298 N.C. App.—No. 2 Pages 134-312

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

OCTOBER 15, 2025

MAILING ADDRESS: The Judicial Department
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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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Shelley Lucas Edwards

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Executive Director
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Director
David Alan Lagos

Assistant Director
Michael W. Rodgers

Staff Attorneys
Lauren T. Ennis
Caroline Koo Lindsey
Ross D. Wilfley
Hannah R. Murphy
J. Eric James

ADMINISTRATIVE OFFICE OF THE COURTS

Director
Ryan S. Boyce

Assistant Director
Ragan R. Oakley

OFFICE OF APPELLATE DIVISION REPORTER

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

COURT OF APPEALS

CASES REPORTED

FILED 19 MARCH 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

AIDING AND ABETTING

Claim against school—enrollment of daughter—aiding breach of separation agreement—no merit—The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly aiding and abetting her daughter's father in breaching the parents' separation agreement by declining to unenroll the daughter at plaintiff's request. First, North Carolina does not recognize as a valid cause of action aiding and abetting a breach of contract. Second, plaintiff's complaint lacked sufficient facts to support a colorable claim for tortious interference with a contract. **Zhang v. Cary Acad., 305.**

APPEAL AND ERROR

Preservation of issues—failure to object to testimony at trial—untimely objection during State's closing—limited review—In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, defendant failed to preserve for appellate review any of her challenges to testimony that was elicited by the State regarding defendant's failure to provide a statement to law enforcement during its investigation of the incident. First, any arguments regarding testimony to which no objections were lodged were waived. Second, defense counsel objected to only portions of the testimony and the same

evidence was later introduced without objection. Finally, some of defense counsel's objections did not provide a specific basis for the objection. Thus, review of the challenged statements was limited to plain error analysis. With regard to defendant's failure to preserve for appellate review statements by the prosecutor during closing argument regarding defendant's silence—because defense counsel's objection was not timely—the appellate court undertook to determine whether the challenged statements were grossly improper. **State v. Earley, 172.**

Statement of grounds of appellate review—appeal from interlocutory order—burden of demonstrating substantial right—not met—In a class action lawsuit filed against a county and a certified nurse assistant (defendants) who worked at two county-owned prenatal care clinics, in which plaintiffs—female patients and their spouses—raised multiple tort claims after the nurse assistant was caught secretly filming patients in various states of undress, plaintiffs' appeal from an order dismissing their claims against the county only (based on lack of personal jurisdiction and the defense of governmental immunity) was dismissed because plaintiffs failed to demonstrate in their statement of the grounds for appellate review that the order affected a substantial right. Specifically, plaintiffs mischaracterized the order as a final judgment and failed to cite precedent to support immediate appellate review based on a substantial right theory. **Ayala v. Perry, 134.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect—allegations of child sexual abuse by father—emotional harm to children caused by mother's response—dependency—alternative child care arrangement—The adjudication of respondent-mother's minor daughters as abused and neglected juveniles was affirmed where, after reporting to police that the children's father had sexually abused them, respondent-mother's subsequent conduct—regardless of whether the abuse allegations were true—caused significant emotional harm to the children, especially where she: systematically alienated the children from their father, even holding a "ceremony" where they burned photographs of him; coached the children regarding the sex abuse allegations, which the children did not corroborate during forensic interviews; recorded them discussing sensitive topics, including embarrassing private behavior; subjected them to repeated medical and forensic evaluations despite professionals advising against it due to the potential trauma caused by the process; and hindered efforts by the department of social services to investigate the abuse allegations. On the other hand, the adjudication of the children as dependent was vacated because there was no evidence showing that respondent-mother lacked appropriate alternative child care options. **In re B.C., 153.**

Adjudication hearing—mother's testimony regarding sexual abuse allegations against father—father's stipulation denying the allegations—no due process violation—Respondent-mother's due process rights were not violated during an abuse and neglect proceeding, which arose from petitions by the department of social services alleging that respondent-mother's conduct toward her children—stemming from a belief that their father had sexually abused them—caused significant emotional harm to the children. First, respondent-mother's contention that she was prevented from testifying about the allegations against the father—and therefore was unable to present a full defense by showing that her subsequent reaction was justified—was not supported by the record, which showed that the abuse allegations were discussed extensively at the adjudication hearing and that any objections

to testimony referencing those allegations were made for reasons other than to prohibit the topic. Second, the court did not err in relying on the father's stipulation that allegations of sexual abuse existed but that he denied them, where the stipulation was legally sufficient under N.C.G.S. § 7B-807(a) and clarified the focus of the adjudication hearing, which was on respondent-mother's actions rather than the father's alleged abuse. **In re B.C., 153.**

Adjudication—findings of fact—incorporating language from petitions and evidentiary materials—all but one challenged finding upheld—In respondent-mother's appeal from an order adjudicating her children as abused, neglected, and dependent juveniles, respondent-mother's arguments challenging specific findings of fact were largely rejected. First, the court's incorporation of language from the juvenile petitions and verbatim portions of certain evidentiary materials did not constitute an improper delegation of its fact-finding duty, since the court ultimately made its own independent findings resolving any material disputes in the case. Second, most of respondent-mother's arguments alleging that the court failed to resolve inconsistencies in the evidence appeared to be masked requests to reweigh the evidence or second-guess the trial court's credibility determinations, which could not be done on appellate review. However, a portion of one finding—addressing the parents' inability to offer appropriate alternative child care options—was not supported by the evidence and was therefore not upheld on appeal. **In re B.C., 153.**

CONSTITUTIONAL LAW

Effective assistance of counsel—timely objection to line of witness questioning—no other action taken—no prejudice shown—In a trial for murder and possession of a firearm by a felon after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, defendant did not receive ineffective assistance of counsel where his attorney objected on Fifth Amendment grounds after the prosecutor questioned a police detective about defendant's silence when surrendering himself to law enforcement. Although defendant's attorney raised the objection fairly late into the line of questioning, it was still a timely objection, which the court sustained. Further, although the attorney neither moved to strike the line of questioning from the record nor requested a curative instruction regarding the detective's testimony—a choice that may have been part of a reasonable trial strategy—these omissions did not prejudice defendant where the State presented overwhelming evidence that he committed the charged crimes. **State v. Parker, 262.**

Right to a public trial—courtroom closure during two witnesses' testimonies—Waller four-part test—At a trial for attempted first-degree murder and related charges arising from an incident where defendant fired a gun at a group of individuals from inside a moving car, the trial court's partial courtroom closure during the testimony of two men from the group—including one who was shot in the back—did not violate defendant's constitutional right to a public trial. Specifically, the court properly determined—at a remand hearing on the issue—that the closure was justified under the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), in that: (1) the closure advanced an overriding interest in witness safety supported by competent evidence, including social media posts in which defendant directed threatening messages at the witnesses, along with other intimidating conduct by defendant and members of the gallery; (2) the closure was narrowly tailored to address witness safety concerns, since it was limited to the testimony of just two witnesses and

of arguable merit, including the potential issues raised by appellate counsel (regarding the trial court's denial of defendant's motion for substitute counsel, failure to inform defendant of his right to self-representation, admission of testimony that drugs were thrown from defendant's car, and defendant's lack of opportunity to be heard regarding attorney fees that the trial court subsequently remitted). **State v. Johnson, 219.**

Prosecutor closing argument—defendant's post-arrest silence—not grossly improper—In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the prosecutor's statements regarding defendant's post-arrest silence and failure to provide a statement to law enforcement were not so grossly improper as to require the trial court to intervene ex mero motu, and the trial court's failure to do so did not constitute an abuse of discretion. The prosecutor's statements were de minimis and, considering the record as a whole, not prejudicial in light of the substantial evidence presented of defendant's guilt. **State v. Earley, 172.**

Prosecutor's closing argument—reference to co-defendant's plea deal—possible misstatement of law—no prejudice shown—In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where a co-defendant (a member of the group that accompanied defendant to the home) testified for the State after entering a plea deal that reduced his initial charge of first-degree murder to involuntary manslaughter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor—in referring to the co-defendant's plea deal—described manslaughter as a lesser-included offense of second-degree murder. Even presuming that the prosecutor misstated the law, the trial court provided curative instructions to the jury distinguishing between first-degree and second-degree murder, as well as instructions regarding how to evaluate the testimony of a witness who had secured a plea deal from the State. **State v. Parker, 262.**

Prosecutor's closing argument—references to not guilty plea and cross-examination of victim's mother—not grossly improper—In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where the victim's mother gave eyewitness testimony identifying defendant as her son's shooter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor stated that defendant "not only refuse[d] to take responsibility" but also "attacked," "harassed," and "yelled at" the victim's mother when cross-examining her. Taken together, these references to defendant's plea of not guilty and cross-examination of the mother were not grossly improper, since they came after defendant attacked the validity of the mother's testimony during his closing argument, and therefore they could be considered part of a strategy to restore the mother's credibility. **State v. Parker, 262.**

DRUGS

Maintaining a dwelling to keep controlled substances—evidence of residency—The trial court properly denied defendant's motion to dismiss a charge of keeping or maintaining a dwelling for the purpose of keeping or selling controlled substances where the State presented substantial evidence from which a jury could

(defendant) where plaintiffs' complaint did not sufficiently plead a product liability claim based on an alleged defect in the maintenance and overhaul manual—which, unlike claims about the aircraft and engine, would not have been barred by the applicable statute of repose. The complaint asserted liability based on defective engine components and alleged that defendant failed to provide proper maintenance instructions, but did not allege that the maintenance and overhaul manual was a separately defective product and, thus, did not put defendant on notice that it was required to defend a product liability claim based on the defective manual as a product separate from the aircraft. Based on the purchase date of the engine, the statute of repose had expired before plaintiffs brought suit. **Weiss v. Cont'l Aerospace Techs., Inc., 293.**

SENTENCING

Prior record level—calculation—point erroneously assigned to exempt traffic violation—prejudicial error—Where the trial court miscalculated defendant as a prior record level (PRL) III based on 6 points by erroneously assigning one point to defendant's prior conviction of driving while license revoked for impaired driving, a traffic offense that is exempt from inclusion in a prior record level calculation pursuant to N.C.G.S. § 15A-1340.14(b)(5), the error was prejudicial—even though his sentence was within the presumptive range of either a PRL II or PRL III—because the minimum sentence for a PRL II is lower than that for a PRL III and, thus, defendant could have received a lesser sentence if the correct PRL had been calculated. Defendant's judgment was vacated and the matter was remanded for the trial court to sentence defendant as a PRL II based on 5 points. **State v. Wilson, 278.**

Prior record level—out-of-state conviction—identity theft—lack of substantial similarity—resentencing required—For purposes of sentencing, the trial court erred by concluding that defendant's prior conviction for identity theft in Virginia was substantially similar to a North Carolina offense, where, unlike in North Carolina, Virginia's statute could be violated by using identifying information for a "false or fictitious person." The court therefore erred by treating the Virginia conviction as a Glass G felony and assigning four points to defendant's prior record level as a result, which made defendant a prior record level III rather than II. Therefore, the matter was remanded for resentencing. **State v. Fuller, 199.**

Second-degree murder—sentenced as Class B1 felony—supported by jury verdict—After defendant was convicted of second-degree murder for going to a young man's home and shooting him in front of the man's mother and five-year-old brother, the trial court properly imposed a Class B1 sentence where the evidence at trial only supported one of the two theories of malice identified in N.C.G.S. § 14-17(b)—in this case, the malice attributed to Class B1 felonies (requiring intent to harm) and not the malice attributed to Class B2 felonies (involving reckless behavior or inherently dangerous acts)—thereby removing any question as to whether the jury rendered an ambiguous verdict. Additionally, a Class B1 sentence was appropriate where the jury found as an aggravating factor that defendant committed the crime in the presence of a minor. **State v. Parker, 262.**

STATUTES OF LIMITATION AND REPOSE

Statute of repose—product liability—defective aircraft maintenance and overhaul manual—separate product—independent claim allowed—In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's

private plane fatally crashed due to engine failure, the appellate court rejected an argument by the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) that plaintiffs' product liability and negligence claims were barred by the six-year statute of repose (pursuant to now-repealed N.C.G.S. § 1-50(a)(6)). While acknowledging contrary holdings from federal courts that distinguish between flight manuals and maintenance or overhaul manuals, the Court of Appeals followed the reasoning in *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519 (1993) (which involved a flight manual), and held that a maintenance and overhaul manual is a separate product that may support an independent claim for product liability if the manual was obtained separately from the aircraft and the claim stemmed from an alleged defect in the manual. **Weiss v. Cont'l Aerospace Techs., Inc., 293.**

TERMINATION OF PARENTAL RIGHTS

Subject matter jurisdiction—failure to provide birth certificate or child's full name—remanded for prejudice determination—The trial court erred by dismissing a mother's petition to terminate the parental rights of her child's father for lack of subject matter jurisdiction where, although the mother failed to comply with the requirements of N.C.G.S. § 7B-1104(1)—because she did not list the child's full name on the petition (instead using the child's first and last name but only an initial for the middle name), did not allege that the child's name was as it appeared on the birth certificate, and did not provide a birth certificate or other supporting documentation to verify the child's legal identity—the mother's technical noncompliance did not automatically deprive the trial court of subject matter jurisdiction absent a finding of prejudice. Therefore, the court's order was vacated and the matter was remanded for the trial court to conduct an inquiry into whether the child's father was prejudiced by the statutory violation. **In re A.J.B., 143.**

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.

AYALA v. PERRY

[298 N.C. App. 134 (2025)]

VANESSA AGUILAR AYALA, MARWA SAAD EL METWALLY, KAREEMELDIN ELAZAB, SHARY MARGARITA LEDESMA, PATIENCE IMONI LYNCH, YAQUELIN ESTELA MEDINA, RUBEN MEDINA, ERIKA MARIVEL MEJIA, DESTINY SAMUEL, KRISTIN M. ZEDEK AND CARLOS ALVAREZ, ON BEHALF OF THEMSELVES AND OTHERS SIMILARLY SITUATED, PLAINTIFFS
v.
JAMES OTIS PERRY AND WAKE COUNTY, NORTH CAROLINA, DEFENDANTS

No. COA24-251

Filed 19 March 2025

Appeal and Error—statement of grounds of appellate review—appeal from interlocutory order—burden of demonstrating substantial right—not met

In a class action lawsuit filed against a county and a certified nurse assistant (defendants) who worked at two county-owned prenatal care clinics, in which plaintiffs—female patients and their spouses—raised multiple tort claims after the nurse assistant was caught secretly filming patients in various states of undress, plaintiffs' appeal from an order dismissing their claims against the county only (based on lack of personal jurisdiction and the defense of governmental immunity) was dismissed because plaintiffs failed to demonstrate in their statement of the grounds for appellate review that the order affected a substantial right. Specifically, plaintiffs mischaracterized the order as a final judgment and failed to cite precedent to support immediate appellate review based on a substantial right theory.

Judge STADING concurring by separate opinion.

Appeal by Plaintiffs from order entered 5 September 2023 by Judge Claire V. Hill in Wake County Superior Court. Heard in the Court of Appeals 11 September 2024.

Edwards Beightol, LLC, by J. Bryan Boyd, Catharine E. Edwards, and Kristen L. Beightol, for Plaintiffs-Appellants.

Wake County Attorney's Office by Roger A. Askew, Jennifer M. Jones, and Macy B. Fisher; Poyner Spruill LLP by J. Nicholas Ellis and Sydney P. Davis; and Cranfill Sumner LLP, by Patrick H. Flanagan, for Defendants-Appellees.

CARPENTER, Judge.

Vanessa Aguilar Ayala, Marwa Saad El Metwally, Kareemeldin Elazab, Shary Margarita Ledesma, Patience Imoni Lynch, Yaquelin Estela Medina, Ruben Medina, Erika Marivel Mejia, Destiny Samuel, Kristin M. Zedek, and Carlos Alvarez, on behalf of themselves and others similarly situated (collectively, "Plaintiffs") appeal from an order (the "Order") entered on 5 September 2023, granting the motion to dismiss filed by Wake County, North Carolina ("Defendant-County"). On appeal, Plaintiffs argue that the trial court erred by dismissing their claims against Defendant-County under Rules 12(b)(2) and 12(b)(6) because governmental immunity did not apply, and the trial court had personal jurisdiction over Defendant-County. After careful review, we dismiss Plaintiffs' appeal as interlocutory.

I. Factual and Procedural Background

This appeal arises from a class-action lawsuit commenced against two defendants: James Otis Perry ("Defendant-Perry") and Defendant-County. The record on appeal tends to show the following. Defendant-Perry was working as a certified nurse assistant ("CNA") in two prenatal clinics: the Millbrook Clinic, located at 2809 Millbrook Road, and the Sunnybrook Clinic, located at 10 Sunnybrook Road, both in Raleigh, North Carolina (collectively, "the Clinics"). Defendant-County owns and operates the Clinics through its Department of Health and Human Services. The Clinics serve Wake County by offering health care services and education programs for pregnant women, including physical exams such as Pap smears, breast exams, and ultrasounds.

Sometime in September 2021, a female employee found a cell phone left in an exam room at the Sunnybrook Clinic. In an effort to identify the phone's owner, the employee tapped the screen and saw what appeared to be a livestream video of the Sunnybrook Clinic women's bathroom. Once she confirmed that the video was a livestream video of the women's bathroom, the Sunnybrook employees contacted the police.

On or about 13 September 2021, Defendant-Perry was arrested for several crimes relating to his conduct of placing cameras in the women's bathroom "for the purpose of arousing or gratifying the sexual desire . . . with the intent to capture the image of another without their consent." On 7 November 2022, following a police investigation, a Wake County grand jury indicted Defendant-Perry for forty counts of felony secret peeping as well as multiple counts of second-degree and third-degree sexual exploitation of a minor. On 17 January 2023, Defendant-Perry

pled guilty to one count of installing or using a photo device, eighteen counts of felony secret peeping, and three counts of second-degree exploitation of a minor.

Thereafter, on 26 January 2023, Vanessa Aguilar Ayala, Marwa Saad El Metwally, Shary Margarita Ledesma, Patience Imoni Lynch, Yaquelin Estela Medina, Erika Marivel Mejia, Destiny Samuel, and Kristin M. Zedek, women who visited one or both of the clinics as patients, (the "Patient Class Representatives") and their spouses, Kareemeldin Elazab, Ruben Medina, and Carlos Alvarez, (the "Spouse Class Representatives") filed a class-action lawsuit on behalf of themselves and others similarly situated against Defendant-Perry and Defendant-County. The Proposed Patient Class (the "Patient Class"), through the Patient Class Representatives, included "all persons who were secretly recorded by [Defendant-Perry] at any time during visits related to medical care [at] the Sunnybrook Clinic and/or Millbrook Clinic." The Proposed Spouse Class (the "Spouse Class"), through the Spouse Class Representatives, included "all persons whose spouse was secretly recorded by [Defendant-Perry] at any time during visits related to medical care [at] the Sunnybrook and/or Millbrook Clinic."

The complaint alleged ten state law causes of action arising in tort against Defendant-Perry and Defendant-County. As against both Defendants, the Patient Class Representatives and the Patient Class alleged: negligence; or, in the alternative to negligence, medical negligence; invasion of privacy; and negligent infliction of emotional distress. As against Defendant-County, the Patient Class Representatives and the Patient Class alleged: premises liability; corporate negligence; and negligent hiring, retention, and supervision. As against Defendant-Perry, the Patient Class Representatives and the Patient Class alleged intentional infliction of emotional distress. As against both Defendants, the Spouse Representatives and the Spouse Class alleged loss of consortium. Finally, as against both Defendants, all Plaintiffs alleged punitive damages.

To summarize, Plaintiffs' complaint alleged that Defendant-Perry, while working as a CNA at the Clinics, placed hidden cameras in the facility to secretly record prenatal care patients during various stages of undress when they were "being weighed, using the bathroom, and/or being examined." Plaintiffs alleged that Defendant-Perry's conduct caused "them and others similarly situated serious humiliation, embarrassment, reputational harm, emotional distress, mental anguish and other economic and non-economic damages." Plaintiffs also alleged that Defendant-County was vicariously liable for the acts of Defendant-Perry

as he "was acting in the course and scope of [his] employment and/or agency." Additionally, Plaintiffs asserted that Defendant-County was liable in its own capacity, for its separate acts or omissions as Defendant-Perry's employer.

On 4 April 2023, Defendant-County filed an answer and moved to dismiss all claims. On 28 July 2023, Defendant-County filed a notice of hearing. On 10 August 2023, the trial court heard arguments on Defendant-County's motion to dismiss.

At the hearing, Defendant-County primarily argued that Plaintiffs' claims were barred by governmental immunity. Specifically, Defendant-County argued it was entitled to "immunity from torts committed by their employees in the exercise of [] a governmental function." Plaintiffs argued the claims against Defendant-County were not barred by governmental immunity since Defendant-County was engaging in a proprietary, not governmental, function. Defendant-County further argued that since governmental immunity applied, Plaintiffs' claims should also be dismissed for lack of personal jurisdiction.

On 5 September 2023, the trial court granted Defendant-County's motion to dismiss under N.C. R. Civ. P. 12(b)(2) and 12(b)(6) with prejudice. In the Order, the trial court concluded "the court lacks personal jurisdiction over [Defendant-County] and [] the [P]laintiffs' complaint against [Defendant-County] fails to state claims against [Defendant-County] upon which relief may be granted[.]" On 5 September 2023, Plaintiffs filed a notice of appeal from the Order.

II. Jurisdiction

As an initial matter, we must consider whether this appeal is properly before us. As a general rule, this Court only hears appeals after a final judgment. *See Denney v. Wardson Constr., Inc.*, 264 N.C. App. 15, 17, 824 S.E.2d 436, 438 (2019) (citations omitted). " 'A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court.' " *Duval v. OM Hosp., LLC*, 186 N.C. App. 390, 392–93, 651 S.E.2d 261, 263 (2007) (quoting *Veazey v. City of Durham*, 231 N.C. 357, 361–62, 57 S.E.2d 377, 381, *rehearing denied*, 232 N.C. 744, 59 S.E.2d 429 (1950) (internal citations omitted)). Conversely, "[a]n interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy." *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381 (citing *Johnson v. Roberson*, 171 N.C. 194, 88 S.E. 231, 231–32 (1916)). "Generally, there is no right of immediate appeal from interlocutory

orders and judgments[,]" *Goldston v. Am. Motors Corp.*, 326 N.C. 723, 725, 392 S.E.2d 735, 736 (1990), predominately because "[t]he allowance of fragmentary and premature appeals from interlocutory orders would encourage and facilitate delays, increase costs and multiply appeals," *Cole v. Farmers Bank & Tr. Co.*, 221 N.C. 249, 249, 20 S.E.2d 54, 56 (1942).

There are exceptions to this rule, however. First, interlocutory orders are "immediately appealable if the order represents 'a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment.' " *Pentecostal Pilgrims & Strangers Corp. v. Connor*, 202 N.C. App. 128, 132, 688 S.E.2d 81, 84 (2010) (quoting N.C. R. Civ. P. 54(b)). Under N.C. R. Civ. P. 54(b), the trial court must "certif[y] there is no just reason to delay the appeal[.]" *James River Equip., Inc. v. Tharpe's Excavating, Inc.*, 179 N.C. App. 336, 339, 634 S.E.2d 548, 552 (2006) (quotation marks and citation omitted).

Next, if the requirements of N.C. R. Civ. P. 54(b) are not met, a party may still appeal an interlocutory order "when the challenged order affects a substantial right." *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438; *see* N.C. Gen. Stat. § 7A-27(b)(3)(a) (2023) ("[A]ppeal lies of right directly to the Court of Appeals . . . [f]rom an interlocutory order or judgment of a superior court or district court in a civil action or proceeding that . . . [a]ffects a substantial right."). "A substantial right is a legal right affecting or involving a matter of substance as distinguished from matters of form; a right materially affecting those interests which a [party] is entitled to have preserved and protected by law: a material right." *Pentecostal*, 202 N.C. App. at 132, 688 S.E.2d at 84 (internal quotation marks and citation omitted).

To request appellate review of an interlocutory order, "the appellant must include in [their] opening brief, in the statement of grounds for appellate review, 'sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right.' " *Denney*, 264 N.C. App. at 17, 824 S.E.2d at 438 (quoting *Larsen v. Black Diamond French Truffles, Inc.*, 241 N.C. App. 74, 77, 772 S.E.2d 93, 95 (2015)); *see* N.C. R. App. P. 28(b)(4). Exactly what facts and argument are sufficient, however, depends on the nature of the case before us. *See Denney*, 264 N.C. App. at 17–18, 824 S.E.2d at 438 (explaining there are "different rules concerning *how* a litigant must show that a substantial right is affected") (emphasis in original). Generally, an appellant is required to " 'present more than a bare assertion that the order affects a substantial right; they must demonstrate why the order affects a substantial right.' " *Beroth Oil Co. v. N.C. Dep't of Transp.*, 256 N.C. App.

401, 411, 808 S.E.2d 488, 496 (2017) (quoting *Hoke Cnty. Bd. of Educ. v. State*, 198 N.C. App. 274, 277–78, 679 S.E.2d 512, 516, *disc. review denied*, 363 N.C. 653, 686 S.E.2d 515 (2009)) (emphasis in original).

For certain issues, however, a demonstration of "*why* the order affects a substantial right," *Beroth*, 265 N.C. App. at 411, 808 S.E.2d at 496 (emphasis in original), although encouraged, is not required to confer jurisdiction, *see Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Instead, "[s]ome rulings by the trial court affect a substantial right essentially as a matter of law." *Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. For example, "[t]his Court has held that a denial of a Rule 12(b)(6) motion to dismiss on the basis of sovereign immunity affects a substantial right and is immediately appealable." *Green v. Kearney*, 203 N.C. App. 260, 266, 690 S.E.2d 755, 761 (2010); *see also McClennahan v. N.C. School of Arts*, 177 N.C. App. 806, 808, 630 S.E.2d 197, 199 (2006) (noting "this Court has repeatedly held that appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review"). Additionally, we have concluded that "motions to dismiss for lack of personal jurisdiction affect a substantial right and are immediately appealable." *A.R. Haire, Inc. v. St. Denis*, 176 N.C. App. 255, 257–58, 625 S.E.2d 894, 898 (2006); *see also Cohen v. Cont'l Motors, Inc.*, 279 N.C. App. 123, 132, 864 S.E.2d 816, 822 (2021).

Bearing these rules in mind, it remains the appellant's burden to raise and sufficiently brief the threshold question of jurisdiction. *See Doe v. City of Charlotte*, 273 N.C. App. 10, 22, 848 S.E.2d 1, 10 (2020) (explaining it is the appellant's burden to " 'construct arguments for or find support for [their] right to appeal from an interlocutory order' ") (quoting *Jeffreys v. Raleigh Oaks Joint Venture*, 115 N.C. App. 377, 380, 444 S.E.2d 252, 254 (1994)). Specifically, where an appellant seeks review of an interlocutory order on a substantial right theory, she must "show[] that the order appealed from affects a substantial right." *Butterfield v. Gray*, 279 N.C. App. 549, 552, 866 S.E.2d 296, 300 (2021); *see* N.C. R. App. P. 28(b)(4). So, in situations where the issue on appeal arguably affects a substantial right as a matter of law, we consider what the appellant must include in her brief to meet her burden.

If the appeal arguably implicates issues of governmental immunity, sovereign immunity, personal jurisdiction, or another well-recognized category of substantial right, the appellant must include in her brief a "categorical assertion that the issue is immediately appealable." *See Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. She must also "cit[e] to precedent to show that an order affects a substantial right." *See Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10. Although she is not required to

demonstrate "*why* the order affects a substantial right," she must, at a minimum, fulfill these two requirements to meet her burden of providing "sufficient facts and argument to support appellate review on the ground that the challenged order affects a substantial right." *See* N.C. R. App. P. 28(b)(4).

Here, Plaintiffs sought relief against two Defendants—Defendant-Perry and Defendant-County—based on claims arising from a common set of facts. The trial court dismissed the claims against Defendant-County without dismissing the claims against Defendant-Perry. Therefore, the trial court's grant of Defendant-County's motion to dismiss was a final judgment as to Defendant-County but not as to all parties. As a result, the Order is interlocutory. *See Babb v. Hoskins*, 223 N.C. App. 103, 105, 733 S.E.2d 881, 883 (2012).

Because Plaintiffs appeal from an interlocutory order, it is their burden to sufficiently brief the issue of jurisdiction. *See Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10. Given the trial court did not certify the Order for immediate review, Plaintiffs' only route to immediate review is to assert that the Order affects a substantial right. Accordingly, it is Plaintiffs' burden to categorically assert that the challenged order affects a substantial right, supported by citation to applicable precedent. *See Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438. Plaintiffs, however, do not meet their burden.

Although this appeal arguably involves issues of sovereign immunity and personal jurisdiction—issues that may affect a substantial right as a matter of law—Plaintiffs have incorrectly stated the Order from which they appeal is a "final judgment" and that this Court has jurisdiction pursuant to section 7A-27(b). Additionally, Plaintiffs fail to cite to any precedent demonstrating that the challenged Order affected a substantial right. *See Doe*, 273 N.C. App. at 22, 848 S.E.2d at 10.[1] Instead,

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1. When the trial court denies a defendant's motion to dismiss and concludes a party is not entitled to the defense of governmental or sovereign immunity, it is traditionally the defendant who asserts an immediate right of appeal based on a substantial right theory. *See Can Am South, LLC v. State*, 234 N.C. App. 119, 121–22, 759 S.E.2d 304, 307 (2014). Generally, the substantial right at issue is a defendant's right to avoid the time and expense of an unwarranted continuation of proceedings.

Here, the procedural posture is the inverse—*Plaintiffs* appealing a trial court's *grant* of Defendant-County's motion to dismiss. Because Plaintiffs failed to carry their burden to show appellate jurisdiction, we do not opine on their right to appeal assuming they sufficiently asserted governmental immunity as a substantial right in their brief. The question of whether Plaintiffs would have been entitled to appellate review on personal jurisdiction grounds—which would have necessarily involved a determination of whether Defendant-County was immune—is a separate consideration.

Plaintiffs simply include the following in their statement of the grounds for appellate review: "Judge Hill's granting of Defendant County's Motions to Dismiss under rule 12(b)(2) and 12(b)(6) are final judgments, and appeal therefore lies to the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b)."

In short, Plaintiffs not only fail to assert a substantial right, they do not even mention the interlocutory nature of their appeal. Without at least a "categorical assertion that the issue is immediately appealable," *see Denney*, 264 N.C. App. at 18, 824 S.E.2d at 438, Plaintiffs fail to meet their burden of properly requesting review from an interlocutory order. *See Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980) ("It is well established . . . that if an appealing party has no right of appeal, an appellate court on its own motion should dismiss the appeal even though the question of appealability has not been raised by the parties themselves."). Thus, we dismiss Plaintiffs' appeal as interlocutory.

III. Conclusion

In sum, we lack jurisdiction over this interlocutory appeal because Plaintiffs did not make a categorical assertion that the appeal affects a substantial right. Accordingly, we dismiss Plaintiffs' appeal as interlocutory.

DISMISSED.

Judge FLOOD concurs.

Judge STADING concurs by separate opinion.

STADING, Judge, concurring, writing separately.

I join in the majority opinion in full but write separately to further emphasize that Plaintiffs could provide our Court with appellate jurisdiction upon sufficiently asserting governmental or sovereign immunity as a substantial right in their brief.

Our precedents establish that "appeals raising issues of governmental or sovereign immunity affect a substantial right sufficient to warrant immediate appellate review." *Hines v. Yates*, 171 N.C. App. 150, 156, 614 S.E.2d 385, 389 (2005). *See Ballard v. Shelley*, 257 N.C. App. 561, 564, 811 S.E.2d 603, 605–06 (2018) (holding that granting a government defendant's motion to dismiss on sovereign immunity grounds affects a substantial right, just as denial does, and thus warrants immediate appellate

review); *see also Denney v. Wardson Constr., LLC*, 264 N.C. App. 15, 18, 824 S.E.2d 436, 438 (2019) ("Some rulings by the trial court affect a substantial right essentially as a matter of law. Sovereign immunity is an example. A litigant appealing the denial of a sovereign immunity defense need only show that they raised the issue below and the trial court rejected it . . . .").

The *Ballard* Court explained that when a trial court denies a government defendant's motion to dismiss a tort claim based on the doctrine of sovereign immunity, the State or its subdivisions may seek immediate review as it affects a substantial right as a matter of law. 257 N.C. App. at 564, 811 S.E.2d at 605. But since previous decisions of our Court have "held that the *grant* of a motion to dismiss based on sovereign immunity or governmental immunity is appealable," the *Ballard* Court determined it was bound to hold the same. *Id.* at 564, 811 S.E.2d at 605–06.

Had Plaintiffs carried their burden in demonstrating appellate jurisdiction, as in *Ballard*, precedent would similarly bind us to hold that their interlocutory appeal impacted a substantial right for immediate appellate review. 257 N.C. App. at 564, 811 S.E.2d at 605–06 ("In a series of cases that we are unable to distinguish from this one, our Court has held that the grant of a motion to dismiss based on sovereign or governmental immunity is immediately appealable.") (citing *Greene v. Barrick*, 198 N.C. App. 647, 649–50, 680 S.E.2d 727, 729–30 (2009) and *Odom v. Lane*, 161 N.C. App. 534, 535, 588 S.E.2d 548, 549 (2003)); *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (holding that where a court of appeals panel has decided the same issue in a different case, then a subsequent panel of the same court is bound by that precedent unless overturned from a higher court).

IN RE A.J.B.

[298 N.C. App. 143 (2025)]

IN THE MATTER OF A.J.B.

No. COA24-702

Filed 19 March 2025

Termination of Parental Rights—subject matter jurisdiction—failure to provide birth certificate or child's full name—remanded for prejudice determination

The trial court erred by dismissing a mother's petition to terminate the parental rights of her child's father for lack of subject matter jurisdiction where, although the mother failed to comply with the requirements of N.C.G.S. § 7B-1104(1)—because she did not list the child's full name on the petition (instead using the child's first and last name but only an initial for the middle name), did not allege that the child's name was as it appeared on the birth certificate, and did not provide a birth certificate or other supporting documentation to verify the child's legal identity—the mother's technical noncompliance did not automatically deprive the trial court of subject matter jurisdiction absent a finding of prejudice. Therefore, the court's order was vacated and the matter was remanded for the trial court to conduct an inquiry into whether the child's father was prejudiced by the statutory violation.

Chief Judge DILLON concurring in separate opinion.

Judge WOOD dissenting.

Appeal by Jennifer R. Batten from order of dismissal entered 7 May 2024 by Judge C. Renee Little in Mecklenburg County District Court. Heard in the Court of Appeals 14 January 2025.

Weaver, Bennett & Bland, PA, by William G. Whittaker and David B. Sherman, Jr., for Plaintiff–Appellant Mother.

BJK Legal, by Benjamin J. Kull, for Defendant–Appellee Father.

Bollinger Law Firm, by Marjory J. Timothy, for Guardian ad litem–Appellee.

MURRY, Judge.

Plaintiff–Mother (Mother) appeals from an order dismissing her petition to terminate Defendant–Father's (Father) parental rights to her minor child, A.J.B. (Aaron).[1] We vacate and remand for a determination of whether Mother's failure to comply with N.C.G.S. § 7B-1104 prejudiced Father.

I. Background

Mother and Father share one child, Aaron, born 25 April 2018. The parties were never married. Father never established legal paternity of Aaron, who currently lives with Mother in Mecklenburg County, North Carolina. On 17 February 2023, Mother petitioned to terminate Father's parental rights to Aaron under three different grounds: neglect, abandonment, and failure to properly establish or assert paternity. N.C.G.S. § 7B-1111(a)(1), (5), (7). Mother did not allege any facts of neglect or abandonment, simply stating that Father "abandoned and neglected the Minor Child." On 1 March 2023, Father petitioned to establish paternity of Aaron. The trial court stayed the legitimation proceeding on 13 April 2023.

On 26 April 2024, the trial court heard Mother's petition for termination of parental rights. At the hearing, Aaron's guardian *ad litem* (GAL) moved to dismiss the petition as to the neglect and abandonment claims for lack of supporting factual allegations. In response to the trial court's preliminary concurrence, Mother's counsel voluntarily withdrew the neglect and abandonment claims. The GAL then moved to dismiss the entire termination petition because neither Aaron's birth certificate nor any supporting documentation appeared anywhere in the record to verify Aaron's name as stated in the petition, in violation of § 7B-1104. *See* N.C.G.S. § 7B-1104(1). The petition stated Aaron's first and last name and indicated his middle initial, but did not provide his middle name. In response to the trial court's inquiry, Mother's counsel could not produce the birth certificate at any point in the hearing. The trial court declared a recess to research the birth certificate requirement prior to ruling. Following the recess from approximately 10:27 a.m. to 11:21 a.m., the trial court dismissed Mother's termination petition for lack of subject-matter jurisdiction due to Mother's statutory noncompliance and failure to include the birth certificate. Mother timely appealed the ruling on 6 June 2024.

II. Appellate Jurisdiction

Mother appeals by right under N.C.G.S. § 7B-1001 because the trial court's ruling is an "order finding absence of jurisdiction . . . [that] in

1. Pseudonym used for the minor child's privacy and ease of reading.

effect determines the action and prevents a judgment from which appeal might be taken." N.C.G.S. § 7B-1001 (a)(1)–(2) (2023).

III. Analysis

A. Standard of Review

This Court reviews misapprehensions of law and questions of subject-matter jurisdiction *de novo*. *See In re Z.O.G.-I.*, 375 N.C. 858, 861 (2020) (misapprehensions); *In re M.A.C.*, 291 N.C. App. 35, 37 (2023) (subject-matter jurisdiction).

B. Statutory Noncompliance

Under N.C.G.S. § 7B-1104, a petition for termination of parental rights must, "with respect to [unknown] facts[,] . . . state . . . [t]he name of the juvenile as it appears on the juvenile's birth certificate . . . ." N.C.G.S. § 7B-1104(1) (2023). Here, Mother's termination petition listed Aaron's first and last name as listed on his birth certificate but used only a middle initial to indicate his middle name. Mother's termination petition does not indicate whether the listed name matched Aaron's birth certificate or identify anyone who might otherwise know that information. Mother's failure to attach the birth certificate to the petition prevented the trial court from legally verifying Aaron's identity in the record.

Although Mother claims that the termination petition contains all the information that "would have appeared on the birth certificate," the trial court concluded that no additional information was included that could enable it to verify Aaron's name. Because Mother's counsel could not locate the juvenile's birth certificate despite the hour-long recess, the termination petition *prima facie* does not comply with § 7B-1104(1). Thus, we now turn to whether that noncompliance bars this Court from exercising subject-matter jurisdiction over the case.

C. Subject-Matter Jurisdiction

Our district courts have exclusive original jurisdiction over the termination of parental rights unless certain statutory requirements have not been met. N.C.G.S. §§ 7B-200(a)(4), -1101 (2023). Subject-matter jurisdiction "never depend[s] upon the conduct, . . . consent, waiver[,] or estoppel" of the parties. *In re T.R.P.*, 360 N.C. 588, 595 (2006) (quotations omitted). A party's consent to the court's subject-matter jurisdiction or constructive actions taken by the party (*e.g.*, filing responsive pleadings) do not overrule a lack of subject-matter jurisdiction without express statutory authority. Additionally, a court's lack of subject-matter jurisdiction may be raised at any time during a pending case, including for the first time on appeal. *See In re K.J.L.*, 363 N.C. 343, 346 (2009).

Father's responsive pleadings in this case cannot confer subject-matter jurisdiction on this Court or otherwise waive its absence but are "immaterial." 360 N.C. at 595. He infers a general rule from caselaw relating to § 7B-1104 that allows for technical noncompliance if it does not prejudice a party upon consideration of the whole record. *See In re Humphrey*, 156 N.C. App. 533, 539 (2003). In other words, a party who alleges a lack of subject-matter jurisdiction will not be found to be prejudiced if any information required under the statute can still be found within the record as a whole.

We distinguish this case from *In re Humphrey*. In *Humphrey*, the petitioning mother failed to include a statutorily mandated statement that she did not file the petition to otherwise circumvent the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). *Id.* at 538-39. This Court affirmed the trial court's holding that her failure to do so did not negate jurisdiction because she conveyed the required information by other means. *Id.* at 539. The trial court found that the petition "did allege the existence of a proceeding in Wake County . . . regarding visitation with this child . . . [which] establish[ed] that the petition was not filed to circumvent the UCCJEA and to cure petitioner's error." *Id.* at 539. On appeal, we found that the technical noncompliance did not prejudice the respondent and therefore found subject-matter jurisdiction. *Id.*

Even if this Court applied the "general rule" proposed above *sub judice*, the information contained in the record does not cure the jurisdictional flaw. *Humphrey* found alternate methods of conveying the required information. Here, neither the petition itself nor the larger record provides enough identifying information to verify Aaron's full name. As noted, the petition gives Aaron's first name, last name, and birthdate, but it offers no supporting documentation to confirm that information and also fails to provide a middle name. Not only is the birth certificate absent, but the petition does not even allege that the stated name matches the birth certificate.

Analyzing other provisions of N.C.G.S. § 7B-1104, this Court has held that "absent a showing of prejudice, failure to comply with . . . § 7B- 1104(5) does not deprive the trial court of subject matter jurisdiction." *In re T.M.*, 182 N.C. App. 566, 571, *aff'd per curiam*, 361 N.C. 683 (2007). Because our Supreme Court affirmed *In re T.M.*, we find that it controls the interpretation of § 7B-1104(1) noncompliance.

Based on the Mother's petition and the Father's answer, it is undisputed that Mother and Father agree on the first name, middle initial, last

name, and date of birth of Aaron. It is also undisputed that Aaron was born in and currently lives in Mecklenburg County, North Carolina with Mother. Father did not show prejudice from the failure to include Aaron's middle name as it appears on the birth certificate in Mother's petition and does not allege that the child has not properly been identified. Additionally, the trial court failed to find whether Mother's noncompliance prejudiced him. It is clear that our Supreme Court jurisprudence is moving away from depriving trial courts of subject matter jurisdiction based on technical noncompliance in pleadings. *See Matter of S.C.L.R.*, 378 N.C. 484 (2021), *Matter of C.N.R.*, 379 N.C. 409 (2021) We have found no case law determining that failure to include a middle name deprives a trial court of subject matter jurisdiction over a juvenile. Therefore, we extend that jurisprudence to this case and remand for a determination whether Mother's statutory noncompliance prejudiced Father in these proceedings.

IV. Conclusion

For the reasons above, this Court holds that the trial court erred by dismissing Mother's termination petition for lack of subject-matter jurisdiction and thus vacates and remands for a determination as to whether Mother's N.C.G.S. § 7B-1104 noncompliance prejudiced Father.

VACATED AND REMANDED.

Chief Judge DILLON concurs in a separate opinion.

Judge WOOD dissents in a separate opinion.

DILLON, Chief Judge, concurring.

I concur in the majority opinion. Based on caselaw from our Court and our Supreme Court, a technical violation of N.C.G.S. § 7B-1104 (hereinafter "the statute") regarding the information which "shall be" included in a petition does not deprive the trial court of subject-matter jurisdiction so long as the violation is not prejudicial. For instance, in a 2005 case, a panel of our Court recognized that there were conflicting lines of cases but decided to follow the earlier line which held as we are holding here today, as follows:

[In *In re Humphrey*, from 2003], this Court concluded as follows:

> We find no authority that compelled dismissal of the action solely because petitioner failed to include

> this statement of fact in the petition. While it is a better practice to include the factual statement as stated in the statute, under the facts in this case we find that respondent has failed to demonstrate that she was prejudiced as a result of the omission.
>
> 156 N.C. App. 533, 539 (2003). Although we note that this Court has more recently [in 2005] concluded that failure to attach a custody order results in a "facially defective" petition which "fail[s] to confer subject matter jurisdiction upon the trial court[,]" *In re Z.T.B.*, 170 N.C. App. 564, 570 (2005), we are persuaded by the reasoning as well as precedential authority of our prior decisions regarding the statute. *See In re R.T.W.*, 359 N.C. 539, 542 n.3 (2005) (citing *In re Civil Penalty*, 324 N.C. 373 (1989), in resolving conflict in this Court regarding jurisdiction over termination proceedings and noting that a second panel of this Court should have followed a prior panel's decision, "which [wa]s the older of the two cases. Had it done so, we would not have two conflicting lines of cases to resolve.").

In re B.D., 174 N.C. App. 234, 241–42 (2005) (internal citations cleaned up).

And in a case cited in the majority opinion, our Supreme Court in 2007 affirmed a decision from our Court which held that the failure to include certain information which the statute states "shall be" required in a petition does not deprive a trial court of subject-matter jurisdiction if no prejudice is shown. *In re T.M.*, 182 N.C. App. 566, 571, *aff'd per curiam*, 361 N.C. 683 (2007). I note that the year after *In re T.M.*, our Supreme Court again affirmed an opinion of our Court holding that the failure to include information required by the statute was not fatal to the trial court's jurisdiction to hear the matter where the failure was not prejudicial or otherwise preserved for appellate review. *In re H.L.A.D.*, 184 N.C. App. 381, 391–92 (2007), *aff'd per curiam*, 362 N.C. 170 (2008).

Here, as noted by the majority, there is no question from the petition as to which child is subject to this proceeding, notwithstanding that the child's full name was not listed in the petition. Accordingly, I concur.

WOOD, Judge, dissenting.

I respectfully dissent from the majority opinion holding that the trial court erred by dismissing Mother's petition for termination of parental

rights for lack of subject matter jurisdiction without a determination of prejudice. I agree with the majority that the termination petition *prima facie* does not comply with N.C. Gen. Stat. § 7B-1104(1). However, I disagree with the majority's conclusion that the matter should be remanded to the trial court for a determination of prejudice to Father in deciding whether Mother's failure to comply with N.C. Gen. Stat. § 7B-1104 deprived the trial court of subject matter jurisdiction. I would hold Mother's failure to provide the full legal name of the juvenile as contained on the birth certificate in the petition is jurisdictional, and, therefore, would affirm the trial court's dismissal of the petition for lack of subject matter jurisdiction.

A petition for termination of parental rights must

> be verified by the petitioner or movant and shall be entitled "In Re (last name of juvenile), a minor juvenile", who shall be a party to the action, and *shall set forth* such of the following *facts as are known*; and with respect to the *facts which are unknown* the petitioner or movant *shall* so state:
>
> (1) *The name of the juvenile as it appears on the juvenile's birth certificate*, the date and place of birth, and the county where the juvenile is presently residing.

N.C. Gen. Stat. § 7B-1104 (emphasis added). "Our appellate courts have consistently held that the use of the word "shall" in a statute indicates what actions are required or mandatory." *Morningstar Marinas/Eaton Ferry, LLC v. Warren Cnty.*, 233 N.C. App. 23, 28, 755 S.E.2d 75, 79 (2014) (citations omitted). Our Supreme Court has stated, "ordinarily, the word "must" and the word "shall," in a statute are deemed to indicate a legislative intent to make the provision of the statute mandatory, and a failure to observe it fatal to the validity of the purported action[.]" *State v. House*, 295 N.C. 189, 203, 244 S.E.2d 654, 661-62 (1978); *see also Internet E., Inc. v. Duro Communications, Inc.*, 146 N.C. App. 401, 405-06, 553 S.E.2d 84, 87 (2001) ("The word "shall" is defined as "must" or "used in laws, regulations, or directives to express what is mandatory.").

Here, Mother's petition failed to comply with the *mandatory* statutory requirements, as the petition: (1) listed the juvenile's first and last name, but used an initial for his middle name; (2) did not allege that the juvenile's name was "as it appears on the juvenile's birth certificate[;]" and (3) failed to attach the birth certificate to the petition, in order for the trial court to verify the juvenile's identity. If Mother is indeed the juvenile's mother, she would undoubtedly know the juvenile's full name

as it appears on the birth certificate. In other words, noncompliance with the *mandatory* statutory requirements could have been easily avoided.

Significantly, the juvenile's Guardian ad Litem ("GAL") made the motion to dismiss the termination petition for lack of subject matter jurisdiction and pursuant to North Carolina Rule of Civil Procedure 12(b)(6). N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). Mother voluntarily dismissed the allegations of abandonment and neglect following the GAL's arguments. The trial court ultimately dismissed Mother's petition for lack of subject matter jurisdiction after determining, in the absence of a birth certificate in the record, it was unable to verify that the name of the juvenile was as it appears on the birth certificate. Mother could have been seeking to terminate parental rights to Aaron *Joseph* Ball[1] or to Aaron *John* Ball, and given the petition's other serious deficiencies, Respondent may not be the father of the juvenile allegedly at issue, as there could be more than one juvenile with the same or similar name. The majority opines that it is "undisputed" that the parties share only one child; however, that information cannot be known from the petition. In determining jurisdiction, we look to the allegations in the petition. The face of the petition does not conclusively identify the juvenile over which the trial court was to exercise subject matter jurisdiction.

"Under our Juvenile Code, a trial court's subject-matter jurisdiction 'arises upon the filing of *a properly verified juvenile petition* and extends through all subsequent stages of the action.' " *In re M.A.C.*, 291 N.C. App. 35, 38, 893 S.E.2d 556, 560 (2023) (citation omitted) (emphasis added). As discussed *supra*, under N.C. Gen. Stat. § 7B-1104, a petition "*shall* set forth" facts that are known, and those which are unknown, including "the name of the juvenile as it appears on the juvenile's birth certificate."

In reaching its holding, the majority cites *In re T.M.*, 182 N.C. App. 566, 643 S.E.2d 471, *aff'd per curiam*, 361 N.C. 683 (2007). There, DSS failed to attach the order granting DSS custody of the juvenile to the petition; however, the petition alleged DSS had custody of the juvenile and that a copy of the order was attached as an exhibit to the petition, as required under N.C. Gen. Stat. § 7B-1104(5). *Id.* at 572, 643 S.E.2d 475. The trial court took judicial notice of the underlying file, which contained evidence that DSS had custody of the juvenile and that the mother was aware of the juvenile's custody with DSS throughout the case. On appeal, the mother challenged the trial court's exercise of jurisdiction,

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

arguing that the custody order was not attached as statutorily required. The Court in *In re T.M.* held, "absent a showing of prejudice, failure to comply with N.C. Gen. Stat. § 7B-1104(5) does not deprive the trial court of subject matter jurisdiction." *Id.* at 571, 643 S.E.2d at 475. In other words, because the record *clearly* contained evidence that DSS had custody of the juvenile and the mother admittedly was aware of this, the mother was unable to demonstrate prejudice and the trial court properly exercised jurisdiction.

In re T.M. is distinguishable from the present case. The juvenile's name as alleged on the petition—with the middle name as the initial "J."—is not the name of the juvenile as listed on the birth certificate. Further, the petition did not allege that "[t]he name of the juvenile [is] as it appears on the juvenile's birth certificate," as required under N.C. Gen. Stat. § 7B-1104(1). Unlike *In re T.M.*, the record before us is devoid of any evidence sufficient to meet this statutory requirement. The birth certificate does not appear in the record and *nowhere within the record* can the full name of the juvenile, as listed on the birth certificate, be found. Simply stated, there is nothing in the record from which the trial court could determine the juvenile's identity. Thus, the petition's failure to satisfy the requirements of a *properly verified juvenile petition* proves fatal.

The majority further reasons that our Supreme Court jurisprudence is moving away from depriving trial courts of subject matter jurisdiction based on technical noncompliance in pleadings, referring to *In re S.C.L.R.*, 378 N.C. 484, 861 S.E.2d 934 (2021) and *In re C.N.R.*, 379 N.C. 409, 866 S.E.2d 666 (2021) to support its position. However, in *In re S.C.L.R.*, our Supreme Court contemplated N.C. Gen. Stat. § 7B-1104(2), to determine "whether the provision of petitioners' names, address, and other facts in the petition [were] 'sufficient to identify . . . petitioner[s] as . . . one authorized by [N.C.]G.S. [§] 7B-1103 to file a petition [for termination of parental rights].' " *Id.* at 487, 861 S.E.2d at 838. The Court noted that N.C. Gen. Stat. § 7B-1104(2) "does not require specific language for compliance," rather, it requires that the petition allege certain information to reach a threshold level of sufficiency. The Court in *In re S.C.L.R.* held, after an examination of the record, that the allegations in the petition were sufficient to comply with N.C. Gen. Stat. § 7B-1104(2). Due to this compliance, the Court declined to address whether noncompliance would have deprived the trial court of jurisdiction. Meaning, the Court in *In re S.C.L.R.* did not contemplate whether "technical noncompliance" deprives a trial court of jurisdiction, as there, the petition complied with § 7B-1104(2). In the present case, unlike *In re S.C.L.R.*, N.C. Gen. Stat.

§ 7B-1104(1) requires that the petition allege specific language, the name of the juvenile as contained on juvenile's birth certificate, and information for compliance. Moreover, as discussed *supra*, nowhere within the record can such information be found in order to assess compliance.

In *In re C.N.R.* the respondent parents argued the trial court lacked subject matter jurisdiction when it entered its termination order, as the verification form attached to the termination motion did not include the date of verification. *In re C.N.R.*, 379 N.C. at 413, 866 S.E.2d at 670; *see also* N.C. Gen. Stat. § 7B-1104 ("The petition, or motion pursuant to G.S. 7B-1102, shall be verified by the petitioner or movant."). The form stated, "[s]worn to and subscribed before me this ___ day of May, 2020," therefore, neither the director of HSA or the notary public filled the blank into which the date was to be inserted. *Id.* The Court first noted "[t]he Juvenile Code does not prescribe a method for verifying a petition or motion." *Id.*, 379 N.C. at 415, 866 S.E.2d at 671. Further, the Notary Public Act contains a "presumption of regularity," which upholds notarized documents despite minor defects, if there was "substantial compliance with the law." The Court in *In re C.N.R.* ultimately held that despite the failure to date the verification, the termination motion substantially complied with the verification requirement in N.C. Gen. Stat. § 7B-1104. Thus, the trial court properly exercised jurisdiction and the failure to include the date of the verification did not affect the validity of the pleading itself. Similar to *In re S.C.L.R.*, the Court in *In re C.N.R.* contemplated compliance with the statutory language, not whether a "technical noncompliance" deprives a trial court of jurisdiction.

It is true, as the majority notes, our Court has previously held that absent a showing of prejudice, failure to comply with the statute does not *necessarily* deprive the trial court of subject matter jurisdiction. However, the failure to provide the juvenile's full name as contained on the birth certificate, and thus properly identify the child who is the subject of the action, is a fatal defect and renders the petition invalid and robs the trial court of subject matter jurisdiction. Stated differently, we need not consider prejudice under the facts of this case because the petition is invalid as filed.

Furthermore, as discussed *supra*, the juvenile's GAL made the motion to dismiss the termination petition for lack of subject matter jurisdiction, not Father. A GAL is appointed "to represent the juvenile" and advocate on behalf of the juvenile's best interests. *In re R.A.H.*, 171 N.C. App. 427, 429, 614 S.E.2d 382, 383 (2005) (citation omitted). "In furtherance of this responsibility, it is within the purview of a guardian ad litem to stand in for the juvenile and accept service of a petition

on a juvenile's behalf." *In re S.D.J.*, 192 N.C. App. 478, 481, 665 S.E.2d 818, 821 (2008) (citations omitted). The majority's focus on whether Mother's noncompliance prejudiced *Father* is thus misplaced. If it were necessary to contemplate prejudice, the appropriate inquiry would be whether Mother's noncompliance prejudiced the juvenile, the party who made the motion through the GAL who represents the juvenile. *See In re L.T.*, 374 N.C. 567, 569, 843 S.E.2d 199, 200 (2020) ("This Court presumes the trial court has properly exercised jurisdiction unless the party challenging jurisdiction meets its burden of showing otherwise.").

"It is well established that fatal defects in an indictment or a juvenile petition are jurisdictional, and thus may be raised at any time[.]" *In re S.R.S.*, 180 N.C. App. 151, 153, 636 S.E.2d 277, 279-280 (2006) (cleaned up). As the petition did not include the juvenile's name as listed on the birth certificate or contain any attachments sufficient to identify the juvenile or verify the juvenile's name, the petition violates N.C. Gen. Stat. § 7B-1104 and is fatally defective. Thus, I would affirm the trial court's dismissal of the termination of parental rights petition.

IN THE MATTER OF B.C., I.C.

No. COA23-830

Filed 19 March 2025

1. Child Abuse, Dependency, and Neglect—adjudication—findings of fact—incorporating language from petitions and evidentiary materials—all but one challenged finding upheld

In respondent-mother's appeal from an order adjudicating her children as abused, neglected, and dependent juveniles, respondent-mother's arguments challenging specific findings of fact were largely rejected. First, the court's incorporation of language from the juvenile petitions and verbatim portions of certain evidentiary materials did not constitute an improper delegation of its fact-finding duty, since the court ultimately made its own independent findings resolving any material disputes in the case. Second, most of respondent-mother's arguments alleging that the court failed to resolve inconsistencies in the evidence appeared to be masked requests to reweigh the evidence or second-guess the trial court's credibility determinations, which could not be done on appellate review. However, a portion of one finding—addressing the parents'

inability to offer appropriate alternative child care options—was not supported by the evidence and was therefore not upheld on appeal.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—allegations of child sexual abuse by father—emotional harm to children caused by mother's response—dependency—alternative child care arrangement

The adjudication of respondent-mother's minor daughters as abused and neglected juveniles was affirmed where, after reporting to police that the children's father had sexually abused them, respondent-mother's subsequent conduct—regardless of whether the abuse allegations were true—caused significant emotional harm to the children, especially where she: systematically alienated the children from their father, even holding a "ceremony" where they burned photographs of him; coached the children regarding the sex abuse allegations, which the children did not corroborate during forensic interviews; recorded them discussing sensitive topics, including embarrassing private behavior; subjected them to repeated medical and forensic evaluations despite professionals advising against it due to the potential trauma caused by the process; and hindered efforts by the department of social services to investigate the abuse allegations. On the other hand, the adjudication of the children as dependent was vacated because there was no evidence showing that respondent-mother lacked appropriate alternative child care options.

3. Child Abuse, Dependency, and Neglect—adjudication hearing—mother's testimony regarding sexual abuse allegations against father—father's stipulation denying the allegations—no due process violation

Respondent-mother's due process rights were not violated during an abuse and neglect proceeding, which arose from petitions by the department of social services alleging that respondent-mother's conduct toward her children—stemming from a belief that their father had sexually abused them—caused significant emotional harm to the children. First, respondent-mother's contention that she was prevented from testifying about the allegations against the father—and therefore was unable to present a full defense by showing that her subsequent reaction was justified—was not supported by the record, which showed that the abuse allegations were discussed extensively at the adjudication hearing and that any objections to testimony referencing those allegations were made for reasons other than to prohibit the topic. Second, the court did not

err in relying on the father's stipulation that allegations of sexual abuse existed but that he denied them, where the stipulation was legally sufficient under N.C.G.S. § 7B-807(a) and clarified the focus of the adjudication hearing, which was on respondent-mother's actions rather than the father's alleged abuse.

Appeal by respondent-mother from orders entered 23 November 2022 by Judge Rebecca Eggers-Gryder and 11 January 2023 by Judge Hal Harrison in Watauga County District Court. Heard in the Court of Appeals 4 March 2025.

di Santi Capua & Garrett, PLLC, by Chelsea Bell Garrett, for petitioner-appellee Watauga County Department of Social Services.

Ellis & Winters LLP, by James M. Weiss and Madeline Pfefferle, for the guardian ad litem.

King Law Offices, P.C., by Patrick K. Bryan, Krista Peace, Erin McCoy, and Michael Ian Maddox, for respondent-appellant mother.

PER CURIAM.

Respondent-Mother challenges the adjudication of her minor children as abused, neglected, and dependent juveniles and the subsequent disposition that the district court entered for the children. After careful review, we affirm the adjudication of the children as abused and neglected juveniles but vacate the adjudication of the children as dependent. The disposition order is left undisturbed.

I. Factual Background and Procedural History

This matter concerns "Ivy" and "Betty,"[1] who were 11 and 10 years old respectively, at the time of the adjudication hearing. The Watauga County Department of Social Services (DSS) became involved after Respondent-Mother reported to the Blowing Rock Police Department (BRPD) on 26 March 2021 that her husband—the children's father—had physically and sexually abused Ivy and Betty, as well as Respondent-Mother. Specifically, Respondent-Mother told a BRPD detective that upon discovering that Ivy and Betty had been masturbating, she became worried about the girls sleeping and snuggling with the father.

1. Pseudonyms are utilized to protect the privacy of the juveniles. N.C. R. App. P. 42(b).

DSS was contacted about Respondent-Mother's report and Respondent-Mother brought Ivy and Betty to the Child Advocacy Center (CAC) for forensic interviews. During the interviews, neither child reported sexual abuse by the father, although Ivy described the father as strict and sometimes accidentally hurting her, while Betty stated that the father did not do anything that made her sad or mad. The girls did not report sexual abuse or domestic violence to the DSS Child Protective Services (CPS) investigator, who formed an opinion that Respondent-Mother's report was not credible. Nevertheless, DSS assisted Respondent-Mother in obtaining a domestic violence protective order (DVPO), asked the father to leave the family home, and entered into a safety plan with Respondent-Mother.

Shortly after making the initial BRPD report, Respondent-Mother made an audio recording of herself talking to the children about the allegations against the father. When Respondent-Mother played the recording for the DSS CPS investigator, he became concerned that Respondent-Mother was coaching Ivy and Betty, and he advised her not to ask them leading questions about any abuse lest the DSS investigation be compromised. Between 31 March and 18 April 2021, however, Respondent-Mother took video recordings of Ivy and Betty masturbating, which she showed to DSS staff members, and then requested another forensic interview of Ivy, claiming that Ivy had disclosed additional abuse by the father. The DSS CPS investigator declined to conduct such an interview, noting that the interview process itself could be traumatic for a child. Regardless, Respondent-Mother took Ivy and Betty to their pediatrician's office to discuss the alleged abuse, which ultimately resulted in a referral to DSS for medical examinations and additional forensic interviews with the children.

On 20 April 2021, during an examination by a nurse practitioner, both children reported their belief that the examination was a result of their parents getting a divorce and denied being touched inappropriately by anyone. Ivy, however, stated that the father would sometimes "rub his private[s]" while she was sleeping with him and that she had begun to sometimes do the same, referring to masturbation. Betty reported that the father sometimes punched or hit her but did not report any sexual acts by herself or the father. For her part, Respondent-Mother denied any physical aggression by the father or other domestic violence in the home, despite a DVPO being in effect.

During its investigation, DSS received materials documenting Respondent-Mother's communications with and payment to a "spiritual advisor" named Tatum Sawyer. Sawyer told Respondent-Mother that Ivy

and Betty had been sexually abused in their past lives and advised that the resulting trauma could only be relieved through orgasm. Those communications took place less than six months before Respondent-Mother's initial report that her children were masturbating, which in turn caused Respondent-Mother to believe that they had been sexually abused by the father.

In July 2021, a forensic custody evaluation by Dr. Jennifer Cappelletty, a licensed psychologist, was ordered in a separate civil custody case between Respondent-Mother and the father. Cappelletty was able to complete a portion of the evaluation, but Respondent-Mother refused to permit Ivy and Betty to participate in a bonding assessment with the father. At that point, Cappelletty became concerned that Respondent-Mother's growing hostility and refusal to comply with the process would taint Cappelletty's ability to evaluate the family. As a result, in June 2022, DSS referred the family for a Child and Family Evaluation which included interviews with the family members by Shonnon Purcell, P.C.

The following month, July 2022, Purcell expressed concerns about the consistency of the allegations of abuse made by Ivy, Betty, and Respondent-Mother, and also about potential damage to the relationship between the children and the father resulting from Respondent-Mother's actions. Later that month, DSS learned of Respondent-Mother's testimony in the civil custody case in which Respondent-Mother described her video recording of Ivy and Betty masturbating as well as a "ceremony" she conducted with the children in which photographs of the father were burned. At that point, although the DSS investigation into the father's alleged sexual abuse remained ongoing, DSS was sufficiently concerned about Respondent-Mother's actions to file juvenile petitions on 25 July 2022 alleging that Ivy and Betty—who had then been in the sole care of Respondent-Mother for a year—were abused, neglected, and dependent juveniles. On the same date, DSS obtained nonsecure custody of Ivy and Betty and placed the children with their paternal cousin.

An adjudication and disposition hearing on the juvenile petitions was held in Watauga County District Court over eight days between August and November 2022. On 23 November 2022, the court entered an order adjudicating both Ivy and Betty to be 1) abused juveniles due to serious emotional damage created or allowed by Respondent-Mother; 2) neglected juveniles due to an injurious living environment created or allowed by Respondent-Mother; and 3) dependent juveniles in that the parents were not able to care for or supervise them and lacked an appropriate alternative child care option. The children remained in

the legal custody of DSS and in a kinship placement with their paternal cousin, with an interim plan of reunification with both parents. On 11 January 2023, the court entered a disposition order continuing legal and physical custody with DSS, the kinship placement, supervised visitation for Respondent-Mother, and a primary permanency plan of reunification with both parents. Respondent-Mother timely filed notice of appeal from the adjudication and disposition orders on 7 February 2023.

II. Analysis

On appeal, Respondent-Mother presents three arguments to this Court: 1) that the district court erred in adjudicating the girls as abused, neglected, and dependent juveniles because the findings of fact supporting the adjudication are improper; 2) that the court violated her due process rights during the adjudication hearing; and 3) that the court's dispositional findings of fact and conclusions of law are erroneous because they "are presupposed upon th[e] findings and conclusions in the adjudication order." As discussed below, we affirm the adjudication order as to abuse and neglect but vacate as to dependency. We affirm the disposition order.

A. Standard of review

In an abuse, neglect, or dependency case, we review a district

> court's adjudication to determine whether the findings are supported by clear, cogent and convincing evidence and the findings support the conclusions of law. A trial court's finding of an ultimate fact is conclusive on appeal if the evidentiary facts reasonably support the trial court's ultimate finding of fact. Where no objection is made to a finding of fact by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal.

In re G.C., 384 N.C. 62, 65–66, 884 S.E.2d 658, 661 (2023) (cleaned up). We review the court's conclusions of law concerning adjudication de novo, that is, anew and without deference to the lower tribunal. *Id.* at 66, 884 S.E.2d at 661. Finally, where some findings of fact are determined not to be supported by clear, cogent, and convincing evidence, but "ample other findings of fact support an adjudication . . . , erroneous findings unnecessary to the determination do not constitute reversible error." *In re T.M.*, 180 N.C. App. 539, 547, 638 S.E.2d 236, 240 (2006).

B. Challenged findings of fact in the adjudication order

[1] Respondent-Mother presents two contentions of error regarding the district court's findings of fact: 1) that the "court impermissibly

delegated its fact[-]finding duty" in that it "copy and paste[d]" sources and incorporated them into the findings of fact; and 2) that the court "failed to employ a process of logical reasoning . . . . [or] reconcile fundamental inconsistencies" in the evidence because many of the findings are statements of what was alleged, believed, or testified to in the case. As explained below, neither alleged flaw necessarily invalidates the findings of fact.

Our appellate courts have frequently been asked to address arguments centered on the style and substance of findings of fact in orders entered pursuant to Chapter 7B. As to Respondent-Mother's first argument, in determining whether factual findings taken verbatim (or nearly so) from juvenile petitions and other sources are proper, this Court has held "that it is not per se reversible error for a trial court's findings of fact to mirror the wording of a party's pleading . . . . [or to fail] to eliminate unoriginal prose." *In re J.W.*, 241 N.C. App. 44, 45, 772 S.E.2d 249, 251, *disc. review denied*, 368 N.C. 290, 776 S.E.2d 202 (2015). Instead, a reviewing court

> will examine whether the record of the proceedings demonstrates that the trial court, through processes of logical reasoning, based on the evidentiary facts before it, found the ultimate facts necessary to dispose of the case. If we are confident the trial court did so, it is irrelevant whether those findings appear cut-and-pasted from a party's earlier pleading or submission.

Id. at 45–46, 772 S.E.2d at 251.

Likewise, as to Respondent-Mother's second contention, our Supreme Court has emphasized that "there is nothing impermissible about describing testimony, so long as the court ultimately makes its own findings, resolving any material disputes." *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021) (cleaned up). In that case, "[i]n addition to making findings of fact that recited the testimony of various witnesses, the trial court made findings of fact that resolved a number of material disputes in the record evidence." *Id.* at 186, 864 S.E.2d at 496. "As a result, these findings of fact [reciting evidence we]re appropriately considered in evaluating the lawfulness of the trial court's" order. *Id.*

In the instant case, in accordance with this precedent, we consider whether the challenged findings reflect that the district court considered the evidence and made findings consistent therewith. As an initial matter, we note that while Respondent-Mother purports to challenge findings of fact 5–60 as not supported by clear and convincing evidence,

she presents specific arguments directly addressing only a handful of these findings:

Finding of fact 5—This lengthy finding, which includes 35 subparts, begins with the court clarifying the allegation at the heart of the juvenile petitions: whether Respondent-Mother was causing trauma to her daughters by her actions, rather than whether allegations of sexual abuse of the children by the father were true. Accordingly, a number of the subparts of finding of fact 5—a to g, i to y, and aa to ii—are recitations of the allegations that DSS made in the juvenile petitions and related aspects of the ongoing DSS investigation of the family. The district court included explicit credibility determinations in subparts h and z; to wit, that Respondent-Mother's explanation of why she made the March 2021 audio recording of her leading discussion with the children was "not credible" and that the court found "concerning" Respondent-Mother's responses to Cappelletty during the forensic evaluation, including her statement that she was "keep[ing] an open mind" regarding the possibility of her daughters having been sexually abused in past lives. In light of the many independent findings made by the court in resolving disputed material facts as discussed below, finding of fact 5 is proper and was appropriately considered by the court. *See id.* at 186, 864 S.E.2d at 496.

Finding of fact 6—Respondent-Mother contends that this finding "is, in actuality, a conclusion of law": "the children are in an injurious and emotionally abusive environment and . . . it is contrary to their welfare to remain in the custody of either parent at this time." We agree, but as discussed below, Cappelletty's report and expert opinion—as well as other findings of fact—support this conclusion.

Finding of fact 7—Respondent-Mother contends that this finding, listing more than 100 sources—including court orders, interviews with members of the family, photographs, medical records, and affidavits—on which Cappelletty relied in conducting her evaluation and forming her opinion is not proper for two reasons. She maintains first that it is only a "copy and paste" of the list provided in Cappelletty's report, and second, that the sources themselves "were not before the trial court." As explained above, it is not error for a court to include verbatim portions of reports as findings of fact, so long as the findings demonstrate the court's logical reasoning in making the necessary ultimate factual determinations. *See J.W.*, 241 N.C. App. at 45–46, 772 S.E.2d at 251. Nor do the resources that an expert consulted in forming her opinion need to be admitted or admissible at a hearing or trial. *See* N.C. Gen. Stat. § 8C-1, Rule 703 (2023) ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived

by or made known to him at or before the hearing." Further, if the facts or data are "of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible into evidence."). Accordingly, finding of fact 7 is a proper finding of fact.

Finding of fact 8—Respondent-Mother argues that this finding "offers nothing more than the court's *ipse dixit*[2] assertion that 'Dr. Cappelletty was thorough in gathering all this information to formulate her report and the information supports her opinions.' " We must reject her assertion that this finding "cannot be supported by clear and convincing evidence as much of 'the information' referenced in the Adjudication Order was never introduced or presented to the court in any substantive capacity during the proceedings."

As just noted, it was appropriate for Cappelletty, who was admitted as an expert in the field of forensic psychology with a specialty in sexual abuse, to rely on the sources cited by the court in finding of fact 7 in forming her opinion as to whether the children were being traumatized by Respondent-Mother's actions regardless of whether those sources were admitted or admissible. *See id.* Moreover, the district court, in its role as finder of fact, was charged with weighing the evidence and making credibility determinations, and therefore its characterization of Cappelletty as "thorough" was appropriate. *See Nash Cty. Dep't of Social Servs. v. Beamon*, 126 N.C. App. 536, 539, 485 S.E.2d 851, 852 ("[T]he trial court sat as fact[-]finder as well as arbiter of the law. The fact[-]finder has the right to consider all, some or none of a witness'[s] testimony; in addition, the fact[-]finder decides the appropriate weight to place on the testimony."), *disc. review denied*, 347 N.C. 268, 493 S.E.2d 655 (1997).

Finding of fact 10—Respondent-Mother takes issue with the court "cherry pick[ing] parts of Dr. Cappelletty's report" regarding the behavior and statements of Ivy "in such a way that mischaracterizes the evidence in the record." As just noted, however, the district court was entitled to assess witness credibility and weigh the evidence before it, and then to include in this finding of fact the portions of the report that it found credible and relevant. *See id.*

Finding of fact 11—Respondent-Mother first takes issue with the court including "verbatim recitations of Dr. Cappelletty's report," yet she acknowledges the introductory language in this finding in which

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2. "Something asserted but not proved." *Ipse dixit*, Black's Law Dictionary (12th ed. 2024).

the court stated that it was *adopting* the doctor's findings and recommendations. Such language indicates that the court considered the evidence in the report, found it credible, and thus adopted the results. This is a proper exercise of the court's discretion as fact-finder. *See id.* Respondent-Mother also characterizes as "circular" subpart d, incorrectly identified in her brief as subpart a, which states that the "research is clear and, while ignoring a source of trauma can be harmful to a child, treating a child for trauma [he or she] did not actually experience also causes the child harm." We perceive nothing "circular" about this statement and, given that the allegations in the petitions largely concern whether Respondent-Mother was traumatizing the children based upon her *belief* that sexual abuse had occurred *regardless of whether any such abuse had actually taken place*, the court's fact-finding determination that "research is clear" on that point is both relevant and supported by clear, cogent, and convincing evidence in the form of Cappelletty's testimony and report.

Finding of fact 32—Respondent-Mother characterizes this finding as an impermissible delegation of the district court's fact-finding duty, in that the court "transpose[d]" Cappelletty's third recommendation from the report—namely,

> that 'the court consider that [Cappelletty] found evidence of significant parental alienation on the part of [Respondent-Mother] regarding systematic efforts to alienate [Ivy] and [Betty] from their father'. . . , into a finding of fact that, '[t]he recommendation of Dr. Cappelletty's report *provides evidence* that Respondent[-]Mother has systematically made efforts to alienate [Ivy] and [Betty] from [the f]ather.

Again, there is no error in using verbatim language from the report, given the portion of finding of fact 11 in which the court, based on Cappelletty's report, specifically "f[ound] as fact . . . [t]hat there has been significant parental alienation on the part of [Respondent-Mother] regarding systematic efforts to alienate [Ivy] and [Betty] from their father." *See J.W.*, 241 N.C. App. at 45–46, 772 S.E.2d at 251. Further, the court was entitled as fact-finder to determine that the report was credible on the issue in question such that it "provide[d] evidence." *See Nash Cty.*, 126 N.C. App. at 539, 485 S.E.2d at 852.

Finding of fact 54— Respondent-Mother makes only a general argument that "findings 12-60 do not demonstrate a 'process of logical reasoning' . . . as shown by unreconciled inconsistencies of evidence and/or by plain failure of said findings to be supported by clear and convincing

evidence in the record." (Quoting *In re B.P.*, 257 N.C. App. 424, 432, 809 S.E.2d 914, 919 (2018)). Upon review, we agree that one portion of finding of fact 54 is unsupported. This finding states:

> Given the allegations of sex abuse by . . . the[f]ather against the Juveniles, and the allegations that Respondent[-] Mother created an injurious and emotionally abusive environment, there was no other alternative but to place the Juveniles outside the home, with a neutral relative. The Juveniles are dependent in that both the Respondent[-] Parents are unable to provide for the Juveniles[']] care or supervision and *lack appropriate alternative child care.*

(Emphasis added).

No party has cited—and we have not independently located—any evidence before the court at the adjudication hearing concerning either parent's offer, or lack thereof, of an "appropriate alternative child care" option for Ivy and Betty once they were removed from the custody of Respondent-Mother. *See* N.C. Gen. Stat. § 7B-101(9). Rather, the record indicates that the children were in a kinship placement with their paternal cousin at the time of the adjudication hearings,[3] and that placement was continued in both the interim disposition set forth in the adjudication order and later in the disposition order. Given the lack of any record evidence regarding Respondent-Mother's or the father's ability to provide an appropriate alternative child care option—including whether the kinship placement utilized was offered by one or both of the parents—we cannot uphold the part of finding of fact 54 which states that the parents "lack appropriate alternative child care."

Findings of fact 12 through 60—As previously observed, Respondent-Mother makes a general argument that "findings 12-60 do not demonstrate a 'process of logical reasoning' . . . as shown by unreconciled inconsistencies of evidence and/or by plain failure of said findings to be supported by clear and convincing evidence in the record." (Quoting *B.P.*, 257 N.C. App. at 432, 809 S.E.2d at 919). We do not find the examples of purported inconsistencies cited by Respondent-Mother meritorious:

- Whether the BRPD or DSS "set up the forensic interview" conducted with the children on 26 March 2021 is a matter of no seeming relevance to the adjudications here.

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3. The kinship placement appears to date from July 2022, when DSS obtained nonsecure custody of Ivy and Betty.

- The court's failure to "demonstrate how [it] reconciled the inconsistent testimony" made by the children during the forensic interview is not error because a fact-finder is not required to provide such justifications, as evidenced by Respondent-Mother's inability to cite authority for her proposition.
- The court was entitled to make findings of fact based on some portions of a witness's testimony but not on others. *See Nash Cty.*, 126 N.C. App. at 539, 485 S.E.2d at 852.
- The court was not inconsistent in making finding of fact 31—that "Dr. Cap[p]elletty's report and her testimony really provides the entire picture, the entire history of what the Juveniles have endured"—without noting that DSS is still investigating the allegations against the father or that Cappelletty was not able to complete her evaluation. Omission of the former fact is not "inconsistent" as the petitions here concern Respondent-Mother's allegedly traumatizing behavior and not any abuse by the father. The latter omission is not inconsistent given the court's finding that Cappelletty's inability to complete the evaluation was due to Respondent-Mother's failure to cooperate with the process and her efforts to sabotage the DSS investigation.
- Finding of fact 28—that the children were not traumatized by discussing with Cappelletty a bonding assessment at which the father would have been present but "became traumatized when they got home and talked to Respondent[-]Mother"—is supported by testimony elicited from Cappelletty on cross-examination. She explained that the children were not upset about the prospect of the bonding assessment when they left an appointment with her, but that Respondent-Mother told Cappelletty a few weeks later that Ivy and Betty were then experiencing "a great deal of distress" about the bonding assessment.

In sum, many of Respondent-Mother's arguments purporting to challenge the district court's findings of fact as failing to resolve inconsistencies in the evidence appear to be requests that this Court reweigh the evidence or second-guess the district court's credibility determinations, which is not our role. *See In re S.C.R.*, 198 N.C. App. 525, 531–32, 679 S.E.2d 905, 909 ("It is the duty of the trial judge to consider and weigh all of the competent evidence, and to determine the credibility of the witnesses and the weight to be given their testimony." (cleaned up)), *appeal dismissed*, 363 N.C. 654, 686 S.E.2d 676 (2009). Further, there is no error

in the findings of fact that use the wording of evidentiary materials, because "the trial court employed a process of logical reasoning, which is evidenced through its having made several independent findings of fact." *B.P.*, 257 N.C. App. at 432, 809 S.E.2d at 918–19 (internal quotation marks omitted). However, we conclude that the portion of finding of fact 54 addressing the parents' ability to offer appropriate alternative child care is not supported by clear, cogent, and convincing evidence.

C. Challenged conclusion of law in the adjudication order

We next turn to Respondent-Mother's assertions that the district court's proper findings of fact did not support its conclusion of law that Ivy and Betty were abused, neglected, and dependent juveniles.

1. Abuse and neglect

[2] Pertinent to this case, the Juvenile Code defines an abused juvenile as one whose parent "[c]reates or allows to be created serious emotional damage to the juvenile[, as] . . . evidenced by [the] juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others." N.C. Gen. Stat. § 7B-101(1)(e). Respondent-Mother contends that the findings of fact do not support the district court's conclusion that the children are abused juveniles in that Respondent-Mother "create[d] or allow[ed] to be created serious emotional damage to" Ivy and Betty. *Id.*

A juvenile is neglected under the Code, *inter alia*, if her parent has "[c]reate[d] or allow[ed] to be created a living environment that is injurious to the juvenile's welfare." *Id.* § 7B-101(15)(e). To support a neglect adjudication, a "trial court must find that there were 'current circumstances' that rendered [the juvenile]'s environment unsafe." *In re D.S.*, 286 N.C. App. 1, 16, 879 S.E.2d 335, 345 (2022). "In order to adjudicate a juvenile neglected, our courts have additionally required that there be some physical, mental, or emotional impairment of the juvenile or a substantial risk of such impairment as a consequence of the failure to provide proper care, supervision, or discipline." *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003) (cleaned up). Respondent-Mother maintains that the court's factual findings do not show that her actions caused any "physical, mental, or emotional impairment of [Ivy and Betty] or a substantial risk of such impairment," *id.* (citation omitted), and that the district court failed to assess the "current circumstances." *D.S.*, 286 N.C. App. at 16, 879 S.E.2d at 345.

In our view, the court's conclusions of law and the resulting adjudications of neglect and abuse are supported by its proper findings of

fact that: Respondent-Mother had, through systematic efforts, caused "significant parental alienation" between the children and the father; the parental alienation had caused "significant emotional harm to" and "been detrimental to the well-being of" the children; "while ignoring a source of trauma can be harmful to a child, treating a child for a trauma [he or she] did not actually experience also causes the child harm"; during the year in which the children were in the sole care of Respondent-Mother, "their emotional distress ha[d] escalated" because Respondent-Mother was not "able or willing to provide an environment that [wa]s conducive to her daughters['] healing"; Respondent-Mother had failed to cooperate with interested professionals, ignored court orders regarding the evaluation by Cappelletty, and "actively sabotaged DSS'[s] investigation"; Respondent-Mother coached the children regarding allegations of abuse against the father and took actions which subjected them to unnecessary evaluations about the alleged abuse; Respondent-Mother instigated the burning of photographs of the father as part of a "ceremony" with the children, damaging any potential future relationship with the father; Respondent-Mother attempted to record the children masturbating and then discussed this private aspect of the children's behavior with "so many people" that it will be "emotionally scarring to them" if they ever learn of her actions; Respondent-Mother's demeanor indicated that she did not appreciate the import of "what she ha[d] done" or the significance of her actions as they affected the children; and "[w]hether the sexual abuse [alleged to have been inflicted by the father] happened or not, [the children] have been traumatized by the way that Respondent[-] Mother has handled the situation."

These findings show that Respondent-Mother either caused or escalated the emotional distress and harm to and created potential emotional scarring of Ivy and Betty. She sabotaged the investigation into the allegations she initiated. She refused to follow the recommendations of professionals or comply with court orders. Her agenda of alienating the children from their father, along with her poor judgment, lack of truthfulness, and ongoing unwillingness or inability to understand the harm to Ivy and Betty resulting from her actions—regardless of whether the sexual abuse allegations regarding the father are true—continued up until the time of the hearing. These factual findings meet the criteria set forth by statute and precedent regarding the adjudication of children as abused and neglected juveniles. Accordingly, the court's conclusions of law to that effect are fully supported, and the resulting abuse and neglect adjudications are affirmed.

2. Dependency

We do, however, find merit in Respondent-Mother's argument that the district court's conclusion that Ivy and Betty are dependent juveniles cannot be upheld.

A dependent juvenile is defined as a child "in need of assistance or placement because . . . the juvenile's parent . . . is unable to provide for the juvenile's care or supervision *and* lacks an appropriate alternative child care arrangement." N.C. Gen. Stat. § 7B-101(9) (emphasis added). "Under this definition, the trial court must address both (1) the parent's ability to provide care or supervision, and (2) the availability to the parent of alternative child care arrangements." *In re P.M.*, 169 N.C. App. 423, 427, 610 S.E.2d 403, 406 (2005). As discussed above, the portion of finding of fact 54 regarding an appropriate alternative child care arrangement is not supported by any record evidence. The dependency adjudication as to Ivy and Betty must therefore be vacated. *See B.P.*, 257 N.C. App. at 435, 809 S.E.2d at 920.

D. Respondent-Mother's due process rights

[3] In her next argument, Respondent-Mother contends that her due process rights were violated by the district court in two ways: that the court 1) "prohibit[ed her] from presenting a full defense [and] relevant evidence during the adjudication hearing," and 2) "impermissibly relied on [the f]ather's 'stipulation' as a basis for the adjudication of abuse, neglect, and dependency." As just noted, the dependency adjudications are vacated. Regarding the abuse and neglect adjudications, however, Respondent-Mother both misrepresents what occurred at the hearing and misreads the adjudication order.

Respondent-Mother argues that she was not able to present "a full defense" in that she was not able to present evidence that the father had sexually abused Ivy and Betty such that her actions in light of that belief were justified, appropriate, and could not have constituted abuse or neglect of the children. Yet, our review of the hearing transcripts does not support Respondent-Mother's representations that "throughout the adjudication hearing, the trial court repeatedly prohibited [her] from presenting evidence in any way related to alleged sexual abuse perpetrated by [the f]ather upon the subject children."

In support of her position, Respondent-Mother cites four specific objections to testimony at the hearing that were sustained by the court. The first occurred during Respondent-Mother's direct examination when her counsel asked why she made her initial abuse report to

law enforcement. Respondent-Mother was allowed to answer, without objection: "Because of the concerns that I ha[d] of the girls' masturbation, because the sexual abuse that [the father] was doing to me. I ha[d] concerns, just not the—what r[o]se up more about the masturbation of the girls [wa]s—[wa]s the fear that they were having to the father." However, when Respondent-Mother answered a follow-up question about how she knew the children were fearful by saying, "They always expressed fear to the[ir] father," a general objection by the father's counsel was sustained. In context, the objection appears to have been sustained on hearsay grounds, given that moments before, the court had sustained an explicit hearsay objection to a question about what Ivy told Respondent-Mother about bruises she received. In sustaining that objection, the court explained that if Ivy testified, she could be asked, but Respondent-Mother could not repeat what Ivy told her. In this light, it appears that Respondent-Mother was not prohibited from mentioning the alleged abuse; rather, she was simply not allowed to give hearsay testimony about what the children said.

On the second occasion cited, Respondent-Mother's counsel asked her what occurred just before she made the audio recording of the children that led to concerns about coaching. The transcript reflects that the objection was sustained because the question was leading, not due to any reference to alleged sexual abuse by the father. Moreover, once her counsel rephrased the question, Respondent-Mother was allowed to testify regarding the conversations she had with Ivy and Betty both before and during the audio recording.

The third point during the hearing where Respondent-Mother contends her due process rights were violated involved testimony from one of her witnesses, the director of a religious organization. He was asked by her counsel about his opinions "with regard to the connection or any connection between . . . finding out whether the children were actually sexually abused and doing the bonding assessment" and what Respondent-Mother told him "about the bonding assessment and sexual abuse that you already talked about." The court sustained general objections to each question, and in a brief discussion amongst counsel and the court, it was clarified that the objection was on the ground that the question had been "asked and answered." Respondent-Mother's counsel was then allowed to ask a rephrased version of essentially the same question, without objection: "Can you please tell the [c]ourt what—if my client talked to you about this, obviously, what, if anything, was the connection that my client saw between the bonding assessment and finding out whether the girls were actually sexually abused?" Thus, the issue

of the father's alleged sexual abuse was not the basis of the objection, and the topic was not prohibited.

In the final instance identified by Respondent-Mother, the court sustained two objections to questions as to whether Betty had disclosed sexual abuse on the basis that the questions were leading. Once again, it was the *form* of the questions and not their reference to alleged sexual abuse that led to the sustained objections. Further, Respondent-Mother's counsel chose not to return to the topic by asking non-leading questions.

Moreover, the allegations of sexual abuse by the father were referred to and discussed throughout the hearing by virtually every witness, as shown by both explicit and implicit references to those allegations in the majority of the findings of fact in the adjudication order. The court further noted that those allegations were still under investigation by DSS, despite Respondent-Mother's hampering of that process, and specifically found that "Respondent[-]Mother does not appear to understand the nuances of what DSS'[s] investigation entailed and that DSS'[s] role was to monitor and try to create a plan, *whether* [*the f*]*ather has sexually abused these children or not*" and "[*w*]*hether the sexual abuse happened or not*, [Ivy and Betty] have been traumatized by the way that Respondent[-]Mother has handled the situation with [them]."

Respondent-Mother's final due process contention is that the district court erred in relying on the father's stipulation that allegations of sexual abuse by the father existed, although he strongly denied committing such abuse. She argues that "there was never a meaningful, or legally sufficient, stipulation" pursuant to N.C. Gen. Stat. § 7B-807. We are not persuaded.

The relevant statute provides, *inter alia:*

> If the court finds from the evidence, including stipulations by a party, that the allegations in the petition have been proven by clear and convincing evidence, the court shall so state. *A record of specific stipulated adjudicatory facts shall be made* by either reducing the facts to a writing, signed by each party stipulating to them and submitted to the court; or *by reading the facts into the record, followed by an oral statement of agreement from each party stipulating to them.*

Id. § 7B-807(a) (emphases added).

Adjudicatory finding of fact 5 states:

> The issue raised in this [p]etition was not whether [the father] had sexually abused the Juveniles, but whether they were experiencing trauma at the hands of Respondent[-] Mother. At the commencement of the hearing, [the f]ather stipulated in open court, by and through his attorney of record, that the factual *allegations* set forth in the [p]etition are true—that there had been allegations of sexual abuse, but he did deny that the allegations themselves were true. . . . The stipulation of [the f]ather, the previous testimony of Respondent[-]Mother, and the additional facts set forth hereinbelow, establish by clear, cogent and convincing evidence that the Juveniles are Abused, Neglected and Dependent Juveniles . . . .

The hearing transcript reveals that counsel for the father stated for the record in open court that the father "*stipulates to the facts as alleged in the petitions* filed by DSS, and I want to, again, clarify that *we are not disputing the fact that allegations have been made against* [*the father*]. We do wholeheartedly and as vigorously as possible *deny that those allegations are true*." These statements fully comport with the requirements for stipulations set forth in N.C. Gen. Stat. § 7B-807(a), and accordingly, the stipulation was legally sufficient.

Respondent-Mother maintains that "[t]his is not a stipulation that has any credible meaning or value for purposes of an adjudication. Nevertheless, both DSS and the trial court accepted it as a stipulation. This acceptance, naturally created undue implications for the remainder of the proceedings and, ultimately, the adjudication of" Ivy and Betty. Specifically, she asserts that the stipulation "seemingly operated as a de facto alignment of the parties with DSS and the[f]ather on one side and Respondent[-]Mother on the other side" and "it apparently relinquished the trial court of its duty to consider the evidence before it regarding the[f]ather's actions as they related to the 'existence or nonexistence of any of the conditions alleged in a petition.' N.C. Gen. Stat. § 7B-802."

Respondent-Mother's argument reflects her ongoing misapprehension of the factual allegations in the petitions. As the petitions state, the DSS supervisor testified, and the court found, the petitions were filed due to concerns that Ivy and Betty were being harmed by *Respondent-Mother's poor judgment and her noncompliance and interference* with the DSS investigation and the related court orders. Moreover, because Respondent-Mother's noncompliance and interference had—at the time

of the hearing—prevented DSS from fully investigating and resolving the truth or falsity of the allegations against the father, *Respondent-Mother's own actions prevented DSS from being able to file any potential petitions based on abuse by the father*. The meaning and value of the father's stipulation was to clarify the bases of the petitions and thus the focus of the adjudication hearing. The district court did not err in relying on the father's legally sufficient stipulation for that purpose.

In sum, each of Respondent-Mother's due process arguments are overruled.

E. Challenge to the disposition order

Respondent-Mother's sole assignment of error as to the district court's disposition order is that the order was "premised and presupposed" upon the findings of fact and conclusions of law in the adjudication order which Respondent-Mother argued were erroneous and unsupported. As explained above, although we vacate the dependency adjudications, we affirm the adjudications of Ivy and Betty as abused and neglected juveniles. Accordingly, we leave the disposition order undisturbed.

III. Conclusion

We affirm the adjudications of Ivy and Betty as abused and neglected juveniles but vacate the adjudications of the children as dependent juveniles. The disposition order is affirmed.

AFFIRMED IN PART; VACATED IN PART.

Panel consisting of Chief Judge DILLON and Judges ZACHARY and FLOOD.

STATE v. EARLEY

[298 N.C. App. 172 (2025)]

STATE OF NORTH CAROLINA
v.
LAVONDA MARIE EARLEY, DEFENDANT

No. COA24-386

Filed 19 March 2025

1. Appeal and Error—preservation of issues—failure to object to testimony at trial—untimely objection during State's closing—limited review

In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, defendant failed to preserve for appellate review any of her challenges to testimony that was elicited by the State regarding defendant's failure to provide a statement to law enforcement during its investigation of the incident. First, any arguments regarding testimony to which no objections were lodged were waived. Second, defense counsel objected to only portions of the testimony and the same evidence was later introduced without objection. Finally, some of defense counsel's objections did not provide a specific basis for the objection. Thus, review of the challenged statements was limited to plain error analysis. With regard to defendant's failure to preserve for appellate review statements by the prosecutor during closing argument regarding defendant's silence—because defense counsel's objection was not timely—the appellate court undertook to determine whether the challenged statements were grossly improper.

2. Constitutional Law—right to remain silent—prosecutor's questions—defendant's post-arrest silence—no probable impact on outcome

In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the trial court did not commit plain error by allowing the State to question defendant regarding her failure to make a statement to law enforcement after her arrest, where, in light of the substantial unchallenged evidence that supported the State's version of events and contradicted defendant's, the jury would not have reached a different verdict absent the alleged error.

3. Criminal Law—prosecutor closing argument—defendant's post-arrest silence—not grossly improper

In a prosecution for attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury arising from a domestic dispute during which defendant shot her husband, the prosecutor's statements regarding defendant's post-arrest silence and failure to provide a statement to law enforcement were not so grossly improper as to require the trial court to intervene ex mero motu, and the trial court's failure to do so did not constitute an abuse of discretion. The prosecutor's statements were de minimis and, considering the record as a whole, not prejudicial in light of the substantial evidence presented of defendant's guilt.

Judge TYSON dissenting.

Appeal by defendant from judgments entered 8 September 2023 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Joshua H. Stein, by Assistant Attorney General Caden William Hayes, for the State.

Kaelyn N. Sweet for defendant-appellant.

FLOOD, Judge.

Defendant, Lavonda Marie Earley, appeals from the trial court's judgments finding her guilty of attempted first degree murder and assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"). On appeal, Defendant argues the trial court erred or plainly erred by: (A) allowing the State to repeatedly question Defendant about her failure to make a statement to law enforcement, and (B) allowing the State to reference her silence during closing argument. Upon careful review, we conclude the trial court did not plainly err in allowing the State to question Defendant about her failure to make a statement to law enforcement, because Defendant cannot establish she was prejudiced by the challenged evidence, and the trial court did not abuse its discretion in failing to intervene *ex mero motu* during the State's closing argument, because the statements were not grossly improper.

I. Factual and Procedural Background

On 25 January 2022, shortly before 6:00 p.m., Defendant's husband, John Stacey, returned from work and arrived at their home at 2000 Chandler Forest Court in Indian Trail, North Carolina. Stacey entered the house and saw Defendant "sitting at the desk" in the kitchen, but Defendant did not look up, and Stacey said nothing to Defendant "because [they] don't really talk." Stacey "grab[bed] a beer[,]" then went upstairs to the master bathroom, "turn[ed] on some jazz[,]" took a "scrub brush[,]" and "got in the shower[.]" Stacey left the bathroom door open. Stacey saw Defendant "pulling the [bathroom] door closed[,]" thinking that she had briefly come in to get something and left. Stacey finished showering, stepped out of the shower, and set one foot on the bathroom floor, when Defendant reentered the room and "just started shooting."

Defendant quickly tried to close the bathroom door; however, a hook on the door prevented her from closing the door. Defendant reentered the room, and Stacey asked Defendant, "why are you doing this[?]" Defendant responded: "You fucked her, you die mother fucker[.]" Defendant removed the door hook, took Stacey's phone and wallet that were lying on the bathroom sink, locked Stacey inside the bathroom, and left the home.

Stacey first tried to call out for help through the bathroom window, to no avail. He then "crawled to the door . . . fumbled and [] got it unlocked[,]" then "crawled to the steps." He crawled out of the bathroom, through the master bedroom, down the second-floor hallway, and to the top of the stairs. Stacey then "balled up in a knot and rolled down" the stairs. He unlocked the front door, and then "rolled to the porch" where he called out for help. He then saw his neighbor, Joshua Betts, passing by.

Earlier that same day, Defendant had called Betts. Betts had "never really spoken to [Defendant,]" yet Defendant was very talkative on the phone call, resulting in "the longest conversation [Betts had] ever had with [Defendant.]" On the call, Defendant asked whether Betts and his wife would be home later in the day so that Defendant could return some Tupperware.

Around 5:30 p.m., Defendant knocked on Betts' front door with Tupperware in hand, and Betts' wife opened the door and accepted the Tupperware. Around the time Stacey began taking his shower, Betts and his wife finished their workday and went on their daily walk around the neighborhood. Betts briefly returned to the house and closed their windows because he and his wife "smelled smoke somewhere[,]" but

when they resumed their walk, Betts heard "a lot of loud bangs" coming from Defendant's house. Betts "kept turning around" to look at Defendant's house, and he eventually saw Defendant at the front door, who was "struggling" with the door lock, and "in a hurry." A few minutes later, Betts saw that Defendant's black Mercedez-Benz was gone.

Although Betts wanted to investigate, his wife "held [him] back" and "pulled [him] along for the rest of the walk." Returning in the direction of their house, Betts and his wife walked past Defendant's house. Betts saw Stacey "laying on the front steps . . . just wearing a bath towel[,]" his "head . . . hang[ing] off of some of his brick steps[,]" and "covered in blood[.]" Stacey told Betts: "Call 911 . . . my wife shot me[.]"

Emergency Response, Investigation, and Arrest

Deputy Jason Frazier, with the Union County Sheriff's Office, was dispatched to Defendant's home shortly after 6:00 p.m. Upon arriving at the home, Deputy Frazier saw Stacey in about the same condition as Betts observed him, and observed Stacey "had several gunshot wounds to his lower body." Deputy Frazier entered the home and observed "a blood trail that led from the front door up the stairs" and "a large amount of blood in the bathroom." He observed "busted glass on the floor and . . . [handgun] casings on the vanity and the counter and the sinks." Soon after, Steven Helms, a paramedic with the Union County EMS, arrived on the scene, began treating Stacey, observed several wounds on Stacey, and noticed he "appeared to have lost a good deal of blood." Helms subsequently transported Stacey to the hospital.

Following Stacey's transportation to the hospital, Crime Scene Investigator Paige Eason arrived at the scene. In the master bathroom, Investigator Eason observed the following: "broken glass, a large amount of blood," and "spent casings"; the glass shower door had "extensive damage"; bath towels and robes were located in the bathtub; five 9-millimeter casings located "in the sink[,]" one casing located "on top of the sink vanity[,]" and another "spent casing [] next to the bathtub"; "suspected projectile holes in the metal of the shower door frame[,]" some "on the wall located next to the shower[,]" and one "in the toilet paper holder[.]" Investigator Eason further observed: a "specific drip pattern" of blood next to the open shower door, indicating Stacey was "not moving, [or] . . . not walking at the time"; blood on the bathroom door; blood on the doorhandle; and an absence of blood where the bathmat had been located. Investigator Eason concluded: "Based on all of that information there definitely was a firearm shot in that bathroom"; "[s]omeone was standing within a particularly close distance to the vanity"; and the shooter was probably standing.

Next, Investigator Eason proceeded to the bedroom, where she observed blood stains leading from the bathroom, and through and out the bedroom, indicating movement "consistent with someone who's actively bleeding [and] crawling through that area[.]" Investigator Eason also observed that none of the items on the dresser appeared out of place, none of the bed linens were out of place, and that only one side of the bed appeared to be in use. She further observed: a "handgun box and the magazine" located towards the foot of the bed; that the magazine was loaded; and that it had "seven rounds in an eight[-]round capacity magazine." She did not locate the gun associated with the magazine or any other handguns in the home.

Sergeant Tyler Kell soon arrived at the house, was assigned lead investigator, and searched the house. He found at least two shotguns in the house, including one shotgun "tucked under" the bed, which was not easily reachable, and appeared "still [intact] as if it had just been purchased[.]" Upon inspection, he determined that the shotguns were unloaded. Sergeant Kell had also been notified that Defendant's phone number had called 911 at 6:28 p.m., and Defendant had several times repeated the phrase "[a]mbulance 2000 Chandler Forest Court." Neither Defendant nor her seventeen-year-old son, Ashton—who was not at the home at the time of the events—had been located since that time. It was later determined that Defendant had been traveling to her mother's house on "[t]he west side of Charlotte," and had crossed into Mecklenburg County at the time of the 911 call.[1] Sergeant Kell had tried to call Defendant, but Defendant never "pick[ed] up her phone[.]" Sergeant Kell further observed a "doorbell camera" on the "front side of the house[.]" Defendant had virtual access to the Ring doorbell camera during the time of the responding officers' arrival.

Law enforcement obtained a warrant to arrest Defendant the same night as the shooting. The next day, on 26 January 2022, an attorney contacted Sergeant Kell informing him Defendant would turn herself in, and she did so that afternoon. Although Sergeant Kell had requested Defendant turn in the gun she used to shoot Stacey, Defendant did not bring a gun upon her arrest. At the time of her arrest, Defendant was given *Miranda* warnings and declined to make a statement to law enforcement.

Senior Crime Scene Investigator Chris McTeague entered Defendant's interview room, where she was photographed, and asked Defendant

1. The 911 operators had attempted to transfer Defendant's call to the Union County 911 Center; however, Defendant hung up the phone before the transfer was complete.

whether "she had any injuries[.]" Defendant "indicated that she did not" have any injuries, and Investigator McTeague did not observe bruising; "nicks, cuts, [or] scrapes"; or any other injuries on Defendant.

Three weeks after the shooting, Stacey, who had been in intensive care and on a ventilator, woke up in the hospital, was discharged a few weeks later, and went to live at his daughter's house. Defendant had, by this time, bonded out of jail and returned to the marital home. Stacey was granted a domestic violence protective order ("DVPO") to remove Defendant from the home. Pursuant to the DVPO, Defendant went to the Union County Sheriff's Office "to surrender a firearm[,]" which was a "pink and black Smith & Wesson M&P Shield 9[-]millimeter semiautomatic handgun."

Trial Proceedings

On 4 April 2022, a Union County Grand Jury returned a true bill of indictment, charging Defendant with attempted first degree murder and AWDWIKISI. On 25 August 2023, the matter proceeded to trial, and both parties presented evidence.

The following, relevant testimony was heard at trial. On direct examination of Sergeant Kell, the State asked whether he "g[a]ve [Defendant] an opportunity to give a statement at the time that she turned herself in[.]" Defense counsel objected on the basis "that the State is trying to elicit the information that my client invoked her . . . Fifth Amendment right not to incriminate herself." The trial court overruled Defense counsel's objection, and Sergeant Kell responded affirmatively.

Later, on direct examination of Sergeant Kell, the State asked questions regarding Sergeant Kell's interactions with Defendant on 8 February 2022, where Sergeant Kell testified he had told Defendant over the phone he "didn't want to speak with [Defendant] about the shooting without her understanding that . . . she had the right to not speak with [him] about that without an attorney present[,]" because Defendant, not being in custody, "still had some rights attached to her[.]" Sergeant Kell testified Defendant wanted to discuss other topics. Defense counsel did not object to this line of questioning.

Next, during Defense counsel's cross-examination of Sergeant Kell, Sergeant Kell confirmed he did not know Defendant's version of events, to which Defense counsel responded: "[a]ll right. So you're just going on the only one side that you knew; correct?" Sergeant Kell responded affirmatively. During the State's redirect examination of Sergeant Kell, Sergeant Kell stated: "We were unable to get [] Defendant's version

of events even though we tried." Defense counsel did not object to this exchange.

Defendant thereafter put on her own case, claiming self-defense. The following, relevant testimony was heard. Forensic psychologist Dr. Mina Ratkalkar testified, among other things, that "at the time of the offense[,] it appears that [Defendant] was in a place where she thought that her life was in imminent danger. . . . [Defendant] was afraid that if she did not take action that . . . she would no longer be here." Later, the State cross-examined Deidre Johnson, a real estate broker who knew Defendant for nineteen years, asking in relevant part whether Johnson was "aware that [Defendant] never called [Sergeant] Kell[.]" Johnson replied in the negative. Defendant did not object to this colloquy.

Next, Defendant testified. According to Defendant, two days prior to the shooting, she confronted Stacey about his drug use and about his selling drugs.[2] Defendant had also previously expressed concern with the "young girl" Stacey called his "weed connection" for whom he bought gifts. Defendant would "destroy [Stacey's] weed every time [she saw] it[,]" and "took out" a camera Stacey had installed "so he could stop watching [Defendant] guard his illegal marijuana." Two days before the shooting, Defendant testified she had located, on an iPad, text messages between Stacey and his nephew that "confirm[ed] exactly what [Defendant] was talking about with [Stacey] selling drugs."

Defendant then testified as to her phone conversation with Betts the day of the shooting, explaining she called him "to go over his Trane warranty with him[,]" referring to Defendant and Stacey having previously "installed a full [HVAC] system," and that it was Defendant's "job [] to follow up[.]" Defendant also told Betts she still had to return the "container from the Christmas cookies[.]" After the phone call, Defendant left to go to her great aunt's funeral.

After she returned, Defendant was sitting in the kitchen "working on paperwork . . . that was for the divorce[,]" when Stacey returned home from work.[3] Stacey asked Defendant, "how was the funeral[,]" to which Defendant responded, "what do you care[?]" An argument ensued, with Defendant and Stacey "cursing [] back and forth [and]

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2. When Defendant was served with the DVPO, Defendant produced drug paraphernalia to Sergeant Michael Malloy of the Union County Sheriff's Office, alleging it belonged to Stacey; Defendant, however, had been in sole possession of the home for a little over one month before this interaction.

3. Evidence was presented that Stacey and Defendant had a strained marital relationship and that they had been regularly discussing divorce since at least 2020.

yelling and screaming[.]" Their argument continued upstairs into the bathroom, where Stacey got into the shower, Defendant "put[] eyeliner on[,]" and continued to argue with Stacey about his "selling drugs with [his] nephew[.]"

After Stacey got out of the shower, Defendant "grabbed his phone[,]" and screamed, "I'm going to show you how you're selling drugs[,]" after which Stacey grabbed the phone back from Defendant. They were struggling over the phone, and had moved into the adjacent master bedroom, when Stacey grabbed Defendant "by [the] neck," "pushed [her] on [to her] back onto the bed and slung [her] over the footboard of the bed." Defendant then "slid under the bed," and "[got] the gun[,]" which was already loaded. Stacey then "dragg[ed Defendant] by [her] feet[,]" screaming: "Bitch, you think I'm fucking playing with you, you think I'm fucking playing with you." Stacey "was pulling [Defendant] in that bathroom[,]" and Defendant testified she knew Stacey kept his "OJ Simpson knife" in the "bottom drawer."

At that point, Defendant "started firing everywhere[.]" Defendant testified she "believe[d she] was going to die" because she "didn't know what [Stacey] had done with the gun that he had took from [her]." Defendant grabbed Stacey's phone because it had "all the evidence on it"; she "took his wallet," "pushed [the] bed back over," and "laid the [loaded magazine] . . . in that box along with the gun case." At that point, Stacey "got up," and through tears stated, "baby, I'm so sorry." Defendant next testified she got in her car and left, "not thinking about anything else but getting . . . to safety." She called 911 and "gave the address" before "being disconnected[.]" Later, she retained an attorney and was "given instructions . . . not to say anything" to law enforcement.

On cross-examination, the State asked Defendant: "[I]sn't it correct that the first time the State became aware of your version of events was [twenty-two] days ago when your attorney handed me Dr. Ratkalkar's report here in the courtroom?" Defendant replied in the affirmative. The State next asked: "You never provided a statement to law enforcement in this investigation, did you?" Defendant replied in the negative. Defense counsel only objected to the last question asked by the State: "[Y]ou never provided any outside witnesses who you allegedly told about the abuse?"[4] Defense counsel timely objected but did not provide a basis for the objection, and the trial court overruled the objection.

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4. Defendant testified that, around 2017 and 2018, Stacey began physically abusing Defendant.

The State next asked Defendant if she kept a journal, which she stated she did. Defendant explained, however, that she did not produce the journal for trial or discovery. In response to the State's questioning her about not producing the journal, Defendant responded: "I don't have to make any statements to the State prior to my trial[;] . . . I had an attorney who advised me not to say anything[.]" Defense counsel did not object to this line of questioning.

The State then asked Defendant: "[Y]ou had an opportunity to give a version of your events to law enforcement; correct?" Defendant responded: "I was given instructions by my attorney not to say anything, which is my right to do so." The State replied: "It is your right. It's also your constitutional right to present whatever fabricated defense you want to a jury, isn't it?" Defense counsel objected, and the trial court sustained the objection.

The State later provided to Defendant: "You didn't give any details to the 911 operator because you didn't know what your story was going to be yet." Defendant responded: "I told them where my husband was." The State then asked: "You wouldn't answer the phone for law enforcement trying to find Ashton; correct?" Defendant responded: "I d[id]n't know that law enforcement was calling me." Defense counsel did not object to this exchange.

The State called several witnesses in rebuttal. Betts testified that his phone call with Defendant did not involve "warranty information about that HVAC system[.]" Betts further maintained that the call was "out of place[.]" Sergeant Kell testified that, as to the "scene in that bedroom[,]" nothing "indicate[d] . . . a fight [or a struggle] had occurred there at all." Sergeant Kell further testified that, "comparing the scene I saw to the testimony [Defendant] gave, I would expect to see things . . . disheveled or knocked over. . . . I just did not feel that the scene correctly represented what she alleged happened." Sergeant Kell also testified: "The probability that those [] casings . . . were able to land in that sink while she was being drug so violently that she is kicking and fighting and shooting wherever[;] . . . I find that . . . highly unlikely and improbable[.]" He testified that there were "no [bullets] in the ceiling" or even "above head level." Sergeant Kell finally testified that: "Without a doubt, . . . the physical evidence present in the bedroom and the bathroom [was not] consistent with [] Defendant's version of events[.]"

In its closing argument, the State argued that Defendant's self-defense claim was an after-the-fact creation—calling it "smoke and mirrors." The State indicated "the first mention of self[-]defense c[ame] from [] Defendant . . . the following day." The State continued: "We know that

[] Defendant did not give a statement to law enforcement." The State then argued Defendant provided "repeated fabrications . . . from that witness stand under oath[,]" and created "a story" and a "movie script" in "an attempt to hoodoo [the jury.]" After the State's closing argument, the jury left to deliberate, when defense counsel stated: "I believe it is improper in a closing argument to say that the defense was smoke and mirror." The trial court did not rule on the objection.

On 7 September 2023, the jury found Defendant guilty of both attempted first degree murder and AWDWIKISI. The trial court sentenced Defendant to 157 to 201 months' imprisonment for the attempted first degree murder verdict, and a consecutive sentence of 73 to 100 months' imprisonment for the AWDWIKISI verdict. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review this appeal from final judgments of a superior court, pursuant to N.C.G.S. §§ 7A-27(b) and 15A-1444(a) (2023).

III. Analysis

On appeal, Defendant argues the trial court erred or plainly erred by: (A) allowing the State to repeatedly question Defendant about her failure to make a statement to law enforcement, and (B) allowing the State to reference her silence during closing argument. We address each argument, in turn.

A. Preservation Issues

[1] As a preliminary matter, we address whether Defendant has preserved her alleged errors for appellate review.

"In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). "To be timely, an objection to the admission of evidence must be made at the time it is actually introduced at trial." *State v. Snead*, 368 N.C. 811, 816 (2016) (citation and internal quotation marks omitted). Rule 10's specificity requirement "prevents unnecessary retrials by calling possible error to the attention of the trial court so that the presiding judge may take corrective action if it is required." *State v. Bursell*, 372 N.C. 196, 199 (2019).

"It is well settled that an error, even one of constitutional magnitude, that [a] defendant does not bring to the trial court's attention is

waived and will not be considered on appeal." *Id.* at 199 (citation omitted); *see also State v. Ashe*, 314 N.C. 28, 39 (1985) (a "defendant's failure to object to alleged errors by the trial court operates to preclude raising the error on appeal"). Furthermore, "[w]here evidence is admitted over objection and the same evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Alford*, 339 N.C. 562, 570 (1995). "Unpreserved error in criminal cases . . . is reviewed only for plain error." *State v. Lawrence*; 365 N.C. 506, 512 (2012); *see also* N.C. R. App. P. 10(a)(4). We first consider whether Defendant has preserved her alleged error for statements made at trial, before closing arguments.

1. Statements made at trial

Here, none of the statements made at trial are preserved for appellate review. Defendant references in her appellate brief several portions of testimony to which no objection was lodged by defense counsel at trial; thus, any errors arising out of any of these portions of testimony, even if they rise to the level of constitutional errors, are deemed waived on appeal. *See Bursell*, 372 N.C. at 199; *see also* N.C. R. App. P. 10(a)(1).

Further, defense counsel objected only to certain portions of testimony. First, defense counsel objected to the colloquy between the State and Sergeant Kell, where the State asked Sergeant Kell whether Defendant had been given "an opportunity to give a statement at the time that she turned herself in[,]" to which Sergeant Kell responded in the affirmative. Although defense counsel timely objected and stated that the basis for the objection was the Fifth Amendment, the State's question did not reference Defendant's silence, but merely her opportunity to give a statement. Even if the State's question could be construed as referencing Defendant's silence, this same evidence was later admitted without objection when the State asked Sergeant Kell about his knowledge of Defendant's version of events, and Sergeant Kell responded that law enforcement was "unable to get [] Defendant's version of events even though [they] tried." Because the same evidence that was previously objected to was later admitted without objection, "the benefit of the objection [was] lost[,]" and any error related to this portion of testimony is waived on appeal. *See Alford*, 339 N.C. at 570; *see also Bursell*, 372 N.C. at 199.

Finally, defense counsel objected to the State's question to Defendant that she "never provided any outside witnesses who [Defendant] allegedly told about the abuse[,]" and later to the State's question to Defendant that "[i]t's also [Defendant's] constitutional right to present whatever fabricated defense [Defendant] want[s] to a jury, isn't it?" Although

defense counsel's objection in both instances was timely, defense counsel did not provide specific grounds for either objection, and because the grounds for both objections are not apparent in their respective contexts—as it is unclear to this Court whether defense counsel was objecting on Fifth Amendment grounds, related to Defendant's silence, or on other grounds—these allegations of error are not preserved for appellate review. *See* N.C. R. App. P. 10(a)(1); *see also Bursell*, 372 N.C. at 199. Next, we consider whether Defendant has preserved her alleged error for statements made by the State during closing argument.

2. Statements made during closing argument

Our Supreme Court has also explained that "[i]t is the general rule that an impropriety in the argument must be brought to the attention of the trial judge in time for it to be corrected[.]" *State v. Smith*, 291 N.C. 505, 521 (1977). "[The] Court is mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *State v. Jones*, 355 N.C. 117, 129 (2002). A defendant must object to statements made during closing argument, however, or the error is not preserved for appellate review. *See State v. Parker*, 269 N.C. App. 629, 638 (2020) ("If [a d]efendant or his counsel believes the State's argument [during closing argument] is improper, they are obliged to speak and object to preserve the error for appellate review.").

This Court has held that an untimely objection made during closing argument failed to preserve the issue for appellate review. *See State v. Hurd*, 246 N.C. App. 281, 291 (2016) (concluding that where "the State twice argued [the d]efendant had [the victim] killed before [the d]efendant objected," such objection was untimely under N.C. R. App. P. 10(a)(1)). Similarly, our Supreme Court has concluded that, where a defendant "did not request the judge to stop the argument or to instruct the jury not to consider it[,]" and where the objection only appeared "for the first time in the case on appeal[,]" the defendant "should have excepted and moved for a mistrial before the case went to the jury, rather than wait until after verdict to make complaint[,]" and thus did not preserve the error for appellate review. *State v. Peele*, 274 N.C. 106, 114 (1968), *superseded on other grounds*, *State v. Gillard*, 386 N.C. 797 (2024). Unpreserved error for improper closing arguments is reviewed only for "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *Jones*, 355 N.C. at 133.

Here, defense counsel objected to the State's closing argument only after the State concluded its argument and after the jury left to deliberate

in the jury room, stating: "I believe it is improper in a closing argument to say that the defense was smoke and mirror. . . . That is improper closing argument by the prosecutor." The objection was untimely because defense counsel, objecting only *after* the jury left to deliberate, did not bring the objection "to the attention of the trial judge in time for it to be corrected[.]" *See Smith*, 291 N.C. at 521. Similar to *Peele*, where the defendant failed to object during closing argument and objected only after the case went to the jury, here, defense counsel objected only after the jury left to deliberate. *See* 274 N.C. at 114. Defense counsel "should have excepted . . . *before* the case went to the jury" so as to make a timely objection and preserve the issue for appellate review, rather than wait until after the jury left to deliberate.[5] *See id.* (emphasis added); *see also Hurd*, 246 N.C. App. at 291; *Parker*, 269 N.C. App. at 638. Because defense counsel's objection was untimely, Defendant's related allegation of error is not preserved for appellate review. *See* N.C. R. App. P. 10(a)(1); *see also Smith*, 291 N.C. at 521; *Peele*, 274 N.C. at 114.

Accordingly, none of Defendant's alleged errors are preserved for appellate review, and thus we review the statements made at trial for plain error, and whether the statements made during closing argument were grossly improper. *See Lawrence*; 365 N.C. at 512; *see also Jones*, 355 N.C. at 133; N.C. R. App. P. 10(a)(4).

B. Testimony at Trial

[2] Defendant first argues the trial court plainly erred by allowing the State to repeatedly question Defendant about her failure to make a statement to law enforcement. We disagree.

To demonstrate plain error, Defendant must satisfy a three-factor test:

> First, the defendant must show that a fundamental error occurred at trial. Second, the defendant must show that the error had a "probable impact" on the outcome, meaning that "absent the error, the jury probably would have returned a different verdict." Finally, the defendant must show that the error is an "exceptional case" that warrants plain error review, typically by showing that the error

5. Defense counsel objected after the trial court had instructed the jury, and the jury had left the courtroom, but before the jury commenced deliberations. Defense counsel's objection was untimely, despite having been made before the jury commenced deliberations, because it had not been made during the State's closing argument. *See Parker*, 269 N.C. App. at 638; *see also Hurd*, 246 N.C. App. at 291; *Peele*, 274 N.C. at 114.

> seriously affects "the fairness, integrity or public reputation of judicial proceedings."

State v. Reber, 386 N.C. 153, 158 (2024) (quoting *Lawrence*, 365 N.C. at 518–19). As to the second part of the test, concerning prejudice, "[t]he question is not whether the challenged evidence ma[kes] it more likely that the jury would reach the *same* result. Instead, the analysis is whether, without that evidence, the jury probably would have reached a *different* result." *Id.* at 160 (emphasis in original). "In other words, the test examines the state of all the evidence except for the challenged evidence and asks whether, in light of that remaining evidence, the jury probably would have done something different." *Id.* at 162.

Here, considering only the remaining evidence not challenged on appeal, the jury would probably not have reached a different result. *See id.* at 160, 162. The State presented overwhelming evidence from which a jury could conclude that the State's version, rather than Defendant's version, accurately explained the events. The State presented substantial unchallenged evidence that blood, broken glass, and several 9-millimeter casings had been found in the bathroom. The State's unchallenged evidence provides that: "there definitely was a firearm shot in that bathroom"; "[s]omeone was standing within a particularly close distance to the vanity"; and the shooter was probably standing, which contradicts Defendant's account that she started firing as she was being dragged into the bathroom by Stacey.

Further, the State presented evidence that there were "no [bullets] in the ceiling" or even "above head level[,]" and that "[t]he probability that those [] casings . . . were able to land in that sink while [Defendant] was being drug so violently that she is kicking and fighting and shooting wherever" was "highly unlikely and improbable[.]" The State further presented evidence of a "specific drip pattern" of blood next to the open shower door, indicating Stacey was "not moving [or] . . . not walking at the time[,]" and presented evidence of blood stains leading from the bathroom, and through and out the bedroom, indicating movement "consistent with someone who's actively bleeding [and] crawling through that area[.]" The State's evidence supports a conclusion that Stacey crawled rather than stood up, casting doubt on Defendant's testimony that Stacey stood up and apologized.

The State also presented evidence that nothing appeared out of place in the bedroom, none of the items in the dresser appeared out of place, the linens were not out of place, and only one side of the bed appeared to be in use. The State presented Sergeant Kell's unchallenged testimony that the scene in the bedroom did not indicate that "a fight [or a struggle]

had occurred there at all[,]" directly contradicting Defendant's account that Defendant and Stacey fought and struggled in the bedroom. After Defendant's arrest, she was not observed to have any injuries, further contradicting Defendant's account of the violent fight and struggle. The State's evidence that law enforcement found no loaded guns in the house casts doubt on Defendant's account that she reached under the bed and obtained a loaded gun.

The State also presented uncontradicted evidence that the home had a Ring doorbell camera, to which Defendant had access during the time the responding officers arrived, and that Defendant's phone number had dialed 911 at 6:28 p.m., after emergency responders had arrived. The uncontradicted evidence also demonstrates Defendant did not pick up the phone when called by Sergeant Kell. Further, the State presented Betts' testimony, where he testified that the phone call between him and Defendant did not involve "warranty information about that HVAC system" and that the call was "out of place[,]" again contradicting Defendant's version of events. Finally, the State presented evidence that Defendant did not turn in the gun upon being arrested, but only after being served with the DVPO, from which a jury could question why Defendant did not turn in the gun upon being arrested.

Examining only the unchallenged evidence, there is substantial evidence that supports the State's version of events, in contradiction of Defendant's version of events, such that there is no showing that "the jury probably would have reached a *different* result." *See id.* at 160, 162. Because Defendant has not satisfied the second factor of the three-factor plain error test, Defendant cannot demonstrate plain error. *See id.* at 158. Accordingly, the trial court did not plainly err in allowing the State to question Defendant about her failure to make a statement to law enforcement. *See id.* at 158.

C. Statements During Closing Argument

[3] Defendant next argues the trial court plainly erred by allowing the State to reference her silence during closing argument. We disagree.

"[P]lain error review does not apply to [statements during closing argument] because plain error is reserved for evidentiary or instructional errors." *See id.* at 163.

> Where a defendant fails to object to the closing arguments at trial, defendant must establish that the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*. To establish such an abuse, [the] defendant must show that the prosecutor's

> comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.

State v. Tart, 372 N.C. 73, 80–81 (2019) (citation omitted) (cleaned up). "[A] new trial will be granted only if the remarks were of such a magnitude that their inclusion prejudiced [the] defendant, and thus should have been excluded by the trial court." *Id.* at 82 (citation and internal quotation marks omitted). As our Supreme Court has explained:

> To warrant a new trial, the prosecutor's remarks must have perverted or contaminated the trial such that they rendered the proceedings fundamentally unfair. In assessing whether this level of prejudice has been shown, the challenged statements must be considered in context and in light of the overall factual circumstances to which they refer. Thus, only when it finds *both* an improper argument and prejudice will th[e] Court conclude that the error merits appropriate relief.

Id. at 82 (citations omitted) (cleaned up); *see also State v. Ward*, 354 N.C. 231, 265 (2001) ("[S]tatements made during closing arguments will not be examined in isolation. Instead, on appeal we must give consideration to the context in which the remarks were made and the overall factual circumstances to which they referred." (citation and internal quotation marks omitted)). Further, where "evidence is introduced without objection at trial and does not meet the criteria for plain error, it is well within the 'parameters of propriety' for a trial court to permit that evidence to be described in closing arguments." *Reber*, 386 N.C. at 164.

"[A] criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *Ward*, 354 N.C. at 266. "A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional." *Id.* at 266.

This Court has held that even where the State unconstitutionally referenced the defendant's silence, when considering the record in its entirety, such reference was not prejudicial and did not require a new trial. In *State v. Adu*, this Court first concluded that where the State referenced the defendant's silence in closing argument, the State's comment violated the defendant's Fifth Amendment right against self-incrimination. 195 N.C. App. 269, 276–77 (2009). This Court next concluded, however, that such error was harmless where the State's statements at trial as to Defendant's silence to law enforcement were

de minimis, and "it d[id] not appear from the record or the transcript that the State attempted to capitalize on Defendant's silence."[6] *Id.* at 277–78. This Court held that "the jury would have reached the same verdict even had the trial court disallowed the contested testimony[,]" because the State presented substantial evidence of the defendant's guilt "other than [the d]efendant's silence to law enforcement," so that the error was not prejudicial. *Id.* at 278.

Here, the State's references to Defendant's silence were *de minimis* and, in context of the Record, do not rise to the level of being prejudicial to Defendant. In its closing argument that lasted for thirty-four pages of the trial transcript, the State referenced Defendant's pre-trial silence to law enforcement only four times. Defendant was not prejudiced, because as previously explained, in addition to providing evidence of Defendant's silence, the State presented substantial evidence of Defendant's guilt. *See Reber*, 386 N.C. at 160, 162. It also does not appear from the Record that the State attempted to capitalize on Defendant's silence. *See Adu*, 195 N.C. App. at 277–78. As in *Adu*, where, despite the State having violated the defendant's Fifth Amendment right against self-incrimination, the defendant was not prejudiced so as to warrant a new trial, here too, the references to Defendant's silence were *de minimis*, and Defendant was not prejudiced because the State presented substantial evidence of Defendant's guilt. *See id.* at 276–77, 278; *see also Reber*, 386 N.C. at 160, 162. Furthermore, the challenged evidence was "well within the 'parameters of propriety' for [the] trial court to permit that evidence to be described in closing arguments" because it did not rise to the level of plain error. *See Reber*, 386 N.C. at 164.

Considering the statements made by the State during closing argument "in context and in light of the overall factual circumstances to which they refer[,]" the statements were not of such "a magnitude that their inclusion prejudiced [D]efendant, and thus should have been excluded by the trial court." *See Tart*, 372 N.C. at 82 (citation omitted). Accordingly, the statements were not so "grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*." *See id.* at 80–81.

IV. Conclusion

Upon review, we conclude the trial court did not plainly err in allowing the State to question Defendant about her failure to make a

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6. In *Adu*, this Court applied the "harmless error" standard of review because the defendant timely objected during closing argument to the State's reference to the defendant's failure to speak with law enforcement. *See* 195 N.C. App. at 273, 274.

statement to law enforcement, because Defendant has failed to establish she was prejudiced by the challenged evidence. Further, the trial court did not abuse its discretion in failing to intervene *ex mero motu* during the State's closing argument, because the statements were not grossly improper.

NO PLAIN ERROR and NO ERROR.

Judge ZACHARY concurs.

Judge TYSON dissents in separate opinion.

TYSON, Judge, dissenting.

I. Background

This case addresses a Defendant's rights to not answer questions or make statements, and to remain silent upon the advice of counsel and for the State not to comment on, nor to use or challenge, the Defendant's assertion of those rights against them at trial. The State repeatedly violated Defendant's assertion of these rights and belittled her silence and prejudiced her before the jury. I respectfully dissent.

On 26 January 2022, the day after the shooting had occurred, Defendant's retained attorney contacted Sergeant Kell and informed him Defendant would surrender and turn herself in, and she willingly did so that afternoon. At the time of her arrest, Defendant was given *Miranda* warnings, and, on the advice of counsel, she declined to answer questions or to make any statements to law enforcement officers. From that point forward, law enforcement officers and the State were on actual notice with specific knowledge Defendant was represented by counsel and upon his advice, she would not answer questions nor make any statements. Defendant posted bond, was released from jail, and she returned to the marital home.

On direct examination, the State asked Sergeant Kell whether he "g[a]ve [Defendant] an opportunity to give a statement at the time that she turned herself in[.]" Defense counsel immediately objected and asserted "that the State is trying to elicit the information that my client invoked her [Fifth Amendment] right not to incriminate herself." The trial court overruled Defense counsel's objection. Sergeant Kell responded, "She was." Defense counsel timely objected and stated the

basis for the objection was the comment on the assertion of Defendant's Fifth Amendment rights.

Later during direct examination, the State further asked Sergeant Kell about his interactions with Defendant on 8 February 2022. Sergeant Kell testified he had initiated a call and had told Defendant over the phone he "didn't want to speak with [Defendant] about the shooting without her understanding that . . . she had the right to not speak with me about that without an attorney present[,]" because Defendant, not being in custody, "*still had some rights* attached to her[.]" (emphasis supplied). Sergeant Kell testified Defendant wanted to discuss other topics, including the theft of items from her home. Sergeant Kell referred Defendant to a magistrate, and she followed by filing a larceny report. It is uncontradicted Sergeant Kell knew Defendant was represented by counsel when he had called her, and she had been instructed by counsel to not answer questions, to make no statements to law enforcement officers, and to remain silent.

During Defense counsel's cross-examination, Sergeant Kell confirmed he did not know Defendant's version of the events, to which Defense counsel responded: "[a]ll right. So you're just going on the only one side that you knew; correct?" Sergeant Kell responded affirmatively. During the State's re-direct examination of Sergeant Kell, Sergeant Kell stated: "We were unable to get [ ] Defendant's version of events *even though we tried*." (emphasis supplied).

The State also cross-examined Deidre Johnson, a real estate broker and defense witness, who had known Defendant for nineteen years. The State asked whether Johnson was "aware that [Defendant] never called [Sergeant] Kell[.]" Johnson replied in the negative. Again, this was a deliberate comment and disparagement by the State on Defendant's Fifth Amendment right to remain silent, as she had been expressly instructed and advised by her attorney. Defendant had timely and specifically asserted self-defense, and the facts before the jury were disputed.

Substantial and uncontradicted evidence was presented tending to show Stacey and Defendant had a strained marital relationship and had been regularly discussing divorce since at least 2020. Defendant testified Stacey had begun physically abusing her since 2017 and 2018. Defendant timely filed pre-trial notice of self-defense and later asserted self-defense, put on evidence, including expert testimony, and she testified at trial.

Dr. Mina Ratkalkar, a forensic psychologist, qualified as an expert witness and testified, "at the time of the offense[,] it appears that

[Defendant] was in a place where she thought that her life was in imminent danger. . . . [Defendant] was afraid that if she did not take action that . . . she would no longer be here."

Defendant testified she had confronted Stacey, two days prior to the shooting, about his illegal drug use, selling drugs, and his relationship with a young woman. Defendant testified she would "destroy[Stacey's] weed every time [she saw] it[,]" and "took out" a camera Stacey had installed "so he could stop watching me guard his illegal marijuana." When Defendant was served with the DVPO and removed from the marital residence, Defendant surrendered a handgun, a shotgun, and drug paraphernalia to Union County Sheriff's Sergeant Michael Malloy and alleged it belonged to Stacey.

Defendant also testified she had located text messages between Stacey and his nephew on an iPad device two days before the shooting, that "confirm[ed] exactly what [Defendant] was talking about with [Stacey] selling drugs." Defendant also asserted concerns about Stacy's relationship and involvement with the "young girl," Stacey had called his "weed connection," and for whom he had bought gifts.

Defendant testified to a phone conversation with neighbor, Joshua Betts, the day of the shooting, explaining she had called him "to go over his Trane warranty with him[,]" referring to Defendant and Stacey having previously "installed a full [HVAC] system," and it was Defendant's "job [] to follow up[.]" Defendant also told her neighbor, Betts, that she still had to return the "container from the Christmas cookies[.]" After the phone call, Defendant left to attend her great aunt's funeral.

After she returned home, Defendant was sitting in the kitchen "working on paperwork . . . that was for the divorce[,]" when Stacey returned home from work. Stacey asked Defendant, "how was the funeral[,]" to which Defendant responded, "what do you care[?]" An argument ensued, with Defendant and Stacey "cursing [] back and forth [and] yelling and screaming[.]" Their argument continued upstairs into the bathroom, where Stacey got into the shower, Defendant "put[] eyeliner on[,]" and she continued to argue with Stacey about his "selling drugs with [his] nephew[.]"

Defendant testified after Stacey got out of the shower, Defendant "grabbed his phone[,]" and screamed, "I'm going to show you how you're selling drugs[,]" after which Stacey grabbed the phone back from Defendant. The two were struggling over the phone, and had moved into the adjacent master bedroom, when Stacey grabbed Defendant "by [the] neck," "pushed [her] on [to her] back onto the bed and slung [her] over the footboard of the bed."

Defendant testified she "slid under the bed," and "[got] the gun[,]" which was already loaded. Stacey then "dragg[ed Defendant] by [her] feet[,]" screaming: "B*tch, you think I'm f*cking playing with you, you think I'm f*cking playing with you." Stacey "was pulling [Defendant] in that bathroom[,]" and Defendant testified she knew Stacey kept his "OJ Simpson knife" in the "bottom drawer" in the bathroom.

At that point, Defendant stated she "started firing everywhere[.]" Defendant testified she "believe[d she] was going to die" because she "didn't know what [Stacey] had done with the gun that he had took from me." Defendant grabbed Stacey's phone because it had "all the evidence on it"; she "took his wallet," "pushed [the] bed back over," and "laid the [loaded magazine] . . . in the box along with the gun case." At that point, Stacey "got up," and through tears stated, "baby, I'm so sorry[.]"

Defendant next testified she got into her car and left driving toward her mother's home in Charlotte, "not thinking about anything else but getting . . . to safety." She called 911 and "gave the address" of and sent them to the marital home where Stacey was located before "being disconnected[.]" Later, she retained an attorney and was "given instructions . . . not to say anything" to law enforcement.

On cross-examination, the State asked Defendant: "[I]sn't it correct that the first time the State became aware of your version of events was [twenty-two] days ago when your attorney handed me Dr. Ratkalkar's report here in this courtroom?" Defendant replied in the affirmative.

The State next asked: "You never provided a statement to law enforcement in this investigation, did you?" Defense counsel objected to this question. Defendant replied in the negative. The State asked "[Y]ou never provided any outside witnesses who you allegedly told about the abuse?" Defense counsel timely objected, but the trial court overruled the objection.

The State next asked Defendant if she had kept a journal, to which she stated she did. Defendant explained she did not produce the journal for trial or discovery. In response to the State's questioning her about not producing the journal, Defendant responded: "I don't have to make any statements to the State prior to my trial[;] . . . I had [retained] an attorney who advised me not to say anything[.]"

The State continued to pursue this line of questioning on her silence and then asked Defendant: "[Y]ou had an opportunity to give a version of your events to law enforcement; correct?" Defendant responded: "I was given instructions by my attorney not to say anything, which is my right to do so." The State replied: "It is your right. It's also your constitutional

right to present whatever fabricated defense you want to a jury, isn't it?" Defense counsel objected, and the trial court sustained the objection, but it failed to strike this testimony nor offer a curative instruction to the jury.

The State asked Defendant: "You didn't give any details to the 911 operator because you didn't know what your story was going to be yet." Defendant responded: "I told them where my husband was." The State then asked: "You wouldn't answer the phone for law enforcement trying to find Ashton; correct?" Defendant responded: "I d[id]n't know that law enforcement was calling me."

In its closing argument, the State argued Defendant's self-defense claim was fabricated and an after-the-fact creation and lie, calling it "smoke and mirrors[.]" The State asserted "the first mention of self[-] defense c[ame] from [] Defendant . . . the following day." The State continued: "We know that [] Defendant did not give a statement to law enforcement." The State then argued Defendant had provided "repeated fabrications . . . from that witness stand under oath[,]" and created "a story" and a "movie script" in "an attempt to hoodoo [the jury.]"

After the State's closing argument, the jury left to deliberate. Defense counsel objected and stated: "I believe it is improper in a closing argument to say that the defense was smoke and mirror." The trial court failed to rule on the objection or to further address the jury.

II. Preservation

As the majority's opinion correctly notes, North Carolina's appellate courts are "mindful of the reluctance of counsel to interrupt his adversary and object during the course of closing argument for fear of incurring jury disfavor." *State v. Jones*, 355 N.C. 117, 129, 558 S.E.2d 97, 105 (2002). Because of this reluctance, "it is incumbent on the trial court to monitor vigilantly the course of such arguments, to intervene as warranted, to entertain objections, and to impose any remedies pertaining to those objections." *Id.* If counsel makes improper remarks during closing argument, the trial court should implement remedies, such as "requiring counsel to retract portions of an argument deemed improper or issuing instructions to the jury to disregard such arguments." *Id.*

Defendant's argument regarding the State's improper and prejudicial comments made during closing arguments are properly preserved. Defendant objected immediately after closing arguments, before the jury had begun deliberations, and explained in detail to the court his reasoning for waiting until the prosecutor had finished her arguments:

> MR. OSHO: Yes, your Honor I truly don't like to make any objection during closing argument, but in the past some judges have deemed my objection to be untimely if I make it after the closing. I believe it is improper in a closing argument to say that the defense was smoke and mirror. And you know, I have the case law I just don't have it with me today. But that is improper closing argument by the prosecutor. I don't want to interrupt but I want the record to reflect that I made the objection, I want the court to take judicial notice that it's made timely because I don't want to disrupt closing by jumping up and down while she's making her closing argument.
>
> THE COURT: Sure. So just the record reflect the objection, it was not made during the closing but for the record it's being made.

"If [a d]efendant or his counsel believes the State's argument [during closing argument] is improper, they are obliged to speak and object to preserve the error for appellate review." *State v. Parker*, 269 N.C. App. 629, 638, 839 S.E.2d 83, 89 (2020). "In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Defendant's counsel timely did so here prior to the jury beginning deliberations. *Jones*, 355 N.C. at 129, 558 S.E.2d at 105.

III. Closing Argument Remarks

A. Standard of Review

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

Jones, 355 N.C. at 133, 558 S.E.2d at 107 (citation omitted). A prosecutors' closing argument must avoid appeals to passion or prejudice. *Id*. at 135, 558 S.E.2d at 108.

When opposing counsel objects during a closing argument, we review for abuse of discretion. *State v. Walters*, 357 N.C. 68, 101, 588 S.E.2d 344, 364, *cert. denied*, 540 U.S. 971, 157 L. Ed. 2d 320 (2003). Our Supreme Court also cautioned that an appellate court should "not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976). "[F]or an inappropriate prosecutorial comment to justify a new trial, it must be sufficiently grave that it is prejudicial error." *State v. Soyars*, 332 N.C. 47, 60, 418 S.E.2d 480, 487-88 (1992) (citation and internal quotation marks omitted).

B. Analysis

"A violation of the defendant's rights under the Constitution of the United States is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt. The burden is upon the State to demonstrate, beyond a reasonable doubt, that the error was harmless." N.C. Gen. Stat. § 15A-1443(b) (2023). The State has failed to carry its burden here.

Our General Statutes provide guidance about permissible commentary during a prosecutor's closing argument:

> During a closing argument to the jury an attorney *may not become abusive*, inject his personal experiences, *express his personal belief as to the truth or falsity of the evidence* or as to the guilt or innocence of the defendant, or make *arguments on the basis of matters outside the record* except for matters concerning which the court may take judicial notice.

N.C. Gen. Stat. § 15A-1230(a) (2023) (emphasis supplied).

Our Supreme Court has held:

> In North Carolina it is well settled that counsel is allowed wide latitude in the argument to the jury. Even so, counsel may not, by argument or cross-examination, place before the jury incompetent and prejudicial matters by injecting his own knowledge, beliefs, and personal opinions not supported by the evidence. A prosecutor must present the

> State's case vigorously while at the same time guarding against statements which might prejudice the defendant's right to a fair trial.

State v. Hill, 311 N.C. 465, 472-73, 319 S.E.2d 163, 168 (1984) (citations and internal quotation marks omitted).

"The prosecuting attorney should use every honorable means to secure a conviction, but it is his [or her] duty to exercise proper restraint so as to avoid misconduct, unfair methods or overzealous partisanship which would result in taking unfair advantage of the accused." *State v. Holmes*, 296 N.C. 47, 50, 249 S.E.2d 380, 382 (1978).

Our Supreme Court, quoting *Berger v. United States*, 295 U.S. 78, 88, 79 L. Ed. 1314, 1324 (1935), provided the following warning to prosecutors:

> The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

State v. Smith, 279 N.C. 163, 167, 181 S.E.2d 458, 460 (1971) (quoting *Berger*, 295 U.S. at 88, 79 L. Ed. at 1324).

Although prosecutors are given wide latitude during closing arguments, the deference given to prosecutors making those remarks "is not unlimited." *State v. Hembree*, 368 N.C. 2, 19, 770 S.E.2d 77, 89 (2015) ("Judicial deference, however, is not unlimited.").

Our Supreme Court has "found grossly improper the practice of flatly calling a witness or opposing counsel a liar when there has been no evidence to support the allegation." *State v. Rogers*, 355 N.C. 420, 462, 562 S.E.2d 859, 885 (2002) (citations omitted); *see also State v. Locklear*, 294 N.C. 210, 217, 241 S.E.2d 65, 70 (1978) ("It is improper for a lawyer to assert his opinion that a witness is lying. He can argue to the jury

that they should not believe a witness, but he should not call him a liar." (citations and internal quotation marks omitted)).

This Court has also repeatedly warned prosecutors about impermissible statements during closing arguments and cautioned them, like Daedalus warned Icarus, not to "fly too close to the sun":

> Notwithstanding our conclusions that Defendant has failed to object or to show prejudice in the prosecutor's statements and demonstrations to warrant a new trial, we find the prosecutor's words and actions troublesome. Without hesitation, the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact. See BERGEN EVANS, DICTIONARY OF MYTHOLOGY 62-63 (Centennial Press 1970). We emphasize, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict." Rev. R. Prof. Conduct N.C. St. B. 3.8 (Special Responsibilities of a Prosecutor) cmt. [1] (2015).

State v. Martinez, 251 N.C. App. 284, 296, 795 S.E.2d 386, 394 (2016).

The majority's opinion expressly recognizes, "a criminal defendant has a right to remain silent under the Fifth Amendment to the United States Constitution, as incorporated by the Fourteenth Amendment, and under Article I, Section 23 of the North Carolina Constitution." *State v. Ward*, 354 N.C. 231, 266, 555 S.E.2d 251, 273 (2001). "A defendant's decision to remain silent following his arrest may not be used to infer his guilt, and *any comment by the prosecutor on the defendant's exercise of his right to silence is unconstitutional*." *Id.* (emphasis supplied).

Defendant argues the prosecutor made repeated and impermissible comments during her direct and cross examinations and closing argument. The State was well aware Defendant had retained an attorney the day after the shooting had occurred. Defendant's retained attorney had contacted Sergeant Kell and informed him Defendant would turn herself in and surrender, and she willingly did so that afternoon.

At the time of her arrest, Defendant was given *Miranda* warnings and, on the advice of her retained counsel, she declined to answer questions or to make any statements to law enforcement officers. Defendant also willingly surrendered the handgun, a shotgun, and evidence of her husband's drug dealing to officers after the DVPO was entered.

The prosecutor first commented on Defendant's failure to speak with law enforcement: "We know that the Defendant, nor her family, returned any calls from law enforcement." The prosecutor later stated Defendant's husband "was willing to speak to investigators." Lastly, the prosecutor argued in closing:

> [Defendant's attorney] also talked about how the State is trying to make this look like we rushed to judgment and we are somehow trying to ask for you to violate the Defendant's constitutional rights of her ability to not provide information. That is her constitutional right, ladies and gentlemen. The State wouldn't contend to you otherwise. *But it is also her right to provide the State with information ahead of time.* The State of North Carolina and the Union County *Sheriff's Office has no interest whatsoever in prosecuting someone who is innocent.* Absolutely not. That is the point that was being made, not asking you folks to violate her constitutional rights. We have afforded the Defendant a fair trial.

(emphasis supplied).

The prosecutor's comments regarding Defendant's "right to provide the State with information ahead of time" implies a duty on Defendant to speak or answer questions. Those repeated comments, coupled with the prosecutor opining Defendant was a liar and the State of North Carolina and Union County Sheriff's Office have "no interest whatsoever in prosecuting someone who is innocent," are particularly troubling. Our General Statutes expressly prohibit a prosecutor from "express[ing] his [or her] personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant[.]" N.C. Gen. Stat. § 15A-1230(a) (2023). Here, the prosecutor did exactly that, while also impermissibly and repeatedly commenting on and denigrating Defendant's constitutional right to counsel's advice and to remain silent, imputing onto her a duty to speak. U.S. Const. amend. V, VI; N.C. Const. art. I § 23.

As our Supreme Court stated in *Hembree*, and even without the benefit of counsel's recorded objection, the "prosecutor's statements to this effect were grossly improper, and the trial court erred by failing to intervene *ex mero motu*." *Hembree*, 368 N.C. at 20, 770 S.E.2d at 90. Thus, presuming Defendant's counsel failed to timely object by interrupting the prosecutor during closing statements, Defendant was entitled to rulings on her objections and curative instructions, and was nevertheless prejudiced and deprived of a fair trial. *Id.*; *Ward*, 354 N.C. at 266, 555 S.E.2d at 273.

Defendant's prior record level shows one point for operating a vehicle with no insurance over thirty years ago. The record also shows Defendant was gainfully employed and mother to minor children with family in the community. She was nonetheless sentenced in the presumptive range for a minimum of 157 to 201 months for the attempted first-degree murder, and a *consecutive* sentence of a minimum of 73 to 100 months for the assault with a deadly weapon conviction arising out the single same event.

I disagree with the majority's conclusion of no error for Defendant's Constitutional rights being repeatedly violated and prejudiced before the jury in the face of multiple and clear objections. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DARRICK LORENZO FULLER

No. COA24-471

Filed 19 March 2025

1. Constitutional Law—right to counsel—forfeiture by conduct—disruptive and combative behavior

In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not err by concluding that defendant had forfeited his right to counsel where defendant's actions were sufficiently combative and interruptive so as to frustrate the purpose of the right to counsel, including: repeatedly disrupting the trial proceedings, refusing to sign the waiver of counsel form, giving conflicting answers regarding whether he desired assistance of counsel, refusing to acknowledge or work with appointed counsel, refusing to stop speaking over all parties in the courtroom, arguing with the trial court, and accusing the trial court of lying.

2. Constitutional Law—right to be present in courtroom—forfeiture by conduct—disruptive behavior

In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not err by concluding that defendant had forfeited his right to be present in the courtroom and having defendant removed from the courtroom, where defendant's actions, including in front of the jury pool, were disruptive, abusive, and disrespectful, such as:

repeatedly accusing the State and the trial court of lying, claiming the State had beat him, interrupting, and challenging the trial court's authority. The trial court complied with the procedures in N.C.G.S. § 15A-1032, provided defendant with regular updates on the trial proceedings by written communications, repeatedly gave defendant the opportunity to return to the courtroom and participate in the trial upon improved behavior, and instructed the jury that defendant's removal was not to be considered in their deliberations.

3. Constitutional Law—right to counsel—decision not to appoint standby counsel—no abuse of discretion

In a prosecution for obstruction of justice, attempted access of a government computer to defraud, and filing false liens, the trial court did not abuse its discretion by declining to appoint defendant standby counsel after determining that defendant had forfeited his right to counsel and his right to be present in the courtroom, where the trial court took into account defendant's disruptive and disrespectful behavior and previous refusal to cooperate with his appointed counsel.

4. Sentencing—prior record level—out-of-state conviction—identity theft—lack of substantial similarity—resentencing required

For purposes of sentencing, the trial court erred by concluding that defendant's prior conviction for identity theft in Virginia was substantially similar to a North Carolina offense, where, unlike in North Carolina, Virginia's statute could be violated by using identifying information for a "false or fictitious person." The court therefore erred by treating the Virginia conviction as a Class G felony and assigning four points to defendant's prior record level as a result, which made defendant a prior record level III rather than II. Therefore, the matter was remanded for resentencing.

Appeal by Defendant from Judgments entered 7 September 2023 by Judge Martin B. McGee in Rockingham County Superior Court. Heard in the Court of Appeals 23 October 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

Darrick Lorenzo Fuller, pro se Defendant-Appellant.[1]

1. Defendant was appointed counsel from the Appellate Defender's office on 28 December 2023. On 2 September 2024, after all briefs were filed, Defendant discharged his counsel. Defendant is now pro se.

HAMPSON, Judge.

Factual and Procedural Background

Darrick Lorenzo Fuller (Defendant) appeals from Judgments entered upon jury verdicts finding him guilty of Obstruction of Justice, two counts of Attempting to Access a Government Computer to Defraud, and two counts of Filing False Liens. The Record before us tends to reflect the following:

On 7 February 2022, Defendant was indicted for Obstruction of Justice, two counts of Attempting to Access a Government Computer to Defraud, and two counts of Filing False Liens. On 16 February 2022, Defendant's first appearance on the indictment, Defendant allegedly indicated he was waiving his right to the assistance of counsel but refused to sign the waiver form.

The first pretrial hearing was held on 29 August 2023. At the hearing, Defendant provided conflicting responses as to whether he wanted an attorney:

> [Defendant]: May I have a -- yes, an attorney?
>
> [Trial Court]: You want me to appoint a lawyer for you?
>
> [Defendant]: (Unintelligible)
>
> [Trial Court]: All right. And have you -- is a lawyer representing you in any other cases?
>
> [Defendant]: I never asked being charged, but defendant -- defendant needs one.
>
> [Trial Court]: Okay. So you're not represented by any other lawyer at this time; is that right?
>
> [Defendant]: I've never even seen the charging instruments, you know, commercial bill or allegation, I haven't seen one.
>
> [Trial Court]: Okay.
>
> [Defendant]: I don't know what the charges are.
>
> [Trial Court]: I just told you what the charges are, sir.
>
> . . . .
>
> [Trial Court]: Okay. All right. You want me to appoint you a lawyer; is that what you're telling me?

> [Defendant]: I want you to appoint the defendant a lawyer.
>
> [Trial Court]: And you are the defendant at this point is my --
>
> [Defendant]: I'm a secured-party creditor --
>
> [Trial Court]: All right.
>
> [Defendant]: -- third-party intervenor in this matter over title to the book.

The trial court appointed James Reaves, who had represented Defendant in a separate matter a year prior, to be Defendant's counsel.

At the second pretrial hearing on 31 August 2023, the trial court removed Defendant from the courtroom for being disruptive. Reaves told the trial court he had asked Defendant if he wanted Reaves to represent him, to which Defendant allegedly responded, "[n]o way in hell." Reaves told the trial court he did not believe there was anyone in the county "equipped" to work with Defendant.

The trial court informed Defendant it was going to resume the hearing in the afternoon and Defendant would be allowed back in the courtroom if he would not be disruptive. The trial court also warned Defendant that if he continued "to disrupt and obstruct court proceedings," he may forfeit his right to be present in the courtroom for trial. At the afternoon session of the hearing, the trial court concluded Defendant had forfeited his right to counsel based on "inappropriate behavior" and released Reaves from his appointment as Defendant's counsel.

The case came on for trial on 5 September 2023. Defendant was brought into the courtroom handcuffed to a wheelchair because he had been threatening to remove his clothing. The trial court offered to reconsider whether Defendant had forfeited his right to counsel:

> [Trial Court]: And, Mr. Fuller, sir, I'm Judge Marty McGee. We were introduced last week, and as a result of your conduct, I asked that you be removed from the courtroom. And, ultimately, I had a hearing to determine that you had forfeited your rights to counsel. I want to review where we are at this point. I have found that -- I'm happy to reconsider all of the things that we've gone through at this point, but right now, you are representing yourself.
>
> . . . .
>
> [Trial Court]: . . . I had a hearing in your absence because you were disruptive, as you continue to be disruptive, and

determined that Mr. Reaves went back and talked with you and that you -- he indicated you were dissatisfied with him, not cooperating with him. I understand that at your previous trial he was your standby counsel but not counsel.

[Defendant]: I believe you gave the defendant Mark C. Keeney. I don't know anything about a James Reaves. You gave the defendant Mark C. Keeney -- Kinney or Keeney or whatever his name is. That's who you gave the defendant. You sent James Reaves to talk to the defendant.

[Trial Court]: Well --

[Defendant]: You didn't -- you didn't give the defendant James Reaves.

[Trial Court]: Well, that's who I appointed, so that's why he came to see you. I see --

[Defendant]: How did you appoint him? I --

[Trial Court]: I see you have somebody's card in your hand. That's who I appointed, and that's who came to see you.

[Defendant]: That's not a fact. That's a lie on the record.

[Trial Court]: All right. Well, I'm doing my best to tell you the information that I know that I believe to be true.

[Defendant]: Okay.

[Trial Court]: So I understand you did not want him to represent you. And you --

[Defendant]: I --

[Trial Court]: I understand you're not being generally cooperative with anybody, let alone him or anybody else or the bailiffs or, frankly, me at this point.

[Defendant]: I am a secured party creditor. I don't need representation from anybody. I don't need to be represented by anybody.

. . . .

[Trial Court]: I understand that you told me that you don't want representation. You said you wanted representation, then you say you don't want representation.

> [Defendant]: I said this?
>
> [Trial Court]: Yes, sir. I thought that's what you said.
>
> [Defendant]: When? When?
>
> [Trial Court]: Last -- last time you were speaking.
>
> . . . .
>
> [Trial Court]: So do you want a lawyer?
>
> [Defendant]: The defendant would like a lawyer.
>
> [Trial court]: Okay. You're pointing to the chair with your eyes. Are you saying you want a lawyer?
>
> [Defendant]: I'm saying the defendant would love a lawyer.
>
> [Trial Court]: Would you cooperate?
>
> [Defendant]: The debtor would love a lawyer.
>
> [Trial Court]: Let me say that you have not cooperated with the lawyer that came to you. You haven't cooperated with anyone, it seems, going through this process.
>
> [Defendant]: I haven't spoken to a lawyer, but James Reaves -- I was told from the defendant that James Reaves was not representing.

The trial court again concluded Defendant had forfeited his right to counsel through misconduct:

> [Trial Court]: All right. Well, I have found that you have forfeited your right to counsel due to conduct. I've reconsidered that. Under the circumstances, I find that you -- that through your conduct that you have again forfeited your right to counsel. It is clear to the Court that you don't intend to cooperate with your counsel or anyone else.

The State made Defendant a plea offer. Defendant requested counsel again before rejecting the plea offer. The trial court denied Defendant's requests for counsel, explaining it had already concluded Defendant had forfeited his right to counsel. Defendant continued to assert his right to counsel. While the State attempted to discuss the plea offer, Defendant repeatedly interjected, asking if "a bond [was] present." Defendant also accused the State of lying about Defendant's prior record level and continued to address the State after the trial court admonished him not to. The trial court warned Defendant that if he continued to be disruptive, he would be removed from the courtroom.

The trial court temporarily removed Defendant from the courtroom while it conducted orientation for the prospective jurors. Afterwards, Defendant was brought back into the courtroom. The trial court asked Defendant if he had reconsidered the State's plea offer. Defendant again rejected the plea offer, denying he was "Mr. Fuller" and stating he did not "sign contracts" nor "contract with the government." The trial court reminded Defendant that he could be removed from the courtroom if he was disruptive in front of the jury.

The jury venire was returned to the courtroom for jury selection. The trial court informed the prospective jurors that Defendant was proceeding pro se. During jury selection, Defendant interrupted the State's questioning, so the trial court sent the jury venire out of the courtroom. As the jurors were exiting the courtroom, Defendant made comments that he had been denied his right to counsel:

> [Defendant]: I have the right to speak. That's what they do. Never had the right to an attorney. Ever. Tell them the truth. Tell them how I've been abused.
>
> [Trial Court]: Sir, I asked you to remain quiet.
>
> [Defendant]: Tell them how I've been abused. Tell them how I got these clothes on. You're not talking that. You're not doing that. Hell, no. Hell, no. Huh-uh. You're not telling them the truth. Telling them a bunch of lies.

The State indicated Defendant's outburst was elicited in response to the State asking members of the jury venire whether they were comfortable with the fact that Defendant was representing himself. The State said Defendant made comments to the effect of "Tell them the truth. I haven't been given that opportunity. Tell them about how you beat me." The trial court concluded Defendant had forfeited his right to be present in the courtroom and ordered Defendant be removed, but informed Defendant he could return to the courtroom upon an assurance of improved behavior.

Defendant was brought into the courtroom the next morning of trial. The trial court explained it had instructed the jury not to consider Defendant's removal in determining the issue of guilt. The trial court told Defendant he could return to the courtroom if he followed instructions and assured the trial court he would not "yell[ ] out in front of the jury."

Defendant insisted the trial court provide him "clarity on how you forfeit a right[,]" talked over the trial court, and told the trial court "I don't think you get paid to think. I think you get paid to know law."

The trial court concluded Defendant had continued to forfeit his right to counsel and had not provided any assurances of appropriate behavior. Again, Defendant was removed from the courtroom.

The trial continued with Defendant absent. Because the courtroom was not equipped with audio or video conferencing capabilities, the trial court provided written updates to Defendant as the trial progressed. The updates were written by the trial court and delivered by the bailiff. In the first update to Defendant, the trial court included a copy of the witness list and extended Defendant the opportunity to return to the courtroom "upon assurance of good behavior." The trial court also directed the bailiff to give Defendant the opportunity to respond. The bailiff delivered the documents and reported Defendant had no message for the trial court.

At the end of the morning session on the second day of trial, the trial court provided Defendant with a second update. After receiving the update, Defendant allegedly laughed and said, "I should be over there." The trial court concluded Defendant's comments "[fell] short" of an assurance of good behavior. At the end of the afternoon session, the trial court sent Defendant a third update. After receiving the third update, Defendant allegedly laughed and said "[y]'all are out for vengeance" and "[y]'all are vicious." The bailiff reported Defendant did not say anything about whether he wished to be returned to the courtroom.

Once the State rested its case, the trial court made a motion to dismiss on Defendant's behalf but found there was sufficient evidence to move forward. The trial court sent Defendant a fourth update, along with a draft copy of the jury instructions and the State's request for special instructions. After receiving the fourth update, Defendant allegedly asked when he could return to the courtroom. The bailiff told the trial court he had told Defendant he could return if he behaved. Defendant allegedly responded by asking "What does that mean?" and saying he was "just trying to ask questions." The trial court concluded that because Defendant had not provided any assurance of good behavior, it was not appropriate to return him to the courtroom.

The State made its closing argument to the jury. Immediately thereafter, the jury received instructions and proceeded to deliberations. The trial court sent Defendant a final update explaining that jury deliberations had begun. The trial court indicated it remained concerned about Defendant's potential behavior:

> [Trial Court]: . . . I still am, frankly, concerned that if he's brought over, that he will still be disruptive. I'm concerned of him saying something to the jury and causing a problem

> with a potential mistrial even at this late date. He has not provided those assurances that he would act appropriate. And I still, at this stage, would find the trial cannot proceed in an orderly manner if he is not absent from the Court.

The jury reached a verdict ten minutes later. With Defendant still absent from the courtroom, the jury returned guilty verdicts on all charges. The jury was dismissed, and Defendant was returned to the courtroom for sentencing.

At the sentencing hearing, the trial court concluded Defendant had a prior record level of III, based in part upon a Virginia conviction for Identity Theft. The trial court entered two judgments: both Judgments sentenced Defendant to an active punishment of 17 to 30 months in prison. The trial court ordered the first Judgment to run concurrent to Defendant's current prison sentence on unrelated charges, and the second Judgment to run concurrent to the first Judgment. On 21 September 2023, Defendant timely filed Notice of Appeal.

Issue

The issues on appeal are whether the trial court erred by: (I) concluding (A) Defendant had forfeited his right to counsel, (B) Defendant had forfeited his right to be present in the courtroom for trial, or (C) it would not appoint standby counsel for Defendant; and (II) concluding Defendant's Virginia conviction for Identity Theft under Va. Code Ann. § 18.2-186.3 is substantially similar to the North Carolina offense of Identity Theft under N.C. Gen. Stat. § 14-113.20 (2023) for sentencing purposes.

Analysis

I. Trial Proceedings

Our Courts review alleged violations of a defendant's constitutional rights, including the right to be present during trial and the right to counsel, de novo. *State v. Anderson*, 222 N.C. App. 138, 142, 730 S.E.2d 262, 265 (2012) (citations omitted).

Both the right to be present at trial and the right to counsel may be forfeited. *State v. Montgomery*, 138 N.C. App. 521, 524-25, 530 S.E.2d 66, 69 (2000) (" '[A] defendant who misbehaves in the courtroom may forfeit his constitutional right to be present at trial[.]' ") and *State v. Blakeney*, 245 N.C. App. 452, 460, 782 S.E.2d 88, 93 (2016) ("The second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel.").

" 'Unlike waiver, which requires a knowing and intentional relinquishment of a known right, forfeiture results in the loss of a right regardless of the defendant's knowledge thereof and irrespective of whether the defendant intended to relinquish the right.' " *Montgomery*, 138 N.C. App. at 524, 530 S.E.2d at 69 (quoting *United States v. Goldberg*, 67 F.3d 1092, 1100 (3d. Cir. 1995)).

A. Forfeiture of Right to Counsel

[1] "A finding that a defendant has forfeited the right to counsel requires egregious[,] dilatory[,] or abusive conduct on the part of the defendant which undermines the purposes of the right to counsel . . . ." *State v. Smith*, 292 N.C. App. 656, 660, 899 S.E.2d 394, 397 (2024) (alterations in original) (citations and quotation marks omitted). More specifically, forfeiture of the right to counsel can occur when a defendant's conduct "constitutes a '[s]erious obstruction of the proceedings[,]' " *State v. Jones*, 292 N.C. App. 493, 501, 898 S.E.2d 784, 790 (2024) (quoting *State v. Simpkins*, 373 N.C. 530, 538, 838 S.E.2d 439, 447 (2020)), such as when he refuses to confirm his desire for counsel, refuses to participate, or causes significant delays. *Id.* (citation omitted). " 'Even if a defendant's conduct is highly frustrating,' however, 'forfeiture is not constitutional where any difficulties or delays are not so egregious that they frustrated the purposes of the right to counsel itself.' " *Smith*, 292 N.C. App. at 661, 899 S.E.2d at 398 (alterations and internal quotation marks omitted) (quoting *State v. Atwell*, 383 N.C. 437, 449, 881 S.E.2d 124, 132 (2022)).

In *Montgomery*, this Court examined the issue of forfeiture of the right to counsel as an issue of first impression. 138 N.C. App. at 524, 530 S.E.2d at 69. The Court held "forfeiture results when the state's interest in maintaining an orderly trial schedule and the defendant's negligence, indifference, or possibly purposeful delaying tactic, combine[ ] to justify a forfeiture of [the] defendant's right to counsel[.]" *Id.* (citation and quotation marks omitted).

In *Smith*, this Court affirmed the trial court's determination the defendant had forfeited his right to counsel where the defendant questioned whether the court could be impartial, refused to cooperate with his attorney, and was "combative and interruptive" during his court appearances. *Smith*, 292 N.C. App. at 661-62, 899 S.E.2d at 398. The Court held that causing "six different attorneys to withdraw" and the "inability to work with court-appointed counsel and insistence that the trial court could not be impartial," amounted to obstreperous conduct resulting in forfeiture of the right to counsel. *Id.*

In *State v. Leyshon*, we held the defendant forfeited his right to counsel for obstructing and delaying the trial proceedings. 211 N.C. App. 511,

517, 710 S.E.2d 282, 287, *appeal dismissed*, 365 N.C. 338, 717 S.E.2d 566 (2011). The defendant refused to sign a waiver of counsel form and stated, "I'm not waiving my right to assistance of counsel[,]" but when the trial court appointed counsel, the defendant stated, "I refuse his counsel." *Id.* at 512, 710 S.E.2d at 285 (quotation marks omitted). The defendant also repeatedly challenged the trial court's jurisdiction instead of answering whether he waived or asserted his right to counsel. *Id.* at 513. The Court stated that by "continually refusing to state whether he wanted an attorney or would represent himself when directly asked by the trial court at four different hearings[,]" the defendant "willfully obstructed and delayed the trial court proceedings" such that he forfeited his right to counsel. *Id.* at 519, 710 S.E.2d at 288-89.

By contrast, in *Simpkins*, our Supreme Court held the defendant's conduct did not rise to a forfeiture. 373 N.C. 540, 838 S.E.2d at 449. In doing so, the court recognized

> [i]f a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel.

Id. at 538, 838 S.E.2d at 447.

The defendant in *Simpkins* did not obtain counsel before his trial and presented "frivolous legal arguments about jurisdiction" throughout the proceedings. *Id.* at 540, 838 S.E.2d at 448. These actions were not sufficiently egregious to lead the Court to "conclude that the [defendant's] failure to retain counsel was an attempt to delay the proceedings, and certainly not an attempt so egregious as to justify forfeiture of the right to counsel." *Id.* at 540, 838 S.E.2d at 449. The Court also noted that "nothing in the record" suggested the defendant was "rude or disrespectful" to the trial court. *Id.* at 539, 838 S.E.2d at 448.

Here, the Record shows Defendant repeatedly disrupted the trial proceedings. Defendant refused to sign the waiver of counsel form. At the 29 August 2022 pretrial hearing, Defendant repeatedly interrupted the trial court, asking the trial court what kind of law it was practicing, whether the trial court had a claim against him, and demanding that all charges "be dropped immediately." At the 31 August 2023 pretrial

hearing, immediately upon being brought into the courtroom, Defendant again repeatedly asked the trial court if it "had a claim" against him and demanded the charges be dismissed. Defendant refused to stop speaking over all parties in the courtroom, including the trial court.

The trial court appointed Reaves as counsel for Defendant, but Defendant refused to acknowledge or work with him. On the first day of trial, the trial court tried to discuss Defendant's asserted dissatisfaction with Reaves, but Defendant instead argued with the trial court, asserting the trial court had never appointed Reaves as his counsel, and accused the trial court of lying. Defendant later contended Reaves would not "suffice" as counsel and demanded the trial court tell the jury what Reaves had "done." When the trial court asked Defendant to elaborate, Defendant responded, "[Reaves] didn't do anything to me as I stated. It was what [Reaves] done to the defendant."

Although the trial court concluded at the 31 August 2023 hearing that Defendant had forfeited his right to counsel, the trial court gave Defendant the opportunity to have the issue reconsidered. There, Defendant stated "the defendant would like a[n] attorney[.]" Yet, at this same hearing, Defendant stated "I don't need representation from anybody[,]" "I'm the authorized representative for the defendant[,]" and "I'm only here to represent the defendant at this point." Defendant continued to speak in the third person and deny being the defendant on trial, making statements such as "I was told from the defendant[,]" "The defendant would like a lawyer[,]" and "The debtor would love a lawyer."

Like the defendant in *Smith*, Defendant was combative and interruptive—he insisted the trial court could not be impartial, interrupted and spoke out of turn, threatened to remove his clothing, and refused to directly answer the trial court's questions. And like the defendant in *Leyshon*, Defendant provided conflicting answers as to whether he desired assistance of counsel and refused to work with his appointed counsel.

Likewise, when the trial court attempted to clarify whether Defendant was waiving or asserting his right to counsel, Defendant instead challenged the trial court by asking whether there was a bond and whether the trial court or the State had a claim against him. Based upon the evidence in the Record, we conclude Defendant's actions were sufficiently obstructive and egregious such that they frustrated the purpose of the right to counsel itself. *See Smith*, 292 N.C. App. at 661, 899 S.E.2d at 398 (citation omitted). Accordingly, Defendant forfeited his right to counsel, and the trial court did not err by concluding the same.

B. Forfeiture of Right to be Present During Trial Phase

[2] However, our inquiry does not end with Defendant's forfeiture of his right to counsel. The trial court also concluded Defendant forfeited his right to be present at trial and had Defendant removed from the courtroom for the remainder of the trial proceedings.

Both the United States Constitution and the North Carolina Constitution guarantee a criminal defendant the right to be present at trial. *See* U.S. Const. amend. VI; N.C. Const. Art. I, §§ 19, 23. The right to be present at trial, like the right to counsel, may be forfeited. *See Montgomery*, 138 N.C. App. at 524-25, 530 S.E.2d at 69 (citation omitted). "[A] defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." *Illinois v. Allen*, 397 U.S. 337, 343, 90 S. Ct. 1057, 1060-61, 25 L. Ed. 2d 353, 359 (1970) (footnote omitted).

Defendant cites several cases wherein courts in other jurisdictions have considered the issue of whether a pro se defendant may be removed from the courtroom during trial. We think *United States v. Mack*, 362 F.3d 597 (9th Cir. 2004) and *People v. Cohn*, 160 P.3d 336, 339 (Colo. Ct. App. 2007) are most relevant to our discussion. In *Mack*, the pro se defendant was removed from the courtroom by the trial court due to his disruptive conduct. 362 F.3d at 599. The trial court had offered to appoint standby counsel but the defendant "refused unless he could have appointed counsel of his choice—a person who was not on the court's standard appointment list." *Id.* Holding the defendant had been denied his right to counsel, the United States Court of Appeals for the Ninth Circuit explained "[a] defendant does not forfeit his right to representation at trial when he acts out. He merely forfeits his right to represent himself in the proceeding." *Id.* at 601. The Court also observed that when the defendant was allowed to return to the courtroom, "he was required to remain silent and was even told that no objections of his would have any effect whatsoever on the proceedings." *Id.* Thus, "[i]n practical effect, he had been removed as his own counsel and nobody stepped in to fill the gap." *Id.*

Similarly, the defendant in *Cohn* argued his right to counsel was violated when the trial court removed him "from the courtroom at various times during the trial without permitting him to appear by means of video conferencing equipment and without counsel being appointed to

represent him in his absence." 160 P.3d at 339. The Colorado Court of Appeals first determined the defendant had forfeited his right to be present in the courtroom due to his disruptive behavior. *Id.* at 341. The Court then asked "whether the trial court, by excluding the pro se defendant from the courtroom, denied his right to counsel." *Id.* The Court determined that under the facts of the case, the defendant had not waived his right to counsel—expressly or by conduct—and his exclusion during portions of jury selection and denial of the opportunity to exercise peremptory challenges was a violation of his right to counsel. *Id.* at 343. Thus, the defendant was "deprived of the presence of counsel at critical stages of the proceedings" and there was "more than a minimal risk that counsel's absence . . . undermine[d] the defendant's right to a fair trial." *Id.* at 342 (citing *Key v. People*, 865 P.2d 822, 825 (Colo. 1994)).

Here, unlike the defendants in *Mack* and *Cohn*, the trial court concluded Defendant had forfeited his right to counsel and did so prior to removing Defendant from the courtroom. Moreover, the facts before us differ from those in *Mack* that would tend to indicate the trial court effectively removed Defendant as his own counsel; here, the trial court maintained an invitation for Defendant to return to the courtroom and participate in the proceedings so long as he reassured the trial court he would no longer be disruptive.

Relatedly, Defendant argues he was removed from the courtroom for "acting in his capacity as his own attorney." Defendant contends he was removed for "objecting to the prosecutor's characterization to the jury of how [he] came to be representing himself." Our review of the Record shows Defendant was not removed for objecting to the State's questioning, but for disrespectful, abusive, and disruptive behavior. The trial court warned Defendant multiple times prior to his removal that if his behaviors continued, he may forfeit his right to be in the courtroom.

In addition to his outburst in front of the jury pool—in which he accused the State of lying, claimed the State had beaten him, and contended he never had the opportunity to have the representation of counsel—Defendant demonstrated persistent disregard for the trial court's orders.

Despite the trial court's admonitions, Defendant continued his behaviors, accusing the trial court and the State of lying, interrupting, and challenging the trial court's authority. Defendant was, thus, "disruptive, contumacious, [and] stubbornly defiant." *See Allen*, 397 U.S. at 343, 90 S. Ct. at 1061. Therefore, the trial court did not err by concluding Defendant had forfeited his right to be present in the courtroom.

Furthermore, the trial court's actions generally complied with N.C. Gen. Stat. § 15A-1032, which governs the procedures for removing a disruptive defendant from the courtroom:

> (a) A trial judge, after warning a defendant whose conduct is disrupting his trial, may order the defendant removed from the trial if he continues conduct which is so disruptive that the trial cannot proceed in an orderly manner. When practicable, the judge's warning and order for removal must be issued out of the presence of the jury.
>
> (b) If the judge orders a defendant removed from the courtroom, he must:
>
> (1) Enter in the record the reasons for his action; and
> (2) Instruct the jurors that the removal is not to be considered in weighing evidence or determining the issue of guilt.

N.C. Gen. Stat. § 15A-1032 (2023). Additionally, "[a] defendant removed from the courtroom must be given the opportunity of learning of the trial proceedings through his counsel at reasonable intervals as directed by the court and must be given opportunity to return to the courtroom during the trial upon assurance of his good behavior." *Id.*

It is true Section 15A-1032 presumes a defendant has counsel: it does not specify how a defendant should be "given the opportunity of learning of the trial proceedings" or who should give the updates if a defendant is pro se. *Id.* Nevertheless, here, the trial court gave Defendant updates on the trial proceedings through written communications. Further, Defendant was routinely apprised of the opportunity to return to the courtroom and participate in the proceedings by assuring the trial court that his conduct would improve and not be disruptive. The Record indicates Defendant chose not to provide any assurances of better behavior. Indeed, when Defendant was first removed from the courtroom he stated, "I'm not here anyway," and when he was brought into the courtroom on the second morning of trial, he commented that he "didn't ask to come here." Additionally, the jurors were instructed that the removal was not to be considered in weighing evidence, and the trial court entered in the Record the reasons for Defendant's removal. Thus, there was no error in the trial court's compliance with N.C. Gen. Stat. § 15A-1032.

C. Decision Not to Appoint Standby Counsel

[3] Ultimately, Defendant concedes the trial court "may have been justified" in concluding he forfeited his right to counsel and to be present in the courtroom. Rather, Defendant argues the trial court erred by failing to appoint standby counsel to act on his behalf and/or failing to provide "some other mechanism" to allow Defendant to participate in his trial. Defendant argues this resulted in a complete deprivation of his right to counsel.

In *State v. Mee*, this Court considered whether the defendant's right to counsel was violated after the defendant "refused to be seated or stay in the courtroom, despite being held in contempt three times," and eventually was removed from the courtroom by the trial court. 233 N.C. App. 542, 558, 756 S.E.2d 103, 112 (2014). The defendant said he did not want to "participate" in his trial, and he did not want standby counsel to do anything on his behalf. *Id.* at 557-58, 756 S.E.2d at 111-12.

Standby counsel was sent periodically to speak with the defendant, "informing him of his right to be present in court and asking if he had changed his mind about participating in the trial." *Id.* at 558, 756 S.E.2d at 112. The defendant continued to refuse to participate. *Id.* In concluding "the defendant had a fair trial, free of error," this Court noted the defendant "engaged in 'purposeful conduct and tactics to delay and frustrate the orderly processes of our trial courts' that resulted in a forfeiture of his right to counsel." *Id.* at 562-63, 756 S.E.2d at 114-15 (quoting *Montgomery*, 138 N.C. App. at 525, 530 S.E.2d at 69).

Defendant's behavior was similar to the defendant in *Mee*. Although the Court in *Mee* did not address whether the defendant had forfeited or waived his right to be present in the courtroom, we have held there was no error at trial where a defendant voluntarily missed portions of their trial. *See id.*; *State v. Moore*, 290 N.C. App. 610, 893 S.E.2d 231 (2023) (no error where defendant forfeited right to counsel and missed portions of his trial to make phone calls).

Good and prudent practice may necessitate appointing standby counsel in these situations. The role of standby counsel is to assist a pro se defendant, understanding that the defendant "must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in *voir dire*, to question witnesses, and to address the court and the jury at appropriate points in the trial." *McKaskle v. Wiggins*, 465 U.S. 168, 174, 104 S. Ct. 944, 949, 79 L. Ed. 2d 122 (1984).

Indeed, standby counsel was appointed or available in many of our cases where a defendant had forfeited their right to counsel. *See*, *e.g.*, *State v. Boyd*, 200 N.C. App. 97, 682 S.E.2d 463 (2009); *Montgomery*, 138 N.C. App. 521, 530 S.E.2d 66; *State v. Joiner*, 237 N.C. App. 513, 767 S.E.2d 557 (2014). Even in *Mee*, where the defendant adamantly insisted he did not want standby counsel, standby counsel was nonetheless present. *See Mee*, 233 N.C. App. at 550, 756 S.E.2d at 108.

Here, however, we cannot say the trial court prejudicially erred by not appointing standby counsel. N.C. Gen. Stat. § 15A-1032 does not require the trial court to appoint standby counsel when a defendant is removed from the courtroom. Furthermore, a pro se defendant does not possess a right to standby counsel. *See State v. Brooks*, 49 N.C. App. 14, 18, 270 S.E.2d 592, 596 (1980) ("If [the] defendant was not confident of his ability to represent himself, he was entitled to counsel appointed for his defense; but he had no right to standby counsel. The appointment of standby counsel is in the sound discretion of the trial court." (citing *State v. Brincefield*, 43 N.C. App. 49, 258 S.E.2d 81, *disc. rev. denied*, 298 N.C. 807, 262 S.E.2d 2 (1979))).

Moreover, the Record shows the trial court considered appointing standby counsel, but decided against it because of Defendant's behavior:

> [Trial Court]: I don't find at this point appointing counsel to go back and forth would be helpful for a number of reasons, one of which, pretty clear to me, he's not going to cooperate with anyone. And, second, I think it puts a lawyer in a very difficult position as to know what conduct -- what the wishes of the defendant would be.

Consequently, Defendant has failed to show the trial court abused its discretion by not appointing standby counsel for him. *Id.* at 19, 270 S.E.2d at 596; *Brincefield*, 43 N.C. App. at 52, 258 S.E.2d at 83 ("The appointment of standby counsel for a defendant is entirely in the sound discretion of the trial judge." (citation omitted)); N.C. Gen. Stat. § 15A-1243 (2023) ("When a defendant has elected to proceed without the assistance of counsel, the trial judge in his discretion may determine that standby counsel should be appointed[.]").

II. Prior Record Level

[4] Defendant also contends the trial court erred in calculating his prior record level. Specifically, Defendant argues the trial court should not have concluded Virginia's identity theft statute, Va. Code Ann. § 18.2-186.3, is substantially similar to North Carolina's identity theft statute.

"The determination of an offender's prior record level is a conclusion of law that is subject to *de novo* review on appeal." *State v. Bohler*, 198 N.C. App. 631, 633, 681 S.E.2d 801, 804 (2009) (citation omitted). "It is not necessary that an objection be lodged at the sentencing hearing in order for a claim that the record evidence does not support the trial court's determination of a defendant's prior record level to be preserved for appellate review." *Id.* (citations omitted).

A prior record level is determined by calculating the sum of the points assigned to each of the offender's prior convictions. N.C. Gen. Stat. § 15A-1340.14(a) (2023). When a prior misdemeanor conviction is for an offense not substantially similar to an offense defined by North Carolina law, the conviction is treated as a Class 3 misdemeanor and does not carry a prior record point for sentencing purposes. *Id.* § 15A-1340.14(b)(5), (e) (2023). However,

> [i]f the State proves by the preponderance of the evidence that an offense classified as either a misdemeanor or a felony in the other jurisdiction is substantially similar to an offense in North Carolina that is classified as a Class I felony or higher, the conviction is treated as that class of felony for assigning prior record level points.

Id. § 15A-1340.14(e) (2023).

Virginia's identity theft statute defines the offense as a Class 1 misdemeanor unless certain other criteria are met to elevate the offense to a felony. *See* Va. Code Ann. § 18.2-186.3(D) (2023). The corresponding North Carolina offense is defined as a Class G felony carrying four points for sentencing. N.C. Gen. Stat. § 14-113.22 (2023) ("A violation of G.S. 14-113.20(a) is punishable as a Class G felony[.]"); N.C. Gen. Stat. § 15A-1340.14(b)(3) (2023) (assigning four points to Class G felonies). Thus, to count towards Defendant's prior record level, the State must prove by a preponderance of the evidence the Virginia offense is substantially similar to the North Carolina offense.

"Determination of whether the out-of-state conviction is substantially similar to a North Carolina offense is a question of law involving comparison of the elements of the out-of-state offense to those of the North Carolina offense." *State v. Fortney*, 201 N.C. App. 662, 671, 687 S.E.2d 518, 525 (2010) (citing *State v. Hanton*, 175 N.C. App. 250, 254-55, 623 S.E.2d 600, 604 (2006)). "The Court of Appeals has held that, for purposes of determining 'substantial similarity' under N.C.G.S. § 15A-1340.14(e), a party may establish the elements of an out-of-state offense by providing evidence of the statute law of such state." *State*

v. Sanders, 367 N.C. 716, 718, 766 S.E.2d 331, 332 (2014) (citation and quotation marks omitted).

"Further, the Court of Appeals has consistently held that when evidence of the applicable law is not presented to the trial court, the party seeking a determination of substantial similarity has failed to meet its burden of establishing substantial similarity by a preponderance of the evidence." *Id.* (citations omitted).

Here, the Record establishes the State provided the trial court with a prior record level worksheet and a certified copy of Defendant's criminal history. The State also produced a copy of the 2023 version of Virginia's identity theft statute with its statutory history and a copy of the 2023 version of North Carolina's identity theft statute. *See* Va. Code Ann. § 18.2-186.3 (2023) and N.C. Gen. Stat. § 14-113.20 (2023). The trial court found by a preponderance of the evidence the Virginia offense was substantially similar to the North Carolina offense.

Defendant contends the trial court could not have compared the elements of the statutes as required by N.C. Gen. Stat. § 15A-1340.14(e) because the Virginia statute has multiple subsections setting out alternate elements of the offense, and thus "we do not know which elements to use in comparing the Virginia statute to the North Carolina statute." Defendant also argues the trial court erred by concluding the offenses were substantially similar because the State provided the 2023 version of the Virginia statute instead of the 2006 version of the Virginia statute—the year Defendant was convicted of the offense. Consequently, Defendant argues, we do not know whether the trial court compared the North Carolina statute to the elements of the Virginia statute as it was written in 2006.

Defendant's first argument fails because both the prior record worksheet and Defendant's criminal history show Defendant was convicted under subsection (B1) of the Virginia statute—"Identity Theft: Obtain ID to Avoid Arrest." And although the State gave the trial court the 2023 version of the Virginia statute, the 2023 statute included its statutory history, demonstrating the differences between the current version of the statute and the statute at the time of Defendant's conviction in 2006. *See State v. Best*, 230 N.C. App. 410, *5, 753 S.E.2d 397 (2013) (unpublished) (trial court did not err by relying on statute with statutory history showing the statutes "were the same version of the statute which were in effect at the time of" the defendant's conviction to conclude offenses were substantially similar).

However, Defendant further argues the statutes are not substantially similar because Virginia's statute can be violated using the identifying

information of a "false or fictious person" whereas North Carolina's statute requires the offender to have used the identifying information of a "real person." We agree.

Va. Code Ann. § 18.2-186.3(B1), at the time of Defendant's conviction in 2006, makes it unlawful "for any person to use identification documents or identifying information of another person *or of a false or fictitious person*, whether that person is dead or alive, to avoid summons, arrest, prosecution or to impede a criminal investigation." (emphasis added). The corresponding North Carolina statute punishes anyone who

> knowingly obtains, possesses, or uses identifying information of another person, living or dead, with the intent to fraudulently represent that the person is the other person for the purposes of making financial or credit transactions in the other person's name, to obtain anything of value, benefit, or advantage, or for the purpose of avoiding legal consequences[.]

N.C. Gen. Stat. § 14-113.20 (2023).

A person in Virginia could be guilty of identity theft for using the identity of a fictitious person, whereas a person in North Carolina could not. *See State v. Faucette*, 285 N.C. App. 501, 505-06, 877 S.E.2d 782, 785 (2022) (reversing denial of motion to dismiss charge of identity theft under N.C. Gen. Stat. § 14-113.20 where the defendant provided a fictitious name and birthdate but there was no evidence he "used the identifying information of any other *actual person*, living or dead." (emphasis added)). Thus, these statutory offenses are not substantially similar for the purposes of N.C. Gen. Stat. § 15A-1340.14(e). *See State v. Davis*, 226 N.C. App. 96, 100, 738 S.E.2d 417, 420 (2013) (holding the Georgia offense of theft by taking is not substantially similar to the North Carolina offense of misdemeanor larceny because a person is guilty of the Georgia offense regardless of whether the taking is permanent or temporary, whereas "temporary deprivation will not suffice" in North Carolina (citation and quotation marks omitted)); *Hanton*, 175 N.C. App. at 258-59, 623 S.E.2d at 606-07 (determining the New York offense of second-degree assault is not substantially similar to the North Carolina offense of assault inflicting serious injury because, unlike the North Carolina offense, the New York offense does not require the defendant cause "serious" physical injury).

The trial court, therefore, erred by concluding the offenses were substantially similar and treating Defendant's Virginia conviction as a Class G felony for purposes of calculating Defendant's prior record level.

Without the four points assigned to this conviction, Defendant would have a prior record level of II rather than III. Consequently, we remand solely for resentencing. "At the resentencing hearing, the trial court may consider additional information presented by the State or by defendant regarding defendant's prior offenses." *State v. Henderson*, 201 N.C. App. 381, 388, 689 S.E.2d 462, 467 (2009).

Conclusion

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

NO ERROR AT TRIAL; REMANDED FOR RESENTENCING.

Chief Judge DILLON and Judge TYSON concur.

STATE OF NORTH CAROLINA
v.
DONNIE MONTE JOHNSON, DEFENDANT

No. COA24-816

Filed 19 March 2025

Criminal Law—multiple convictions—Anders review—no issues of arguable merit

In an appeal after defendant was convicted by a jury of possession of cocaine, felony fleeing to elude arrest, and speeding, in which defendant's appellate counsel filed a no-merit brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), the appellate court conducted a full examination of the record and concluded that there were no issues of arguable merit, including the potential issues raised by appellate counsel (regarding the trial court's denial of defendant's motion for substitute counsel, failure to inform defendant of his right to self-representation, admission of testimony that drugs were thrown from defendant's car, and defendant's lack of opportunity to be heard regarding attorney fees that the trial court subsequently remitted).

Appeal by Defendant from judgments entered 22 May 2023 by Judge Marvin K. Blount III in Pitt County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Emily E. Sorge, for the State.

Attorney W. Michael Spivey, for the Defendant-Appellant.

STADING, Judge.

Donnie M. Johnson ("Defendant") appeals from final judgments entered against him pursuant to jury verdicts finding him guilty of possession of cocaine and felony fleeing to elude arrest. Counsel for Defendant filed a brief under *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Kinch*, 314 N.C. 99, 331 S.E.2d 665 (1985). After careful review, we discern no error.

I. Background

On 10 April 2022, Defendant was charged by indictment with felony possession of cocaine, maintaining a vehicle for the purpose of selling cocaine, and felony fleeing to elude arrest. Defendant was also charged with driving while impaired and speeding seventy miles per hour in a fifty-five miles per hour zone. The offenses arose from an incident in which Trooper Ashley Smith, of the North Carolina Highway Patrol, observed Defendant speeding and activated his blue lights and siren to initiate a traffic stop. Defendant kept driving for several miles, during which time Trooper Smith observed Defendant throwing something out of the car's window. Upon stopping in a convenience store parking lot, Defendant exited the car. A search revealed a plastic bag containing 0.26 grams of cocaine on the driver's seat, digital scales on the passenger seat, and approximately $1,100 in cash in the glove compartment.

At the 22 May 2023 session of Pitt County Superior Court, following his trial, the jury acquitted Defendant of driving while impaired and maintaining a vehicle for the purpose of selling cocaine. But the jury returned verdicts finding Defendant guilty of possession of cocaine, felony fleeing to elude arrest, and speeding.

The trial court sentenced Defendant to a term of five to fifteen months of imprisonment for the felony fleeing to elude arrest conviction. It imposed a consecutive sentence of five to fifteen months for the possession of cocaine conviction, to run at the expiration of the previous sentence; this sentence was suspended for twenty-four months of supervised probation. The trial court imposed a $100 fine for the speeding conviction. Defendant gave his 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

On appeal, Defendant's appellate counsel filed a brief citing *Anders*, indicating an inability "to identify any discernible issue with sufficient merit to support a meaningful argument for relief on appeal," and requesting this Court to "conduct a full examination of the record for any prejudicial error and determine if any issue has been overlooked." Counsel has shown to the satisfaction of this Court that he has complied with *Anders* and *Kinch* by advising Defendant of his right to file his own written arguments with this Court and by providing him with the documents necessary to do so. Defendant himself has not filed a brief with our Court.

Counsel directs our review to four potential issues: (1) denial of Defendant's motion for substitute counsel; (2) failure to inform Defendant of his right to self-representation; (3) admission of testimony that marijuana was thrown from Defendant's car; and (4) lack of opportunity to be heard regarding attorney's fees that were ultimately remitted.

A. Motion for Substitute Counsel

The record reveals that Defendant's appointed trial counsel attempted to negotiate a plea on his behalf that was not acceptable to the trial court. Defendant and his trial counsel then reported "irreconcilable differences." Upon further explanation, trial counsel told the court that Defendant sought to employ defenses that counsel did not think had "any legal or factual basis." However, "[a] disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel." *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981) (citations omitted).

B. Right to Self-Representation

After Defendant and his trial counsel brought up their concerns of continued representation, the dialogue transitioned to a motion to continue, and the topic of self-representation was not brought up. At no point in time did Defendant express a desire to go forward without his trial counsel. And "[u]nless an accused makes *some* form of an affirmative statement which would amount to a manifestation of a desire to

proceed *pro se*, it cannot be reasonably argued that an accused has been forced to accept representation at trial." *Id.* at 338, 279 S.E.2d at 799.

C. Overruled Objection to Disputed Testimony

At trial, the prosecutor asked Trooper Smith "based on your training and experience, what did you believe was being thrown out the window?" Defendant's trial counsel objected on the basis of speculation. After a bench conference, the question was asked again without objection and Trooper Smith replied, "it appeared to be marijuana." Without analyzing this particular transaction, we note that the record contains ample other instances of testimony concerning evidence of marijuana in the car where no objection was proffered. Yet Defendant waived his prior objection because "[a]dmission of evidence without objection waives *prior* or subsequent objection to the admission of evidence of a similar character." *State v. Valentine*, 357 N.C. 512, 525, 591 S.E.2d 846, 857 (2003) (citations omitted).

D. Waived Attorney's Fees

Defendant also points to a lack of opportunity to address the trial court concerning his trial counsel's fee for appointment and representation. But no such opportunity arose because the trial court remitted the attorney fees. Before imposing a judgment for appointed-counsel fees, under N.C. Gen. Stat. § 7A-455 (2023), "the trial court must afford the defendant notice and an opportunity to be heard." *State v. Friend*, 257 N.C. App. 516, 522, 809 S.E.2d 902, 906 (2018) (citations omitted). Since the trial court in fact remitted such fees, logic dictates that Defendant's need to address this decision became unnecessary. *See id.* at 518, 809 S.E.2d at 904 (emphasis added) (holding that "trial courts must provide criminal defendants, personally and not through their appointed counsel, with an opportunity to be heard *before entering a money judgment* under [section] 7A-455."). In any event, if this was an error of law by the trial court, we must determine whether such error prejudiced Defendant. *See* N.C. Gen. Stat. § 15A-1442 (2023). Here, had Defendant been heard on attorney's fees, the best possible outcome for his cause would have been remission of those fees. Accordingly, Defendant cannot show, but for his opportunity to be heard, a different outcome would have been reached. Any such claimed defect is therefore harmless.

IV. Conclusion

In accordance with *Anders* and *Kinch*, we have fully examined the record for any issue with arguable merit. *See State v. Frink*, 177 N.C. App. 144, 145, 627 S.E.2d 472, 473 (2006) (quoting *State v. Hamby*, 129

N.C. App. 366, 367–68, 499 S.E.2d 195, 195) ("Under our review pursuant to *Anders* and *Kinch*, 'we must determine from a full examination of all the proceedings whether the appeal is wholly frivolous.' "). We therefore conclude that Defendant received a fair trial free from error.

NO ERROR.

Judges WOOD and GORE concur.

STATE OF NORTH CAROLINA
v.
DALLAS JEROME McGIRT, DEFENDANT

No. COA24-551

Filed 19 March 2025

1. Constitutional Law—right to counsel—voluntary waiver—insufficient colloquy by trial court—continued requests by defendant for new counsel

Defendant was entitled to a new trial on multiple counts of sexual offenses against a child where, after conducting a colloquy at a hearing on defense counsel's motion to withdraw, the trial court erred in concluding that defendant voluntarily waived his right to counsel. During the colloquy, the court failed to: inform defendant that he would be waiving his right to counsel if he fired his current attorney; ask defendant whether he wished to represent himself; ensure that defendant understood and appreciated the consequences of waiving his right to counsel; or inform defendant of the full range of permissible punishments for the charges, explaining only the minimum punishment. Further, although defendant had previously fired multiple attorneys and even filed a handwritten motion indicating that he wished to proceed pro se with standby counsel, he repeatedly requested new counsel throughout the proceedings and stated in the handwritten motion that he felt it was "time to move on with a new attorney who is willing to help," thereby contradicting any implication of a knowing waiver of counsel.

2. Constitutional Law—right to counsel—forfeiture—defendant firing multiple attorneys—no evidence of delay tactics

Defendant was entitled to a new trial on multiple counts of sexual offenses against a child where he did not forfeit his right to

counsel by committing egregious misconduct. Firstly, at no point did defendant threaten counsel, disrupt court proceedings, deny the trial court's jurisdiction, or refuse to participate in the judicial process. Secondly, although defendant did fire multiple attorneys throughout the proceedings, the trial court made no findings to support the State's claim that defendant was trying to delay the trial by doing so. Rather, the record showed that defendant's first two attorneys withdrew for reasons unrelated to defendant's conduct, his third attorney withdrew for unexplained "personal reasons," and defendant's dissatisfaction with subsequent attorneys stemmed from disagreements over the preparation of his defense.

3. Constitutional Law—right to counsel—waiver by conduct—warning from trial court required

Defendant was entitled to a new trial on multiple counts of sexual offenses against a child because, although he did fire multiple attorneys throughout the case, he received no warning from the trial court that he was engaging in dilatory conduct and therefore he did not waive his right to counsel through waiver by conduct.

Judge TYSON dissenting.

Appeal by defendant from judgment entered 1 June 2023 by Judge G. Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 15 January 2025.

Attorney General Joshua H. Stein, by Special Deputy Attorney General Elizabeth B. Jenkins, for the State.

Mary McCullers Reece for defendant-appellant.

FLOOD, Judge.

Defendant Dallas Jerome McGirt appeals from the trial court's judgment finding him guilty of four counts of statutory sex offense with a child and ten counts of indecent liberties with a child. On appeal, Defendant argues the trial court erred in concluding Defendant voluntarily waived his right to counsel, and in the alternative, forfeited his right to counsel. We likewise address whether Defendant waived his right to counsel by the hybrid situation of waiver by conduct with a warning, which combines aspects of waiver and forfeiture. Upon review, we conclude Defendant did not "clearly and unequivocally" waive his right to counsel,

commit "egregious misconduct" to forfeit his right to counsel, nor waive his right to counsel by engaging in dilatory conduct after receiving a warning. We therefore reverse and remand for a new trial.

I. Factual and Procedural Background

On 8 April 2019, Defendant was indicted by a grand jury for six counts of statutory sexual offense with a child and ten counts of indecent liberties with a child. The trial court found Defendant to be indigent and ordered that Defendant be given court-appointed counsel from the public defender's office. The public defender's office, however, moved to withdraw as counsel for having previously represented one of the victim's mothers, which the trial court granted.

The trial court then appointed outside counsel, ordering James M. Wilson to be Defendant's counsel. Mr. Wilson, however, left private practice to work for the Attorney General's Office and could no longer represent Defendant. The trial court reordered that outside counsel be appointed, and Cindy Popkin-Bradley was appointed as Defendant's counsel on 20 November 2019. On 3 May 2021, Ms. Popkin-Bradley moved to withdraw as Defendant's counsel for "personal reasons," stating that she could "not be effective in defending [Defendant]." The trial court granted the motion and again ordered that Defendant be appointed substitute counsel.

On 19 April 2022, Defendant filed a handwritten motion alleging that Margaret Lumsden had been appointed to represent him in May 2021. Defendant claimed he was dissatisfied with Ms. Lumsden's representation, stating that she had refused to meet his objectives, had lied to him about withdrawing from his case after his request for her to do so, and had lied to him about her being on vacation. Defendant requested that the trial court dismiss her from his case. The trial court did not grant or deny the motion, but entered an order providing that because Defendant had filed this request pro se, but was still under representation by Ms. Lumsden, "the [trial c]ourt must conduct an in-person colloquy in open court before the [trial c]ourt will grant [Defendant's] request[,]" pursuant to N.C.G.S. § 7A-457. The trial court stated that if Defendant wished for this hearing to be held, "[Defendant] may request that [his] attorney schedule a hearing[.]"

On 16 May 2022, Defendant filed another handwritten motion, requesting that the trial court grant him a hearing date on the matter, and further explaining that Ms. Lumsden "went missing [in] September 2021," returned 29 March 2022, and "has been missing since." Defendant lamented in his motion that "May 2022 makes one year that she has been

on my case and has not accomplished any of my objectives or anything at all. Once again, I feel it's time to move on with a new attorney who is willing to help." Defendant wrote, "[a]t this time, I would like to go *pro se* and have court appointed counsel on stand-by."

On 3 June 2022, the trial court granted Defendant's motion in part, allowing his counsel to be withdrawn, but ordered again that outside counsel be appointed. The trial court appointed Charles Christopher, Jr. to be Defendant's counsel.

On 18 August 2022, Defendant again wrote a handwritten letter to the trial court, requesting Mr. Christopher to be fired, alleging that Mr. Christopher "has yet to come and see me." On 24 April 2023, Mr. Christopher moved to withdraw as Defendant's counsel, stating that "Defendant refuses to discuss his case with this attorney or assist this attorney in any way" and that Defendant refused to meet with him on 21 April 2023.

On 4 May 2023, three weeks before the matter was set for trial, counsel's motion to withdraw came on for hearing. At the hearing, the trial court pointed out that Mr. Christopher had attempted to meet with Defendant, and Defendant responded that Mr. Christopher "wanted to play word games," and that Defendant would have one of his family members "buy [Mr. Christopher] a Scrabble game for Christmas."

The trial court granted Mr. Christopher's motion to withdraw, and then addressed Defendant:

> We need to consider if you have effectively waived your right to the assistance of court-appointed counsel anyway and that you need to represent yourself or if we need to appoint standby counsel to assist you with this case. What are you asking to do, just so I have an understanding of that first?

Defendant replied: "Your Honor, I've been held almost [fifty] months, and it doesn't make sense. From my third attorney, Cindy Bradley, sat on my case [eighteen] months, provided no assistance, had no communication with her. She didn't even request the motion for discovery. She never requested one." The trial court asked whether the State had anything to say about Defendant's counsel history. The State's attorney responded:

> The State has every single time tried to get this to trial, and so he has continued to behave in ways that are making that impossible. The State is ready to proceed on May 30th. This has been set for several months, and I would ask that

> we either appoint somebody, potentially Mr. Christopher, as standby since he is aware of this case. Every single lawyer that he has had, I have given discovery, full discovery to. I actually recopied discovery for Mr. Christopher so I know he had all of it, so I would submit that that would make the most sense, to do standby counsel with somebody who is aware of the case and proceed.

The trial court then asked Defendant a series of questions: whether there was anything impairing Defendant's ability to understand what was happening in his case, to which Defendant responded there was nothing to impair him; whether Defendant could read, write, hear, and understand, to which Defendant responded in the affirmative; and whether Defendant understood the minimum statutory sentencing, to which Defendant responded in the affirmative. The trial court next asked Defendant: "[Y]ou do understand that you have had the right to have attorneys represent you, but it seems as though you've five times not been satisfied with counsel that's been provided[?]" Defendant acknowledged he had not been satisfied with counsel.

The trial court then stated to Defendant, "I'm going to find that you have -- that you have waived your right to the assistance of counsel. I will not assign a sixth attorney to represent you on these matters. The case -- the case can still move forward to trial. I will assign standby counsel." Defendant did not object.

The trial court entered an order, finding Defendant was waiving counsel, and ordering standby counsel be appointed by the public defender's office. Additionally, the trial court ordered that Defendant have access to the law library so that he could prepare for trial.

On 22 May 2023, Defendant requested court-appointed counsel, and the trial court denied his request, stating in an order:

> Defendant currently represents himself (case is already set for trial) and would like court appointed counsel; the court finds [] Defendant has previously waived his right to court appointed counsel and can still have Mr. Liles as stand-by; Defendant can hire an attorney but the motion to get court appointed counsel is denied.

On 30 May 2023, the matter came on for trial, and the State filed a motion to have standby counsel, rather than Defendant, examine the prosecuting witnesses. Defendant did not object, and the trial court granted the motion.

At trial, standby counsel questioned the prosecuting witnesses, and otherwise, Defendant represented himself. At the close of all evidence, the jury convicted Defendant of four counts of statutory sex offense with a child and ten counts of indecent liberties with a child. The trial court then sentenced Defendant to minimum sentences totaling seventy-five years of imprisonment. Defendant timely appealed.

II. Jurisdiction

This Court has jurisdiction to review an appeal from a final judgment by a superior court, pursuant to N.C.G.S. §§ 7A-27(b)(1) and 15A-1444(a) (2023).

III. Standard of Review

This Court reviews de novo a criminal defendant's appeal regarding waiver of counsel. *See State v. Jenkins*, 273 N.C. App. 145, 150 (2020). 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) (citation omitted).

IV. Analysis

On appeal, Defendant argues the trial court erred in concluding (A) he voluntarily waived his right to counsel, and in the alternative, (B) he forfeited his right to counsel. We address each argument, in turn. We likewise address (C) whether Defendant waived his right to counsel through the hybrid situation of waiver by conduct with a warning.

A. Voluntary Waiver of Counsel

[1] Defendant first argues the trial court erred in concluding he voluntarily waived his right to representation. Specifically, Defendant contends he "did not 'clearly and unequivocally' request to proceed pro se at the 4 May 2023 hearing where the trial court found voluntary waiver of counsel." We agree.

Criminal defendants have a constitutional right to the assistance of counsel under both the United States Constitution and the North Carolina State Constitution. *See* U.S. Const. amend. VI.; *see also* N.C. Const. art. I, §§ 19, 23; *Powell v. Alabama*, 287 U.S. 45, 66 (1932); *State v. McFadden*, 292 N.C. 609, 611 (1977). "Criminal defendants also have the absolute right to waive counsel, represent themselves, and make trial strategy decisions without the assistance of counsel." *State v. Jones*, 292 N.C. App. 493, 497 (2024) (citation omitted).

Before a defendant may waive this right, however, "a trial court must conduct a statutorily-required colloquy to determine that 'constitutional

and statutory safeguards are satisfied.' " *Id.* at 497 (quoting *State v. Moore*, 362 N.C. 319, 322 (2008)). During this colloquy, the trial court must determine "whether the defendant knowingly, intelligently, and voluntarily waives the right to in-court representation by counsel." *Moore*, 362 N.C. at 322. "[A] criminal defendant's election to proceed *pro se* must be 'clearly and unequivocally' expressed." *State v. Watlington*, 216 N.C. App. 388, 393 (2011).

The trial court may enter an order to allow a defendant to waive their right to counsel only after being satisfied the defendant:

> (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments.

Jones, 292 N.C. App. at 498 (citation omitted); *see also* N.C.G.S. § 15A-1242 (2023) (codifying this procedure). We have held that during a trial court's inquiry as to a defendant's understanding of the decision to proceed pro se, "[t]he trial court must specifically advise a defendant of the possible maximum punishment, of the range of permissible punishments, and of the consequences of representing himself. Failing to advise a defendant of any of these requirements renders the subsequent waiver invalid." *State v. Lindsey*, 271 N.C. App. 118, 127 (2020) (cleaned up); *see also State v. Frederick*, 222 N.C. App. 576, 583 (2012) (holding the trial court inadequately advised the defendant of the range of permissible punishments by telling the defendant "you can go to prison for a long, long time," and "if you're convicted of these offenses, the law requires you get a mandatory active prison sentence").

"A written waiver is important evidence to show a defendant wishes to act as [his] own attorney." *Jenkins*, 273 N.C. App. at 151. "When a defendant executes a written waiver which is in turn certified by the trial court, the waiver of counsel will be presumed to have been knowing, intelligent, and voluntary, unless the rest of the record indicates otherwise." *Id.* at 151 (citation omitted). A written waiver, however, "is something in addition to the requirements of N.C.G.S. § 15A-1242, not an alternative to it." *Id.* at 151 (citation omitted) (cleaned up). "Any waiver of counsel shall be effective only if the court finds of record that at the time of waiver the [] person acted with full awareness of his rights and of the consequences of the waiver." N.C.G.S. § 7A-457(a) (2023).

Looking to our case law, we have held a defendant has "voluntarily, knowingly and intelligently" waived his right to counsel where a

defendant: has made explicit statements such as, "I'll represent myself," after being directly asked multiple times if he wanted to represent himself and being explained the difference between standby counsel and court-appointed counsel, *see State v. Bannerman*, 276 N.C. App. 205, 207–09 (2021); has refused to answer any of the questions presented to him by the trial court, *see Jones*, 292 N.C. App. at 498; has executed multiple waivers of counsel and no contra evidence existed that the initial waiver was insufficient, *see State v. Harper*, 285 N.C. App. 507, 517 (2022); and where the trial court has thoroughly explained to the defendant the consequences of a potential conviction of the crime he is charged with. *See State v. Moore*, 290 N.C. App. 610, 633 (2023); *see also State v. Seraphem*, 90 N.C. App. 368, 371 (1988) (holding the defendant intelligently waived counsel after the "trial judge explained to the defendant the maximum penalties for the charges against her and emphasized the seriousness of her plight").

We find *Moore* to be particularly helpful in highlighting what is required by a trial court before finding a defendant has waived his right to counsel. In *Moore*, we concluded the defendant, charged with first degree murder, waived his right to counsel where the trial court had conducted two separate colloquies into the defendant's waiver of counsel. *See Moore*, 290 N.C. App. at 632–33. The record revealed "[the d]efendant executed a written waiver of court-appointed attorney . . . after the trial court had conducted a colloquy[,]" and the "trial court conducted a similar colloquy when [the d]efendant sought to remove [another attorney] as his counsel during trial." *Id.* at 632. The trial court directly explained to the defendant that if the defendant fired his court-appointed counsel during the middle of trial, "you're going to be forfeiting your right to have an attorney[,]" and the defendant responded, "[t]hat's fine." *Id.* at 633. The trial court explained to the defendant that he "would not have the right to another appointed attorney, and [the d]efendant would have to hire his own attorney or represent himself[, and the d]efendant stated he understood." *Id.* at 633.

On appeal, after reviewing the record, we held the defendant waived his right to counsel "knowingly, intelligently, and voluntarily," and in making this holding explained:

> At each colloquy, the trial court advised and counseled [the d]efendant about his right to an attorney, including his right to appointed counsel. The trial court counseled [the d]efendant on the complexity of handling his own jury trial and the fact the judge would neither be able to offer legal advice nor excuse non-compliance with any rules of evidence or procedure.

> The trial court addressed the seriousness of the first-degree murder charge. The trial court advised a conviction by the jury of first-degree murder carried a life sentence without the possibility of parole. The trial court further told [the d]efendant that no other appointed counsel would be able or willing to immediately step into the middle of an ongoing trial. After being fully advised, [the d]efendant proceeded to fire [his counsel] and was left to acquire his own counsel or proceed *pro se*.

Id. at 633.

Alternatively, we have held a defendant does not waive his right to counsel where the defendant "repeatedly requested new counsel" even where he has signed a waiver of court-appointed counsel. *See In re S.L.L.*, 167 N.C. App. 362, 364–65 (2004).

Our review of the Record in the instant case reveals that, during the hearing on Mr. Christopher's motion to withdraw as counsel for Defendant, the following sole colloquy occurred between the trial court and Defendant regarding potential waiver of counsel:

> THE COURT: All right. Well, [Mr. Christopher's] motion to withdraw is allowed. The question now, sir, is whether or not we've come to a point where you have, in essence, waived your right -- well, you said you have a waiver?
>
> THE DEFENDANT: Yeah, that's what I -- I filed it just to get him off my case.
>
> THE COURT: We're somewhat coming to a point where we need to consider if you have effectively waived your right to the assistance of court-appointed counsel anyway and that you need to represent yourself or if we need to appoint standby counsel to assist you with this case. What are you asking to do, just so I have an understanding of that first?
>
> THE DEFENDANT: Your Honor, I've been held almost 50 months, and it doesn't make sense. From my third attorney, Cindy Bradley, sat on my case 18 months, provided no assistance, had no communication with her. She didn't even request the motion for discovery. She never requested one. She filed a motion to withdraw and got my charges wrong, stood here and stated that she was working on my case the whole time. If you was working on my case the whole time, how you getting my charges wrong?

> THE COURT: All right. Thank you.
>
> . . . .
>
> THE COURT: And you do understand that you have had the right to have attorneys represent you, but it seems as though you've five times not been satisfied with counsel that's been provided so you've fired -- you just mentioned you fired Ms. Lumsden; you wanted Mr. Christopher gone; you were dissatisfied with Ms. Bradley, and there were two other attorneys before that[.]
>
> THE DEFENDANT: Theodore Dardess -- Theodore Dardess, he withdrew immediately, and the second one was Ryan Willis, who stated he had a overloaded caseload or something so he wouldn't be able to take my case.
>
> THE COURT: All right. And then there were the next three that -- where there have been complications at least one time when it was set for trial. And you do understand that this case is headed for trial?
>
> THE DEFENDANT: Oh, yes.
>
> . . . .
>
> THE COURT: All right, sir, *I'm going to find that you have -- that you have waived your right to the assistance of counsel*. I will not assign a sixth attorney to represent you on these matters. The case -- the case can still move forward to trial. I will assign standby counsel. Mr. Christopher, do you have any -- anything that you would add as it relates to being available as standby counsel in the event that [Defendant] would need assistance?
>
> THE DEFENDANT: Appoint anybody but him. I'll take him. (Indicating to the bailiff.) Anybody but Mr. Christopher.

Unlike the defendant in *Moore*, where the trial court directly explained to the defendant that he would be forfeiting his right to counsel if he fired his attorney, Defendant was not told by the trial court that he would be waiving his right to counsel if he fired Mr. Christopher. *See Moore*, 290 N.C. App. at 633. After the trial court granted Mr. Christopher's motion to withdraw, the trial court *told* Defendant, "I'm going to find that you have -- that you have waived your right to the assistance of counsel[,]" but that it would appoint standby counsel.

There is nothing in the colloquy with the trial court to indicate Defendant "expressly and voluntarily" waived his right to counsel, *see In re S.L.L.*, 167 N.C. App. at 364, nor did Defendant "clearly and unequivocally" express his decision to proceed pro se. *See Watlington*, 216 N.C. App. at 393; *see also State v. Blakeney*, 245 N.C. App. 452, 460 (2016) ("[O]ur own review of the transcript fails to reveal any evidence that [the] defendant indicated, much less 'clearly and unequivocally' requested, that he be permitted to proceed *pro se*."). The trial court never asked if Defendant wished to represent himself, *cf. Moore*, 290 N.C. App. at 633, nor did Defendant make an explicit statement that he would represent himself. *See Bannerman*, 276 N.C. App. at 207–09.

The trial court further failed to determine whether Defendant "underst[ood] and appreciat[ed] the consequences of the decision[,]" as it did not inquire whether Defendant understood the difference between a court-appointed counsel versus standby counsel, such that Defendant was now proceeding pro se. Although Defendant wrote in a previous letter that he "would like to go pro se and have court[-]appointed counsel on stand-by[,]" the trial court did not make a determination that Defendant understood the consequences of that decision as required by N.C.G.S. § 15A-1242. *See id.* at 207–09; *see also* N.C.G.S. § 15A-1242. In fact, Defendant unequivocally stated, "[a]ppoint anybody but [Mr. Christopher]."

The trial court also failed to thoroughly advise Defendant of the consequences of a conviction, as required, advising Defendant only as to the minimum punishment:

> THE COURT: Okay. And so, sir, for each of the statutory sex offenses, you recognize that there is the possibility of life -- not life, but 25 years minimum for each of those six?
>
> THE DEFENDANT: I'm very well aware, Your Honor.

See Moore, 290 N.C. App. at 633 (upholding a waiver where the trial court addressed the seriousness of the charge and advised the defendant that a conviction carried a maximum of a life sentence without the possibility of parole); *see also Seraphem*, 90 N.C. App. at 371 (upholding a waiver where the trial court explained to the defendant the "maximum penalties for the charges against her and emphasized the seriousness of her plight"); *Lindsey*, 271 N.C. App. at 127 (requiring a trial court to "specifically advise a defendant of the possible maximum punishment, of the range of permissible punishments, and of the consequences of representing himself").

In *State v. Gentry*, this Court explained that "a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed *pro se*" does not constitute a *per se* violation of N.C.G.S. § 15A–1242 unless "there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about the range of permissible punishment." 227 N.C. App. 583, 599–600 (2013) (internal quotation marks omitted). We did so, however, only *after* concluding "[t]he record . . . clearly reflect[ed] that the trial court made a substantially proper inquiry into the extent to which [the d]efendant's waiver of counsel was knowing and voluntary." *See id.* at 598. In *Gentry*, "[t]he only component of the trial court's discussion with [the d]efendant [with] which [the d]efendant [took] issue [was] the information concerning 'the range of permissible punishments' that the trial court provided." *Id.* at 598. We reviewed the trial court's failure to properly state the maximum number of months to see whether the error prejudiced the defendant in his "otherwise knowing and voluntary waiver of counsel." *See id.* at 600.

Here, however, this Court must consider whether Defendant "has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled[,]" "understands and appreciates the consequences of the decision[,]" and "comprehends the nature of the charges and proceedings[,]" such that we are not looking at whether this one failure to properly state "the range of permissible punishments" *prejudiced* Defendant, but whether in the context of the requirements stated above, Defendant knowingly and voluntarily waived counsel. *See Jones*, 292 N.C. App. at 498.

Further, although Defendant captioned his request to remove Mr. Christopher and others as "Waiver of Counsel" and wrote that he wished to represent himself, he expressed that he requested this because he felt it was "time to move on with a new attorney who is willing to help." Such evidence, expressing he wished to move on to a new attorney and requesting someone else be appointed to him, is "contra" to a clear waiver of counsel. *See Harper*, 285 N.C. App. at 517 (holding the defendant's multiple written waivers were enough to establish he had waived his right of counsel where "no evidence *contra* exist[ed]"). Additionally, Defendant's handwritten document filed on 16 May 2022—the sole time he wrote "[a]t this time, I would like to go *pro se* and have court appointed counsel on stand-by[,]" after lamenting he "feel[s] it's time to move on with a new attorney who is willing to help"—was not written in the presence of the trial court for the trial court to determine if Defendant, "at the time of the waiver . . . acted with full awareness of his

rights and of the consequences of the waiver." Additionally, during the colloquy with the trial court, Defendant never asked to proceed pro se nor did Defendant request standby counsel. Thus, this waiver cannot be deemed effective. *See* N.C.G.S. § 7A-457(a).

Like in *In re S.L.L.*, the trial court here erred in finding Defendant waived his right of counsel where, although he once "wrote he would like to go pro se," he "repeatedly requested new counsel," and even stated in that very handwritten note that he felt like it was "time to move on with a new attorney who is willing to help." *See In re S.L.L*, 167 N.C. App. at 365. A fulsome review of the Record overcomes the presumption that a written waiver of counsel by Defendant was done "knowing[ly], intelligent[ly], and voluntar[ily]." *See Jenkins*, 273 N.C. App. at 151; *see also Harper*, 285 N.C. App. at 517; N.C.G.S. § 7A-457(a).

Accordingly, we conclude Defendant did not "clearly and unequivocally" waive his right to counsel, *see Watlington*, 216 N.C. App. at 393, the trial court failed to determine whether Defendant "underst[ood] and appreciat[ed] the consequences of the decision[,]" and thus the trial court erred in entering an order stating that Defendant waived this right. *See Jones*, 292 N.C. App. at 498; *see also* N.C.G.S. § 15A-1242.

B. Forfeiture of Counsel

[2] Defendant next argues that, even though the trial court spoke in terms of waiver, he also did not forfeit his right to counsel. Defendant contends "the trial court made several references to his having been represented by five different attorneys, the implication being that [Defendant] was unreasonable in his dissatisfaction and should therefore be deemed to have forfeit[ed] his right to counsel." Defendant argues "there was no showing, nor any finding by the trial court, that [his] requests for new counsel arose from anything other than real efforts to prepare for a trial on the serious charges pending against him." We agree.

This Court has explained that "[t]he second circumstance under which a criminal defendant may no longer have the right to be represented by counsel occurs when a defendant engages in such serious misconduct that he forfeits his constitutional right to counsel." *Blakeney*, 245 N.C. App. at 460; *see also State v. Simpkins*, 373 N.C. 530, 535 (2020) ("[I]n situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel."). In *Simpkins*, our Supreme Court explained:

> [I]n rare circumstances a defendant's actions frustrate the purpose of the right to counsel itself and prevent the trial court from moving the case forward. In such

> circumstances, a defendant may be deemed to have forfeited the right to counsel because, by his or her own actions, the defendant has totally frustrated that right. If one purpose of the right to counsel is to justify reliance on the outcome of the proceeding, then totally frustrating the ability of the trial court to reach an outcome thwarts the purpose of the right to counsel.

Id. at 536 (internal citations and quotations marks omitted). We have previously explained that, although there is no "bright-line definition of the degree of misconduct that would justify forfeiture[,]" the following conduct is usually a cause for forfeiture of the right to counsel:

> (1) flagrant or extended delaying tactics, such as repeatedly firing a series of attorneys; (2) offensive or abusive behavior, such as threatening counsel, cursing, spitting, or disrupting proceedings in court; or (3) refusal to acknowledge the trial court's jurisdiction or participate in the judicial process, or insistence on nonsensical and nonexistent legal "rights."

Blakeney, 245 N.C. App. at 461–62.

"[E]ven if a defendant's conduct is highly frustrating, forfeiture is not constitutional where any difficulties or delays are not so egregious that they frustrated the purposes of the right to counsel itself." *State v. Atwell*, 383 N.C. 437, 449 (2022) (citation omitted) (cleaned up). Additionally, where a trial court makes "no factual findings about the circumstances which led to the withdrawal," there is "no inference that [the] defendant was attempting to delay h[is] case." *Id.* at 451.

Here, Defendant did not threaten counsel or disrupt any court proceedings, nor did he refuse to acknowledge the trial court's jurisdiction. Defendant participated in the judicial process and did not insist on nonsensical or nonexistent legal rights. *See Blakeney*, 245 N.C. App. at 461–62. The only potential misconduct is as to whether Defendant used flagrant or extended delay tactics by "repeatedly firing a series of attorneys." Thus, we now look to our Courts' previous cases regarding defendants firing their attorneys, as a basis for forfeiting their right to counsel.

Our Supreme Court has previously held a defendant does not forfeit his right to counsel where a defendant fires court-appointed counsel "due to differences related to the preparation of [the] defendant's defense rather than [the] defendant's refusal to participate in preparing a defense." *State v. Harvin*, 382 N.C. 566, 590 (2022) (cleaned up). A defendant likewise does not forfeit his right to counsel where he fires

his counsel for failing to pursue a non-frivolous jurisdictional issue that the defendant desired. *See Atwell*, 383 N.C. at 451–52.

Alternatively, we have held a defendant forfeits his right to counsel when he "refuse[s] to cooperate" with his counsel and "assault[s] him," *see State v. Montgomery*, 138 N.C. App. 521, 525 (2000), and where he "insist[s] that his attorneys pursue defenses that [are] barred by ethical rules" and "refus[es] to cooperate when they [do] not comply with his requests." *See State v. Smith*, 292 N.C. App. 656, 661 (2024).

In the present case, Defendant's first two court-appointed counsel withdrew immediately for conflicts of interest, one having represented the mother of one of Defendant's victim's before, and one having left private practice to work at the Attorney General's office. Defendant's third court-appointed counsel withdrew as Defendant's counsel for "personal reasons."[1] Defendant's fourth court-appointed counsel was Ms. Lumsden, who Defendant claimed "went missing [in] September 2021," returned 29 March 2022, and "has been missing since." Defendant lamented he was dissatisfied with Ms. Lumsden's representation because she had refused to meet his objectives, lied about withdrawing from his case after his request for her to do so, and lied to him about her being on vacation.[2] Defendant's fifth and final court-appointed counsel was Mr. Christopher, whom Defendant requested to fire in August 2022 because Mr. Christopher "ha[d] yet to come and see [him]." Seven months later, Mr. Christoper moved to withdraw, claiming "Defendant refuse[d] to discuss his case with this attorney or assist this attorney in any way," although Mr. Christopher provided only one date that Defendant refused to meet with him, which was 21 April 2023, three days before Mr. Christopher moved to withdraw.

We can ascertain from the Record: Defendant's first two attorneys withdrew for reasons outside of Defendant's conduct; Defendant fired his third attorney for reasons not stated in the Record, only that she withdrew for "personal reasons," and thus we cannot say this was done as a delay tactic, *see Atwell*, 383 N.C. at 451; Defendant fired his fourth attorney over disagreements on objectives of the case, which is not a delay tactic, "rather than [D]efendant's refusal to participate in

1. There is no hearing transcript in the Record, and thus we are left only with the knowledge that the third court-appointed counsel, Ms. Popkin-Bradley, withdrew for "personal reasons."

2. There is no motion from Ms. Lumsden to withdraw nor a hearing transcript in the Record; there is only an order from the trial court granting the motion, and thus, we are unable to ascertain the reasons for Ms. Lumsden's withdrawal.

preparing a defense," *see Harvin*, 382 N.C. at 590; and the trial court did not make any findings regarding the withdrawal of Defendant's fourth attorney. Nothing in the Record indicates Defendant's objectives were unethical. *See Smith*, 292 N.C. App. at 661. Defendant fired his fifth attorney after claiming the attorney "ha[d] yet to come and see [him]." The Record indicates that Defendant's fifth attorney described Defendant as "refus[ing] to discuss this case with" him after Defendant had already filed a pro se motion to have him fired seven months before.

Unlike the defendant in *Montgomery*, Defendant never assaulted his attorneys. *See Montgomery*, 138 N.C. App. at 525. Defendant only refused to discuss the case with his last attorney after indicating he wished to fire that attorney for previously failing to come to see him regarding his case. *Cf. id.* at 525.

The only negative Record evidence of Defendant's actions is found in the trial transcript, before the trial court's colloquy with Defendant, where the State lamented:

> This defendant has literally, every single time something starts to get towards a trial, has done some kind of thing with his attorney to get them to withdraw. We were set for trial with Ms. Bradley and he did the same kind of stuff and she was able t[o] withdraw the week before trial.
>
> . . . .
>
> The State has every single time tried to get this to trial, and so he has continued to behave in ways that are making that impossible. The State is ready to proceed on May 30th. This has been set for several months, and I would ask that we either appoint somebody, potentially Mr. Christopher, as standby since he is aware of this case. Every single lawyer that [Defendant] has had, I have given discovery, full discovery to. I actually recopied discovery for Mr. Christopher so I know he had all of it, so I would submit that that would make the most sense, to do standby counsel with somebody who is aware of the case and proceed.

The trial court, however, did not make any findings regarding Defendant's alleged actions by the State, and thus, we cannot make any inference that Defendant's actions were an attempt to delay the trial. *See Atwell*, 383 N.C. at 451.

Based on the Record evidence, we cannot say Defendant's firing of his attorneys was "egregious misconduct" or a flagrant delaying tactic.

See Harvin, 382 N.C. at 590; *see also Smith*, 292 N.C. App. at 661; *Atwell*, 383 N.C. at 451; *Blakeney*, 245 N.C. App. at 461–62; *Simpkins*, 373 N.C. at 535. Accordingly, the trial court erred in concluding Defendant forfeited his right to counsel.

C. Hybrid: Waiver of Counsel by Conduct with Warning

[3] We also consider the State's argument that, in addition to voluntary waiver and forfeiture, Defendant exhibited a "hybrid" form of waiving one's right to counsel, waiver by conduct. We conclude he did not.

In *Blakeney*, this Court provided:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since *a waiver by conduct requires that a defendant be warned about the consequences of his conduct*, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Blakeney, 245 N.C. App. at 464–65, (citation and internal quotation marks omitted) (cleaned up) (emphasis added). In *Blakeney*, the defendant was not given a warning that, should he continue in his conduct, he would be required to proceed *pro se*. *See id.* at 464. In holding that the defendant did not waive his right to counsel by conduct, this Court explained: "[W]e find it very significant that [the] defendant was not warned or informed that if he chose to discharge his counsel but was unable to hire another attorney, he would then be forced to proceed *pro se*. Nor was [the] defendant warned of the consequences of such a decision." *Id.* at 464.

Here, like the defendant in *Blakeney*, Defendant received no warning that he was "engag[ing] in dilatory tactics" of any sort; instead, in

the colloquy, the trial court stated: "All right. Well, [Mr. Christopher's] motion to withdraw is allowed. The question now, sir, is whether or not we've come to a point where you have, in essence, waived your right[.]" *See id.* at 464. There is nothing in the Record to indicate the trial court ever warned Defendant that any of his conduct was dilatory. *See id.* at 464. Because waiver by conduct "requires that a defendant be warned about the consequences of his conduct," and there is no Record here that the trial court provided Defendant with any warning regarding his conduct, nor does the State argue there was any warning, we hold Defendant did not waive his right to counsel by conduct. *See id.* at 465.

Because we conclude Defendant did not knowingly and voluntarily waive his right to counsel, forfeit his right to counsel by engaging in egregious misconduct, nor waive his right to counsel by engaging in dilatory conduct after receiving a warning, we hold the trial court erred in concluding Defendant waived his right to counsel.

V. Conclusion

Upon our de novo review, *see Jenkins*, 273 N.C. App. at 150, we conclude the trial court erred in concluding Defendant voluntarily waived his right to counsel, where Defendant requested new counsel and did not "clearly and unequivocally" express his decision to proceed pro se, and the trial court did not determine Defendant understood the consequences of proceeding *pro se*. The trial court likewise erred in concluding Defendant forfeited his right to counsel where the Record lacks evidence that Defendant fired multiple attorneys to delay his trial, and thus Defendant did not commit "egregious misconduct," nor did Defendant waive his right to counsel by engaging in dilatory conduct after receiving a warning. We therefore vacate and remand for a new trial. *See State v. Sorrow*, 213 N.C. App. 571, 579 (2011) (vacating and remanding where the trial court erred in concluding a defendant waived his right to counsel).

VACATED AND REMANDED.

Judge ZACHARY concurs.

Judge TYSON dissents in separate opinion.

TYSON, Judge, dissenting.

The majority's opinion erroneously concludes Defendant did not voluntarily waive and/or forfeit his right to counsel. Defendant's actions also present a "hybrid" waiver/forfeiture situation from *State v. Blakeney*, 245 N.C. App. 452, 464-65, 782 S.E.2d 88, 96 (2016). There is no prejudice shown and no error in the judgment. I respectfully dissent.

I. Background

Defendant was indicted for six counts of statutory sex offense with a child and ten counts of indecent liberties with a child on 8 April 2019. The trial court initially appointed the public defender's office to represent Defendant. However, the public defender's office withdrew because of its prior representation of one of the victim's mothers. The trial court next appointed attorney James M. Wilson to represent Defendant. Wilson left private practice to work for the North Carolina Department of Justice, and he was allowed to withdraw.

The trial court next appointed attorney Cindy Popkin-Bradley on 20 November 2019. Popkin-Bradley moved to withdraw due to "personal reasons" the week before the matter was set for trial. The trial court allowed her motion and then appointed attorney Margaret Lumsden to represent Defendant in May 2021.

Defendant filed a handwritten motion alleging he was dissatisfied with Lumsden's representation, and he requested the trial court to dismiss her from the case. Defendant alleged Lumsden had refused to meet his objectives, had lied to him about withdrawing from the case, and had lied about going on vacation.

The trial court did not either grant or deny Defendant's motion, however, it entered an order advising Defendant "the [trial] court must conduct an in-person colloquy in open court before the [trial c]ourt will grant [Defendant's] request." The trial court further advised Defendant, if he wanted this hearing to be held, Defendant was to "request that [his] attorney schedule a hearing."

Defendant field a handwritten motion to remove Lumsden on 16 May 2022 alleging she "went missing September 2021," returned 29 March 2022, and "has been missing since." Defendant asserted: "At this time, I would like to go *pro se* and have court appointed counsel on stand-by." The trial court allowed Defendant's motion for Lumsden to withdraw, but it ordered outside counsel to be appointed instead of allowing Defendant to proceed *pro se*. The trial court appointed Charles Christopher, Jr. as Defendant's fifth appointed counsel.

Defendant wrote another handwritten letter to the trial court requesting for Christopher to be replaced on 18 August 2022. Defendant also filed a *pro se* document with the Court entitled "Waiver of Counsel." Attorney Christopher moved to withdraw as Defendant's counsel on 24 April 2023, alleging, "Defendant refuses to discuss his case with this attorney or assist this attorney in any way." Christopher also stated Defendant had refused to meet with him on 21 April 2023.

Three weeks before the matter was set for trial, Christopher's motion was heard on 4 May 2023. In open court, the trial court heard from both Defendant and Christopher. The State opposed Defendant's motion and alleged Defendant had previously filed speedy trial motions. The State further asserted every time the State was prepared to bring the case to trial, Defendant acted in a manner to cause his attorney to withdraw. The State also asserted the victims had experienced emotional troubles from being prepared for trial multiple times, only to then have the trial again delayed.

The trial court and Defendant entered into the following colloquy:

> THE COURT: We're somewhat coming to a point where we need to consider if you have effectively waived your right to the assistance of court-appointed counsel anyway and that you need to represent yourself or if we need to appoint standby counsel to assist you with this case. What are you asking to do, just so I have an understanding of that first?
>
> DEFENDANT: Your Honor, I've been held almost 50 months, and it doesn't make sense. From my third attorney, Cindy Bradley, sat on my case 18 months, provided no assistance, had no communication with her. She didn't even request the motion for discovery. She never requested one. She filed a motion to withdraw and got my charges wrong, stood here and stated that she was working on my case the whole time. If you was [sic] working on my case the whole time, how [are] you getting my charges wrong?
>
> . . .
>
> THE COURT: Well, I have some of the documents. I'm waiting for additional files to come up. All right, sir, I am going to find that you have waived – well, actually, let me ask a couple more questions. It seems as though you – do you have any difficulty being able to hear or understand?

DEFENDANT: No, Your Honor.

THE COURT: It seems like you're well versed in – well, I know you're able to read and write because you've clearly been reading and you've written the Court, so that's true, correct?

DEFENDANT: Yes, it is. Also, Your Honor, I would like to state last year on June 3rd, upon firing my fourth attorney, Ms. Margaret Lumsden, the judge that presided over my case that day stated to me that she wanted to see my motion for discovery and granted me a court date for July 5th, the following month, which is the same day Mr. Christopher was appointed to me.

THE COURT: All right.

. . .

DEFENDANT: They refused to bring me in.

THE COURT: So you're able to hear and understand me and you understand the right that you do have the ability to plea not guilty, obviously, correct?

DEFENDANT: Yes.

THE COURT: I know you're in custody, but have you been using – has anybody allowed or have you used any alcohol or any drugs, narcotics or anything that would intoxicate you?

DEFENDANT: No, Your Honor.

THE COURT: So nothing in the past 50 months?

DEFENDANT: No, Your Honor.

THE COURT: And you do understand that you have had the right to have attorneys represent you, but it seems as though you've five times not been satisfied with counsel that's been provided so you've fired – you just mentioned you fired Ms. Lumsden; you wanted Mr. Christopher gone; you were dissatisfied with Ms. Bradley, and there were two other attorneys before that that you –

DEFENDANT: Theodore Dardess – Theodore Dardess, he withdrew immediately, and the second one was Ryan

Willis, who stated he had a overloaded caseload or something so he wouldn't be able to take my case.

THE COURT: All right. And then there were the next three that – where there have been complications at least one time when it was set for trial. And you do understand that this case is headed for trial?

DEFENDANT: Oh, yes.

THE COURT: You understand that – what's the minimum for a statutory – I'm trying to recall –

[THE STATE]: They are all – all six of those are the 25-year minimums.

THE COURT: Okay. And so, sir, for each of the statutory sex offenses, you recognize that there is the possibility of life – not life, but 25 years minimum for each of those six?

DEFENDANT: I'm very well aware, Your Honor.

THE COURT: Are there any – are you aware of each – the elements in each part of the offenses against you?

DEFENDANT: Yes, I am.

THE COURT: All right, sir, I'm going to find that you have – that you have waived your right to the assistance of counsel. I will not assign a sixth attorney to represent you on these matters. The case – the case can still move forward to trial. I will assign standby counsel. Mr. Christopher, do you have any – anything that you would add as it relates to being available as standby counsel in the event that Mr. McGirt would need assistance?

DEFENDANT: Appoint anybody but him. I'll take him. (Indicating to the bailiff.) Anybody but Mr. Christopher.

THE COURT: All right. I'll ask that the Public Defender's Office assign someone to serve as standby counsel in your matter. It is still continuing for trial. Yes, I will order that the Public Defender's Office still assign someone as standby counsel in this matter.

II. Waiver of Counsel

Both the Constitution of the United States and the North Carolina Constitution recognize a criminal defendant's right to the assistance of

counsel. U.S. Const. amend. VI.; N.C. Const. art. I, §§ 19, 23; *see also Powell v. Alabama*, 287 U.S. 45, 66, 77 L. Ed. 158, 169 (1932); *State v. McFadden*, 292 N.C. 609, 611, 234 S.E.2d 742, 744 (1977). Criminal defendants also have the absolute right to waive or forfeit counsel, represent themselves, and handle their case without the assistance of counsel. *State v. Mems*, 281 N.C. 658, 670-71, 190 S.E.2d 164, 172 (1972).

The majority's opinion incorrectly concludes Defendant did not waive or forfeit his right to counsel. Before a defendant is allowed to waive the right to counsel, a trial court must conduct a statutorily-required colloquy to determine that "constitutional and statutory safeguards are satisfied." *State v. Moore*, 362 N.C. 319, 322, 661 S.E.2d 722, 724 (2008) (citation omitted). Courts "must determine whether the defendant knowingly, intelligently and voluntarily waives the right to in-court representation by counsel." *Id.* (citation omitted).

N.C. Gen. Stat. § 15A-1242 (2023) governs the procedure to be used for a defendant to waive counsel. Courts may only enter an order to allow a defendant to waive their right to counsel after the court is satisfied and the record shows the movant: (1) has been clearly advised of his rights to the assistance of counsel, including his right to the assignment of appointed counsel when he is so entitled; (2) understands and appreciates the consequences of the decision; and, (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. *Id.* The record clearly shows compliance with all three statutory factors.

Our Supreme Court has held a "trial court must obtain a written waiver of the right to counsel." *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992) (citation omitted). The record does not indicate whether Defendant executed a written waiver of court-appointed attorney after the trial court had conducted a colloquy into Defendant's present mental state. The trial court questioned Defendant about whether he was under the influence of any drugs or intoxicants, whether he understood the charges and its possible punishments, his level of education, his right to appointed or retained counsel, his right to represent himself, and Defendant's obligations and responsibilities if he decided to represent himself.

Written waivers of counsel, certified by the trial court, create a rebuttable presumption the waiver was executed knowingly, intelligently, and voluntarily pursuant to N.C. Gen. Stat. § 15A-1242. *See State v. Kinlock*, 152 N.C. App. 84, 89, 566 S.E.2d 738, 741 (2002) (citation omitted), *aff'd per curiam*, 357 N.C. 48, 577 S.E.2d 620 (2003).

The record does not include a signed waiver and certification by the superior court judge that a proper inquiry and disclosure was made in compliance with the statute. N.C. Gen. Stat. § 15A-1242 (2023). There is no mention of a signed waiver in the transcript of the hearing wherein the trial court conducted the statutory colloquy.

This absence in the record does not invalidate Defendant's waiver. *See State v. Heatwole*, 344 N.C. 1, 18, 473 S.E.2d 310, 318 (1996) (holding *inter alia* the lack of a written waiver neither alters the conclusion that the waiver was knowing and voluntary, nor invalidates the defendant's waiver of counsel); *State v. Fulp*, 355 N.C. 171, 176, 558 S.E.2d 156, 159 (2002) (affirming *Heatwole* holding "that a waiver was not invalid simply because there was no written record of the waiver" (citation and internal quotation marks omitted)).

The majority's opinion incorrectly concludes the trial court failed to ascertain whether Defendant had "expressly and voluntarily" waived his right to counsel. It also incorrectly concludes the trial court failed: to determine whether Defendant had "clearly and unequivocally" expressed his decision to proceed *pro se*, to determine whether Defendant "underst[ood] and appreciate[d] the consequences of the decision[,]" and to advise Defendant of the consequences of a conviction to the charges.

The majority's opinion holds the trial court did not ascertain whether Defendant had "expressly and voluntarily" waived his right to counsel. The record shows Defendant had filed two separate motions entitled "Waiver of Counsel" with the trial court on 16 May 2022 and again on 4 April 2023. The majority's opinion further holds Defendant did not "clearly and unequivocally" express his decision to proceed *pro se*. This is also error. Defendant clearly and unambiguously stated in his 16 May 2022 motion: "At this time I would like to go Pro Se and have Court Appointed Counsel on stand-by." During the colloquy, Defendant again requested stand by counsel, which the trial court clearly allowed.

The majority's opinion also asserts Defendant was not advised of the consequences of being convicted of the crimes charged because Defendant was only advised of the minimum punishment for each of the charges. The majority's opinion uses a string citation with accompanying parentheticals of this Court's prior opinions in *State v. Moore*, 290 N.C. 610, 893 S.E.2d 231, *appeal dismissed*, 385 N.C. 624, 895 S.E.2d 402 (2023), *State v. Seraphem*, 90 N.C. App. 368, 368 S.E.2d 643 (1988), and *State v. Lindsey*, 271 N.C. App. 118, 843 S.E.2d 322 (2020). All of these cases assert the trial court's responsibility to inform a criminal defendant seeking to proceed *pro se* with the maximum sentence.

However, this case is more analogous to "calculation errors" in informing defendants of the maximum sentence they face if convicted. A "calculation error" in the maximum sentence a criminal defendant is facing violates N.C. Gen. Stat. § 15A-1242, only "if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about the 'range of permissible punishments.' " *State v. Gentry*, 227 N.C. App. 583, 600, 743 S.E.2d 235, 246 (2013) (internal quotation marks omitted). *See State v. Fenner*, 290 N.C. App. 553, 892 S.E.2d 111 (2023) (unpublished). Defendant has failed to make that required showing here.

In *Gentry*, the trial court had incorrectly informed the defendant he could be sentenced to a maximum sentence of 740 months when he actually faced a 912 months active sentence. *Gentry*, 227 N.C. App. at 599, 743 S.E.2d at 246. This Court found no prejudicial error had occurred and held the defendant:

> waived his right to counsel knowingly and voluntarily as the result of a trial court's failure to comply with N.C. Gen. Stat. § 15A-1242, it does not have such an effect in this instance given that either term of imprisonment mentioned in the trial court's discussions with [the defendant] was, given [the defendant's] age, *tantamount to a life sentence*.

Id. at 600, 743 S.E.2d at 246-47 (emphasis supplied).

Here, Defendant was born in 1970 and was charged with six counts of class B1 felonies, which each charge carries a minimum of 300 months and a maximum of 420 months. During the colloquy the State asserted, "[t]hey are all -- all six of those are the 25-year minimums." The trial court asked: "Okay. And so, sir, for each of the statutory sex offenses, you recognize that there is the possibility of life -- not life, but 25 years minimum for each of those six?" Defendant responded: "I'm very well aware, Your Honor."

Defendant was ultimately tried and convicted of four of the six counts of statutory sex offense. A single conviction would cause Defendant to be over seventy-five years old upon completion of a single sentence. Defendant was sentenced to a minimum of 100 years and a maximum of 140 years for only his B1 convictions. Presuming he only serves the minimum sentences imposed, he would be over 150 years old upon completion of his B1 convictions' sentences. Defendant was clearly informed and acknowledged these charges each carry a minimum sentence of

twenty-five years, or 300 months. These sentences are "tantamount to a life sentence" given the Defendant's advanced age upon expiration of his sentences. *Id.* at 600, 743 S.E.2d at 246-47. The record does not contain evidence tending to show Defendant was prejudiced or would have made a different choice had he been further told he could be sentenced to a maximum of 35 years imprisonment for each charge instead of the minimum 25 years. *Id.*

The majority's opinion seeks to differentiate this analysis by boldly stating, without citation to any authority, "[S]uch that we are not looking at whether this one failure to properly state the 'range of permissible punishments' *prejudiced* Defendant, but whether in the context of the requirements stated above, Defendant knowingly and voluntarily waived counsel." This statement is an incorrect application of both our General Statutes and our case law. The case cited prior to the statement, *State v. Jones*, 292 N.C. App. 493, 498, 898 S.E.2d 784, 788 (2024) (citing *State v. Thomas*, 331 N.C. 671, 675, 417 S.E.2d 473, 476 (1992)), includes the correct requirement from N.C. Gen. Stat. § 15A-1242 that a defendant "comprehends the nature of the charges and proceedings and the range of permissible punishments." N.C. Gen. Stat. § 15A-1242 (2023).

III. Hybrid Waiver and Forfeiture

In *State v. Moore*, this Court examined a mixture of waiver and forfeiture of counsel as described in *State v. Blakeney*. *Moore*, 290 N.C. App. at 628, 893 S.E.2d at 244. In *Blakeney*, this Court held:

> Finally, there is a hybrid situation (waiver by conduct) that combines elements of waiver and forfeiture. Once a defendant has been warned that he will lose his attorney if he engages in dilatory tactics, any misconduct thereafter may be treated as an implied request to proceed *pro se* and, thus, as a waiver of the right to counsel. Recognizing the difference between forfeiture and waiver by conduct is important. First, because of the drastic nature of the sanction, forfeiture would appear to require extremely dilatory conduct. On the other hand, a waiver by conduct could be based on conduct less severe than that sufficient to warrant a forfeiture. This makes sense since a waiver by conduct requires that a defendant be warned about the consequences of his conduct, including the risks of proceeding *pro se*. A defendant who engages in dilatory conduct having been warned that such conduct will be treated as a request to proceed *pro se* cannot complain that a court is forfeiting his right to counsel.

Blakeney, 245 N.C. App. at 464-65, 782 S.E.2d at 96 (citation, ellipses, and quotation marks omitted).

Defendant moved for a speedy trial and, as the trial dates approached, was dilatory and refused to engage with, or otherwise fired, his three appointed attorneys. Defendant also filed two written notices to represent himself preceding the trial court's finding that he had waived his right to counsel and allowed him, *as he had requested in writing*, to proceed *pro se* with appointed standby counsel. *Id.* Defendant cannot now be heard to complain about the consequences directly resulting from his own requests and actions. *Id.*

IV. Conclusion

Defendant has not shown prejudicial errors, and his convictions and sentences should lawfully remain undisturbed. He knowingly waived and/or forfeited his right to a further appointed sixth counsel and proceeded with standby counsel, as he had requested. *Moore*, 290 N.C. App. at 628, 893 S.E.2d at 244.

Defendant received a fair trial, free from prejudicial errors he preserved and argued. There is no reversible error in the jury's verdicts or in the judgments entered thereon.

The majority's opinion erroneously vacates Defendant's jury convictions and remands for a new trial. The sexual assault victims are unnecessarily traumatized once again. I respectfully dissent.

STATE OF NORTH CAROLINA
v.
DEREK JVON MILLER, DEFENDANT

No. COA24-72

Filed 19 March 2025

Constitutional Law—right to a public trial—courtroom closure during two witnesses' testimonies—Waller four-part test

At a trial for attempted first-degree murder and related charges arising from an incident where defendant fired a gun at a group of individuals from inside a moving car, the trial court's partial courtroom closure during the testimony of two men from the group—including one who was shot in the back—did not violate defendant's constitutional right to a public trial. Specifically, the court properly determined—at a remand hearing on the issue—that the closure was justified under the four-part test in *Waller v. Georgia*, 467 U.S. 39 (1984), in that: (1) the closure advanced an overriding interest in witness safety supported by competent evidence, including social media posts in which defendant directed threatening messages at the witnesses, along with other intimidating conduct by defendant and members of the gallery; (2) the closure was narrowly tailored to address witness safety concerns, since it was limited to the testimony of just two witnesses and defendant's direct relatives were allowed to remain in the courtroom; (3) the court properly considered and ruled out reasonable alternatives, such as banning cell phones in the courtroom; and (4) the court made sufficient findings of fact based on competent evidence to support the closure.

Appeal by Defendant from judgment entered 5 June 2023 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 15 May 2024.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Katy Dickinson-Schultz, for defendant-appellant.

Attorney General Jeff Jackson, by Special Deputy Attorney General Kimberley A. D'Arruda, for the State.

STADING, Judge.

Derek Jvon Miller ("Defendant") appeals from a final judgment entered against him pursuant to jury verdicts finding him guilty of attempted first degree murder, going armed to the terror of the people, and possession of a handgun by a minor. After careful consideration, we affirm the trial court's order.

I. Background

On 19 August 2018, Neqayvius McClendon ("McClendon"), Nyhiem Kendall ("Kendall"), and O.S.[1] (collectively, "the group") walked to a local basketball court together. On their way to the basketball court, the group was accosted by D.G., E.G., K.H., and Defendant, who were riding together in a car. D.G. was driving the car, and all of the occupants were in possession of guns. D.G. pulled up next to where the group was walking, and the car's occupants "flash[ed]" their guns at the group. As D.G. began driving away, testimony revealed that Defendant fired his gun at the group—striking McClendon in his back.

On 8 July 2019, Defendant was indicted for attempted first degree murder, possession of a handgun by a minor, discharging a firearm in city limits, and going armed to the terror of the people. Before Defendant's trial, on 24 November 2021, the State moved for closure of "the courtroom . . . to the public" while McClendon and Kendall testified, arguing that it was justified under *Waller v. Georgia*, 467 U.S. 39, 104 S. Ct. 2210 (1984) and N.C. Gen. Stat. § 15A-1034 (2023) ("Controlling access to the courtroom."). The State argued that closing the courtroom was warranted because of "concerns for the safety of the witnesses." The State reasoned that closure was justified since Defendant previously attempted to intimidate the witnesses via social media. Defendant objected, arguing that closing the courtroom would amount to a Sixth Amendment violation, or in the alternative, that it was unnecessary given that other "reasonable alternatives" were available.

The parties then conferred in "the back hallway" with the trial court to "briefly talk about a possible solution to closing the court[room] . . . ." Upon returning, the trial court recounted the conversation on the record:

> THE COURT: Madam Court Reporter, for the record, we stepped to the back. And the inquiry was about what the Court was inclined to do for the State's motion to close the courtroom.

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1. The record is unclear whether certain individuals involved are juveniles. We therefore use pseudonyms to protect their anonymity as a precautionary measure.

> What I indicated to both parties is what I was thinking, as they could pick up, was my — my resolution at this point, unless circumstances change, is for direct relatives of Mr. Miller to stay in the courtroom during those two witnesses. Anybody not directly related to him will be outside the courtroom. And deputies, after my admonition for no cell phone use, will keep an eye on anybody in the courtroom and their use of cell phones. And that will be true for any State witnesses as well, Mr. Collins, or speculators. So anybody who's not a direct relative of Mr. Miller or Mr. Purser, they will be asked to step outside during those two witnesses' examinations.

In this context, the trial court defined "direct relatives" as "blood" relatives, including Defendant's "mother, brother, sister, [and] father." Thereafter, Defendant's case proceeded to trial and a jury found Defendant guilty of all charges. Following entry of judgment, Defendant gave notice of appeal in open court.

In *State v. Miller*, 287 N.C. App. 660, 662, 884 S.E.2d 175, 177 (2023) (hereinafter "*Miller I*"), Defendant argued that the trial court's order, closing the courtroom, violated his constitutional right to a public trial for failure to "engag[e] in the four-part test set forth in *Waller* . . . ." He also asserted "that the charge of discharging a weapon within . . . city limits should have been dismissed because neither the arrest warrant nor the indictment contained the caption of the ordinance and the State failed to prove the ordinance at trial." *Id.* at 665, 884 S.E.2d at 179. A prior panel from our Court held that "the trial court failed to utilize the *Waller* four-part test and make adequate findings of fact in an order to support closing the courtroom to the public," and thus remanded the case "for a hearing on the propriety of the closure." *Id.* at 666, 884 S.E.2d at 180. The Court held,"[i]f the trial court determines that the closure was not justified, then Defendant is entitled to a new trial." *Id.* However, "[i]f the trial court determines that the closure was justified, then Defendant may seek review of the trial court's order by means of an appeal from the judgment that the trial court will enter on remand following resentencing." *Id.* The Court also held that "the trial court erred by denying Defendant's motion to dismiss the charge of discharging a weapon within city limits" and therefore, "vacate[d] Defendant's conviction . . . and remand[ed] for resentencing." *Id.*

On remand, the trial court entered an order decreeing that closure of the courtroom during the testimony of McClendon and Kendall was warranted under *Waller*. The trial court concluded: "the State has an

overriding interest in having its witnesses and victims in cases testify, and [to] be safe while doing so–which is likely prejudiced if there is intimidation, or unauthorized recording of court proceedings occurring"; its decision was "**no broader than necessary** to protect the interest of the State having its witnesses and victims testify"; and it "**considered reasonable alternatives to closure**, including allowing relatives of Defendant to remain in the courtroom, which it did." The trial court also made "its own observations of the situation, including noting the relatively young age of the witnesses/victims as well as the violent nature of the offenses at issue." The following exhibits were reviewed in reaching this decision:

> (1) State Exhibits [#]1-4 are individual pictures of the Defendant on a social media page holding large sums of money in stacks of currency (bills), flashing gang signs, and holding a firearm – a pistol – pointed while appearing to aim towards something off screen[.]
>
> (2) State Exhibit [#]5 are several photos . . . with the Defendant flashing gang signs, and the caption underneath the pictures of "Let him keep on talking he's a dead man . . . ."
>
> (3) State Exhibit #6 is another picture of the Defendant . . . with the same caption of "Let him keep talking he's a dead man . . . ."
>
> (4) State Exhibit #7 is a pair of pictures, one of which is the Defendant with a mask, flashing a gang sign, with stacks of cash in his hand and all around him while sitting on a staircase, along with a different picture of three individuals (not including the Defendant) – one with hands over his ears, one with his hands over his eyes, and one making a shushing gesture, indicating to the Court something along the lines of hear nothing, say nothing, see nothing[.]
>
> (5) State Exhibit #8 is a pair of pictures with the Defendant flashing gang signs, with a caption reading "I'ma Pull Up In Style, We Gon Do A Drive By In The Wraith" and displaying a countdown clock with the caption "Trial Date" and showing hours, minutes, and seconds[.]
>
> (6) State Exhibit #9 is a set of lyrics partially referenced in State Exhibit #8 that reference additional lyrics

> from the same song, including "I'll shoot him right up in his face" and references to carrying guns and "beat[ing] the case" as referenced in Exhibit #8 as well.

The day after entry of the trial court's order on remand, the State filed a dismissal of Defendant's charge for discharging a firearm in city limits. The trial court resentenced Defendant, and he entered his notice of appeal in open court.

II. Jurisdiction

This court has jurisdiction to consider Defendant's appeal under N.C. Gen. Stat. §§ 7A-27(b)(1) (2023) ("From any final judgment of a superior court . . . .") and 15A-1444(a) (2023) ("A defendant who has entered a plea of not guilty to a criminal charge, and who has been found guilty of a crime, is entitled to appeal as a matter of right when final judgment has been entered.").

III. Analysis

Defendant asks us to consider whether, on remand, the trial court's order closing the courtroom during the testimony of McClendon and Kendall was entered in error. Defendant maintains that: (1) the State failed to advance an overriding interest that would be prejudiced if the courtroom was kept open; (2) the trial court's findings of fact concerning the State's overriding interest were not supported by competent evidence; (3) the trial court's findings of fact concerning the State's overriding interest do not support its conclusion of law; and (4) the trial court's order was broader than necessary because it failed to consider other reasonable alternatives.

A. Standard of Review

"It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *State v. Rollins*, 231 N.C. App. 451, 453, 752 S.E.2d 230, 233 (2013) (citation omitted) (hereinafter, "*Rollins II*"). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) (citation omitted). The trial court's findings of fact "have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. A trial court's conclusions of law, however, are reviewable *de novo*." *Rollins II*, 231 N.C. App. at 454, 752 S.E.2d at 233 (citation omitted). Our previous decisions reflect that an alleged

violation of the constitutional right to a public trial is reviewed under a *de novo* standard. *See State v. Spence*, 237 N.C. App. 367, 372, 764 S.E.2d 670, 675 (2014); *see also Miller I*, 287 N.C. App. at 662, 884 S.E.2d at 177. "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (internal quotation marks and citations omitted). "The violation of the constitutional right to a public trial is a structural error, not subject to harmless error analysis." *State v. Rollins*, 221 N.C. App. 572, 576, 729 S.E.2d 73, 77 (2012) (hereinafter, "*Rollins I*").

B. Right to a Public Trial

"The Sixth Amendment of the United States Constitution and Article I, Section 18, of the North Carolina Constitution guarantee a criminal defendant the right to a public trial." *Miller I*, 287 N.C. App. at 662, 884 S.E.2d at 177. "[T]here can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public. The central aim of a criminal proceeding must be to try the accused fairly . . . ." *Waller*, 467 U.S. at 46, 104 S. Ct. at 2215 (citation omitted). The right to a public trial "has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. 257, 270, 68 S. Ct. 499, 506 (1948).

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions . . . .

Rollins I, 221 N.C. App. at 576, 729 S.E.2d at 77 (citations and internal quotation marks omitted).

"Although there is a strong presumption in favor of openness, the right to an open trial is not absolute." *State v. Comeaux*, 224 N.C. App. 595, 599, 741 S.E.2d 346, 349 (2012) (citations and quotation marks omitted). "[T]he right to an open trial may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." *Rollins I*, 221 N.C. App. at 576, 729 S.E.2d at 77 (citations and internal quotation marks omitted). In accordance with these principles,

a trial court "may impose reasonable limitations on access to the courtroom when necessary to ensure the orderliness of courtroom proceedings or the safety of persons present." N.C. Gen. Stat. § 15A-1034(a). "Additionally, the trial court may order that all persons in the courtroom 'be searched for weapons or devices that could be used to disrupt or impede the proceedings[,]' but such order 'must be entered on the record.' " *Miller I*, 287 N.C. App. at 662, 884 S.E.2d at 177 (quoting N.C. Gen. Stat. § 15A-1034(b)). Circumstances meriting closure of the courtroom, "will be rare, however, and the balance of interests must be struck with special care." *Rollins I*, 221 N.C. App. at 576, 729 S.E.2d at 77 (citations and internal quotation marks omitted).

Pursuant to *Waller*, the closure of a public trial in whole or in part must satisfy the following four-part test: (1) "the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced", (2) "the closure must be no broader than necessary to protect that interest", (3) "the trial court must consider reasonable alternatives to closing the proceeding, and" (4) "it must make findings adequate to support the closure." 467 U.S. at 48, 104 S. Ct. at 2216; *accord State v. Jenkins*, 115 N.C. App. 520, 525, 445 S.E.2d 622, 625 (1994).

1. Overriding Interest; Competent Evidence

Defendant first contends that the trial court committed error because "the State failed to advance an overriding interest that would be prejudiced if the courtroom was kept open." Defendant maintains, as to the overriding interest element of *Waller*, that "[t]he findings were not supported by competent evidence, nor were they sufficient to justify the closure." We disagree.

"[W]hen review[ing] a trial court's decision to remove certain spectators from the courtroom, . . . [the] transcript is an imperfect tool for conceptualizing the events of a trial." *State v. Register*, 206 N.C. App. 629, 635, 698 S.E.2d 464, 469 (2010) (citation and internal quotations omitted). This Court "must leave much . . . to the judgment and good sense of the judge who presides over [the trial]." *Id.* (citations and internal quotation marks omitted). To that end, "[t]he trial court's own observations can serve as the basis of a finding of fact as to facts which are readily ascertainable by the trial court's observations of its own courtroom." *Spence*, 237 N.C. App. at 372, 764 S.E.2d at 675 (2014) (citation omitted). In addition, "[f]indings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary." *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019) (citation omitted). "[W]hile the trial court need not make exhaustive findings

of fact, it must make findings sufficient for this Court to review the propriety of the trial court's decision to close the proceedings." *Rollins I*, 221 N.C. App. at 579, 729 S.E.2d at 79 (citation omitted).

On remand, the trial court's findings of fact were made pursuant to a battery of competent evidence including: (1) nine exhibits from the State; (2) photographs from Defendant's social media demonstrating intimidation; (3) the "violent nature" of the charges; (4) "the relatively young age of the witnesses [and] victims"; (5) "concerns" of the testifying witnesses and their parents; (6) the prior intimidating conduct of Defendant at his bond hearing; and (7) the prior intimidating conduct of members of the gallery during Kendall's testimony. Based on these findings, the trial court concluded that "the State had an overriding interest in having its witnesses and victims in cases testify, and be safe while doing so–which is likely prejudiced if there is intimidation, or unauthorized recording of court proceedings occurring."

The exhibits introduced by the State, included in the trial court's findings of fact, demonstrated that Defendant had previously made threats to potential witnesses on three occasions:

> State Exhibit [#]5 are several photos . . . with the Defendant flashing gang signs, and the caption underneath . . . "Let him keep on talking he's a dead man . . . ."
>
> State Exhibit #6 is another picture of the Defendant with his hands in a clawing pose, with the same caption of "Let him keep on talking he's a dead man . . . ."
>
> State Exhibit #7 is a pair of pictures, one of which is the Defendant with a mask, flashing a gang sign, with stacks of cash in his hands and all around him while sitting on a staircase, along with a different picture of three individuals (not including the Defendant) – one with his hands over his ears, one with hands over his eyes, and one making a shushing gesture, indicating the Court something along the lines of hear nothing, say nothing, see nothing[.]
>
> State Exhibit #8 is a pair of pictures with the Defendant flashing gang signs, with a caption reading "I'ma Pull Up In Style, We Gon Do A Drive By In The Wraith" and displaying a countdown clock with the caption "Trial Date" and showing hours, minutes, and seconds[.]

The trial court found that "[a]s a whole, these social media materials with multiple images of guns and allusions to violence are potentially

intimidating, and certainly would seem concerning to a potential victim and . . . witness taking the stand." When viewing these exhibits in conjunction with the other findings made by the trial court, there is competent evidence on the record to warrant the conclusion that there were genuine safety concerns for the testifying witnesses. Contrary to Defendant's assertion, this evidence is competent because "a reasonable mind might accept" these photos and other evidence "as adequate to support the finding." *Ashworth*, 248 N.C. App. at 651, 790 S.E.2d at 176 (citation omitted).

For example, the trial court found that:

> [D]uring a prior hearing, someone present in the audience had taken a video of the witness . . . Kendall on the stand and put in on a social media website subsequently. This according to the State had led the witnesses and their parents to express concerns about their personal safety and testifying in the trial.

A reasonable mind might accept this as being adequate to support the finding because being filmed while testifying will likely prejudice the testimony that a witness is willing to give out of fear for their safety; especially when coupled together with the intimidating nature of the social media posts previously described. *See Comeaux*, 224 N.C. App. at 601, 741 S.E.2d at 350 (finding an overriding interest on behalf of the State where the defendant's wife "engaged in behavior designed to intimidate the minor victim" while the minor victim was giving testimony). When discussing this previous incident, counsel for the State noted that Kendall "was concerned about" being filmed and it "bothered him." Further, at the pretrial hearing, counsel for the State provided that when speaking with the witnesses and their family members, they expressed concerns for their safety while testifying:

> In speaking to our witnesses last week, in discussing this matter coming up this week for trial, there was concern by them as well . . . by the family, the dad did most of the talking, Mr. Chris Kendall, about the safety and well-being of his family if any of them, specifically the boys, testify in this matter. And I know the Court is an open forum. It's supposed to be open. But, Judge, we would ask that you would close it based on that, based on the concerns that they have, concerns that I have based on what they say about their safety. . . . [T]here is concern that might happen again as far as somebody posting something,

> recording something, them being intimidated as far as coming forward and being able to testify openly and truthfully in this matter.

Shortly after, counsel for the State added:

> We would state that we have in that the interests of our witnesses being safe outside of the courtroom as well as being . . . able to go forward with this case without there being any type of intimidation of them while they are possibly on the stand is the prejudice that we are trying to overcome or want to overcome.
>
> . . . .
>
> But, again, the main thing, Judge, is for their safety. They are concerned about their safety as far as testifying in this matter, like I said.

Contrary to Defendant's urging, the State adequately advanced the overriding interest of witness safety, and that interest was likely to be prejudiced by the intimidation tactics of Defendant and members of the gallery filming. Accordingly, the trial court adhered to the first and fourth *Waller* elements in reaching its decision on remand. 467 U.S. at 48, 104 S. Ct. at 2216. Moreover, the competent findings in the trial court's order adequately support its conclusion—that the State had an overriding interest in having its witnesses and victims testify, which is likely prejudiced if there is intimidation or unauthorized recording of court proceedings occurring. *Rollins II*, 231 N.C. App. at 453, 752 S.E.2d at 233.

Defendant further contends that the trial court's findings were not supported by competent evidence because neither of the witnesses themselves testified to being fearful; rather, these assertions were made by the prosecutor. Defendant cites non-binding case law to advance his proposition. *See State v. Turrietta*, 2013-NMSC-036, 308 P.3d 964 (2013); *see also Longus v. State*, 416 Md. 433, 7 A.3d 64 (2010); *see also Woods v. Kuhlmann*, 977 F.2d 74 (2d Cir. 1992); *see also Guzman v. Scully*, 80 F.3d 772 (2d Cir. 1996); *see also United States v. Simmons*, 797 F.3d 409 (6th Cir. 2015). In his brief, Defendant contends that "concerns for safety have to be specific and be based on something more than a prosecutor's perfunctory statement . . . ." We disagree.

Upon review of our case law, "in certain pretrial motions, 'evidence at the hearing may consist of oral statements by the attorneys in open court in support and in opposition to the motion . . . .' " *State v. Williams*, 232 N.C. App. 152, 165, 754 S.E.2d 418, 427 (2014) (citation

omitted) (ellipses in original), *disc. rev. denied and appeal dismissed*, 367 N.C. 784, 766 S.E.2d 846 (2014). In *Williams*, 232 N.C. App. at 160, 754 S.E.2d at 424, our Court was faced with the same task of determining whether the trial court made the requisite findings to support its decision to close the courtroom under *Waller*. The defendant similarly contended that the findings of fact were not supported by competent evidence "because they were based solely upon the prosecutor's arguments at the . . . hearing." *Id.* at 165, 754 S.E.2d at 426. In response, the Court determined that a pretrial motion to close a courtroom "can be disposed of on affidavit or [by] representations of counsel." *Id.* at 165, 754 S.E.2d at 427 (citations omitted); N.C. Gen. Stat. § 15A-952 (2023). The Court reasoned as follows:

> In *Pippin*, we noted that the Official Commentary to N.C. Gen. Stat. § 15A-952, a statute addressing pretrial motions, specifically provides that " 'pretrial motions . . . can be disposed of on affidavit or representations of counsel.' " 72 N.C. App. at 397, 324 S.E.2d at 907. We believe the same is true here given that the State's motion to temporarily close the courtroom was a pretrial motion. Thus, even though the . . . hearing took place well after the trial ended, it was simply a rehearing of the original motion, and—for this reason—we believe that N.C. Gen. Stat. § 15A-952 is applicable. As such, the trial court did not err in basing its findings . . . on the prosecutor's arguments.

Williams, 232 N.C. App. at 165–66, 754 S.E.2d at 427. For the reasons noted in *Williams*, Defendant's assignment of error is overruled. *Id.*

2. No Broader Than Necessary; Reasonable Alternatives

Defendant next contends that the closure was broader than necessary because banning cell phones would have addressed the State's concerns. Defendant submits that since this reasonable alternative was available, the trial court's order on remand was broader than necessary. We disagree.

The trial court adequately adhered to the second and third *Waller* elements by ensuring that closure of the courtroom was no broader than necessary and *considering* reasonable alternatives. *See Bell v. Jarvis*, 236 F.3d 149, 169 (4th Cir. 2000) ("*Waller* counsels trial courts to consider alternatives to a complete closure of a public proceeding. But . . . *Waller* does not require a trial court . . . to invent and reject alternatives to the proposed closure."); *see also Williams*, 232 N.C. App. at 167, 754 S.E.2d at 428 ("[T]he trial court's supplemental findings do indicate

that it *considered* these options. *Waller* does not require more."). The trial court noted the importance of having the family members of Defendant present while testimony was being elicited from McClendon and Kendall. Thereby, it considered and ordered the reasonable alternative of allowing "direct relatives of [Defendant] to stay in the courtroom during those two witnesses." *Williams*, 232 N.C. App. at 167, 754 S.E.2d at 428. More importantly, the trial court only closed the courtroom during the testimony of two witnesses—McClendon and Kendall—to counter the likely prejudice at hand. The trial court's decision was therefore narrowly tailored to achieve the State's overriding interest of witness safety. *See Waller*, 467 U.S. at 45, 104 S. Ct. at 2215 ("The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."). Further discounting Defendant's argument on this basis, even after the trial court banned cell phones in the courtroom, one of Defendant's relatives "still had possession of one during [Kendall's] testimony." Accordingly, the trial court appropriately considered the second and third *Waller* elements in rendering its decision on remand. *Id.* at 48, 104 S. Ct. at 2216.

IV. Conclusion

Our review leads us to hold that the trial court's order, on remand, complied with the requirements set forth in *Waller*, 467 U.S. at 48, 104 S. Ct. at 2216. The order contained findings of fact supported by competent evidence, and those findings, in turn, adequately underpin its conclusion of law. *Rollins II*, 231 N.C. App. at 453, 752 S.E.2d at 233.

AFFIRMED.

Judges HAMPSON and WOOD concur.

STATE OF NORTH CAROLINA
v.
TELLY SAVALES PARKER

No. COA24-230

Filed 19 March 2025

1. Criminal Law—prosecutor's closing argument—references to not guilty plea and cross-examination of victim's mother—not grossly improper

In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where the victim's mother gave eyewitness testimony identifying defendant as her son's shooter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor stated that defendant "not only refuse[d] to take responsibility" but also "attacked," "harassed," and "yelled at" the victim's mother when cross-examining her. Taken together, these references to defendant's plea of not guilty and cross-examination of the mother were not grossly improper, since they came after defendant attacked the validity of the mother's testimony during his closing argument, and therefore they could be considered part of a strategy to restore the mother's credibility.

2. Criminal Law—prosecutor's closing argument—reference to co-defendant's plea deal—possible misstatement of law—no prejudice shown

In a trial for murder and possession of a firearm by a felon, brought after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, where a co-defendant (a member of the group that accompanied defendant to the home) testified for the State after entering a plea deal that reduced his initial charge of first-degree murder to involuntary manslaughter, the trial court did not err in declining to intervene ex mero motu during closing arguments when the prosecutor—in referring to the co-defendant's plea deal—described manslaughter as a lesser-included offense of second-degree murder. Even presuming that the prosecutor misstated the law, the trial court provided curative instructions to the jury distinguishing between first-degree and second-degree murder, as well as instructions regarding how to evaluate the testimony of a witness who had secured a plea deal from the State.

3. Constitutional Law—effective assistance of counsel—timely objection to line of witness questioning—no other action taken—no prejudice shown

In a trial for murder and possession of a firearm by a felon after defendant went to a young man's home and shot him in front of the man's mother and five-year-old brother, defendant did not receive ineffective assistance of counsel where his attorney objected on Fifth Amendment grounds after the prosecutor questioned a police detective about defendant's silence when surrendering himself to law enforcement. Although defendant's attorney raised the objection fairly late into the line of questioning, it was still a timely objection, which the court sustained. Further, although the attorney neither moved to strike the line of questioning from the record nor requested a curative instruction regarding the detective's testimony—a choice that may have been part of a reasonable trial strategy—these omissions did not prejudice defendant where the State presented overwhelming evidence that he committed the charged crimes.

4. Sentencing—second-degree murder—sentenced as Class B1 felony—supported by jury verdict

After defendant was convicted of second-degree murder for going to a young man's home and shooting him in front of the man's mother and five-year-old brother, the trial court properly imposed a Class B1 sentence where the evidence at trial only supported one of the two theories of malice identified in N.C.G.S. § 14-17(b)—in this case, the malice attributed to Class B1 felonies (requiring intent to harm) and not the malice attributed to Class B2 felonies (involving reckless behavior or inherently dangerous acts)—thereby removing any question as to whether the jury rendered an ambiguous verdict. Additionally, a Class B1 sentence was appropriate where the jury found as an aggravating factor that defendant committed the crime in the presence of a minor.

Appeal by defendant from judgment entered 3 February 2023 by Judge L. Lamont Wiggins in Wilson County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Isham Faison Hicks, for the State.

Michele Ann Goldman, Attorney at Law, by Michele Ann Goldman, for the defendant-appellant.

TYSON, Judge.

Telly Savales Parker ("Defendant") appeals from judgments entered upon a jury's verdicts finding him guilty of second-degree murder and possession of a firearm by a felon. We find no error.

I. Background

Defendant shot and killed twenty-one-year-old Amaru Carroll-Lee ("Lee") on the evening of 2 May 2020. Lee had attacked Defendant's son on 1 May 2020. Defendant was upset and sought retribution.

Lee lived with his mother and five-year-old brother. Defendant and several others went to Lee's home. A man in the group knocked on Lee's mother's door and asked her if she knew about any altercations between her son and Defendant's son. Lee's mother explained she was unaware of any altercations, but a man in the group accused her of lying. A few minutes later, the same man who had accused her of lying returned to her door along with Defendant. Defendant and the man pushed their way into the home. Defendant brandished a weapon.

Lee came out of his bedroom and was standing next to his mother when he was shot. His younger brother was also present. After the shooting, Defendant said, "I had to do what I had to do for my son."

Defendant was indicted for first degree murder, first degree burglary, and possession of a firearm by a convicted felon on 12 April 2021. A trial was held on 30 January 2023.

The State called numerous witnesses. Among them was Lee's mother, who testified she had seen Defendant with a gun prior to the shooting, and Defendant was the one who had shot Lee during the confrontation inside her home. Defense counsel, on cross examination, attempted to impeach Lee's mother by highlighting discrepancies between what she had testified to in open court and the notes taken by the detective, who had interviewed her.

The State additionally called for the testimony of one of the other men involved in the encounter, Terry Parker, who had entered into a plea deal with the State. As a part of his plea deal, the witness' initial charge of first-degree murder was reduced to involuntary manslaughter. During cross examination, Defendant's counsel attempted to impeach Terry Parker's character by questioning him about the specifics of his plea deal and how it had reduced his charge and sentence.

Detective Bradshaw ("Det. Bradshaw") also testified. During direct examination, the prosecutor asked Det. Bradshaw about what had occurred when Defendant had surrendered himself to police. During the questioning, the prosecutor asked Det. Bradshaw whether Defendant had spoken to police officers. Defendant's counsel objected to the question for impermissibly commenting on Defendant's silence, and the objection was sustained.

In closing statements, the prosecutor attempted to rehabilitate Lee's mother's testimony by showing video footage of Lee's mother positively identifying Defendant as the man who shot her son within a few hours of the incident. The prosecutor also referenced the manner in which Lee's mother was questioned during cross examination, saying she was "attacked," "harassed," and "yelled at." In doing so, the prosecutor also referenced Defendant's not guilty plea. These comments occurred without objection from defense counsel and without intervention or correction from the trial judge.

At the conclusion of closing arguments, the trial court delivered pattern jury instructions about Defendant's decision not to testify, the jury evaluating a witness's credibility, evaluating testimony from witnesses who testified pursuant to an agreement with the State for a charge reduction, first-degree murder where a deadly weapon was used, with the lesser-included of second-degree murder, first-degree burglary, with the lesser-included crimes of second-degree burglary and felonious breaking and entering, and how the jury may find the presence of an aggravating factor, if they find the crime was committed in the presence of a person under the age of eighteen.

The jury returned verdicts of guilty for second-degree murder and possession of a firearm by a convicted felon. The jury also found the presence of the aggravating factor of the presence of a minor for the second-degree murder conviction. The jury acquitted Defendant of first-degree burglary or any of its lesser-included offenses. The trial court stated the jury had convicted Defendant of a Class B1 Felony and sentenced him accordingly.

Defendant was sentenced as a prior record level III offender in the aggravated range to a minimum of 397 months and a maximum of 489 months imprisonment for his second-degree murder conviction. He was also sentenced to a consecutive minimum term of 17 months and a maximum of 30 months for his conviction of possession of a firearm by a convicted felon, which was in the presumptive range and set to run upon completion of Defendant's sentence for second-degree murder. Defendant appealed in open court.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. §§ 7A-27(b)(1), 15A-1444 (2023).

III. Issues

Defendant asserts multiple errors at trial. First, Defendant asserts the trial court erred by failing to intervene *ex mero motu* during the State's closing arguments. The Defendant also asserts, in the alternative, his counsel's failure to object during the State's closing arguments constitutes ineffective assistance of counsel. Finally, Defendant asserts the trial court erred in sentencing him to a Class B1 sentence for second-degree murder because of a lack of support for such a lengthy sentence in the jury's verdicts.

IV. Failure to Intervene *Ex Mero Motu*

Defendant argues the trial court erred by not intervening *ex mero motu* during the State's closing argument. In the alternative, he asserts he had received ineffective assistance of counsel for the trial counsel's failure to object during closing arguments. As part of his ineffective assistance of counsel claim, he argues his counsel was deficient by failing to object to certain portions of the State's cross-examination and closing.

A. Standards of Review

> The standard of review when a defendant fails to object at trial is whether the argument complained of was so grossly improper that the trial court erred in failing to intervene *ex mero motu*. "[T]he impropriety of the argument must be gross indeed in order for this Court to hold that a trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument which defense counsel apparently did not believe was prejudicial when he heard it." In determining whether the statement was grossly improper, we must examine the context in which it was given and the circumstances to which it refers.

State v. Trull, 349 N.C. 428, 451, 509 S.E.2d 178, 193 (1998) (internal citations omitted). We first review the transcript to determine if the State's closing arguments are so grossly improper to be prejudicial.

For review of Defendant's ineffective assistance of counsel claim, we apply a two-pronged analysis:

> First, the defendant must show his counsel's performance was deficient, such that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693. Second, the defendant must show counsel's alleged errors prejudiced him such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 80 L. Ed. 2d at 698.

State v. Lane, 271 N.C. App. 307, 317, 844 S.E.2d 32, 41 (2020).

B. Analysis

Defendant asserts the State prejudiced him during closing arguments by making references to Defendant's plea of not guilty, criticizing the manner in which Defendant's counsel had cross-examined Lee's mother, and equating his trial to the charges the State's co-defendant witness had pled guilty to. We review each component in turn for purported and prejudicial errors by the trial court before proceeding to the claim of ineffective assistance of counsel.

1. Reference During Closing Argument to the Defendant's Cross-Examination of Carroll-Lee's Mother and Defendant's Not Guilty Plea

[1] In closing, the prosecutor for the State said:

> Ladies and gentlemen of the jury, we are here because the Defendant not only refuses to accept responsibility, the consequences of his actions, we are here because he has the audacity, the audacity, to look that mother in the face, kill her son in front of her and come to court this week and say it's her fault. The audacity.
>
> Ladies and gentlemen, you heard and you saw her attacked on that stand. She was harassed. She was yelled at. A lie can shout as loud as it wants. A lie can bully. It can be loud. It can be aggressive. It can say look over here. Look over there. Maybe this. But the truth is quiet. The truth has been sitting with you this week. The truth has been sitting over there. You heard the truth when that mom told you how her son was executed in front of her. You heard the truth in her sobs. You saw the truth in her tears. And no amount of shouting will change that.

It is wholly impermissible to reference a criminal defendant's exercise of their right to remain silent during trial or closing argument. *State v. Grant*, 293 N.C. App. 457, 458, 900 S.E.2d 408, 410 (2024) (citing N.C. Gen. Stat. § 8-54 (2023)). If the State does reference a defendant's silence, the trial court can and should take measures to cure such comments. *See id.*, 293 N.C. App. at 461, 900 S.E.2d at 412 (citing *State v. Reid*, 334 N.C. 551, 555, 434 S.E.2d 193, 196 (1993)).

"The prosecutor may, however, appropriately respond to comments critical of the State's investigation and witnesses made by defense counsel in closing argument in order to restore the credibility of the State's witnesses, . . . and to 'defend [the prosecutor's] own tactics, as well as those of the investigating authorities, when challenged.' " *Trull*, 349 N.C. at 453, 509 S.E.2d at 194 (citations omitted).

Here, the challenged portions of the State's closing argument came after Defendant had delivered his closing arguments. In those closing arguments, Defendant attacked the validity of Lee's mother's testimony. The State's closing arguments were not prejudicial comments on Defendant's execution of his right to remain silent, but could be considered instead a defense of the State's strategy and "to restore the credibility of the State's witnesses." *Id.*

2. Reference to Witness's Plea Deal and Potential Misstatement of Law

[2] In its closing arguments, the State made the following claim regarding Terry Parker's acceptance of a plea deal:

> [T]here's a reason why Terry pled to manslaughter.
>
> > Under the law if you play a role in someone getting hurt, then you're responsible even if you didn't do the hurting, and that makes sense because if a pack of wolves comes together, then they share in the kill, and we apply that through our laws as well. So Terry has made it seem like he got some sweetheart deal. What Terry pled guilty to is actually what he's legally guilty of. He didn't plead to anything that he's not guilty of. So manslaughter is a charge when you are responsible for someone's death but you didn't commit first degree murder, so that's the difference here. So what he pled to is what he is literally guilty of.

The State was explaining manslaughter, the charge Terry Parker pled guilty to, is a lesser-included charge to second-degree murder. Presuming, *arguendo*, this was a misstatement of law, the trial court

provided curative instructions to the jury about what constitutes both first-degree and second-degree murder. *Grant*, 293 N.C. App. at 461, 900 S.E.2d at 412. Furthermore, the trial court also provided the jury with instructions regarding how to evaluate the testimony of a witness who had secured a plea deal from the State.

The jury is presumed to follow the law as provided in the instructions, and the trial court's instructions empowered the jury to evaluate the witness' credibility regardless of any purported misstatement of law. *State v. Young*, 291 N.C. 562, 573, 231 S.E.2d 577, 584 (1977) ("Ordinarily, the effect of improper argument may be removed by curative instructions by the trial court, *State v. Sparrow*, 276 N.C. 499, 173 S.E.2d 897 (1970), since it is presumed that jurors will understand and comply with the instructions of the court." (citing *State v. Long*, 280 N.C. 633, 187 S.E.2d 47 (1972))). Defendant's argument is overruled.

3. Ineffective Assistance of Counsel

[3] The Sixth Amendment of the Constitution of the United States guarantees the right to counsel for all criminal defendants. *State v. Oglesby*, 382 N.C. 235, 242, 876 S.E.2d 249, 256 (2022). In protecting this right, we have adopted the two-prong test of *Strickland*. *Id.* The test is as follows:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984).

Because we hold the trial court did not err by failing to intervene *ex mero motu* during portions of the State's closing argument, we do not address whether his counsel's failure to object during those portions of the State's closing argument constituted ineffective assistance of counsel. *Id.*

We now address Defendant's IAC claim regarding the State's questioning of Det. Bradshaw. In this instance, the witness was a police detective, who had investigated the case. The State's district attorney asked:

Q: Were you present when he was arrested?

A: I was.

Q: When he was arrested did he say anything?

A: He did not.

Q: Did he make any statements?

A: He did not.

Q: Did the Defendant indicate that he wanted to talk to you at all?

A: He did not.

Q: What did he do?

A: Him turning himself in was arranged with his attorney, Mr. Sallenger, so they came to the police department at a prearranged time.

Q: Okay. So he was there with his lawyer?

A: Yes.

Q: And neither of them wished to speak to you about this matter?

A: No.

Q: At any time between when the Defendant was arrested and today, have you spoken to the Defendant?

A: No.

This line of questioning was interrupted by Defendant's counsel:

MR. SALLENGER: Objection, Your Honor. My client, under our constitution, under the Fifth and Sixth Amendments to the constitution, has an absolute right not to make a statement. That is our law. We believe that this line of questioning is attempting –

THE COURT: Objection is sustained.

Defendant asserts that defense counsel acted deficiently by raising the objection later in the line of questioning, and for not making a motion to strike the line of questioning from the record nor asking for curative instructions.

For the first prong, we evaluate whether the conduct of Defendant's trial counsel was reasonable by the norms of the profession. *State v. Todd*, 369 N.C. 707, 711, 799 S.E.2d 834, 838 (2017). Defendant asserts that the objection in question was not timely. Additionally, Defendant now asserts his trial counsel should have also moved to strike and requested curative instructions. We evaluate these assertions with a rebuttable deference to the counselor's trial strategy. *Oglesby*, 382 N.C. at 243, 876 S.E.2d at 256.

Counsel's objection was made in the jury's presence, while the witness was still present on the witness stand. Presuming it may have been made more immediately, it was still timely. *See State v. McIver*, 285 N.C. App. 205, 211-12, 876 S.E.2d 857, 862 (2022) (discussing preservation issues).

As to the lack of curative instruction, the record supports a conclusion this may have been a reasonable trial strategy choice. *See Strickland*, 466 U.S. at 699, 80 L. Ed. 2d at 701-02. At trial, defense counsel focused their efforts on discrediting the State's witnesses and denying Defendant had the murder weapon in his possession at the time of Lee's homicide. Defense counsel properly ceased the State's offensive line of questioning, and he may have wished to not draw further attention to the issue. These conclusions are not dispositive. Ultimately, we turn to the second prong.

Presuming Defendant's trial counsel's decision to not move to strike and ask for curative instruction was not reasonable, trial counsel's omission did not prejudice Defendant. The State provided overwhelming evidence through the testimony of two eyewitnesses to the shooting, the detective who had interviewed Lee's mother, as well as other witnesses, who had interacted with Defendant. The results of the forensic pathology were also admitted. Defendant has failed to show the properly objected-to testimony in question without additional motions was prejudicial to award a new trial. Defendant's IAC claim lacks merit and is overruled.

V. The Sentence Imposed

A. Standard of Review

"We review *de novo* whether the sentence imposed was authorized by the jury's verdict." *State v. Lail*, 251 N.C. App. 463, 471, 795 S.E.2d 401, 408 (2016) (internal citations omitted).

B. Analysis

[4] North Carolina's statutes state Class B1 and B2 felonies are to be differentiated by the type of malice involved. N.C. Gen. Stat. § 14-17(b) (2023). This differentiation is as follows:

> Any person who commits second degree murder shall be punished as a Class B1 felon, except that a person who commits second degree murder shall be punished as a Class B2 in either of the following circumstances:
>
> (1) The malice necessary to prove second degree murder is based on an inherently dangerous act or omission, done in such a reckless and wanton manner as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. . . .

N.C. Gen. Stat. § 14-17(b) (2023).

We have held ambiguous verdicts, using the same pattern jury instruction as used in the case at bar, cannot support a class B1 sentence. *State v. Mosley*, 256 N.C. App. 148, 149, 153, 806 S.E.2d 148, 366-67, 369 (2017). In doing so, this Court stated:

> [When] there [i]s evidence presented which would . . . support[] a verdict on second degree murder on more than one theory of malice, and because those theories support different levels of punishment under N.C. Gen. Stat. § 14-17(b), the verdict rendered . . . [i]s ambiguous. When a verdict is ambiguous, neither we nor the trial court is free to speculate as to the basis of a jury's verdict, and the verdict should be construed in favor of the defendant.

Id. at 153, 806 S.E.2d at 369. In *Mosley*, we determined there was adequate evidence presented to satisfy the two forms of malice as outlined in N.C. Gen. Stat. § 14-17(b). *Id.* at 153, 806 S.E.2d at 368-69.

In the present case, there is no such evidence. The State presented substantial evidence tending to show Defendant was in unlawful possession of a deadly weapon and was intent on causing harm and revenge, saying afterwards, he "had to do it" for his son. The State's case was predicated on first-degree murder, burglary, and illegal possession of a firearm by a felon. The jury also found the aggravating factor of the crime was committed in the presence of a person under the age of eighteen, the five-year-old brother of the victim.

The State did not present evidence, nor did it make any alternative argument, indicating Defendant was engaged in an inherently dangerous act or was acting recklessly. Defense counsel did not argue Defendant was acting reckless, but instead argued throughout the course of the trial Defendant did not have possession of a gun when Lee was shot. Following our analysis in *Mosley*, we hold the trial court could conclude an aggravated B1 sentence on the jury's verdict is supported under these facts. *Id.*

VI. Conclusion

In the absence of an objection, the trial court did not prejudicially err by failing to intervene *ex mero motu* and interject during the State's closing argument. We again strongly caution the State against comments on a defendant's silence, right to counsel, and assertion of his constitutional rights during closing arguments. *Grant*, 293 N.C. App. at 458, 900 S.E.2d at 410 (citing N.C. Gen. Stat. § 8-54 (2023)).

The trial court did not err in imposing a Class B1 sentence. N.C. Gen. Stat. § 14-17(b) (2023). Defendant has failed to demonstrate he received ineffective assistance of counsel at trial or prejudice. *Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693.

Defendant received a fair trial, free from prejudicial errors he preserved and argued on appeal. We find no error in the jury's verdicts or in the judgments entered thereon. *It is so ordered.*

NO ERROR.

Judges WOOD and MURRY concur.

STATE OF NORTH CAROLINA
v.
DAVID LEE ROWLAND

No. COA24-274

Filed 19 March 2025

Drugs—maintaining a dwelling to keep controlled substances—evidence of residency

The trial court properly denied defendant's motion to dismiss a charge of keeping or maintaining a dwelling for the purpose of keeping or selling controlled substances where the State presented substantial evidence from which a jury could find the element of the offense that defendant kept or maintained a dwelling, including: defendant's admission that he had "been" at his parents' home for more than fifteen years, defendant's identification of an upstairs bedroom in his parents' house as his bedroom, a piece of mail with defendant's name and his parents' address on the dresser of his bedroom, defendant's admission to having used heroin "on and off" for more than twenty years, and defendant's acknowledgment that he used heroin after being asked about the heroin (approximately sixty-nine grams) and drug paraphernalia that had been found in his bedroom.

Appeal by Defendant from judgments entered 16 March 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 28 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Yvonne B. Walker, for the State-Appellee.

Jarvis John Edgerton, IV, for Defendant-Appellant.

COLLINS, Judge.

Defendant David Lee Rowland appeals from judgments entered upon guilty verdicts of various crimes, including keeping or maintaining a dwelling for the keeping or selling of controlled substances. Defendant argues that the trial court erred by denying his motion to dismiss the charge of keeping or maintaining a dwelling. We find no error.

I. Background

On 7 June 2021, a grand jury indicted Defendant on charges of possession of a firearm by a felon, trafficking in heroin by possession, and keeping or maintaining a dwelling. On 13 March 2023, Defendant's case came on for jury trial. The evidence at trial tended to show the following: Detectives with the Raleigh Police Department received information from an informant that Defendant was "selling bundles of heroin from his residence," which prompted them to initiate an investigation and conduct "trash pulls at the defendant's residence." On 22 January and 5 February 2021, the detectives searched the trash left outside Defendant's parents' home, wherein they discovered "suspected empty heroin bindles" and documents bearing Defendant's name and parents' address.

On 11 February 2021, the detectives executed a search warrant at Defendant's parents' home. During the execution, the detectives searched Defendant's bedroom and found one handgun; three "long guns"; 3,299 "bindles" or "little blue envelopes" of heroin; a digital scale; and a piece of mail addressed to Defendant at his parents' address. At trial, a forensic chemist presented expert testimony that the substance found in Defendant's room was approximately sixty-nine grams of heroin. Detective Martucci testified that the amount of heroin found in Defendant's bedroom was not consistent with personal use.

Defendant gave a voluntary interview to law enforcement on 11 February 2021, which was recorded and played for the jury. When asked by a detective how long he had stayed at his parents' home, Defendant responded, "I have been there for, uh, on and off since 2005." The detective then asked Defendant, "You said your room is upstairs to the left, right?" and Defendant replied, "Yes."

At the close of the State's evidence, Defendant moved to dismiss all charges and argued specifically in part that, as to the charge of keeping or maintaining a dwelling, the State failed to meet its burden to show that "the dwelling has been kept or maintained over time for purposes of controlled substances." The trial court denied Defendant's motion. The jury found Defendant guilty on all charges. On 16 March 2023, the trial court entered two Judgments and Commitments, sentencing Defendant to two consecutive sentences totalling 240 to 310 months' imprisonment. Defendant gave oral notice of appeal in open court on 16 March 2023 and written notice of appeal on 20 March 2023.

II. Discussion

Defendant argues that the trial court erred by denying his motion to dismiss the charge of keeping or maintaining a dwelling because there

was insufficient evidence of the "keeping or maintaining" element of the offense.

A. Standard of Review

"In ruling on a motion to dismiss, the trial court need determine only whether there is substantial evidence of each essential element of the crime and that the defendant is the perpetrator." *State v. Crockett*, 368 N.C. 717, 720 (2016) (quotation marks and citations omitted). "Substantial evidence is relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *State v. Miller*, 363 N.C. 96, 99 (2009) (quotation marks and citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Austin*, 279 N.C. App. 377, 382 (2021) (quotation marks and citation omitted). "Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *Crockett*, 368 N.C. at 720 (citation omitted).

B. Element of Keeping or Maintaining

N.C. Gen. Stat. § 90-108(a)(7) governs the crime of keeping or maintaining a dwelling and provides that it is unlawful for any person

> [t]o knowingly keep or maintain any . . . dwelling house . . . or any place whatever, which is resorted to by persons using controlled substances in violation of this Article for the purpose of using such substances, or which is used for the keeping or selling of the same in violation of this Article.

N.C. Gen. Stat. § 90-108(a)(7) (2023). To survive a motion to dismiss, the State must present substantial evidence that a defendant did (1) intentionally (2) keep or maintain (3) a dwelling (4) which is used for the keeping or selling (5) of controlled substances. *State v. Mitchell*, 336 N.C. 22, 31 (1994), *overruled in part on other grounds by State v. Rogers*, 371 N.C. 397 (2018). The element of keeping or maintaining "refers to possessing something for at least a short period of time . . . for a certain use." *Rogers*, 371 N.C. at 402 (a receipt found within the vehicle bearing defendant's name and a date from two and a half months prior to his arrest was substantial evidence that defendant "kept or maintained" the vehicle pursuant to N.C. Gen. Stat. § 90-108(a)(7)).

While mere *occupancy* of a property, without more, will not support the "keeping or maintaining" element, "evidence of *residency*, standing

alone, is sufficient to support the element of maintaining." *State v. Spencer*, 192 N.C. App. 143, 148 (2008) (emphasis added and citations omitted) (defendant's admission that he "resided at the home . . . was substantial evidence that defendant maintained the dwelling"); *see State v. Moore*, 188 N.C. App. 416, 424 (2008) (evidence supported residency where "defendant used, treated, and perceived the dwelling as his residence and not merely as a place he occupied . . . from time to time" (quotation marks and citation omitted)). Proof of residency may be established by a defendant's admission. *Spencer*, 192 N.C. App. at 148. Proof of residency may also be shown through circumstantial evidence. *See State v. Williams*, 242 N.C. App. 361, 371-72 (2015) (evidence supported residency where the defendant received mail at the house, kept personal effects at the house, and referred to the property as "his house").

Here, the State presented substantial evidence that Defendant kept or maintained a dwelling, because the evidence shows that Defendant was a resident of his parents' home. First, Defendant admitted during his interview with detectives that he had "been" at his parents' home "on and off since 2005," a period of more than fifteen years. This admission of residency, "standing alone, is sufficient to support the element of maintaining." *Spencer*, 192 N.C. App. at 148 (citations omitted).

Furthermore, the State presented the following evidence that Defendant "used, treated, and perceived [his parents' home] as his residence and not merely as a place he occupied . . . from time to time," *Moore*, 188 N.C. App. at 424 (quotation marks and citation omitted): When directly questioned by a detective, Defendant admitted that an upstairs' bedroom in his parents' home was his room; detectives found a piece of mail on a dresser in Defendant's bedroom bearing his name and parents' address; detectives found a basket of men's clothing in Defendant's bedroom, along with "bindles and bundles of . . . heroin" inside a grocery bag that was located inside of the basket; detectives "found a Newport cigarette box that contained bindles of heroin," a digital scale, and a package of Narcan on Defendant's bedside table, and they "found a Smith & Wesson handgun on [Defendant's] bed"; Defendant admitted during his police interview that he had used heroin "on and off" for more than twenty years; and when questioned by a detective about the heroin found in his bedroom, Defendant responded "uh-huh" to using the heroin but denied selling it. This evidence further supports that Defendant kept or maintained a dwelling for the purposes of keeping or selling controlled substances. *See State v. Frazier*, 142 N.C. App. 361, 365-66 (2001).

As Defendant admitted to residing at his parents' home on and off for more than fifteen years, and there was abundant other evidence that

Defendant resided at his parents' home, the State presented substantial evidence of the "keeping or maintaining" element of N.C. Gen. Stat. § 90-108(a)(7).

III. Conclusion

Because the State presented substantial evidence that Defendant kept or maintained a dwelling for the purposes of keeping or selling controlled substances, the trial court properly denied Defendant's motion to dismiss.

NO ERROR.

Judges WOOD and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
JOSHUA DUANE WILSON

No. COA24-442

Filed 19 March 2025

Sentencing—prior record level—calculation—point erroneously assigned to exempt traffic violation—prejudicial error

Where the trial court miscalculated defendant as a prior record level (PRL) III based on 6 points by erroneously assigning one point to defendant's prior conviction of driving while license revoked for impaired driving, a traffic offense that is exempt from inclusion in a prior record level calculation pursuant to N.C.G.S. § 15A-1340.14(b)(5), the error was prejudicial—even though his sentence was within the presumptive range of either a PRL II or PRL III—because the minimum sentence for a PRL II is lower than that for a PRL III and, thus, defendant could have received a lesser sentence if the correct PRL had been calculated. Defendant's judgment was vacated and the matter was remanded for the trial court to sentence defendant as a PRL II based on 5 points.

Judge MURRY dissenting.

Appeal by defendant from judgment entered 31 October 2023 by Judge Theodore W. McEntire in Watauga County District Court. Heard in the Court of Appeals 14 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Brent D. Kiziah, for the State.

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

DILLON, Chief Judge.

Defendant Joshua D. Wilson pleaded guilty to possession of a stolen firearm. During sentencing, the trial court determined Defendant's prior record level ("PRL") to be Level III with 6 points. And after finding a mitigating factor, the trial court sentenced Defendant to 6 to 17 months, within the PRL Level III mitigating range.

On appeal, Defendant argues that the trial court should have calculated his PRL as a Level II with 5 points. Specifically, he argues that, in calculating Defendant's PRL, the trial court erroneously assigned 1 point for a Class 1 misdemeanor conviction on driving while license revoked for impaired driving ("DWLR-Impaired Revocation"). For the reasoning below, we agree and, therefore, vacate the judgment and remand for resentencing.

I. Analysis

At the outset, we note there is a question as to whether Defendant properly gave notice of his appeal. To the extent that Defendant's notice was not sufficient to invoke jurisdiction over this appeal, we grant Defendant's petition for writ of *certiorari* to aid our jurisdiction. *See* N.C.G.S. § 7A-32(c).[1]

During sentencing, a defendant may stipulate to a prior conviction, relieving the State from its burden of producing other evidence of that conviction. *State v. Arrington*, 371 N.C. 518, 522 (2018). However, it is a question of law as to how many points to assign any said prior conviction. *Id.* at 524 ("Once a defendant [stipulates to a prior offense], the trial court then makes a legal determination by reviewing the proper classification of [said] offense so as to calculate the points assigned to that prior offense.").

For prior convictions of traffic offenses, our General Assembly has directed that a sentencing court allocate 1 point for any Class 1

1. We note that Defendant also filed a Motion for Appropriate Relief with our Court, in which he seeks the same relief that he seeks on appeal. Based on this opinion, we render his motion moot.

or A1 misdemeanor, defined as "impaired driving, impaired driving in a commercial vehicle, and misdemeanor death by vehicle, *but no[ ] . . . other misdemeanor traffic offense*[.]" N.C.G.S. § 15A-1340.14(b)(5) (emphasis added).

Here, the trial court calculated 6 points arising from Defendant's prior record, which included 1 point for his prior DWLR-Impaired Revocation conviction. On appeal, Defendant does not challenge that conviction. Rather, he correctly argues that DWLR-Impaired Revocation is an "other misdemeanor traffic offense" expressly exempted from PRL determinations. During sentencing, Defendant bound himself to only the factual stipulation of this conviction, not any legal stipulation arising from that conviction. Accordingly, we hold that the trial court should have only assigned 5 points to Defendant's prior record. As such, Defendant should have been sentenced as a PRL II, rather than a PRL III. *See* N.C.G.S. § 15A-1340.14(c)(2), (3) (defining the PRL II range as 2 to 5 points and the PRL III range as 6 to 9 points).

The State argues that any error by the trial court in sentencing Defendant as a PRL III was not prejudicial. Specifically, the State argues essentially as follows: Defendant was sentenced for a Class H felony to a minimum term of 6 months. The mitigated range for a Class H felony with a PRL III is 6 to 8 months. The mitigated range for a Class H felony with a PRL II is 4 to 6 months. *See* N.C.G.S. § 15A-1340.17(c). The minimum sentence here of 6 months is within the mitigated range for both PRL II and PRL III. Accordingly, the State reasons that Defendant cannot show prejudice.

As the State has pointed out, our Court has held that a defendant suffers no prejudice when a trial court assigns him the wrong PRL where his sentence "is within the presumptive range at the correct record level." *See*, *e.g.*, *State v. Ballard*, 244 N.C. App. 476, 481 (2015). In another case, our Court found no prejudicial error where a defendant's minimum sentence fell within both the PRL [VI] applied by the sentencing judge and the lower PRL [V] that the judge should have applied:

> The presumptive range of minimum sentences for a [PRL] V offender convicted of a Class C felony is between 101 and 127 months' imprisonment, and the presumptive range of minimum sentences for a [PRL] VI [ ] is between 117 and 146 months[.] Defendant was sentenced to a minimum of 117 months[,] which is within the presumptive range of minimum sentences for both a [PRL] V and VI offender. Therefore, the trial court's error, if present, was harmless.

State v. Harris, 255 N.C. App. 653, 663 (2017) (internal citations omitted). *See also State v. Ledwell*, 171 N.C. App. 314, 321 (2005).

However, our Supreme Court has held that a defendant *is* entitled to be re-sentenced where he was sentenced at an incorrect PRL, *even if* his sentence was within the proper PRL. *See State v. Williams*, 355 N.C. 501 (2002). In holding such, our Supreme Court reasoned that prejudice occurs because the trial court may have sentenced the defendant to less time had the court applied the correct PRL:

> Under the State's theory, 145 months falls within the range for minimum presumptive sentences for class C felonies at a prior record level V, and therefore, the trial court may have been somewhat lenient in the Crump assault case. Thus, the State contends that defendant has not suffered any harm in the sentence for the Crump assault from the trial court's error finding defendant to have a prior record level of VI. We disagree.
>
> Defendant was sentenced at an incorrect prior record level, and the trial court sentenced defendant according to this incorrect prior record level. We are not persuaded by the State's contention that defendant was not harmed *because the trial court could have sentenced defendant to lesser time for the Crump assault if the proper prior record level had been calculated.* If the trial court was lenient with regard to sentencing defendant in the Crump assault case, as the State contends, then that is for the trial court to determine, not the State. Therefore, we remand this case for resentencing on only the noncapital felony convictions at a prior record level V.

Id. at 587 (emphasis added).

Our Supreme Court's 2002 decision in *Williams* has not been overruled by that Court. And decisions from our Court holding that a defendant is *not* prejudiced do not cite to *Williams*. Accordingly, we conclude we must apply our Supreme Court's holding in *Williams* and hold that Defendant has been prejudiced. Indeed, perhaps on remand the trial court may sentence Defendant to a minimum sentence of four months, which is at the bottom of the sentencing range for a PRL II offender and which is below the six-month minimum sentence the trial court imposed on Defendant as a PRL III offender.

In conclusion, we hold that the trial court erred in assigning a point for Defendant's prior DWLR-Impaired Revocation offense and, therefore, sentencing Defendant as a PRL III. Accordingly, we vacate the judgment and remand. On remand, the trial court shall sentence Defendant as a PRL II.

VACATED AND REMANDED.

Judge WOOD concurs.

Judge MURRY dissents by separate opinion.

MURRY, Judge, dissenting.

I agree with the majority that the trial court erred when it sentenced Defendant as prior record level (PRL) III instead of a PRL II. However, I disagree that this error requires a remand for resentencing under *State v. Williams*. Accordingly, I respectfully dissent in part.

Pursuant to his plea agreement, Defendant was sentenced to 6 to 17 months suspended for 18 months of supervised probation. As part of the plea negotiation, Defendant stipulated to being a PRL III. Additionally, the State dismissed the charges of felony possession of methampheamine, misdemeanor possession of drug paraphernalia, and three traffic offenses.

On appeal, Defendant argues that the trial court erred by sentencing him as a PRL III with six points. He asserts that he would "have received lesser time" had the trial court "properly calculated" him as a PRL II with only five points. Stipulations to convictions are questions of fact left undisturbed absent an abuse of discretion; however, assignments of PRLs are questions of law reviewed *de novo*, *State v. Wingate*, 213 N.C. App. 419, 420 (2011), that "[do] not bind[ ] . . . appellate" courts. *State v. Prevette*, 39 N.C. App. 470, 472 (1979). Based on a *de novo* substitution of judgment for that of the trial court, *State v. Williams*, 362 N.C. 628, 632–33 (2008), I would hold that the sentencing error is not prejudicial because the Defendant's sentence is "still within the . . . range [of either] record level[ ]." *State v. Ballard*, 244 N.C. App. 476, 477 (2015).

Under N.C.G.S. § 15A-1443, a trial court's error prejudices a defendant "unless the appellate court finds" the resulting violation of his constitutional rights "harmless beyond a reasonable doubt," which the State bears the burden of showing. N.C.G.S. § 15A-1443(b) (2015).

> The rules for determining harmless error vary depending on whether a defendant has asserted the denial of a constitutional right or a statutory right. . . .When a defendant requests relief for the denial of a statutory right, N.C.G.S. § 15A-1443(a) places the burden of demonstrating prejudice squarely on the defendant. N.C.G.S. § 15A-1443(a). In most circumstances, satisfying this burden requires the defendant to show "a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises."

State v. King, 386 N.C. 601, 609 (2024) (internal citations omitted).

I would find that Defendant has not carried his burden of proving that a different result would have been reached had Defendant been sentenced as a PRL II instead of a PRL III.

When analyzing "improper calculations of [PRL] points," *State v. Lindsay*, 185 N.C. App. 314, 315 (2007), this Court has "repeatedly . . . held that an erroneous . . . calculation does not prejudice the defendant if [his] . . . sentence is [still] within the presumptive range at the correct record level." *Ballard*, 244 N.C. App. 476, 477 (2015).

The majority invokes *State v. Williams*, 355 N.C. 501 (2022), to assert our Supreme Court's "express[ ] reject[ion]" of harmless-error analysis of a defendant's purportedly incorrect PRL sentencing. In *Williams*, the defendant was sentenced to death and eight other non-capital sentences, each of which ran concurrently with the death sentence itself but consecutively to one another. *Id.* at 565. The Court acknowledged the trial court's failure to "sentence[ ] defendant according to [ ]his [ ]correct [PRL]." *Id.* at 587. On appeal, the State conceded the necessity of a resentencing hearing for every non-capital sentence except the contested one within an allegedly correct range for its minimum presumptive sentence. *Id.* The Court held that this outstanding sentence still prejudiced the defendant "because the trial court could have sentenced [him] to lesser time" had it properly calculated defendant's PRL. *Id.* As a result, the Court remanded all eight non-capital offenses for resentencing. *Id.* at 590.

Unlike *Williams*, Defendant's sentence does not involve intertwined sentences for which the State conceded a common prejudicial error. Defendant's sentence does not run consecutively or concurrently to any other prejudicial sentences. Further, a one-point miscalculation in PRL does not automatically prejudice a defendant under

N.C.G.S. § 15A-1443(b), thereby invalidating the judgment. Rather, N.C.G.S. § 15A-1443(b) directs "the appellate courts" to make a "find[ing]" as to whether the State has met its burden of demonstrating that the error was harmless. The Supreme Court in *Williams* was "not persuaded" that the error was harmless; the Court of Appeals in *Ballard* and *Harris* were. *Ballard*, 244 N.C. App. 476, 781 S.E.2d 75 (2015); *State v. Harris*, 255 N.C. App. 653, 662-63 (2017). I find *Ballard* and *Harris* more analogous to the present case. Both *Ballard* and *Harris* are published opinions and I would follow the precedent established regarding harmless error when analyzing PRL errors and sentencing.

In *Ballard*, this Court held that the trial court harmlessly erred when it calculated the defendant's sentence as a PRL II instead of a PRL I. This Court reasoned that a defendant's "sentence was within the presumptive range at both [the correct and incorrect] record levels," and thus "d[id] not prejudice the defendant." *Id.* at 481. Here, Defendant's mitigated 6 to 17 month sentence similarly falls "within the range" at both PRL II and III in the mitigated range. N.C.G.S. § 15A-1340.17. Our Supreme Court denied discretionary review of *Ballard*.

Additionally, in *Harris*, this Court held that the trial court's error of sentencing a defendant as the wrong PRL level was harmless because the sentence was within the correct PRL range. *Harris*, 255 N.C. App. at 663. In *Harris*, the trial court committed error in finding defendant's PRL to be a VI instead of a V. *Id.* at 663-64. The *Harris* Court noted that "precedent compel[led] [it]" to hold harmless error if the trial court's sentence stayed "within the presumptive range at the correct record level." *Id.* at 663.

> The State concedes the mathematical error in Defendant's prior record level calculation, but argues the error was harmless. *See Lindsay*, 185 N.C. App. at 315 ("This Court applies a harmless error analysis to improper calculations of prior record level points." (citations omitted)). Our precedent compels us to agree. "[T]his Court repeatedly has held that an erroneous record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct record level." *Ballard*, 244 N.C. App at 481 (citing *State v. Ledwell*, 171 N.C. App. 314, 321 (2005)); *see also State v. Rexach*, 240 N.C. App. 90, WL 1201250, at *2 (2015) (unpublished) ("An error in the calculation of a defendant's prior record level points is deemed harmless if the sentence imposed by

> the trial court is within the range provided for the correct prior record level.").

Id. (cleaned up).

I would similarly hold the trial court's error harmless because Defendant's sentence remained within the mitigated range for both PRL II and PRL III. Therefore, the trial court's error did not prejudice Defendant.

I. Conclusion

For the reasons discussed above, I would hold that the trial court's error was harmless and did not prejudice Defendant. Thus, I respectfully dissent in part.

STATE OF NORTH CAROLINA
v.
DAVID ADAM WINDSETH, DEFENDANT

No. COA24-718

Filed 19 March 2025

1. Evidence—authentication—still frames from ATM videos—business record—subset of data collected—no plain error

There was no plain error in defendant's trial for felony obtaining property by false pretenses and felony identity fraud by the admission of still photos extracted from ATM videos showing defendant withdrawing funds from his mother's account. The still photos were properly admitted as a business record where the State laid a proper foundation for the videos—to which defendant did not object—by declaring them as business records that had not been edited and that were true and correct copies of records maintained by the bank that operated the ATM, and where the proper admission of the videos impliedly included their constituent frames, which were a subset of data from the overall videos.

2. Identification of Defendants—lay opinion testimony of officer—person depicted in ATM videos—prior interactions with defendant—no abuse of discretion

The trial court did not abuse its discretion in defendant's trial for felony obtaining property by false pretenses and felony identity

theft by allowing the lay opinion testimony of a law enforcement officer that defendant was the person depicted in still frames from ATM videos who withdrew funds from defendant's mother's account. The officer had previously interacted with defendant multiple times as part of an investigation into the disappearance of defendant's mother, and those interactions gave the officer a sufficient level of familiarity with defendant's appearance to be helpful to the jury.

Appeal by David A. Windseth from judgment entered 4 January 2024 by Judge Gregory R. Hayes in Jackson County Superior Court. Heard in the Court of Appeals 11 February 2025.

Attorney General Jeff Jackson, *by Assistant Attorney General Kristin Cook McCrary, for the State.*

Attorney Stephen D. Fuller, *for Defendant–Appellant.*

MURRY, Judge.

Defendant appeals from judgment entered upon jury verdicts finding him guilty of felony obtaining property by false pretenses and felony identity fraud under N.C.G.S. §§ 14-100 and 14-113.20, respectively. For the reasons below, we affirm.

I. Background

David A. Windseth (Defendant) appeals his jury convictions for one count of felony obtaining property by false pretenses under N.C.G.S. § 14-100 and felony identity fraud under N.C.G.S. § 14-113.20. N.C.G.S. § 14-100(a) (false pretenses); *id.* § 14-113.20(a) (identity fraud).

On or about January 2022, Defendant's mother, Joanna Windseth, went missing. Sergeant Ronald E. Ferris ("officer" or "Ferris") of the Jackson County Sheriff's Office soon began investigating her disappearance. As part of the investigation, Ferris reviewed visual information about her immediate family (including Defendant) and went so far as to set up a camera just outside her driveway in July 2022. The officer contemporaneously subpoenaed Ms. Windseth's bank, Wells Fargo, for her account information in the hopes of electronically tracking her possible whereabouts. In response, Wells Fargo returned a "business records declaration" detailing this information alongside certain relevant boilerplate language:

BUSINESS RECORDS DECLARATION

I, [internal authenticator], . . . declare that I am employed by Wells Fargo . . . and . . . certify that the attached records:

A) Were prepared by personnel of Wells Fargo in the ordinary course of business at or near the time of . . . events described [there]in . . . ;[ ]

B) [Were made in] the ordinary course of business [by] Wells Fargo employees . . . with knowledge of the . . . event[ ] . . . recorded . . . [; and]

C) . . . [A]re true and correct copies of the business records as maintained by Wells Fargo.

The records produced are described as follows:

Document Type	**Account #**
. . . .	
Video ATM / DVD	XXXXXX4130
. . . .	
Video ATM / DVD	XXXXXX2831
. . . .	

I declare under penalty of perjury under the law(s) of the state of North Carolina that the foregoing is true and correct according to my knowledge and belief. Executed on . . . [1 September 2022][ ] in . . . Charlotte, [N.C.].

Upon reviewing the two ATM videos showing Defendant withdraw money from his mother's bank accounts, Ferris recognized and began searching for Defendant. The Sheriff's Office eventually found Defendant camping on 20 August 2022, at which point they discovered on his person multiple credit and debit cards belonging to his mother.

At trial, the State offered as evidence several still-shots from the videos. Officer Ferris identified Defendant as the individual withdrawing his mother's funds in these videos, both of which he testified to leaving unaltered. The officer also identified Franklin, N.C. as their locations. Defendant's counsel did not contemporaneously object to either the evidentiary authentication or testimonial admission. On 1 January 2024, the jury found Defendant guilty on both felony counts. On 5 January 2024, Defendant timely appealed to this Court.

II. Jurisdiction

This Court has jurisdiction to hear Defendant's appeal of his jury-trial convictions because they arose after he first "entered . . . plea[s] of not guilty to [the] criminal charge[s]." N.C.G.S. § 15A-1444(a) (2023).

III. Analysis

Defendant argues on appeal that the trial court plainly erred (1) by admitting ATM videos of Defendant even though the State failed to properly authenticate them and (2) by permitting Officer Ferris to offer his own lay-opinion testimony as to Defendant's identity in those videos. In the alternative, Defendant argues that his counsel's failure to object to either alleged error amounted to ineffective assistance of counsel (IAC) so egregious as to violate his right to counsel under the federal Sixth Amendment. We hold the trial court did not err for the reasons discussed below. We affirm the trial court on both counts and thus decline to reach the merits of his IAC claim.

A. Video Authentication

[1] First, Defendant argues that the trial court plainly erred by ruling that the State properly authenticated the video evidence of his ATM usage mid-theft. We disagree. Because the proper admission of a full evidentiary video impliedly admits its constituent frames, this Court holds that the trial court did not err by admitting the ATM video still-shots.[1]

Under N.C.G.S. § 8-97, the State may introduce a recorded video "as substantive evidence" if it can first "lay[ ] a proper foundation and meet [ ] other applicable evidentiary requirements." N.C.G.S. § 8-97 (2023). It may lay a proper foundation in relevant part by adducing "testimony that the videotape had not been edited[ ] and that the picture fairly and accurately recorded the actual appearance of the area photographed."

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1. We note an apparent conflict among our precedents on whether to review issues of evidence authentication *de novo* or for an abuse of discretion. *State v. Hollis*, 905 S.E.2d 265, 267 (N.C. App. Ct. 2024). *Compare State v. Jones*, 288 N.C. App. 175, 187 (2023) (reviewing *de novo*), *and State v. Clemons*, 274 N.C. App. 401, 409 (2020) (Murphy, J., unanimous in result only) (holding that "appropriate standard of review for authentication of evidence is *de novo*"), *with In re Goddard & Peterson, PLLC*, 248 N.C. App. 190, 198 (2016) (reviewing for abuse of discretion), *and State v. Mobley*, 206 N.C. App. 285, 288–89 (2010) (affirming trial court's denial of defendant's "objection to the evidence on the grounds . . . [of] authenticat[ion]" despite noting how our previous "cases . . . conflict[ ] as to the appropriate standard of review"). Because the trial court here did not err, however, we need not attempt to resolve that intra-panel split now. *See In re Lucks*, 369 N.C. 222, 231 (2016) (Hudson, J., concurring) (declining to further opine on "which standard of review should apply because the result would be the same under either standard").

14 N.C. Index 4th *Evidence* § 1635 (2024). The North Carolina Rules of Evidence (Rules) specify certain types of evidence and procedures that may satisfy any additional requirements. *E.g.*, N.C. R. Evid. Rule 803(6) (business records); *id.* 902 (self-authenticating documents).

Specifically, Rule 901 is a "main evidentiary requirement" that permits admission with a showing of "evidence sufficient to support a finding that the matter in question is what the proponent claims." *State v. Jones*, 288 N.C. App. 175, 187 (2023) (quoting N.C. R. Evid. 901(a)). "Records of [r]egularly [c]onducted [a]ctivity," N.C. R. Evid. 803(6), "made under penalty of perjury" also "fulfill the purpose of authentication," *State v. Hollis*, 905 S.E.2d 265, 271 (N.C. App. Ct. 2024). Because Rule 803 and 901's languages match those of their federal counterparts in all material respects, *see* N.C. R. Evid. 803 cmt.; *id.* 901 cmt., federal courts' interpretations of the latter may inform our interpretations of the former, *see State v. Thompson*, 332 N.C. 204, 219 (1992). *Cf.*, *e.g.*, *State v. Collins*, 216 N.C. App. 249 (2011) (finding certain "federal court cases persuasive" because federal Rule 701 "is indistinguishable from . . . [N.C. R. Evid.] Rule 701").

Faced with no controlling precedent for these facts, we instead look to an analogous *State v. Jackson*, 229 N.C. App. 644 (2013), to better frame the issue here. In *Jackson*, this Court addressed whether the trial court properly admitted a "video file plotting the data from [an] electronic monitoring device" worn by the defendant the night of his crimes. *Id.* at 650. At trial, the State introduced as unobjected evidence both "the specific electronic monitoring device" "and the data [it] produced." *Id.* at 648. On appeal, the defendant argued that the State failed to "properly authenticate[ ]" the derivative tracking data. *Id.* at 649. This Court rejected his claim and affirmed the trial court's admissions. *Id.* at 650. In so doing, we characterized the video file as "merely an *extraction of* that data compiled in the device." *Id.* (emphasis added). The "extraction was admi[ssible] as a business record" so long as its underlying "data was recorded in the regular course of business near the time of the incident" and laid upon "a proper foundation." *Id.* (emphasis added) (referencing N.C. R. Evid. 803(6)). As a threshold matter of principle, we see little difference between *Jackson*'s admission of specific location data points drawn from an unobjected GPS-monitoring device and this case's admission of specific still-shots drawn from an unobjected security video.

We find persuasive the otherwise noncontrolling reasoning of *United States v. Clotaire*, 963 F.3d 1288 (2020), which addressed this precise issue upon near-identical facts. In *Clotaire*, the defendant regularly withdrew funds from various PNC Bank ATMs with debit cards he

fraudulently opened in the victims' names. *Id.* at 1292. Noticing common traits between the identity thefts, the investigating officer subpoenaed each card's "ATM withdrawal history" and "surveillance from the bank branches" to identify and arrest the defendant. *Id.* The trial court later admitted "PNC Bank's *full* surveillance videos a[s] business[-] records" evidence under Fed. R. Evid. 803(6) without objection. *Id.* at 1293 (emphasis added). The defendant instead challenged the discrete "photo stills pulled from the video" as "not business records within the meaning" of that rule. *Id.* The Eleventh Circuit disagreed, holding that a "format change[ ]from video to photograph" does not render "an otherwise-admissible business record . . . a new, inadmissible record merely because [of] its . . . adapt[ation] for trial display." *Id.* at 1293. That appellate court reasoned that this "technical format change" requires "little human discretion or judgment" and does not alter in any way the data's "communicative content" for the jury. *Id.* at 1294. "[A]s a general rule, the format of an extracted dataset has nothing to do with whether it qualifies as a business record. What matters is whether the *original* record met the requirements of [federal] Rule 803(6)." *Id.* In reaching this conclusion, the *Clotaire* Court articulates the presumption of "a foundation . . . laid for each individual frame" of an "entire videotape . . . admitted into evidence" without objection. 44 Am. Jur. *Trials* § 79.

Here, Defendant contests on appeal only the individual still-shots from the ATM videos—not the videos themselves. We reject his challenge because those shots are just "a subset of available data" found in the larger videos. *Clotaire*, 963 F.3d at 1294. The State merely "extract[ed] . . . that data" from the Wells Fargo videos, which the trial court "properly admitted as a business record" in accordance with Rule 803(6). *Jackson*, 229 N.C. App. at 650. *First*, the State laid the proper foundation for the videos by introducing a formal "business records declaration" that the attached ATM-video files "[we]re true and correct copies of the business records as maintained by Wells Fargo." (Capitalization omitted.) The State adduced Ferris's testimony that he "made [no] alterations to the[ ] [videos]" "since [he] received th[em]." Ferris also located the ATMs seen in the video to their purported locations. *Second*, the State adhered to its "main evidentiary requirement" by adducing without objection Wells Fargo's business-records declaration "made under penalty of perjury." *Hollis*, 905 S.E.2d at 269. Black-letter law permits "the authentic[ation] of business records . . . by a witness who is familiar with them and the system under which they were made." *State v. Rupe*, 109 N.C. App. 601, 611 (1993). Thus, this Court holds that the trial court properly authenticated the ATM videos as admissible evidence because their derivative photos were "nothing more than a series of static images appearing at a given frame rate." *Clotaire*, 963 F.3d at 1294.

B. Lay-Opinion Testimony

[2] Second, Defendant argues that the trial court plainly erred by allowing Ferris to testify as to Defendant's identity in the ATM videos still-shots. To support this assertion, Defendant analogizes his situation to the defendant in *State v. Belk*, 201 N.C. App. 412 (2009). There, this Court overturned a conviction on appeal because the testifying officer had "limited contact with" the defendant prior to his arrest, thus violating Rule 701. *Id.* at 417. We review admissions of lay-opinion testimony only for an abuse of discretion absent here. *Id.* Because this case is instead more analogous to *State v. Collins*, 216 N.C. App. 249 (2011) (distinguishing *State v. Belk*), this Court holds that the trial court did not err by admitting Ferris's lay-opinion testimony.

Under Rule 701, an officer may testify as a layman only if his testimony is "(a) rationally based on [his own] perception . . . and (b) help[s] to . . . determin[e] . . . a fact in issue." N.C. R. Evid. 701. Not so in *Belk*. There, this Court reversed a defendant's felony convictions after the trial court erroneously admitted the arresting officer's lay testimony. *Id.* at 414. The State indicted the defendant for several robberies allegedly caught on camera. *Id.* At trial, the arresting officer identified the defendant in the surveillance video despite having had "limited contact with [him] and his 'very distinctive profile' " prior to testifying. *Id.* at 417. Despite the jurors' "opportunity to view the video footage on a [PC]," the officer further acknowledged the video resolution's qualitative decline from the "desktop computer in the police station" to the "large projection screen [shown] to the[m]." *Id.* In remanding for a new trial, we reasoned from these facts that the trial court had "no basis" to conclude that the officer would be "more likely than the jury" to "correctly . . . identify [the] [d]efendant as the individual in the surveillance footage." *Id.* at 418.

In *Collins*, the defendant asserted plain error in the admission of the arresting officer's lay-opinion testimony that he "was the person depicted" in an incriminating videotape. *Id.* at 254. Comparing his situation to that in *Belk*, the *Collins* defendant suggested that his own officer "was in no better position than the jury to identify [him] as the person in the surveillance video." *Id.* at 255 (quoting *Belk*, 201 N.C. App. at 414). At trial, the arresting officer testified to "recogniz[ing] [the] defendant in the video" as a direct result of "prior dealings with him." *Id.* at 251. This Court rejected the defendant's argument and upheld the testimonial admission. *Id.* at 257. We reasoned that the officer's " 'dealings' with [the] defendant . . . mean[t] more than [the] minimal contacts" found in *Belk*. Much like those with Officer Ferris here, the *Collins* officer's multiple

interactions with the defendant amounted to "a sufficient level of familiarity with [his] appearance to aid the jury in its determination." *Id.*

The superior pretrial knowledge of the *Collins* defendant's personal appearance cleared Rule 701's testimonial threshold to the same degree as with Defendant here. Officer Ferris had already dealt with Defendant prior to his investigation because his mother had gone missing on or about January 2022 —six months before Ferris received the ATM video from Wells Fargo. By the time he first saw the ATM video, Ferris had interacted with Defendant on multiple occasions as part of that preexisting investigation. These repeated interactions "mean more than [the] minimal contacts" that would otherwise not "be helpful to the jury." *Collins*, 216 N.C. App. at 257. Thus, this Court holds that the trial court did not abuse its discretion by admitting Officer Ferris's lay-opinion testimony because doing so did not "invade the province of the jury" as factfinder. *Id.* at 255 (quoting *State v. Fulton*, 299 N.C. 491, 494 (1980)).

C. Ineffective Assistance of Counsel

Finally, Defendant argues that he received constitutionally defective assistance because his counsel failed to object to the trial court admitting ATM videos of Defendant and permitting Officer Ferris to offer his own lay-opinion testimony as to Defendant's identity in those videos. Defendant argues that counsel's failure to object to either alleged error amounted to IAC so egregious as to violate his Sixth Amendment right to counsel. Because the trial court did not err either by admitting the ATM videos or allowing Officer Ferris to offer his lay opinion, this Court dismisses Defendant's IAC claim for lack of merit.

IV. Conclusion

For the reasons discussed above, this Court holds that the trial court did not err either by holding as authenticated the ATM videos of Defendant or by admitting Officer Ferris's lay-opinion testimony as to his identity in them. This Court also dismisses Defendant's IAC claim as meritless.

NO ERROR.

Judges ZACHARY and CARPENTER concur.

WEISS v. CONT'L AEROSPACE TECHS., INC.

[298 N.C. App. 293 (2025)]

JAN WEISS, Administrator CTA of the Estate of Dennis Alan O'Neal, and JAN WEISS, Administrator CTA of the Estate of Debra Dee O'Neal, Plaintiffs
v.
CONTINENTAL AEROSPACE TECHNOLOGIES, INC. (f/k/a CONTINENTAL MOTORS, INC.); and AIRCRAFT ACCESSORIES OF OKLAHOMA, INC., Defendants

No. COA24-701

Filed 19 March 2025

1. Statutes of Limitation and Repose—statute of repose—product liability—defective aircraft maintenance and overhaul manual—separate product—independent claim allowed

In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's private plane fatally crashed due to engine failure, the appellate court rejected an argument by the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) that plaintiffs' product liability and negligence claims were barred by the six-year statute of repose (pursuant to now-repealed N.C.G.S. § 1-50(a)(6)). While acknowledging contrary holdings from federal courts that distinguish between flight manuals and maintenance or overhaul manuals, the Court of Appeals followed the reasoning in *Driver v. Burlington Aviation, Inc.*, 110 N.C. App. 519 (1993) (which involved a flight manual), and held that a maintenance and overhaul manual is a separate product that may support an independent claim for product liability if the manual was obtained separately from the aircraft and the claim stemmed from an alleged defect in the manual.

2. Products Liability—defective aircraft maintenance and overhaul manual—sufficiency of pleadings—barred by statute of repose

In a suit initiated on behalf of the estates of a husband and wife (plaintiffs), after the couple's private plane fatally crashed due to engine failure, the trial court properly granted summary judgment in favor of the manufacturer of the plane's engine and of the maintenance and overhaul manual (defendant) where plaintiffs' complaint did not sufficiently plead a product liability claim based on an alleged defect in the maintenance and overhaul manual—which, unlike claims about the aircraft and engine, would not have been barred by the applicable statute of repose. The complaint asserted liability based on defective engine components and alleged that defendant failed to provide proper maintenance instructions, but did not allege that the maintenance and overhaul manual was a

separately defective product and, thus, did not put defendant on notice that it was required to defend a product liability claim based on the defective manual as a product separate from the aircraft. Based on the purchase date of the engine, the statute of repose had expired before plaintiffs brought suit.

Appeal by Plaintiffs from Order entered 7 June 2023 by Judge James L. Gale in Nash County Superior Court. Heard in the Court of Appeals 6 November 2024.

Poyner Spruill LLP, by N. Cosmo Zinkow and Andrew H. Erteschik, for Plaintiffs-Appellants.

Williams Mullen, by Alexander M. Gormley, and Cunningham Swaim, LLP, by Ross Cunningham and Steven D. Sanfelippo, appearing Pro Hac Vice, for Defendant-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Jan Weiss as Administrator of the Estate of Dennis Alan O'Neal and the Estate of Debra Dee O'Neal (collectively, Plaintiffs) appeals from the trial court's Order granting Summary Judgment to Continental Aerospace Technologies, Inc. (Continental), based on the statute of repose N.C. Gen. Stat. § 1-50(6).[1] The Record on Appeal tends to reflect the following:

On 31 March 2013, Dennis and Debra O'Neal were flying in their Lancair LC42-550FG airplane (the Aircraft), traveling from Wilkes County Airport in North Wilkesboro to Warren Field Airport in Washington, North Carolina. The O'Neals were licensed and experienced pilots; Debra piloted the Aircraft. After climbing to 5,000 feet, at 12:46 p.m. "the pilot declared an emergency and reported: 'low fuel pressure—engine's quitting.' " The pilot reported smoke in the cockpit and that the engine was barely producing power. At 12:50 p.m. the Aircraft made a forced landing and collided with trees and terrain. The O'Neals died as a result of the crash.

Data from the accident revealed the engine failure was caused by a faulty engine starter adapter: the adapter's oil plug became dislodged

1. Fred Cohen was originally named as the Executor of both Estates. On 14 August 2023, Jan Weiss was substituted as Administrator of the Estates by Order of the trial court.

during flight, releasing engine oil. The Aircraft's engine starter adapter had been replaced approximately seven weeks before the crash, on 11 February 2013.

On 13 March 2015, the executor of the O'Neals' estates filed suit, asserting claims against several defendants. While the Complaint addresses additional related entities, it asserts claims against three separate defendants: Continental, the manufacturer of the engine and remaining defendant on appeal; Aircraft Accessories of Oklahoma (Aircraft Accessories), which overhauled the replacement engine starter adapter and sold it prior to installation; and Air Care Aviation Services (Air Care), the maintenance company that installed the starter adapter. The Complaint asserted claims for product liability, negligence, breach of warranty, and negligent representation, among others.

Evidence in the Record reveals the history of the Aircraft's engine and the faulty starter adapter. Continental originally manufactured the engine on 29 March 2002 and sold it to Lancair International, the manufacturer of the Aircraft. Lancair installed the engine in the Aircraft, which the O'Neals acquired in 2010. In January 2013, they noticed a problem with their engine starter adapter and brought it to Air Care for maintenance. On 11 February 2013, Air Care replaced the engine starter adapter with an overhauled adapter it had purchased from Aircraft Accessories on 29 January 2013. Aircraft Accessories performed an overhaul on this adapter in January 2013, using a 2011 maintenance and overhaul manual published by Continental (the Maintenance and Overhaul Manual). The resulting engine failure and crash occurred the month after the overhauled adapter was installed, on 31 March 2013.

The Complaint was filed in March 2015, and Aircraft Accessories moved to dismiss for lack of personal jurisdiction. The trial court denied this motion, and this Court affirmed that denial in a previous decision. *Cohen v. Continental Motors, Inc.*, 253 N.C. App. 407, 799 S.E.2d 72, 2017 WL 1632643 (unpublished). Continental likewise moved to dismiss for lack of personal jurisdiction, and we reversed the trial court's grant of that motion. *Cohen v. Continental Motors, Inc.*, 279 N.C. App. 123, 864 S.E.2d 816 (2021).

On 15 September 2022, Continental moved for Summary Judgment, arguing that all of Plaintiffs' claims were barred by the applicable statute of repose. The trial court granted this motion on 2 June 2023. On 30 June 2023, Plaintiffs filed written Notice of Appeal. We dismissed that appeal without prejudice as interlocutory, as Plaintiffs' claims against all defendants had not been resolved. *Cohen v. Continental Aerospace*

Technologies, *Inc.*, 294 N.C. App. 315, 901 S.E.2d 271, 2024 WL 2828596 (unpublished). Plaintiffs had at that time voluntarily dismissed their claims against Air Care and Teledyne Technologies (an associate corporation of Continental's) but their claims against Aircraft Accessories remained. On 11 June 2024, Plaintiffs voluntarily dismissed their claims against Aircraft Accessories. With Judgment now final with respect to all defendants, on 10 July 2024, Plaintiffs timely refiled their Notice of Appeal from the 2 June 2023 Order granting Summary Judgment to Continental. *See* N.C. Gen. Stat. § 1A-1, Rule 54 (2023); N.C. Gen. Stat. § 7A-27(b)(1); N.C. R. App. P. 3 (2024).

Issues

The dispositive issues in this case are whether: (I) the Maintenance and Overhaul Manual used in overhauling the engine starter adapter can be considered a separate product that supports an independent claim for product liability arising within the statute of repose provided by now-repealed N.C. Gen. Stat. § 1-50(a)(6); and (II) Plaintiffs properly pleaded a claim for product liability arising from the allegedly defective Maintenance and Overhaul Manual in their Complaint.

Analysis

The trial court granted Continental's Motion for Summary Judgment, holding Plaintiffs' claims were barred by the six-year statute of repose applicable to the Aircraft under then-N.C. Gen. Stat. § 1-50(a)(6) (2007).

Summary judgment based on a statute of repose is appropriate when "the pleadings or proof show without contradiction that the statute of repose has expired." *Bryant v. Don Galloway Homes*, *Inc.*, 147 N.C. App. 655, 657, 556 S.E.2d 597, 600 (2001). This is a question of law that we review *de novo* when the relevant facts are not in dispute. *Udzinski v. Lovin*, 159 N.C. App. 272, 273, 583 S.E.2d 648, 649 (2003).

Under Section 1-50(a)(6), "No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption." Section 1-50(a)(6) was repealed in 2009 and replaced with N.C. Gen. Stat. § 1-46.1, extending the time to file a claim to twelve years for causes of action accruing on or after 1 October 2009. S.L. 2009-420, § 1, 2009 N.C. Sess. Laws 808. Under both the current and repealed statute, the repose period begins to run on "the date of initial purchase for use or consumption." N.C. Gen. Stat. §§ 1-46.1(1); 1-50(a)(6). For products first delivered or purchased before 1 October 2009, the

six-year statute of repose applies. *See, e.g.*, *Robinson v. Bridgestone/Firestone N. Am. Tire, LLC*, 209 N.C. App. 310, 315, 703 S.E.2d 883, 886-87 (2011). *See also Colony Hill Condominium I Ass'n v. Colony Co.*, 70 N.C. App. 390, 394, 320 S.E.2d 273, 276 (recognizing that a statute of repose grants the defendant a vested right not to be sued which cannot be impaired by the retroactive effect of a later statute).

Continental contends because it sold the Aircraft engine in 2002, the statute of repose expired prior to the filing of the Complaint in 2015. Thus, Continental contends Plaintiff's claims against it alleged in the Complaint are barred by the expiration of the six-year statute of repose.

On appeal, Plaintiffs argue the trial court erred in concluding their claims were barred by Section 1-50(a)(6) because they contend their product liability claim is based—in part—on a defect in the 2011 Maintenance and Overhaul Manual published by Continental and used in the overhaul of the engine starter adapter, rather than the Aircraft engine itself. Plaintiffs claim the Maintenance and Overhaul Manual erroneously instructed maintenance personnel to coat the threads of the oil plug in aviation oil in addition to a sealing agent prior to installing it, which proximately caused the plug to come loose. Thus, Plaintiffs contend under this theory of the case, the defective product was not the engine, but rather the Maintenance and Overhaul Manual. Therefore, Plaintiffs assert the applicable date for purposes of the statute of repose is the date of sale of the 2011 Maintenance and Overhaul Manual.

I. Maintenance and Overhaul Manual as Separate Product

[1] Plaintiffs argue our decision in *Driver v. Burlington Aviation* requires their claims be allowed to proceed. 110 N.C. App. 519, 430 S.E.2d 476 (1993). In *Driver*, the plaintiff was injured when riding as a passenger in an aircraft that lost power and crashed. *Id.* at 521, 430 S.E.2d at 479. The complaint alleged the aircraft's flight information manual, which had been relied upon by the pilot, contained insufficient information concerning carburetor icing: it failed to warn about weather conditions that could cause icing and failed to advise pilots to activate carburetor heat during slow-flight operations to prevent this. *Id.* at 522, 430 S.E.2d at 479. It alleged this omission from the flight manual proximately led to the crash. *Id.* at 523, 430 S.E.2d at 479.

The aircraft manufacturer argued the action was based in product liability and, since the aircraft was sold in 1978, eleven years before the crash, the claim was barred by the statute of repose. N.C. Gen. Stat. § 1-50(6). However, the plaintiff did not allege the aircraft itself was defective in any way and conceded that carburetor icing is a common

condition that occurs in any aircraft under certain conditions. 110 N.C. App. at 528-29, 430 S.E.2d at 483. Accordingly, we held the defective product at issue was the manual, not the aircraft. *Id.* As the manual was sold to the pilot separately, the date of that sale was "the crucial event triggering the statute of repose." *Id.* Because neither party had pleaded that date, the trial court had insufficient information to dismiss the action. *Id.*

Plaintiffs argue this case is analogous to *Driver* in that the alleged defect lies only in the Maintenance and Overhaul Manual, a separate product from the Aircraft, and the statute of repose should run from its date of sale rather than that of the Aircraft. Continental argues *Driver* is distinguishable because it involves a flight manual, as opposed to the Maintenance and Overhaul Manual in this case. It argues even if a flight manual can support a separate product liability claim, the Maintenance and Overhaul manual is issued by Continental in its role as a manufacturer of the Aircraft components. Thus, Continental contends a maintenance manual cannot be considered a separate product establishing an independent product liability claim.

A. Manuals as Aircraft Components under GARA

In support of its argument, Continental raises as persuasive authority several federal cases interpreting provisions of the General Aviation Revitalization Act (GARA). This federal statute creates an 18-year statute of repose for civil actions against manufacturers of general aviation aircraft and component parts. GARA, § 2(a)(2); 49 U.S.C. § 40101 Note.

This 18-year period contains a "rolling" provision, which causes the 18-year period to begin anew if a plaintiff's injury is caused by any "new component, system, subassembly, or other part which replaced another component, system, subassembly, or other part originally in, or which was added to, the aircraft." *Id.* While federal courts have held flight manuals are "parts" of the aircraft for the purposes of that statute, they have distinguished maintenance manuals from that consideration. Continental argues we should likewise distinguish between these types of manuals. However, the distinction made by federal courts is inapposite to this case.

Federal courts have held that a flight manual is so intrinsic to the aircraft as to be a "part" of it under GARA, and a reissue of the manual can trigger the statute's rolling provision. In *Caldwell v. Enstrom Helicopter Corp.*, the plaintiff alleged a helicopter's flight manual was defective because it did not include a warning that the last two gallons of fuel in the helicopter's tanks could not be used, leading to a crash

when the aircraft ran out of fuel. 230 F.3d 1155 (9th Cir. 2000). Although the helicopter had been purchased 23 years before the crash in that case, the flight manual had been revised several times within the previous 18 years. *Id.* at 1156.

That court held a flight manual is a "part" of the aircraft:

> Federal regulations require that manufacturers of helicopters include a flight manual with each helicopter and require that the manual contain "information that is necessary for safe operation because of design, operating, or handling characteristics." 14 C.F.R. § 27.1581(a)(2). The manual specifically must include information about a gas tank's unusable fuel supply, if the unusable portion exceeds one gallon or five percent of the tank capacity. *See id.* § 27.1585(e). In the face of these requirements, there is no room to assert that a helicopter manufacturer's manual is a separate product. By the rule of the excluded middle, then, it must be part of the aircraft.
>
> In other words, a flight manual is an integral part of the general aviation aircraft product that a manufacturer sells. It is not a separate, general instructional guide (like a book on how to ski), but instead is detailed and particular to the aircraft to which it pertains. The manual is the "part" of the aircraft that contains the instructions that are necessary to operate the aircraft and is not separate from it.

Id. at 1157. Accordingly, if the manufacturer had, within the past 18 years, made a substantive revision or deletion to the instructions regarding fuel tanks and that revision proximately caused the crash, the plaintiffs' claim would not be barred by GARA. *Id.*

The Ninth Circuit distinguished this from prior cases in which plaintiffs alleged defective manuals to assert claims that manufacturers had failed to warn of latent defects in the aircraft itself. *See, e.g.*, *Alter v. Bell Helicopter Textron, Inc.*, 944 F.Supp. 531, 538-39 (S.D. Tex. 1996) (holding GARA barred claim that maintenance manual failed to provide inspection instructions that would have allowed detection that defective component was failing); *Schamel v. Textron-Lycoming*, 1 F.3d 655, 657 (7th Cir.1993) (holding action for failure to warn of a defective component barred by Indiana statute of repose). Unlike these cases, the claim in *Caldwell* was not an attempt to circumvent the statute of repose by implying an ongoing duty to warn of a design or manufacturing defect in the aircraft. Instead, the defect was entirely within the revised flight

manual, which failed to properly instruct how to operate the aircraft. *Caldwell*, 230 F.3d at 1157; *see also Crouch v. Honeywell Int'l, Inc.*, 720 F.3d 333, 342 (6th Cir. 2013) ("If claims for negligently *failing* to warn in manual revisions were not barred by GARA's period of repose, plaintiffs could artfully plead suits arising out of design defects as 'failure to warn' claims, thereby defeating Congress's intent." (emphasis in original)).

In applying this precedent, federal courts have distinguished between flight and maintenance manuals. In *Colgan Air, Inc. v. Raytheon Aircraft Co.*, the Fourth Circuit rejected the district court's holding that a maintenance manual was, as a matter of law, a "part" of an aircraft for the purpose of interpreting a warranty provision. 507 F.3d 270, 280 (2007). The plaintiff alleged it relied upon the maintenance manual and improperly installed a component in the aircraft, causing the aircraft to crash, and asserted a claim for breach of warranty. *Id.* at 274. The express warranty agreement disclaimed all other warranties and warranted "each part of the Aircraft" was free from defects in workmanship, materials, or design for a period of ninety days. *Id.* at 273. The defendant argued the manual was a part of the aircraft, citing *Caldwell*, and as the crash had occurred outside the 90-day window no express or implied warranty applied.

The court rejected this argument. Unlike a flight manual, a maintenance manual is not required to be kept onboard the aircraft and is not "necessary to operate the aircraft" in the way a flight manual is. *Id.* at 276-77.[2] Accordingly, whether the maintenance manual was a part of the aircraft subject to the warranty provision was a question of fact, and evidence as to how the plaintiff obtained the manual—whether it came with the aircraft or was purchased separately and paid for with a subscription—was relevant to resolving this question. *Id.* at 277-78.

The Sixth Circuit's approach to overhaul manuals like the Maintenance and Overhaul Manual at issue in this case mirrors this treatment of maintenance manuals. In *Crouch*, the plaintiffs alleged an engine failure occurred due to a separation of components installed during an overhaul performed according to instructions in a manual published by the manufacturer. 720 F.3d at 336-37. They argued the overhaul manual was a part of the aircraft, and revisions to the manual triggered GARA's rolling provision for replacement parts. *Id.* at 341. The court rejected this argument, as the overhaul manual, unlike a flight manual,

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2. *But see Rogers v. Bell Helicopter Textron*, 185 Cal. App. 4th 1403, 1410, 112 Cal. Rptr. 3d 1, 2 (2010) (disagreeing that federal regulations require flight manuals to be carried onboard aircraft).

was not "originally in, or . . . added to, the aircraft." *Id.* at 342. Thus, federal courts consider maintenance and overhaul manuals as less integrated into the aircraft than flight manuals.

B. Flight, Maintenance, and Overhaul Manuals under Driver

Continental essentially argues that, because federal courts treat flight and overhaul manuals differently from each other when determining if they are "parts" under GARA, we should also treat them differently when determining if the manual can be considered a separate product for the purpose of our statute of repose. This argument ignores the reasoning underlying the distinction made by federal courts: that a maintenance or overhaul manual is not by law considered a "part" by federal courts because it is *less* integrated into the aircraft than a flight manual. Our decision in *Driver* held that a flight manual is a separate product. Applying the reasoning of the federal cases Continental cites, the Maintenance and Overhaul Manual in this case is at least as much a separate product from the Aircraft as a flight manual, if not more so.

We first note, as federal courts have acknowledged, our holding in *Driver* is at odds with these federal cases: "The reasoning of the state court of appeals in *Driver* is inconsistent with that of the other courts faced with similar claims." *Alter*, 944 F. Supp. at 540. "The sole case holding that an airplane manual is a separate product from its corresponding aircraft is *Driver v. Burlington Aviation, Inc.*" *Colgan Air, Inc. v. Raytheon Aircraft Co.*, 404 F.Supp.2d 893 (E.D. Va. 2005) (*rev'd*, 507 F.3d 270). While federal caselaw regards a flight manual as a part of the aircraft as a matter of law, for the purpose of North Carolina's statute of repose a flight manual is a separate product that can support a product liability claim as long as (1) the defect exists only in the manual and (2) the manual was obtained in a separate transaction from the purchase of the aircraft. *Driver*, 110 N.C. App. at 528-29, 430 S.E.2d at 483. We are bound by this interpretation made in a prior decision of another panel of this Court. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Accordingly, the persuasiveness of these federal cases to support Continental's argument is mitigated. Moreover, the cases cited by Continental distinguish between (1) flight manuals and (2) maintenance or overhaul manuals based on a determination the latter are *less* integrated into the aircraft itself. In *Colgan*, the court held the maintenance manual was not as a matter of law a part of the aircraft and explicitly rejected the trial court's conclusion that the manual and the aircraft were a "single, integrated product" as, unlike a flight manual, the maintenance manual was not necessary to operate the aircraft. 507 F.3d at

276-77. Similarly, in *Crouch* the Sixth Circuit concluded that, unlike a flight manual, an overhaul manual "is not a replacement part of the aircraft." 720 F.3d at 342. These cases do not persuade us that we should consider a maintenance manual more integrated into the aircraft than a flight manual and thus unable to support a claim like the one made in *Driver*.

Continental contends some of the specific language used in *Crouch* implies an inverted analysis of this distinction, arguing the Sixth Circuit "recognized that the overhaul manual was not a separate product because 'production of the manual is an essential element in the overall process of creating a product that satisfies FAA regulations.' " *Id.* at 339. Continental misunderstands the reasoning of that court, which at no point in its opinion determines the overhaul manual is not a "separate product." Continental's analysis of *Crouch* conflates two separate issues dealt with in the opinion. The first is a threshold issue: GARA's 18-year statute of repose only applies to suits brought against an aircraft manufacturer for actions performed "in its capacity as a manufacturer." 49 U.S.C. § 40101 Notes, § 2. The court determined the defendant was acting in its capacity as a manufacturer in publishing the manual, in part because it had a duty to disclose maintenance information to the FAA, before moving on to the second issue: determining whether the manual should be considered a part of the aircraft. 720 F.3d at 340-41.

While the Sixth Circuit recognized in its analysis of this second question "the duty of a manufacturer to publish and update manuals derives from its manufacturing of the original aircraft or part," *id.* at 342, it does not follow that the overhaul manual is therefore more tightly integrated into the aircraft than a flight manual. The court in *Crouch* unequivocally held "the revised overhaul manual relied on by Jewell Aircraft is not a replacement part of the aircraft." *Id.* Under the federal caselaw cited by Continental, if a manual is not a part, it is a separate product. *Caldwell*, 230 F.3d at 1157 ("As a matter of logic, there are only two possibilities. Either an aircraft's flight manual is a part of the aircraft, or it is a separate product."). Under *Driver*, we treat flight manuals as a separate product for the purpose of the statute of repose if the manual was obtained separately from the aircraft and the claims stem from defects in the manual. Continental has presented no reason we should not apply that same analysis to overhaul manuals.

Accordingly, Plaintiffs can make a product liability claim based on defects in the Maintenance and Overhaul Manual as long as: (1) the manual was purchased separately from the Aircraft and within the applicable statute of repose; (2) their claim is based entirely upon defects in the manual and not design or manufacturing defects in the Aircraft or

its components; and (3) the defects in the manual proximately caused harm to Plaintiffs. *See Driver*, 110 N.C. App. at 528-29, 430 S.E.2d at 483.

[2] Continental argues, however, Plaintiffs failed to properly plead their claim that the Maintenance and Overhaul Manual was itself a defective product—separate from the Aircraft and its engine—and proximately caused the crash.

Under our Rules of Civil Procedure:

> A pleading which sets forth a claim for relief, whether an original claim, counterclaim, crossclaim, or third-party claim shall contain
>
> (1) A short and plain statement of the claim sufficient to give the court and the parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved showing that the pleader is entitled to relief, and
>
> (2) A demand for judgment for the relief to which he deems himself entitled.

N.C. Gen. Stat. § 1A-1, Rule 8(a) (2023). Under this notice theory of pleading, "a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of *res judicata*, and to show the type of case brought." *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (citations omitted). "Such simplified notice pleading is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." *Pyco Supply Co., Inc. v. Am. Centennial Ins. Co.*, 321 N.C. 435, 442-43, 364 S.E.2d 380, 384 (1988).

"While the concept of notice pleading is liberal in nature, a complaint must nonetheless state enough to give the substantive elements of a legally recognized claim[.]" *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 205, 367 S.E.2d 609, 612 (1988). It should "give notice of the events and transactions and allow the adverse party to understand the nature of the claim and to prepare for trial." *Murdock v. Chatham County*, 198 N.C. App. 309, 317, 679 S.E.2d 850, 855 (2009).

Plaintiffs argue Continental had sufficient notice of their theory the defective Maintenance and Overhaul Manual proximately caused the engine failure. In their Complaint, they allege Continental "fail[ed] to

properly provide maintenance instructions for the starter adapter" and that it provided "defective and inadequate instructions, warnings and information regarding the operation and maintenance of the aircraft engine and its systems, components, accessories, and hardware."

Outside of these two allegations, the Complaint primarily asserts liability based on defective components, including alleging engine components were defectively designed. It alleges the defendants failed to properly design and manufacture the Aircraft engine and various components and that the engine and starter adapter were not constructed to function safely.

The Complaint in this case differs significantly from that in *Driver*, in which there were "no allegations in plaintiffs' amended complaint contending the aircraft was in any way defective." 110 N.C. App. at 528-29, 430 S.E.2d at 483. The plaintiffs in that case conceded the carburetor icing that led to the crash was a common condition that could occur in any aircraft, and did not argue the aircraft functioned defectively or improperly. *Id.* at 529, 430 S.E.2d at 483. Instead, their entire claim as pleaded addressed the failure of the flight information manual to properly instruct a pilot regarding this issue. Accordingly, we held "the 'defective' product at issue is the manual, not the aircraft." *Id.*

In this case, there is no separate mention of the Maintenance and Overhaul Manual in the Complaint. It is not alleged to be a separately defective product. As such, unlike in *Driver*, there is no claim that the Maintenance and Overhaul manual was defective. The allegations Continental "fail[ed] to properly provide maintenance instructions for the starter adapter" and provided "defective and inadequate instructions, warnings and information regarding the operation and maintenance of the aircraft engine and its systems, components, accessories, and hardware" give no notice of the factual theory that a maintenance worker improperly performed the overhaul based on faulty instructions from a defective Maintenance and Overhaul Manual. Instead, the Complaint alleges defects in the design and manufacture of components of the Aircraft engine. The Complaint did not give Continental notice that it was required to defend a product liability claim asserting the Maintenance and Overhaul Manual as an independent defective product, separate from the Aircraft and its engine.

Thus, the Complaint did not state a claim for liability based on a defective manual as a product separate from the Aircraft. Therefore, the six-year statute of repose provided by now-repealed N.C. Gen. Stat. § 1-50(a)(6) was properly calculated from the date of the initial purchase of the Aircraft's engine in 2002. Consequently, the trial court did not err

in granting Summary Judgment to Continental based on the applicable statute of repose.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's 3 June 2023 Order granting Summary Judgment in favor of Continental.

AFFIRMED.

Judges ARROWOOD and COLLINS concur.

LEILEI ZHANG, PLAINTIFF
v.
CARY ACADEMY, DEFENDANT

No. COA24-744

Filed 19 March 2025

1. Contracts—breach—school enrollment—mootness—student graduated

Plaintiff's breach of contract claim against her daughter's school (defendant) for failing to modify a re-enrollment agreement, which was dismissed by the trial court, was moot because plaintiff's daughter graduated from the school and was no longer attending and, therefore, the relief requested (the daughter's unenrollment) had been achieved. Further, there was no basis for granting plaintiff's ancillary requests for relief where plaintiff did not allege any damages, financial or otherwise, caused by her daughter's enrollment.

2. Parent and Child—claim against school—alleged violation of Parental Bill of Rights—no private cause of action

The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly violating the Parental Bill of Rights (N.C.G.S. § 114A-10) where the statute did not create a private cause of action, either express or implied, against non-parent third parties such as defendant in this case.

3. Aiding and Abetting—claim against school—enrollment of daughter—aiding breach of separation agreement—no merit

The trial court properly dismissed plaintiff's claim against her daughter's school (defendant) for allegedly aiding and abetting

her daughter's father in breaching the parents' separation agreement by declining to unenroll the daughter at plaintiff's request. First, North Carolina does not recognize as a valid cause of action aiding and abetting a breach of contract. Second, plaintiff's complaint lacked sufficient facts to support a colorable claim for tortious interference with a contract.

Appeal by Plaintiff from order entered 3 April 2024 by Judge Bryan Collins in Wake County Superior Court. Heard in the Court of Appeals 12 February 2025.

Leilei Zhang, pro se Plaintiff-Appellant.

Parker Poe Adams & Bernstein, LLP, by Tory Ian Summey and Zachary S. Anstett, for Defendant-Appellee.

GRIFFIN, Judge.

Plaintiff Leilei Zhang appeals from the trial court's order granting Defendant Cary Academy's motion to dismiss Plaintiff's complaint. Plaintiff contends, by allowing her daughter, Emily,[1] to remain enrolled, Cary Academy: (1) breached the terms of their enrollment agreement; (2) violated Plaintiff's statutory right to control her daughter's education; and (3) aided and abetted the violation of her separation agreement with Emily's father. We disagree and hold the trial court properly dismissed Plaintiff's complaint.

I. Factual and Procedural Background

Emily was a minor child who first enrolled at Cary Academy in 2016, and eventually graduated in 2024. Plaintiff and Emily's father separated in August 2021 and eventually divorced in October 2022. Plaintiff and Emily's father entered a joint custody agreement stating Emily would remain in Cary with her father for school purposes, but would spend school holidays with Plaintiff in California. In February 2023, Emily's father and Plaintiff both executed a Re-enrollment Agreement for Emily to complete her senior year of high school at Cary Academy. The Re-enrollment Agreement stated that the agreement "may not be amended or modified except in a written document signed by all parties that expressly acknowledges such amendment or modification."

1. We use a pseudonym to protect the identity of the juvenile and for ease of reading. *See* N.C. R. App. P. 42(b).

On 6 March 2023, Plaintiff emailed Cary Academy attempting to withdraw her portion of the Re-enrollment Agreement. However, Emily's father did not consent to withdrawing Emily from Cary Academy. Cary Academy informed Plaintiff that without the consent of both parents, the school could not unenroll Emily.

On 29 August 2023, Plaintiff filed a complaint against Cary Academy in Wake County superior court. Plaintiff brought claims for breach of contract, violation of parental rights, and aiding and abetting. Cary Academy moved to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Their motion came on for hearing in the Wake County superior court on 16 January 2024. Following the hearing, the court granted Cary Academy's motion and dismissed Plaintiff's complaint in its entirety. Plaintiff timely appeals.

II. Analysis

Plaintiff argues the trial court erred by dismissing her claims. Plaintiff contends she adequately stated claims asserting Defendant: (1) breached the Re-enrollment Agreement signed by Plaintiff and Emily's father; (2) violated Plaintiff's parental right to control and direct Emily's education; and (3) aided and abetted the violation of a separation agreement between Plaintiff and Emily's father. We disagree.

We review a trial court's decision on a motion to dismiss de novo. *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013). A motion to dismiss pursuant to Rule 12(b)(6) is properly granted if "one of the following three conditions is satisfied: (1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Podrebarac v. Horack, Talley, Pharr, & Lowndes, P.A.*, 231 N.C. App. 70, 74, 752 S.E.2d 661, 663 (2013) (citations and internal marks omitted). We construe the complaint liberally in favor of the non-moving party and review "the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Id.* at 74, 752 S.E.2d at 664 (citations and internal marks omitted). However, a complaint must "state enough to give the substantive elements of a *legally recognized claim*." *New Hanover Cnty. Bd. of Educ. v. Stein*, 380 N.C. 94, 111, 868 S.E.2d 5, 17 (2022) (citation and internal marks omitted).

A. Breach of Contract

[1] Plaintiff contends the trial court erred by dismissing her claim for breach of contract. Specifically, Plaintiff argues Cary Academy breached

the Re-enrollment Agreement by failing to modify the agreement after Plaintiff's unilateral request to unenroll Emily. We hold this claim is moot.

North Carolina courts decline to make determinations on questions that have become moot as an exercise of judicial restraint. *In re Peoples*, 296 N.C. 109, 147, 250 S.E.2d 890, 912 (1978). "A case is considered moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy." *Lange v. Lange*, 357 N.C. 645, 647, 588 S.E.2d 877, 879 (2003) (internal citations omitted). Further, if during "litigation it develops that the relief sought has been granted or that the questions originally in controversy between the parties are no longer at issue, the case should be dismissed, for courts will not entertain or proceed with a cause merely to determine abstract propositions of law." *Dickerson Carolina, Inc. v. Harrelson*, 114 N.C. App. 693, 697, 443 S.E.2d 127, 131 (1994) (citations and internal marks omitted).

Here, Plaintiff's complaint, filed on 25 August 2023, asked the court to order Cary Academy to pause Emily's school activity until further notice from the Plaintiff. However, Emily successfully graduated from Cary Academy in May of 2024. Since the filing of the complaint, Emily is no longer attending Cary Academy and the exact relief Plaintiff initially sought has been achieved outside of the judicial process. As such, we cannot entertain or proceed with this cause merely to determine abstract propositions of law. *See McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 67–68, 736 S.E.2d 811, 823 (2013) (holding a breach of contract claim premised upon a scholarship agreement moot because the student-athlete graduated and matriculated to the NFL).

Moreover, Plaintiff's ancillary requests for relief are not supported by law because she did not sufficiently allege any damages, financial or otherwise, caused by Emily's attendance at Cary Academy. For example, Plaintiff admits Emily's father would have withheld Emily from her regardless of Emily's attendance at Cary Academy. She also admits that she did not pay for Emily's tuition—rather, Emily's father paid her tuition to Cary Academy. Accordingly, Plaintiff's breach of contract claim is moot.

B. Violation of Parental Rights

[2] Plaintiff alleges section 114A-10 of the North Carolina General Statutes, the Parental Bill of Rights, creates a private cause of action against non-parent third parties which Cary Academy violated. N.C. Gen. Stat. § 114A-10 (2023). We disagree.

The General Assembly can create a private cause of actions by statute. *See Sykes v. Health Network Sol., Inc.*, 372 N.C. 326, 338, 828 S.E.2d 467, 474 (2019) (holding statutes may create a private cause of action). Generally, for a private cause of action to exist, the "the legislature [must have] expressly provided a private cause of action within the statute." *Id.* However, in limited circumstances, a statute may not expressly create a cause of action but may imply one. *Id.* North Carolina has established that "an implicit right of a cause of action exists when a statute requires action from a party, and that party has failed to comply with the statutory mandate." *Sugar Creek Charter Sch., Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 195 N.C. App. 348, 356, 673 S.E.2d 667, 673 (2009).

The Parental Bill of Rights enumerates the various rights, which parents have related to the education and upbringing of their children. *See* N.C. Gen. Stat. § 114A-10 ("A parent has the right to . . . direct the education and care of his or her child."). Here, we are unable to identify anything in section 114A-10 which explicitly authorizes the assertion of a private cause of action for the purpose of enforcing the Parental Bill of Rights. *Id.*

Moreover, we do not discern an implied private cause of action in section 114A-10 either. *Id.* North Carolina has established that "an implicit right of a cause of action exists when a statute requires action from a party, and that party has failed to comply with the statutory mandate." *United Daughters of the Confederacy v. City of Winston-Salem by & through Joines*, 383 N.C. 612, 637–38, 881 S.E.2d 32, 52 (2022) (quoting *Sugar Creek*, 195 N.C. App. at 356, 673 S.E.2d at 673). Here, the Parental Bill of Rights codifies the rights a parent has but does not require any action from a party—as such, there is no implied private cause of action.

Because the Parental Bill of Rights does not explicitly state that there is a private cause of action or imply one exists, we hold the trial court properly dismissed Plaintiff's claim brought under section 114A-110.

C. Aiding and Abetting

[3] Plaintiff also alleges the trial court erred by dismissing her claim for aiding and abetting. Specifically, she alleges Cary Academy aided and abetted Emily's father in breaching a separation agreement between Plaintiff and Emily's father. We disagree.

North Carolina has never recognized aiding and abetting a breach of contract as a valid cause of action. Rather, North Carolina recognizes tortious interference with a contract. *Intersal, Inc. v. Hamilton*, 373

N.C. 89, 100, 834 S.E.2d 404, 413 (2019). To state a colorable claim for tortious interference with a contract, a plaintiff must allege facts sufficient to support the following elements:

> (1) a valid contract between the plaintiff and a third person which confers upon the plaintiff a contractual right against a third person; (2) the defendant knows of the contract; (3) the defendant intentionally induces the third person not to perform the contract; (4) and in doing so acts without justification; (5) resulting in actual damage to the plaintiff.

Id. However, even construing Plaintiff's Complaint liberally, she failed to allege facts sufficient to support a claim for tortious interference with a contract. *Id*. Thus, the trial court properly dismissed Plaintiff's claim.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not err by granting Defendant's motion to dismiss pursuant to Rule 12(b)(6).

AFFIRMED.

Judges TYSON and HAMPSON concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 19 MARCH 2025)

BEACON POINTE OWNERS ASS'N, INC. v. CORRIGAN No. 24-294	Iredell (20CVS2678)	Dismissed
FEHL v. APPALACHIAN STATE UNIV. No. 24-845	Office of Admin. Hearings (23OSP005125)	Affirmed
IN RE A-A.H-T. No. 24-530	Pitt (23JA000150)	Affirmed
IN RE B.M. No. 24-728	Greene (22JA000025) (22JA000026)	Affirmed
IN RE E.B. No. 24-705	Surry (23JA000056)	Affirmed
IN RE J.F. No. 24-553	Cumberland (22JA000121)	Affirmed in Part, Vacated in Part, and Remanded
IN RE R.X.F. No. 23-547	Buncombe (19JT222) (19JT223) (19JT224)	
MUSE v. DAIMLER TRUCKS N. AM. No. 23-1038	N.C. Industrial Commission (19-050540)	Affirmed
SHERRILL v. SIMPSON No. 23-667	Cabarrus (20CVS2064)	Affirmed
STATE v. BAILEY No. 24-324	New Hanover (22CRS51379)	No Error
STATE v. EVANS No. 24-774	Davidson (23CRS484064) (24CRS000046)	Affirmed
STATE v. HATCHER No. 24-555	Moore (21CRS050700)	NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

STATE v. JACKSON No. 24-421	Guilford (20CRS88477)	No Prejudicial Error
STATE v. KEMPTON No. 24-400	Pender (21CRS51080)	No Error
STATE v. LAWRENCE No. 24-558	New Hanover (17CRS060189) (17CRS060191) (17CRS060193) (17CRS060195) (17CRS060290)	Vacated and Remanded for Resentencing.
STATE v. MEJIA No. 24-216	Cleveland (23CRS331184)	Remanded
STATE v. MURPHY No. 24-182	Randolph (16CRS235) (18CRS64)	No Error
STATE v. OLLISON No. 24-499	Craven (20CRS052626)	No Error
TOWNSEND v. N.C. DEP'T OF ADULT CORR. No. 24-659	N.C. Industrial Commission (TA-28672)	Affirmed

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