

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

DECEMBER 5, 2025

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

**THE COURT OF APPEALS
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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FILED 16 APRIL 2025

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ACCOMPLICES AND ACCESSORIES

Accessory after the fact—felony murder—assault with deadly weapon—hit and run—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the State presented substantial evidence to defeat defendant's motion to dismiss the charges. Defendant's behavior after witnessing her co-defendant run over multiple victims more than once with the car gave rise to a reasonable inference that she aided her co-defendant in escaping arrest, detection, or punishment, including by: getting in the car, leaving the scene, abandoning the car some distance from the scene, and taking the car key from the co-defendant so as to conceal the co-defendant's identity as the driver. **State v. Watlington, 584.**

Accessory after the fact—hit and run—more than merely leaving the scene—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not err by denying defendant's motion to dismiss the charges of accessory after the fact to her co-defendant's convictions for hit and run. Contrary to defendant's argument, the convictions were not merely for "leaving the scene," but for defendant's actions in assisting her co-defendant escape

ACCOMPLICES AND ACCESSORIES—Continued

detection, arrest, and punishment by taking the car keys, abandoning the car after driving away from the scene, and concealing her co-defendant's identity as the driver. **State v. Watlington, 584.**

Accessory after the fact—multiple counts—unit of prosecution—rule of lenity inapplicable—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the appellate court determined that, because the charging statute—N.C.G.S. § 14-7—unambiguously set forth the allowable unit of prosecution to be each felony that was committed by the principal and assisted by the accessory after the fact, the rule of lenity did not apply. Therefore, the trial court did not err by denying defendant's motion to dismiss for insufficient evidence that she committed more than one count of accessory after the fact. **State v. Watlington, 584.**

Accessory after the fact—some of principal's judgments arrested—corresponding accessory convictions unsupported—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, where the appellate court had arrested judgment on three of the co-defendant's convictions of hit and run, leaving two undisturbed, the appellate court similarly arrested judgment on three of defendant's convictions of accessory after the fact and remanded for resentencing. **State v. Watlington, 584.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT

Abuse and neglect—adjudicatory findings of fact—ambiguity resolved—In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's adjudicatory findings of fact did not lack clarity about respondent-mother's role in causing the child to undergo three vaginal exams where, although the evidence was unclear about whether respondent-mother or the maternal grandmother took the child to the hospital, the court specifically found that respondent-mother gave permission for each of the exams to be undertaken. **In re K.E.P., 527.**

Abuse and neglect—adjudicatory findings of fact—evidentiary support—In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's findings of fact challenged by respondent-mother were supported by clear, cogent, and convincing evidence, including: (1) child welfare reports that were properly admitted pursuant to the business records exception to the general bar on hearsay; (2) testimony from doctors whose opinions were properly based on out-of-court statements made for the purpose of medical treatment and a written child medical examination (which itself had been admitted); and (3) testimony from a child protective services worker, about which the court made credibility determinations. **In re K.E.P., 527.**

CHILD ABUSE, DEPENDENCY, AND NEGLECT—Continued

Abuse and neglect—adjudicatory findings of fact—no finding of bad faith required—In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical examinations), the district court did not err in failing to determine whether respondent-mother acted in bad faith in making the sexual abuse reports because the Juvenile Code does not require bad faith by a parent for a juvenile adjudication; rather, in determining whether a child is abused or neglected, the circumstances and conditions surrounding the child—not the fault or culpability of a parent—are the determinative factors. **In re K.E.P.**, 527.

Abuse and neglect—child with life-threatening medical condition—parent's ongoing failure to provide proper care—causing injury and risk of serious physical harm—An order adjudicating a father's ten-year-old son as an abused and neglected juvenile was affirmed where the trial court's uncontested factual findings showed that the father was aware of his child's serious medical condition but consistently failed to provide the necessary medical care, which caused injury to the boy and placed him at risk of serious physical harm and even death. Specifically, the court found: the father knew his son had type 1 diabetes, received extensive training on how to medicate his son, and was repeatedly informed of the risks associated with his son's diabetes not being monitored by an adult; the father refused to take responsibility over his son's medical care, instead leaving the child in charge of managing his own diet, blood sugar, and medication schedule; and, as a result, the child was hospitalized several times for diabetic ketoacidosis, which in turn resulted in end organ damage and multiple near-death injuries. **In re A.D.W.**, 515.

CONSTITUTIONAL LAW

North Carolina—Sunday hunting statute—facial challenge—rational basis—In considering a facial challenge to the constitutionality of an amended version of N.C.G.S. § 103-2 (restricting hunting on Sundays to permitted times, locations, methods, and prey) enacted in the same legislative session during which an amendment to the North Carolina constitution (that was ultimately ratified) protecting the right to hunt and fish was introduced, the Court of Appeals affirmed the decision of the three-judge panel that allowed summary judgment in favor of defendants (government entities connected to the passage or enforcement of the statute) after applying rational basis review and noting that the restrictions ensured that, on Sunday mornings: non-hunters could safely enjoy game lands; residents—including churchgoers—could enjoy respite; and migratory bird populations could be preserved. Additionally, by applying the statutory restrictions, North Carolina received compensatory hunting days from the U.S. Fish and Wildlife Service. **Oates v. Berger**, 550.

CONTEMPT

Civil—noncompliance with alimony order—finding of ability to pay sufficient—remand for clerical correction—In holding defendant in civil contempt for his failure to meet his support obligations under an existing alimony order, the trial court's findings of fact—that defendant's income at the time of the contempt hearing exceeded his income at the time the alimony order was entered and that defendant had acted in deliberate disregard of his support obligations—fully supported the court's determination that he had the ability to pay the alimony award for which he was in arrears; however, the matter was remanded for correction of a clerical error in regard to the exact amount of the arrearage. **Icenhour v. Icenhour**, 502.

CRIMINAL LAW

Jury instructions—accessory after the fact—evidence showing assistance—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not plainly err by allowing the jury to consider defendant's possession of the car keys as circumstantial evidence that defendant knowingly assisted her co-defendant in escaping detection, arrest, and punishment. Although the indictments did not allege that defendant possessed the car keys, this evidence provided the means by which defendant assisted her co-defendant after the events that gave rise to the charges. **State v. Watlington, 584.**

Jury instructions—felony murder trial—voluntary manslaughter not supported by evidence—In defendant's trial for felony murder and related offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by failing to instruct the jury on the lesser included offense of voluntary manslaughter because the evidence did not support a reasonable inference that defendant's actions were a result of a passion or heat of blood produced by adequate provocation. Defendant had walked away from an initial altercation in the parking lot, gotten into the car, and paused, then backed over the victim before changing gears and running over the victim a second time. Even if the instruction had been warranted, any error would have been harmless given that the jury convicted defendant of felony murder. **State v. Watlington, 584.**

Jury instructions—felony murder—level of intent required—plain error analysis—In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not plainly err in its jury instruction on felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury, where the court properly told the jury that it could convict defendant if it found that defendant intentionally struck the victims with her vehicle. Contrary to defendant's argument, the trial court's instruction did not allow the jury to convict defendant upon mere culpable or criminal negligence. **State v. Watlington, 584.**

Prosecutor's closing argument—post-crime evasion—reasonable inferences from evidence—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court was not required to intervene ex mero motu during the State's closing argument, in which the prosecutor stated that defendant and her co-defendant were "walking away together." The statement was a reasonable inference from the evidence—provided by officer testimony and body camera footage—that the two defendants were walking near each other when they were apprehended. **State v. Watlington, 584.**

DIVORCE

Alimony—modification—change in circumstances—findings of fact supported by evidence—In denying defendant's motion to modify his alimony payments to plaintiff, the trial court's findings of fact necessary to support its conclusions of law were supported by competent evidence, including findings: (1) that defendant ceased paying full alimony to plaintiff during the relevant time period, as demonstrated by both an exhibit and testimony from plaintiff's counsel's paralegal; (2) regarding the amount of defendant's income in 2020, as shown by defendant's December 2020 paycheck and in light of his testimony that he was furloughed thereafter; (3) that defendant was not worried about making job transitions in the relevant time period, as determined by the court in considering the credibility of defendant's testimony and lack of other evidence; and (4) about defendant's income, which was supported by testimony and exhibits (despite a nonprejudicial clerical error). **Icenhour v. Icenhour, 502.**

Alimony—modification—consideration of debt payments and other expenses—no substantial change of circumstances shown—In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not fail to consider defendant's debt payments and the impact of his live-in girlfriend on his expenses in light of the specific factors set forth in N.C.G.S. § 50-16.3A to determine whether defendant had demonstrated a substantial change of circumstances, as required for modification. Rather, defendant failed to produce any evidence to support the allegations in his motion—including those concerning his purported increased expenses—leaving the court unable to determine whether there had been a substantial change in defendant's expenses. **Icenhour v. Icenhour, 502.**

Alimony—modification—imputed income—credibility and weight of evidence left to the trial court's discretion—In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not err in imputing income to defendant after considering defendant's evidence and testimony about his choice to change jobs to accept a lower-paying position because the court was the sole of judge of credibility and was free to weigh the testimony and evidence in its discretion. **Icenhour v. Icenhour, 502.**

DOMESTIC VIOLENCE

Protective order—complaint improperly incorporated—error not prejudicial—The trial court erred by incorporating plaintiff's complaint as additional findings of fact into its order granting plaintiff a one-year domestic violence protective order (DVPO) because, unlike in an ex parte DVPO, the trial court was required to comply with Civil Procedure Rule 52 by specially making its own findings and, here, the court did not demonstrate any processes of logical reasoning before incorporating the complaint's allegations, not all of which were supported by the evidence. However, the error was not prejudicial because the court's remaining findings—including that defendant bumped into plaintiff with her car, causing injury to plaintiff's finger—supported the conclusion that defendant had committed acts of domestic violence. **Williams v. Cabrera, 611.**

Protective order—discretionary relief—animal custody and treatment—social media ban—The trial court's order granting plaintiff a one-year domestic violence protective order based on an incident in which defendant backed her car into plaintiff was modified and affirmed. First, the trial court did not abuse its discretion by granting plaintiff custody of one of the parties' two emotional support animals and by ordering defendant to refrain from cruelly treating or abusing any animal

DOMESTIC VIOLENCE—Continued

possessed by the parties, where the facts of the case warranted this discretionary relief under N.C.G.S. § 50B-3(a). However, the trial court’s directive banning defendant from posting or commenting about plaintiff on social media was overbroad and arbitrary because it was not reasonably tailored to the facts, and the appellate court ordered this portion stricken from the DVPO. **Williams v. Cabrera, 611.**

EVIDENCE

Possession of drug paraphernalia—motion to dismiss—evidence sufficient—In a prosecution on several drug charges—brought after defendant, upon being stopped for suspected shoplifting, was discovered to possess heroin and a glass pipe—the trial court properly denied defendant’s motion to dismiss the charge of possession of drug paraphernalia where, in the light most favorable to the State, the evidence that defendant intended to use the glass pipe to ingest a controlled substance “other than marijuana” (as required by N.C.G.S. § 90-113.22)—or, more specifically, that defendant had heroin in the same pocket as the pipe (which was visibly charred, indicating prior use), but did not possess marijuana or any other substance for which the pipe could be used—was sufficient to send the issue to the jury. **State v. Bryant, 566.**

HOMICIDE

First-degree felony murder—predicate felony—assault with deadly weapon inflicting serious injury—In defendant’s trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by submitting to the jury the first-degree felony murder charge based on the underlying felony of assault with a deadly weapon inflicting serious injury. Although defendant did not preserve the issue for appellate review, the appellate court considered the issue in its discretion and determined that the assault could serve as a predicate felony for the felony murder charge as a matter of law. Sufficient evidence was presented that defendant had actual intent to commit the assault by first backing the vehicle directly over multiple people, completely running them over; coming to a full stop; pausing; and then shifting the car’s gears and driving forward at full speed over the victims a second time. **State v. Watlington, 584.**

IMMUNITY

Governmental—city firefighter—collision while driving firetruck back to fire station—governmental function—waiver not shown—In a negligence case brought against a city firefighter and the city itself (together, defendants), where the firefighter was driving a firetruck back to the fire station when she collided with a motorcyclist (plaintiff) who sustained serious injuries as a result, including one leg amputation, the trial court erred in partially denying defendants’ motion to dismiss—filed pursuant to Rule 12(b)(2)—based on governmental immunity. To begin with, governmental immunity—which applies to actions taken by municipalities in the course of a governmental function—applied to the firefighter’s conduct because the operation of a firetruck is a governmental function, even when the firetruck is not responding to an emergency. Furthermore, plaintiff failed to show that defendants waived governmental immunity where: (1) the city’s excess liability insurance policies contained language excluding coverage for claims in which immunity applied; (2) the city did not participate in a local government risk pool; and (3) although

IMMUNITY—Continued

the city did pass a resolution establishing requirements that, if met, would result in a limited waiver of immunity, plaintiff failed to meet those requirements. **Smith v. Lane, 560.**

INDICTMENT AND INFORMATION

Indictment—accessory after the fact—no fatal variance from evidence at trial—In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, there was no fatal variance between the indictments and the evidence presented at trial. Evidence that defendant possessed the car keys after the incident—an allegation that was not included in the indictments—demonstrated the means by which defendant aided her co-defendant in escaping detection, arrest, and punishment. **State v. Watlington, 584.**

MOTOR VEHICLES

Murder trial—multiple counts of hit and run—unit of prosecution—rule of lenity—In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, although defendant was convicted of four counts of felonious hit and run resulting in serious bodily injury or death and one count of misdemeanor hit and run based on the number of victims, since the charging statute—N.C.G.S. § 20-166—was ambiguous regarding the allowable unit of prosecution, the appellate court applied the rule of lenity and held that the unit of prosecution under the statute was the number of crashes from which the defendant fled and not the number of victims. Since defendant had fled from two crashes, she could only be convicted of two violations of the statute; therefore, the appellate court arrested judgment on three of the hit-and-run convictions and remanded to the trial court for resentencing. **State v. Watlington, 584.**

SEARCH AND SEIZURE

Warrantless search of vehicle—implied consent—wallet on top of car excluded—In a prosecution for possession of methamphetamine, which was based on drugs found inside defendant's wallet during a warrantless search of defendant's vehicle while in a national forest, the trial court erroneously denied defendant's motion to suppress the drugs. Although wildlife officers had defendant's implied consent to search the vehicle (because defendant did not object after her companion, who had been driving the car and thus had control over it, gave explicit consent for the search in her presence and hearing and because defendant tried to assist the officers as they began their search), that consent did not extend, absent clear and unequivocal evidence, to search the wallet, which the trial court found had been placed on top of the car by defendant at some point during the encounter and which was not attached or tethered to the car in any way. Since the only evidence supporting the offense was found inside the wallet, and the trial court did not make any findings regarding whether defendant consented to the wallet being searched, defendant's conviction was vacated and the matter was remanded for further proceedings. **State v. Peters, 572.**

SENTENCING

Life imprisonment without parole—judicial review after 25 years served—statutory requirements met—After defendant had served 25 years of his life without parole sentence for first-degree murder, thereby becoming eligible for review of his sentence pursuant to N.C.G.S. § 15A-1380.5, the trial court's recommendation not to alter or commute defendant's sentence was affirmed, where the court's review process followed all of the statutory requirements and where its recommendation was reasonably supported by the record. The trial court did not abuse its discretion by declining to hold a hearing on the matter or to enter written factual findings supporting its recommendation, as neither step was required under section 15A-1380.5. Further, the court made it clear that it had considered the trial record, defendant's record from the Department of Corrections, the risk he posed to society, and other relevant information when reviewing defendant's sentence. **State v. Walker, 579.**

TERMINATION OF PARENTAL RIGHTS

Indian Child Welfare Act—inquiry into child's heritage—"at the commencement of the proceeding"—hearing held after twelve continuances—An order terminating a father's parental rights in his son—and finding that the child was not an "Indian child" for purposes of the Indian Child Welfare Act (ICWA)—was affirmed because, although the case was continued twelve times after the termination petition was filed, the trial court had complied with ICWA's requirement to inquire into the child's possible Indian heritage "at the commencement of the proceeding," where it conducted the inquiry during a pre-trial hearing, which—because it was the first hearing held after the filing of the petition and after all twelve continuances—provided the first opportunity for the court to conduct the inquiry. **In re L.Q., 540.**

Initial hearing on petition—continued for more than 90 days—father's failure to petition for writ of mandamus—In a termination of parental rights (TPR) case, where the initial hearing on the petition to terminate a father's rights did not occur until seventeen months after the petition was filed, since the trial court had continued the case twelve times (including for reasons related to the COVID-19 pandemic), the father failed to file a petition for a writ of mandamus while the TPR petition was pending and therefore missed his opportunity to seek a remedy for what he argued was a violation of N.C.G.S. § 7B-1109(d) (providing that courts may continue an initial hearing on a TPR petition "for up to 90 days" after the petition's filing). **In re L.Q., 540.**

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.

ICENHOUR v. ICENHOUR

[298 N.C. App. 502 (2025)]

JEANNIE ROBERTS ICENHOUR, PLAINTIFF

v.

JEFFREY DAVID ICENHOUR, DEFENDANT

No. COA24-601

Filed 16 April 2025

1. Divorce—alimony—modification—consideration of debt payments and other expenses—no substantial change of circumstances shown

In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not fail to consider defendant's debt payments and the impact of his live-in girlfriend on his expenses in light of the specific factors set forth in N.C.G.S. § 50-16.3A to determine whether defendant had demonstrated a substantial change of circumstances, as required for modification. Rather, defendant failed to produce any evidence to support the allegations in his motion—including those concerning his purported increased expenses—leaving the court unable to determine whether there had been a substantial change in defendant's expenses.

2. Divorce—alimony—modification—change in circumstances—findings of fact supported by evidence

In denying defendant's motion to modify his alimony payments to plaintiff, the trial court's findings of fact necessary to support its conclusions of law were supported by competent evidence, including findings: (1) that defendant ceased paying full alimony to plaintiff during the relevant time period, as demonstrated by both an exhibit and testimony from plaintiff's counsel's paralegal; (2) regarding the amount of defendant's income in 2020, as shown by defendant's December 2020 paycheck and in light of his testimony that he was furloughed thereafter; (3) that defendant was not worried about making job transitions in the relevant time period, as determined by the court in considering the credibility of defendant's testimony and lack of other evidence; and (4) about defendant's income, which was supported by testimony and exhibits (despite a nonprejudicial clerical error).

3. Divorce—alimony—modification—imputed income—credibility and weight of evidence left to the trial court's discretion

In denying defendant's motion to modify his alimony payments to plaintiff, the trial court did not err in imputing income to defendant after considering defendant's evidence and testimony about

ICENHOUR v. ICENHOUR

[298 N.C. App. 502 (2025)]

his choice to change jobs to accept a lower-paying position because the court was the sole of judge of credibility and was free to weigh the testimony and evidence in its discretion.

4. Contempt—civil—noncompliance with alimony order—finding of ability to pay sufficient—remand for clerical correction

In holding defendant in civil contempt for his failure to meet his support obligations under an existing alimony order, the trial court's findings of fact—that defendant's income at the time of the contempt hearing exceeded his income at the time the alimony order was entered and that defendant had acted in deliberate disregard of his support obligations—fully supported the court's determination that he had the ability to pay the alimony award for which he was in arrears; however, the matter was remanded for correction of a clerical error in regard to the exact amount of the arrearage.

Appeal by Defendant from an order entered 16 April 2024 by Judge Richard S. Holloway in Caldwell County District Court. Heard in the Court of Appeals 28 January 2025.

Wesley E. Starnes, for Plaintiff-Appellee.

Wilson, Lackey, Rohr & Hall, P.C., by Destin C. Hall, for Defendant-Appellant.

WOOD, Judge.

Defendant appeals from an order entered 16 April 2024 finding there had not been a substantial change in circumstances to warrant modifying Defendant's alimony obligation and finding Defendant in contempt for failure to pay alimony as ordered. Defendant contends the trial court erred by failing to consider Defendant's debt payments and other relevant ultimate facts, by making findings of fact regarding Defendant's income and reason for changing employment, by imputing income to Defendant, and by finding Defendant in contempt.

I. Factual and Procedural Background

Plaintiff and Defendant were married on 20 June 1987, separated on 23 April 2011, and divorced on 4 June 2014. The parties entered into a consent judgment on 10 January 2012 which resolved all issues, including spousal support and equitable distribution of the parties' marital property. Defendant was ordered to pay \$1,800.00 per month in alimony

ICENHOUR v. ICENHOUR

[298 N.C. App. 502 (2025)]

to Plaintiff, beginning 1 January 2012, until terminated by one of the statutory events in N.C. Gen. Stat. § 50-16.9.

In 2014, Defendant filed a motion to modify alimony which was denied by the trial court. On 15 February 2018, Defendant filed another motion to modify alimony alleging that his income had been reduced while his expenses were increasing. Plaintiff sought and received a show cause order on 10 April 2019 based on Defendant's alleged failure to fully pay his monthly alimony obligations starting in January of 2019.

On 17 January 2020, an Order Amending Alimony was entered, modifying Defendant's monthly alimony obligation to Plaintiff to \$1,700.00 effective 1 January 2020. Plaintiff voluntarily dismissed her motion for contempt.

On 25 August 2020 Plaintiff filed another motion for contempt and show cause order. A corresponding show cause order was entered the same day.

On 29 December 2020, Defendant filed a motion to modify alimony. The parties' motions came on for hearing on 29 March 2022. On 6 June 2022, the trial court entered orders modifying Defendant's alimony obligation to \$600.00 per month, finding Defendant in civil contempt of the 17 January 2020 order, and requiring Defendant to pay \$100.00 per month towards the arrearage and to pay \$1,000.00 to Plaintiff for attorney's fees at the rate of \$50.00 per month. Both parties appealed from the 6 June 2022 order.

In an unpublished opinion issued 1 August 2023, this Court held that the Alimony Order lacked "adequate findings to support its legal conclusions" and set aside the order and remanded the matter to the trial court for further proceedings. *Icenhour v. Icenhour*, 290 N.C. App. 126, 889 S.E.2d 535 (2023) (unpublished). This Court noted that "[a] conclusion of a substantial change in circumstances based solely on a change in income is inadequate and erroneous. Instead, the extant overall circumstances of the parties must be compared with those at the time of the award to determine whether a substantial change has occurred" *Id.* (cleaned up).

Upon return to the trial court, the court determined, in consultation with counsel for each party, that it would not take new evidence but would decide the matter on the record and evidence previously presented. On 16 April 2024, the trial court issued an Order on Remand. The trial court denied Defendant's motion to modify the alimony award finding Defendant failed to establish a substantial change in circumstances

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to warrant such a modification. In addition, the trial court found Defendant in contempt and ordered him to pay an extra \$100.00 per month until the arrearage of \$36,600.00 is paid in full. On remand the trial court made twenty-nine findings of fact to support its six conclusions of law. Defendant appeals from this order.

II. Standard of Review

During appellate review of both alimony modification and contempt orders, “the standard . . . 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.” *Kelly v. Kelly*, 228 N.C. App. 600, 601, 747 S.E.2d 268, 273 (2013) (cleaned up); *see also Spears v. Spears*, 245 N.C. App. 260, 273, 784 S.E.2d 485, 494 (2016). Whether the findings of fact support the legal conclusion of a substantial change under the circumstances is reviewed *de novo*. *Peeler v. Joseph*, 263 N.C. App. 198, 201, 823 S.E.2d 155, 158 (2018). The alimony determination, if supported by adequate findings and conclusions, is reviewed for abuse of discretion. *Dodson v. Dodson*, 190 N.C. App. 412, 415, 660 S.E.2d 93, 96 (2008).

III. Analysis

On appeal, Defendant raises four issues: whether the trial court committed reversible error by failing to consider Defendant’s debt payments and other relevant ultimate facts; whether the trial court erred in making findings of fact regarding Defendant’s income and reason for changing employment; whether the trial court erred by imputing income to Defendant; and whether the trial court erred in finding Defendant in contempt.

A. Consideration of Debt Payments and Ultimate Facts

[1] In North Carolina, N.C. Gen. Stat. § 50-16.9 provides for the modification of alimony. “An order of a court of this State for alimony or post-separation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested.” N.C. Gen. Stat. § 50-16.9 (2024). When establishing an alimony award, the trial court must consider specific statutory factors. N.C. Gen. Stat. § 50-16.3A(b) (2024). These same factors are to be considered when evaluating a substantial change in that award. *Cunningham v. Cunningham*, 345 N.C. 430, 435, 480 S.E.2d 403, 406 (1997). Not every factor is required in all cases, but “the court must provide sufficient detail to satisfy a reviewing court that it has considered ‘all relevant factors.’” *Rhew v. Rhew*, 138 N.C. App. 467, 472, 531 S.E.2d 471, 474 (2000). The resulting

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order must find “the ultimate facts which were raised by the defendant’s motion to modify. . .” *Kelly v. Kelly*, 228 N.C. App. 600, 608, 747 S.E.2d 268, 276 (2013). “As a general rule, the changed circumstances necessary for modification of an alimony order must relate to the financial needs of the dependent spouse or the supporting spouse’s ability to pay.” *Cunningham* at 436, 480 S.E.2d at 406. There must be some “distinct and definite change in the financial circumstances of the parties.” *Id.*

However, it is error to modify alimony based on only one factor, such as a change in a party’s income. Rather, the present overall circumstances of the parties must be compared with the circumstances existing at the time of the original award in order to determine if there has been a substantial change.

Dodson v Dodson, 190 N.C. App. 412, 416, 660 S.E.2d 93, 96 (2008) (cleaned up).

Defendant contends the trial court failed to consider his debt payments, other expenses and the impact of Defendant’s girlfriend on his expenses as relevant “ultimate facts.” The trial court made the following findings to address these issues:

25. Defendant’s expenses at the time of the order were \$3,569.50. Defendant contends that his expenses at the time of the hearing were \$4,043.46, at most a modest contention of change. In addition, Defendant acknowledged his girlfriend resided in his home. Defendant did not offer sufficient credible evidence from which the [c]ourt could determine the impact of Defendant’s girlfriend upon his expenses. As such, the [c]ourt is unable to determine whether there has been a change in Defendant’s expenses from the evidence and the record.

The trial court addressed Defendant’s expenses and determined that Defendant’s failure to present adequate evidence to support his claim made the ultimate determination of a change in expenses impossible. Defendant testified that his girlfriend lives with him and is employed but does not contribute consistently to payment of the bills. He did not produce evidence regarding her income, her contribution to the household expenses, or an increase in expenses related to her residing with him. He stated she “may” pay some of the light bill if he is short on money. There was no other testimony or evidence presented to determine what increase in expenses was incurred because of her presence in the home such as increases for water, electricity, food or other expenses, leaving

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the trial court unable to determine any impact caused by her residing in the residence. Therefore, the trial court was unable to determine whether there was a substantial change in Defendant's expenses. "The movant bears the burden of showing a change of circumstances in order to modify . . . alimony." *Groseclose v. Groseclose*, 291 N.C. App. 409, 413, 896 S.E.2d 155, 160 (2023) (cleaned up). If Defendant has not provided the necessary information, then he has failed to meet his burden.

B. Errors in Findings of Fact

[2] Defendant next argues that the trial court's findings of fact 14, 15, 16, 20, 21, 22, 23 and 24 were not supported by competent evidence and cannot be relied upon to support the conclusions of law.

"[F]indings of fact made by the trial judge are conclusive on appeal if supported by competent evidence, even if . . . there is evidence to the contrary.'" *Sisk v. Transylvania Cmty. Hosp.*, 364 N.C. 172, 179, 695 S.E.2d 429, 434 (2010) (cleaned up).

[W]hen an appellate court determines that a finding of fact is not supported by sufficient evidence, the court must disregard that finding and examine whether the remaining findings support the trial court's conclusions of law. If the remaining findings support the trial court's conclusions, the appellate court must affirm, notwithstanding the existence of some invalid findings.

In re A.J., 386 N.C. 409, 410, 904 S.E.2d 707, 710 (2024).

1. Finding 14

Finding of fact 14 states, "In 2020, Defendant ceased paying his full amount of alimony to the Plaintiff. He made \$5,200.00 in payments during the relevant time-period (\$1,000.00 + \$1,800.00 + \$900.00 + \$500.00 + \$1,000.00 = \$5,200.00)." Plaintiff's Exhibit 1 and testimony from Plaintiff's counsel's paralegal illustrate that in 2020 Defendant made \$1,700.00 payments in each of January, February, and March. However, when he "ceased paying in full" in April, payments during that "relevant time period" included a \$1,000.00 payment in April 2020; an \$1,800.00 payment in May 2020; a \$900.00 payment in June 2020; a \$500.00 payment in January 2021; and a \$1,000.00 payment in February 2021 totaling \$5,200.00 in payments since he stopped paying in full. In addition, the calculation of total arrearage after credit for partial payments is addressed in findings of fact 27 and 28 and comports with the totals on Plaintiff's Exhibit 1. This finding of fact is clearly supported.

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2. Finding 15

Finding of fact 15 states, “In 2020, the year of the January 17th, 2020, order, Defendant earned \$67,106.00 for the year which equals \$5,592.17. He was working at Richard Petty Motor Sports. He was furloughed for a time and upon his return his income was reduced.”

The \$67,106.00 noted by the trial court is the year-to-date income found on the 4 December 2020 paycheck from Richard Petty Motor Sports submitted as Plaintiff’s Exhibit 4. Defendant’s testimony indicated this would have been his last paycheck in 2020 due to his furlough and eventual layoff. The trial court determined a monthly amount of \$5,592.17 by dividing the year-to-date income reported on the 4 December 2020 paystub by twelve months.

Further, the trial court stated that the year-to-date total of \$67,106.00 was in fact his 2020 income which had been impacted by his furlough during COVID. Defendant’s testimony concerning his termination from Richard Petty Motor Sports due to the pandemic as well as his receipt of an unknown amount in unemployment payments from the end of 2020 through the beginning of 2021 support this determination.

3. Findings of Fact 16 and 24

Defendant contends that together findings of fact 16 and 24 inaccurately imply that he chose to leave Richard Petty Motor Sports and had no concerns about unemployment. The findings at issue read:

16. Defendant changed employment, in February of 2021, when he went to work at Special Event Transportation, where he worked for three weeks.

...

24. The Court has considered the ease with which Defendant was able to change employment. He was employed at Richard Petty Motor Sports at the time of the last order in January 2020. He left this employment and went to Special Event Transportation, which he left to take the job at Big Machine. He then left Big Machine to work at Big Wheels in November 2021[.] [The Court also considered whether] his concerns about finding other employment were anything other than speculation.

Defendant testified that he was first furloughed and then laid off from Richard Petty Motor Sports during the COVID pandemic in November 2020 and was out of work until February 2021 when he found employment

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at Special Event Transportation (“SET”). However, he did not provide any documentation to evidence his unemployment payments. He then testified that he stayed at SET for only three weeks because he acquired a higher paying job at Big Machine. Finally, Defendant reported that in November 2021 he transitioned from Big Machine to Big Wheels because based on his twenty years of experience in the racing industry he was concerned that Big Machine would not have a team in the coming year, and he would again be out of a job.

The trial court’s finding of fact 16 directly reflects Defendant’s testimony regarding his limited time at SET. Defendant testified, he was at SET for “three weeks or so till the job at Big Machine came open.” Therefore, Defendant’s own testimony is competent evidence supporting the trial court’s finding.

Similarly, the employment timeline illustrated in finding of fact 24 is also supported by Defendant’s testimony. However, Defendant contends that the findings concerning the “ease” of his employment transitions and “speculation” about job security are not supported by competent evidence. During his testimony, Defendant made a vague statement that he had “some concern” about job security but offered no evidence or corroborating testimony as to why he chose to leave his higher paying job at Big Machine. This Court has consistently held that the trial court is “the sole judge of the credibility and weight of the evidence, and it [is] free to accept or reject the testimony of a witness, either in whole or in part, depending solely upon whether it believes or disbelieves the same.” *State v. Johnson*, 378 N.C. 236, 242, 861 S.E.2d 474, 482 (2021) (cleaned up). It was entirely within the trial court’s discretion to disbelieve Defendant’s reasoning for leaving and question the frequency of his employment transitions. We conclude that findings of fact 16 and 24 were supported by competent evidence.

4. Findings of Fact 20, 21, 22 and 23

Defendant challenges the trial court’s findings of fact 20, 21, 22 and 23 all of which address Defendant’s income.

20. At Big Wheels, Defendant earned \$5,706.20 per month.

21. Defendant’s income in 2021, the year before the filing of his motion was \$58,774.51 while at Big Machine Racing, LLC; \$4,078.50 while at Special Event Transportation, Inc.; \$1,835.83 while at Big Wheels Trucking, LLC; and an unknown amount in unemployment benefits. Thus,

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Defendant's income for 2021 was \$64,688.84, plus an unknown amount of unemployment. The Court is without sufficient information to find a change in Defendant's income in 2021, without the evidence concerning his unemployment benefits. Even without the unemployment benefits, Defendant's income in 2021 had not changed substantially from his income at the time of the entry of the last order.

22. What is clear to the Court is that Defendant's income has remained steady since the entry of the January 17th, 2020 order, with income of 2020: \$5,592.17 per month: \$5390.74 per month plus an unknown amount of unemployment; and 2022: \$5706.20 per month. The evidence is that even with his brief unemployment, Defendant's income had changed modestly and the Court finds so.

23. Defendant's decision to leave Big Machine where he earned \$6,101.33 per month to take employment with Big Wheels where he earned \$5,706.20 per month, without any factual or well-reasoned basis demonstrates that Defendant acted in deliberate disregard for his support obligations. Defendant's income of \$6,101.33 per month exceeded his earnings at the time of the prior order that he seeks to modify, when his income was \$5,592.17 per month.

In finding 20 and 23, the trial court found as fact that Defendant's income at Big Wheels Trucking was \$5,706.20 per month. Both Defendant and Plaintiff entered Defendant's paystubs into evidence and Defendant testified to them on both direct and cross-examination. The same paystub also reports \$735.00 in miscellaneous reimbursement. Absent any evidence concerning the purpose of the reimbursement, the trial court was within its discretion to include it in its calculation of Defendant's income.¹

Plaintiff concedes that finding of fact 21 contains a typographical or clerical error. The trial court stated, "Defendant's income in 2021, the year *before* the filing of this motion." However, 2021 was the year after this motion was filed, 29 December 2020. The trial court correctly identified the filing date in finding of fact 12 stating "Defendant filed a motion

1. The year-to-date income of \$13,749.96 + \$735.00 in miscellaneous equals \$14,484.96. \$14,484.96 divided by 11 weeks equals \$1,316.81 per week. \$1,316.81 multiplied by 52 weeks equals \$68,474.35 per year or \$5,706.20 per month.

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to modify the order for alimony on December 29th, 2020.” Defendant makes no showing as to how he is harmed by this clerical error.

Appellate courts do not set aside verdicts and judgments for technical or harmless error. It must appear that the error . . . was material and prejudicial, amounting to a denial of some substantial right. The appellant thus bears the burden of showing not only that an error was committed below, but also that such error was prejudicial—meaning that there was a reasonable possibility that, but for the error, the outcome would have been different.

Wiley v. L3 Commc’ns Vertex Aerospace, 251 N.C. App. 354, 366, 795 S.E.2d 580, 589 (2016) (quoting *Faucette v. 6303 Carmel Road, LLC*, 242 N.C. App. 267, 274, 775 S.E.2d 316, 323 (2015)). We conclude this clerical error does not constitute prejudicial error.

Defendant also contends there was error in the trial court’s finding that the court included nontaxable income in its determination of the Defendant’s income from SET. Defendant’s W-2 from 2021 clearly states that his gross income was \$4,078.50 and this Court has consistently held that gross income can be appropriate for determining a party’s ability to meet alimony payments. *Britt v. Britt*, 29 N.C. App. 463, 471, 271 S.E.2d 921, 927 (1980). It is within the trial court’s sound discretion to have utilized Defendant’s reported gross income for its calculation.

Finding 22 states that Defendant’s income had been relatively steady during the time between the 2020 and 2022 orders. As discussed *supra*, this finding of fact is well supported. Defendant earned \$5,592.17 per month plus unknown unemployment benefits in 2020, \$5,309.74 per month in 2021 plus unknown unemployment benefits, and \$5,706.20 per month in 2022. “Minor fluctuations in income are a common occurrence and the likelihood that they would occur must have been considered by the court when it entered a decree for alimony.” *Britt* at 472, 271 S.E.2d at 927, *see also Kelly* at 604, 747 S.E.2d at 274.

All contested findings of fact are supported by competent evidence. The findings of fact in turn support the trial court’s conclusion of law that Defendant failed to establish a substantial change in circumstances to warrant a modification of the alimony.

C. Imputing Income

[3] Defendant contends that the trial court erred in imputing income to him when Plaintiff failed to prove bad faith on the part of the Defendant.

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The trial court may refuse to modify support and/or alimony on the basis of an individual's earning capacity instead of his actual income when the evidence presented to the trial court shows that a husband has disregarded his marital and parental obligations by: (1) failing to exercise his reasonable capacity to earn, (2) deliberately avoiding his family's financial responsibilities, (3) *acting in deliberate disregard for his support obligations*, (4) refusing to seek or to accept gainful employment, (5) willfully refusing to secure or take a job, (6) deliberately not applying himself to his business, (7) intentionally depressing his income to an artificial low, or (8) intentionally leaving his employment to go into another business.

Wolf v. Wolf, 151 N.C. App. 523, 526-27, 566 S.E.2d 516, 518-19 (2002) (cleaned up) (emphasis added); *see also Sternola v. Aljian*, 293 N.C. App. 166, 172, 900 S.E.2d 139, 144 (2024).

In finding of fact 23, the trial court found “Defendant’s decision to leave Big Machine where he earned \$6,101.33 per month to take employment with Big Wheels where he earned \$5,706.20 per month, without any factual or well-reasoned basis demonstrates that Defendant *acted in deliberate disregard for his support obligations*. . . .” The trial court also found, “Defendant testified that his decision to change employment was based upon concerns for his employment the next year. Defendant gave no fact or reasoning justifying his alleged concerns.” Finally, the trial court made note of the “ease with which” Defendant was able to change employment and that his concerns about finding other employment were not “anything other than speculation.”

Defendant’s testimony was the only evidence offered to explain why he chose to change jobs.

Q. Why did you – why’d you leave that job?

...

THE WITNESS: My understanding of the reasoning is, we were – they didn’t know if they were going to proceed this year[] with the race team or not.

Q. Okay. And how long have you worked in this general business of – of hauling racecars?

A. Nineteen, twenty years.

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Q. And in that business, is it common for these haulers, from year to year, for it to be uncertain. . .

A. Yes.

Q. . . . as to whether they're going to go the next year?

A. Yes. Yes, it is.

Q. And -- and did you have some concern with this job that you were going to be without a job. . .

A. Yes.

Q. . . . come race season?

A. Yes.

The trial court is the sole judge of credibility and is free to weigh the testimony in its discretion. *State v. Johnson*, 378 N.C. 236, 242, 861 S.E.2d 474, 482 (2021) (cleaned up). The trial court considered the available information regarding Defendant's choice to change jobs and determined Defendant made speculative choices of employment in disregard of his obligation to pay alimony. Therefore, the trial court was free to impute income based on his proven earning capacity of \$6,101.33 per month.

D. Contempt

[4] Finally, Defendant contends that because he is unable to comply with the alimony order he should not be held in contempt. Additionally, he notes calculation errors in the dollar amount of arrears.

"Civil contempt is employed to coerce contumacious defendants into compliance with the orders of the court." *Bossian v. Bossian*, 284 N.C. App. 208, 214, 875 S.E.2d 570, 576 (2022). Pursuant to N.C. Gen. Stat. § 5A-21(a),

"[f]ailure to comply with a court order is a continuing civil contempt as long as:

(1) The order remains in force;

(2) The purpose of the order may still be served by compliance with the order;

(2a) The noncompliance by the person to whom the order is directed is willful; and

(3) The person to whom the order is directed is able to comply with the order or is able to take reasonable

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measures that would enable the person to comply with the order.

N.C. Gen. Stat. § 5A-21(a) (2024).

“It is well established that the trial court cannot hold a defendant in contempt unless the court first has sufficient evidence to support a factual finding that the defendant had the ability to pay, in addition to all other required findings to support contempt.” *Groseclose* at 427-28, 896 S.E.2d at 168. The trial court made a sufficient finding that “Defendant’s income of \$6,101.33 per month exceeded his earning at the time of the prior order that he seeks to modify, when his income was \$5,592.17 per month.” That, in addition to the findings that Defendant “acted in deliberate disregard for his support obligations” support the trial court’s conclusion that Defendant is in civil contempt.

Plaintiff concedes that a clerical miscalculation of the amount Defendant is in arrears exists. Clerical mistakes are “mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission . . .” N.C. Gen. Stat. § 1A-1, R. Civ. P. 60. “A clerical error is defined as an error resulting from a minor mistake or inadvertence, especially in writing or copying something on the record, and not from judicial reasoning or determination.” *Face v. Face*, 296 N.C. App. 306, 322, 909 S.E.2d 521, 532 (2024) (cleaned up). Here, the trial court stated Defendant owed an arrearage of \$36,600.00. However, from January 2020 through 22 March 2022 Defendant owed \$1,700.00 per month, which totals \$45,900.00. As stated in finding of fact 27, Defendant had paid \$10,300.00 during that time which left a total of \$35,600.00 unpaid. Accordingly, we remand to the trial court for correction of the arrearage to the amount of \$35,600.00.

IV. Conclusion

For the foregoing reasons we affirm the trial court’s determination that Defendant failed to prove a substantial change of circumstances to warrant modification of the alimony order. However, we remand for correction of the clerical error in the calculation of arrearage which shall be corrected to reflect an arrearage of \$35,600.00 as of 6 June 2022. It is so ordered.

AFFIRMED AND REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judge COLLINS and Judge GRIFFIN concur.

IN RE A.D.W.

[298 N.C. App. 515 (2025)]

IN THE MATTER OF A.D.W.

No. COA24-868

Filed 16 April 2025

Child Abuse, Dependency, and Neglect—abuse and neglect—child with life-threatening medical condition—parent’s ongoing failure to provide proper care—causing injury and risk of serious physical harm

An order adjudicating a father’s ten-year-old son as an abused and neglected juvenile was affirmed where the trial court’s uncontested factual findings showed that the father was aware of his child’s serious medical condition but consistently failed to provide the necessary medical care, which caused injury to the boy and placed him at risk of serious physical harm and even death. Specifically, the court found: the father knew his son had type 1 diabetes, received extensive training on how to medicate his son, and was repeatedly informed of the risks associated with his son’s diabetes not being monitored by an adult; the father refused to take responsibility over his son’s medical care, instead leaving the child in charge of managing his own diet, blood sugar, and medication schedule; and, as a result, the child was hospitalized several times for diabetic keto-acidosis, which in turn resulted in end organ damage and multiple near-death injuries.

Appeal by Respondent-Father from orders entered on 24 June 2024 by Judge David E. Sipprell in Forsyth County District Court. Heard in the Court of Appeals 19 March 2025.

Patricia M. Propheter for Respondent-Father Appellant.

Forsyth County Department of Social Services, by Deputy County Attorney Theresa A. Boucher, for Petitioner-Appellee.

Poyner Spruill LLP, by Rohun S. Shah, for Guardian ad Litem, Petitioner-Appellee.

WOOD, Judge.

Respondent-Father (“Father”) appeals from the trial court’s adjudication and disposition orders. The trial court adjudicated the juvenile

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abused and neglected and entered a disposition identifying reunification as the permanent plan. On appeal, Father argues the trial court erred by adjudicating the juvenile abused when evidence failed to prove abuse as defined by N.C. Gen. Stat. § 7B-101(1)(b) and by adjudicating the juvenile neglected where Father did his best to control the juvenile's diabetes. For the reasons set forth below, we affirm the trial court's order.

I. Factual and Procedural Background

Andrew¹ was born on 23 May 2013. He lived with Mother, Father, and his siblings after birth until he and his siblings were removed from the home. From 5 July 2013 until March of 2015, Andrew and his siblings were in the custody of Forsyth County Department of Social Services ("DSS") due to concerns with Mother's mental health and her ability to care for the children as well as Father's inability to keep the children safe from Mother. In 2014, at about thirteen months old, Andrew was diagnosed with Type 1 Diabetes. After Andrew returned to his parents' care in March 2015, DSS received ten Child Protective Services reports necessitating family assessments resulting in case findings of services needed three times for in-home services to work with the family to address the concerns.

On 19 March 2023, DSS received a report alleging improper care of Andrew's medical needs after Andrew was admitted to the Intensive Care Unit ("ICU") with a blood sugar level of 966. The report alleged that the parents were not providing appropriate medical care and were expecting nine-year-old Andrew to manage his own blood sugar and medication.

On 20 March 2023, a DSS social worker met with Andrew, his parents, and hospital staff. It was noted that Andrew had been hospitalized three times in the previous six months due to diabetic ketoacidosis. In addition, hospital staff determined he also has lipohypertrophy which impacts his body's ability to move insulin. Parents confirmed that Andrew was responsible for managing his diabetes and blamed him for his poor eating habits. Mother also reported that she has Bi-Polar Disorder and Schizophrenia for which she was not seeking treatment. After the 20 March meeting, Mother relocated to Mississippi, leaving Andrew in Father's care. Mother has not been actively involved in the family since that time and is not a party to this appeal.

During the Child Protective Services Family Assessment Father acknowledged that the power in the home had been cut off and that he

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

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was unemployed. The family's sole income was Andrew's Social Security income. Father refused support offered by the social worker including substance abuse treatment and help with transportation. Father continued to miss Andrew's medical appointments and Andrew was again hospitalized for diabetic ketoacidosis.

On 11 July 2023, the case was transferred to in-home services under a new social worker, Phillip Wilson ("Wilson"). At that time DSS recommended that Father complete drug screenings, restore and maintain electricity and utilities, attend parenting classes, and follow medical directives from Andrew's providers for the care and management of Andrew's diabetes. However, Father continued to miss medical appointments for Andrew including those on 14 July, 25 July, and 14 August 2023.

Also, on 14 August, Father tested positive for cocaine before entering into a Family Services Agreement in which he agreed to comply with the recommendations previously made by his DSS social worker.

On 5 October 2023, a Child and Family Team Meeting was held. Social worker Wilson and Father discussed a Temporary Safety Provider (TSP) for Andrew. Father agreed that Andrew would stay with a neighbor.

On 2 October, 11 October, and 23 October 2023 Andrew was admitted to the hospital due to diabetic ketoacidosis and elevated blood sugar. During the 23 October admission hospital staff reported that Father told Andrew, "you should have told me last night you needed insulin."

On 27 October 2023, Social Worker Hinson met with Andrew and the neighbor while Andrew remained hospitalized. Andrew reported he was still responsible for his medication, but it would be good to have an adult's help. The neighbor acknowledged that she was caring for Andrew but did not seem to understand her responsibility for his medical needs. Hinson explained the necessity of managing the juvenile's diet, medications and medical appointments and the neighbor stated she understood and would comply. Father requested a Dexcom 7 device, a continuous glucose monitoring system, be provided by hospital and DSS staff to assist in managing Andrew's diabetes. On 1 November 2023, Andrew was discharged from the hospital into the neighbor's care.

On 30 November 2023, Andrew completed a Child Medical Exam (CME) with Dr. Meggan Goodpasture. The doctor found that Andrew has had many admissions secondary to medical neglect. She also stated that "excessive training and education for all family members involved including father has been documented repeatedly in the medical record" and "[Andrew] continues to be at tremendous risk for serious bodily

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harm and death due to repeated medical neglect as documented over the years and reported to CPS in his medical record. His medical needs due to his [diabetes] are tremendous and require consistent and thorough care.” Father was present for the CME but appeared to be under the influence of substances. He could not answer simple questions like how old he was or how many children he had. Dr. Goodpasture determined that Andrew’s life was at risk because his diabetes was not being managed well.

Also on 30 November 2023, DSS received a second report alleging improper discipline, improper medical and remedial care, injurious environment and domestic violence. This report stemmed from an incident that occurred on 26 November 2023. Reportedly, Father was angry at Andrew because his blood sugar was high, so he hit him on the arm and leg with his hand, grabbed him by the shirt, threw him on the couch and slapped him on the head. Father was cursing and yelling during the incident. Andrew also reported that he did not feel safe with the neighbor because “she is fighting with a grown up and they use their bodies and words.”

On 1 December 2023, Hinson met with Andrew and Father. Andrew was withdrawn during the meeting. Father reported that the incident in question did not occur as described, however he did admit to hitting and yelling at Andrew. He stated that he did not know how to get through to Andrew but if Andrew did not do what he needed to he was going to have to leave his dad and had nowhere else to go. The following week Hinson met with the neighbor who stated Andrew had reported to her the incident of being hit on his head by his father. Also, she admitted Andrew had been going to Father’s house unsupervised.

On 27 December 2023, a Child and Family Team meeting was held with Father via teleconference regarding his non-compliance with the in-home services plan. Father became frustrated during the meeting and refused to engage. He stated that it was not his fault that Andrew sneaks food and eats food when he goes out in the neighborhood. When it was discussed that Andrew needs supervision, Father stated to the social worker, people need to sleep, and he cannot watch him all the time. Father acknowledged that he had hit Andrew but said it was “not like he punched him.” Father was upset and stated he wanted Andrew back home but could not articulate any changes he would make to ensure Andrew’s safety. He refused to discuss other placement options and was unaware of Andrew’s next medical appointment. Father eventually hung up and did not participate further at that time. However, Father contacted Social Work Supervisor Coble (“Coble”) within the following

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forty-eight hours and decided to reengage in substance abuse treatment, random drug screens and comply with medical appointments.

On 29 December 2023, Coble completed a referral for a substance abuse assessment, mental health assessment, and parenting classes for Father. Also on 29 December, Coble met with the neighbor and Andrew. Andrew reported that it had been three days since he checked his blood sugar. The last check was 520. Coble asked Andrew to check his blood sugar, and his current level was 415. The neighbor denied being aware of Andrew's blood sugar level or that anyone had discussed with her the necessity of helping Andrew maintain a lower blood sugar level. In contrast, she acknowledged that both she and her niece were diabetic, and she was familiar with the process of diabetic care. She also stated that Andrew had lost his Dexcom 7. Coble contacted Father about Andrews' blood sugar level. When Father arrived, he asked Andrew what he had been eating and instructed him to use insulin. Andrew gave himself an insulin shot, and Father instructed him to wait thirty minutes and recheck. When Andrew rechecked, his level was 492. Coble asked Father to call EMS, but Father refused, instead instructing Andrew to use more insulin, this time in his leg instead of his arm. Coble again advised Father to call EMS and again he was hesitant. Eventually, Father called EMS, and Andrew was taken to the hospital where they were able to get his blood sugar stabilized.

On 2 January 2024, Father was supposed to take Andrew for a diabetes management appointment; however, he called to reschedule because he reportedly overslept. Additionally, the neighbor determined that she no longer wanted to be a temporary placement because of "her hands being tied," so she returned Andrew to Father.

On 11 January 2024, Coble conducted a school visit and learned there were current concerns with elevated blood sugar levels now that Andrew was back at home. Additionally, the previous day Andrew missed the bus, googled the school phone number, and requested that someone come to get him. Coble then visited Father to discuss the new concerns. Father again blamed Andrew for his blood sugar levels. Additionally, Father stated that he would have to reschedule the substance abuse and mental health assessment that Coble had referred him to because he had a court date for a driving offense that conflicted with the scheduled date and time. Coble requested that Father take a drug screen, but Father admitted that he would test positive for cocaine as he had used the previous day.

Later in the day of 11 January 2024, the school contacted Coble and informed her that they were concerned about Andrew because he had

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shut down at school and written a note asking God to kill him. They were in the process of assessing his immediate medical needs and had contacted Father.

On 12 January 2024, DSS filed a petition alleging Andrew to be an abused and neglected juvenile. The trial court entered an Order for Nonsecure Custody 18 January 2024, and Andrew was placed with his maternal aunt (“Aunt”).

On 19 January 2024, a Nonsecure Custody Hearing was held. Father attended the hearing but Mother’s whereabouts were unknown. The trial court continued nonsecure custody with DSS and placement with Aunt as well as supervised visitation with Father once a week for an hour.

On 24 January 2024, another Nonsecure Custody Hearing was held. Father was present and Mother’s location was still unknown. The trial court continued nonsecure custody with DSS and placement with Aunt and scheduled the adjudication hearing for 26 February 2024.

On 26 February, the adjudication hearing was continued by request of DSS as they needed additional time to issue subpoenas. The adjudication hearing was rescheduled for 10 May 2024.

On 10 May 2024, the trial court conducted an adjudication hearing. The trial court heard testimony from Dr. Goodpasture, DSS social workers, Father and the Guardian ad Litem and admitted various records, including the DDS and Guardian ad Litem reports. The trial court made numerous findings regarding Father’s refusal to take responsibility for Andrew’s medical needs despite DSS’ repeated attempts to educate and train him as well as Andrew’s continuously high blood sugar readings and hospitalizations from failure to manage his care. By order rendered on 10 May 2024 and filed 24 June 2024, the trial court adjudicated Andrew as abused and neglected. Father entered timely notice of appeal on 18 July 2024.

II. Analysis

Father asserts two arguments on appeal regarding the 24 June 2024 adjudication order. Father argues: (1) the trial court erred by adjudicating Andrew as an abused child when evidence failed to prove abuse as defined by N.C. Gen. Stat. § 7B-101(1)(b) and (2) the trial court erred by adjudicating Andrew as neglected when Father did his best to control Andrew’s diabetes.

This Court reviews an adjudication of neglect and abuse to determine whether the findings of fact are supported by “clear and convincing

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evidence,” and whether the trial court’s findings support its conclusions of law. “If such evidence exists, the findings of the trial court are binding on appeal, even if the evidence would support a finding to the contrary.” *In re L.C.*, 293 N.C. App. 380, 389, 900 S.E.2d 697, 706 (2024) (cleaned up). Any unchallenged findings of fact are binding on appeal. *Id.* Because Father has not challenged any findings of fact, all fifty-nine findings are binding on appeal.

We review a trial court’s conclusions of law *de novo*. *Id.* “Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the [trial court].” *In re K.S.*, 380 N.C. 60, 64, 868 S.E.2d 1, 4 (2022) (cleaned up). “The determination that a child is ‘neglected’ [or ‘abused’] is a conclusion of law we review *de novo*.” *In re L.C.*, 293 N.C. at 389, 900 S.E.2d at 706.

A. Adjudication of Abuse

Father contends that the ongoing lack of appropriate care for a life-threatening medical condition does not meet the requirements of N.C. Gen. Stat. § 7B-101(1)(b). We disagree.

N.C. Gen. Stat. § 7B-101(1)(b) reads:

(1) Abused juveniles.—Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker:

b. Creates or *allows to be created a substantial risk of serious physical injury* to the juvenile by other than accidental means . . .

(emphasis added).

DSS and the Guardian ad Litem argue that Father: (1) allowed to be created a substantial risk of (2) serious physical injury when he repeatedly refused to monitor and medicate Andrew’s type 1 diabetes causing repeated hospitalizations for diabetic ketoacidosis, which resulted in end organ damage.

This Court has repeatedly held that when the parent is aware of the existence of the risk and “fail[s] to take the necessary steps to protect [the] minor” the element of “allow[s] to be created a substantial risk” under N.C. Gen. Stat. § 7B-101(1)(b) is met. *In re W.C.T.*, 280 N.C. App. 17, 28, 867 S.E.2d 14, 22 (2021); *In re M.G.*, 187 N.C. App. 536, 549, 653 S.E.2d 581, 589 (2007), *rev’d in part on other grounds*, 363 N.C. 570, 681 S.E.2d 290 (2009).

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The juvenile code does not contain a definition for the term “serious physical injury” with respect to chapter 7B. However, this Court has utilized the definition provided by N.C. Gen. Stat. § 14-318.4, the felony child abuse statute. *In re L.T.R.*, 181 N.C. App. 376, 381, 639 S.E.2d 122, 125–26 (2007). “Under N.C. Gen. Stat. § 14-318.4, a ‘serious physical injury’ is defined as an injury that causes ‘great pain and suffering.’” *State v. Romero*, 164 N.C. App. 169, 172, 595 S.E.2d 208, 210 (2004) (cleaned up). Additionally, Black’s Law Dictionary defines an “injury” as “[a]ny harm or damage,” and defines “physical” or “bodily” injury as “[p]hysical damage to a person’s body.” *Black’s Law Dictionary* (12th ed. 2024).

In an unpublished yet persuasive opinion, this Court has previously held that a heart attack caused by severe malnourishment met the criteria for a serious physical injury and when the father “saw the problem, and realized it was a problem, and they failed to get the child . . . to health care professionals” it supported the adjudication of abuse. *In re D.L.*, 213 N.C. App. 217, 714 S.E.2d 209 (2011) (unpublished).

Similarly, in *In re K.B.*, this Court upheld a trial court’s determination of abuse when a parent failed to medicate and supervise their child, and that failure resulted in the child inflicting serious self-harm. *In re K.B.*, 253 N.C. App. 423, 434-35, 801 S.E.2d 160, 168 (2017). This Court held, “[the child] was abused in that respondents created a substantial risk of physical injury to [the child] by other than accidental means, and that respondents inflicted or allowed to be inflicted on [the child] serious physical injury by other than accidental means.” *Id.* at 435, 801 S.E.2d at 168.

In the case *sub judice*, the trial court heard extensive testimony from Dr. Meggan Goodpasture and admitted medical reports based on that testimony. Dr. Goodpasture testified that Andrew suffers from Type 1 diabetes mellitus and has been admitted to the intensive care unit many times due to Father’s failure to monitor Andrew’s diet, blood sugar, and medication administration. Due to these repeated hospitalizations, Dr. Goodpasture stated that Andrew has been “close to death on multiple occasions” and has had “end organ damage and complication[s]” such as acute kidney injuries. The doctor testified that Andrew is at high risk for death and further organ damage including damage to his kidneys, brain, eyes and nerves.

In addition, the trial court made multiple findings concerning the numerous times that medical and DSS staff met with Father and educated him concerning the need for serious and continuous adult

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monitoring of Andrew's blood sugar levels and insulin usage as well as the serious risks to Andrew's life and health if that monitoring and medication administration fails. However, Father repeatedly refused to take responsibility and repeatedly blamed Andrew, a ten-year old child, for his inability to care for himself.

These unchallenged findings of fact illustrate the abundance of evidence, including testimony and reports from medical providers and DSS staff, which provide clear and convincing evidence that Father was aware of the risk associated with Andrew's type 1 diabetes being unmonitored and failed to take any of the necessary steps to protect Andrew. Father's inaction resulted in near death and acute kidney damage that caused Andrew "great pain and suffering" requiring the juvenile to be in the intensive care unit for multiple days on multiple occasions. We affirm the trial court's conclusion that Andrew met the statutory criteria of an abused juvenile.

B. Adjudication of Neglect

Father argues the trial court erred by adjudicating Andrew as neglected when Father did his best to control Andrew's diabetes; however, Father does not challenge any of the trial court's findings. Based on a thorough review of the uncontested findings of fact by the trial court, this argument is without merit.

N.C. Gen. Stat. § 7B-101(15) reads in pertinent part:

15) Neglected juvenile.—Any juvenile less than 18 years of age (i) who is found to be a minor victim of human trafficking under G.S. 14-43.15 or (ii) whose parent, guardian, custodian, or caretaker does any of the following:

a. Does not provide proper care, supervision, or discipline.

...

c. Has not provided or arranged for the provision of necessary medical or remedial care.

...

e. Creates or allows to be created a living environment that is injurious to the juvenile's welfare.

"[I]n concluding that a juvenile lives in an environment injurious to the juvenile's welfare, N.C. [Gen. Stat.] § 7B-101(15), the clear and convincing evidence in the record must show current circumstances that present a risk to the juvenile." *In re J.A.M.*, 372 N.C. 1, 9, 822 S.E.2d 693,

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698 (2019). Further, the Supreme Court stated, “[i]n 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.’ ” *Id.* Specifically, neglect has been found in cases where “the conduct at issue constituted either severe or dangerous conduct or a pattern of conduct either causing injury or potentially causing injury to the juvenile.” *In re Stumbo*, 357 N.C. 279, 283, 582 S.E.2d 255, 258 (2003).

In the case *sub judice*, the trial court made numerous findings by clear and convincing evidence that Father continuously failed to monitor Andrew’s blood sugar and insulin use which resulted in serious near-death injuries. Specifically, the trial court found:

14. On or about March 19, 2023, Forsyth County Department of Social Services (FCDSS) received a Child Protective Services report alleging improper care, and improper medical/remedial care. [Andrew] was not receiving proper medical care for his Type 1 Diabetes; his parents were not giving him insulin appropriately or regularly. [Andrew] was being admitted to the ICU due to his blood sugar being 966. Reportedly, his parents expected [Andrew] to manage his blood sugar and medication, which is not appropriate for a 9 year old.

15. FCDSS social worker Janet Riley-Wright met with [Andrew], his mother [], his father [], and hospital staff on March 20, 2023, and confirmed that [Andrew] was not receiving the appropriate medical care for his diabetes. As of that date, [Andrew] had been hospitalized three times in the previous six months due to Diabetes Ketoacidosis (DKA). Additionally, medical staff stated he had Lipohypertrophy, which is the condition that involves insulin settling in frequently injected areas and not traveling through the body appropriately. [Mother] and [Father] confirmed that [Andrew] was in charge of managing his diabetes and blamed him for his poor eating habits. Additionally, his parents were not consistent with [Andrew’s] medical appointments. They also blamed the current hospitalization on [Andrew] going to a birthday party at a friend’s house, but [Father] could not remember the name of the woman who hosted the party. . . .

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17. . . . During in Home Services, [Father] missed several medical appointments; July 14, July 25 and on August 14, 2023. . . .

19. On or about October 2, 11, and 23, [Andrew] was admitted to Brenner Children's Hospital due to Diabetes Ketoacidosis and his blood sugar levels being elevated.

20. . . . on October 23, 2023, . . . [Father] was heard saying to [Andrew] "you should have told me last night you needed insulin."

23. On or about November 30, 2023, [Andrew] completed a Child Medical Exam (CME) with Dr. Meggan Goodpasture. Dr. Goodpasture's evaluation found that [Andrew] has had many admissions secondary to medical neglect, and multiple life-threatening events due to the medical neglect. She also stated that "excessive training and education for all family members involved including father has been documented repeatedly in the medical record." Dr. Goodpasture concluded that "[Andrew] continues to be at tremendous risk for serious bodily harm and death due to repeated medical neglect as documented over the years and reported to CPS in his medical record. His medical needs due to his DM are tremendous and require consistent and thorough care."

24. On or about November 30, 2023, FCDSS received a second report alleging improper discipline, improper medical/remedial care, injurious environment, and domestic violence. On Sunday, November 26, 2023, [Father] was mad at [Andrew] because his blood sugar was high, so [Father] hit him on the arm and leg with his hand. [Father] also grabbed the child by the shirt and threw him on the coach and slapped him on the head. [Father] was cursing and yelling at him and stated, "you must want me to go to jail."

27. On or about December 27, 2023, a Child and Family Team meeting was held with [Father] regarding his non-compliance with the In-Home Services plan to ensure [Andrew's] safety. [Father] became frustrated during the meeting and refused to engage. [Father] again stated that it's not his fault [Andrew] sneaks food and eats what he wants when he goes out in the neighborhood.

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When it was discussed that he needs supervision, [Father] responded that people need to sleep and he cannot watch him all the time. When the concerns from the CME were discussed, [Father] acknowledged he hit [Andrew] in the head but said it was not like he punched him. [Father] became verbally upset during the meeting and said he wanted his son back home. [Father] could not state anything he would do differently to ensure his son was safe in his home. . . . When asked about [Andrew's] next appointments, [Father] said he did not know when they were and did not know how to log into MyChart to figure it out. . . .

28. On or about December 29, 2023 social work supervisor Coble met with [neighbor] regarding [Andrew] and asked [Andrew] when the last time he checked his blood sugar; [Andrew] reported it was three days ago and was at his brother, [] house. Social work supervisor Coble observed the last blood sugar level was 520. Social work supervisor Coble asked [Andrew] to check while she was present, and the blood sugar level was 415. . . . Social work supervisor Coble contacted [Father] about [Andrew's] blood sugar level. Upon arrival, [Father] asked [Andrew] what he had been eating and instructed him to use his insulin. . . . Social work supervisor Coble observed as [Andrew] gave the insulin shot in his right arm. [Father] instructed [Andrew] to wait 30 minutes and recheck his blood sugar levels. When it was checked again, it was 492. Social work supervisor Coble asked [Father] to contact EMS; at first [Father] refused to call EMS and advised [Andrew] to use his insulin again in his leg, instead of his arm. Social work supervisor Coble advised [Father] to contact EMS due to life threatening blood sugar levels. [Father] was hesitant but contacted EMS. Social work supervisor Coble waited for EMS. Upon arrival, [Andrew] was take to Brenner Children's Hospital for further evaluation. . . . [Father] was supposed to take [Andrew] to a diabetes management appointment on January 2, 2024, but called and rescheduled the appointment until January 23, 2024. [Father] reported that he overslept and was unable to attend this appointment.

These findings support the trial court's conclusion that Andrew meets the criteria under N.C. Gen. Stat. § 7B-101(15) as a neglected

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juvenile. Father was repeatedly informed of the risks associated with Andrew's diabetes not being monitored by an adult, was taught how to monitor and medicate him, witnessed the repeated hospitalizations required when Andrew suffered from diabetic ketoacidosis as a result of dangerously high blood sugar levels and still refused to accept responsibility for the monitoring and management of his son's serious medical condition. This clearly constituted a pattern of conduct that both caused injury and potentially would cause further injury to the juvenile.

III. Conclusion

The trial court made fifty-nine uncontested findings of fact which adequately support by clear and convincing evidence its conclusions that the juvenile is abused and neglected. When a parent is aware of their child's serious medical issue and fails to provide or acquire the necessary medical care, which causes injury to the child and places the child at risk of serious physical harm or death, this failure can constitute both abuse and neglect of the child. Accordingly, we affirm the trial court's adjudication order.

AFFIRMED.

Judges ARROWOOD and FLOOD concur.

IN THE MATTER OF K.E.P., A JUVENILE

No. COA24-792

Filed 16 April 2025

1. Child Abuse, Dependency, and Neglect—abuse and neglect—adjudicatory findings of fact—evidentiary support

In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's findings of fact challenged by respondent-mother were supported by clear, cogent, and convincing evidence, including: (1) child welfare reports that were properly admitted pursuant to the business records exception to the general bar on hearsay; (2) testimony from doctors whose opinions were properly based on out-of-court

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statements made for the purpose of medical treatment and a written child medical examination (which itself had been admitted); and (3) testimony from a child protective services worker, about which the court made credibility determinations.

2. Child Abuse, Dependency, and Neglect—abuse and neglect—adjudicatory findings of fact—ambiguity resolved

In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical exams), the district court's adjudicatory findings of fact did not lack clarity about respondent-mother's role in causing the child to undergo three vaginal exams where, although the evidence was unclear about whether respondent-mother or the maternal grandmother took the child to the hospital, the court specifically found that respondent-mother gave permission for each of the exams to be undertaken.

3. Child Abuse, Dependency, and Neglect—abuse and neglect—adjudicatory findings of fact—no finding of bad faith required

In an abuse and neglect proceeding arising from respondent-mother's repeated reports of the child's sexual abuse by the child's father (none of which were substantiated, but which required the child to undergo multiple medical examinations), the district court did not err in failing to determine whether respondent-mother acted in bad faith in making the sexual abuse reports because the Juvenile Code does not require bad faith by a parent for a juvenile adjudication; rather, in determining whether a child is abused or neglected, the circumstances and conditions surrounding the child—not the fault or culpability of a parent—are the determinative factors.

Appeal by respondent-mother from orders entered 10 April 2024 and 3 May 2024 by Judge Shelly S. Holt in Sampson County District Court. Heard in the Court of Appeals 18 March 2025.

Mary McCullers Reece and The Law Office of W. Joel Starling, Jr. PLLC, by W. Joel Starling, Jr., for petitioner-appellee Sampson County Department of Social Services.

NC Guardian Ad Litem Program, by Michelle FormyDuval Lynch, for appellee guardian ad litem.

BJK Legal, by Benjamin J. Kull, for respondent-appellant mother.

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ZACHARY, Judge.

Respondent-Mother appeals from the trial court's orders adjudicating her minor child "Karina"¹ to be an abused and neglected juvenile and placing Karina in the sole legal and physical custody of Respondent-Father. After careful review, we affirm.

I. Background

Karina was born to Respondents in April 2018, when they were living in Cumberland County. Within months of Karina's birth, Respondents' relationship drastically deteriorated, with each parent making allegations of domestic violence against the other. Respondent-Mother filed an action seeking custody of Karina in 2018. In 2019, a child custody order was entered in Cumberland County District Court awarding Respondent-Mother custody of Karina and granting Respondent-Father visitation.

From 2018 to 2021, the Cumberland County Department of Social Services ("CCDSS") received five child welfare reports concerning Respondent-Father's alleged maltreatment of Karina. The first report was not investigated, and CCDSS determined that the allegations of the next four reports were unsubstantiated. Nevertheless, after receiving the fifth report, CCDSS sought to have a child medical examination conducted on Karina. Dr. Danielle Thomas-Taylor initially objected to performing the examination, as Karina had already been evaluated for sexual allegations twice before and Dr. Thomas-Taylor believed that further physical examination could be traumatic for Karina.

By 2021, Karina and Respondent-Mother were living in Sampson County with Karina's maternal grandmother and step-grandfather. On 23 March 2021, the Sampson County Department of Social Services ("SCDSS") received its first child welfare report that Respondent-Father had sexually abused Karina. Dr. Thomas-Taylor agreed to conduct a child medical examination in the hopes that this would "potentially . . . stop having [Karina] evaluated so many times and give the family an answer and recommendations for moving forward for the safety and well-being of their child." SCDSS determined that the allegations were unsubstantiated; however, in her written report ("the CME"), Dr. Thomas-Taylor expressed "concerns for the frequency with which [Karina] has presented to the emergency department with request for thorough evaluation for concerns of sexual abuse."

1. For ease of reading and to protect the identity of the minor child, we use the pseudonym to which the parties stipulated. *See* N.C. R. App. P. 42(b).

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In July 2021, SCDSS received two more child welfare reports alleging Respondent-Father's maltreatment of Karina. Further involvement by SCDSS in Karina's case led a child protective services worker to develop "concerns for control and manipulation" of Respondent-Mother. SCDSS determined that Dr. Maria O'Tuel should perform a child and family forensic evaluation ("the CFE") "to help determine the presence or absence of abuse, to determine the extent of abuse or neglect if found," and to provide a basis for informed treatment recommendations.

As part of the CFE, Dr. O'Tuel conducted interviews and reviewed Karina's medical records and reports drafted by child protective services workers from both counties, including the CME. Dr. O'Tuel concluded, *inter alia*, "that it was highly improbable that [Karina] had been sexually abused as alleged" and instead "concluded that it was highly likely that [Karina] had sustained some emotional abuse" by Respondent-Mother and her family. Consistent with Dr. O'Tuel's recommendations, SCDSS attempted to implement a safety plan allowing Karina to reside with Respondent-Father, but Respondent-Mother refused to agree to its terms.

On 8 September 2021, SCDSS filed a juvenile petition alleging that Karina was an abused and neglected juvenile. SCDSS obtained nonsecure custody of Karina that same day and placed her with Respondent-Father.

This matter came on for hearing on 26 February 2024 in Sampson County District Court. Child protective services workers from CCDSS and SCDSS testified, as did Dr. Thomas-Taylor and Dr. O'Tuel. The CME and the five child welfare reports alleging Respondent-Father's maltreatment of Karina that were received by CCDSS were admitted into evidence; however, the CFE and various hospital and medical records upon which the CME was partially based were not.

On 10 April 2024, the trial court entered an order in which it adjudicated Karina to be an abused and neglected juvenile. On 3 May 2024, the court entered its disposition order, determining that it was in Karina's best interests for Respondent-Father to be granted sole legal and physical custody of Karina and for Respondent-Mother to be granted visitation. That same day, the court entered a Chapter 7B-911 custody order to that effect. *See* N.C. Gen. Stat. § 7B-911 (2023).

Respondent-Mother timely filed notice of appeal.

II. Discussion

On appeal, Respondent-Mother challenges the evidentiary support for several of the trial court's adjudicatory findings of fact and further contends that the adjudicatory findings lack necessary clarity. Finally,

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she argues that the adjudication order “must be reversed because even as written, the adjudicatory findings lack one necessary factual determination: that the reports of Karina’s suspected sexual abuse were somehow made in bad faith.” We disagree.

A. Standard of Review

In an appeal from an initial adjudication in a juvenile proceeding, “the sole question for the reviewing court is whether the trial court’s conclusions of law are supported by adequate findings and whether those findings, in turn, are supported by clear, cogent, and convincing evidence.” *In re A.J.*, 386 N.C. 409, 411–12, 904 S.E.2d 707, 711 (2024) (cleaned up). “When assessing whether a particular finding is supported by clear, cogent, and convincing evidence, the reviewing court must consider any properly preserved challenges to the admission of the supporting evidence.” *Id.* at 412, 904 S.E.2d at 711.

It is well established that “the North Carolina Rules of Evidence apply at the adjudication stage of these juvenile proceedings. Thus, statements that constitute inadmissible hearsay are not clear, cogent, and convincing evidence on which the trial court may rely.” *Id.* (citation omitted). “Assuming an evidentiary objection is properly preserved, a party may argue on appeal that any findings supported solely by inadmissible evidence are infirm and cannot support the trial court’s conclusions of law.” *Id.*

Moreover, “[i]n a non-jury [juvenile] adjudication, the trial court’s findings of fact supported by clear and convincing competent evidence are deemed conclusive, even where some evidence supports contrary findings. If competent evidence supports the findings, they are binding on appeal.” *In re L.Z.A.*, 249 N.C. App. 628, 632, 792 S.E.2d 160, 165 (2016) (cleaned up).

B. Analysis

On appeal, Respondent-Mother raises a series of arguments concerning the sufficiency of the trial court’s findings of fact in the adjudication order, which she contends must be reversed. She further asserts that if her arguments succeed, then “the disposition order—as well as the private custody order resulting from it—must also be reversed.” However, she offers no independent arguments concerning those orders; her appeal rests entirely on the sufficiency of the adjudication order.

The trial court adjudicated Karina to be an abused juvenile pursuant to N.C. Gen. Stat. § 7B-101(1)(e) and a neglected juvenile pursuant to § 7B-101(15)(a) and (e). A juvenile may be adjudicated as abused if the

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juvenile's parent, guardian, custodian, or caretaker "[c]reates or allows to be created serious emotional damage to the juvenile; serious emotional damage is evidenced by a juvenile's severe anxiety, depression, withdrawal, or aggressive behavior toward himself or others." N.C. Gen. Stat. § 7B-101(1)(e). A juvenile may be adjudicated as neglected if the juvenile's parent, guardian, custodian, or caretaker "[d]oes not provide proper care, supervision, or discipline" or "[c]reates or allows to be created a living environment that is injurious to the juvenile's welfare." *Id.* § 7B-101(15)(a), (e).

1. Evidentiary Support for Adjudicatory Findings

[1] We first address Respondent-Mother's argument that many of the trial court's adjudicatory findings of fact were "based on evidence that was not offered to prove the truth of the matter(s) contained therein" and therefore "cannot be considered" in our appellate review of whether the court's findings support the conclusions of law. In particular, Respondent-Mother focuses on findings of fact that she alleges were based on evidence received at the hearing (1) "for explaining the background of SCDSS's investigation," and (2) "for explaining the factual bases of the two experts' opinions."

As an initial matter, the guardian ad litem contends that many of Respondent-Mother's arguments concerning the findings of fact "are broadside challenges stating the finding relied on evidence that was either not admitted into evidence or does not contain the information in the finding with no reference to objections, acknowledgment of testimonial evidence supporting the finding, and little to no citation to legal authority." It is well established that a single general challenge to "the sufficiency of the evidence to support numerous findings of fact is broadside and ineffective." *In re K.D.*, 178 N.C. App. 322, 327, 631 S.E.2d 150, 154 (2006) (cleaned up). We agree that Respondent-Mother wages broadside attacks against many of the findings of fact that she challenges, including findings #11–20, 22–24, 38–39, and 52. However, even assuming, *arguendo*, that the general thrust of Respondent-Mother's arguments provides sufficient support for review of these challenges, they still lack merit.

a. Child Welfare Reports

The first two groups of findings that Respondent-Mother challenges are those based on the five child welfare reports concerning Karina that CCDSS received, all of which were admitted into evidence pursuant to the business records exception to the hearsay rule. Because

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Respondent-Mother's argument regarding these reports is based on a misunderstanding of this exception to the hearsay rule, we begin with a brief overview of that rule.

"Hearsay" is defined by our Rules of Evidence as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c). "Hearsay is not admissible except as provided by statute or by" the Rules of Evidence. *Id.* § 8C-1, Rule 802. One such exception is the business records exception, "which provides that business records of regularly conducted activity are not excluded by the hearsay rule, even though the declarant is unavailable as a witness." *In re S.D.J.*, 192 N.C. App. 478, 482, 665 S.E.2d 818, 821 (2008); N.C. Gen. Stat. § 8C-1, Rule 803(6).

Rule 803(6) provides that the following types of evidence, if properly authenticated, are not excluded by the hearsay rule:

A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if (i) kept in the course of a regularly conducted business activity and (ii) it was the regular practice of that business activity to make the memorandum, report, record, or data compilation . . .

N.C. Gen. Stat. § 8C-1, Rule 803(6).

The records of a juvenile case, kept by a department of social services, upon which a child protective services worker relies in her testimony, may qualify as a business record under this exception. *In re C.R.B.*, 245 N.C. App. 65, 69–70, 781 S.E.2d 846, 850–51, *disc. review denied*, 368 N.C. 916, 787 S.E.2d 23 (2016). As this Court has recognized, "even though a witness's knowledge was limited to the contents of . . . [a parent]'s file with which [s]he had familiarized h[er]self, [s]he could properly testify about the records and their significance so long as the records themselves were admissible under the business records exception to the hearsay rule." *Id.* at 69, 781 S.E.2d at 850 (cleaned up).

Qualifying business records are admissible under Rule 803(6) "when a proper foundation is laid by testimony of a witness who is familiar with the records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *Id.* at 70,

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781 S.E.2d at 850 (cleaned up). “While the foundation must be laid by a person familiar with the records and the system under which they are made, there is no requirement that the records be authenticated by the person who made them.” *Id.* at 70, 781 S.E.2d at 850–51 (cleaned up).

At the hearing below, SCDSS consistently maintained that it was offering the child welfare reports into evidence pursuant to the business records exception to the hearsay rule, and our careful review of the transcript clearly shows that the trial court admitted all five reports under this exception. Indeed, Respondent-Mother’s counsel acknowledged as much when she objected to the records’ admission—arguing that the records were, in fact, being offered as substantive evidence—and when she subsequently renewed her objection to the court’s ruling on the grounds of “authentication, hearsay, and no business record exception.”

On appeal, Respondent-Mother does not argue that these child welfare reports were improperly admitted pursuant to the business records exception. Respondent-Mother does not challenge the reports’ admission into evidence, nor does she raise any of her arguments that were more vigorously asserted below regarding the reports’ authentication and any alleged hearsay therein. Instead, she argues that the findings of fact based on the child welfare reports should be treated as “non-substantive evidentiary findings.” *In re A.J.L.H.*, 384 N.C. 45, 52, 884 S.E.2d 687, 692, *reh’g denied*, 384 N.C. 670 (2023). This argument fails for several reasons.

In support of her argument, Respondent-Mother relies upon *A.J.L.H.* and *In re Mashburn*, 162 N.C. App. 386, 591 S.E.2d 584, *appeal dismissed*, 359 N.C. 68, 603 S.E.2d 884 (2004). However, the portions of these cases relevant to Respondent-Mother’s argument concern *admissible nonhearsay*, rather than *hearsay properly admitted* pursuant to the business records exception, as was the case here. *See A.J.L.H.*, 384 N.C. at 52, 884 S.E.2d at 692; *Mashburn*, 162 N.C. App. at 392–93, 591 S.E.2d at 589.

Respondent-Mother’s citation to *A.J.L.H.* is particularly inapposite because, in a portion of this Court’s opinion that was not appealed to our Supreme Court, we upheld the trial court’s finding of fact summarizing the details of previous child welfare reports that were admitted into evidence as properly authenticated business records. *In re A.J.L.H.*, 275 N.C. App. 11, 19–20, 853 S.E.2d 459, 466 (2020), *rev’d and remanded on other grounds*, 384 N.C. 45, 884 S.E.2d 687 (2023). Indeed, it is well established that properly authenticated records kept by a department of social services in a juvenile matter may be “admissible under the business

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records exception to the hearsay rule.” *In re Smith*, 56 N.C. App. 142, 148, 287 S.E.2d 440, 444, *cert. denied*, 306 N.C. 385, 294 S.E.2d 212 (1982).

In that Respondent-Mother neither claims that the reports were not properly authenticated, nor raises any concern of double-hearsay within the reports, she has thus abandoned any such arguments on appeal. *See* N.C. R. App. P. 28(b)(6). The argument that she does raise lacks merit, and therefore her challenge to the court’s adjudicatory findings #11–15, 29, 38–39, and 61 is overruled.

b. Bases for Expert Opinions

Respondent-Mother next challenges a series of adjudicatory findings based upon the testimony of Dr. Thomas-Taylor and Dr. O’Tuel, asserting that “the evidence that forms the factual basis for an expert’s opinion is not admissible for the truth of the matter(s) asserted therein.” She claims that therefore any of the trial court’s findings of fact based on this type of evidence—such as “the experts’ testimony regarding the content of the hospital/medical records and the content of interviews they conducted in the course of forming their opinions, or the [CME]”—“are not findings regarding the truth of the matters asserted therein” and “serve no practical purpose” in our appellate review of the adjudication order.

However, the CME was admitted into evidence. At the hearing, SCDSS not only offered the CME into evidence on the ground that it contained “the information that formed the basis of [Dr. Thomas-Taylor’s] conclusions” as an expert witness, but it also noted that the out-of-court statements within the CME were “made for the purposes of a medical evaluation or medical treatment” and were therefore admissible hearsay. *See* N.C. Gen. Stat. § 8C-1, Rule 803(4) (providing that out-of-court “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history” are not excluded by the hearsay rule). The trial court admitted the CME—which Respondent-Mother admits “also discussed” the factual bases for the experts’ opinions—with the explanation that “any statements [in the CME] made by other individuals were done as the basis of preparing her, conducting her examination and . . . the foundation of her conclusions.” Consequently, the CME was admitted not only as the basis for expert testimony but also as statements made for purposes of medical treatment. *See id.* Again, Respondent-Mother’s counsel confirmed this when she subsequently noted her objections for “lack of foundation, hearsay, and various other violations of [Respondent-Mother]’s constitutional state and federal rights.”

On appeal, however, Respondent-Mother raises no argument concerning the CME’s admission into evidence, nor does she challenge any

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potential hearsay statements contained therein. As a result, any such arguments are abandoned. *See* N.C. R. App. P. 28(b)(6). The trial court properly considered the CME when making its findings of fact. In that the CME, with its descriptions of Karina’s medical history, supports the challenged portions of findings #16–20, 22–24, 31–32, 35, 37, 48, 50, 52, 55, and 57–59, these challenges are likewise overruled.

c. Other Challenged Findings

In addition to the two primary groups of findings that Respondent-Mother challenges, she also challenges several others on a variety of grounds that are similarly unsuccessful. For example, Respondent-Mother challenges finding of fact #6, but that finding is unnecessary to support the trial court’s conclusions of law and thus may be disregarded. *See, e.g., In re J.K.*, 253 N.C. App. 57, 60, 799 S.E.2d 439, 441–42 (2017) (“[E]rroneous findings that are unnecessary to support the trial court’s conclusions of law may be disregarded as harmless.” (citation omitted)).

We further note that challenged findings of fact #38–39, 49, and 61 are supported by the testimony of a SCDSS child protective services worker. To the extent that Respondent-Mother challenges findings #49 and 60 as mere recitations of testimony, we note that these findings appropriately carry “indication[s] that the trial court evaluated the credibility of the relevant witness[es] or resolved any contradictions in [their] testimony.” *In re A.E.*, 379 N.C. 177, 185, 864 S.E.2d 487, 495 (2021). Moreover, to the extent that Respondent-Mother asks us to reconsider the trial court’s credibility determinations regarding the various testifying witnesses from the adjudication hearing below, it is not the role of this Court to question such credibility determinations on appeal. *See In re J.A.M.*, 372 N.C. 1, 11, 822 S.E.2d 693, 700 (2019) (“[A]n important aspect of the trial court’s role as finder of fact is assessing the demeanor and credibility of witnesses, often in light of inconsistencies or contradictory evidence. It is in part because the trial court is uniquely situated to make this credibility determination that appellate courts may not reweigh the underlying evidence presented at trial.”).

Finally, as Respondent-Mother aptly notes, challenged findings #63–64 are actually conclusions of law, which we treat as such on appeal. *See, e.g., In re K.J.M.*, 288 N.C. App. 332, 341–42, 886 S.E.2d 589, 596 (2023).

As indicated herein, our careful review of the record reveals that the unchallenged findings, combined with the challenged findings of fact that are supported by clear, cogent, and convincing evidence, amply support

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the trial court's conclusions of law. Therefore, Respondent-Mother's evidentiary arguments are overruled.

2. Clarity of Findings

[2] Respondent-Mother next argues that “the adjudicatory findings lack the clarity needed to determine whether [she] ‘allowed’ the non-caretaker Maternal Grandparents to take Karina to the hospital for three vaginal exams.” This argument is wholly without merit.

Respondent-Mother contends that “the adjudicatory findings fail to specifically identify *who* took Karina to the hospital for those emergency room visits and exams.” Instead, she notes that finding of fact #16 “says that it was either [Respondent]Mother, Maternal Grandmother, ‘and/or’ Maternal Grandfather who took her.” Critically, finding of fact #18 explains that Respondent-Mother “either took [Karina] to these emergency room visits herself *or gave permission* for [Karina] to receive medical treatment during the emergency room visits.” (Emphasis added).

This finding of fact satisfies the “allows to be created” elements of the definitions of abused and neglected juveniles. N.C. Gen. Stat. § 7B-101(1)(e), (15)(e). As this finding of fact—which resolves the alleged ambiguity that Respondent-Mother sees—is binding on appeal, as discussed above, Respondent-Mother's argument is meritless. As the guardian ad litem notes: “There is no ambiguity; it is clear that Respondent[-]Mother either took Karina to the ER when invasive physical exams were completed, or allowed the maternal grandparents to take her.” Respondent-Mother's clarity argument is also overruled.

3. Failure to Find Bad Faith

[3] Finally, we address Respondent-Mother's argument that the trial court erred “because even as written, the adjudicatory findings lack one necessary factual determination: that the reports of Karina's suspected sexual abuse were somehow made in bad faith.”

First, this is essentially a policy argument, wherein Respondent-Mother presages “a terrifying dilemma for any parent.” According to Respondent-Mother: “If you withhold your suspicions [of sexual abuse] out of fear of being wrong, then you risk criminal liability; but if you report your suspicions and end up being wrong, then even if you acted in good faith, your mistaken reporting can be used against you and your family.” But such rhetoric is ineffective, as we remain “an error-correcting body, not a policy-making or law-making one.” *In re I.B.*, 262 N.C. App. 402, 408, 822 S.E.2d 472, 476 (2018) (citation omitted), *abrogated on other grounds by In re L.E.M.*, 372 N.C. 396, 831 S.E.2d 341 (2019).

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Second, and more fundamentally, there is simply no requirement in our Juvenile Code that a parent's reports of suspected sexual abuse must be made in bad faith in order to adjudicate a juvenile as abused or neglected. In support of her contention, Respondent-Mother cites the immunity provision of N.C. Gen. Stat. § 7B-309, which states that a person who makes "a good-faith report of child abuse or neglect . . . is immune from any civil or criminal liability that might otherwise be incurred or imposed for that action provided that that person was acting in good faith." N.C. Gen. Stat. § 7B-309. She further cites our Supreme Court's statement that § 7B-309 "is intended to encourage citizens to report suspected instances of child abuse without fear of potential liability if [the] report [is] made in good faith." *Dobson v. Harris*, 352 N.C. 77, 82, 530 S.E.2d 829, 835 (2000). These citations are unavailing.

As SCDSS aptly observes, "the adjudication of a child as neglected or abused is not a matter of monetary damages or 'civil liability' for her parents. As such, the cooperation requirement of N.C. Gen. Stat. § 7B-309 cannot provide 'cover' against adjudications of abuse or neglect."

Moreover, with specific regard to neglect, it is well established that "[i]n determining whether a child is neglected, the determinative factors are the circumstances and conditions surrounding the child, not the fault or culpability of the parent." *In re Montgomery*, 311 N.C. 101, 109, 316 S.E.2d 246, 252 (1984).²

Indeed, this Court recently reviewed a similar case involving a mother's treatment of her children amidst an investigation of reported allegations of sexual abuse against the children's father. *In re B.C.*, No. 23-830, 2025 WL 850051, slip op. at *5 (N.C. App. Mar. 19, 2025). "[A]lthough the DSS investigation into the allegations of the father's alleged sexual abuse remained ongoing, DSS was sufficiently concerned about [the r]espondent-[m]other's actions to file juvenile petitions" alleging that the children were abused, neglected, and dependent. *Id.*

2. Respondent-Mother claims that this oft-cited precedent is no longer good law, asserting that recent legislative amendments to N.C. Gen. Stat. § 7B-101(15) have "brought the definition of 'neglected juvenile' in line with that for 'abused juvenile,' which is likewise written in terms of the parent's (or other caregiver's) actions, rather than the child's conditions or circumstances." (Citation omitted). We disagree.

Notwithstanding the supposedly precedent-altering legislative amendments that Respondent-Mother cites, this Court has continued to cite this well-known proposition from *Montgomery* as good law. See, e.g., *In re M.C.*, 286 N.C. App. 632, 641, 881 S.E.2d 871, 878 (2022). Our Supreme Court has not overruled *Montgomery*, "and this Court is bound by precedent from our Supreme Court." *In re N.R.R.N.*, 297 N.C. App. 673, 680, 911 S.E.2d 510, 516 (2025).

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On appeal, the respondent-mother argued, *inter alia*, “that she was not able to present ‘a full defense’ ” because “she was not able to present evidence that the father had sexually abused [the children] such that her actions in light of that belief were justified, appropriate, and could not have constituted abuse or neglect of the children.” *Id.* at *20. This Court was unpersuaded and instead approvingly cited the trial court’s findings that the respondent-mother did “not appear to understand the nuances of what DSS’s investigation entailed”; “that DSS’s role was to monitor and try to create a plan”; and further, that “*whether the father ha[d] sexually abused these children or not and whether the sexual abuse happened or not*, [the children] ha[d] been traumatized by the way that [the r]espondent-[m]other ha[d] handled the situation with them.” *Id.* at *23 (cleaned up).

Here, Respondent-Mother’s claim that the trial court erred by failing to make an adjudicatory finding of bad faith is likewise misguided and reflects a similar misunderstanding of the focus of the proceedings at the adjudication phase. As illustrated by *B.C.*, when a parent’s reports of sexual abuse precipitate further investigation in an ongoing juvenile case, the proper focus of the trial court in an adjudication hearing is on *the effect of those reports—and their investigation—on the child*, not the sincerity of the parent’s reporting. *See id.* at *19.

This argument is also overruled.

III. Conclusion

For the foregoing reasons, the trial court’s adjudicatory order is affirmed. Because Respondent-Mother raises no independent arguments concerning the disposition order or the private custody order, those orders are also affirmed.

AFFIRMED.

Judges STROUD and COLLINS concur.

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No. COA24-571

Filed 16 April 2025

**1. Termination of Parental Rights—Indian Child Welfare Act—
inquiry into child’s heritage—“at the commencement of the
proceeding”—hearing held after twelve continuances**

An order terminating a father’s parental rights in his son—and finding that the child was not an “Indian child” for purposes of the Indian Child Welfare Act (ICWA)—was affirmed because, although the case was continued twelve times after the termination petition was filed, the trial court had complied with ICWA’s requirement to inquire into the child’s possible Indian heritage “at the commencement of the proceeding,” where it conducted the inquiry during a pre-trial hearing, which—because it was the first hearing held after the filing of the petition and after all twelve continuances—provided the first opportunity for the court to conduct the inquiry.

**2. Termination of Parental Rights—initial hearing on petition—
continued for more than 90 days—father’s failure to petition
for writ of mandamus**

In a termination of parental rights (TPR) case, where the initial hearing on the petition to terminate a father’s rights did not occur until seventeen months after the petition was filed, since the trial court had continued the case twelve times (including for reasons related to the COVID-19 pandemic), the father failed to file a petition for a writ of mandamus while the TPR petition was pending and therefore missed his opportunity to seek a remedy for what he argued was a violation of N.C.G.S. § 7B-1109(d) (providing that courts may continue an initial hearing on a TPR petition “for up to 90 days” after the petition’s filing).

Appeal by Respondent-Father from order entered 25 October 2023 by Judge J. Frank Wood in Harnett County District Court. Heard in the Court of Appeals 18 March 2025.

*Duncan B. McCormick for Petitioner-Appellee Harnett County
Department of Social Services.*

K&L Gates, LLP, by Sophie Goodman, for Guardian ad Litem.

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Emily Sutton Dezio for Respondent-Appellant Father.

COLLINS, Judge.

Father appeals the termination of his parental rights to his minor child, Lou.¹ Father argues that the trial court (1) failed to conduct an Indian Child Welfare Act (“ICWA”) inquiry at the commencement of the action terminating his parental rights and (2) violated Father’s due process rights when it failed to comply with N.C. Gen. Stat. § 7B-1109(d) and continued this case for more than ninety days before holding an initial termination of parental rights hearing. We find no merit in these arguments and affirm the trial court’s order.

I. Background

Mother and Father are the biological parents of Lou, a minor child born in July 2017. Mother and Father were never married but had an on-and-off relationship that produced two children. Mother also had two other children with two other fathers; those children were adjudicated neglected and dependent in 2016.² Johnston County Department of Social Services (“DSS”) became involved with Mother and Father in 2016 because of a history of domestic violence, substance abuse issues, and concerns for untreated mental health issues for both Mother and Father. In light of this history, DSS again became involved with the family shortly after Lou’s birth due to concerns for his wellbeing. Father was in jail at the time of Lou’s birth, and DSS formulated a case plan for him to begin upon his release. DSS noted that, prior to going to jail, Father: did not have stable housing; did not cooperate with DSS; refused to address the allegations of substance abuse; refused to take drug tests; acknowledged his history of domestic violence; violated safety assessments put in place by DSS; failed to attend psychological evaluations and counseling appointments; and “engaged in criminal activity resulting in new criminal charges.”

On 29 January 2018, DSS filed a petition alleging that Lou was neglected and took nonsecure custody of Lou that same day. On 27 April 2018, the trial court entered its adjudication order, finding in relevant part that it had “inquired of the participants with respect to possible Indian heritage,” that “[t]he participants are not reporting any Indian

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

2. Mother is not a party to this appeal, and Lou’s siblings are not subjects of this appeal.

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heritage,” and that Father “is not a member of an Indian tribe.” The trial court found that: Father was in jail at the time of the filing of the petition and remained in jail as of the time of the adjudication hearing; Lou did not receive proper care, supervision, or discipline; Lou lived in an environment injurious to his welfare prior to the filing of the petition; and Lou was exposed to a substantial risk of physical, mental, or emotional impairment prior to the filing of the petition. The trial court concluded that Lou was a neglected juvenile as defined by N.C. Gen. Stat. § 7B-101(15), and it moved to the disposition phase of the hearing.

During the disposition phase, the trial court found that Father was still incarcerated, and it was not in Lou’s best interest to “award a minimum period or frequency of visitation to [Father] while he is in jail.” The trial court ordered that Father enter into and comply with a services agreement with DSS, which included notifying DSS of his release from jail; obtaining a substance abuse assessment; complying with substance abuse treatment; completing random drug screens; enrolling in parenting classes; completing domestic violence prevention classes; and participating in “any relevant programs and services available to him while in jail or prison.” The trial court found that it was in Lou’s best interest to remain in DSS custody and scheduled a permanency planning hearing for July 2018.

In a permanency planning review order entered on 8 March 2019, the trial court found that Father was released from jail in September 2018, had not made any progress on his case plan, and was “now jailed in Johnston County.” The trial court concluded that it was in Lou’s best interest to remain in DSS custody, and it was not in Lou’s best interest to visit with Father. The trial court again directed Father to comply with his case plan with DSS and scheduled a permanency planning review hearing for 5 April 2019.

In a permanency planning review order entered on 28 June 2019, the trial court again found that Father had not made any progress on his case plan and that he was “now jailed in a county jail” and “has pending criminal charges.” The trial court found that “[c]ontinued reunification efforts clearly would be unsuccessful with . . . [Father]. Reunification efforts should be ceased.” The trial court concluded that it was in Lou’s best interest to remain in DSS custody and that Lou’s primary permanent plan should be adoption, and it scheduled a permanency planning review hearing for 4 October 2019.

In a permanency planning review order entered on 8 May 2020, the trial court found that Father “maintained contact with DSS” and

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“contacted DSS following his release from incarceration,” but that Father “has not made or documented significant progress since the [last permanency planning review] hearing.” The trial court found that Father was not actively participating in his case plan or cooperating with the plan, DSS or the guardian ad litem. The trial court again found that reunification efforts between Lou and Father would be unsuccessful. The trial court concluded that it was in Lou’s best interest to remain in DSS custody and that Lou’s primary permanent plan should be adoption, and it scheduled a permanency planning review hearing for 14 August 2020.

On 5 August 2020, DSS filed a petition to terminate Father’s parental rights to Lou (“TPR Petition”). DSS alleged that Father’s rights should be terminated on the grounds of neglect; willfully failing to make reasonable progress in correcting the conditions which led to Lou’s removal; willfully failing to pay a reasonable portion of the cost of care; abandonment; and a prior involuntary termination of Father’s parental rights to another child. In the TPR Petition, DSS alleged that Lou “is not an Indian child for the purposes of the Indian Child Welfare Act.” Father did not file a response to the TPR Petition.

Between the filing of the TPR Petition and the first hearing on the TPR Petition on 11 March 2022, the trial court entered twelve continuance orders due to various reasons including Father becoming ill, attorneys and court staff contracting COVID-19, and the Court’s heavy docket due to COVID-19. No one objected to any of the continuances.

On 11 March 2022, the TPR Petition came on for hearing. During the pre-trial hearing, DSS stated, “[T]he department is not aware of any American Indian heritage or any native American Indian heritage. This case is old enough to where I don’t recall what findings were made then, but I believe inquiries were made. . . . We would ask that all participants indicate that they’re aware of any American Indian heritage.” The trial court asked whether anyone was “aware of any tribal affiliation or any American Indian heritage,” and Father’s attorney responded, “[Father] informs me his grandmother is Blackfoot Indian.” DSS then called Elaine Coley, a worker with DSS, to the stand for direct examination. Coley testified that she was not aware of any possible American Indian heritage with respect to Lou or his parents and that she had not been given any indication that Lou or his parents had “any kind of tribal affiliation.” On cross-examination, Father’s attorney asked Coley if she ever asked about “whether there was any Indian heritage from [Father].” Coley responded:

We always, in the very beginning. That’s one of the things that we have to look into if there is any possibility of

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Indian heritage. I can't say if I asked myself or if the CPS worker would have asked, but that's something that we thought very early on about Indian heritage.

The trial court continued the hearing to 25 March 2022, at which point it moved to the adjudication phase of the hearing. DSS called Father as a witness and he testified that he had possible "Blackfoot" heritage and that his grandmother's "mama's mama's mama" was "Blackfoot." Father testified that she never showed him any documentation or identification card showing that she was a member of the tribe and that none of his other relatives indicated that they were members of the tribe. On cross-examination by his attorney, Father testified that he had been told he was a member of the "Blackfoot" tribe and had believed that since he was sixteen years old. He also testified that DSS never asked him about Indian heritage. The trial court continued the adjudicatory hearing until 8 April 2022.

At the 8 April 2022 session, Father called his paternal aunt as a witness; Father's attorney asked her about a possible relationship to the "Blackfoot" tribe, and she testified that the only thing she knew was that Father's paternal grandmother was "100 percent Cherokee Indian." Father's aunt was not sure whether Father's paternal grandmother was a member of the Cherokee tribe and testified that she did not have a membership or any documentation to show that she was part of the Cherokee tribe. Father's aunt did not recall any mention of the "Blackfoot" tribe and did not recall any mention of any other tribes.

Father was called to the stand again as a witness, and DSS asked him on cross-examination whether he had heard of any Cherokee heritage. Father testified, "I'm just going to be honest. The reason why I said Blackfoot because I remember when I was 16, my grandmama and everybody, you know, they come to my grandmama house and communicate, socialize. And my grandmama said something about, you know, Blackfoot tribe, so that stuck with me. I didn't know about Cherokee." The trial court continued the hearing until 22 April 2022.

On 22 April 2022, the trial court moved to the disposition phase of the hearing and explained that it was ready to give findings for all issues "except for the native American finding." DSS explained that it was "still waiting" for "letters from the tribes" of Blackfeet and Cherokee. The trial court stated, "I'm going to go ahead and give you findings, but this is all subject to receiving documentation back from the letters that we sent to the tribe. The Court would hold the evidence open for any final determination regarding the tribal affiliation or none thereof."

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Over the following seven months, DSS waited to hear back from the three federally recognized Cherokee bands and the federally recognized Blackfeet tribe. On 28 July 2022, the Cherokee Nation indicated that Lou was “not an Indian Child” in relation to Cherokee Nation. On 28 July 2022, the Eastern Band of Cherokee Indians indicated that Lou was “not an Indian Child” as to the Eastern Band of Cherokee Indians. On 20 September 2022, the Blackfeet tribe indicated that Lou was “not an Indian Child” as to the Blackfeet. On 21 November 2022, the United Keetoowah Band of Cherokee Indians indicated that Lou was “not an Indian Child” in relation to the United Keetoowah Band of Cherokee Indians. On 18 April 2023, the trial court held a hearing for “tribal affiliation discussions,” and DSS entered the tribal information and responses into evidence without objection.

On 25 October 2023, the trial court entered its order terminating Father’s parental rights. The Court found that: it had inquired of the participants as to possible Indian heritage; Father and his aunt were told about possible family connections to Indian tribes; Father described a possible connection to the “Blackfoot” tribe and his aunt described a possible connection to the Cherokee tribe; Father and his aunt did not have any information other than what they had been told by paternal relatives; and Father and his aunt were not members of any tribes. The trial court then found that Lou was not an “Indian Child” in relation to the Blackfeet tribe or any three of the Cherokee bands and concluded that Lou was not an “Indian Child” for purposes of ICWA.

The trial court concluded that grounds existed to terminate Father’s parental rights on the grounds of neglect; willfully leaving Lou in foster care for more than twelve months without showing reasonable progress in correcting the conditions which led to Lou’s removal; and prior involuntary termination of Father’s parental rights to another child. The trial court further concluded that it was in Lou’s best interest to terminate Father’s parental rights. Father filed his notice of appeal on 25 January 2024.³

3. Father filed a petition for writ of certiorari with this Court on 3 September 2024, explaining that the order terminating Father’s parental rights was entered on 25 October 2023, that there is no certificate of service indicating when DSS served Father with the order, and that Father received “actual notice” of the order on 6 December 2023. Father signed his Notice of Appeal with his attorney on 22 December 2023 but, due to miscommunication in his attorney’s office and the Christmas holidays, Father’s notice of appeal was not filed until 25 January 2024. Father states that his notice of appeal was untimely, as it was filed more than 30 days after the order was entered and after he received actual notice of the order, and he asks this Court to grant his petition for writ of certiorari and reach the merits of the appeal. We grant Father’s petition for writ of certiorari.

IN RE L.Q.

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II. Discussion

Father argues that (1) the “[t]rial [c]ourt’s failure to conduct an ICWA inquiry at the commencement of the action violated [Father’s] due process rights,” and (2) the trial court violated his due process rights when it failed to comply with N.C. Gen. Stat. § 7B-1109(d) and continued this case for more than ninety days before holding an initial termination of parental rights hearing.

1. ICWA

[1] The issue of whether a trial court complied with ICWA requirements is reviewed de novo. *See In re A.P.*, 260 N.C. App. 540, 542-46 (2018). Under de novo review, this Court “considers the matter anew and freely substitutes its own judgement for that of the trial court.” *In re M.R.F.*, 378 N.C. 638, 641 (2021) (quotation marks, brackets, and citations omitted).

Congress enacted ICWA “to establish the ‘minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes’ in order to ‘protect the best interests of Indian children and to promote the stability and security of Indian tribes and families.’” *In re A.P.*, 260 N.C. App. at 542-43 (quoting 25 U.S.C. § 1902).

Subsection 23.107(a) of Title 25 of the Code of Federal Regulations provides that “[s]tate courts must ask each participant in an . . . involuntary child-custody proceeding whether the participant knows or has reason to know that the child is an Indian child. The inquiry is made at the commencement of the proceeding and all responses should be on the record.” 25 C.F.R. § 23.107(a) (2024).

An “Indian child” is “any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe[.]” 25 U.S.C. § 1903(4) (2023). The relevant inquiry is whether the child has a political affiliation with a federally recognized Indian tribe. *In re C.C.G.*, 380 N.C. 23, 29 (2022). “Indian heritage, which is racial, cultural, or hereditary does not indicate Indian tribe membership, which is political.” *Id.* at 30; *see* 25 U.S.C. § 1903(4).

A trial court has reason to know an Indian child is involved in a proceeding if: “Any participant in the proceeding, officer of the court involved in the proceeding, Indian Tribe, Indian organization, or agency informs the court that it has discovered information indicating that the child is an Indian child[.]” 25 C.F.R. § 23.107(c)(2) (2024). When a trial

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court has reason to know that a child could be an Indian child, but does not have conclusive evidence, the trial court should confirm and “work with all of the Tribes of which there is reason to know the child may be a member (or eligible for membership), to verify whether the child is in fact a member” 25 C.F.R. § 23.107(b)(1) (2024).

When a trial court knows or has reason to know that an Indian child is involved in an involuntary custody proceeding, federal law provides:

[T]he party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child’s tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. . . . No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe

25 U.S.C. § 1912(a) (2023).

This Court has “required social service agencies to send notice to the claimed tribes rather than risk the trial court’s orders being voided in the future, when claims of Indian heritage arise, even where it may be unlikely the juvenile is an Indian child.” *In re A.P.*, 260 N.C. App. at 545 (citations omitted).

Here, the parties do not dispute that the trial court inquired about Lou’s possible Indian heritage, nor that, when the trial court had reason to know that Lou may be an Indian child, DSS properly notified the relevant tribes and each tribe confirmed that Lou is not an eligible member.

Father does dispute, however, whether this inquiry was made at the commencement of the termination of parental rights proceedings, and thus whether it was proper under ICWA. The trial court inquired about Lou’s potential membership in an Indian tribe at the pre-trial hearing on 11 March 2022. This hearing took place following twelve continuances beginning on 5 September 2020. All twelve continuances were caused by either COVID-19 exposures and regulations, Father’s inability to be present, Mother’s inability to be present, or a heavy docket. Father argues that, due to the twelve continuances over seventeen months, the inquiry into Lou’s possible Indian heritage did not occur at the commencement of proceedings, as is required by 25 C.F.R. § 23.107(a). We disagree.

The record indicates that the 11 March 2022 pre-trial hearing was the first opportunity for the trial court to make an inquiry into Lou’s

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possible Indian heritage. At the start of the pre-trial hearing, the court asked the parties if “[a]nybody [was] aware of any tribal affiliation or any American Indian heritage?” DSS was not aware of any possible Indian heritage. Father’s counsel responded, stating that Father’s grandmother is “Blackfoot Indian.” At subsequent hearings, the court heard testimony on potential Indian heritage from Father, Mother, Father’s paternal aunt, and a social worker. Father stated that his paternal grandmother was “Blackfoot” Indian, while his paternal aunt indicated that she was told the paternal grandmother was Cherokee Indian. No documentation of tribal affiliation was presented at trial. After being given reason to know Lou may be an Indian child, DSS properly notified and received responses from the Blackfeet Tribe, the Cherokee Nation, the Eastern Band of Cherokee Indians, and the United Keetoowah Band of Cherokee Indians indicating that Lou is not an Indian child.

The record reflects that the trial court properly made the inquiry required by 25 C.F.R. § 23.107(a) at the commencement of the termination of parental rights proceedings and subsequently notified and received responses from the relevant tribes. Therefore, the trial court complied with ICWA.

2. N.C. Gen. Stat. § 7B-1109

[2] Father argues that the trial court violated his due process rights when it failed to comply with N.C. Gen. Stat. § 7B-1109(d) and continued this case for more than ninety days before holding an initial hearing on the petition to terminate his parental rights. Father acknowledges that filing a writ of mandamus is the appropriate remedy for the trial court’s failure to hold a timely hearing on a petition to terminate parental rights. However, Father argues that, “considering the time-frames established by the juvenile code for the expeditious resolution of these matters,” the trial court “should have moved this case to its conclusion within a reasonable amount of time.” We are not persuaded.

This Court reviews whether a trial court complied with N.C. Gen. Stat. § 7B-1109 de novo on appeal. *In re C.V.D.C.*, 374 N.C. 525, 530 (2020).

A writ of mandamus is the proper remedy when the trial court fails to hold a hearing or enter an order as required by statute. *See In re C.R.L.*, 377 N.C. 24, 28 (2021). “A writ of mandamus ensures that the trial courts adhere to statutory time frames without the ensuing delay of a lengthy appeal.” *In re T.H.T.*, 362 N.C. 446, 455 (2008). “Moreover, the availability of the remedy of mandamus ensures that the parties remain actively engaged in the district court process and do not ‘sit back’ and rely upon an appeal to cure all wrongs.” *Id.* at 455-56 (citations omitted).

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In *In re C.R.L.*, the parent argued that a thirty-three month span between the filing of a termination of parental rights petition and the termination hearing was so egregious a violation of N.C. Gen. Stat. § 7B-1109 that it should be considered “presumptively prejudicial.” 377 N.C. at 28. Our Supreme Court held that the appellant’s failure to petition for writ of mandamus precluded him from obtaining relief from the violation of N.C. Gen. Stat. § 7B-1109. *Id.* at 29.

Here, as in *C.R.L.*, Father failed to file a petition for writ of mandamus at any point between the filing of the TPR Petition and the conclusion of proceedings to terminate his parental rights. Also like in *C.R.L.*, Father offered no explanation for his failure to file a petition for writ of mandamus. Because Father “did not file a petition for writ of mandamus while the termination petitions were pending, . . . he missed his opportunity to remedy the violation of [N.C. Gen. Stat.] § 7B-1109.” *Id.*

III. Conclusion

The record indicates that the trial court properly inquired about Lou’s potential Indian heritage at the commencement of termination of parental rights proceedings. After being given reason to know that Lou may be an Indian child within the meaning of ICWA, DSS properly notified and received responses from the relevant Indian tribes. Thus, the trial court complied with ICWA.

Father missed his opportunity to remedy the trial court’s violation of N.C. Gen. Stat. § 7B-1109 by failing to file a petition for writ of mandamus during the termination of parental rights proceedings. Accordingly, we affirm the trial court’s termination order.

AFFIRMED.

Judges STROUD and ZACHARY concur.

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TIM OATES, PLAINTIFF

v.

PHILIP E. BERGER, IN HIS OFFICIAL CAPACITY AS PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; TIMOTHY K. MOORE, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE HOUSE OF REPRESENTATIVES; CAMERON INGRAM, IN HIS OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; THE NORTH CAROLINA WILDLIFE RESOURCES COMMISSION; AND THE STATE OF NORTH CAROLINA, DEFENDANTS

No. COA24-559

Filed 16 April 2025

**Constitutional Law—North Carolina—Sunday hunting statute—
facial challenge—rational basis**

In considering a facial challenge to the constitutionality of an amended version of N.C.G.S. § 103-2 (restricting hunting on Sundays to permitted times, locations, methods, and prey) enacted in the same legislative session during which an amendment to the North Carolina constitution (that was ultimately ratified) protecting the right to hunt and fish was introduced, the Court of Appeals affirmed the decision of the three-judge panel that allowed summary judgment in favor of defendants (government entities connected to the passage or enforcement of the statute) after applying rational basis review and noting that the restrictions ensured that, on Sunday mornings: non-hunters could safely enjoy game lands; residents—including churchgoers—could enjoy respite; and migratory bird populations could be preserved. Additionally, by applying the statutory restrictions, North Carolina received compensatory hunting days from the U.S. Fish and Wildlife Service.

Appeal by plaintiff from order and judgment entered 12 February 2024 by a panel consisting of Judges Daniel A. Kuehnert, Rebecca W. Holt, and Richard K. Harrell in Superior Court, Wake County. Heard in the Court of Appeals 29 January 2025.

Center for Constitutional Rights & Free Trade, by Scott Maitland, for plaintiff.

Attorney General Jeff Jackson, by Deputy Solicitor General Nicholas S. Brod, Solicitor General Ryan Y. Park, Special Deputy Attorney General Olga Vysotskaya de Brito, Solicitor General Fellow Kaeli Czosek, and Assistant Attorney General Benjamin T. Spangler, for defendants.

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ARROWOOD, Judge.

Tim Oates (“plaintiff”) appeals from an order granting summary judgment in favor of Philip Berger, et al. (“defendants”), on plaintiff’s facial challenge to the constitutionality of the Sunday hunting laws of N.C.G.S. § 103-2. For the following reasons, we affirm the lower court’s decision.

I. Background

On 25 July 2017, Governor Roy Cooper signed House Bill 559 into law, amending the Sunday hunting laws of North Carolina which up to that point had prohibited all firearm hunting on Sundays, punishable as a Class 3 misdemeanor. 2017 H.B. 559, S.L. 2017-182. The amended law included the following prohibitions in pertinent part:

(a) Any landowner or member of the landowner’s family, or any person with written permission from the landowner, may, subject to rules established by the Wildlife Resources Commission, hunt wild animals and upland game birds with the use of firearms on Sunday on the landowner’s property, except that all of the following limitations apply:

(1) Hunting on Sunday between 9:30 A.M. and 12:30 P.M. is prohibited, except on controlled hunting preserves licensed pursuant to G.S. 113-273(g).

...

(3) The use of a firearm to take deer that are run or chased by dogs on Sunday is prohibited.

(4) Hunting on Sunday within 500 yards of a place of religious worship, as defined by G.S. 14-54.1(b), or any accessory structure thereof, is prohibited.

...

(a1) Any person may . . . hunt wild animals and upland game birds with the use of firearms on Sunday on public lands of the State managed for hunting, except that the following limitations apply:

(1) Hunting on Sunday between 9:30 A.M. and 12:30 P.M. is prohibited.

(2) The use of a firearm to take deer that are run or chased by dogs on Sunday is prohibited.

(3) Hunting on Sunday within 500 yards of a place of religious worship, as defined by G.S. 14-54.1(b), or any accessory structure thereof, is prohibited.

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...

(a2) The hunting of migratory birds on Sunday is prohibited unless authorized by proclamation or rules of the Wildlife Resources Commission, subject to the following limitations:

(1) Hunting on Sunday between 9:30 A.M. and 12:30 P.M. is prohibited, except on controlled hunting preserves licensed pursuant to G.S. 113-273(g).

(2) Hunting on Sunday within 500 yards of a place of religious worship, as defined by G.S. 14-54.1(b), or any accessory structure thereof, is prohibited.

...

Id. These Sunday hunting laws are codified as N.C.G.S. § 103-2. During the same legislative session, an amendment to the North Carolina Constitution protecting the right to hunt and fish was filed in the Senate, which was ultimately ratified on 25 June 2018. 2018 S.B. 677. This amendment reads as follows:

The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and shall be forever preserved for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing. Public hunting and fishing shall be a preferred means of managing and controlling wildlife. Nothing herein shall be construed to modify any provision of law relating to trespass, property rights, or eminent domain.

N.C. Const. art. I § 38.

On 25 September 2020, plaintiff filed a complaint against Attorney General Josh Stein in Wake County stating three causes of action: (1) that N.C.G.S. § 103-2(a2), which prohibits Sunday waterfowl hunting, impermissibly interferes with the fundamental rights of hunting and pursuit of happiness guaranteed by the North Carolina Constitution; (2) that N.C.G.S. § 103-2(a1), which limits hunting hours on Sunday, is likewise unconstitutional; and (3) that all restrictions on Sunday hunting are not allowed under the federal Establishment Clause. Attorney General Stein filed a motion to dismiss on 23 October 2020, arguing that

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he was not a proper party to the action and that plaintiff lacked standing to sue him. On 2 December 2020, plaintiff filed an amended complaint against present defendants. In the amended complaint, plaintiff argued that restrictions on the right to hunt migratory birds on Sunday, all restrictions on hunting on public grounds on Sundays, and time bound hunting restrictions “interfere[] with a multitude of rights granted by the state constitution”

Defendants subsequently filed a motion to dismiss the amended complaint pursuant to Rules 12(b)(1), 12(b)(2), and 12(b)(6) as to Cameron Ingram, the North Carolina Wildlife Resources Commission, and the State of North Carolina, arguing that plaintiff had failed to plead sufficient facts to state claims upon which relief could be granted. Plaintiff filed a motion for summary judgment on 13 January 2021. An additional motion to dismiss as to defendants Philip E. Berger and Timothy K. Moore was filed on 17 June 2021, stating in part that plaintiff had not pled sufficient facts to support his as-applied challenge.

The amended complaint and motions to dismiss were heard in Wake County Superior Court on 14 September 2021. In a 19 January 2022 order, Judge Keith Gregory recognized that plaintiff had dismissed his as-applied challenges with prejudice and transferred the facial challenges to a three-judge panel.

On 12 February 2024, a panel consisting of Judges Daniel Kuehnert, Rebecca Holt, and Richard Harrell, entered an order granting summary judgment in favor of defendants. In addressing Count 1, plaintiff’s challenge to the restriction on migratory bird hunting on Sundays, the panel applied rational basis review, finding that plaintiff could not meet his burden on the facial challenge “because the statute is reasonably and rationally related to the legitimate government interest contemplated in the text of the amendment under which Plaintiff brings his challenge.” The court noted that strict scrutiny was “chiefly inappropriate,” given that the Article contained “express language that limits the right to hunt by vesting in the State a right and a duty to manage wildlife.” The panel further noted that there were additional State obligations to protect the lands and waters to the benefit of both hunters and non-hunters, and discussed “several conceivable reasons to restrict hunting” on Sundays: protecting migratory birds; enabling non-hunters to enjoy scenic game lands without disturbance; and allowing an extended hunting season through compensatory hunting days.

In addressing Count 2, plaintiff’s contention that any and all restrictions on hunting on public lands are unconstitutional, the panel noted

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its analysis of Count 1 and cited Article XIV of the North Carolina Constitution: “the State is required ‘to conserve and protect its lands and waters for the benefit of *all* its citizenry’ ” The court further noted that the Equal Protection Clause does not apply to different types of land.

Regarding Count 3, plaintiff’s challenge to the ban on hunting on public or private land between 9:30 a.m. and 12:30 p.m. on Sundays, the panel found that the General Assembly had authority to exercise the police power of the State to protect the people’s welfare, and that an ordinance which “may require the cessation of secular pursuits on Sunday during the hours in which churchgoing people usually attend religious services, will not be held unconstitutional, if otherwise reasonable and valid[,]” quoting *State v. McGee*, 237 N.C. 633, 644 (1953). The panel determined that this law was “a valid exercise of the State’s police power,” given the benefit to non-hunters, who will have a guaranteed window of time during which they will not be disturbed by hunting, and the extended hunting season in North Carolina.

Upon finding that there was “no genuine issue of material fact” and that plaintiff had failed to satisfy the burden of proof as to facial unconstitutionality, the panel granted summary judgment in favor of defendants. Plaintiff filed notice of appeal on 10 March 2024.

II. Discussion

Plaintiff raises three issues on appeal. First, plaintiff argues that the panel applied the incorrect standard of review; second, that the panel’s interpretation of Article I, Section 38 as a grant of power to the general assembly was incorrect; and third, that the correct application of any level of scrutiny to the hunting law would show it to be unconstitutional. We address each of plaintiff’s arguments in turn.

A. Standard and Scope of Review

We review an appeal from an order granting summary judgment *de novo*. *Stevens v. Heller*, 268 N.C. App. 654, 658 (2019). “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 (2008) (interior quotations and citation removed).

A party is entitled to summary judgment when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C.G.S. § 1A-1, Rule 56 (2024). “The purpose of summary judgment is

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to eliminate formal trial when the only questions involved are questions of law.” *Ellis v. Williams*, 319 N.C. 413, 415 (1987) (citations omitted).

Reviewing plaintiff’s appeal requires an additional level of analysis, that of the constitutionality of the law itself, which we also review *de novo*. See *State v. Grady*, 372 N.C. 509, 521 (2019). Here, plaintiff engages in a facial challenge to the statute, rather than a challenge to the statute as applied to himself in particular. To succeed in this challenge, plaintiff bears a heavy burden, as he must not rely on speculation, but rather “establish that no set of circumstances exists under which the act would be valid.” *Holmes v. Moore*, 384 N.C. 426, 436 (2023) (interior quotations and citation omitted). We presume that laws passed by the General Assembly are constitutional, and will not make a finding of unconstitutionality unless convinced beyond a reasonable doubt. *Grady*, 372 N.C. at 521–22. A “constitutional violation must be plain and clear,” and in deciding such, “we look to the text of the constitution, the historical context in which the people of North Carolina adopted the constitutional provision at issue, and our precedents.” *N.C. State Bd. of Educ. v. State*, 371 N.C. 149, 157 (2018) (citations omitted).

B. Appropriate Level of Scrutiny

Laws passed by the General Assembly implicate different types of rights, and the type of right implicated will determine how closely we examine the purpose and effect of the law. Where a right “is constitutionally fundamental, then the court must apply a strict scrutiny analysis wherein the party seeking to apply the law must demonstrate that it serves a compelling state interest.” *Affordable Care, Inc. v. N.C. State Bd. of Dental Exam’rs*, 153 N.C. App. 527, 535–36 (2002) (citation omitted). However, where the right is not fundamental, “the party seeking to apply it need only meet the traditional test of establishing that the law is rationally related to a legitimate state interest.” *Id.* at 536.

We have previously held that “[f]undamental rights include those either explicitly or implicitly guaranteed by the state or federal constitution” *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 694 (2002). Very few rights are recognized as fundamental under the federal Constitution; these include the right to marry, have children, and enjoy marital privacy. *Standley v. Town of Woodfin*, 362 N.C. 328, 332 (2008) (citations omitted). Fundamental rights under the North Carolina Constitution appear in a variety of cases; our courts have, at various times, recognized fundamental rights to just compensation, *Dept. of Transp. v. Rowe*, 353 N.C. 671, 676 (2001), opportunity for a basic education, *Hoke Cnty. Bd. of Educ. v. State*, 382 N.C. 386, 435–36 (2022), and a one-person one-vote standard, *Blankenship v. Bartlett*, 363 N.C. 518, 522 (2009).

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Plaintiff argues that the right to hunt is a fundamental right, and thus deserving of strict scrutiny. However, while the right to hunt has been made explicit in our Constitution, this does not mean that it is a fundamental right for several reasons, chief among them being the reservation of power to the General Assembly contained within the constitutional amendment.

In *Blankenship v. Bartlett*, our Supreme Court addressed the question of whether a right written into the constitution is a fundamental right. There, the court held that even though the State was “under no mandate to give its citizens the right to vote for superior court judges, once it has done so in its constitution, that provision must be construed in conjunction with the Equal Protection Clause to prevent internal conflict.” *Blankenship*, 363 N.C. at 525. This right, the Court held, “is literally enshrined in the North Carolina Constitution and, as such, is distinguishable from other citizenship privileges that receive rational basis review.” *Id.* at 526. However, despite this “literal enshrinement,” the Court did not find that strict scrutiny was appropriate, since judicial elections have “a separate component that is ordinarily the province of the legislature” *Id.* at 523–24. Thus, despite “literal enshrinement,” the right to vote in judicial elections also occupied the province of the legislature, which prevented the court from applying rational basis review.

Even further distinguishing the right in the case *sub judice* from a fundamental right, and also distinguishing it from the right in *Blankenship*, is the grant of power to the General Assembly written into the amendment. Our Supreme Court has previously ruled on the appropriate standard of review when a right is subject to the power of the General Assembly. The Court found that the right of contract is “qualified” and that the “guaranty of liberty does not withdraw the right of legislative supervision” *Morris v. Holshouser*, 220 N.C. 293, 296 (1941). Where the legislature has power over a right, this court will not overturn a law curtailing that right unless it was unreasonable or arbitrary. *See id.* (quoting *Alaska Packers Ass’n v. Indus. Comm.*, 55 S. Ct. 518, 522 (1935)). Thus, although the right to hunt was written into our Constitution, the amendment has all the hallmarks that indicate laws passed under the amendment deserve only rational basis review.

Plaintiff takes issue with interpretation of the phrase “subject only to laws enacted by the General Assembly” contained within the constitutional amendment. He argues that this phrase was misinterpreted by the superior court panel, and that it acts as a *limit on*, rather than a grant of, power to the General Assembly, the latter being our contention here. Plaintiff’s argument centers on his interpretation of our reasoning

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in *Coastal Conservation Ass'n v. State*, 285 N.C. App. 267 (2022), upon which the superior court panel relied in making its determination.

The central dispute of *Coastal Conservation Ass'n* was the allegation that the State had breached, *inter alia*, Article I, Section 38 of the North Carolina Constitution by “permitting for-profit harvesting of fin-fish or shellfish in quantities or through methods that cause overexploitation or undue wastage to North Carolina’s coastal fisheries resources.” *Id.* at 269. We held that this amendment was created to protect the right to fish against encroachment, and that the State had an affirmative duty pursuant to the amendment “to preserve the right of the people to fish and harvest fish.” *Id.* at 282. This included the duty to preserve fisheries. *Id.* at 283.

Plaintiff argues that rational basis review is inappropriate in light of this holding, since it would “allow almost any encroachment of these rights no matter how tenuously related they are to actual wildlife management.” He contends that the Sunday hunting laws “have nothing to do with managing wildlife and everything to do with managing people.” We disagree with plaintiff’s position for a number of reasons: the historical record surrounding the Sunday hunting laws and the enactment of this amendment indicate that these were decided in tandem, and the state Constitution already demands that state land be used for the benefit of all.

The scope of our historical review can be expansive: we interpret the law “in accordance with the intent of its framers and the citizens who adopted it. Inquiry must be had into the history of the questioned provision and its antecedents, the conditions that existed prior to its enactment, and the purposes sought to be accomplished by its promulgation.” *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 613 (1980). Our review here reveals that the amendment and updates to the Sunday hunting laws were made almost in tandem. North Carolina House Bill 559 was passed as part of the 2017–18 legislative session, first filed 4 April 2017, and ratified on 30 June 2017. 2017 H.B. 559. At the same time that these changes to the Sunday hunting laws were under consideration in the House, the Senate introduced the hunting and fishing amendment on 6 June 2017, which was ratified a year later. 2017 S.B. 677. Both of the bills passed with significant margins. It is clear from the historical record, then, that our legislature saw no conflict between the amendment and what was left of the Sunday hunting laws, as they chose to pass the amendment and keep the laws in a limited form, rather than entirely discard Sunday hunting laws.

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Finally, we note that “a constitution cannot be in violation of itself,” and thus we read each provision of our Constitution in *pari materia*. *Stephenson v. Bartlett*, 355 N.C. 354, 378 (2002) (citations omitted). Article XIV, Section 5 of our State Constitution reads, in pertinent part: “It shall be the policy of this State to conserve and protect its lands and waters for the benefit of *all its citizenry*” N.C. Const. art. XIV, § 5 (emphasis added).

Given, then, that the power of the General Assembly to pass laws concerning hunting was written into the amendment, that the laws were changed and the amendment introduced in the same session of the General Assembly and ratified with wide margins, the fact that our Constitution requires the protection of land for all the citizens of North Carolina, we hold that the Sunday hunting laws must be reviewed under the rational basis test.

C. Rational Basis Review of Sunday Hunting Laws

Reviewing, then, the Sunday hunting laws for a rational basis, we find that they are valid under the North Carolina Constitution. “The ‘rational basis’ standard merely requires that the governmental classification bear some rational relationship to a conceivable legitimate interest of government.” *White v. Pate*, 308 N.C. 759, 766–67 (1983). Laws reviewed under rational basis are presumed valid. *Id.* at 767.

There are numerous rational bases on which these hunting laws rest. By restricting hunting on Sundays, North Carolina receives compensatory hunting days under U.S. Fish and Wildlife regulations, extending the hunting season while receiving the same number of hunting days. Letter from U.S. Fish and Wildlife Serv. to N.C. Wildlife Res. Comm’n (Nov. 3, 2023) (on file in record). By limiting the hours on which hunting can occur, the law provides opportunities for non-hunters to enjoy North Carolina game lands and provides residents and churchgoers with an assured respite on Sunday mornings. The law also ensures that migratory bird populations will be preserved by preventing their hunting on Sundays.

Plaintiff challenges this last basis, protecting bird populations, by pointing to a study on the impact of Sunday hunting on migratory birds conducted by the North Carolina Wildlife Resources Commission and presented to the North Carolina General Assembly on 1 March 2018. N.C. WILDLIFE RESOURCES COMM’N, *Final Report to the North Carolina General Assembly on the Biological, Resource Management, Sociological and Economic Impacts of Allowing Sunday Hunting of Migratory Birds in North Carolina* (2018). Plaintiff notes that the study concluded

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that “Sunday hunting of waterfowl has NO NEGATIVE (*sic*) impact on conservation, management or preservation, it also has POSITIVE (*sic*) social economic impacts.”¹ However, plaintiff misstates the strength with which the Commission provided its advice. The Commission offered the advice that “[w]hile there is no evidence that Sunday hunting would have any negative biological impact on migratory bird populations, empirical data to accurately predict impacts do not currently exist nor are they likely to exist in the future.” *Final Report* at 4. The General Assembly, therefore, was entitled to make a reasoned decision based on the lack of conclusive evidence and thereby decided to preserve the law prohibiting the hunting of migratory birds on Sunday.

III. Conclusion

For the foregoing reasons, we affirm the decision of the Superior Court panel.

AFFIRMED.

Judges GORE and MURRY concur.

1. The Commission’s letter notes that migratory birds include waterfowl. *Final Report* at 2.

SMITH v. LANE

[298 N.C. App. 560 (2025)]

ROBERT DUSTIN SMITH, PLAINTIFF

v.

TERESA LANE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS A CITY OF RALEIGH FIREFIGHTER,
AND CITY OF RALEIGH, DEFENDANTS

No. COA24-790

Filed 16 April 2025

Immunity—governmental—city firefighter—collision while driving firetruck back to fire station—governmental function—waiver not shown

In a negligence case brought against a city firefighter and the city itself (together, defendants), where the firefighter was driving a firetruck back to the fire station when she collided with a motorcyclist (plaintiff) who sustained serious injuries as a result, including one leg amputation, the trial court erred in partially denying defendants' motion to dismiss—filed pursuant to Rule 12(b)(2)—based on governmental immunity. To begin with, governmental immunity—which applies to actions taken by municipalities in the course of a governmental function—applied to the firefighter's conduct because the operation of a firetruck is a governmental function, even when the firetruck is not responding to an emergency. Furthermore, plaintiff failed to show that defendants waived governmental immunity where: (1) the city's excess liability insurance policies contained language excluding coverage for claims in which immunity applied; (2) the city did not participate in a local government risk pool; and (3) although the city did pass a resolution establishing requirements that, if met, would result in a limited waiver of immunity, plaintiff failed to meet those requirements.

Appeal by Defendants from an order entered 3 May 2024 by Judge Hoyt G. Tessener in Wake County Superior Court. Heard in the Court of Appeals 25 February 2025.

Krompecher Law Firm, LLC by Pedro Krompecher, III and Beasley, Allen, Crow, Methvin, Portis & Miles, P.C. by J. Parker Miller, pro hac vice, for Plaintiff-Appellee.

City Attorney Karen McDonald, by Andrew J. Seymour Senior Associate City Attorney, for Defendants-Appellants.

WOOD, Judge.

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Teresa Lane and the City of Raleigh (“Defendants”) appeal from an order denying a Motion to Dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6). As Plaintiff has failed to “allege and prove” Defendants waived their immunity as required in N.C. Gen. Stat. § 160A-485(a), the trial court erred by denying Defendants’ motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). For the reasons set forth below, we reverse the trial court’s order.

I. Factual and Procedural Background

On 22 October 2022, Teresa Lane (“Lane”) a City of Raleigh firefighter, was on duty and driving a firetruck and returning to Fire Station 9. Robert Smith (“Plaintiff”) was riding on a motorcycle following Lane’s firetruck along Six Forks Road in Raleigh in the right lane. Plaintiff contends that Lane moved from the right lane to the center lane while Plaintiff continued in the right lane. Then suddenly and without warning Lane performed a lane change from the middle lane back to the right lane directly in front of Plaintiff without signal causing a collision.

Defendants assert Lane was driving in the far-right lane and Plaintiff was directly behind the firetruck but as Lane approached the entrance to the fire station, Defendant crossed into the middle lane to make the right turn into the entrance of the fire station. As Defendant was turning, Plaintiff drove straight into the side of the firetruck. Both parties agree that the firetruck was not responding to an emergency and did not have its lights or sirens activated. Plaintiff sustained serious injuries, including the amputation of one leg above the knee.

On 4 October 2023, Plaintiff filed a complaint alleging Lane had negligently caused the collision and that the City of Raleigh was responsible for the negligence under the doctrines of negligent supervision and *respondeat superior*.

On 1 December 2023, Defendants filed motions to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1), 12(b)(2), and 12(b)(6) citing grounds that the trial court lacked personal and subject matter jurisdiction over Defendants based on the doctrine of governmental immunity and that the complaint failed to state a cause of action upon which relief could be granted.

On 25 April 2024, Defendants’ motion came on for hearing in Wake County Superior Court. The trial court granted the motion in part and denied it in part. The trial court granted the 12(b)(6) motion to dismiss punitive damages and denied the 12(b)(6) motion to dismiss

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official capacity claims against Lane. In addition, the trial court denied Defendants' 12(b)(1) and 12(b)(2) motions to dismiss based on governmental immunity.

On 15 May 2024, Defendants filed notice of appeal.

II. Analysis

On appeal, Defendants contend the trial court erred by denying Defendants' Rule 12(b)(2) motion to dismiss. Defendants argue the undisputed evidence establishes that, as a matter of law, governmental immunity bars Plaintiff's claims. We agree.

A. Standard of Review

"An 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." *Doe v. Charlotte-Mecklenburg Bd. of Educ.*, 222 N.C. App. 359, 363, 731 S.E.2d 245, 248 (2012) (cleaned up). The denial of a Rule 12(b)(2) motion to dismiss is such an interlocutory order. Generally, interlocutory orders are not immediately appealable unless they affect a substantial right. However, such an appeal "addressing a governmental entity's immunity claim is immediately appealable because immunity represents a substantial right. This Court reviews a trial court's decision to grant or deny a motion to dismiss based upon the doctrine of governmental or legislative immunity using a de novo standard of review." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 209, 876 S.E.2d 453, 460 (2022) (cleaned up).

B. Governmental Immunity

North Carolina courts have long held that "governmental immunity covers only the acts of a municipality or a municipal corporation committed pursuant to its governmental functions." *Providence Volunteer Fire Dep't, Inc. v. Town of Weddington*, 382 N.C. 199, 212, 876 S.E.2d 453, 462 (2022) (cleaned up) (quoting *Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Rec. Dept.*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012)). Governmental immunity does not apply when the municipality engages in a proprietary function. In determining whether an entity is entitled to governmental immunity, the issue turns on whether the alleged tortious conduct of the county or municipality was a result of an activity that was governmental in nature or proprietary in nature. *Id.*

We have long held "a 'governmental' function is an activity that is 'discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State rather than for itself.'" *Providence*

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Volunteer Fire Dep't, Inc. v. Town of Weddington, 382 N.C. 199, 212, 876 S.E.2d 453, 462 (2022) (quoting *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952)). In contrast, a proprietary function is one that is “commercial or chiefly for the private advantage of the compact community.” *Britt* at 450, 73 S.E.2d at 293.

Sub judice, both Plaintiff and Defendants, acknowledge “at all times relevant, Defendant Lane operated the Firetruck in the course and scope of her employment with Defendant City.” In *Taylor v. Ashburn*, this Court held that a firefighter shares in the city’s governmental immunity for claims arising out of a firefighter’s negligent operation of a fire truck concluding that the operation of a firetruck is a governmental function. *Taylor v. Ashburn*, 112 N.C. App. 604, 608, 436 S.E.2d 276, 279 (1993). Although both parties agree with the holding in *Taylor*, Plaintiff attempts to distinguish *Taylor* from the current case on the notion Defendant’s firetruck was not responding to an emergency call with lights and sirens, but rather it was returning to the fire station. We disagree. A firetruck’s departure from its station by necessity requires its return. Therefore, a firetruck on return to a Fire Station fulfills a governmental function because a city or municipalities’ operation of a fire department is clearly a governmental function. We conclude governmental immunity applies *sub judice*.

C. Waiver of Immunity

We next consider whether Defendants waived their governmental immunity. Pursuant to N.C. Gen. Stat. § 160A-485(a), governmental immunity may be waived: (1) by purchasing insurance that actually indemnifies the city from tort liability; (2) by participating in a local government risk pool that actually indemnifies the city; or (3) by adopting a resolution that deems the creation of a funded reserve to be the same as a purchase of insurance. N.C. Gen. Stat. § 160A-485(a) (2024). “Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the sovereign right to immunity, must be strictly construed.” *Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 537–38, 299 S.E.2d 618, 627 (1983). A plaintiff bringing claims against a governmental entity and its employees acting in the scope of their official capacities “must allege and prove that the officials have waived their immunity or otherwise consented to suit.” *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 607, 698 S.E.2d 83, 89 (2010).

1. Waiver By Purchase of Insurance

Plaintiff contends that Defendants waived their liability by purchasing two insurance plans whose exclusionary clause does not explicitly address governmental immunity.

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The purchase of excess insurance does not waive a governmental entity's immunity when the insurance policy contains language that preserves the entity's immunity and excludes coverage for claims to which immunity applies. *See, e.g., Hinson v. City of Greensboro*, 232 N.C. App. 204, 213, 753 S.E.2d 822, 828 (2014); *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 607-08, 698 S.E.2d 83, 89 (2010); *Estate of Earley ex rel. Earley v. Haywood Cnty. Dep't of Social Servs.*, 204 N.C. App. 338, 343, 694 S.E.2d 405, 409-10 (2010).

It is uncontested that the City of Raleigh purchased two excess insurance policies that provide a combined total of \$10 million in insurance coverage for certain claims subject to certain limitations and endorsements. Defendants submitted affidavits by Ryan Wilson, the Risk and Insurance Manager for the City of Raleigh, and Karen McDonald, the City Attorney, as well as evidence that the endorsements preserved their immunity and excluded coverage to claims in which immunity applied. The endorsements at issue state:

Governmental Tort Liability Limitation Endorsement: By accepting coverage under this policy, the *insured* does not waive any of its statutory immunities for monetary limits of liability (commonly known as tort liability damages caps), and Berkley Public Entity shall not be liable for any *claims* in excess of the statutory monetary limits unless the statutory tort limitation is found by a court not to apply. If *claims* are asserted in any judicial jurisdiction where statutory liability damage caps do not apply, then the limits of coverage shown in the Declarations and further described in Section C. Limits of Insurance apply.

Plaintiff argues that the language in this endorsement is ambiguous and therefore should not be held to exclude governmental immunity claims. We disagree. "If the meaning of the policy is clear and only one reasonable interpretation exists, the courts must enforce the contract as written[.]" *Wright v. Gaston Cnty.*, 205 N.C. App. 600, 607, 698 S.E.2d 83, 89 (2010) (cleaned up). The "Governmental Liability Limitation" in *Wright* was substantially similar to the endorsement in this case and based upon that provision this Court held that the defendants had not waived sovereign immunity through the purchase of the policy. Similarly, the plain language of the endorsement for "Governmental Tort Liability" in the City of Raleigh's insurance policies likewise excludes coverage for claims to which governmental immunity applies. As governmental immunity applies to each of Plaintiff's claims, the excess insurance policies provide no coverage and therefore, no waiver of immunity has occurred.

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2. Waiver By Participation in a Local Government Risk Pool

Based on Defendant's affidavit from Ryan Wilson, the City's Risk and Insurance Manager, the City does not participate in a local government risk pool. Rather, the City of Raleigh manages its liability through a \$1,000,000.00 self-insured retention ("SIR"). Further, Plaintiff has not brought forth any argument that the City of Raleigh waived governmental immunity by participating in a risk pool.

3. Waiver by Resolution

In 1999, by authority granted under N.C. Gen. Stat. § 160A-485, the Raleigh City Council adopted a resolution setting forth guidelines for waiver of its immunity and the immunity of its officers for claims within its \$1,000,000.00 SIR. The resolution established mandatory requirements that must be met before the City would agree to a limited waiver. These requirements include that a party must accept the limited damages contained in the resolution and execute a release of all claims against all persons, firms, and corporations on account of the incident giving rise to the claim. *Arrington v. Martinez*, 215 N.C. App. 252, 259-60, 716 S.E.2d 410, 414-15 (2011). Plaintiff has not met the waiver requirements of the City of Raleigh's Resolution. Additionally, Plaintiff explicitly seeks damages exceeding the limits set forth under the resolution. Therefore, Defendants' immunity is not waived by the resolution.

"Because it is a jurisdictional matter, a plaintiff's complaint must affirmatively demonstrate the basis for the waiver of immunity when suing a governmental entity which has immunity." *Arrington v. Martinez*, 215 N.C. App. 252, 263, 716 S.E.2d 410, 417 (2011). Plaintiff fails to do so here. As Plaintiff has failed to establish basis for the waiver of immunity, we hold the trial court erred in its denial of Defendants' Rule 12(b)(2) motion to dismiss.

III. Conclusion

Driving a firetruck on return to the station is clearly a governmental function entitled to immunity. As Plaintiff has failed to "allege and prove" Defendants had waived their immunity as required in N.C. Gen. Stat. § 160A-485(a) the trial court erred in its denial of Defendants' motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2). We therefore reverse and remand for dismissal.

REVERSED AND REMANDED.

Judge TYSON and Judge MURRY concur.

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[298 N.C. App. 566 (2025)]

STATE OF NORTH CAROLINA

v.

BRANDON WALKER BRYANT

No. COA24-436

Filed 16 April 2025

Evidence—possession of drug paraphernalia—motion to dismiss—evidence sufficient

In a prosecution on several drug charges—brought after defendant, upon being stopped for suspected shoplifting, was discovered to possess heroin and a glass pipe—the trial court properly denied defendant’s motion to dismiss the charge of possession of drug paraphernalia where, in the light most favorable to the State, the evidence that defendant intended to use the glass pipe to ingest a controlled substance “other than marijuana” (as required by N.C.G.S. § 90-113.22)—or, more specifically, that defendant had heroin in the same pocket as the pipe (which was visibly charred, indicating prior use), but did not possess marijuana or any other substance for which the pipe could be used—was sufficient to send the issue to the jury.

Appeal by Defendant from Judgment entered 30 November 2023 by Judge George R. Hicks in Union County Superior Court. Heard in the Court of Appeals 16 January 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Milind K. Dongre, for the State.

Cooley Law Office, by Craig M. Cooley, for Defendant.

HAMPSON, Judge.

Factual and Procedural Background

Brandon Walker Bryant (Defendant) appeals from a Judgment entered upon jury verdicts finding him guilty of Felony Trafficking in Heroin by Possession, Felony Trafficking in Heroin by Transportation, and Misdemeanor Possession of Drug Paraphernalia.¹ The Record

1. On appeal, however, Defendant challenges only the conviction for Misdemeanor Possession of Drug Paraphernalia.

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before us—including evidence presented at trial—tends to reflect the following:

On 6 September 2021, Detective Brantley Birchmore and Officer Jacob McWhorter of the Monroe Police Department (MPD) responded to a report of suspected shoplifting at a Belk department store in Monroe, North Carolina. The store's Loss Prevention Officer (LPO) identified Defendant, Samantha West, and Jimmy Russell as potential shoplifters.

Detective Birchmore and Officer McWhorter approached Defendant, West, and Russell and explained “Belk suspected or thought that they might be shoplifting.” Detective Birchmore requested the group walk him and Officer McWhorter to their car. Russell, the car's registered owner, consented to a search of the vehicle; no store merchandise was found. West agreed to a search of her handbag, during which Detective Birchmore discovered a “medicine bottle” holding “another type of smaller container,” within which were “plastic baggies” containing “a brown powder[y] tar like substance.” Upon this finding, West was detained.

As West was being placed in handcuffs, Detective Birchmore saw Defendant “make a motion from the front of his body with his hand . . . going around behind his back.” Detective Birchmore observed Defendant holding a “bright orange or red . . . container of some sort.” After Defendant refused to identify what he was holding, Detective Birchmore attempted to detain him. Defendant “took off” running through the parking lot and Detective Birchmore, along with Officer McWhorter, chased after him. During the chase, Officer McWhorter observed Defendant remove “a clear tube with [a] reddish orangish cap” from his right front pocket. Officer McWhorter saw Defendant throw the container toward Russell's vehicle immediately before Defendant was apprehended.

Other officers, including Detective Patrick Torpey and Officer Bryson Burton had arrived on the scene to provide backup assistance. Officer Burton searched Defendant and found a clear glass pipe, a red straw, and two “clear plastic baggies”—one containing “a black tar substance” and the other containing “a white crystal like substance”—all in Defendant's right front pants pocket. While Officer Burton searched Defendant, Detective Birchmore recovered the container Defendant had thrown. The container held four small baggies of “a brown tar like substance.” These baggies, along with the pipe and other items, were sent to the North Carolina State Crime Laboratory for testing. Forensic analysis revealed the baggies found in the container Defendant had

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thrown contained approximately 29.53 total grams of heroin. No forensic analysis was conducted on the pipe or other items.

On 29 November 2021, Defendant was indicted for Trafficking in Heroin by Possession, Trafficking in Heroin by Transportation, Possession of Drug Paraphernalia, and Possession of Methamphetamine. The matter came on for trial on 27 November 2023. On 28 November 2023, the State dismissed the charge of Possession of Methamphetamine because the Lab had not finished its testing. At the close of the State's evidence, defense counsel moved to dismiss the charge of Possession of Drug Paraphernalia. The trial court denied this motion. Defense counsel renewed its Motion to Dismiss after declining to present evidence. Again, the trial court denied the Motion.

On 30 November 2023, the jury returned verdicts finding Defendant guilty of all three charges. The trial court consolidated the convictions and entered a Judgment sentencing Defendant to 225 to 282 months imprisonment. Defendant orally gave Notice of Appeal in open court.

Issue

The sole issue on appeal is whether the trial court erred in denying Defendant's Motions to Dismiss the charge of Possession of Drug Paraphernalia.

Analysis

"This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon [a] defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (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

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inference and resolving any contradictions in its favor.” *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted). However, “[w]hether the State has offered such substantial evidence is a question of law for the trial court.” *State v. McKinney*, 288 N.C. 113, 119, 215 S.E.2d 578, 583 (1975) (citations omitted).

Defendant argues the trial court erred in denying his Motions to Dismiss the charge of Possession of Drug Paraphernalia. Under N.C. Gen. Stat. § 90-113.22, titled Possession of Drug Paraphernalia, it is a Class 1 misdemeanor to “knowingly use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest, inhale, or otherwise introduce into the body a controlled substance *other than marijuana* which it would be unlawful to possess.” N.C. Gen. Stat. § 90-113.22(a), (b) (2023) (emphasis added).² On appeal, Defendant challenges only the element of intent. Specifically, Defendant argues the State did not present sufficient evidence he intended to use the pipe in connection with a controlled substance other than marijuana.³ Defendant contends the pipe could have been used to smoke marijuana or for some other use, rather than any other controlled substance.

While much of the caselaw addressing the specific intent to use drug paraphernalia to introduce a controlled substance into the body is unpublished and, thus, not controlling legal authority,⁴ we find *State v. Gamble* persuasive in our assessment of the facts at bar. In *Gamble*, officers searched a home where an informant had purchased cocaine. *State v. Gamble*, 218 N.C. App. 456, 721 S.E.2d 763, 2012 WL 380251, at *1 (2012) (unpublished). During the search, the defendant was observed exiting a bedroom; the officers searched the bedroom and located a bag

2. Possession of Marijuana Drug Paraphernalia is a separate, lesser included offense of N.C. Gen. Stat. § 90-113.22. See N.C. Gen. Stat. § 90-113.22A (2023) (defining Possession of Marijuana Drug Paraphernalia as a Class 3 misdemeanor).

3. At trial, defense counsel argued the pipe was not drug paraphernalia as defined by N.C. Gen. Stat. § 90-113.21. Defendant did not make this argument in his briefing and appears to have abandoned this argument on appeal. Nonetheless, we conclude there was substantial evidence the pipe constitutes drug paraphernalia. See *State v. Garrett*, 246 N.C. App. 651, 783 S.E.2d 780, 785 (2016) (glass pipe was drug paraphernalia); *State v. Huffman*, 222 N.C. App. 636, 731 S.E.2d 276, 2012 WL 3573940, at *6 (2012) (unpublished) (same); *State v. Christopher*, 184 N.C. App. 758, 646 S.E.2d 864, 2007 WL 2034113, at *2 (2007) (unpublished) (same).

4. Our Rules of Appellate Procedure provide: “An unpublished decision of the North Carolina Court of Appeals does not constitute controlling legal authority. Accordingly, citation of unpublished opinions in briefs, memoranda, and oral arguments in the trial and appellate divisions is disfavored[.]” N.C. R. App. P. 30(e)(3) (2024).

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of cocaine inside a chair, as well as “crack pipes concealed in a shoe box and under a couch.” *Id.* at *4. The defendant was indicted for and convicted of, *inter alia*, possession of drug paraphernalia. *Id.* at *1. On appeal, the defendant argued there was insufficient evidence of his intent to use the crack pipes in connection with a controlled substance. *Id.* at *4. The State’s evidence of intent included: the crack pipes were found in the same room as cocaine, a controlled substance; an officer testified that “through his training and experience he knew that the glass pipe found in the shoe box was a crack pipe because it was charred, broken at the ends, and was stuffed with a brillo pad”; and another officer testified the pipe found under the couch was “also charred.” *Id.* The Court held this evidence was sufficient to establish the defendant intended to use the crack pipes in connection with a controlled substance. *Id.*

Similarly, in *State v. Harlee*, also an unpublished case, this Court held there was sufficient evidence of the defendant’s intent to introduce a controlled substance other than marijuana. *State v. Harlee*, 180 N.C. App. 692, 639 S.E.2d 143, 2006 WL 3718084 (2006) (unpublished). This evidence included a ceramic pipe found on the defendant; officer testimony that “through his experience as a police officer, a ceramic pipe is used to ingest crack cocaine” and the defendant’s pipe “had burn marks where a lighter had been used to heat the crack cocaine”; and additional officer testimony that the pipe “was a crack pipe.” *Id.* at *3 (internal quotation marks omitted).

Defendant points to *State v. Hedgecoe*, 106 N.C. App. 157, 415 S.E.2d 777 (1992) and *State v. Eldred*, 259 N.C. App. 345, 815 S.E.2d 742 (2018) in support of his argument. In *Hedgecoe*, this Court held the evidence of the defendant’s intent to introduce a controlled substance was insufficient. 106 N.C. App. at 164, 415 S.E.2d at 781. The only evidence presented at trial was a hypodermic syringe and needle that had been found on the defendant, along with an officer’s testimony that the items “were used to introduce drugs of ‘some kind’ into the body.” *Id.* The Court found the evidence “merely established that defendant possessed a hypodermic syringe and needle but did not show any other incriminating circumstances.” *Id.* Thus, “mere possession . . . fail[ed] to establish the crucial element of possession of drug paraphernalia with the accompanying intent necessary to establish a violation of our Controlled Substances Act.” *Id.*

In *Eldred*, we held there was insufficient evidence to support the defendant’s conviction for driving while impaired. 259 N.C. App. at 350-51, 815 S.E.2d at 746. The defendant was found “[t]wo or three miles” away from his wrecked vehicle. *Id.* at 346, 815 S.E.2d at 743. He

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had visible head injuries and told officers he was “smoked up on meth.” *Id.* However, no evidence was produced at trial of “whether Defendant’s [impairment] was caused by an impairing substance or by [his injuries],” “when or where Defendant had consumed meth or any other impairing substance[,]” and when the vehicle had crashed. *Id.* at 350, 815 S.E.2d at 745. The Court reasoned this evidence did “no more than raise a suspicion of guilt[.]” *Id.* at 350, 815 S.E.2d at 746 (citation omitted). Thus, there was insufficient evidence to support the conclusion the defendant was impaired while driving.

Here, unlike *Hedgecoe*, the evidence at trial reflected more than “mere possession” of drug paraphernalia. 106 N.C. App. at 164, 415 S.E.2d at 781. Likewise, the facts before us are distinguishable from *Eldred*, where there were significant “gaps in [the] evidence.” 259 N.C. at 345, 815 S.E.2d at 742. Indeed, the evidence at trial tended to show Defendant was found contemporaneously in possession of drug paraphernalia—the pipe—and a controlled substance other than marijuana—heroin. Moreover, there is no evidence Defendant was in possession of marijuana or other substances for which the pipe may have been used.

Here, as in *Gamble* and *Harlee*, the State presented evidence of incriminating circumstances from which a jury could reasonably infer Defendant intended to use the glass pipe in connection with a controlled substance other than marijuana: heroin. The evidence tended to show Defendant possessed the pipe and the baggies of heroin in the same right front pocket. The pipe, admitted into evidence and presented to the jury, was visibly charred—consistent with signs of prior use. Furthermore, like the officers in *Gamble* and *Harlee*, Detective Torpey testified, based on his training and experience, the pipe was “consistent with narcotic use.” This evidence is sufficient to support the inference Defendant intended to use the pipe in connection with a controlled substance other than marijuana. *See Harlee*, 2006 WL 3718084 at *3. *See also In re A.O.A.*, 248 N.C. App. 453, 790 S.E.2d 753, 2016 WL 3889922, at *3 (2016) (unpublished) (observing there was no evidence of a controlled substance “found anywhere near” the defendant in holding there was insufficient evidence of intent to use drug paraphernalia in connection with a controlled substance).

Thus, viewed in the light most favorable to the State, there was substantial evidence Defendant intended to use the pipe in connection with a controlled substance other than marijuana. Therefore, the trial court properly denied Defendant’s Motions to Dismiss. Consequently, the trial court did not err in entering Judgment against Defendant on the jury verdicts.

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Conclusion

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

NO ERROR.

Judges GORE and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
SOSHA NICOLE PETERS, DEFENDANT

No. COA24-475

Filed 16 April 2025

Search and Seizure—warrantless search of vehicle—implied consent—wallet on top of car excluded

In a prosecution for possession of methamphetamine, which was based on drugs found inside defendant's wallet during a warrantless search of defendant's vehicle while in a national forest, the trial court erroneously denied defendant's motion to suppress the drugs. Although wildlife officers had defendant's implied consent to search the vehicle (because defendant did not object after her companion, who had been driving the car and thus had control over it, gave explicit consent for the search in her presence and hearing and because defendant tried to assist the officers as they began their search), that consent did not extend, absent clear and unequivocal evidence, to search the wallet, which the trial court found had been placed on top of the car by defendant at some point during the encounter and which was not attached or tethered to the car in any way. Since the only evidence supporting the offense was found inside the wallet, and the trial court did not make any findings regarding whether defendant consented to the wallet being searched, defendant's conviction was vacated and the matter was remanded for further proceedings.

Appeal by defendant from judgment entered 13 November 2023 by Judge Steve R. Warren in McDowell County Superior Court. Heard in the Court of Appeals 14 January 2025.

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Attorney General Joshua H. Stein, by Assistant Attorney General Christine Wright, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender John F. Carella, for defendant-appellant.

DILLON, Chief Judge.

Defendant Sosha Nicole Peters was convicted of possession of methamphetamine discovered in her wallet by wildlife officers during a warrantless search. During the encounter, officers were in the process of searching Defendant's vehicle and retrieved and searched the inside of Defendant's wallet that she had placed on top of the vehicle, whereupon the officers found the methamphetamine inside the wallet. On appeal, Defendant argues that the trial court erred by denying her motion to suppress the evidence found in her wallet during the search. We vacate and remand for further consideration.

I. Background

This matter involves an encounter between officers and Defendant during which the officers searched Defendant's vehicle and her wallet which was on top of her vehicle. Defendant was not charged for possession of anything found by the officers inside her vehicle, but only for the methamphetamine found inside her wallet.

The uncontradicted evidence and findings made by the trial court at Defendant's suppression hearing tended to show as follows: On 1 July 2022, two officers with the State of North Carolina Wildlife Resource Commission came in contact with Defendant and Tyrone Thomas, who were residing in a camp in the vicinity of Pisgah National Forest in McDowell County. During the encounter, one of the officers requested to see proof of identity and proof of ownership of the vehicle parked next to the tent where Defendant and Mr. Thomas were residing. Much of the encounter was caught on an officer's body camera.

Defendant walked to the car, opened the passenger door, retrieved both her wallet and the vehicle title, retrieved her identification from her wallet, and handed her identification and vehicle title showing her as the vehicle owner to the officer. The officers acknowledged Defendant as the owner of the vehicle. There were several needles in the vehicle. Defendant provided the officer with a card that allowed her access to the needles that she received from a medical center. Mr. Thomas explained

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to the officer that they had only had the vehicle for two days and he had been driving it, as Defendant did not have a current license.

After checking the identity of both Defendant and Mr. Thomas, the officer went back to speak with them. The officer asked them if there was “anything in the car [he] might need to know about.” Defendant responded, “No sir.”

The officer then asked if he could “check [the car] out,” to which Mr. Thomas responded, “Yeah, go ahead.” While the officer was preparing to search the vehicle, Defendant was cleaning the passenger side of the car and grabbing her pill bottles off the floor. The officer informed her to leave everything in the car. She apologized, stating she was just trying to clean it up for him because it was messy.

At some point, before the officer began his search of the car’s interior, Defendant’s wallet came to be on top of the vehicle. Neither the video of the encounter nor the testimony from the suppression hearing definitively establishes *how* Defendant’s wallet came to be on top of Defendant’s vehicle. The trial court, though, made a finding that it was Defendant who placed her wallet on top of the car at some point during the encounter. And Defendant in this present appeal does not challenge this finding. Therefore, for purposes of our review, the trial court’s finding is binding. *See, e.g., Brackett v. Thomas*, 371 N.C. 121, 127 (2018) (holding unchallenged findings are binding on appeal). (We express no opinion as to whether this finding remains binding on Defendant on remand or in any subsequent appeal.)

In any event, at some point, the officer retrieved Defendant’s wallet from the top of the vehicle and searched inside of it, whereupon he discovered a bag of methamphetamine inside the wallet. It is unclear based on testimony and body camera footage when, by whom, and under what circumstances Defendant’s wallet was placed on top of the car.

Defendant was only charged for the methamphetamine found in her wallet. Prior to her trial, she moved to suppress the evidence found in her wallet on the grounds that the evidence was found during an unconstitutional search.

The trial court entered an order denying Defendant’s motion to suppress. The court determined that Defendant’s companion, Mr. Thomas, had validly consented to the search of her vehicle, based on his “apparent control” of the vehicle, and that Defendant, otherwise, also implied consented to the search of her vehicle (presumably based on her actions and inactions). The trial court, however, made no findings or conclusions concerning whether consent was given to search the wallet itself.

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Defendant pleaded guilty to possession of methamphetamine, reserving her right to appeal the trial court's denial of her motion to suppress. Defendant appealed.

II. Analysis

We review a trial court's order denying a defendant's motion to suppress by "determining whether the trial court's underlying findings of fact are supported by competent evidence and whether those factual findings in turn support the trial court's ultimate conclusions of law." *State v. Parisi*, 372 N.C. 639, 649 (2019) (citations and internal quotations omitted). A trial court's findings of fact are "conclusive on appeal if supported by competent evidence, even if the evidence is conflicting." *State v. Eason*, 336 N.C. 730, 745 (1994). "We will review conclusions of law de novo regardless of the label applied by the trial court." *State v. Jackson*, 220 N.C. App. 1, 8 (2012).

The relevant findings of facts and conclusions of law are as follows:

[Finding 5]: At each time Ms. Peters accessed the car she did so from the driver's side. The court concludes that Ms. Peter[s] had her belongings stored in the passenger area of the car and she did not access the driver's area as she had not been in control of its operations and contents in the driving area.

[Finding 7]: In the presence of both Mr. Thomas and Ms. Peters, [the officer], in requesting consent to search the car, asked "care if we check it out?" Mr. Thomas said "Yeah, go ahead." The Court finds from this evidence that Ms. Peters did not object and at no time voiced opposition to the search, or the impending search, thereafter.

[Finding 8]: As a result of the search [the officer] discovered methamphetamine inside a pink [wallet] which had been removed from the interior of the car by Ms. Peters who placed it on the roof of the car in view [of the officer] after he had received consent to search.

[Conclusion 1]: Mr. Thomas was in apparent control of the vehicle's operation and contents at the time the consent by him was given and had valid authority to consent to said search.

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[Conclusion 2]: Ms. Peters did not object to Mr. Thomas'[s] authorization given to [the officer] to search the vehicle and impliedly consented to the same.

Consent of a search is analyzed by looking at the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). A person who is not the lawful owner of a vehicle may consent to the search of a vehicle. *See, e.g.*, N.C.G.S. § 15A-222(2) (providing that one in apparent control of a vehicle may consent to its search). Also, our Court has held that consent of an owner to search her vehicle may be inferred from her silence when consent is given by a third party who is in apparent control of the car. *See State v. Foster*, 33 N.C. App. 145, 148 (1977).

Here, we conclude there is evidence from which the trial court could find that Defendant impliedly consented to the search of her vehicle, aside from her failure to object when Mr. Thomas consented. Specifically, there was uncontradicted evidence that Defendant cleaned an area of the interior to facilitate the officer's search and that she responded, "okay," when the officer told her to "just leave everything in it." From this and other behavior, the officer reasonably believed that Defendant was consenting to the search that had been previously verbally given by Mr. Thomas, specifically, to search the vehicle.

Notwithstanding, the trial court failed to make any finding concerning whether Defendant consented to the search of her wallet outside the vehicle. That is, the trial court found that the officer "request[ed] consent to search the car," that consent was given "to search the vehicle," and that the methamphetamine was discovered "inside a pink [wallet] which had been removed from the interior of the car by [Defendant] who placed it on the roof of the car in view of [the officer] after he had received consent to search." The wallet was neither inside nor otherwise attached to the vehicle. *See, e.g., United States v. Clayton*, 2024 U.S. Dist. LEXIS 87639 (W.D. Tenn. 2024) (holding that the automobile exception did not authorize officers to search a plastic bag on top of the vehicle, reasoning that "[c]ontainers that can serve as a natural extension of a vehicle possess the same potential mobility as does the car, but containers placed on a vehicle that are neither attached nor tethered do not").

Since the trial court made no determination concerning whether consent was validly given for the search of the wallet where the methamphetamine was found, the trial court's findings cannot support its order denying Defendant's motion to suppress. And such denial was necessarily prejudicial as the methamphetamine found in the wallet was the basis of the charge against Defendant.

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We, however, must next consider whether the proper mandate is to vacate and remand for further findings or whether the proper mandate is to reverse the order denying Defendant's suppression motion. For the reasoning below, we believe the best course in this case is to vacate the trial court's order and subsequent judgment and remand the matter to the trial court for further findings.

In so considering the appropriate mandate, we are mindful that the burden rests *with the State* to show that consent to search a particular area was validly given. *See State v. Hardy*, 339 N.C. 207, 226 (1994). We are also mindful that the consent must be "clear and unequivocal" for the consent to be valid. *State v. Pearson*, 348 N.C. 272, 277 (1998).

Here, the trial court did find that the wallet "had been removed from the interior of the car by [Defendant] who placed it on the roof of the car in view of [the officer] after he had received consent to search [the car]." There was evidence that she was in possession of the wallet earlier when she was providing her identification and title information to the officer, that she went towards the car to clean it out to facilitate the officer's search of the car (after Mr. Thomas gave verbal consent to the search), and that she did not possess the wallet when she stepped away from the car as the officer began his search. However, there is no direct evidence in the record for this finding. Defendant, though, has not challenged the finding. Therefore, this finding is binding on appeal. *In re A.A.M.*, 379 N.C. 167, 176 (2021).

However, it is unclear why Defendant placed her wallet on the car. She may have left it there inadvertently while cleaning out her car and simply forgot that the wallet was there when the officer told her to stop cleaning. Or it may be that she placed the wallet on the car as a gesture of consent to the search since she carried other personal items away from the car prior to the search.

Further, Defendant's silence while the officer searched her wallet cannot constitute consent. Specifically, our Supreme Court has held that where a defendant has consented to the search of his vehicle, the officer's search of a defendant's *person* (and finding drugs on his person) based on a defendant's silence/acquiescence is unlawful:

The superior court relied on the consent to search the vehicle . . . and the fact that [the defendant] did not object when he was [personally] searched to conclude the defendant consented to the search. This was error. The consent signed by the defendant applied only to the vehicle. We cannot broaden the consent to include the defendant's

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person. We also cannot hold that the acquiescence of the defendant when the officer told him he would frisk him was consent, considering all the circumstances. There must be clear and unequivocal consent before a defendant can waive his constitutional rights.

Pearson, 348 N.C. at 277. We have held, though, that nonverbal behavior by a defendant *may* constitute a sufficient expression of consent. *See State v. Harper*, 158 N.C. App. 595, 603 (2003).

The United States Supreme Court has held the test concerning the scope of consent to be “that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?” *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991).

On remand, the trial court may again deny Defendant’s motion, but only if it makes findings based on the evidence that the officer objectively believed that Defendant was giving her clear and unequivocal consent to the officer’s search of her wallet. Otherwise, it is the trial court’s duty to grant Defendant’s motion.

We express no opinion as to the appropriateness of the trial court’s consideration of new evidence on remand, as neither party has briefed this issue.

VACATED AND REMANDED.

Judges WOOD and MURRY concur.

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[298 N.C. App. 579 (2025)]

STATE OF NORTH CAROLINA

v.

KENNETH LOUIS WALKER

No. COA24-615

Filed 16 April 2025

Sentencing—life imprisonment without parole—judicial review after 25 years served—statutory requirements met

After defendant had served 25 years of his life without parole sentence for first-degree murder, thereby becoming eligible for review of his sentence pursuant to N.C.G.S. § 15A-1380.5, the trial court’s recommendation not to alter or commute defendant’s sentence was affirmed, where the court’s review process followed all of the statutory requirements and where its recommendation was reasonably supported by the record. The trial court did not abuse its discretion by declining to hold a hearing on the matter or to enter written factual findings supporting its recommendation, as neither step was required under section 15A-1380.5. Further, the court made it clear that it had considered the trial record, defendant’s record from the Department of Corrections, the risk he posed to society, and other relevant information when reviewing defendant’s sentence.

Appeal by Defendant from a recommendation pursuant to N.C. Gen. Stat. § 15A-1380.5 entered 8 February 2024 by Senior Resident 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 Benjamin Szany, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Amanda S. Zimmer, for Defendant.

WOOD, Judge.

Kenneth Walker (“Defendant”) filed a Petition for a Writ of Certiorari on 8 March 2024, which this Court granted on 24 April 2024, seeking to appeal the trial court’s recommendation regarding his sentence entered 8 February 2024 pursuant to N.C. Gen. Stat. § 15A-1380.5. For the reasons set forth below, we affirm the trial court’s recommendation.

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[298 N.C. App. 579 (2025)]

I. Factual and Procedural Background

Defendant was tried in October 1999 in Wake County Superior Court for the murder of Stephanie B. Keith on 14 November 1998 in a capital trial. On 20 October 1999, the jury found him guilty of first-degree murder. The State sought the death penalty. On 22 October 1999, the jury recommended a sentence of life imprisonment without parole after concluding the State had not proved the one aggravating factor submitted to the jury. The trial court entered judgment sentencing Defendant to life imprisonment without parole in accordance with the jury's recommendation. On 5 June 2001, Defendant filed an Anders brief on appeal. In an unpublished opinion issued 7 June 2002, this Court determined Defendant's trial was free from prejudicial error and his appeal was wholly frivolous.

On 11 September 2023, Defendant requested that the trial court review his sentence of life imprisonment without parole pursuant to N.C. Gen. Stat. § 15A-1380.5. Under N.C. Gen. Stat. § 15A-1380.5, Defendant became eligible for review of his life sentence on or about 14 November 2023. After careful review and consideration of the trial record, Defendant's record from the Department of Corrections, the degree of risk posed by Defendant to society, and other information contained in the record, Senior Resident Judge Paul C. Ridgeway made his recommendation that Defendant was not entitled to have his sentence altered or commuted on 8 February 2024. On 10 April 2024, Defendant filed a pro se Petition for Writ of Certiorari to this Court. On 24 April 2024, this Court allowed certiorari and remanded the matter to the trial court for a hearing to determine whether Defendant is indigent and entitled to court appointed counsel. On 29 April 2024, Judge Ridgeway entered an order finding Defendant was indigent and entitled to appointment of counsel and on 13 May 2024 appellate entries were entered finding Defendant indigent and appointing the Appellate Defender's Office to represent him.

II. Analysis

On appeal, Defendant raises three issues: the trial court abused its discretion by concluding Defendant's sentence should not be altered without making findings of fact; the trial court erred by failing to consider the trial record; and the trial court abused its discretion by not conducting a hearing during its review of Defendant's sentence.

In 1994, the North Carolina General Assembly enacted N.C. Gen. Stat. § 15A-1380.5 in response to the addition of life imprisonment without parole to North Carolina sentencing practices. From 1994 to 1998,

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the statute provided that “[a] defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment.” N.C. Gen. Stat. § 15A-1380.5(b) (1994) (repealed 1998).

Defendants sentenced to life imprisonment without parole for offenses committed between 1 October 1994 and 1 December 1998 remain entitled to review of their sentences after serving 25 years of imprisonment. *Id.*; see also *State v. Young*, 369 N.C. 118, 124, 794 S.E.2d 274, 278-79 (2016) (cleaned up). A trial court’s recommendation under N.C. Gen. Stat. § 15A-1380.5 is “reviewed on appeal only for an abuse of discretion.” N.C. Gen. Stat. § 15A-1380.5(f) (1994) (repealed 1998).

N.C. Gen. Stat. § 15A-1380.5 states in its entirety:

(a) For the purposes of this Article the term “life imprisonment without parole” shall include a sentence imposed for “the remainder of the prisoner’s natural life.”

(b) A defendant sentenced to life imprisonment without parole is entitled to review of that sentence by a resident superior court judge for the county in which the defendant was convicted after the defendant has served 25 years of imprisonment. The defendant’s sentence shall be reviewed again every two years as provided by this section, unless the sentence is altered or commuted before that time.

(c) In reviewing the sentence the judge shall consider the trial record and may review the defendant’s record from the Department of Correction, the position of any members of the victim’s immediate family, the health condition of the defendant, the degree of risk to society posed by the defendant, and any other information that the judge, in his or her discretion, deems appropriate.

(d) After completing the review required by this section, the judge shall recommend to the Governor or to any executive agency or board designated by the Governor whether or not the sentence of the defendant should be altered or commuted. The decision of what to recommend is in the judge’s discretion.

(e) The Governor or an executive agency designated under this section shall consider the recommendation made by the judge.

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(f) The recommendation of a judge made in accordance with this section may be reviewed on appeal only for an abuse of discretion.

N.C. Gen. Stat. § 15A-1380.5 (1994) (repealed 1998).

“It is a bedrock rule of statutory interpretation that if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.” *Belmont Ass’n v. Farwig*, 381 N.C. 306, 313, 873 S.E.2d 486, 490 (2022) (cleaned up). N.C. Gen. Stat. § 15A-1380.5 clearly and plainly lays out the requirements for the trial court when reviewing a defendant’s sentence. After serving 25 years of imprisonment: (1) the defendant must receive a review; (2) the review must be completed by a superior court judge; (3) the judge must review the trial record; (4) the judge must make a recommendation; (5) the recommendation must be considered; and (6) the recommendation can only be reviewed for an abuse of discretion. N.C. Gen. Stat. § 15A-1380.5 (1994) (repealed 1998).

Our Supreme Court has held that N.C. Gen. Stat. § 15A-1380.5 “guarantees no hearing, no notice, and no procedural rights.” *State v. Young*, 369 N.C. 118, 124, 794 S.E.2d 274, 279 (2016). It “requires only that the judge consider the trial record and notes that the judge may review other information in his or her discretion.” *Id.* (cleaned up).

Similarly, N.C. Gen. Stat. § 15A-1380.5 does not require the reviewing resident superior court judge to issue an order with findings of fact or conclusions of law. The statute requires only a recommendation to be made. “[I]n effectuating legislative intent, it is the duty of the courts to give effect to the words actually used in a statute and not to delete words used or to insert words not used.” *State v. Watterson*, 198 N.C. App. 500, 505, 679 S.E.2d 897, 900 (2009). In North Carolina, a court order, generally, must be in writing and contain findings of fact and conclusions of law that are supported by evidence. The findings must be sufficiently detailed to demonstrate that the court properly considered the relevant issues and evidence. The conclusions of law must logically follow from the findings of fact, and the judgment must be based on these conclusions. This progression ensures that appellate courts can review the order for legal sufficiency. See *Sunshine v. Sunshine*, 294 N.C. App. 289, 292, 903 S.E.2d 352, 256 (2024); see also *State v. Edwards*, 286 N.C. App. 306, 308, 879 S.E.2d 391, 393 (2022). Had the legislature intended for findings of fact and conclusions of law to be required it could have chosen to require the reviewing judge to issue orders, rather than recommendations, as they have in numerous other statutes. See N.C. Gen. Stat. § 1A-1, Rule 52; see also N.C. Gen. Stat. § 7B-906.2(d).

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This Court reviews recommendations made pursuant to N.C. Gen. Stat. § 15A-1380.5 for abuse of discretion. N.C. Gen. Stat. § 15A-1380.5(f) (1995) (repealed 1998). “An abuse of discretion occurs when a trial court’s ruling is so arbitrary that it cannot be the result of a reasoned decision. A trial court also abuses its discretion when it makes an error of law.” *In re McClatchy Co.*, 386 N.C. 77, 92, 900 S.E.2d 765, 776 (2024) (cleaned up). Based on this discretionary standard of review paired with the limited effect inherent in a mere recommendation, our Supreme Court in *Young* recognized,

[u]ltimately, the decision of what to recommend is in the judge’s discretion, and the only effect of the judge’s recommendation is that the Governor or an executive agency designated under this section must “consider” it. Because of these provisions, the possibility of alteration or communication . . . is deeply uncertain and is rooted in essentially unguided discretion.

State v. Young, 369 N.C. 118, 124-25, 794 S.E.2d 274, 279 (2016) (cleaned up). As such, when the trial court has followed the statutory requirements of N.C. Gen. Stat. § 15A-1380.5 and its recommendation is reasonably supported by the record review there is no abuse of discretion.

In the case *sub judice*, the trial court clearly stated it had considered “the record proper” and the submissions of the State and Defendant during its review. It further stated that the court “has considered the trial record, the Defendant’s record from the Department of Corrections, the degree of risk to society posed by the defendant, and such other information contained in the record.” The trial court concluded, “[f]ollowing this review, the [c]ourt, in its discretion, recommends that the sentence of the defendant should not be altered or commuted.”

Through these actions, the trial court satisfied the requirements of N.C. Gen. Stat. § 15A-1380.5. Further, a thorough review of the record provides ample support for the trial court’s decision to recommend that Defendant’s sentence not be altered or commuted. Accordingly, we hold the trial court did not abuse its discretion when making its recommendation without holding a hearing or making explicit findings as it completed the necessary review of the record, and the record supports the trial court’s recommendation.

III. Conclusion

Pursuant to N.C. Gen. Stat. § 15A-1380.5 when reviewing a defendant’s sentence of life of imprisonment without parole, “the judge shall

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consider the trial record and *may* review . . . any other information that the judge, in his or her discretion, deems appropriate.” N.C. Gen. Stat. § 15A-1380.5(c) (1994) (repealed 1998). Upon completion of the review, the trial court must make a recommendation but is not required to hold a hearing or make explicit findings of fact. The trial court did not abuse its discretion in making its recommendation as the record supports the trial court’s recommendation. Thus, the trial court’s recommendation is affirmed.

AFFIRMED.

Judges COLLINS and GRIFFIN concur.

STATE OF NORTH CAROLINA
v.
MERANDA CHANTEL WATLINGTON

STATE OF NORTH CAROLINA
v.
FANA ANQUETTE FELTON

No. COA23-1106

Filed 16 April 2025

1. Homicide—first-degree felony murder—predicate felony—assault with deadly weapon inflicting serious injury

In defendant’s trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by submitting to the jury the first-degree felony murder charge based on the underlying felony of assault with a deadly weapon inflicting serious injury. Although defendant did not preserve the issue for appellate review, the appellate court considered the issue in its discretion and determined that the assault could serve as a predicate felony for the felony murder charge as a matter of law. Sufficient evidence was presented that defendant had actual intent to commit the assault by first backing the vehicle directly over multiple people, completely running them over; coming to a full stop; pausing; and then shifting the car’s gears and driving forward at full speed over the victims a second time.

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2. Criminal Law—jury instructions—felony murder—level of intent required—plain error analysis

In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not plainly err in its jury instruction on felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury, where the court properly told the jury that it could convict defendant if it found that defendant intentionally struck the victims with her vehicle. Contrary to defendant's argument, the trial court's instruction did not allow the jury to convict defendant upon mere culpable or criminal negligence.

3. Criminal Law—jury instructions—felony murder trial—voluntary manslaughter not supported by evidence

In defendant's trial for felony murder and related offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, the trial court did not err by failing to instruct the jury on the lesser included offense of voluntary manslaughter because the evidence did not support a reasonable inference that defendant's actions were a result of a passion or heat of blood produced by adequate provocation. Defendant had walked away from an initial altercation in the parking lot, gotten into the car, and paused, then backed over the victim before changing gears and running over the victim a second time. Even if the instruction had been warranted, any error would have been harmless given that the jury convicted defendant of felony murder.

4. Motor Vehicles—murder trial—multiple counts of hit and run—unit of prosecution—rule of lenity

In defendant's trial for multiple offenses arising from an incident in which defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, although defendant was convicted of four counts of felonious hit and run resulting in serious bodily injury or death and one count of misdemeanor hit and run based on the number of victims, since the charging statute—N.C.G.S. § 20-166—was ambiguous regarding the allowable unit of prosecution, the appellate court applied the rule of lenity and held that the unit of prosecution under the statute was the number of crashes from which the defendant fled and not the number of victims. Since defendant had fled from two crashes, she could only be convicted of two violations of the statute; therefore,

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the appellate court arrested judgment on three of the hit-and-run convictions and remanded to the trial court for resentencing.

5. Accomplices and Accessories—accessory after the fact—felony murder—assault with deadly weapon—hit and run

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the State presented substantial evidence to defeat defendant's motion to dismiss the charges. Defendant's behavior after witnessing her co-defendant run over multiple victims more than once with the car gave rise to a reasonable inference that she aided her co-defendant in escaping arrest, detection, or punishment, including by: getting in the car, leaving the scene, abandoning the car some distance from the scene, and taking the car key from the co-defendant so as to conceal the co-defendant's identity as the driver.

6. Indictment and Information—indictment—accessory after the fact—no fatal variance from evidence at trial

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, there was no fatal variance between the indictments and the evidence presented at trial. Evidence that defendant possessed the car keys after the incident—an allegation that was not included in the indictments—demonstrated the means by which defendant aided her co-defendant in escaping detection, arrest, and punishment.

7. Accomplices and Accessories—accessory after the fact—multiple counts—unit of prosecution—rule of lenity inapplicable

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person

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and seriously injuring several others, before the two defendants drove away from the scene, the appellate court determined that, because the charging statute—N.C.G.S. § 14-7—unambiguously set forth the allowable unit of prosecution to be each felony that was committed by the principal and assisted by the accessory after the fact, the rule of lenity did not apply. Therefore, the trial court did not err by denying defendant's motion to dismiss for insufficient evidence that she committed more than one count of accessory after the fact.

8. Accomplices and Accessories—accessory after the fact—hit and run—more than merely leaving the scene

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not err by denying defendant's motion to dismiss the charges of accessory after the fact to her co-defendant's convictions for hit and run. Contrary to defendant's argument, the convictions were not merely for "leaving the scene," but for defendant's actions in assisting her co-defendant escape detection, arrest, and punishment by taking the car keys, abandoning the car after driving away from the scene, and concealing her co-defendant's identity as the driver.

9. Accomplices and Accessories—accessory after the fact—some of principal's judgments arrested—corresponding accessory convictions unsupported

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, where the appellate court had arrested judgment on three of the co-defendant's convictions of hit and run, leaving two undisturbed, the appellate court similarly arrested judgment on three of defendant's convictions of accessory after the fact and remanded for resentencing.

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10. Criminal Law—jury instructions—accessory after the fact—evidence showing assistance

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court did not plainly err by allowing the jury to consider defendant's possession of the car keys as circumstantial evidence that defendant knowingly assisted her co-defendant in escaping detection, arrest, and punishment. Although the indictments did not allege that defendant possessed the car keys, this evidence provided the means by which defendant assisted her co-defendant after the events that gave rise to the charges.

11. Criminal Law—prosecutor's closing argument—post-crime evasion—reasonable inferences from evidence

In defendant's trial for sixteen counts of accessory after the fact to her co-defendant's felonies (including felony murder, assault with a deadly weapon with intent to kill inflicting serious injury, and felonious hit and run) arising from an incident in which her co-defendant drove a car over multiple people in a parking lot, killing one person and seriously injuring several others, before the two defendants drove away from the scene, the trial court was not required to intervene ex mero motu during the State's closing argument, in which the prosecutor stated that defendant and her co-defendant were "walking away together." The statement was a reasonable inference from the evidence—provided by officer testimony and body camera footage—that the two defendants were walking near each other when they were apprehended.

Appeal by Defendants from judgments entered 10 and 11 October 2022 by Judge R. Stuart Albright in Guilford County Superior Court. Heard in the Court of Appeals 29 October 2024 in session at Duke University School of Law in the City of Durham pursuant to N.C. Gen. Stat. § 7A-19(a).

Attorney General Jeff Jackson, by Special Deputy Attorney General Kathryne E. Hathcock, for the State-Appellee.

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Hynson Law, PLLC, by Warren D. Hynson, for Defendant-Appellant Meranda Chantel Watlington.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Daniel Shatz, for Defendant-Appellant Fana Anquette Felton.

COLLINS, Judge.

This case involves appeals by two defendants: Meranda Chantel Watlington and Fana Anquette Felton. Watlington appeals from judgments entered upon a jury's guilty verdicts of nine felonies, including one count of first-degree murder, and two misdemeanors. Felton appeals from judgments entered upon a jury's guilty verdicts on eleven counts of accessory after the fact, one for each of Watlington's convictions. Watlington and Felton each raise several issues on appeal. For the following reasons, we arrest judgment on three of Watlington's convictions for hit and run and three of Felton's convictions for accessory after the fact to hit and run, and we remand for resentencing. We find no error or dismiss defendants' arguments as to the remaining convictions, including Watlington's conviction for first-degree murder and Felton's conviction to accessory after the fact to first-degree murder.

I. Background

Watlington was indicted for one count of first-degree murder, five counts of attempted first-degree murder, four counts of assault with a deadly weapon with intent to kill inflicting serious injury, six counts of felonious hit and run resulting in serious bodily injury or death, one count of driving while license revoked, and one count of failure to reduce speed. Felton was indicted for sixteen counts of accessory after the fact to all of the felony charges against Watlington. Watlington and Felton were tried jointly, and the evidence at trial, which included testimony from both lay and expert witnesses, medical records, and video footage, tended to show the following:

In the early morning hours of 12 October 2019, at approximately 3:25 a.m., Felton drove a 2006 Ford Explorer to the Exxon gas station located on West Gate City Boulevard in Greensboro, North Carolina. In addition to Felton, three other individuals were in the Explorer: Watlington was in the front passenger seat, and cousins Latika and Zanelle Tucker were in the rear seats.

Felton turned into the Exxon parking lot and drove the Explorer between two gas pumps toward the store. Shanna Goode was sitting

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inside her car that was parked at one of the gas pumps. As Felton passed the gas pumps, she hit the side of Goode's car with the front right side of the Explorer. Felton drove the Explorer a few feet past Goode's car and stopped in the middle of the parking lot. Felton and Watlington got out of the Explorer and approached Goode, who had stepped out of her car and was standing beside it. A conversation ensued between Watlington, Felton, and Goode. A few minutes later, Latika and Zanelle got out of the Explorer and joined the conversation. This conversation occurred to the side of Goode's car and directly behind the Explorer.

As the conversation about the accident continued, Felton became increasingly aggressive. Exxon's security footage shows Watlington repeatedly attempting to remove Felton from the situation back to the Explorer, to no avail. Others at the Exxon began to take notice, and a few individuals approached to check on the situation. Eventually, approximately ten people can be seen on the security footage standing to the side of Goode's car and behind the Explorer.

After approximately twenty minutes, the confrontation became physical. Goode testified that a fight first broke out between Felton and Jennifer Lennon, one of the individuals who had approached to check on the situation. Soon after, multiple fights broke out in the Exxon parking lot. Goode testified that the fighting lasted for more than twenty-five minutes, with Felton being the primary aggressor.

Throughout the fight, Zanelle tried to control Felton and get her back into the Explorer. While doing so, however, Zanelle was hit in the head. She started to feel light-headed and laid down on the ground directly behind the Explorer. Meanwhile, the fighting and chaos continued. Some individuals became concerned about Zanelle and approached to check on her. Latika stood over Zanelle, and Donnetta Evans sat on the ground next to Zanelle and attempted to check Zanelle's pulse. Evans' husband, Billy Travis, also stood behind the Explorer, checking on Zanelle.

Nearly thirty minutes after the initial conversation between Watlington, Felton, and Goode began, with the fighting and chaos ongoing, Watlington walked back to the Explorer and got into the driver's seat. She sat in the Explorer for a few seconds and then backed the Explorer over the group of individuals directly behind her, which included Zanelle, Latika, Evans, Goode, and Travis. It took Watlington approximately ten seconds to completely run over them. Goode testified that Watlington ran over her legs and "people's bodies."

Watlington brought the Explorer to a complete stop, with the people she had hit now on the ground a few feet in front of her. A few individuals

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began moving and attempting to stand up; some, including Goode, were able to roll out of Watlington's immediate path. Kalyn Burch, who was not initially hit by Watlington, dragged Travis out of the way and then kneeled next to Evans, who was lying injured on the ground.

However, eight seconds after Watlington backed over the individuals, she put the Explorer in drive, stepped hard on the gas pedal, and drove forward toward the same group. According to Goode, who had rolled herself far enough to the side to avoid getting hit a second time, Watlington drove the Explorer forward at full speed. Watlington drove straight into and over the group of people in front of her, which included Zanelle, Latika, Evans, and Burch. She also swiped the side of Goode's car and crashed into another vehicle—occupied by Melinda Sims—on the other side of the parking lot. The incident, caught on Exxon's security footage, left several individuals lying motionless on the ground.

Felton, as seen in the security footage, watched the entire incident occur. After Watlington ran over the victims the second time, Felton stood directly over the victims and yelled at them. Watlington backed the Explorer up again and stopped adjacent to the individuals she had just hit. As law enforcement and emergency services vehicles began to arrive, Felton got into the front passenger seat of the Explorer, and Watlington drove out of the Exxon parking lot.

Law enforcement officer Douglas Maund saw chaos upon arriving at the scene; he saw people running everywhere, multiple damaged vehicles, and “five or six” individuals lying on the ground motionless.

Law enforcement officers located the Explorer parked in a driveway about a quarter of a mile away from the Exxon. Expert testimony at trial indicated that although the vehicle was damaged, its brakes, steering wheel, and accelerator pedal were functioning normally. Officer James Cozart, a member of the Greensboro Police Department's Crash Reconstruction Unit, analyzed data from the Explorer's data recorder. He testified that the accelerator pedal percentage, which measures how much the driver is depressing the gas pedal, was at 99.5 percent when Watlington put the Explorer into reverse and backed over the individuals. When Watlington put the Explorer in drive and began driving forward, Officer Cozart testified that the accelerator pedal percentage was ninety-five percent.

Not long after arriving at the scene and locating the abandoned Explorer, officers found Watlington and Felton walking along West Gate City Boulevard near the Exxon and apprehended them. The keys

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to the Explorer were found in the purse Felton was carrying when apprehended.

Zanelle was declared deceased at the scene. Several other individuals were injured as a result of being hit or run over by Watlington, including Travis, Evans, Latika, Burch, and Sims.

- Travis sustained a concussion and blunt chest trauma, and suffered two miniature heart attacks in the days immediately following the crash.
- Evans woke up in the hospital approximately twenty days after the crash and spent a total of twenty-six days in the hospital. She sustained a fractured skull, a compound-fractured collarbone, a broken shoulder blade, broken ribs, a broken back, a broken pelvis, a broken leg and foot, and other more minor injuries. She also suffered memory loss and a permanent loss of smell.
- Latika suffered a traumatic brain injury which left her with memory loss. She also sustained blunt trauma to her left lung, a broken shoulder blade, a broken left leg, a broken pelvis, and a broken back, and she went into hemorrhagic shock from internal bleeding.
- Burch sustained a broken back and neck, a broken jaw, and several broken ribs. He also had a severe laceration to his scalp and remained in the hospital for eleven days.
- Sims sustained minor injuries, including a dislocated knee and back pain.

The jury convicted Watlington of one count of first-degree murder under the felony murder rule, four counts of assault with a deadly weapon inflicting serious injury, one count of assault with a deadly weapon, four counts of felonious hit and run resulting in serious bodily injury or death, and one count of misdemeanor hit and run. The jury convicted Felton of accessory after the fact to all eleven of Watlington's convictions. Watlington and Felton appeal.

II. Discussion**A. Defendant Watlington**

Watlington makes several arguments on appeal. We address each in turn.

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1. Assault With a Deadly Weapon Inflicting Serious Injury as the Predicate Felony for Felony Murder

[1] Watlington first argues that the trial court erred by sentencing her to life without parole for first-degree felony murder where the judgment for felony murder was impermissibly based on the felony of assault with a deadly weapon inflicting serious injury. Watlington’s argument is meritless.

We first address Watlington’s preservation of this issue for appeal. Generally, “[i]n order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.” N.C. R. App. P. 10(a)(1). The party must also obtain a ruling on their request, objection, or motion. *Id.*

Furthermore, “[a] party may not make any portion of the jury charge . . . the basis of an issue presented on appeal unless the party objects thereto before the jury retires to consider its verdict[.]” N.C. R. App. P. 10(a)(2). However, an error based on the ground that “[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, or is otherwise invalid as a matter of law” is preserved by law without such objection. *See* N.C. Gen. Stat. § 15A-1446(d)(18) (2023).

Nevertheless,

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

N.C. R. App. P. 10(a)(4).

Watlington presents this issue as a “sentencing error” that is preserved for appellate review absent objection; this mischaracterizes the issue. The essence of Watlington’s argument is that the trial court erred by submitting to the jury felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury. This is a jury instruction issue. Watlington failed to object to the felony-murder jury instruction or raise this issue at any point in the trial court. Watlington has also failed to argue on appeal that this issue amounts to plain error. Accordingly, Watlington has failed to preserve this issue for appellate review.

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The State, however, does not disagree with Watlington's characterization of this issue as a "sentencing error." The State does not argue that Watlington has failed to preserve this issue for our review and addresses the issue under a de novo review. In our discretion, we will address the parties' arguments as to whether assault with a deadly weapon inflicting serious injury, as a matter of law, can serve as the predicate felony for felony murder.

"Felony murder is murder in the first degree 'irrespective of premeditation or deliberation or malice aforethought.'" *State v. Wilson*, 313 N.C. 516, 537 (1985) (citation omitted). "The elements of felony murder are: (1) [] a defendant . . . committed or attempted to commit a predicate felony under N.C. Gen. Stat. § 14-17(a)[]; (2) [] a killing occurred in the perpetration or attempted perpetration of that felony; and (3) [] the killing was caused by the defendant[.]" *State v. Maldonado*, 241 N.C. App. 370, 376 (2015) (quotation marks and citation omitted). "[T]he perpetration or attempted perpetration of any . . . felony committed or attempted with the use of a deadly weapon" is a predicate felony for purposes of felony murder. N.C. Gen. Stat. § 14-17(a) (2023).

Assault with a deadly weapon inflicting serious injury is a felony with the following elements: "(1) an assault (2) with a deadly weapon (3) inflicting serious injury (4) not resulting in death." *State v. Foreman*, 270 N.C. App. 784, 789 (2020) (citation omitted); see N.C. Gen. Stat. § 14-32(b) (2023). "[A]n automobile can be a deadly weapon if it is driven in a reckless or dangerous manner." *State v. Jones*, 353 N.C. 159, 164 (2000) (citation omitted). Assault with a deadly weapon inflicting serious injury is not a specific intent crime. *State v. Woods*, 126 N.C. App. 581, 587 (1997). Instead, it is a general intent crime which only requires the doing of some act. *Id.*; see also *State v. Jones*, 339 N.C. 114, 148 (1994). An individual may be found guilty of assault with a deadly weapon inflicting serious injury if she acts with either "actual intent" or "culpable or criminal negligence from which such intent may be implied." *Id.* at 164-65 (citation omitted). For assault with a deadly weapon inflicting serious injury to serve as the predicate felony for a felony murder conviction, however, the individual must have acted with a "level of intent greater than culpable negligence." *Id.* at 167. That is, the person must have acted with the "actual intent to commit the act that forms the basis of [the] first-degree murder charge." *Id.* at 166 (quotation marks omitted).

Watlington argues that our Supreme Court's holding in *State v. Jones*, 353 N.C. 159, establishes a bright-line rule that assault with a

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deadly weapon inflicting serious injury can never serve as the predicate felony for a felony murder charge. Watlington's argument is not correct.

In *Jones*, the “appreciably impaired” defendant crashed his vehicle into another vehicle occupied by six college students. 353 N.C. at 161-62. Two of the students were killed in the collision. *Id.* at 161. The evidence presented at trial indicated that the defendant “perpetrated the assault by operating his automobile, a deadly weapon, in a culpably or criminally negligent manner. His criminal or culpable negligence was established, as a matter of law, when he was convicted of DWI by the jury[.]” *Id.* at 165. Reversing the defendant's felony murder conviction, the Court held that “culpable negligence may not be used to satisfy the intent requirements for a first-degree murder charge.” *Id.* at 163. The Court emphasized that all categories of first-degree murder¹ require mental states “greater than culpable or criminal negligence; that is, they all require that the defendant had ‘actual intent’ to commit the act that forms the basis of a first-degree murder charge.” *Id.* at 166. Contrary to Watlington's assertion, however, the Court did not hold that assault with a deadly weapon inflicting serious injury can never serve as the predicate felony for a felony murder charge.

Here, the trial court's instructions reflect a correct statement of the law—that felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury must be committed with the “actual intent to commit the act that forms the basis of [the] first-degree murder charge.” *Jones*, 353 N.C. at 166 (quotation marks omitted). The trial court instructed the jury that to find Watlington guilty of first-degree murder under the felony murder rule, the State must prove beyond a reasonable doubt that, among other things, Watlington committed assault with a deadly weapon inflicting serious injury “by intentionally striking Billy Travis, Latika Tucker, or Donnetta Evans with a 2006 Ford Explorer.”

Furthermore, the evidence presented at trial was sufficient to support a conclusion that Watlington acted with the intent to strike Latika, Burch, Evans, and Travis. Watlington can be seen on the Exxon security footage conversing with others and participating in the fight for nearly

1. “[M]urders classified as murder in the first degree by the 1893 enactment were divided into three basic categories: (1) murders perpetrated by means of poison, lying in wait, imprisonment, starving, or torture, (2) premeditated murder, and (3) killings occurring in the commission of certain specified felonies ‘or other felony.’” *State v. Davis*, 305 N.C. 400, 423 (1982).

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thirty minutes. She then walked to the Explorer and got into the driver's seat. After a brief pause, she backed the vehicle directly over the victims, completely running them over. Watlington then brought the vehicle to a complete stop, shifted the car's gears, and drove forward, hitting and running over the victims a second time. This evidence supports a conclusion that Watlington "had 'actual intent' to commit the act that forms the basis of a first-degree murder charge." *Id.* at 166.

Watlington argues that the jury's acquittal of first-degree murder based upon premeditation and deliberation shows that she did not act intentionally, but rather that she acted with mere negligence. This argument reflects a misunderstanding of the law. As the *Jones* Court clarified, "the actual intent to kill may be present or absent; however, the actual intent to commit the underlying felony is required." *Id.* at 167. Thus, even if the jury did not find that Watlington intended to kill Zanelle, the evidence was sufficient for the jury to find that she was "purposely resolved" to strike Latika, Burch, Evans, and Travis—"the conduct that comprises" the underlying predicate felony. *Id.*

Accordingly, assault with a deadly weapon inflicting serious injury, as a matter of law, can serve as the predicate felony for a felony murder conviction when the defendant acts with the "actual intent to commit the act that forms the basis of [the] first-degree murder charge." *Id.* at 166 (quotation marks omitted). Because the trial court only instructed the jury on assault with a deadly weapon inflicting serious injury committed with actual intent to strike Latika, Burch, Evans, and Travis, and the evidence was sufficient to support the instruction, the trial court did not err by submitting to the jury first-degree felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury.

2. Felony Murder Jury Instruction

[2] Watlington next contends that the trial court plainly erred by failing to instruct the jury that it could not convict Watlington of felony murder if it found that Watlington acted with culpable or criminal negligence as opposed to actual intent. This argument is without merit.

The plain error standard of review is well established:

For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error had a probable impact on the jury's finding that

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the defendant was guilty. Moreover, because plain error is to be applied cautiously and only in the exceptional case, the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]

State v. Lawrence, 365 N.C. 506, 518 (2012) (quotation marks and citations omitted).

When instructing the jury, the trial court's "purpose is to give a clear instruction which applies the law to the evidence in such manner as to assist the jury in understanding the case and in reaching a correct verdict." *State v. Smith*, 360 N.C. 341, 346 (2006) (quotation marks and citation omitted). When reviewing jury instructions, we consider whether the instruction complained of contains a correct statement of the law and, if so, whether "there [is] evidence upon which to base the instruction given, or to justify the charge to the jury[.]" *State v. Alston*, 228 N.C. 555, 557 (1948). "Furthermore, to constitute plain error, the challenged instruction must result in a miscarriage of justice or the probability of a different verdict than the jury would otherwise have reached." *State v. Fowler*, 353 N.C. 599, 624 (2001) (citation omitted).

Here, the trial court instructed the jury on both first and second-degree murder. For the first-degree murder charge, the trial court instructed the jury as to murder on the basis of malice, premeditation, and deliberation and murder under the felony murder rule. As to felony murder, the trial court instructed the jury only on felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury committed with actual intent to inflict injury:

Whether or not you find Defendant Watlington guilty of first degree murder on the basis of malice, premeditation, and deliberation, you will also consider whether Defendant Watlington is guilty of first degree murder under the First Degree Felony Murder Rule. Therefore, if you find from the evidence beyond a reasonable doubt that on or about the alleged date, Defendant Watlington *intentionally struck* Billy Travis, Latika Tucker, or Donnetta Evans with a 2006 Ford Explorer thereby inflicting serious injury upon Billy Travis, Latika Tucker, or Donnetta Evans and that while committing assault with a deadly weapon inflicting serious injury, Defendant Watlington killed Zanelle Tucker and that Defendant Watlington's act was a proximate cause of Zanelle Tucker's death and that Defendant Watlington committed assault with a deadly weapon inflicting serious

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injury with the use of a deadly weapon, it would be your duty to return a verdict of guilty of first degree murder under the Felony Murder Rule. *If you do not so find or have a reasonable doubt as to one or more of these things, you will not return a verdict of guilty of first degree murder under the Felony Murder Rule.*

(emphasis added).

In its instruction, the trial court clearly articulated that if the jury did not find beyond a reasonable doubt that Watlington acted intentionally in striking the victims with her vehicle, it was to return a verdict of not guilty of felony murder. Therefore, had the jury found that Watlington acted with mere culpable or criminal negligence as opposed to actual intent, it would have, under the trial court's instructions, returned a verdict of not guilty. Accordingly, the trial court did not err, much less plainly err, in its instructions on the requisite elements for first-degree murder under the felony murder rule.

3. Voluntary Manslaughter Jury Instruction

[3] Watlington next argues that the trial court erred by failing to instruct the jury on voluntary manslaughter. Specifically, Watlington contends that a voluntary manslaughter instruction was warranted because the evidence at trial supported a finding that she acted in the heat of passion suddenly aroused by adequate provocation in killing Zanelle. This argument lacks merit.

“First-degree murder is the unlawful killing—with malice, premeditation and deliberation—of another human being.” *State v. Arrington*, 336 N.C. 592, 594 (1994) (citations omitted). “Voluntary manslaughter is the killing of another human being without malice and without premeditation and deliberation under [1] the influence of some passion or [2] heat of blood produced by adequate provocation.” *State v. Simonovich*, 202 N.C. App. 49, 53 (2010) (citation omitted).

[T]he heat of passion suddenly aroused by provocation must be of such nature as the law would deem adequate to temporarily dethrone reason and displace malice. Mere words however abusive are not sufficient provocation to reduce second-degree murder to manslaughter. Legal provocation must be under circumstances amounting to an assault or threatened assault.

State v. Montague, 298 N.C. 752, 757 (1979) (citations omitted). “Voluntary manslaughter is a lesser included offense of first-degree

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murder.” *Simonovich*, 202 N.C. App. at 53 (citation omitted). “A jury must be instructed on a lesser included offense only when evidence has been introduced from which the jury could properly find that the defendant had committed the lesser included offense.” *State v. Woodard*, 324 N.C. 227, 232 (1989) (citation omitted).

Here, there is insufficient evidence that Watlington killed Zanelle in “the heat of blood produced by adequate provocation.” *Simonovich*, 202 N.C. App. at 53 (citation omitted). The brawl that broke out at the Exxon was lengthy and physical; however, Watlington walked away from the fight and to the driver’s side of the Explorer on her own accord. As she walked away from the fight and got into the driver’s seat, Watlington was not under “circumstances amounting to an assault or threatened assault.” *Montague*, 298 N.C. at 757 (citation omitted). Nor was she under such circumstances when she sat in the Explorer for a few seconds before backing the Explorer straight over Zanelle, who was on the ground directly behind her. Nor was she under such circumstances when she sat in the Explorer for eight seconds after backing over Zanelle and before driving forward, running over Zanelle again. The evidence “does not permit a reasonable inference that [Zanelle’s] killing[] resulted from such provocation as would temporarily dethrone reason and displace malice.” *Id.* We therefore find no error in the trial court’s decision not to instruct the jury on voluntary manslaughter.

Moreover, even if it had been error not to instruct the jury on voluntary manslaughter, such error would have been harmless because the jury convicted Watlington of felony murder. *See, e.g., State v. Wagner*, 343 N.C. 250 (1996).

4. Watlington’s Multiple Hit and Run Counts

[4] Next, Watlington argues that the trial court erred by permitting her to be convicted of multiple counts of hit and run. Specifically, Watlington contends that N.C. Gen. Stat. § 20-166 is ambiguous because it does not clarify whether its unit of prosecution is the conduct of crashing and leaving the scene of the crash or the number of victims injured as a result of the crash. Therefore, Watlington contends, the rule of lenity should apply.

Whether N.C. Gen. Stat. § 20-166 defines its unit of prosecution by the act of crashing and leaving the scene of the crash or instead by the number of persons injured as a result of the crash is an issue of statutory construction. Issues of statutory construction are conclusions of law to be reviewed de novo by this Court. *State v. Patterson*, 266 N.C. App. 567, 570 (2019).

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The legislature has the discretion to define the allowable unit of prosecution, subject to constitutional limitations. *State v. Smith*, 323 N.C. 439, 441 (1988). When, however, the legislature does not define the precise unit of prosecution with clarity, the court must determine the allowable unit and must resolve any ambiguity in favor of lenity. *Id.* at 442-43; *State v. White*, 127 N.C. App. 565, 570 (1997). In other words, “the presumption is against multiple punishments in the absence of a contrary legislative intent.” *State v. Garris*, 191 N.C. App. 276, 284 (2008) (quotation marks and citation omitted).

N.C. Gen. Stat. § 20-166 provides, in pertinent part,

(a) The driver of any vehicle who knows or reasonably should know:

(1) That the vehicle which he or she is operating is involved in a crash; and

(2) That the crash has resulted in serious bodily injury, as defined in [N.C. Gen. Stat. §] 14-32.4, or death to *any person*;

shall immediately stop his or her vehicle at the scene of the crash. . . .

(a1) The driver of any vehicle who knows or reasonably should know:

(1) That the vehicle which he or she is operating is involved in a crash; and

(2) That the crash has resulted in *injury*;

shall immediately stop his or her vehicle at the scene of the crash. . . .

N.C. Gen. Stat. § 20-166 (2023) (emphasis added).

Subsection (a)(2) refers to a crash that results in serious bodily injury or death to “any person” while subsection (a1)(2) refers to a crash that results in “injury.” *Id.* Neither provision is a “clear expression of legislative intent to punish separately and cumulatively for each and every” person injured in the crash. *Smith*, 323 N.C. at 442 (emphasis and citations omitted). As the legislature has not established the allowable unit of prosecution under this statute, we must resolve this ambiguity in favor of lenity and hold that the unit of prosecution under N.C. Gen. Stat. § 20-166 is the number of crashes from which the defendant fled and not the number of victims injured as a result of the crashes.

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Our Supreme Court has come to similar conclusions when construing statutes with similar language. In *Smith*, our Supreme Court concluded that a statute making it unlawful to “disseminate” “any obscene writing, picture, record or other representation or embodiment of the obscene” was ambiguous. 323 N.C. at 441 (quoting N.C. Gen. Stat. § 14-190.1 (1986 & Cum. Supp. 1987)). Similarly, in *State v. Conley*, our Supreme Court held that the criminal statute prohibiting the possession or carrying of “any gun, rifle, pistol, or other firearm” on educational property was ambiguous. 374 N.C. 209, 214 (2020) (emphasis omitted) (quoting N.C. Gen. Stat. § 14-269.2(b) (2019)). The Court determined in each case that the relevant statutory provision failed to provide a “clear expression of legislative intent to punish separately and cumulatively for each and every” prohibited item found in the defendants’ possession. *Smith*, 323 N.C. at 442-44 (emphasis omitted); *see also Conley*, 374 N.C. at 214. Resolving such ambiguity in the defendants’ favor, the Court determined that the proper unit of prosecution under each statute was the defendant’s conduct of possessing the prohibited items, not the number of items found in the defendant’s possession. *Id.*; *see also Garris*, 191 N.C. App. at 285 (holding that simultaneous possession of two firearms supports only a single conviction for possession of a firearm by a convicted felon rather than multiple convictions).

Here, Watlington was convicted of four counts of felonious hit and run resulting in serious bodily injury or death and one count of misdemeanor hit and run—a total of five violations of N.C. Gen. Stat. § 20-166 corresponding with each individual injured as a result of the crashes. The five convictions, however, resulted from two crashes: first, when Watlington backed over the victims with the Explorer and second, when Watlington drove forward and hit and ran over the victims with the Explorer a second time. She subsequently left the Exxon. Therefore, Watlington can only be convicted of two violations of N.C. Gen. Stat. § 20-166, one conviction for Watlington’s conduct of leaving the scene of each crash. We arrest judgment on three of Watlington’s hit-and-run convictions and remand this matter to the trial court for resentencing.

5. Serious Bodily Injury to Billy Travis

Finally, Watlington argues that the trial court erred by denying her motion to dismiss the charge of felonious hit and run resulting in serious bodily injury to Travis. In accordance with our conclusion that Watlington may only be convicted of two counts of hit and run resulting from the two crashes in the instant case, this issue is dismissed as moot.

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B. Defendant Felton

Felton also makes several arguments on appeal. We address each in turn.

1. Motion to Dismiss for Insufficient Evidence

Felton first argues that the trial court erred by denying her motion to dismiss because there was insufficient evidence to support her convictions.

“This Court reviews the trial court’s denial of a motion to dismiss *de novo*.” *State v. Smith*, 186 N.C. App. 57, 62 (2007) (citation omitted). “Upon [a] defendant’s motion for dismissal, the question for the [trial] court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant’s being the perpetrator of such offense.” *State v. Fritsch*, 351 N.C. 373, 378 (2000) (citation omitted). If there is substantial evidence of each, the motion to dismiss is properly denied. *Id.* “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *State v. Smith*, 300 N.C. 71, 78-79 (1980) (citations 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. Rose*, 339 N.C. 172, 192-93 (1994) (citation omitted).

a. Evidence of Accessory After the Fact

[5] Felton first argues that the evidence was insufficient to support her convictions for accessory after the fact because no evidence was presented showing that she took any action making her an accessory after the fact.

The elements necessary to prove accessory after the fact under N.C. Gen. Stat. § 14-7 are: “(1) a felony was committed; (2) the accused knew that the person he received, relieved, or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felony personally.” *State v. Earnhardt*, 307 N.C. 62, 68 (1982) (citations omitted); see N.C. Gen. Stat. § 14-7 (2023). Circumstantial evidence is permitted, and once the trial court “decides that a reasonable inference of defendant’s guilt may be drawn from the circumstances, then it is for the jury to decide whether the facts, taken singly or in combination,” show the defendant’s guilt beyond a reasonable doubt. *Fritsch*, 351 N.C. at 379 (cleaned up).

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Here, the trial court announced what the evidence showed:

And as the police arrive, Defendant Felton willingly, voluntarily, and knowingly as to what Defendant Watlington had done, gets into the car with Defendant Watlington and allows and in fact condones Defendant Watlington to drive away and flee the scene.

....

It's also uncontroverted that the two defendants, Defendant Watlington and Defendant Felton, were seen a short time later not too far from the crime scene in the same general location. . . . At that time Defendant Felton, with the gold purse on her shoulder, was in exclusive possession of the ignition key to the Ford Explorer.

....

She fled from the car with Defendant Watlington, and it's important that she did this all the while knowing that the police, who had already arrived at the Exxon, were actively looking for the perpetrator of the crime. By taking possession of the key and control of the car and fleeing the car, when she had the ability and capacity to operate the car, . . . she elected to flee from the car with Defendant Watlington after taking exclusive possession of the key or at some point taking exclusive possession of the key. She still fled from the car. By doing so, she aided Defendant Watlington in attempting to escape detection, arrest, or punishment.

Similarly, she took the car keys, the – the part of the Ford Explorer's equipment, the car key, the thing that operated what was used to commit all of the crimes. By taking the car key after abandoning the car, she also concealed who the driver of the car was or at least by taking the car key away from [Watlington], aided the Defendant Watlington in escaping arrest, detection, or punishment.

This evidence, viewed in the light most favorable to the State, was sufficient to show that Felton, after witnessing Watlington hit and run over the victims with the Explorer and leave the scene of the crashes, took the Explorer's car keys, abandoned the Explorer, and concealed Watlington's identity as the Explorer's driver. Accordingly, there was sufficient evidence to support a reasonable inference of Felton's guilt of

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accessory after the fact to Watlington's felonies, and the trial court did not err by denying Felton's motion to dismiss.

b. Allegations in the Indictments

[6] Felton next argues that there was a fatal variance between the indictments charging her with accessory after the fact and the evidence presented at trial. Specifically, Felton contends that her possession of the car keys should have been unavailable to the State as a theory of prosecution because it was not alleged in her indictments for accessory after the fact. This argument lacks merit.

A motion to dismiss on account of a fatal variance should be granted “when the prosecution fails to offer sufficient evidence [that] the defendant committed the offense charged. A variance between the criminal offense charged and the offense established by the evidence is in essence a failure of the State to establish the offense charged.” *State v. Tarlton*, 279 N.C. App. 249, 253 (2021) (citation omitted). “In order to prevail on such a motion, the defendant must show a fatal variance between the offense charged and the proof as to the gist of the offense.” *Id.* A variance “does not require reversal unless the defendant is prejudiced as a result.” *State v. Glidewell*, 255 N.C. App. 110, 113 (2017) (quotation marks and citation omitted).

A bill of indictment “couched in the language of the statute is generally sufficient to charge the statutory offense.” *State v. Palmer*, 293 N.C. 633, 638 (1977). An indictment will generally be deemed sufficiently complete even “without evidentiary matters descriptive of the manner and means by which the offense was committed.” *State v. Muskelly*, 6 N.C. App. 174, 176-77 (1969). Furthermore, the fatal variance rule “was not intended as a get-out-of-jail-free card for setting aside convictions based on hyper-technical arguments.” *State v. Henry*, 237 N.C. App. 311, 323 (2014) (citation omitted).

Here, each of Felton's accessory-after-the-fact indictments alleges that Felton “did knowingly assist [Watlington] in attempting to escape and in escaping detection, arrest, and punishment by providing a means of escape, to wit: an automobile, to flee the crime scene, and by concealing evidence, to wit: an automobile.” When viewed “in the light most favorable to the State, giving the State the benefit of every reasonable inference,” Felton's taking of the car keys evidences her attempt to assist Watlington escape arrest and conceal the Explorer. *Rose*, 339 N.C. at 192 (citation omitted). Accordingly, the bills of indictment charging Felton with accessory after the fact are not fatally varied from the evidence presented at trial.

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c. Multiple Counts of Accessory After the Fact

[7] Felton next argues that the trial court erred by denying her motion to dismiss because there was insufficient evidence that Felton committed more than one count of accessory after the fact. Specifically, Felton contends that N.C. Gen. Stat. § 14-7 is ambiguous as to the applicable unit of prosecution for the crime of accessory after the fact and, as such, the rule of lenity should apply.

As discussed above, the rule of lenity provides that any ambiguity in a criminal statute concerning the unit of prosecution “should be resolved in favor of lenity” toward the defendant. *Smith*, 323 N.C. at 442-43. It is well-established that when interpreting a statute, “a court must consider the statute as a whole and determine its meaning by reading it in its proper context and giving its words their ordinary meaning.” *City of Asheville v. Frost*, 370 N.C. 590, 592 (2018) (citation omitted).

N.C. Gen. Stat. § 14-7 governs the crime of accessory after the fact and provides:

If any person shall become an accessory after the fact to any felony, whether the same be a felony at common law or by virtue of any statute made, or to be made, such person shall be guilty of a crime, and may be indicted and convicted together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted for such crime whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice. Unless a different classification is expressly stated, that person shall be punished for an offense that is two classes lower than the felony the principal felon committed[.]

N.C. Gen. Stat. § 14-7.

Unlike in our above analysis of N.C. Gen. Stat. § 20-166, the context of N.C. Gen. Stat. § 14-7 clearly indicates that the legislature intended the allowable unit of prosecution to be each felony for which the principal committed and the accessory assisted after the fact. Additionally, the accessory-after-the-fact statute sets forth different punishments for an accessory after the fact based on the severity of the underlying felony committed by the principal, further demonstrating the legislature’s intent. *See id.*

We therefore conclude that the statute is unambiguous, and the legislature intended for an accessory after the fact to be punished for each

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felony the principal committed.² Accordingly, the rule of lenity is inapplicable, and the trial court did not err by denying Felton's motion to dismiss for this reason.

d. Accessory After the Fact to Hit and Run

[8] Next, Felton contends that the trial court erred by denying her motion to dismiss the charges of accessory after the fact to Watlington's convictions for "leaving the scene." Felton argues, "Even if the evidence were sufficient to show that [] Felton assisted [] Watlington after the assaults and homicide at the gas station by helping [] Watlington get the car from the gas station to where it was parked, that would make [] Felton a co-principal to [] Watlington's crime of leaving the scene, not an accessory after the fact to that crime." Felton mischaracterizes the crime for which Watlington was convicted and the behavior for which Felton was herself convicted.

"An accessory after the fact is one who, knowing that a felony has been committed by another, receives, relieves, comforts or assists such felon, or who in any manner aids him to escape arrest or punishment." *State v. Oliver*, 302 N.C. 28, 55 (1981) (citations omitted). The essential elements of felony hit and run are:

- (1) that the defendant was involved in an accident; (2) that someone was physically injured in this accident; (3) that at the time of the accident the defendant was driving the vehicle; (4) that the defendant knew that he had struck a pedestrian and that the pedestrian suffered physical injury; (5) that the defendant did not stop his vehicle immediately at the scene of the accident; and (6) that the defendant's failure to stop was willful, that is, intentional and without justification or excuse.

State v. Acklin, 71 N.C. App. 261, 264 (1984) (citing N.C. Gen. Stat. § 20-166).

Contrary to Felton's assertion, Watlington was not convicted of merely "leaving the scene." Leaving the scene of the crashes was only one element of her hit-and-run convictions. Here, the evidence, viewed in the light most favorable to the State, was sufficient to show the following: After witnessing Watlington hit and run over the victims with the

2. We note that Felton was convicted of accessory after the fact to Watlington's convictions of misdemeanor hit and run and misdemeanor assault with a deadly weapon. N.C. Gen. Stat. § 14-7 provides that an individual may be convicted as an accessory after the fact to any *felonies* committed by the principal. Felton has not raised this issue on appeal, and we do not address it.

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Explorer and leave the scene of the crashes, Felton aided Watlington to escape arrest or punishment by taking the Explorer's car keys, abandoning the Explorer, and concealing Watlington's identity as the Explorer's driver. Felton's driving away with Watlington was not the behavior for which she was convicted. Accordingly, there was sufficient evidence to support a reasonable inference of Felton's guilt of accessory after the fact to Watlington's felonious hit-and-run convictions, and the trial court did not err by denying Felton's motion to dismiss on this basis.

e. Felton's Multiple Counts of Accessory After the Fact to Hit And Run

[9] Felton also argues that because the evidence supports Watlington being convicted of only one count of hit and run, the trial court erred by denying Felton's motion to dismiss the charge of multiple counts of accessory after the fact to hit and run.

As explained above, Felton may only be convicted of accessory after the fact to Watlington's felony hit and run convictions. As Watlington can only be convicted of two counts of hit and run, Felton may only be convicted of two counts of accessory after the fact to felonious hit and run. We therefore arrest judgment on three of Felton's convictions for accessory after the fact to Watlington's hit-and-run convictions and remand for resentencing.

2. Jury Instruction for Accessory After the Fact

[10] Felton next argues that the trial court plainly erred by instructing the jury on a theory of guilt not alleged in her indictments.

Under the plain error standard of review, a defendant must show that the trial court committed a fundamental error that resulted in prejudice to the defendant. *Lawrence*, 365 N.C. at 518. "[B]ecause plain error is to be applied cautiously and only in the exceptional case, . . . the error will often be one that seriously affect[s] the fairness, integrity or public reputation of judicial proceedings[.]" *Id.* (quotation marks and citations omitted).

An indictment must allege "all the essential elements of the offense endeavored to be charged." *State v. Hunt*, 357 N.C. 257, 267 (2003) (quotation marks and citation omitted). Furthermore, "an indictment couched in the language of the statute is generally sufficient to charge the statutory offense." *Palmer*, 293 N.C. at 638. When instructing the jury, the trial court does not need "to state, summarize, or recapitulate the evidence, or to explain the application of the law to the evidence." *State v. Wallace*, 104 N.C. App. 498, 504 (1991) (citations omitted).

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The elements of accessory after the fact under N.C. Gen. Stat. § 14-7 are: “(1) a felony was committed; (2) the accused knew that the person he received, relieved, or assisted was the person who committed the felony; and (3) the accused rendered assistance to the felony personally.” *Earnhardt*, 307 N.C. at 68 (citations omitted).

Here, each of Felton’s accessory-after-the-fact indictments alleges that Felton “did knowingly assist [Watlington] in attempting to escape and in escaping detection, arrest, and punishment by providing a means of escape, to wit: an automobile, to flee the crime scene, and by concealing evidence, to wit: an automobile.” Consistent with these indictments, the trial court instructed the jury to consider whether Felton “knowingly and willfully assisted Defendant Meranda Watlington in attempting to escape detection, arrest, and punishment.” Felton’s possession of the Explorer’s car keys when apprehended was circumstantial evidence that she knowingly assisted Watlington in concealing the deadly weapon and of Watlington’s identity as the operator of the deadly weapon. Contrary to Felton’s contention, this is not a stand-alone theory presented by the State. Therefore, the trial court did not err, much less plainly err, by allowing the jury to use Felton’s possession of the car keys to convict Felton of accessory after the fact.

3. State’s Closing Argument

[11] Finally, Felton contends that the trial court erred by failing to intervene *ex mero motu* when the State made the following argument during its closing statement: that Felton “was walking away from the gas station with Meranda Watlington. Were they side by side at the time that the officers got to them? No. But they were walking away together. That is trying to let Meranda Watlington escape detection, arrest, or punishment.” We find no merit in this argument.

Because Felton failed to object to the State’s closing argument at trial, “the standard of review is whether the remarks were so grossly improper that the trial court abused its discretion by failing to intervene *ex mero motu*.” *State v. Anthony*, 354 N.C. 372, 423 (2001) (quotation marks and citation omitted). “To establish such an abuse, defendant must show that the prosecutor’s comments so infected the trial with unfairness that they rendered the conviction fundamentally unfair.” *Id.* Therefore, when defense counsel fails to object to the State’s improper argument and the trial court does not intervene, “the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant’s right to a fair trial.” *State v. Huey*, 370 N.C. 174, 179 (2017) (citations omitted).

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During a criminal jury trial, “prosecutors are given wide latitude in the scope of their argument and may argue to the jury the law, the facts in evidence, and all reasonable inferences drawn therefrom.” *State v. Phillips*, 365 N.C. 103, 135 (2011) (quotation marks and citations omitted). A prosecutor’s closing argument “may properly be based upon the evidence and the inferences drawn from that evidence.” *State v. Diehl*, 353 N.C. 433, 436 (2001) (citation omitted). Furthermore, “[o]nly an extreme impropriety on the part of the prosecutor will compel this Court to hold that the trial judge abused his discretion in not recognizing and correcting *ex mero motu* an argument that defense counsel apparently did not believe was prejudicial when originally spoken.” *Anthony*, 354 N.C. at 427 (citation omitted).

Here, the State’s closing argument was neither improper nor misleading. The challenged portion of the State’s closing argument stems from the testimony of the law enforcement officer who apprehended Felton and Watlington after the assaults. This officer testified that when he initially encountered Felton and Watlington, Watlington was walking “a little bit further up” from Felton. This initial encounter was captured by the officer’s body-worn camera and was shown to the jury. Based upon this evidence, it is not unreasonable for the State to state its inference that Felton and Watlington were together when they were apprehended by law enforcement. Accordingly, as there was no error in the State’s closing remarks, the trial court did not abuse its discretion in failing to intervene *ex mero motu*.

III. Conclusion

For the foregoing reasons, as to Watlington’s arguments on appeal, we conclude and order as follows:

- There was no error in submitting to the jury felony murder based on the underlying felony of assault with a deadly weapon inflicting serious injury.
- There was no error in the instructions on the elements of felony murder.
- There was no error in failing to instruct the jury on voluntary manslaughter.
- There was error in convicting Watlington for more than two counts of hit and run under N.C. Gen. Stat. § 20-166. The three judgments on Watlington’s hit-and-run convictions are arrested and the matter is remanded for resentencing.

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- Watlington's argument that the trial court erred by denying her motion to dismiss the charge of felonious hit and run resulting in serious bodily injury to Travis is dismissed as moot.

For Felton's arguments on appeal, we conclude and order as follows:

- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact for insufficient evidence.
- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact for a fatal variance.
- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact on account of ambiguity in N.C. Gen. Stat. § 14-7.
- There was no error in denying Felton's motion to dismiss her charges of accessory after the fact to hit and run for insufficient evidence.
- It was error to convict Felton of more than two counts of accessory after the fact to felonious hit and run. The three judgments on Felton's convictions of accessory after the fact to hit and run are arrested and the matter remanded for resentencing.
- There was no error in the jury instruction for accessory after the fact.
- The trial court did not abuse its discretion by not intervening ex mero motu in the State's closing argument.

In sum, we arrest judgment on three of Watlington's convictions for hit and run and remand for resentencing. We arrest judgment on three of Felton's convictions for accessory after the fact to Watlington's hit and run convictions and remand for resentencing. The remaining convictions remain undisturbed.

NO ERROR IN PART; DISMISSED IN PART; JUDGMENT ARRESTED IN PART AND REMANDED FOR RESENTENCING.

Judges HAMPSON and WOOD concur.

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ADRIAN YOLANDA WILLIAMS, PLAINTIFF

v.

JESSICA GRACE CABRERA, DEFENDANT

No. COA23-826

Filed 16 April 2025

1. Domestic Violence—protective order—complaint improperly incorporated—error not prejudicial

The trial court erred by incorporating plaintiff's complaint as additional findings of fact into its order granting plaintiff a one-year domestic violence protective order (DVPO) because, unlike in an ex parte DVPO, the trial court was required to comply with Civil Procedure Rule 52 by specially making its own findings and, here, the court did not demonstrate any processes of logical reasoning before incorporating the complaint's allegations, not all of which were supported by the evidence. However, the error was not prejudicial because the court's remaining findings—including that defendant bumped into plaintiff with her car, causing injury to plaintiff's finger—supported the conclusion that defendant had committed acts of domestic violence.

2. Domestic Violence—protective order—discretionary relief—animal custody and treatment—social media ban

The trial court's order granting plaintiff a one-year domestic violence protective order based on an incident in which defendant backed her car into plaintiff was modified and affirmed. First, the trial court did not abuse its discretion by granting plaintiff custody of one of the parties' two emotional support animals and by ordering defendant to refrain from cruelly treating or abusing any animal possessed by the parties, where the facts of the case warranted this discretionary relief under N.C.G.S. § 50B-3(a). However, the trial court's directive banning defendant from posting or commenting about plaintiff on social media was overbroad and arbitrary because it was not reasonably tailored to the facts, and the appellate court ordered this portion stricken from the DVPO.

Appeal by Defendant from order entered 5 December 2022 by Judge Doretta L. Walker in Durham County District Court. Heard in the Court of Appeals 17 April 2024.

Bull City Legal Services, by Lynne M. Kay, for Defendant-Appellant.

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No brief filed on behalf of Plaintiff-Appellee.

CARPENTER, Judge.

Jessica Grace Cabrera (“Defendant”) appeals from the trial court’s 5 December 2022 domestic violence protective order (the “Order”) entered in favor of Adrian Yolanda Williams (“Plaintiff”). On appeal, Defendant argues the trial court erred by entering the Order and granting Plaintiff certain additional relief. After careful review, we affirm the Order as modified.

I. Factual & Procedural Background

Plaintiff and Defendant met in California in 2016 and began a relationship. In August 2017, Defendant adopted an emotional support animal (“ESA”); a dog named Chaco. In August 2020, Plaintiff adopted an ESA; a dog named Melo. On 25 October 2020, Plaintiff and Defendant married in California. Then, in 2021, Plaintiff and Defendant moved to North Carolina with Chaco and Melo.

From August 2022 until 14 September 2022, Plaintiff and Defendant attended therapy to “work[] on their relationship.” But, on 15 September 2022, Defendant informed Plaintiff that she was unhappy and wanted to end their marriage. At this time, the parties began discussing how they would resolve custody of Chaco and Melo. Plaintiff suggested a “coparenting” arrangement in which the parties would share custody of Chaco and Melo according to an agreed-upon visitation schedule.

On 21 September 2022, while at home, Plaintiff brought up “coparenting” again and asked if he could take Chaco and Melo to California for three days on a trip. Defendant said no. Plaintiff asked Defendant to “not make th[e] situation any worse than it had to be,” but Defendant did not change her mind. Plaintiff then exited the home and called a friend, Lakya Jones. Jones suggested that Plaintiff attempt to locate the ESA paperwork for Melo.

Back inside the home, Plaintiff could not find the ESA paperwork, so he confronted Defendant. Plaintiff discovered Defendant in the bathroom with the door locked. Plaintiff knocked and asked Defendant if she would open the door, but Defendant refused. Then Plaintiff stepped outside, called the Durham Police Department’s non-emergency line for assistance in “resolv[ing] the situation in a peaceful manner,” and waited for police to arrive.

A few hours later, Defendant exited the home with Chaco and Melo. At that point, Plaintiff was outside on the phone with Jones. Plaintiff

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informed Defendant that the police were on their way to discuss the ESA paperwork. Defendant said, “So what?” and proceeded to get in her car with Chaco and Melo. As Plaintiff stood in the driveway behind Defendant’s car, Defendant reversed and struck Plaintiff’s body. Plaintiff banged on the back of the car, yelling at Defendant. Plaintiff fell to the ground, temporarily lost possession of his phone, and incurred a minor laceration to his right index finger. Meanwhile, Defendant drove away with Chaco and Melo. Plaintiff remained on the phone with Jones for the duration of the incident.

When police arrived, Plaintiff did not tell the officer about the incident with Defendant and the car. The responding officer accompanied Plaintiff while he packed up and removed some of his personal belongings from the home. The following day, Plaintiff removed the remainder of his belongings. Approximately a week later, Defendant moved into a new residence.

On 10 October 2022, Plaintiff filed a complaint and motion for a domestic violence protective order (“DVPO”). That same day the trial court issued an *ex parte* DVPO. On 5 December 2022, the trial court conducted a hearing to determine whether to issue a one-year DVPO. After the hearing, the trial court entered the Order. In the Order, the trial court concluded that Defendant committed acts of domestic violence on 21 September 2022 by: (1) attempting to cause and intentionally causing bodily injury to Plaintiff; and (2) placing Plaintiff in fear of imminent serious bodily injury. The trial court also concluded there was a danger of serious and immediate injury to Plaintiff.

To support its conclusions, the trial court found that “Defendant bumped into [P]laintiff with her car and took off with his ESA causing him to fear for his emotional health. Additionally, [Plaintiff] had injury to his finger.” The trial court, in this section of the Order, incorporated Plaintiff’s complaint as further findings of fact stating “[s]ee complaint incorporated herein.”

The Order required that Defendant refrain from cruelly treating or abusing an animal owned, possessed, kept or held as a pet by either party and posting or commenting about Plaintiff on social media. Additionally, the trial court granted custody of Melo to Plaintiff. On 21 December 2022, Defendant filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(2) (2023).

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III. Issues

The issues are whether the trial court erred by entering the Order and granting Plaintiff certain discretionary relief.

IV. Analysis**A. DVPO**

[1] First, Defendant argues it was improper for the trial court to incorporate Plaintiff's complaint as additional findings of fact because the evidence did not support every allegation in Plaintiff's complaint. Additionally, Defendant asserts the trial court erred by entering the Order because its conclusions were not supported by its findings or competent evidence. While we agree with Defendant that the trial court's incorporation of Plaintiff's complaint was improper, we nonetheless conclude the error was not prejudicial under the facts of this case. The trial court's additional findings contained on the face of the Order are supported by competent evidence and are sufficient to support the conclusion that an act of domestic violence occurred.

1. Standard of Review

This Court reviews a trial court's order issuing a DVPO to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Kennedy v. Morgan*, 221 N.C. App. 219, 220–21, 726 S.E.2d 193, 195 (2012) (quoting *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009)). Findings of fact supported by competent evidence are binding on appeal. *Hensey*, 201 N.C. App. at 59, 685 S.E.2d at 544.

2. Incorporation of Complaint

As an initial matter, we address the trial court's incorporation of Plaintiff's complaint as further findings of fact. As a general rule, "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment." N.C. Gen. Stat. § 1A-1, Rule 52(a)(1) (2023). Under Rule 52, the trial court's findings of fact must contain the " 'specific ultimate facts sufficient for an appellate court to determine that the judgment is adequately supported by competent evidence.' " *Shomette v. Needham*, 298 N.C. App. 400, 915 S.E.2d 39 (2025) (quoting *Williamson v. Williamson*, 140 N.C. App. 362, 363–64, 536 S.E.2d 337, 338 (2000)). Although "verbatim recitations of the testimony" do not qualify as findings of fact "because they do not reflect a conscious choice between the conflicting versions of the incident in

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question,” *Shomette*, 298 N.C. App. at 406, 915 S.E.2d at 44 (quoting *In re Green*, 67 N.C. App. 501, 505 n.1, 313 S.E.2d 193, 195, n.1, (1984)), a trial court may recite testimony in its findings so long as it “‘ultimately makes its own findings, resolving material disputes,’” *In re T.N.H.*, 372 N.C. 403, 408, 831 S.E.2d 54, 59 (2018) (quoting *In re C.L.C.*, 171 N.C. App. 438, 446, 615 S.E.2d 704, 708 (2006)).

For an *ex parte* DVPO, however, this Court has relaxed the application of Rule 52 by permitting the trial court to incorporate pleadings in lieu of making its own “findings and conclusions that fully satisfy the requirements of [Rule 52].” *Hensey*, 201 N.C. App. at 63, 685 S.E.2d at 547 (explaining that *ex parte* DVPOs are meant to be “entered on relatively short notice in order to address a situation in which quick action is needed in order to avert a threat of imminent harm”).

The issuance of a one-year DVPO does not implicate the same level of expediency as an *ex parte* DVPO, meaning the trial court is required, as in any other civil bench trial on the merits, to comply with Rule 52. *See Hensey*, 201 N.C. App. at 62, 685 S.E.2d at 546 (noting the Rules of Civil Procedure apply in “all actions and proceedings of a civil nature” including an action brought under Chapter 50B). The trial court must “find the ultimate facts essential to support the conclusions of law” by utilizing “processes of logical reasoning, based on the evidentiary facts.” *In re Harton*, 156 N.C. App. 655, 660, 577 S.E.2d 334, 337 (2003) (quoting *In re Anderson*, 151 N.C. App. 94, 95, 564 S.E.2d 599, 601 (2012) (internal quotations omitted)). It is well settled that reciting testimony as findings of fact fails to demonstrate processes of logical reasoning required by Rule 52. *See Williamson*, 140 N.C. App. at 363–64, 536 S.E.2d at 338. It follows that the trial court’s mere recitation or wholesale incorporation of allegations from a pleading is similarly inadequate under Rule 52. *See id.* at 363–64, 536 S.E.2d at 338. Indeed, allegations in a complaint have been subject to less scrutiny and are less reliable than testimonial evidence.

Put simply, the trial court fails to resolve the material disputes in the evidence where it wholly incorporates a plaintiff’s complaint without demonstrating “processes of logical reasoning” required by Rule 52. *See In re Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. Moreover, by employing this disfavored method of fact finding, the trial court runs the risk of improperly delegating its fact-finding duty. *See In re J.S.*, 165 N.C. App. 509, 511, 598 S.E.2d 658, 660 (2004), *superseded on other grounds by statute*, 2013 N.C. Sess. Law 129, § 25 (N.C. 2013); *Jay*

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v. Jay, 298 N.C. App. 50, 912 S.E.2d 873 (2025) (Carpenter, J., dissenting).¹ Ultimately, without adequate findings, this Court cannot properly assess whether issuance of a DVPO is supported by competent evidence. *See Williamson*, 140 N.C. App. at 363–64, 536 S.E.2d at 338.

In the instant case, to support its conclusion that Defendant committed acts of domestic violence, the trial court found that: “Defendant bumped into [P]laintiff with her car and took off with his ESA causing him to fear for his emotional health. Additionally, [Plaintiff] had injury to his finger.” The trial court also purported to incorporate Plaintiff’s complaint as further findings of fact. The trial court did not demonstrate processes of logical reasoning, such as annotating, striking through, or otherwise expounding upon Plaintiff’s complaint before incorporating it as further findings. This falls short of the requirements of Rule 52. *See Williamson*, 140 N.C. App. at 364, 536 S.E.2d at 339; *In re Harton*, 156 N.C. App. at 660, 577 S.E.2d at 337. Accordingly, it was improper for the trial court to incorporate Plaintiff’s complaint as further findings of fact.

3. Grounds for DVPO

Notwithstanding this error, we analyze the trial court’s remaining findings of fact appearing on the face of the Order. Although sparse, they are sufficiently detailed to identify the basis for an act of domestic violence.

“To support entry of a DVPO, the trial court must make a conclusion of law ‘that an act of domestic violence occurred.’ ” *Kennedy v. Morgan*, 221 N.C. App. 219, 223, 726 S.E.2d 193, 196 (2012) (quoting N.C. Gen. Stat. § 50B–3(a) (2011)). “The conclusion of law must be based upon the findings of fact.” *Id.* at 223, 726 S.E.2d at 196. “While the trial court need not set forth the evidence in detail it does need to make findings of ultimate fact which are supported by the evidence; the findings must identify the basis for the ‘act of domestic violence.’ ” *Id.* at 224, 726 S.E.2d at 196 (quoting N.C. Gen. Stat. § 50B–3(a) (2011)). The trial court is required to grant a DVPO if it concludes that at least one act of domestic violence has occurred. N.C. Gen. Stat. § 50B–3(a) (2023). In other words, because a single act of domestic violence is sufficient, the trial court’s issuance of a DVPO will be upheld if the findings support at

1. In a recent case, a majority panel of this Court upheld a one-year DVPO which incorporated the plaintiff’s complaint as further findings of fact. *Jay*, 298 N.C. App. at ___, 912 S.E.2d at ___. The Court distinguished *Hensey* but did not explicitly take a position on the incorporation issue, deferring to the trial court’s credibility determination in concluding that the evidence supported the findings. *Id.* at ___, 912 S.E.2d at ___ (citing *Hensey v. Hennessy*, 201 N.C. App. 56, 685 S.E.2d 541 (2009)).

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least one act of domestic violence. *See Keenan v. Keenan*, 285 N.C. App. 133, 136, 877 S.E.2d 97, 101 (2022).

Here, the trial court concluded Defendant committed acts of domestic violence, including: (1) attempting to cause and intentionally causing bodily injury to the Plaintiff; and (2) placing Plaintiff in fear of imminent serious bodily injury. To support its conclusions, the trial court found that: “Defendant bumped into [P]laintiff with her car and took off with his ESA causing him to fear for his emotional health. Additionally, [Plaintiff] had injury to his finger.”

During the hearing, Plaintiff testified that Defendant “reversed her vehicle into my physical body.” Plaintiff also testified to “banging on the back window [of Defendant’s car] screaming her name and asking her to stop.” After being hit by the car, Plaintiff incurred an injury to his index finger. Plaintiff’s testimony supports the trial court’s finding that “Defendant bumped into Plaintiff with her car” and that Plaintiff “had injury to his finger.” These findings, in turn, support the trial court’s conclusion that Defendant committed an act of domestic violence by causing bodily injury to Plaintiff. Thus, notwithstanding the trial court’s improper incorporation of Plaintiff’s complaint into the Order, the trial court did not prejudicially err by granting the DVPO because its remaining findings support the conclusion that an act of domestic violence occurred. *See Kennedy*, 221 N.C. App. at 223, 726 S.E.2d at 196.

We hold the trial court must find facts in accordance with the requirements of Rule 52, demonstrating processes of logical reasoning in its resolution of material conflicts in the evidence, when granting or denying a plaintiff’s request for a one-year DVPO. Where a trial court incorporates a pleading in its findings of fact, our reasoning applies with equal force regardless of whether the pleading was verified or unverified.

B. Discretionary Relief

[2] Next, Defendant asserts that the trial court erred by granting Plaintiff certain additional relief. Specifically, Defendant argues the trial court lacked authority to: (1) grant Plaintiff custody of Melo; (2) order that Defendant refrain from cruelly treating or abusing an animal owned, possessed, kept, or held as a pet by either party residing in the household; (3) order that Defendant refrain from posts or comments about Plaintiff on social media; and (4) grant Plaintiff the care, custody, and control of an animal owned, possessed, kept, or held as a pet by either party residing in the household. Defendant relies on her primary argument here, arguing that because entry of the DVPO was improper, Plaintiff was not entitled to additional relief. We disagree.

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Our review of the relevant caselaw does not reveal a clear standard of review for evaluating Defendant's specific challenge. Section 50B-3(a) provides a non-exhaustive list of "types of relief" that the trial court "may" include in a DVPO after concluding that an act of domestic violence has occurred. N.C. Gen. Stat. § 50B-3(a). When this Court examines an appellant's challenge to the trial court's grant of discretionary relief in a civil no contact order—a distinct but related concept—we review for abuse of discretion. *See Angarita v. Edwards*, 278 N.C. App. 621, 633, 863 S.E.2d 796, 805 (2021) (holding the trial court did not abuse its discretion by ordering the defendant to obtain a mental-health evaluation in a no-contact order). It logically flows that any additional permissive relief the trial court grants in a DVPO involves an exercise of discretion. Accordingly, we conclude abuse of discretion is the appropriate standard of review.

A trial court abuses its discretion if its ruling is either manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985) (citing *Clark v. Clark*, 301 N.C. 123, 271 S.E.2d 58 (1980)). When issuing a DVPO, the trial court does not have "unfettered discretion to order a broad range of remedies" simply because the trial court believes the relief is "necessary for the protection of any party or child." *Russell v. Wofford*, 260 N.C. App. 88, 94, 816 S.E.2d 909, 913 (quoting *State v. Elder*, 368 N.C. 70, 73, 773 S.E.2d 51, 52 (2015)). Stated differently, although the trial court has broad discretion under section 50B-3(a) to impose additional relief, it cannot exercise "unfettered discretion" in doing so. *See id.* at 94, 816 S.E.2d at 913.

Here, after concluding Defendant committed acts of domestic violence, the trial court ordered that Defendant refrain from cruelly treating or abusing an animal held as a pet by either party and posting or commenting about Plaintiff on social media. The trial court also awarded Plaintiff custody of Melo.

Section 50B-3 expressly provides that the trial court may direct a party to refrain from cruelly treating or abusing an animal possessed by the parties. *See* N.C. Gen. Stat. § 50B-3(a)(9)(b1). Section 50B-3(a) further states that the trial court may provide for possession of personal property, including custody and control of an animal. *Id.* at § 50B-3(a)(8). This relief is authorized and warranted in this case. Accordingly, the trial court did not abuse its discretion by granting Plaintiff custody of Melo or by ordering that Defendant refrain from cruelly treating or abusing any animal possessed by the parties.

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Section 50B–3 does not explicitly provide that the trial court may require a party to refrain from posting about another party on social media, but the list of possible relief is non-exhaustive. In other words, it is possible for the trial court to require a party to refrain from posting threatening language about another party on social media if the facts justify such relief. That being said, the directive in the instant case is overbroad and not reasonably tailored to the facts at hand. Because the trial court’s social media directive was arbitrary, we strike that portion of the Order.

V. Conclusion

In sum, the trial court did not prejudicially err by entering the Order and did not abuse its discretion by granting Plaintiff custody of Melo or ordering that Defendant refrain from engaging in animal cruelty. The trial court’s directive that Defendant refrain from posting about Plaintiff on social media is stricken from the Order. Accordingly, we affirm the Order as modified.

MODIFIED AND AFFIRMED.

Judges WOOD and GORE concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 16 APRIL 2025)

IN RE M.H.B. No. 24-533	Gaston (22JT000041) (22JT000042)	Affirmed
KUSTRA v. GRIFFING No. 24-766	Gaston (23CVS003647)	Dismissed
MELVIN v. N.C. DEPT OF THE SEC'Y OF STATE No. 24-769	N.C. Industrial Commission (TA-030717)	Affirmed
STATE v. BOGGS No. 24-470	Mecklenburg (18CRS210502) (18CRS210503)	No Error in Part and Dismissed in Part
STATE v. BOHL No. 24-592	Hoke (21CRS050693-460) (21CRS051001-460)	No Error
STATE v. BULLOCK No. 24-469	Durham (07CRS050838)	No Error
STATE v. DRAYTON No. 23-1087	Davidson (18CRS56929) (18CRS56931) (19CRS906)	Dismissed
STATE v. DUNCAN No. 24-501	Wake (19CR215611-910) (19CR215613-910)	No Error.
STATE v. FISHBACK No. 24-540	Cherokee (23CRS007003)	Dismissed
STATE v. LOTSON No. 24-56	Wake (18CRS210227-910)	No Error
STATE v. PARCHMENT No. 24-580	Forsyth (21CRS059858) (21CRS059862)	No Error
STATE v. PROCTOR No. 24-891	Gaston (18CRS000734) (18CRS051101) (18CRS051102) (18CRS701330)	No Error; Remanded For Correction of A Clerical Error.

STATE v. ROBINSON No. 24-147	Mecklenburg (17CRS202088)	No Error
STATE v. ROBINSON No. 24-735	Wake (21CR216345-910) (21CR216346-910) (21CR216347-910) (23CR024847-910)	No Error
STATE v. THOMPSON No. 24-660	Union (21CRS053944)	No Error
STATE v. WALTON No. 24-886	Wake (21CR212029-910) (23CR047315-910)	No error in part and dismissed in part.
STEWART v. BRICKMAN No. 24-710	Mecklenburg (20CVD017711)	Affirmed in Part, Vacated in Part, and Remanded

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