*, 256 N.C. 110, 119, 123 S.E.2d 590, 596 (1962). Here, the evidence tends to show that Paradigm Park, by its conduct, led Global Growth to believe it had dispensed with its right to collect rent. Specifically, Paradigm Park's conduct led Global Growth to believe that payments on the mortgage and payments to upkeep the Property were satisfactory in lieu of monthly rent. *See Medearis*, 148 N.C. App. at 12, 558 S.E.2d at 206-07 (the intention to relinquish a right is implied "when a person dispenses with a right 'by conduct which naturally and justly leads the other party to believe that he has so dispensed with the right.' "). Accordingly, the trial court erred in granting summary judgment in favor of Paradigm Park on its breach of contract claim.

B. Unjust Enrichment

[2] Next, Global Growth argues the trial court erred when it dismissed its counterclaim for unjust enrichment, as it made payments and performed services beyond those required under the Lease.

"In order to recover on a claim of unjust enrichment, a party must prove that it conferred a benefit on another party, that the other party consciously accepted the benefit, and that the benefit was not conferred gratuitously or by an interference in the affairs of the other party." *Se. Shelter Corp. v. BTU, Inc.*, 154 N.C. App. 321, 330, 572 S.E.2d 200, 206 (2002) (citation omitted). "A claim of this type is neither in tort nor contract but is described as a claim in quasi contract or a contract implied in law." *Hinson v. United Fin. Servs., Inc.*, 123 N.C. App. 469, 473, 473 S.E.2d 382, 385 (1996) (citation omitted). This Court has consistently held, "if there is a contract between the parties, the contract governs the claim, and the law will not imply a contract." *Delta Env't Consultants of N. Carolina, Inc. v. Wysong & Miles Co.*, 132 N.C. App. 160, 165, 510 S.E.2d 690, 694 (1999) (cleaned up). Stated differently, "[o]nly in the absence of an express agreement of the parties will courts impose a quasi-contract or a contract implied in law in order to prevent an unjust enrichment." *Whitfield v. Gilchrist*, 348 N.C. 39, 42, 497 S.E.2d 412, 415 (1998) (citation omitted). "Therefore, the focus in the *quantum meruit* context is on whether there is an express contract on the subject matter at issue and not on whether there was a contract between the parties." *Cabrera v. Harvest St. Holdings, Inc.*, 284 N.C. App. 227, 234, 876 S.E.2d 593, 599 (2022) (cleaned up).

Global Growth argues it conferred three extra-contractual benefits on Paradigm Park: (1) the payment of the mortgage on the Property; (2) the payment of maintenance, utilities, services, and equipment on the Property; and (3) Global Growth's use of its employees to manage the Property since Paradigm Park had none.

As an initial matter, we observe that the Lease constitutes an express contract between Global Growth and Paradigm Park. It contains provisions for the payment of the services and expenses from which Global Growth seeks to recover. For example, the Lease included the following sections: rental payments and the Lease term; utility bills and service contracts; taxes and insurance; repairs by the landlord and tenant; alterations to the Property; and remedies. *See Gregory v. Pearson*, 224 N.C. App. 580, 586, 736 S.E.2d 577, 581 (2012) ("It is a well-established principle that an express contract precludes an implied contract with reference to the same matter.") (citation omitted).

However, the benefits for which Global Growth's complaint seeks compensation are extra-contractual. The Lease did not obligate Global Growth to make mortgage payments; rather, it required Global Growth to pay $265,201.88 in monthly rent. The Lease did not require Global Growth to pay for utilities and certain services, yet Global Growth paid for these

expenses. Likewise, Paradigm Park was responsible for major repairs and maintenance to the Property but, instead, Global Growth paid for these expenses and utilized its employees to manage and maintain the Property.

We turn now to address the purpose of the equitable remedy of unjust enrichment. "The hallmark rule of equity is that it will not apply 'in any case where the party seeking it has a full and complete remedy at law.' " *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385 (citation omitted). "Unjust enrichment has been described as: the result or effect of a failure to make restitution of, or for, property or benefits received under such circumstances as to give rise to a legal or equitable obligation to account therefor." *Watson Elec. Const. Co. v. Summit Companies, LLC*, 160 N.C. App. 647, 652, 587 S.E.2d 87, 92 (2003) (citation omitted). The doctrine is "based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another." *Hinson*, 123 N.C. App. at 473, 473 S.E.2d at 385 (citation omitted). Likewise, the remedy is proper "in circumstances such that it would be 'unfair' for the recipient to retain the benefit of the claimant's services." *Watson Elec. Const. Co.*, 160 N.C. App. at 652, 587 S.E.2d at 92 (citation omitted).

It would be inequitable to allow Paradigm Park to retain Global Growth's payments and services, allegedly in the amount of $8,200,000.00, without compensating Global Growth. The mortgage payments, property management costs, and other maintenance expenses were not Global Growth's obligations under the terms of the Lease. Paradigm Park accepted these benefits at the expense of Global Growth without objection for nearly four years. Thus, if Global Growth is found to have breached the Lease Agreement, then it must have its day in court to put forth evidence to support its counterclaim for unjust enrichment. This holding is consistent with the purpose of the doctrine of unjust enrichment. Accordingly, the trial court erred by dismissing Global Growth's counterclaim for unjust enrichment.

III. Conclusion

For the foregoing reasons, we conclude the trial court erred by granting summary judgment on Paradigm Park's breach of contract claim and erred by dismissing Global Growth's counterclaim for unjust enrichment. We reverse the trial court's summary judgment order and vacate the resulting final judgment entered 1 February 2024 and remand to the trial court for further proceedings not inconsistent with this opinion. It is so ordered.

REVERSED, VACATED, AND REMANDED.

Judges COLLINS and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
CYNTHIA ANNE DRISCOL FEARNS, DEFENDANT

No. COA23-650

Filed 5 March 2025

1. Appeal and Error—preservation of issues—criminal case—due process violation—substitute judge's authority to sign written order

In a criminal case where defendant moved to dismiss a charge for embezzlement, arguing that the State's more than ten-year delay in prosecuting her violated her Fifth Amendment due process rights, and where the order denying her motion was signed by a substitute judge after the judge who originally presided over the case had retired, defendant preserved for appellate review: (1) the Fifth Amendment issue, by filing her motion to dismiss, presenting evidence in support of her motion at a hearing, and receiving an oral ruling on the motion (from the original judge); and (2) her argument challenging the substitute judge's authority to sign the order, by filing a "Notice of Exception" to the order, renewing her motion to dismiss at trial, and timely filing her notice of appeal from the order after a final judgment was entered in the case. The State's argument that defendant should have done more to preserve the second issue was meritless, since the original judge had directed the State at the hearing to prepare the written order, which defendant could not have anticipated would later be signed by a different judge without a new hearing.

2. Judges—motion to dismiss criminal charge—orally denied—written order signed by substitute judge—without new hearing—order deemed a nullity

In a criminal case where the presiding trial judge retired nine months after orally denying defendant's motion to dismiss a charge for embezzlement, and where the written order memorializing the oral ruling was signed by a substitute judge, the written order was vacated and the matter was remanded because the substitute judge lacked authority to sign the order without holding a new hearing. Although the substitute judge cited Civil Procedure Rule 63 as authority for signing in place of the now-retired judge, the Rules of Civil Procedure do not apply to criminal cases. Since there was no other legal basis for allowing the substitute judge to sign the order without holding a new hearing, the order was a nullity.

Judge STADING concurring in a separate opinion.

Appeal by defendant from judgment entered 7 April 2022 by Judge John M. Dunlow in Superior Court, Granville County. Heard in the Court of Appeals 12 February 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Derrick C. Mertz, for the State.

Drew Nelson for defendant-appellant.

STROUD, Judge.

Defendant appeals her conviction of embezzlement, contending the pre-accusation delay between the time the investigation started and the date she was charged violated her Fifth Amendment right to due process. Defendant also argues the trial court did not have authority to enter the Order denying her motion to dismiss under Rule 63 of the North Carolina Rules of Civil Procedure since the Order was not entered by the superior court judge who held the hearing and rendered a ruling at the hearing. The trial court did not hold a new hearing on Defendant's motions to dismiss but entered a written order including detailed findings of fact and conclusions of law, purporting to rely upon Rule 63 of the Rules of Civil Procedure. Rule 63 of the Rules of Civil Procedure does not apply to criminal cases, so the trial court did not have authority to enter the order based on Rule 63. We have been unable to identify any legal basis for Judge Dunlow's authority to enter the Order on behalf of Judge Fox, so this matter must be remanded to the trial court for a new hearing and entry of a new order making appropriate findings of fact and conclusions of law. We vacate the trial court's Order denying Defendant's motion to dismiss and remand this matter to the trial court for re-hearing of Defendant's motion to dismiss.

I. Background

On or about 9 June 2008, Lieutenant Cates with the Creedmoor Police Department received a report from attorney David Vesel that "an employee that was working for him had embezzled approximately $50,000 from some trust funds." The employee who allegedly embezzled from Mr. Vesel's law firm ("the Law Firm") was Defendant. Lieutenant Cates interviewed Defendant, who explained she recently filed a complaint with the North Carolina State Bar ("State Bar") regarding Mr. Vesel's trust accounting practices in the Law Firm. As Lieutenant Cates

did not have adequate experience dealing with complex financial crimes, he requested help from the North Carolina State Bureau of Investigation ("SBI") and Agent Robin Todd took over the case in July 2008.

For a variety of reasons, including the retirement of the State Bar employee who was first in charge of the trust account investigation; the need to interview Defendant, Mr. Vesel, and other individuals; the process of obtaining records from the State Bar; and the assignment of new prosecutors throughout the case, charges were not brought until 2019. Defendant was indicted for embezzlement on 22 January 2019, over ten years after the Creedmoor Police Department first received the report.

On or about 21 August 2019, Defendant filed a "Motion to Dismiss for Failure of the State to Timely Prosecute: Specifically the Pre-accusation Delay[.]" (Capitalization altered.) Central to Defendant's motion was the claim that many documents related to the case were no longer available and the documents were never in Defendant's possession. The motion was heard on 24 January 2020 before Superior Court Judge Carl Fox. After the hearing, Judge Fox gave an oral rendition of his ruling, stating "there is actual prejudice to . . . Defendant in this case. But what I cannot say is the delay was inexcusable and intentional" and "there's no question that there is delay, but there's just nothing before this [c]ourt . . . that this was done deliberately and unnecessarily and that it was to gain an advantage in this case, and therefore the motion is denied[;]" Judge Fox instructed the State to draft the written order. On 1 October 2020, Judge Fox retired from his position as a superior court judge.[1]

Almost two years after the hearing, on 13 September 2021, the "Order Denying [Defendant's] Motion to Dismiss" ("the Order") was filed. It was signed by Superior Court Judge John Dunlow. Attached to the Order was a page that stated "[t]his Order being issued by the Honorable Carl R. Fox, Jr. on the 21st day of January, 2020 and pursuant to N.C.G.S. 1A-1-Rule 63, signed by the Honorable John M. Dunlow on September 13, 2021."

Defendant's case came on for trial on 28 March 2022. The jury returned a guilty verdict on the embezzlement charge on 5 April 2022. Judgment was entered on 7 April 2022 sentencing Defendant to an

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1. While Judge Fox's exact date of retirement is not in our record, we take judicial notice of this fact as it is "not subject to reasonable dispute" and is both "generally known within the territorial jurisdiction of the trial court" and "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." N.C. Gen. Stat. § 8C-1, Rule 201 (2023).

active term of imprisonment. Defendant gave oral notice of appeal in open court.

II. Authority of the Trial Judge to Sign the Written Order

Defendant argues "the written order denying the motion to dismiss must be vacated because Judge Dunlow did not have the authority to sign the Order without first holding a hearing on the motion" and "Judge Dunlow erred by issuing written findings of fact and conclusion[s] of law that were not made by Judge Fox." As both Defendant and the State recognize, we review the issue of whether Judge Dunlow had authority to enter the order under Rule 63 *de novo* since it is a question of law. *See In re E.D.H.*, 381 N.C. 395, 398, 873 S.E.2d 510, 513 (2022) ("The North Carolina Rules of Civil Procedure are part of the General Statutes. Accordingly, interpreting the Rules of Civil Procedure is a matter of statutory interpretation. A question of statutory interpretation is ultimately a question of law for the courts. We review conclusions of law de novo." (citations and quotation marks omitted)).

A. Preservation

[1] The State does not present any substantive argument in support of Judge Dunlow's authority to enter the Order without holding a new hearing but instead addresses only whether Defendant properly preserved this argument and Defendant's other arguments regarding the findings of fact and conclusions of law.

The State contends Defendant did not preserve this issue for appellate review. Specifically, the State argues under Rule 10 of our Rules of Appellate Procedure, "a party making a motion in the trial court bears the responsibility of obtaining a ruling sufficient to preserve the matter for review" and "[t]here is nothing in the Record suggesting that [D]efendant sought to have Judge Fox reduce his ruling to writing at any time before his retirement." In her reply brief, Defendant contends she "fully complied with . . . Rule 10. She filed her motion to dismiss, she produced evidence in support of the motion and sought to persuade Judge Fox, and she received a ruling on her motion at the conclusion of the hearing." She also noted her exception to Judge Fox's ruling upon rendition and requested a transcript of the hearing. Judge Fox directed the State to prepare the Order, and the State responded, "Yes, sir, I will."

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states "[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court

to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). It is clear Defendant properly objected under the Fifth Amendment to the pre-accusation delay as she filed a motion raising this issue and presented evidence at the hearing on the motion to dismiss. Thus, Defendant's arguments as to the merits of the findings and conclusions of law in the Order are preserved. *See id.*

Further, the State argues "[t]here is nothing in the Record suggesting that [D]efendant sought to have Judge Fox reduce his ruling to writing at any time before his retirement." But as Defendant notes in her reply, at the conclusion of the hearing Judge Fox instructed the State to prepare the Order denying the motion to dismiss and the State accepted that responsibility. The State effectively argues that Defendant should have taken action to make the State fulfill its duty to prepare the Order as directed by Judge Fox; this argument is somewhat ironic since Defendant's motion to dismiss was based on the State's delay in pursuing her prosecution. The State contends that Defendant should have "sought to have Judge Fox reduce his ruling to writing . . . before his retirement." But Defendant cannot be required to object to an issue that has not yet occurred; Defendant would have no way to anticipate that a judge who did not hear the motion would sign an order without requiring a new hearing. On 24 January 2024, Judge Fox directed the State to prepare the Order for his signature, and Judge Fox retired almost 9 months later.

The State also faults Defendant because "in the over two years from January 2020 through trial, [D]efendant did not seek a new hearing or present any additional evidence on her motion as forecast." The State cites no legal basis upon which Defendant may have been able to request that the trial court hold a new hearing on a motion Judge Fox had already heard or Judge Dunlow had already entered an order upon, depending upon the point during the two years it claims Defendant had this option.

Then the State goes further and argues that Defendant did not object properly or sufficiently after Judge Dunlow signed the Order to preserve the issue for appellate review. But Defendant made her intent to appeal the Order clear by filing a "Notice of Exception to Order Entered [September] 13, 2021[,]" (capitalization altered), specifically excepting to the Order "because the [O]rder makes multiple findings of facts contrary to the transcript of the hearing[.]" Defendant also excepted to Conclusion of Law 7, that "Defendant has not established actual and substantial prejudice from the pre-accusation delay" because Judge Fox made "the finding of fact that there is actual prejudice to . . . Defendant

in this case." The State contends that since Defendant did not specifically note her exception based upon Judge Dunlow's lack of authority to enter the Order after Judge Fox's retirement, she has failed to preserve the issue for review. But the State does not identify any statute or case applicable to criminal appeals in support of its argument. Instead, throughout its argument, the State relies in large part on civil cases using Rules of Civil Procedure not applicable to a criminal case. The State has not identified, and we have been unable to find, any law requiring Defendant to file her "Notice of Exception" in this particular situation or requiring that Defendant preserve this issue for appeal in a manner other than filing a timely notice of appeal from the final judgment. *See* N.C. Gen. Stat. § 7A-27(b) (2023) ("[A]ppeal lies of right directly to the Court of Appeals in any of the following cases: (1) From any final judgment of a superior court[.]").

We also note Defendant did renew her motion to dismiss based upon the pre-accusation delay at the close of the State's evidence at trial. The State notes Defendant did not specifically argue that Judge Dunlow had no authority to enter the Order based on Judge Fox's hearing. At trial, Defendant referred to the motion to dismiss she previously filed and relied upon the same legal authorities she had presented to Judge Fox. She also noted some evidence presented at the hearing before Judge Fox, but the evidence addressing the pre-accusation delay was not presented again at the hearing. But the trial court denied the motion, stating as the reason that "[c]ounsel's renewal of the motion to dismiss has previously been ruled upon by Judge Fox."

Defendant was unable to appeal the pre-trial Order denying Defendant's motion to dismiss immediately because it was an interlocutory order. In criminal cases, interlocutory orders are generally not immediately appealable. *See State v. Ward*, 46 N.C. App. 200, 203, 264 S.E.2d 737, 739 (1980) ("Ordinarily in North Carolina an appeal will only lie from a final judgment. In criminal cases, there is no appeal as a matter of right from an interlocutory order. An interlocutory order which does not put an end to the action is not appealable unless it seriously affects a substantial right." (citations omitted)). In *State v. Shoff*, this Court reviewed "our prior decisions regarding the appealability of interlocutory orders in criminal proceedings." 118 N.C. App. 724, 726, 456 S.E.2d 875, 877 (1995). The *Shoff* Court explained that under North Carolina General Statute Section 7A-27(b) and North Carolina General Statute Section 15A-1444(a), "appeals in criminal actions" are limited to "those taken from a final judgment." *Id.* at 725, 456 S.E.2d at 877. Defendant did not have the ability to appeal from Judge Dunlow's Order denying

the motion to dismiss until entry of the final judgment in the criminal prosecution, and she timely gave notice of appeal. This issue was preserved for this Court's review and we will thus discuss the merits of Defendant's argument.

B. Authority to Enter Order

[2] Defendant argues "the written order denying the motion to dismiss must be vacated because Judge Dunlow did not have the authority to sign the Order without first holding a hearing on the motion." Judge Dunlow cited North Carolina Rule of Civil Procedure 63 as authority for signing the Order in place of Judge Fox.

The State acknowledges that if Defendant preserved this issue for appellate review under the Rules of Appellate Procedure, "it is axiomatic that the written order is a nullity[,]" citing *In re K.N.*, 381 N.C. 823, 829-30, 874 S.E.2d 594, 599 (2022), and *State v. Bartlett*, 368 N.C. 309, 313-14, 776 S.E.2d 672, 674 (2015).

Under Rule 63, our Supreme Court has determined

> [o]ne of the duties to be performed by the court under these rules, N.C.G.S. § 1A-1, Rule 63, is finding the facts, stating the conclusions of law, and directing the entry of judgment pursuant to Rule 52. Thus, this Court has interpreted Rules 52 and 63 together to provide that a substitute judge cannot find facts or state conclusions of law in a matter over which he or she did not preside. Conversely, and [the] respondent concedes, if Judge Houston made the findings of fact and conclusions of law that appear in the order before retiring and Chief Judge Byrd did nothing more than put his signature on the order and enter it ministerially, the order is valid.

In re E.D.H., 381 N.C. at 399, 873 S.E.2d at 513 (citation and quotation marks omitted).

But this issue is not governed by Rule 63 because this is a criminal case.[2] The Rules of Civil Procedure, including Rule 63, "govern the

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2. If this issue were governed by Rule 63, the Order would still have to be vacated. It is apparent that the Order includes detailed findings of fact and conclusions of law not rendered by Judge Fox at the hearing and that Judge Fox determined Defendant was prejudiced by the delay. Conclusion of Law 7 made by Judge Dunlow directly contradicts Judge Fox's oral rendering, as Judge Fox unequivocally stated "there is actual prejudice to . . . Defendant in this case" but Judge Dunlow specifically stated "[D]efendant has not established actual and substantial prejudice from the pre-accusation delay."

procedure . . . in all actions and proceedings of a *civil nature*[.]" N.C. Gen. Stat. § 1A-1, Rule 1 (2023) (emphasis added). "A criminal action is – (1) An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof." N.C. Gen. Stat. § 1-5 (2023). This case is a criminal action, not a civil action. As a general rule, the Rules of Civil Procedure do not apply in criminal cases. *See State v. Burrow*, 227 N.C. App. 568, 571, 742 S.E.2d 619, 621 (2013) ("The Rules of Civil Procedure cited by Defendant do not apply to criminal cases."). We have been unable to find any case applying Rule 63 in a criminal case.

Since Rule 63 does not provide authority for Judge Dunlow to enter an order on behalf of Judge Fox, we have also considered whether the State has identified any other basis for this authority. The Rules of Criminal Procedure do not address the authority of one judge to enter an order on behalf of another judge in this context and based upon Chapter 15 of the North Carolina General Statutes, *see generally* N.C. Gen. Stat. ch. 15 (2023) ("Criminal Procedure"), we cannot find any statutory authority for Judge Dunlow to enter the Order on behalf of Judge Fox.

In *State v. Bartlett*, Judge Jones held a hearing on the defendant's motion to suppress and "orally granted [the] defendant's motion and asked counsel to prepare a written order reflecting his decision." 368 N.C. at 311, 776 S.E.2d at 673. Judge Jones did not announce an oral ruling with findings of fact resolving a material conflict in the evidence. *Id.* at 311-12, 776 S.E.2d at 673-74. The written order was not prepared until after Judge Jones's term of office expired, and Judge Hudson signed an order granting the defendant's motion to suppress without holding a new hearing. *Id.* This order "found that [the] defendant's expert was credible, gave weight to the expert's testimony, and used the expert's testimony to conclude that no probable cause existed to support [the] defendant's arrest." *Id.* at 311, 776 S.E.2d at 673. The State appealed, and the Supreme Court held that Judge Hudson did not have "the authority to resolve the evidentiary conflict in his written order" since "he did not conduct the suppression hearing" and ordered a new suppression hearing. *Id.* at 313, 776 S.E.2d at 674.

This case deals with a motion to dismiss based on pre-accusation delay, and *Bartlett* addressed a motion to suppress, but this difference in the type of motion does not allow us to overlook *Bartlett*. The Criminal Procedure Act has specific rules addressing orders on motions to suppress, but no similar rule for motions to dismiss. *See id.* ("Section 15A-977 of the General Statutes prescribes the procedure that the superior court must follow to decide a motion to suppress evidence."). But in addition

to North Carolina General Statute Section 15A-977, the Supreme Court noted general principles of law supporting its determination that the judge who presided at the hearing must make the findings of fact:

> The trial judge who presides at a suppression hearing sees the witnesses, observes their demeanor as they testify and by reason of his more favorable position, he is given the responsibility of discovering the truth. For this reason, our appellate courts treat findings of fact made by the trial court as conclusive on appeal if they are supported by the evidence. The logic behind this approach is clear. In this setting, the trial judge is better able than we at the appellate level to gauge the comportment of the parties and to discern the sincerity of their responses to difficult questions. But a trial court is in no better position than an appellate court to make findings of fact if it reviews only the cold, written record.

Id. at 313, 776 S.E.2d at 674-75 (citations, quotation marks, and ellipses omitted).

The *Bartlett* Court also rejected the defendant's argument for an alternate basis for authority for Judge Hudson to sign the order "on behalf of Judge Jones." *Id.* at 313, 776 S.E.2d at 675. The defendant sought to rely on North Carolina General Statute Section 15A-1224(b), which provides that:

> (b) If by reason of absence, death, sickness, or other disability, the judge before whom the defendant is being or has been tried is unable to perform the duties required of him before entry of judgment, and has not ordered a mistrial, any other judge assigned to the court may perform those duties, but if the other judge is satisfied that he cannot perform those duties because he did not preside at an earlier stage of the proceedings or for any other reason, he must order a mistrial.

N.C. Gen. Stat. § 15A-1224 (2023). The Supreme Court held that "[b]y its plain terms, subsection 15A-1224(b) applies only to criminal trials, not suppression hearings." *Bartlett*, 368 N.C. at 313, 776 S.E.2d at 675. Here, the hearing on Defendant's motion to dismiss, held over two years before the trial, is also not a "criminal trial" so North Carolina General Statute Section 15A-1224(b) also does not provide any authority to Judge Dunlow to enter the Order on behalf of Judge Fox.

III. Conclusion

Because Judge Dunlow had no authority to enter the Order on behalf of Judge Fox, the Order is a nullity and we must vacate and remand for the trial court to conduct a new hearing on Defendant's motion to dismiss due to the pre-accusation delay.

VACATED AND REMANDED.

Judge HAMPSON concurs.

Judge STADING concurs in a separate opinion.

STADING, Judge, concurring, writing separately.

I concur in the decision reached by the majority, particularly since the second trial court judge's written dismissal order contained a conclusion of law directly contradicting the original trial court judge's orally rendered conclusion. I write separately to emphasize a tempered application of *State v. Bartlett* to the present matter. 368 N.C. 309, 776 S.E.2d 672 (2015).

Our Supreme Court's ruling in *Bartlett* heavily relied on the specific mandates contained in our motion to suppress statutes. *See* N.C. Gen. Stat. Ch. 15A, Subch. IX, Art. 53 (2023). The Court determined "[s]ection 15A-977 contemplates that the same trial judge who hears the evidence must also find the facts." *Bartlett*, 368 N.C. at 313, 776 S.E.2d at 674. In reaching its determination, the Court carefully analyzed the language of N.C. Gen. Stat. §§ 15A-974 and -977 (2023). Subsection 15A-974(b) states, "[t]he court, in making a determination whether or not evidence shall be suppressed under this section, shall make findings of fact and conclusions of law which shall be included in the record, pursuant to G.S. 15A-977(f)." Subsection 15A-977(f) requires, "[t]he judge must set forth in the record his findings of fact and conclusions of law."

Defendant's motion to dismiss was filed pursuant to N.C. Gen. Stat. § 15A-954(a)(4) (2023), which does not contain the same express requirements as N.C. Gen. Stat. §§ 15A-974(b) and 15A-977(d), (f). Although instructive, given *Bartlett*'s focus on the motion to suppress statutes, I caution against extrapolating its use to matters outside of the motion to suppress context.

STATE v. GRIFFIN

[298 N.C. App. 85 (2025)]

STATE OF NORTH CAROLINA
v.
JAMAAL GRIFFIN, DEFENDANT

No. COA24-156

Filed 5 March 2025

Jury—juror replacement—before jury was empaneled—jury veniremember selected over alternate juror—no prejudice shown—constitutional argument not preserved

In a prosecution on charges including first-degree murder, where a juror was excused before the jury was empaneled because his wife had unexpectedly gone into labor, the trial court did not err by selecting his replacement from the jury venire instead of using a prospective alternate juror. The court did not violate N.C.G.S. § 15A-1215(a)—which requires an alternate juror to replace a juror who is discharged for any reason before a verdict is rendered—since that statute only applies after a jury is officially empaneled. Rather, the court followed the correct procedure under N.C.G.S. § 15A-1214(g), which governed the jury selection process before empanelment. Further, defendant failed to argue that the juror replacement prejudiced his case, and he could not bypass the requirement to show prejudice by arguing that the court committed error per se or structural error. Finally, defendant failed to preserve his constitutional argument that he was deprived of a fair and impartial jury where he did not raise that argument at trial; moreover, his case did not involve the "manifest injustice" that would justify invoking Appellate Rule 2 to suspend the Rules of Appellate Procedure and decide the constitutional issue on the merits.

Appeal by defendant from judgments entered 18 May 2023 by Judge Patrick Thomas Nadolski in Mecklenburg County Superior Court. Heard in the Court of Appeals 11 June 2024.

Carolina Appeal, by Attorney Drew Nelson, for the defendant-appellant.

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

STADING, Judge.

Jamaal Griffin ("Defendant") appeals from final judgments entered against him pursuant to jury verdicts finding him guilty of first-degree murder and possession of a firearm by a felon. Defendant was also found guilty of one count of conspiracy to commit robbery with a dangerous weapon; however, the trial court arrested judgment on this conviction at sentencing. For the reasons below, we discern no error.

I. Background

This matter concerns an armed robbery resulting in the killing of Churchill Zoker on 30 June 2018. A grand jury indicted Defendant for multiple offenses, including first-degree murder, possession of a firearm by a felon, and conspiracy to commit robbery with a dangerous weapon. Jury selection for Defendant's trial commenced on 1 May 2023. The parties agreed on twelve prospective jurors—including Mr. Stolz, to be seated as Juror No. 7. Next, the parties began selection of three prospective alternate jurors—Mr. Brent, Mr. Caldwell, and Mr. Spain. After questioning, defense counsel struck Mr. Caldwell but was satisfied with the other two alternates.

The next day, the parties reconvened to select a final alternate juror. But Mr. Stolz's wife had unexpectedly gone into labor, leading the trial court to excuse him from jury service. The State argued that another prospective juror from the jury venire[1] should replace Mr. Stolz since the jury had not yet been empaneled.[2] According to the State, the procedure in N.C. Gen. Stat. § 15A-1214(g) (2023) was controlling:

> If at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that the juror has made an incorrect statement during voir dire or that some other good reason exists:
>
> . . . .

1. "Jury venire" is used synonymously with "jury pool" and "jury panel" in North Carolina. *See, e.g.*, *State v. Tirado*, 358 N.C. 551, 571, 599 S.E.2d 515, 530 (2004) (N.C. Gen. Stat. § 15A-1211 "uses the term 'panel' to refer to the entire jury pool or venire . . . .").

2. Courts use both "empanel" and "impanel." *See United States v. Haymond*, 588 U.S. 634, 662–63, 139 S. Ct. 2369, 2388 (2019) (Alito, J., joined by Thomas, J., Roberts, C.J., and Kavanaugh, J., dissenting) ("[T]here is simply no way that the federal courts could empanel enough juries to adjudicate all those proceedings, let alone try all those proceedings in accordance with the Sixth Amendment's Confrontation Clause."); *see also Yeager v. United States*, 557 U.S. 110, 118, 129 S. Ct. 2360, 2366 (2009) (citation omitted) ("Instead, a jury's inability to reach a decision is the kind of 'manifest necessity' that permits the declaration of a mistrial and the continuation of the initial jeopardy that commenced when the jury was first impaneled.").

> (2) If the judge determines there is a basis for challenge for cause, he must excuse the juror or sustain any challenge for cause that has been made.
>
> . . . .
>
> Any replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror.

Counsel for Defendant conceded the applicability of the statute but disputed its outcome. Instead, counsel proposed that Mr. Brent, one of the prospective alternate jurors, take Mr. Stolz's place, and a new alternate juror should be selected from the jury venire. Counsel for Defendant expressed concern that peremptory challenges were exhausted for the prospective twelve jurors, but noted her client retained an additional strike for any new prospective alternate juror.

The trial court ultimately agreed with the State's argument, deciding that another juror would be seated from the jury venire, and the prospective alternate jurors would remain in place. The trial court noted Defendant's objection. Defendant's counsel stated, "[w]e just really wanted to slide [Mr. Brent] over. But I've read the statute. The jury isn't impaneled. It seems like the statute is on point in that." Following this discussion, the clerk called Ms. Nannini as a prospective juror to replace Mr. Stolz as prospective Juror No. 7, and both parties accepted her. Defendant's counsel renewed the objection:

> [DEFENDANT'S ATTORNEY]: Your Honor, just to preserve for the record that defense objects to taking someone f[rom] the general pool and putting them in seat number 7, rather than placing in alternate number 1 in seat number 7, and then replacing the other people. We want to preserve that for the record. I know I have been researching. I haven't found anything, but we think it's necessary to preserve that because the State is supposed to pass to us a set of complete – 12 jurors. Obviously, they passed to us last week. We selected two alternates. What happened this morning happened. And the voir dire was reopened and we had to question – instead of the ones we have -- we have to question one that wasn't passed to us with a complete pool, so we want to preserve that for the record.
>
> THE COURT: All right. Your objection is noted for the record. Anything else?

[DEFENDANT'S ATTORNEY]: No, Your Honor. Thank you.

Later that day, the parties also accepted another prospective alternate juror, Mr. Young. Thereafter, all jurors and alternate jurors were officially empaneled.

During Defendant's case-in-chief, the trial court informed the parties that empaneled Juror No. 1, Ms. Emeram, had a "scheduling conflict," and expressed "trepidation" because this juror could have pressure to reach a verdict on an improper basis. During voir dire, all parties were aware of this possible conflict and agreed to accept Ms. Emeram because they did not foresee the length of the trial. After questioning Ms. Emeram, a bench conference was held, and the trial court excused her without objection from the parties. One of the alternate jurors, Mr. Brent, was then seated as Juror No. 1. Following deliberations, the jury found Defendant guilty of first-degree murder, possession of a firearm by a felon, and conspiracy to commit robbery with a dangerous weapon. Defendant gave notice of appeal in open court.

II. Jurisdiction

Jurisdiction is proper with our Court since Defendant appeals from a "final judgment of a superior court," and "entered a plea of not guilty to a criminal charge, and . . . [was] found guilty of a crime." *See* N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) and 15A-1444(a) (2023).

III. Analysis

Defendant asserts a single issue for appeal: whether the trial court committed error by filling Mr. Stolz's seat with someone from the jury venire rather than one of the prospective alternate jurors. He maintains the trial court's decision contravenes N.C. Gen. Stat. § 15A-1215(a) (2023) and amounts to error per se or structural error. After careful consideration, we disagree.

"When an alleged statutory violation by the trial court is properly preserved, either by timely objection or . . . by operation of rule of law, we review for prejudicial error pursuant to N.C. [Gen. Stat.] § 15A-1443(a)." *State v. Austin*, 378 N.C. 272, 276–77, 861 S.E.2d 523, 528 (2021); *e.g.*, *State v. Jaynes*, 353 N.C. 534, 544–45, 549 S.E.2d 179, 189 (2001) ("[W]hen a trial court acts contrary to statutory mandate and the defendant is prejudiced thereby, the right to appeal the court's action is preserved, notwithstanding defendant's failure to object at trial.").[3]

3. Defendant properly objected on statutory grounds and later renewed this objection before the jury was empaneled.

"[I]f the [preserved] error relates to a right *not arising* under the United States Constitution, . . . review requires the defendant to bear the burden of showing prejudice." *Austin*, 378 N.C. at 277, 861 S.E.2d at 528 (citations omitted and emphasis added). "[A] new trial does not automatically follow a finding of statutory error." *State v. Garcia*, 358 N.C. 382, 406, 597 S.E.2d 724, 742–43 (2004). Indeed, "[t]his Court has consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial." *Id.* at 406, 597 S.E.2d at 743. To show prejudice, a "defendant must prove that a reasonable possibility exists that, had the error not been committed, a different result would have been reached at trial." *Id.* at 407, 597 S.E.2d at 743 (quoting N.C. Gen. Stat. § 15A-1443(a)).

In criminal cases, jurors are selected under N.C. Gen. Stat. § 15A-1214(a) (2023), which provides: "The clerk, under the supervision of the presiding judge, must call jurors from the panel by a system of random selection which precludes advance knowledge of the identity of the next juror to be called." The trial court may permit the seating of one or more alternate jurors under N.C. Gen. Stat. § 15A-1215(a). Those alternate jurors "must be sworn and seated near the jury with equal opportunity to see and hear the proceedings. . . ." *Id.* And, "[i]f at any time prior to a verdict being rendered, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror, in the order in which selected, and serves in all respects as those selected on the regular trial panel." *Id.* But if the judge determines there is a basis for challenge for cause "at any time after a juror has been accepted by a party, and before the jury is impaneled, it is discovered that . . . some . . . good reason exists," "he must excuse the juror." N.C. Gen. Stat. § 15A-1214(g). Ultimately, "[t]he intended result of jury selection is to empanel an impartial and unbiased jury." *Garcia*, 358 N.C. at 407, 597 S.E.2d at 743. Trial judges have "broad discretion to see that a competent, fair and impartial jury is impaneled . . . ." *State v. Johnson*, 298 N.C. 355, 362, 259 S.E.2d 752, 757 (1979). They also have "the power to regulate and supervise the selection of a jury so that the defendant and the State have the benefit of trial by an impartial jury." *State v. McLamb*, 313 N.C. 572, 575, 330 S.E.2d 476, 478 (1985).

Latching onto the language of N.C. Gen. Stat. § 15A-1215(a)—"any time prior to a verdict being rendered, any juror dies, becomes incapacitated or disqualified, or is discharged for any other reason, an alternate juror becomes a juror"—Defendant claims that the trial court erred in selecting someone from the jury venire to replace Mr. Stolz, rather than seating one of the prospective alternate jurors. Defendant claims

this subsection is effective after the "initial twelve jurors have been selected." Stated another way, Defendant proffers that the duties of an alternate juror are triggered before the jury is empaneled. This necessarily presents a novel argument for our consideration: whether those prospective, yet-to-be members of the to-be-empaneled jury who have been accepted by each party, are properly classified as jurors or alternate jurors.

The criminal jury selection statutes do not offer a precise definition of "juror" or "alternate juror." *See* N.C. Gen. Stat. Ch. 15A, Subch. XII, Art. 72. We therefore consider the plain meaning of "juror" or "alternate juror" in view of Article 72. *State v. Langley*, 371 N.C. 389, 395, 817 S.E.2d 191, 196 (2018) (internal quotation marks and citation omitted) ("The intent of the General Assembly may be found first from the plain language of the statute, then from the legislative history, the spirit of the act and what the act seeks to accomplish."). The term "juror" "should be distinguished from *potential juror* or[4] *veniremember*." Bryan A. Garner, *Garner's Modern English Usage* 635 (5th ed. 2022) (ellipses omitted). "The difference is that a *potential juror* or *veniremember* hasn't yet been selected to sit on the jury . . . a *juror* is someone who has been empaneled on the jury." *Id.* It follows that a plain-meaning analysis disfavors Defendant's urged position because an alternate juror does not become so until empaneled. This definitional analysis accords with the language of N.C. Gen. Stat. § 15A-1214(g).

Defendant also disputes the applicability of N.C. Gen. Stat. § 15A-1214(g), as he maintains that N.C. Gen. Stat. § 15A-1215(a) is controlling. Subsection 15A-1214(g) discusses discovered concerns regarding a prospective juror amounting to a basis for a challenge for cause after a juror has been accepted, but not yet empaneled. *See* N.C. Gen. Stat. § 15A-1214(g). While the circumstances presented here are unique, this subsection applies since it squarely addresses scenarios within the procedural posture of the present matter and provides the proper course of action. *See id.* ("any time after a juror has been accepted . . . and before the jury is impaneled"; "[a]ny replacement juror called is subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror."). A trial court judge is permitted to "excuse a juror without challenge by either party if he determines that grounds for challenge for cause are present." *Id.* § 15A-1211 (2023). The trial

4. "Or" is a disjunctive term, indicating application to one of the two categories listed. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012).

court did not explicitly state he was exercising his statutory authority to challenge this juror for cause, but the record makes that determination readily apparent. *See id.* § 15A-1212(9). In its effort to resolve this quandary, the trial court followed the protocol provided in subsection 15A-1214(g)—he called a replacement juror from the jury venire, and they were "subject to examination, challenge for cause, and peremptory challenge as any other unaccepted juror."

In any event, nothing about Defendant's contention shows that he was prejudiced against having a competent, fair, and impartial jury. *See State v. Lawrence*, 352 N.C. 1, 13, 530 S.E.2d 807, 815 (2000) (holding that no prejudice was shown despite the trial court's direct deviation from statutory jury selection procedures). In fact, in his brief, Defendant does not address prejudice, instead he asserts that the applicable standard of review does not require a showing of prejudice.

To that end, Defendant argues that the violation was error per se or structural error. *See State v. Lawrence*, 365 N.C. 506, 514, 723 S.E.2d 326, 332 (2012) ("Like structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice."). "In a limited class of cases, the [United States Supreme] Court has . . . held that 'some errors necessarily render a trial fundamentally unfair.' " *Id.* at 513–14, 723 S.E.2d at 331 (quoting *Rose v. Clark*, 478 U.S. 570, 577, 106 S. Ct. 3101, 3106 (1986)). These types of errors are referred to as "structural" and "require automatic reversal regardless of a showing of prejudice . . . because they 'affect[ ] the framework within which the trial proceeds, rather than simply an error in the trial process itself[.]' " *Id.* (citations omitted).

> The Supreme Court has noted six instances where structural error had been found: (1) "total deprivation of the right to counsel"; (2) "lack of an impartial trial judge"; (3) "unlawful exclusion of grand jurors of defendant's race"; (4) violation of "the right to self-representation at trial"; (5) violation of "the right to a public trial"; and (6) "erroneous reasonable-doubt instruction to jury."

State v. Hamer, 377 N.C. 502, 506, 858 S.E.2d 777, 781 (2021) (citation omitted). "North Carolina courts also apply a form of structural error known as error per se. Like structural error, error per se is automatically deemed prejudicial and thus reversible without a showing of prejudice." *Lawrence*, 365 N.C. at 514, 723 S.E.2d at 331–32.

Contrary to Defendant's argument, our relevant jurisprudence—citing statutory error—does not allow us to dispense of the prejudice

prong. *See, e.g.*, *Garcia*, 358 N.C. at 406, 597 S.E.2d at 743 ("This Court has consistently required that defendants claiming error in jury selection procedures show prejudice in addition to a statutory violation before they can receive a new trial."); *see also State v. Golphin*, 352 N.C. 364, 412, 533 S.E.2d 168, 202 (2000) ("However, assuming, without deciding, that the trial court violated [N.C. Gen. Stat.] § 15A-1214(a), defendants cannot show prejudicial error."); *see also State v. Woodley*, 286 N.C. App. 450, 465–66, 880 S.E.2d 740, 751 (2022) (overruling jury selection argument because defendant failed to show prejudice).

For example, in *Garcia*, our Supreme Court determined that "the procedures employed at trial violated the express requirements of N.C. [Gen. Stat.] § 15A-1214(f)." 358 N.C. at 406, 597 S.E.2d at 742. But since the defendant "made no attempt, either in written brief or at oral argument . . . to show how the identified statutory violation prejudiced his case[,]" the Court overruled his argument. *Id.* at 407, 597 S.E.2d at 743. Similarly, in *State v. Gurkin*, our Court determined that "the trial court violated the statutorily mandated procedure for jury selection." 234 N.C. App. 207, 214, 758 S.E.2d 450, 455 (2014). Yet since the defendant failed to show or argue prejudice, we held "that the trial court's deviation from the statutory procedure does not warrant a new trial." *Id.* at 214, 758 S.E.2d at 456. Since Defendant failed to demonstrate prejudice, his contentions as to statutory error are overruled. *See Austin*, 378 N.C. at 276–77, 861 S.E.2d at 528.

Defendant also contends that the trial court's failure to adhere to N.C. Gen. Stat. § 15A-1215(a) infringed on his constitutional right to a fair and impartial jury. To that end, Defendant argues that the trial court committed either error per se or structural error because he was tried by an improperly constituted jury. *See State v. Poindexter*, 353 N.C. 440, 444, 545 S.E.2d 414, 416 (2001) ("A trial by a jury that is improperly constituted is so fundamentally flawed that the verdict cannot stand."); *see also Garcia*, 358 N.C. at 410, 597 S.E.2d at 745 ("Defendant has shown only a technical violation of the state jury selection statute. Without more, this statutory violation is insufficient to support a claim of constitutional structural error."). Despite Defendant's claim, he did not raise this argument at trial, denying the court the opportunity to pass upon the issue. *See* N.C. R. App. P. 10; *see also*, *e.g.*, *State v. Smith*, 359 N.C. 199, 208, 607 S.E.2d 607, 615 (2005) (overruling defendant's assignment of error because he "failed to object . . . on constitutional grounds"). In fact, when Defendant objected at trial, he only objected on statutory grounds. As a consequence, Defendant failed to preserve his constitutional issue for appellate review. *See State v. Fleming*, 350 N.C. 109,

122, 512 S.E.2d 720, 730 (1999); *see also State v. King*, 342 N.C. 357, 364, 464 S.E.2d 288, 293 (1995); *see also State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) ("[A] constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal.").

Defendant implores us to exercise Rule 2 of the Appellate Rules of Procedure to review the merits of this argument. Under Rule 2, this Court may suspend the Appellate Rules "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest." N.C. R. App. P. 2. Case law addresses the appropriateness of discretionarily invoking Rule 2, which "relates to the residual power of our appellate courts to consider, in exceptional circumstances, significant issues of importance in the public interest or to prevent injustice which appears manifest to the Court and only in such instances." *State v. Hart*, 361 N.C. 309, 315–16, 644 S.E.2d 201, 205 (2007) (citations and quotation marks omitted). "[T]he exercise of Rule 2 was intended to be limited to occasions in which a fundamental purpose of the appellate rules is at stake, which will necessarily be rare occasions." *Id.* at 316, 644 S.E.2d at 205 (citations and internal quotation marks omitted). "This assessment—whether a particular case is one of the rare 'instances' appropriate for Rule 2 review—must necessarily be made in light of the *specific circumstances of individual cases and parties*, such as whether 'substantial rights of an appellant are affected.' " *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 602 (2017) (citations omitted). Put another way, "precedent cannot create an automatic right to review via Rule 2. Instead, whether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *Id.* at 603, 799 S.E.2d at 603.

Defendant urges that we should invoke Rule 2 because allowing his conviction by an improperly constituted jury "would represent manifest injustice." But nothing in the record or Defendant's brief demonstrates "exceptional circumstances" sufficient to justify suspending or varying the rules. *Hart*, 361 N.C. at 315, 644 S.E.2d at 205. Although a constitutional right is a substantial right, Defendant has failed to demonstrate error relating to a substantial right. *Cf. State v. Bursell*, 372 N.C. 196, 201, 827 S.E.2d 302, 306 (2019) (determining that "a constitutional right, such as the Fourth Amendment right implicated here, is a substantial right" and since "the State concede[d] that the trial court committed error relating to a substantial right, the Court of Appeals did not abuse its discretion by invoking Rule 2."). Rather, Defendant is no different than other litigants who failed to preserve their constitutional arguments and

failed to specifically argue manifest injustice on appeal. *See*, *e.g.*, *State v. Ricks*, 378 N.C. 737, 742, 862 S.E.2d 835, 839 (2021) (upholding our Court's decision, denying the invocation of Rule 2, "because the defendant was 'no different from other defendants who failed to preserve their constitutional arguments' and failed to argue 'any specific facts' to demonstrate that invoking Rule 2 would prevent 'manifest injustice.' ").

In our discretion, we decline to invoke Rule 2. *See State v. Barnes*, 278 N.C. App. 245, 248, 862 S.E.2d 852, 854 (2021) ("An appellate court's decision to invoke Rule 2 and suspend the appellate rules is always an exercise of discretion."). Consequently, Defendant's unpreserved constitutional argument is dismissed.

IV. Conclusion

For the above reasons, we overrule Defendant's assignment of statutory error. *See* N.C. Gen. Stat. §§ 15A-1211, -1212, -1214, -1215(a) and -1443(a). We hold that Defendant failed to preserve his constitutional argument for our review under N.C. R. App. P. 10. Since the present circumstances do not warrant invoking Rule 2, we decline further review of the matter.

NO ERROR.

Judges STROUD and COLLINS concur.

STATE OF NORTH CAROLINA
v.
EDUARDO JORGE ROJAS

No. COA24-690

Filed 5 March 2025

Sentencing—second-degree murder—aggravated sentence—mitigating factors—no finding of mental illness

In sentencing defendant in the aggravated range after he was convicted of the second-degree murder of his girlfriend (who he stabbed and cut over 160 times), the trial court did not err by declining to find defendant's proposed mitigating factor, pursuant to N.C.G.S. § 15A-1340.16(e)(3), that defendant suffered from a mental or physical condition that was insufficient to constitute a defense but significantly reduced his culpability. Although a forensic psychiatrist testified that he had diagnosed defendant with schizophrenia while evaluating defendant for the sole purpose of determining his competency to stand trial, that evidence did not constitute substantial, uncontradicted, and manifestly credible evidence that, at the time of the murder: (1) defendant suffered from schizophrenia, and (2) that his illness significantly contributed to the murder; therefore, defendant failed to meet his burden.

Appeal by defendant from judgment entered 14 September 2023 by Judge Steve R. Warren in Superior Court, Gaston County, No. 16 CRS 055300. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General T. Hill Davis III, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katherine Jane Allen, for defendant.

FREEMAN, Judge.

Eduardo Jorge Rojas ("defendant") appeals his aggravated sentence of 397 to 489 months imprisonment entered and based on his conviction for second-degree murder. Defendant contends the sentencing judge erred in failing to find the statutory mitigating factor that "[t]he defendant was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced the defendant's

culpability for the offense." N.C.G.S. § 15A-1340.16(e)(3) (2023). After careful review, we conclude the sentencing judge did not err in refusing to find this mitigating factor and we affirm defendant's resentencing.

I. Background

A complete recitation of the facts relevant to defendant's trial and initial sentencing can be found in this Court's prior opinion in this matter. *See State v. Rojas*, No. COA20-810, 2021 WL 5066762 (N.C. Ct. App. Nov. 2, 2021). Because this appeal concerns only defendant's resentencing, a brief overview of the background will suffice.

On 5 May 2016, defendant murdered his girlfriend, Amoritta Starr Costner, and left her body in a bathtub at their shared home. The victim's autopsy revealed 112 stab wounds, 49 cutting wounds, and several blunt trauma injuries. Defendant inflicted these wounds all over the victim's body—including her face, head, neck, wrists, hands, chest, back, stomach, and buttocks—using multiple different weapons.

Three of the numerous stab wounds to the victim's neck nicked her jugular vein and carotid artery. These wounds were fatal, but not immediately so; the victim bled to death over the course of several minutes. According to the responding Crime Scene Investigator, who has processed over 1,000 crime scenes, "[t]his one was the worst as far as I've ever seen, as far as the amount of wounding . . . [t]his is one that never leaves the memory."

After murdering the victim, defendant "contacted his mother to come to his house, pick him up, and take him to the hospital." *Rojas*, 2021 WL 5066762, at *1. Defendant's "clothes were bloody and bleach-stained, and he smelled of bleach." *Id.* (cleaned up). After defendant refused to go inside to change his clothes, his mother transported him to a nearby hospital. *Id.* Defendant's mother then returned to the home where she discovered the victim's body. *Id.* Upon defendant's discharge from the hospital, he was arrested and charged with murder. *Id.*

> After initially being found incapable of proceeding to trial due to psychotic disorders, Rojas received psychiatric hospital care. In three follow-up evaluations over several years, experts found him "barely" competent to stand trial but in a "precarious" situation that would require re-evaluation, particularly once Rojas confronted the stress of a trial. After his final evaluation, more than a year passed before Rojas pleaded guilty to second degree

> murder and then proceeded to a [bench] trial on the sentencing factors without any follow-up evaluation.
>
> . . .
>
> After hearing the evidence, the trial court found two aggravating factors. First, the court found that Rojas took advantage of a position of trust or confidence. Second, the court found that the offense was especially heinous, atrocious, or cruel. The court found that the mitigating factors offered by Rojas were present but were outweighed by the two aggravating factors. The court sentenced Rojas to an aggravated range sentence of 397 to 489 months in prison.

Id. at *1–3.

In his first appeal, defendant argued that the trial court erred "by failing, on its own initiative, to conduct a competency hearing before the sentencing proceeding because there was substantial evidence before the court that raised questions about his competency." *Id.* at *3.[1] This Court agreed with defendant's argument, vacated his criminal sentence, and remanded "for the trial court to conduct a new sentencing proceeding after first evaluating Rojas's capacity to proceed." *Id.* at *4.

On 21 August 2023, after a hearing before Judge Robert C. Ervin, the trial court on remand found "based upon the most recent evaluation" defendant was "mentally competent and capable of proceeding" with a new sentencing proceeding. The new sentencing proceeding took place on 13 and 14 September 2023 before Judge Steven R. Warren in Gaston County Superior Court.

At the sentencing hearing, defendant presented testimony from Dr. Sherif Soliman, a forensic psychiatrist. Dr. Soliman testified on direct examination in part:

> Q. And so in what capacity did you have an opportunity to meet Mr. Rojas?
>
> A. I was asked to evaluate his capacity to proceed, in my role at Broughton Hospital.

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1. Defendant also argued "the trial court erred by allowing him to waive his right to a jury trial on the existence of aggravated sentencing factors." *Rojas*, 2021 WL 5066762, at *5. We rejected this argument under our Supreme Court's controlling precedent. *See id.* (citing *State v. Hamer*, 377 N.C. 502 (2021)).

Q. And in your evaluation, did you have an opportunity to view his medical records?

A. I did.

Q. And in your capacity to proceed, or view his medical records, did you determine if he had a psychiatric diagnosis?

A. I did.

Q. And what was that diagnosis?

A. I diagnosed Mr. Rojas with schizophrenia.

. . .

Q. So looking back over Mr. Rojas' medical records, and the situation that was going on, can you give us a general idea of his symptoms of schizophrenia that might have existed in 2016?

A. Well, I can speak to his current symptoms of schizophrenia. The record wasn't sufficiently detailed to describe his symptoms in 2016. . . .

. . .

Q. Well, let me ask you this. In 2016, a crime of great rage and violence occurred. Is it possible that one suffering from schizophrenia, that could contribute to that kind of behavior?

A. Is it possible? If it's possible, broadly—a lot of things—it's certainly possible. But again, I just want to emphasize that I didn't evaluate whether he did in this case. So I can't testify with reasonable medical certainty that it did or did not, but it's certainly possible.

On cross-examination, Dr. Soliman testified in part as follows:

Q. So, Dr. Soliman—and please correct me if I'm wrong with any of my questions, I want to make sure I understood your testimony.

In this particular case with Mr. Rojas, you were looking at one thing specifically, which was his capacity to proceed; is that correct?

A. That is correct.

Q. And with that, I think you kind of indicated it was a snapshot for at that time was he capable to proceed. And with the capacity to proceed you have to look at certain standards that have been delineated by the Court as to whether or not he can help his attorney with his defense, whether or not he can understand the roles of the different people in the courtroom, things of that nature; is that correct?

A. Yes. All of those are included in the capacity to proceed standard.

Q. All right. And in your report there is not any mention, and none of your testimony can go to how any sort of diagnosis that he may or may not have had could have affected him on May 5th of 2017; is that correct?

A. That's correct. I wasn't asked to evaluate his mental state at the time, so I wasn't asked to evaluate him to offer an opinion on diminished capacity, or an insanity defense.

Defendant also testified on his own behalf at the sentencing hearing. During cross-examination, defendant testified in part as follows:

Q. Mr. Rojas, you have been testifying for about the last 12 minutes; is that correct?

A. Yes. About that, yes.

Q. Okay. And during that whole time you have been blaming Starr for what happened; isn't that right?

A. No, I'm blaming the medication and the negativity in the room and being hallucinating and feeling bothered and not respected, and just—

Q. So you felt bothered and disrespected, and that's why we're here today; is that right?

A. No.

Q. Let's talk about the medications, since you brought that [up].

You indicated that you have been in several hospitals, I think in New York; is that right?

A. Yes.

Q. Okay. And you know that nobody was ever able to get any sort of records from any of those hospitals; did you know that?

A. I didn't know that. I don't know how long they keep their records, but it's been a while since I started.

Q. Okay. And you told the Court that when you first started dating Starr, and the medication went missing, were you aware that when they searched your home after you murdered your girlfriend they found, like, an entire stack of your antipsychotic medicine, not used, in the storage room?

A. No.

Q. So isn't it true that you were just choosing not to take your medication and using drugs like cocaine instead?

A. No, not at all.

Q. Did you or did you not test positive for cocaine the very next day after you murdered Starr when you went to the hospital?

A. Yeah, that was her drug of choice. And when she would warm me up, I guess, or—that was just her daily routine. You know, like, here I got this for you, just do it. She had took my pain medication from being shot and I needed something to feel a little bit relieved, or something.

Q. Okay. So again, this was Starr's fault that you took cocaine. And instead of going back to the doctor, or going to your mom to get the medication you were supposed to be on, you chose to do an illegal substance instead; is that right?

It's a simple yes or no.

A. Not because of that, no.

During the sentencing proceeding, a jury found the existence of two aggravating factors: the offense was especially heinous, atrocious, or cruel, and defendant took advantage of a position of trust or confidence to commit the offense. The trial court found the existence of three mitigating factors: defendant has a support system in the community; defendant has a positive employment history or is gainfully employed; and

defendant has a good treatment prognosis and a workable treatment plan is available.

After finding the aggravating factors outweighed the mitigating factors, the trial court imposed an aggravated sentence of 397 to 489 months imprisonment. Defendant timely appealed to this Court, arguing that the trial court erred in failing to find the statutory mitigating factor that, at the time of the murder, he was suffering from a mental or physical condition that was insufficient to constitute a defense but that nevertheless significantly reduced his culpability for the offense.

II. Jurisdiction

> A defendant who has been found guilty, or entered a plea of guilty or no contest 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.

N.C.G.S. § 15A-1444(a1) (2023). Because defendant pleaded guilty, and because his minimum sentence of imprisonment does not fall within the presumptive range for his prior record level and class of offense, this Court has jurisdiction over his appeal of right. *See also* N.C.G.S. § 7A-27(b)(4) (2023) ("[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom any other order or judgment of the superior court from which an appeal is authorized by statute.").

III. Standard of Review

Generally, "[t]his Court reviews a trial court's decision to sentence outside of the presumptive range for an abuse of discretion." *State v. Davis*, 206 N.C. App. 545, 548 (2010). However, because this case requires us to determine whether the sentencing judge erred in failing to find a statutory mitigating factor, rather than in weighing properly found aggravating and mitigating factors, we review this issue *de novo*. *See State v. Jones*, 309 N.C. 214, 218–20 (1983).

IV. Analysis

A sentencing judge must "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.G.S. § 15A-1340.16(a) (2023).

"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.*

"When evidence in support of a particular mitigating or aggravating factor is *uncontradicted*, *substantial*, *and there is no reason to doubt its credibility*," a sentencing judge errs in not finding such factor. *Jones*, 309 N.C. at 218–19 (emphasis added).

> Thus, when a defendant argues, as in the case at bar, that the trial court erred in failing to find a mitigating factor proved by uncontradicted evidence, his position is analogous to that of a party with the burden of persuasion seeking a directed verdict. He is asking the court to conclude that the evidence so clearly establishes the fact in issue that no reasonable inferences to the contrary can be drawn, and that the credibility of the evidence is manifest as a matter of law.

Id. at 219–20 (cleaned up).

"A trial judge is given wide latitude in determining the existence of . . . mitigating factors, and the trial court's failure to find a mitigating factor is error only when no other reasonable inferences can be drawn from the evidence." *State v. Johnson*, 196 N.C. App. 330, 336 (2009) (quoting *State v. Norman*, 151 N.C. App. 100, 105–06) (2002)). Therefore, "[a]n appellate court may reverse a trial court for failing to find a mitigating factor *only* when the evidence offered in support of that factor is both uncontradicted and manifestly credible." *State v. Mabry*, 217 N.C. App. 465, 471 (2011) (emphasis added) (cleaned up).

Here, defendant argues the trial court erred in failing to find the statutory mitigating factor that, at the time he murdered the victim by stabbing and cutting her over 160 times, he "was suffering from a mental or physical condition that was insufficient to constitute a defense but significantly reduced [his] culpability for the offense." N.C.G.S. § 15A-1340.16(e)(3). To prevail on this issue, defendant must show he offered evidence in support of this factor which was "uncontradicted, substantial," *Jones*, 309 N.C. at 218, "manifestly credible," *Mabry*, 217 N.C. App. at 471, and from which "no other reasonable inferences can be drawn," *Johnson*, 196 N.C. App. at 336. We conclude defendant has failed to meet this high bar.

Defendant argues Dr. Soliman's testimony provided substantial, uncontradicted, and manifestly credible evidence establishing that: (1)

defendant "suffered from the disease of schizophrenia for over twenty years" and (2) "[s]chizophrenia can contribute to crimes such as this one."[2] Defendant's burden, however, was to provide substantial, uncontradicted, and manifestly credible evidence establishing that: (1) he suffered from schizophrenia at the time of the murder and (2) his schizophrenia in fact "significantly reduced [his] culpability" for the murder. N.C.G.S. § 15A-1340.16(e)(3).

Accordingly, our review focuses on whether Dr. Soliman's testimony established that defendant was suffering from schizophrenia at the time of the murder and that such mental condition significantly reduced defendant's culpability. Presuming, without deciding, defendant's evidence established he was suffering from schizophrenia at the time of the murder, Dr. Soliman did not offer substantial and uncontradicted evidence tending to show defendant's schizophrenia significantly reduced his culpability for the offense.

Although Dr. Soliman testified it was "certainly possible" schizophrenia could contribute to the "kind of behavior" defendant displayed when he viciously murdered the victim, he "emphasize[d] that [he] didn't evaluate whether [it] did in this case." Dr. Soliman specifically testified he "wasn't asked to evaluate [defendant's] mental state at the time" of the offense and "wasn't asked to evaluate him to offer an opinion on diminished capacity[.]" Accordingly, Dr. Soliman stated "I can't testify with reasonable medical certainty that it," i.e., defendant's schizophrenia, "did or did not" contribute to the murder.

Our review of the record and transcripts in this case demonstrates that defendant failed to offer substantial, uncontradicted, and manifestly credible evidence that his schizophrenia significantly reduced his culpability for the offense. Defendant's only expert witness could not, and did not, testify with reasonable medical certainty that defendant's schizophrenia contributed to the murder or otherwise significantly reduced defendant's culpability for the offense. Based upon the evidence presented at the re-sentencing hearing, the sentencing judge did

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2. Defendant also argues that portions of his own testimony provide substantial, uncontradicted, and manifestly credible evidence. However, defendant's testimony does not qualify as the kind of "manifestly credible" evidence relevant to our analysis. Though appellate courts do not ordinarily judge the credibility of witnesses, in this case we must determine whether the credibility of defendant's testimony is "manifest as a matter of law." *Jones*, 309 N.C. at 220 (cleaned up). Considering defendant's history of competency issues, the content of his actual testimony, and his obvious self-interest in the outcome of the re-sentencing hearing, we conclude his testimony was not manifestly credible and therefore did not compel a finding of the mitigating factor under section 15A-1340.16(e)(3).

not err in failing to find defendant's proposed mitigating factor under section 15A-1340.16(e)(3) or in imposing an aggravated sentence of 397 to 489 months imprisonment.

V. Conclusion

An appellate court may reverse a trial court's decision not to find a mitigating factor only if the evidence supporting such factor is substantial, uncontradicted, and manifestly credible. Because defendant failed to present substantial, uncontradicted, and manifestly credible evidence supporting his proposed mitigating factor under section 15A-1340.16(e), the trial court did not err in failing to find that mitigating factor.

NO ERROR.

Judges TYSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
ERIC RUFFIN

No. COA24-276

Filed 5 March 2025

1. Drugs—lay witness testimony—visual identification by law enforcement officer—marijuana versus hemp—plain error not shown

In a prosecution on numerous drug-related charges, the trial court did not err, let alone commit plain error, in allowing lay opinion testimony from a law enforcement officer that, based on his training and experience, certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. The case cited by defendant in support of his position—*State v. Ward*, 364 N.C. 133 (2010)—concerned expert testimony admitted pursuant to Evidence Rule 702 rather than lay opinion testimony admitted pursuant to Evidence Rule 701 (such as the officer's marijuana identification).

2. Drugs—expert testimony—scientific identification of plant material—marijuana versus hemp—plain error not shown

In a prosecution on numerous drug-related charges, the trial court did not commit plain error in allowing expert testimony

from a forensic scientist that certain plant material defendant sold to a confidential informant was marijuana rather than legal hemp. Longstanding precedent held that chemical analysis is not required for the identification of marijuana, and the principles and methods applied by the expert—including weighing, macroscopic testing, microscopic examination, and confirmatory testing—demonstrated sufficient reliability for admission pursuant to Evidence Rule 702(a) (governing expert testimony).

3. Drugs—motion to dismiss—sale and delivery of marijuana—marijuana versus hemp—evidence sufficient

In a prosecution on numerous drug-related charges, the trial court did not err in denying defendant's motion to dismiss the marijuana-related charges for insufficiency of evidence that the plant material defendant sold to a confidential informant was marijuana rather than legal hemp where: (1) a law enforcement officer testified that the material appeared to be marijuana upon visual inspection, he heard defendant use the term "an eighth"—referring to marijuana—and he observed defendant rolling a "blunt"—a marijuana cigarette—via surveillance equipment; and (2) a forensic scientist testified that she performed multiple tests on the material and determined that it belonged "to the genus cannabis containing tetrahydrocannabinol, concentration of cannabinoid not determined." That evidence was sufficient to send the marijuana-related charges to the jury.

4. Drugs—jury instructions—legal definitions of marijuana and hemp—plain error not shown

In a prosecution on numerous drug-related charges, the trial court did not commit plain error in giving the pattern jury instructions for the charges of sale and delivery of marijuana, with the addition of the phrase "the term [marijuana] does not include hemp or hemp products" (as requested by defendant during the charge conference), but without explaining that marijuana has a Delta-9 tetrahydrocannabinoid (THC) content in excess of 0.3%, while hemp has a Delta-9 THC content of 0.03% or less. Appellate courts routinely approve jury instructions that are consistent with the North Carolina Pattern Jury Instructions, and the additional language requested by defendant and given by the court tracked language from the statute defining marijuana (N.C.G.S. § 90-87(16)).

5. Sentencing—marijuana—convictions for both selling and delivering—consolidation and concurrent sentencing—any error harmless

Following defendant's convictions on numerous drug-related charges, arising from defendant selling controlled substances—including marijuana—to a confidential informant, any error in defendant being sentenced for both selling and delivering marijuana as part of the same transaction (a matter the appellate court assumed without deciding) was harmless because the court consolidated those convictions and set their sentences to run concurrently with the longer sentence defendant received on his conviction on a trafficking charge; accordingly, defendant's term of imprisonment was not affected by the sale and delivery sentences.

6. Sentencing—extraneous information from prosecutor—not considered by trial court—permissible considerations

Defendant failed to show that, in sentencing him on convictions for trafficking in heroin by transportation, the trial court considered extraneous information presented by the prosecutor—that someone had died as a result of the drug transaction underlying the trafficking charges—in deciding to impose consecutive, as opposed to concurrent, sentences. During sentencing, the trial court expressly stated that it was not considering the death (or a potential death by distribution charge) in imposing sentences on the trafficking convictions. Further, challenged remarks made by the trial court during sentencing—such as discussing "peddling dope that kills people"—referenced permissible considerations within the court's discretion, such as the societal impact and severity of the crimes.

Appeal by Defendant from Judgments entered 29 March 2023 by Judge Wayland J. Sermons, Jr. in Martin County Superior Court. Heard in the Court of Appeals 6 November 2024.

Attorney General Jeff Jackson, by Assistant Attorney General Alexander H. Ward, for the State.

Shelly Bibb DeAdder for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Eric Ruffin (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Trafficking in Heroin by Sale of More than 4 but Less than 14 Grams of Heroin, Trafficking in Heroin by Delivery of More than 4 but Less than 14 Grams of Heroin, Trafficking in a Mixture

Containing Heroin by Transporting More than 4 but Less than 14 Grams of a Mixture Containing Heroin, Trafficking in a Mixture Containing Heroin by Possession, Possession with Intent to Sell or Deliver (PWISD) a Controlled Substance (Mixture Containing Heroin), Sale of Marijuana, and Delivery of Marijuana. The Record before us tends to reflect the following:

Defendant was charged with Trafficking in Heroin by Sale; Trafficking in Heroin by Delivery; Trafficking in Heroin by Manufacture; Trafficking in Heroin by Transportation; Trafficking in Heroin by Possession; Possession with Intent to Manufacture, Sell, and Deliver Heroin; Sale of Marijuana; and Delivery of Marijuana on or about 21 April 2021. Following presentation to a grand jury, the charge of Trafficking in Heroin by Manufacture was dismissed. Defendant was indicted for Trafficking in Heroin by Sale, Trafficking in Heroin by Delivery, Trafficking in Heroin by Transportation, Trafficking in Heroin by Possession, Trafficking in a Mixture Containing Heroin by Transportation, Trafficking in a Mixture Containing Heroin by Possession, PWISD a Controlled Substance (Heroin), Sale of Marijuana, and Delivery of Marijuana. On or about 8 August 2022, the State obtained a superseding indictment for PWISD a Controlled Substance (Mixture Containing Heroin) rather than PWISD a Controlled Substance (Heroin).

This matter came on for trial on 27 March 2023. At trial, the State presented evidence tending to show that on or about 8 March 2021, a confidential informant (CI) contacted Detective Justin Harrell of the Martin County Sheriff's Office to arrange a controlled buy of drugs from Defendant. Detective Harrell had used this CI numerous times over a five-year period. At the time of trial, Detective Harrell had been in law enforcement for nearly twelve years and in the narcotics division for nine years.

On 8 March 2021, the CI sent a text message to Defendant stating he wanted buy seven grams of fentanyl "and some marijuana." Defendant quoted the CI a price of "$100 a gram for fentanyl" and "$35 for an eighth of an ounce of marijuana." Defendant then went to the CI's house and waited in his car. The CI paid Defendant $735 through his car window, and Defendant gave him two separate bags containing "the fentanyl and the marijuana." The two spoke briefly before Defendant left. Defendant was arrested shortly after leaving the scene. Police recovered the substances Defendant gave the CI, including a leafy green plant material, following the controlled buy.

Detective Harrell testified that based on his training and experience, the plant material appeared to be marijuana. Detective Harrell

also testified to his observations during the conversation between the CI and Defendant via surveillance equipment. During that conversation, Detective Harrell heard Defendant discuss an "eighth"—a common shorthand for an amount of marijuana—and observed Defendant "rolling a marijuana blunt."

The State also called Lyndsay Cone, a forensic scientist for the North Carolina State Crime Laboratory (Crime Lab) in the drug chemistry section, as an expert witness in drug analysis and identification. Cone testified she used the Crime Lab's procedures to test the plant material and other substances seized and described those tests. Based on that testing, Cone concluded one substance was "plant material belonging to the genus cannabis containing tetrahydrocannabinol [THC], concentration of cannabinoid not determined[.]" On cross-examination, Cone testified to the difference between marijuana and hemp, specifically that "in marijuana, the THC, the psychoactive ingredient, is very, very high, and the CBD is very low whereas in hemp they're reversed[.]" Additionally, Cone stated "at our lab we currently do not have the ability to distinguish between marijuana and hemp because that analysis requires what's called a quantitative analysis which is where you're measuring the percentages of what's present in the plant material[.]" Defense counsel then asked Cone whether the plant material she tested could have been hemp, to which she responded: "It's possible. Yes."

During the jury charge conference, Defendant requested the trial court add the following to the pattern jury instruction for the marijuana-related charges: "the term [marijuana] does not include hemp or hemp products." The trial court read the proposed instruction back to defense counsel who confirmed it was as requested. The trial court allowed Defendant's proposed instruction. Defendant did not otherwise object to the trial court's jury instructions.

On 29 March 2023, the jury returned verdicts finding Defendant guilty of Trafficking in Heroin by Sale of More than 4 but Less than 14 Grams of Heroin, Trafficking in Heroin by Delivery of More than 4 but Less than 14 Grams of Heroin, Trafficking in a Mixture Containing Heroin by Transporting More than 4 but Less than 14 grams of a Mixture Containing Heroin, Trafficking in a Mixture Containing Heroin by Possession, PWISD a Controlled Substance (Mixture Containing Heroin), Sale of Marijuana, and Delivery of Marijuana. The trial court sentenced Defendant to a term of 70 to 93 months of imprisonment for Trafficking in Heroin by Sale and an additional term of 70 to 93 months of imprisonment for Trafficking in a Mixture Containing Heroin by Transportation to run *consecutively*.

Defendant was also sentenced to two terms of 70 to 93 months of imprisonment, one for Trafficking in Heroin by Delivery and the other for Trafficking in a Mixture Containing Heroin by Possession, set to run concurrently with the Trafficking in Heroin by Sale sentence. The trial court sentenced Defendant to a further 8 to 19 months of imprisonment for PWISD (Mixture Containing Heroin). The trial court consolidated the convictions for Sale of Marijuana and Delivery of Marijuana and sentenced Defendant to 8 to 19 months of imprisonment to run concurrently with his sentence for Trafficking in a Mixture Containing Heroin by Transportation. Defendant orally gave Notice of Appeal in open court on 29 March 2023.

Issues

The issues on appeal are whether the trial court erred by: (I) denying Defendant's Motion to Dismiss his marijuana charges; (II) admitting Detective Harrell's testimony; (III) admitting Cone's expert testimony; (IV) instructing the jury using the pattern instruction and Defendant's requested instruction verbatim; (V) sentencing Defendant on consolidated marijuana offenses concurrently with a longer sentence; and (VI) considering the seriousness and impact of Defendant's trafficking heroin offenses in sentencing.

Analysis

I. Detective Harrell's Testimony

[1] Defendant contends the trial court plainly erred by allowing Detective Harrell to testify that the plant material in question was marijuana. Defendant did not object to Detective Harrell's testimony at trial. Thus, our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional

case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . 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[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Under our statutes, at the time of the underlying incident, marijuana was defined as "all parts of the plant of the genus Cannabis . . . not includ[ing] industrial hemp[.]" N.C. Gen. Stat. § 90-87(16) (2021). Industrial hemp was defined under the Industrial Hemp Act as any variety of cannabis which contained no more than 0.3% of THC and was "cultivated or possessed by a grower licensed by the [North Carolina Industrial Hemp] Commission." N.C. Gen. Stat. § 106-568.51(7) (2022).[1]

Our Rules of Evidence provide a lay witness' 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). Generally, "in prosecutions involving controlled substances, the State bears the burden of proving the substance's identity beyond a reasonable doubt." *State v. Teague*, 286 N.C. App. 160, 184, 879 S.E.2d 881, 899 (2022) (citing *State v. Ward*, 364 N.C. 133, 147, 694 S.E.2d 738, 747 (2010)). However, this Court has consistently held that "a police officer experienced in the identification of marijuana may testify to his visual identification of evidence as marijuana[.]" *State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (2011); *see also State v. Johnson*, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013) ("It is well established that officers with proper training and experience may opine that a substance is marijuana."); *State v. Jones*, 216 N.C. App. 519, 526, 718 S.E.2d 415, 421 (2011) ("[O]ur case law provides that an officer may testify that the contraband seized was marijuana based on visual inspection alone.").

Here, Detective Harrell testified to his training and experience at trial. Detective Harrell testified that at the time of the trial, he had worked for the Martin County Sheriff's Office for nearly twelve years and had worked in the narcotics division for nine years. In that role, he

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1. The Industrial Hemp Act expired on 30 June 2022; however, the General Assembly added the same definition of hemp to N.C. Gen. Stat. § 90-87(13a), which maintained the legal status of hemp while removing a licensure requirement. Further, the General Assembly modified the definition of "marijuana" to not include hemp. N.C. Gen. Stat. § 90-87(16) (2023).

investigated narcotics-related offenses, the transportation of illegal narcotics, and worked with confidential informants. He also stated that he completed yearly narcotics training. After testifying to the events leading up to Defendant's arrest, Detective Harrell testified that, based on his training and experience, the plant material appeared to be marijuana. Consistent with our caselaw, this identification was properly admitted because Detective Harrell is a law enforcement officer with proper training and experience in narcotics.

Defendant points to *State v. Ward*, 364 N.C. 133, 694 S.E.2d 738 (2010), arguing a law enforcement officer's visual identification is no longer reliable since our General Assembly legalized hemp because hemp and marijuana are indistinguishable without a chemical analysis. In *Ward*, our Supreme Court held "the burden is on the State to establish the identity of any alleged controlled substance that is the basis of the prosecution. Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." *Id.* at 147, 694 S.E.2d at 747. We believe *Ward* is distinguishable from the case at hand.

First, we note our Supreme Court in *Ward* expressly stated: "This holding is limited to North Carolina Rule of Evidence 702." *Id.* Rule 702 governs expert testimony only. Thus, the standard for lay opinion testimony under Rule 701—including Detective Harrell's testimony—is unchanged in light of *Ward*. Moreover, the contraband substances at issue in *Ward* were pharmaceuticals, not marijuana. *Id.* at 135-39, 694 S.E.2d at 740-42. And our cases following *Ward* have affirmed that law enforcement officers may still offer lay opinion testimony identifying a substance as marijuana. *E.g.*, *Garnett*, 209 N.C. App. at 546, 706 S.E.2d at 286; *Johnson*, 225 N.C. App. at 455, 737 S.E.2d at 451; *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012); *State v. Cox*, 222 N.C. App. 192, 198, 731 S.E.2d 438, 443 (2012), *rev'd on other grounds*, 367 N.C. 147, 749 S.E.2d 271 (2013); *Jones*, 216 N.C. App. at 526, 718 S.E.2d at 421. *But see State v. Highsmith*, 285 N.C. App. 198, 199, 877 S.E.2d 389, 390 (2022) (acknowledging the emergence of hemp, "another plant that looks and smells the same as illegal marijuana but is legal in North Carolina," has "brought about speculation and discussion surrounding the ability of law enforcement to use the sight and scent traditionally associated with marijuana" to establish probable cause). Consistent with this caselaw, we conclude the admission of Detective Harrell's opinion testimony identifying the plant material as marijuana was not error. Therefore, the admission was not plain error.

II. Expert Testimony

[2] Similarly, Defendant contends the trial court's admission of Cone's testimony as an expert witness to identify the plant material in question as marijuana was plain error. Defendant did not object to Cone's testimony at trial. Thus, we again apply the plain error standard of review. *See Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334.

Rule of Evidence 702 governs the admissibility of expert testimony. This Rule provides:

> (a) If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion, or otherwise, if all of the following apply:
>
> (1) The testimony is based upon sufficient facts or data.
>
> (2) The testimony is the product of reliable principles and methods.
>
> (3) The witness has applied the principles and methods reliably to the facts of the case.

N.C. Gen. Stat. § 8C-1, Rule 702(a) (2023). Defendant contends none of the three criteria were satisfied in this case.

As our Supreme Court has noted, North Carolina adopted the federal *Daubert* standard for determining whether to admit expert opinion testimony. *State v. McGrady*, 368 N.C. 880, 888, 787 S.E.2d 1, 8 (2016). Consistent with this standard, a trial court applies the three-pronged reliability test set forth in Rule 702(a). "The primary focus of the inquiry is on the reliability of the witness's principles and methodology, not on the conclusions that they generate." *Id.* at 890, 787 S.E.2d at 9 (citations and quotation marks omitted). "The precise nature of the reliability inquiry will vary from case to case depending on the nature of the proposed testimony. In each case, the trial court has discretion in determining how to address the three prongs of the reliability test." *Id.* (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152-53, 119 S. Ct. 1167, 1176, 143 L. Ed. 2d 238 (1999)). "Trial courts enjoy 'wide latitude and discretion when making a determination about the admissibility of [expert] testimony.' " *State v. King*, 366 N.C. 68, 75, 733 S.E.2d 535, 539-40 (2012) (quoting *State v. Wise*, 326 N.C. 421, 432, 390 S.E.2d 142, 149 (1990), *cert. denied*, 498 U.S. 853, 111 S. Ct. 146, 112 L. Ed. 2d 113 (1990)).

Defendant points to *State v. Teague* for the proposition that the identity of a controlled substance must be proven by "scientifically valid chemical analysis and not mere visual inspection." 286 N.C. App. 160, 184, 879 S.E.2d 881, 899 (2022) (quoting *Ward*, 364 N.C. at 142, 694 S.E.2d at 744). Yet the next sentence of that opinion reads: "However, marijuana has long been excepted from this rule." *Id.* Further, "[n]otwithstanding *Ward*, this Court has 'specifically noted that marijuana is distinguishable from other controlled substances that require more technical analyses for positive identification. In keeping with a long line of cases, we [have repeatedly] held . . . that the State is not required to submit marijuana for chemical analysis.' " *Id.* (quoting *State v. Mitchell*, 224 N.C. App. 171, 179, 735 S.E.2d 438, 444 (2012) (citation omitted), *appeal dismissed and disc. review denied*, 366 N.C. 578, 740 S.E.2d 466 (2013)) (alterations in original). Consistent with our caselaw then, the State was not required to submit the plant material for chemical analysis. The question remaining is whether, although the State did not need to submit a chemical analysis, Cone's expert testimony was otherwise reliable under Rule 702(a).

Cone's procedure substantially matches that approved of by this Court in *State v. Abrams*, 248 N.C. App. 639, 789 S.E.2d 863 (2016). There, as here, the defendant challenged the expert witness' testimony as not based on reliable principles and methods and argued she had not applied the principles and methods reliably to the facts of the case under Rule 702(a). *Id.* at 642-46, 789 S.E.2d at 865-67. At trial, the State's expert witness testified she followed the procedures in place at the Crime Lab for identifying marijuana at the time, including weighing the material, conducting a preliminary color test and microscopic examination, followed by a chemical reaction color test. *Id.* at 644, 789 S.E.2d at 866.

At trial, the State called and qualified Cone, a forensic scientist with the Crime Lab, as an expert in drug analysis and identification. Cone testified she tested evidence submitted by the State in accordance with the procedures for identifying marijuana used by the Crime Lab at the time. Those procedures included weighing the material, a macroscopic test, a preliminary test, a microscopic exam, and a confirmatory test. Based on that testing, Cone concluded the plant material Defendant possessed was cannabis containing THC, "concentration of cannabinoid not determined[.]" This Court has consistently approved of similar procedures in our caselaw. *E.g.*, *Abrams*, 248 N.C. App. at 644-46, 789 S.E.2d at 866-67; *State v. Hall*, 287 N.C. App. 394, *9, 881 S.E.2d 762 (2022) (unpublished). Thus, the expert testimony identifying the plant material as marijuana was sufficiently reliable under Rule of Evidence 702(a). Therefore, the trial court did not plainly err in admitting this testimony.

III. Motion to Dismiss

[3] "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455. "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant contends the trial court erred in denying his Motion to Dismiss the marijuana-related charges because the State did not present sufficient evidence showing his plant material was marijuana, rather than hemp. The jury found Defendant guilty of both Sale and Delivery of Marijuana pursuant to N.C. Gen. Stat. § 90-95(a)(1).

At trial, the State presented testimony from both Detective Harrell, an experienced narcotics officer, and Lyndsay Cone, a forensic scientist for the Crime Lab, to establish that the plant material was marijuana. First, as discussed previously, Detective Harrell consistently testified he believed the plant material was marijuana "based on [his] training and experience." Further, Detective Harrell testified he heard Defendant discuss an "eighth"—referring to marijuana—and observed Defendant "rolling a marijuana blunt" via surveillance equipment.

Cone, a forensic scientist for the Crime Lab, testified she performed multiple tests and determined the substance belonging to Defendant was "plant material belonging to the genus cannabis containing [THC], concentration of cannabinoid not determined[.]" Cone acknowledged she could not determine the concentration of THC in the sample in the Crime Lab. However, as Defendant concedes, "our courts have never held [a chemical analysis] is necessary" to allow a jury to determine

whether a substance was marijuana or hemp. *State v. Massey*, 287 N.C. App. 501, 511, 882 S.E.2d 740, 749 (2023); *see also State v. Osborne*, 372 N.C. 619, 630-31, 831 S.E.2d 328, 336 (2019). Indeed, our courts have consistently affirmed that testimony identifying a substance as marijuana—from a law enforcement officer as well as a forensic expert—is sufficient to take the matter to the jury. *See State v. Booth*, 286 N.C. App. 71, 78-80, 879 S.E.2d 370, 376-77 (2022); *State v. Massey*, 287 N.C. App. 501, 511, 882 S.E.2d 740, 749 (2023); *State v. Duncan*, 286 N.C. App. 159, *5-*6, 878 S.E.2d 682 (2022) (unpublished); *State v. Johnson*, 225 N.C. App. 440, 455, 737 S.E.2d 442, 451 (2013); *State v. Mitchell*, 217 N.C. App. 401, *3, 720 S.E.2d 29 (2011) (unpublished).

The relevant facts in this case are similar to those in *State v. Booth*, 286 N.C. App. 71, 879 S.E.2d 370 (2022). In *Booth*, a law enforcement officer conducted controlled buys of marijuana using a confidential informant. *Id.* at 72, 879 S.E.2d at 372. The officer recovered a "green leafy substance" which he identified as marijuana based on his training and experience. *Id.* at 73, 79, 879 S.E.2d at 373-74, 376. On appeal, the defendant contended the trial court improperly denied his motion to dismiss the marijuana charges because, in his view, the State had failed to introduce sufficient evidence the substance in question was marijuana rather than hemp. *Id.* at 77, 879 S.E.2d at 375. At trial, the State presented evidence the defendant admitted seized items—including plastic baggies and a scale—belonged to him; defendant had on his person money that had been provided to the confidential informant; and the law enforcement officer's testimony identifying the substance at issue as marijuana based on his training and experience. *Id.* at 79, 879 S.E.2d at 376. This Court determined this evidence was sufficient to survive the defendant's motion to dismiss. *Id.* at 79-80, 879 S.E.2d at 376-77.

Here, the State presented Detective Harrell's testimony identifying the plant material as marijuana based upon his training and experience as a narcotics officer. Detective Harrell also testified to hearing Defendant discussing an "eighth"—a common unit of marijuana for sale—with the CI via surveillance equipment. Detective Harrell also observed Defendant "rolling a marijuana blunt." Further, the State presented the testimony of Lyndsay Cone, an experienced forensic scientist at the Crime Lab, who performed multiple tests on Defendant's plant material and concluded it was marijuana. Thus, based on our caselaw, the State presented substantial evidence the plant material belonging to Defendant was marijuana. Therefore, the trial court properly denied Defendant's Motion to Dismiss.

IV. Jury Instructions

[4] Defendant argues the trial court plainly erred by not instructing the jury on the legal definitions of marijuana and hemp. Because Defendant made no objection to the jury instructions at trial, our review is again limited to plain error. *See* N.C. R. App. P. 10(a)(4) (2023) ("In criminal cases, an issue that was not preserved by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). "To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Kuhns*, 260 N.C. App. 281, 284, 817 S.E.2d 828, 830 (2018) (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973)). "Accordingly, 'it is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence.' " *Id.* (quoting *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988)). "It is a well-established principle in this jurisdiction that in reviewing jury instructions for error, they must be considered and reviewed in their entirety." *Murrow v. Daniels*, 321 N.C. 494, 497, 364 S.E.2d 392, 395 (1988) (citation omitted). "This Court has recognized that the preferred method of jury instruction is the use of the approved guidelines of the North Carolina Pattern Jury Instructions." *State v. Ballard*, 193 N.C. App. 551, 555, 668 S.E.2d 78, 81 (2008) (citation omitted).

Here, during the charge conference discussion on the instructions around the Sale and Delivery of Marijuana charges, Defendant asked the trial court to add the following to the pattern jury instruction: "the term [marijuana] does not include hemp or hemp products." The trial court read the proposed instruction back and defense counsel confirmed that was how he wished it to read. Thus, for Defendant's marijuana charges, the trial court instructed the jury in accordance with the pattern jury instructions, with the only deviation being the inclusion of Defendant's proposed instruction. On appeal, Defendant contends this instruction

was plainly erroneous because it omitted information specifying that marijuana has a Delta-9 THC content in excess of 0.3%, while hemp has a Delta-9 THC content of 0.3% or less.

Our Courts have repeatedly approved of jury instructions that are consistent with the North Carolina Pattern Jury Instructions. *See, e.g.*, *State v. DeCastro*, 342 N.C. 667, 693, 467 S.E.2d 653, 666 (1996) (concluding instructions were "a correct statement of the law" where "[t]he instruction as given was virtually identical to the pattern jury instructions[.]"). The instruction in this case was identical to the pattern instruction with the exception of Defendant's requested instruction, which the trial court gave verbatim. Moreover, Defendant's requested instruction was an accurate statement of the law, as our statutes define "marijuana" as "all parts of the plant of the genus Cannabis. . . . The term does not include hemp or hemp products." N.C. Gen. Stat. § 90-87(16) (2023). Thus, we cannot conclude the omission of the language specifying the THC content in marijuana as opposed to hemp was plain error.

V. Concurrent Sentencing

[5] Defendant asserts he was improperly sentenced for both selling and delivering marijuana as part of the same transaction. Even assuming without deciding that Defendant's marijuana convictions both arose from the same transaction, we conclude any error was harmless.

Defendant correctly cites *State v. Moore*, in which our Supreme Court held "[a] defendant may not, however, be convicted under N.C.G.S. § 90-95(a)(1) of both the sale *and* the delivery of a controlled substance arising from a single transfer." 327 N.C. 378, 382, 395 S.E.2d 124, 127 (1990) (emphasis in original). In *Moore*, the defendant was convicted of possession, sale, and delivery of a controlled substance charged in one indictment, as well as possession with intent to sell or deliver, sale of a controlled substance, and delivery of a controlled substance charged in a second indictment. *Id.* at 380, 395 S.E.2d at 125. The trial court consolidated the three counts in each indictment and sentenced the defendant to consecutive sentences of six years of imprisonment. *Id.* at 380, 395 S.E.2d at 126.

This Court recently applied *Moore* in remanding a case for resentencing where the defendant was convicted of two counts each of possession, sale, and delivery of a controlled substance. *State v. Morris*, 288 N.C. App. 65, 88-89, 884 S.E.2d 750, 766-67 (2023). There, the trial court entered judgment on both the sale and delivery charges, sentencing the defendant to two terms of imprisonment of 15 to 27 months. *Id.* at 71, 884 S.E.2d at 755. The instant case is readily distinguishable.

Although Defendant was sentenced for both Sale and Delivery of Marijuana, the trial court consolidated those convictions to run *concurrently* with the longer sentence for Trafficking in a Mixture Containing Heroin by Transportation. Defendant's term of imprisonment would thus be the same even without a sentence for the sale and delivery of marijuana. Indeed, Defendant concedes that even if this matter were remanded for resentencing, the term of imprisonment "might not change" because the sentences run concurrently. Thus, Defendant has not established he was prejudiced by this alleged error. *See State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962) ("A judgment will not be disturbed because of sentencing procedures unless there is a showing of . . . procedural conduct prejudicial to [the] defendant[.]"); *State v. Chivers*, 180 N.C. App. 275, 281, 636 S.E.2d 590, 595 (2006) (overruling assignment of error where trial court improperly calculated defendant's prior record level but defendant was not prejudiced); *State v. Williams*, 65 N.C. App. 472, 478, 310 S.E.2d 83, 87 (1983) ("Upon arrival of the case in the appellate division the burden is upon the criminal defendant not only to show error but to show prejudicial error."). Therefore, we conclude the trial court did not plainly err in sentencing Defendant on the marijuana-related charges.

VI. Sentencing Considerations

[6] Finally, Defendant contends the trial court erred in sentencing because, in his view, the trial court considered extraneous information presented by the prosecutor when imposing two consecutive sentences for Trafficking Heroin by Transportation. We disagree.

Prior to sentencing, the trial prosecutor informed the court, "there are circumstances around this particular sale that didn't come out in the trial. . . that being the death of Tina Harrison . . . I know he hasn't been convicted of that, but the State would ask that you take that into consideration." However, during sentencing, the trial court made the following statements to Defendant: "Well, what do you call peddling dope that kills people?" and "I just can't understand. Marijuana you know . . . Marijuana is marijuana. You jacked it up to heroin and fentanyl" and "we have another proceeding at some point in the future because he's charged with death by distribution. I did not consider that. . . . [T]hat will rise or fall on its own evidence." Defendant argues these comments demonstrate the trial court relied on the prosecuting counsel's remarks, directly impacting the imposition of two consecutive active sentences of 70 to 93 months, as opposed to imposing concurrent sentences.

"When this Court is confronted with statutory errors regarding sentencing issues, such errors are questions of law, and as such, are

reviewed *de novo*." *State v. Allen*, 249 N.C. App. 376, 379, 790 S.E.2d 588, 591 (2016) (citation and quotation marks omitted). "When a sentence is within the statutory limit it will be presumed regular and valid unless 'the record discloses that the court considered irrelevant and improper matter in determining the severity of the sentence.' " *State v. Davis*, 167 N.C. App. 770, 775, 607 S.E.2d 5, 9 (2005) (quoting *State v. Johnson*, 320 N.C. 746, 753, 360 S.E.2d 676, 681 (1987)). "If the record discloses that the [trial] court considered irrelevant and improper matter in determining the severity of the sentence, the presumption of regularity is overcome, and the sentence is in violation of [the] defendant's rights." *State v. Boone*, 293 N.C. 702, 712, 239 S.E.2d 459, 465 (1977) (citation omitted). However, where "the record reveals no such express indication of improper motivation," the defendant is not entitled to a new sentencing hearing. *Johnson*, 320 N.C. at 753, 360 S.E.2d at 681. In the present case, we cannot conclude that the trial court improperly considered extraneous information in determining the nature of Defendant's sentence.

This Court has previously analyzed a trial court's sentencing considerations in *State v. Oakes*, 219 N.C. App. 490, 724 S.E.2d 132 (2012). There, the Court observed, "defendant cites no authority—and we know of none—suggesting that a trial court may not take into account the seriousness of a crime and the defendant's criminal record in deciding where within a presumptive range a defendant's sentence should fall." *Id.* at 497, 724 S.E.2d at 137. Indeed, the Court noted, "If a trial court is free to choose 'any' minimum term, we fail to see why a trial court should not be able to take into account the seriousness of the particular offense when exercising its discretion[.]" *Id.* at 498, 724 S.E.2d at 138.

Similarly, in *State v. Butler*, when sentencing the defendant on two drug trafficking charges, the trial court expressly cited the broader impact of drugs on the community as a reason for imposing consecutive, rather than concurrent, active sentences. 147 N.C. App. 1, 13-14, 556 S.E.2d 304, 312 (2001). There, during sentencing, the trial court explained the sentence it imposed as follows: "The primary [reason] is that drugs in the community impact a lot of people, not just individuals who take the drugs. . . . It impacts everybody around you[.]" *Id.* at 14, 556 S.E.2d at 312. On appeal, this Court affirmed the trial court's decision, holding it was not improper for the trial court to consider the general societal impact of drugs when determining sentences, even though it was not specifically related to the defendant's actions. *Id.* at 14, 556 S.E.2d at 313. Finally, in *State v. Juarez*, Defendant appealed consecutive active sentences for Trafficking in Heroin. 270 N.C. App. 202, *1, 837 S.E.2d 724 (2020) (unpublished). Although *Juarez* is unpublished

and thus not controlling legal authority,[2] we find it instructive. There, this Court rejected the defendant's claim, holding "it was not improper for the trial court to consider the impact of drugs when deciding the appropriate sentence for defendant." *Id.* at *3. This is consistent with *Butler*'s holding that a trial court may weigh the broader effects of drugs when imposing sentences for drug-related offenses. Thus, this Court has consistently affirmed a trial court's discretion to consider certain factors beyond the immediate offense, such as societal impact and the severity of the crime, when determining sentences.

Here, Defendant contends the trial court improperly considered extraneous information during sentencing, specifically outside drug charges and a death by distribution charge. Although the trial court acknowledged the prosecutor's request to consider these factors, it expressly said it did not consider the death by distribution charge, stating, "I did not consider that. . . . [T]hat will rise or fall on its own evidence." In the present case, the Record is even clearer than those in *Oakes*, *Butler*, and *Juarez*. Unlike the aforementioned cases, the trial court here expressly rejected the prosecutor's arguments regarding the separate charges on the Record and affirmatively stated that other charges would be considered in separate proceedings. The trial court's unambiguous language reinforces our conclusion the trial court did not rely on the separate charges against Defendant.

Moreover, the challenged statements fall within the bounds of permissible considerations under our caselaw. During sentencing, the trial court made references to the societal impact of drugs and the severity of Defendant's offenses:

> I don't know how in the world you thought that it was anywhere near a good business to be in to sell fentanyl and heroin but fentanyl that kills people just by touching it and you seem like a smart guy, and I'm pretty sure you saw on the news people dying of fentanyl all the time, and it escapes me that you didn't just dismiss that because you were making money with – with getting people hooked on this terrible, terrible drug.

As this Court noted in *Butler*, consideration of the broader societal impact of drug crimes is permissible during sentencing. 147 N.C. App.

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2. Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure provides: "An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority." N.C. R. App. P. 30(e)(3) (2024).

at 14, 556 S.E.2d at 313. Further, as in *Oakes*, it is within the trial court's discretion to consider the severity of the crime itself at sentencing. 219 N.C. App. at 498, 724 S.E.2d at 138.

Defendant points to *State v. Johnson*, 265 N.C. App. 85, 827 S.E.2d 139 (2019), in support of his argument. There, this Court vacated the defendant's sentence after determining the trial court improperly considered offenses for which the defendant had not been charged. *Id.* at 90-91, 827 S.E.2d at 143. In that case, the trial court expressly acknowledged matters outside the record in sentencing, stating they were "even more important[ ] to me." *Id.* at 88, 827 S.E.2d at 141. The present case is distinguishable.

In *Johnson*, "the trial judge did not just consider the impact of [the] defendant's drug offenses on the community, but clearly indicated in her remarks that she was considering a specific offense in her community for which [the] defendant was not charged." *Id.* at 89, 827 S.E.2d at 142. In contrast, here the trial court expressly rejected the prosecutor's arguments regarding other charges, stating: "we have another proceeding at some point in the future because he's charged with death by distribution. *I did not consider that.* . . . [T]hat will rise or fall on its own evidence." The clear rejection of extraneous information rebuts Defendant's claim the trial court relied on impermissible factors in sentencing him.

Thus, there is no indication on this Record the sentence imposed on Defendant was based on improper extraneous information. Therefore, the trial court did not err in sentencing Defendant to consecutive active sentences within the presumptive range set by the sentencing guidelines. Consequently, the trial court properly entered the Judgments on Defendant's convictions.

Conclusion

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

NO ERROR.

Judges ARROWOOD and COLLINS concur.

ZIEGLER v. ZIEGLER

[298 N.C. App. 122 (2025)]

A.J.Z., a minor by her Guardian ad Litem DEMI-LEE ZIEGLER, Plaintiff
v.
JAY DEREK ZIEGLER, Defendant

No. COA24-536

L.Z., a minor by his Guardian ad Litem DEMI-LEE ZIEGLER, Plaintiff
v.
JAY DEREK ZIEGLER, Defendant

No. COA24-539

Filed 5 March 2025

Domestic Violence—protective order—personal jurisdiction—sufficient minimum contacts

In a proceeding for a domestic violence protection order—sought by a mother on behalf of her minor children—the trial court had personal jurisdiction over the children's father, a resident of Tennessee, where he had sufficient minimum contacts with North Carolina to satisfy our state's Long Arm Statute (N.C.G.S. § 1-75.4) and his right to due process in that he: (1) participated in a child custody modification action in North Carolina; (2) was alleged to have committed domestic violence against his minor children, who were residents of North Carolina; and (3) contracted with a North Carolina attorney to represent him in the child custody and domestic violence actions.

Appeal by defendant from order entered 8 February 2024 by Judge Melinda H. Crouch in New Hanover County District Court. Heard in the Court of Appeals 30 January 2025.

Rice Law, PLLC, by Richard Forrest Kern, for defendant-appellant.

No brief was submitted for plaintiffs-appellees.

FLOOD, Judge.

Defendant Jay Derek Ziegler appeals from the trial court's order denying Defendant's motion to dismiss for lack of personal jurisdiction and entering a domestic violence protective order (the "DVPO") against

Defendant. On appeal, Defendant argues that visiting his children in North Carolina and participating in his child custody modification action does not grant a North Carolina trial court the power to exercise personal jurisdiction over him. Upon review, we conclude the trial court did not err in finding it had personal jurisdiction over Defendant where, in addition to and in the context of the child custody modification proceeding, Defendant was alleged to have committed domestic violence actions towards his minor children who reside in North Carolina, and Defendant obtained legal representation in North Carolina for the child custody modification and domestic violence actions.

I. Factual and Procedural Background

Defendant is the biological father of Plaintiffs A.J.Z. and L.Z.,[1] both minor children. Defendant and Plaintiffs' mother, who is also Plaintiffs' guardian ad litem (the "GAL") in the present matter, were married and living together along with Plaintiffs in Hamilton, Tennessee, where Defendant was working as a law enforcement officer. In 2021, Defendant and Plaintiffs' mother separated, and Plaintiffs' mother moved with her children to New Hanover, North Carolina, while Defendant remained in Tennessee.

On 20 July 2023, Plaintiffs' mother, as the GAL, filed a petition to register the parties' child custody order, which had been previously granted in Tennessee (the "Tennessee Child Custody Order"), in the New Hanover County District Court. The trial court entered an order confirming the registration of the Tennessee Child Custody Order in North Carolina. On 28 August 2023, the GAL filed a motion in the district court to modify the Tennessee Child Custody Order (the "custody modification action"). Defendant filed a response and a motion to stay the matter pending resolution of jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (the "UCCJEA"), and filed a motion for communication between the Tennessee and North Carolina courts pursuant to the UCCJEA.

The Tennessee Circuit Court of Hamilton County (the "Tennessee circuit court") held a telephone conference on 26 October 2023 with both parties' counsel present to discuss jurisdiction of the custody matter. On 2 November 2023, the Tennessee circuit court entered an order relinquishing jurisdiction to North Carolina for the custody modification

1. Pseudonyms are used to protect the identity of the minor children and for ease of reading. *See* N.C. R. App. P. 42(b).

action per the UCCJEA, but retaining jurisdiction of the ongoing child support matter.

Following a visitation period that took place in Tennessee, Defendant met with Plaintiffs' mother in Georgia on 26 December 2023 to return the children to her. After exchanging the children, Plaintiffs' mother visited a restroom and later alleged she had discovered, when in that restroom, a "red swollen marking" on her daughter's bottom, and that her son had a "bruise on his face and a burn on his leg." Defendant is also "alleged to have put horrible tattoos all over the children's bodies even after being told by [a] therapist not to do so" and to have "handcuffed" the children in the past.

On 16 January 2024, Plaintiffs' mother, as the GAL, filed a complaint and motion in the district court for an *ex parte* DVPO on behalf of the minor children against Defendant. On 26 January 2024, Defendant filed a motion to dismiss the complaint and challenged the *ex parte* DVPO for lack of personal jurisdiction. Additionally, Defendant also filed motions to compel discovery, a motion for North Carolina and Tennessee Department of Social Services ("DSS") records, and a motion for hospital records.[2]

On 9 February 2024, the trial court made the following pertinent findings with respect to Defendant's activity in and contacts with North Carolina:

> 4. [Plaintiffs] have resided in North Carolina with their mother. . . herein since 2021. [] Defendant has known the children and their mother have been in North Carolina since that time.
>
> 5. North Carolina is the "home state" for purposes of the UCCJEA as the children have resided in North Carolina since 2021 and continue to reside here.
>
> 6. Plaintiff[s' mother] filed a Petition for Registration of a Foreign Custody Order in New Hanover County file number 23 CVD 2432 on July 20, 2023. She filed a Motion to Modify Custody on August 28, 2023[,] and an Order Confirming Registration was entered by [the trial court] on September 14, 2023.
>
> . . . .

2. The trial court noted Defendant had filed these motions, but they are not before us nor further mentioned in the Record.

10. [] Defendant has been to North Carolina on several occasions to visit his children and attend a dance recital.

11. [] Defendant has entered into a contract in North Carolina to hire his attorney to represent him in the custody action and the domestic violence actions.[3]

12. Defendant is aware that the children's doctors and therapist are in North Carolina[.]

13. [] Defendant is aware that the children are in school in North Carolina, and he has access to the schools.

14. Defendant is aware that there is an open [DSS] investigation in North Carolina and Tennessee.

15. Defendant is aware that there is an investigation by law enforcement in North Carolina into Plaintiff[s'] claims concerning domestic violence that is the subject of this action and Defendant testified that law enforcement in Tennessee has conducted prior investigations in Tennessee.

. . . .

17(c). [] Defendant has never lived in the State of North Carolina.

. . . .

19. The only contact that [] Defendant maintains he has had with the State of North Carolina arises from the visits he has made to see his children and of child custody and domestic violence litigation in this State.

20. Witnesses to the alleged incidents of domestic violence may exist in both North Carolina and the State of Tennessee[.]

. . . .

23. Defendant would know or would have reason to know that actions toward his children that could be deemed domestic violence would be fair game for the courts of this state to adjudicate especially since this court has already assumed jurisdiction to determine custody.

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3. The Record does not indicate when this contract was entered or provide further information regarding the contract.

Based on these findings, the trial court concluded:

> 5. Defendant could reasonably foresee that actions that may be deemed domestic violence towards his children would be the subject of his custody action in North Carolina as well as actions under the North Carolina domestic violence statute as this court is required to determine whether the minor children have been subjected to domestic violence in determining the children's best interests.
>
> 6. This [c]ourt can exercise personal jurisdiction over [D]efendant as an out of state defendant based on [D]efendant's awareness and the fact that he could have "reasonably anticipate[d]" his actions would connect him to the state of North Carolina. [*Mucha*], 378 N.C. at 174.

The trial court denied Defendant's motion to dismiss for lack of personal jurisdiction and entered a DVPO against Defendant. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal pursuant to N.C.G.S. § 1-277(b), which provides that "[a]ny interested party has the right of immediate appeal from an adverse ruling as to the jurisdiction of the trial court over the person or property of the defendant[.]" N.C.G.S. § 1-277(b) (2023); *see also Bruggeman v. Meditrust Acquisition Co.*, 138 N.C. App. 612, 614 (2000) ("The denial of a motion to dismiss for lack of jurisdiction is immediately appealable." (citation omitted)).

III. Standard of Review

"The standard of review on appeal of an order determining personal jurisdiction is whether the findings of fact by the trial court are supported by competent evidence in the record." *Bartlett v. Est. of Burke*, 285 N.C. App. 249, 256 (2022) (citation omitted) (cleaned up). "We review de novo the issue of whether the trial court's findings of fact support its conclusion of law that the court has personal jurisdiction over a defendant." *Id.* at 256 (citation omitted) (cleaned up). 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 (2008). Additionally, "unchallenged findings of fact are presumed to be supported by competent evidence and are binding on appeal." *In re R.D.B.*, 274 N.C. App. 374, 379–80 (2020) (citation omitted) (cleaned up).

IV. Analysis

On appeal, Defendant argues the trial court lacked personal jurisdiction over him, contending that by visiting his children in the forum state and participating in the custody modification action, he did not establish sufficient minimum contacts with the State of North Carolina to satisfy due process. We disagree and conclude Defendant's alleged domestic violence towards his children, the alleged violence as it pertains to the custody modification action, and Defendant's representation in both actions in North Carolina, establish sufficient minimum contacts necessary for the trial court's exercise of personal jurisdiction over Defendant.

A. Due Process

"The Fourteenth Amendment's Due Process Clause limits a state court's power to exercise jurisdiction over a defendant." *Ford Motor Co. v. Mont. Eighth Jud. Dist. Ct.*, 592 U.S. 351, 358 (2021). A trial court must have either general or personal jurisdiction over a defendant in domestic violence actions. *See Mucha v. Wagner*, 378 N.C. 167, 177 (2021). Here, the trial court did not find it had general jurisdiction over Defendant, and thus, we will consider only whether the trial court had personal jurisdiction over Defendant.

For North Carolina courts to exercise personal jurisdiction over a nonresident defendant, "(1) there must be statutory authority for the exercise of jurisdiction, and (2) the nonresident defendant must have sufficient contacts with this State such that the exercise of jurisdiction does not violate the federal due process clause." *Bruggeman*, 138 N.C. App. at 614–15.

North Carolina's Long Arm Statute, N.C.G.S. § 1-75.4 (2023), "grants North Carolina's courts specific personal jurisdiction over defendants to the extent allowed by due process." *Bartlett v. Est. of Burke*, 285 N.C. App. 249, 256 (2022) (citation omitted) (cleaned up). Our Long Arm Statute provides, in relevant part, that a trial court will have personal jurisdiction over a nonresident defendant if that defendant "[i]s engaged in substantial activity within this State, whether such activity is wholly interstate, intrastate, or otherwise." N.C.G.S. § 1-75.4(1)(d) (2023). "[W]hen evaluating the existence of personal jurisdiction pursuant to [N.C.]G.S. § 1–75.4(1)(d), the question of statutory authorization collapses into the question of whether the defendant has the minimum contacts with North Carolina necessary to meet the requirements of due process." *Bruggeman*, 138 N.C. App. at 617 (citation omitted) (cleaned up).

We therefore proceed to the due process inquiry, considering whether the trial court had personal jurisdiction over Defendant based on his contacts with North Carolina.

B. Personal Jurisdiction and Minimum Contacts

In order to satisfy due process, "the defendant must 'have certain minimum contacts with the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.' " *Mucha*, 378 N.C. at 171 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Our courts look at the following factors in determining whether minimum contacts exist:

> (1) the quantity of the contacts, (2) the nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience to the parties.

Banc of Am. Sec. LLC v. Evergreen Int'l Aviation, Inc., 169 N.C. App. 690, 696 (2005) (citation omitted). "To ascertain whether a defendant's contacts are of the frequency and kind necessary to surpass the 'minimum contacts' threshold, courts must first examine whether the defendant has taken 'some act by which [they] *purposefully avail* [themselves] of the privilege of conducting activities within the forum State.' " *Mucha*, 378 N.C. at 171 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

A defendant must be aware that they are "establishing a connection with the State of North Carolina. This awareness—whether actual or imputed—is what permits a court in North Carolina to exercise judicial authority over the nonresident defendant." *Mucha*, 378 N.C. at 172. Our Supreme Court has explained that "[a]t a minimum, there must be some evidence from which the court can infer that in undertaking an act, the defendant purposefully established contacts with the State of North Carolina specifically." *Mucha*, 378 N.C. at 180. We now consider Defendant's contacts in North Carolina as they pertain to the custody modification action and the domestic violence action.

Defendant argues the trial court erred in finding he had sufficient minimum contacts, based on his visitation with his children in North Carolina and participating in the custody modification action in North Carolina, so as to establish a connection with the state that would permit a North Carolina court to exercise judicial authority over him.

Our courts have addressed whether sufficient minimum contacts arise from child custody and visitation actions such that personal jurisdiction is established. In *Miller v. Kite*, our Supreme Court considered

the issue of whether the trial court had personal jurisdiction over a nonresident parent who was visiting his child. 313 N.C. 474, 479 (1985). After the couple's separation, the defendant's ex-wife had moved their daughter from Illinois to North Carolina, and the defendant, who had never lived in North Carolina, sent child support checks to North Carolina and occasionally visited his child in North Carolina. *Id.* at 475-76. Our Supreme Court held the facts did not establish personal jurisdiction over the defendant, explaining that "the child's presence in North Carolina was not caused by the defendant's acquiescence. Instead, it was solely the result of the plaintiff's decision as the custodial parent to live here with the child[,]" and "unilateral acts by the party claiming a relationship with a non-resident defendant may not, without more, satisfy due process requirements." *Id.* at 479.

Our Supreme Court concluded, "[the] defendant did not purposefully avail himself of the benefits and protections of the laws of this State[,] and "[a] contrary conclusion would discourage voluntary child custody agreements and subject a non-custodial parent to suit in any jurisdiction where the custodial parent chose to reside." *Id.* at 479. Further, the Court acknowledged "that the presence of the child and one parent in North Carolina might make this State the most convenient forum for the action[,]" but "[t]his fact . . . does not confer personal jurisdiction over a non-resident defendant." *Id.* at 479. Additionally, a nonresident "defendant's general appearance in the child custody and support action" does not establish sufficient minimum contacts but is a "submission to jurisdiction in that action only and does not waive his right to object to jurisdiction in separate causes of action." *Buck v. Heavner*, 93 N.C. App. 142, 146 (1989).

Here, the trial court made several findings of fact pertaining to Defendant's custody modification action and visitation, which Defendant does not challenge on appeal. Findings of Fact 4, 5, and 6 identify that Plaintiffs' mother unilaterally moved the minor children to North Carolina, they have lived in North Carolina since 2021, and there is an ongoing custody modification action taking place in North Carolina. Findings of Fact 10, 11, and 17 reveal that Defendant, who has never lived in North Carolina, has occasionally visited North Carolina in order to visit with his children, and that he hired a North Carolina attorney to represent him in the custody modification action. Findings of Fact 12 and 13 state Defendant is aware that the children are in school in North Carolina, he has access to the schools, and he is aware the children's doctors and therapist are in North Carolina. Additionally, Finding of Fact 19 reveals that the only contact "Defendant maintains he has had

with the State of North Carolina arises from the visits he has made to see his children and of child custody and domestic violence litigation in this State."

Similar to the situation in *Miller* where "the child's presence in North Carolina . . . was solely the result of the plaintiff's decision as the custodial parent to live here with the child[,]" Defendant's children were present in North Carolina solely as the result of Plaintiffs' mother's decision as the custodial parent to live in North Carolina with the children. *See Miller*, 313 N.C. at 479. Defendant's visitation with his children in North Carolina and his participation in the custody modification action, without more, would fail to establish sufficient minimum contacts to meet due process standards.

Here, however, there is more, where the trial court's consideration of Defendant's interaction with his children was not isolated to the issues of custody and visitation, but rather was in the context of the custody modification action, which necessarily included consideration of the domestic violence action against Defendant. *See Miller*, 313 N.C. at 479; *see also Buck*, 93 N.C. App at 146.

The trial court made multiple findings of fact regarding Defendant's alleged domestic violence, which Defendant left unchallenged. Findings of Fact 11 and 12 show that Defendant hired a North Carolina attorney to represent him in the domestic violence action, and he knows his children's doctor and therapist are in North Carolina, where the children receive medical and emotional care. Findings of Fact 14 and 15 reveal Defendant is aware that there is an open DSS investigation in North Carolina and in Tennessee, and he is aware there is an investigation by North Carolina law enforcement officers into the domestic violence action. Additionally, the trial court found in Finding of Fact 20 that witnesses to actions of domestic violence may exist in both North Carolina and Tennessee, while medical providers in North Carolina could also be witnesses. The trial court further found in Finding of Fact 23: "Defendant would know or would have reason to know that actions toward his children that could be deemed domestic violence would be fair game for the courts of this state to adjudicate especially since this court has already assumed jurisdiction to determine custody."

Based on these unchallenged, and thus binding findings of fact, *see In re R.D.B.*, 274 N.C. App. at 379–80, we discern no error with the trial court's Conclusion of Law 5 because Defendant could "reasonably foresee" that his alleged domestic violence towards his children, in the context of the custody modification action and under North Carolina's domestic violence statute, would be a necessary consideration for the

trial court's best interest of the child analysis. Further, we discern no error with Conclusion of Law 6, where Defendant could have "reasonably anticipate[d]" his actions would connect him to the state. *See Mucha*, 378 N.C. at 174; *see also Int'l Shoe Co.*, 326 U.S. at 316 (establishing the minimum contacts test required for due process). By committing actions that may be deemed domestic violence towards his minor children whose custody modification was under consideration by the trial court in this State, and by hiring a North Carolina attorney to represent him in the domestic violence action, Defendant "purposefully avail[ed]" himself of the benefits and protections of the laws of this State. *See Mucha*, 378 N.C. at 171.

Upon de novo review, we conclude the trial court's findings of fact support its conclusions of law, and Defendant established sufficient minimum contacts with the State to confer personal jurisdiction of the trial court over Defendant, thus satisfying due process. *See Bartlett*, 285 N.C. App. at 256; *see also Mucha*, 378 N.C. at 172; *Int'l Shoe Co.*, 326 U.S. at 316.

V. Conclusion

In the context of his participation in the child custody modification action, Defendant's alleged domestic violence towards his minor children, who reside in North Carolina, and Defendant's representation for custody and domestic violence actions in North Carolina, establish sufficient minimum contacts necessary for the trial court's exercise of personal jurisdiction so as to satisfy due process.

AFFIRMED.

Judges HAMPSON and STADING concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 5 MARCH 2025)

IN RE J.C.M. No. 24-269	Forsyth (22JA86)	Affirmed
IN RE J.D.T.D. No. 24-752	Henderson (20JT000126) (20JT000127)	Affirmed
IN RE M.B. No. 24-694	Cumberland (18JA000337) (24CVD002241)	Affirmed
IN RE PETITION OF OCHSNER No. 24-343	Mecklenburg (23CVS16437)	Affirmed
IN RE W.G. No. 23-775	Union (20JT000022-890) (20JT000023-890) (20JT000024-890)	Remanded
MERRITT v. S&S MGMT. GRP., LLC No. 24-648	Brunswick (22CVS000371)	Affirmed in Part, Vacated in Part, and Remanded
STATE v. DALTON No. 24-662	McDowell (15CRS000440) (15CRS050733) (15CRS051062) (15CRS052019) (15CRS052258) (16CRS000028) (16CRS050062)	Affirmed
STATE v. DUNBAR No. 24-747	Perquimans (22CRS050015) (22CRS050016)	NO ERROR In Part; NO PLAIN ERROR In Part; VACATED In Part; and REMANDED FOR RESENTENCING.
STATE v. FAIR No. 24-385	Lincoln (21CRS50492-93)	No Error
STATE v. MORGAN No. 24-575	Beaufort (22CRS291736)	NO PREJUDICIAL ERROR IN PART; NO ERROR IN PART

STATE v. SMITH No. 24-517	Randolph (20CRS052256) (20CRS052292)	No Error In Part; Remanded For Correction of A Clerical Error.
STATE v. WILSON No. 24-885	Davidson (23CRS225646)	Reversed and Remanded

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