299 N.C. App.—No. 1 Pages 1-149

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 26, 2026

MAILING ADDRESS: The Judicial Department
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OF
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COURT OF APPEALS

CASES REPORTED

FILED 21 MAY 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

ANIMALS

Protection of Animals Act—poultry production process exempt—motion to dismiss proper—The trial court properly dismissed a complaint brought by a nonprofit entity against defendants (businesses engaged in the raising and slaughtering of chickens for consumption) for failure to state a claim upon which relief could be granted where the legislation that defendants were alleged to have violated, section 19A-1 of the General Statutes (the Protection of Animals Act), specifically exempted "lawful activities" conducted for the production of poultry and for the primary purpose of providing food for human or animal consumption. Whether defendants were exempt from suit under the Act was a question of statutory interpretation and, thus, a question of law properly resolved by the court at the pleading stage. Further, plaintiff's argument that some of the systems and steps defendants employed in their poultry-production operation were either unlawful or not for the purpose of producing poultry or food for consumption failed because the plain meaning of "lawful activities" is one's collective acts not contrary to law; accordingly, the legislation's exemption was directed at the entire series of steps undertaken in producing

CONTEMPT

Civil—purge prior to entry of written order—vacated—A trial court's order finding defendant in civil contempt for his failure to pay court-ordered child support, uninsured medical expenses, and attorney fees was vacated because, although the court orally found defendant in contempt of its child support order—incarcerating him and requiring him to pay the child support and medical expenses he owed to purge himself of contempt—defendant executed a cash bond for the purge amount before the court filed its written contempt order; once defendant purged the contempt, the trial court lacked authority to hold defendant in contempt. **Bridges v. Bridges, 9.**

Criminal—indirect—violation of injunction—denial of motion to dismiss—standard of review—In an appeal from the trial court's order finding defendant in contempt after a hearing on a motion for order to show cause filed by plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors)—in which plaintiff alleged that defendant had violated a permanent injunction by performing HVAC work without a license—the appellate court reviewed the trial court's denial of defendant's motion to dismiss de novo and determined that, since the case involved indirect criminal contempt, the appropriate standard of review was the substantial evidence standard. Thus, the question was whether plaintiff presented substantial evidence, viewed in the light most favorable to plaintiff, that defendant installed a new HVAC system or that he removed and replaced the duct work of an old HVAC system, either one of which would allow a trier of fact to find a violation of the injunction. **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71.**

Criminal—not a misdemeanor—no applicable statute of limitations—The trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license was not entered in violation of any statute of limitations. Although an indirect criminal contempt proceeding resembles a conventional criminal bench trial, criminal contempt does not come within the "[a]ny other crime" language in N.C.G.S. § 14-1 (delineating felonies and misdemeanors). Moreover, a criminal contempt determination is not a misdemeanor in North Carolina; therefore, the contempt proceeding was not subject to the two-year statute of limitations set forth in N.C.G.S. § 15-1(a). **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71.**

Criminal—plumbing work performed in violation of injunction—findings of fact—sufficiency of evidence—In an appeal from the trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license, several findings of fact challenged by defendant as being improper or unsupported by the evidence were upheld on appeal, including findings derived from an investigator's observations that an HVAC unit installed by defendant was installed improperly and an ultimate finding of fact that plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) presented sufficient circumstantial evidence that defendant installed a new HVAC unit and made replacement repairs to an old HVAC unit. Competent evidence supported each finding and, moreover, even if the findings regarding the investigator's opinion were improper—assuming defendant's position that the investigator was not tendered as an expert witness—any error was not prejudicial because plaintiff only needed to prove that defendant installed an HVAC system, regardless of whether it was installed properly. **State Bd. of Exam'rs of Plumbing, Heating & Fire Sprinkler Contractors v. Hudson, 71.**

company leased space as a commercial tenant—where plaintiff asserted his claims against defendants in their individual capacities as property owners and landlords of the workplace. By the plain language and express terms of the release agreement, defendants were not subject to the release: first, as individuals, they did not qualify as affiliates of the company; and second, in the context of plaintiff's claims, they were not acting in their official capacities in the course and scope of their employment with the company. Therefore, the trial court erred by granting defendants' motion to dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1). **Nelson v. Smith, 51.**

CRIMINAL LAW

Motion to withdraw guilty plea—twenty-year delay—properly denied before sentencing—greater sentence improperly imposed—In a criminal case that was reinstated twenty years after defendant had gone missing, where defendant had pleaded guilty to multiple charges (including robbery with a dangerous weapon) with the condition that he would receive an active sentence of 61 to 83 months, the trial court did not err in denying defendant's motion to withdraw his plea agreement prior to sentencing, since several factors—particularly the twenty-year time span between his plea agreement and his motion to withdraw—weighed heavily against a finding that he had a fair and just reason for withdrawing his guilty plea. However, because the court failed to inform defendant of his statutory right (under N.C.G.S. § 15A-1024) to withdraw his plea after it imposed a greater sentence than what defendant had agreed to in his plea agreement, the court's judgment was vacated and the case was remanded for a new sentencing hearing. **State v. Latta, 103.**

Murder trial—jury instructions—self-defense—disqualifying felonious conduct—causal nexus established—The trial court did not commit plain error in defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana) by instructing the jury that if it found an immediate causal nexus between defendant's use of force and the attempt to commit, commission of, or escape after the commission of a felony, defendant would be disqualified from asserting self-defense. Despite defendant's argument to the contrary, the contemporaneous criminal conduct engaged in by defendant in this case, attempting to possess two ounces of marijuana and attempting to possess any amount of marijuana with the intent to sell or deliver, were felonies that could negate a claim of self-defense upon a showing by the State that, but for defendant's felonious conduct, the fatal confrontation with the victim would not have occurred. **State v. Townsend, 132.**

Prosecutor's argument—urging jurors to "walk in the victim's shoes"—remarks improper but not prejudicial—In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not reversibly err in failing to intervene, in the absence of an objection by defendant, during closing arguments when the prosecutor urged the jurors to "walk in [the victim's] shoes." Although those remarks were improper, they did not prejudice defendant given the overwhelming evidence of his guilt. **State v. Maney, 108.**

Prosecutor's closing statement—murder trial—no improper assumption of facts not in evidence—In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the prosecutor's closing

argument during which, contrary to defendant's assertion on appeal, the prosecutor argued facts that were properly admitted into evidence—including contents downloaded from defendant's phone—and all reasonable inferences drawn therefrom. Further, the prosecutor's suggestion in closing that defendant learned from a concealed carry class that he could assert self-defense by claiming to be in fear for his life did not constitute reliance on improperly admitted hearsay; therefore, the prosecutor did not violate ethics rules governing attorney conduct. **State v. Joyner, 93.**

EVIDENCE

Against a child—Evidence Rule 404(b)—no error—Evidence Rule 403—no abuse of discretion—In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not err, let alone plainly err, in admitting evidence from defendant's ex-wife about defendant's abusive, erratic, and threatening behavior against her where that evidence met the criteria for admission under Evidence Rule 404(b) because it was: (1) temporally proximate to charged offenses against defendant's daughter; (2) probative of why defendant's ex-wife did not report an incident in which defendant sexually assaulted both his daughter and his then-wife and why his daughter did not initially report being abused; and (3) sufficiently similar to the charged offenses, in that both involved sexual abuse against family members, sometimes took place in the same locations, often involved force and threats, and included vaginal rape. Further, the trial court did not abuse its discretion in admitting the testimony under Evidence Rule 403 after reviewing the ex-wife's testimony outside the presence of the jury, hearing opposing arguments from counsel, and explaining the reasons for admitting the evidence. **State v. Maney, 108.**

Authentication—forensic download of defendant's phone—testimony confirming contents—In defendant's trial for first-degree murder, the trial court did not err, much less plainly err, by allowing the State to introduce into evidence a forensic download of defendant's cell phone. The data extracted, including text messages and call logs, was properly authenticated pursuant to Evidence Rule 901 by the testimony of the sheriff's department sergeant who had examined defendant's phone and its contents prior to initiating the download and therefore had knowledge that the extracted data was what the State claimed it to be. **State v. Joyner, 93.**

Lay opinion testimony—admissibility—bullet trajectory—detective not qualified as ballistics expert—no abuse of discretion—In defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana), the trial court did not abuse its discretion by allowing testimony from a detective regarding the trajectory of bullets based on dowel rods that he had placed in bullet holes at the crime scene. In addressing this issue of first impression, the appellate court noted that, although the detective was not qualified as an expert in ballistics or projectiles, his testimony was properly admitted as lay opinion testimony pursuant to Evidence Rule 701, since his opinion was based on his own personal observations, training, and experience. **State v. Townsend, 132.**

Lay opinion testimony—bullet trajectory—detective not qualified as ballistics expert—not subject to statutory disclosure requirement—In defendant's trial for second-degree murder (which arose from the shooting of a man from whom defendant sought to buy marijuana), where a detective's testimony regarding bullet

efforts with respondent-mother and the subsequent order terminating her parental rights in both children were vacated because, in the former order, the trial court failed to enter statutorily-required findings of fact showing that reunification efforts clearly would be unsuccessful or would be inconsistent with the children's health or safety—specifically, there were no findings showing that it had considered each of the factors enumerated in N.C.G.S. § 7B-906.2(d), such as whether respondent-mother had remained available to the department of social services and the guardian ad litem for her children, or whether she had acted in a manner inconsistent with her parental rights and with the health and safety of her children. **In re N.M.W., 20.**

Right to counsel—waiver—forfeiture—aggressive behavior toward court-appointed counsels—In a termination of parental rights case, respondent-father's right to counsel under N.C.G.S. § 7B-1101.1(a) was not violated where the trial court's findings of fact showed that he had waived his right to counsel through "egregious dilatory or abusive" conduct—namely, verbal harassment and other threatening behavior directed at his multiple court-appointed attorneys (or their staff) throughout the case. Additionally, after respondent-father's final appointed counsel withdrew, respondent-father indicated a willingness to proceed pro se during a colloquy with the trial court, after which he signed a written waiver of counsel. Furthermore, even if respondent-father's waiver was neither knowing nor voluntary, his aggressive behavior toward his appointed attorneys still constituted a clear forfeiture of his right to counsel. **In re N.M.W., 20.**

UNJUST ENRICHMENT

Express contract—claim barred—motion to dismiss properly denied—motion for judgment notwithstanding the verdict properly denied—In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing a notice of *lis pendens* concerning the property with the clerk of superior court and defendants asserting a counterclaim for slander of title—where the parties stipulated to the existence of an express contract for the purchase and sale of the property for development purposes, the trial court did not err in dismissing plaintiff's claim for unjust enrichment and denying plaintiff's motion for judgment notwithstanding the verdict (filed after the jury returned verdicts in favor of defendants and awarded damages), because an express contract totally excludes any claim arising under an implied contract, such as a claim for unjust enrichment. **Palmetto RTC, LLC v. Fielden, 61.**

WILLS

Caveat proceeding—after-born heirs—putative father—paternity established prior to decedent's death—In a caveat proceeding filed by three of decedent's children (caveators) who had not been named in decedent's will, the trial court properly concluded—albeit on an incorrect basis—that caveators were pretermitted heirs who were entitled to take shares in decedent's estate pursuant to N.C.G.S. § 29-19 (involving succession rights of children born out of wedlock). Although the trial court incorrectly determined that caveators could take under subsection 29-19(b)(1)—which did not apply because caveators had not been finally adjudicated as decedent's heirs prior to reaching the age of majority—caveators were nevertheless entitled to take under subsection 29-19(b)(2), the requirements of which were satisfied by decedent during his lifetime. Decedent acknowledged his paternity of caveators in an affidavit of parentage, consent order, and amended paternity order,

all of which were filed with the clerk of superior court in decedent's county of residence while he was alive. Further, caveators provided timely notice of their claim in compliance with section 29-19(b). Therefore, the trial court's order entered in favor of caveators was affirmed as reaching the correct result. **In re Will of Arnette, 35**.

WORKERS' COMPENSATION

Exclusivity provision—inapplicable to employer's landlords—negligence claim against landlords not barred—In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff had filed a complaint with the Industrial Commission and subsequently entered into a compromise settlement agreement with his employer (a company), the exclusivity provision of the Workers' Compensation Act did not apply to bar plaintiff's claim against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant. Since defendants and the company were separate entities, plaintiff was not barred from asserting his negligence claims against defendants in their individual capacities as property owners and landlords of the workplace. Therefore, the trial court erred by granting defendants' motion to dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1). **Nelson v. Smith, 51.**

N.C. COURT OF APPEALS
2026 SCHEDULE FOR HEARING APPEALS

Cases for argument will be calendared during the following weeks:

January	12 and 26
February	9 and 23
March	9 and 23
April	20
May	4 and 18
June	1
August	10 and 24
September	14 and 28
October	12 and 26
November	16
December	1

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

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ADAMS HOMES AEC, LLC, PLAINTIFF
v.
STANLY COUNTY, NORTH CAROLINA, DEFENDANT

No. COA24-924

Filed 21 May 2025

Public Works—assessment of system development fees—water and sewage—county ordinance—"new development"—deference to county's interpretation

In a declaratory judgment action where a homebuilder (plaintiff) that owned multiple parcels within a development challenged the imposition of system development fees (SDFs) by Stanly County (defendant) in connection to the development's water and sewer system, the trial court's order granting summary judgment for defendant was affirmed where the SDFs had properly been assessed pursuant to a county ordinance, which imposed the fees upon parcels constituting "new development." Where the definition of "new development" was ambiguous under both the ordinance and the associated enabling statute, defendant reasonably interpreted the term to include parcels with completed construction that increased the number of "service units," which defendant reasonably defined as actual impervious surfaces requiring water capacity, and this definition of "new development" included plaintiff's parcels.

Judge FREEMAN concurring in result only.

Appeal by Plaintiff from an order entered 18 July 2024 by Judge Claire V. Hill in Stanly County Superior Court. Heard in the Court of Appeals 9 April 2025.

Shumaker, Loop & Kendrick, LLP by Frederick M. Thurman, Jr., for Plaintiff-Appellant.

Womble, Bond, Dickenson (US) LLP, by Alexander J. Buckley, for Defendant-Appellee.

WOOD, Judge.

Adams Homes AEC, LLC ("Plaintiff") appeals from an order denying Plaintiff's Motion for Summary Judgment and granting the cross Motion for Summary Judgment for Stanly County ("Defendant").

I. Factual and Procedural Background

In September 2007, a developer recorded a map for a new development in the City of Locust, North Carolina, named Glenwood at the Village of Redbridge (the "Development"). In May 2018, Plaintiff began acquiring multiple parcels within the existing development. In November 2018, Defendant entered an Interlocal Agreement with the City of Locust. The City of Locust is primarily located in Stanly County, however certain portions of the city limits, including the Development, are in Cabarrus County. Cabarrus County did not have the infrastructure necessary to provide water and sewer services to those neighborhoods therefore, the interlocal agreement was created in which Defendant agreed to provide water service to all the developments within the City of Locust including those in Cabarrus County.

Plaintiff began building homes on their parcels within the Development sometime after the Interlocal Agreement was signed and upon completion of the homes would arrange with Defendant for the installation of water meters and the commencement of water services.

In September 2022, Defendant enacted Ordinance SCU No. 2022-02, "An Ordinance to Adopt System Development Fees for the Water and Sewer System as Authorized by Article 8 of Chapter 162A of the North Carolina General Statutes" (the "Ordinance"). The Ordinance is a land use plan which allows Defendant to collect System Development Fees, a charge or assessment for service imposed for new developments, to fund the costs of capital improvements attributable to expanding capacity to service new developments.

In May 2023, Defendant began charging Plaintiff a system development fee ("SDF") under the Ordinance for each parcel in the Development when it was connected to water services. Plaintiff paid the fees under protest. On 13 June 2023, Plaintiff filed a Complaint for Declaratory Judgment against Defendant. Defendant filed their answer to Plaintiff's complaint on 16 August 2023.

On 29 May 2024, Plaintiff filed a Motion for Summary Judgment, and on 31 May 2024, Defendant filed a cross Motion for Summary Judgment. Both motions for summary judgment were heard in Stanly County Superior Court on 10 June 2024. On 18 June 2024, the trial court filed an order denying Plaintiff's motion for summary judgment and granting Defendant's motion for the same finding, "Defendant Stanly County has properly interpreted Ordinance No. 2022-02" and the "System Development Fees assessed by Stanly County . . . were validly assessed and done so in a manner consistent with the Ordinance."

Plaintiff filed written notice of appeal on 18 July 2024.

II. Analysis

On appeal, Plaintiff contends the trial court erred as a matter of law in interpreting Ordinance SCU No. 2022-02 and granting summary judgment to the Defendant. Specifically, Plaintiff contends their parcels do not meet the definition of "new development" as outlined in the Ordinance. We disagree.

A. Standard of Review

"Our standard of review of an appeal from summary judgment is de novo; such judgment is appropriate only when the record shows that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." *Galloway as Trustee of Melissa Galloway Snell Living Trust Dated May 1, 2018 v. Snell*, 384 N.C. 285, 287, 885 S.E.2d 834, 836 (2023).

B. Interpretation of Ordinance SCU No. 2022-2

In 2017, the North Carolina General Assembly enacted session law 2017-138 (HB 436) known as the "Public Water and Sewer System Development Fee Act" ("the Act") amending Chapter 162A of the General Statutes. 2017 N.C. Sess. Laws 138; N.C. Gen. Stat. §§ 162A-200-215 (2024). This amendment authorized procedures and methods for the calculation and authorization of system development fees to be charged by local governments. A system development fee ("SDF") is defined by statute as, "[a] charge or assessment for service . . . imposed with respect to

new development to fund costs of capital improvements necessitated by and attributable to such new development, to recoup costs of existing facilities which serve such new development, or a combination of those costs. . . ." N.C. Gen. Stat. § 162A-201(9) (2024).

In September 2022, Defendant enacted Ordinance SCU No. 2022-02, "An Ordinance to Adopt System Development Fees for the Water and Sewer System as Authorized by Article 8 of Chapter 162A of the North Carolina General Statutes" ("the Ordinance") in compliance with the Act passed by the General Assembly. The Ordinance specifically states, "[s]ystem development fees shall be charged consistent with the requirements of [N.C. Gen. Stat.] Chapter 162A, Article 8 as such may be amended from time to time. Terms used in this section shall have the same meanings as set forth in [N.C. Gen. Stat.] Chapter 162A, Article 8." Ordinance SCU No. 2022-02.

Under the Ordinance, "new development" is defined in pertinent part as,

> . . . any of the following occurring after the September 6, 2021 (the one year look back period for platted subdivisions required by [N.C. Gen. Stat.] § 162A-201) *that increases the water and/or sewer capacity necessary to serve that development*:
>
> a. The subdivision of land;
>
> b. The construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of any structure *which increases the number of service units*; or
>
> c. Any use or extension of the use of land *which increases the number of service units*.

Ordinance SCU No. 2022-02 (emphasis added). This definition is consistent with the definition of "new development" in N.C. Gen. Stat. § 162A-201(6).

Plaintiff's argument hinges on the definition of "service units." Plaintiff argues that service units should mean the capacity necessary to serve the development as determined when the original map was approved and recorded in Cabarrus County, in which case there was no "increase in service units" based on Plaintiff's home building activity that would qualifying as "new development." We disagree.

We review issues of statutory construction *de novo*. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009). "If the

statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning." *JVC Enters., LLC v. City of Concord*, 376 N.C. 782, 785, 855 S.E.2d 158, 161 (2021). However, if the statutory language is ambiguous, "[i]t is well settled that . . . the court should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *State ex rel. Utils. Comm'n v. Env't Working Grp.*, 295 N.C. App. 650, 662, 907 S.E.2d 409, 417 (2024).

The term "service unit" is not defined within the Ordinance. However, it is defined within N.C. Gen. Stat. § 162A-201(8), and the Ordinance explicitly included the terms of the Act. Under the Act service unit is defined as "[a] unit of measure, typically an equivalent residential unit, calculated in accordance with generally accepted engineering or planning standards." N.C. Gen. Stat. § 162A-201(8) (2024). An equivalent residential unit ("ERU") is not defined within Article 8 of N.C. Gen. Stat. § 162A-201 and a thorough review of the General Statutes and Administrative Code reveal no use of the term. Additionally, there is a dearth of case law defining an ERU. In S*mith Chapel Baptist Church v. City of Durham*, our Supreme Court heard a case involving a City of Durham code in which Durham defined an ERU as "2,400 square feet of impervious surface, which is the average amount of impervious surface on a single family property in the city." *Smith Chapel Baptist Church v. City of Durham*, 350 N.C. 805, 817, 517 S.E.2d 874, 882 (1999) (citing Durham, N.C., Code ch. 23, art. VIII, § 23–201). Notably, in *Smith Chapel Baptist Church* our Supreme Court did not define what an ERU is. Other cities and towns within North Carolina utilize similar definitions of ERU in their codes as Durham does, typically when referencing storm water management. In Kinston an ERU is defined as "the total impervious area of a typical single-family residential property, and is determined as the median impervious area of a representative sample, as determined by the city, of all developed residential properties in the single-family residential category." Kinston, N.C., Code part II, ch. 19, art. IV, § 19-182. In Kings Mountain the code reads "such charges shall be based on the amount of impervious surface on each parcel as determined by the equivalent residential unit standard. For purposes of this chapter, an equivalent residential unit (ERU) is 2000 square feet of impervious surface." Kings Mountain, N.C., Code title V, ch. 54, § 54.006. In Apex an ERU is defined as 2,700 square feet of impervious surface, which is the average amount of impervious surface on a single-family detached property in the town (based on GIS analysis). Apex, N.C., Code ch. 12, art. III, div. VII, §12-111.

According to definitions currently in use within the state of North Carolina, an ERU is a measurement equal to the average area of impervious surface on a parcel of land for a single-family residential property in the applicable regulated area. We apply this definition to the context of the statute as "[w]e first look at the statute as a 'composite whole' to avoid construing any of its words or phrases out of context." *In re Expungement for Spencer*, 140 N.C. App. 776, 779, 538 S.E.2d 236, 238 (2000) (cleaned up). In applying this definition of ERU to section (A)(2)(b) of Ordinance SCU No. 2022-02, new development occurs when "construction, reconstruction, redevelopment, conversion, structural alteration, relocation or enlargement of any structure increases the number of [measurements equal to the average area of impervious surface on a parcel of land for a single-family residential property in Stanly County]." This definition lacks precision and is ambiguous. One could perceive "the measurements equal to the average area" as a calculation of estimated possible capacity needed in the future based on the recorded maps as posited by the Plaintiff or alternatively it could be the number of actual impervious surfaces of "average area" in existence for which water capacity is imminently necessary as argued by Defendant.

Since the Ordinance and the Act are ambiguous in regard to the definition of service units or equivalent residential units and, therefore, what qualifies as new development, precedent dictates that we "should defer to the agency's interpretation of the statute as long as the agency's interpretation is reasonable and based on a permissible construction of the statute." *State ex rel. Utils. Comm'n v. Env't Working Grp.*, 295 N.C. App. 650, 662, 907 S.E.2d 409, 417 (2024).

In this instance, Defendant contends their Ordinance should be read to include increases in the number of actual ERUs in existence as constituting "new development." We agree. Defendant's reading of ERUs within the definition of "new development" is a reasonable construction of the Ordinance that gives meaning not only to all the words within section (A)(2) of Ordinance SCU No. 2022-02 but is also consistent with other sections within the entirety of Ordinance SCU No. 2022-02 as well as the enabling statute N.C. Gen. Stat. § 162A-201.

Within section (A)(2) of the Ordinance, reading ERUs to refer to actual impervious surface gives meaning to each of the nouns utilized in subsections b and c. This aligns with the presumption that "when the legislature enacts a statute, it intentionally includes and gives meaning to every word therein." *Happel v. Guilford Cnty. Bd. of Educ.*, 387 N.C. 186, 207, 913 S.E.2d 174, 192 (2025). If the actual existence or creation (new construction) of an impervious surface is read into the definition,

then "construction, reconstruction, redevelopment, conversion, structural alteration, relocation, or enlargement of any structure" potentially increases the number of service units. In contrast, if ERUs refer to impervious surfaces that potentially could exist, and the corresponding capacities determined upon the original plot map of a development, then irrespective of any future building or land uses the number of service units as determined at the time the map was filed would not increase.

Within the broader reading of the Ordinance, section E subsections 2 and 3 both support Defendant's interpretation. Subsection 2 states,

> For all [non-subdivision] new development, the County shall collect the system development fee at the earlier of either of the following:
>
> (a) The time of application for connection of the individual unit of development to the service or facilities.
>
> (b) When water or sewer service is committed by the county.

Ordinance SCU No. 2022-02(E)(2). The Ordinance authorizes a fee collection once an actual structure is prepared to receive water services not when a proposed subdivision map is recorded and possible water capacity could be calculated. If the later reading of the Ordinance were adopted then Defendant would collect fees based on the capacity suggested when the map is filed, a proposal that could negatively impact developers who may or may not be able to complete the proposed development as drawn and may not have the funds to pay all water fees long before any houses are ready for sale. Such a payment schedule was explicitly prohibited by the legislature in N.C. Gen. Stat. § 162A-213, which creates a specific timeline for the collection of system development fees anchored on either the building of a structure or the connection of a structure to the service. N.C. Gen. Stat. § 162A-213 (2024). Additionally, subsection 3 states,

> For ongoing subdivisions currently under construction, the system development fees shall be due at the time of application for water and/or sewer service. All subdivided lots that have completed dwellings and the owner or developer has made application and paid for water and/or sewer connection shall not pay system development fees for those lots.

Ordinance SCU No. 2022-02(E)(3). Again, this subsection of the Ordinance is consistent with the notion that the completion of

construction effectively increases the number of service units thereby triggering the system development fees.

Finally, N.C. Gen. Stat. § 162A-201 defines "existing development" as "[l]and subdivisions, structures, and land uses in existence at the start of the written analysis process required by [N.C. Gen. Stat. §] 162A-205, no more than one year prior to the adoption of a system development fee." N.C. Gen. Stat. § 162A-201(3) (2024). Based on this clear and unambiguous definition, the parcels at issue in the case *sub judice* do not qualify as existing development because the structures and land uses in contest were not in existence one year prior to the 6 September 2022 adoption of system development fees. If Plaintiff's proposed definition of ERU were incorporated in the Ordinance defining new development, then any parcels that were mapped prior to 6 September 2021 but have not completed construction or applied for water or sewer services, such as the parcels at issue here, would be neither new development nor existing development. This is an issue the legislature likely would have foreseen and a result they would not have intended to occur. Therefore, we agree with Defendant that a reasonable and permissible construction of the Act and Ordinance would include such parcels by reading the definition of ERUs to refer to actual completed construction of an average impervious surface.

III. Conclusion

Section (A)(2)(b) of Ordinance SCU No. 2022-02 based on N.C. Gen. Stat. §162-201(6) and (8) is ambiguous; therefore, statutory interpretation precedent dictates we turn to Defendant Stanly County's interpretation of its own Ordinance. Finding Defendant's interpretation to be both reasonable and based on a permissible construction of the statute, we affirm the trial court's order granting summary judgment for Defendant.

AFFIRMED.

Judge ARROWOOD concurs.

Judge FREEMAN concurs in result only.

BRIDGES v. BRIDGES

[299 N.C. App. 9 (2025)]

BECKY MINTER BRIDGES, PLAINTIFF
v.
PHILIP KEITH BRIDGES, DEFENDANT

No. COA24-984

Filed 21 May 2025

Contempt—civil—purge prior to entry of written order—vacated

A trial court's order finding defendant in civil contempt for his failure to pay court-ordered child support, uninsured medical expenses, and attorney fees was vacated because, although the court orally found defendant in contempt of its child support order—incarcerating him and requiring him to pay the child support and medical expenses he owed to purge himself of contempt—defendant executed a cash bond for the purge amount before the court filed its written contempt order; once defendant purged the contempt, the trial court lacked authority to hold defendant in contempt.

Appeal by Defendant from Order entered 29 September 2023 by Judge Erin S. Hucks in Union County District Court. Heard in the Court of Appeals 9 April 2025.

Parent Defender Wendy C. Sotolongo, by Assistant Parent Defender Jacky L. Brammer, for Defendant-Appellant.

Becky Minter Bridges, pro se Plaintiff-Appellee.

HAMPSON, Judge.

Factual and Procedural Background

Philip Keith Bridges (Defendant) appeals from an Order holding him in civil contempt for failure to pay child support and uninsured medical expenses. The Record before us tends to reflect the following:

Defendant and Becky Minter Bridges (Plaintiff) separated in October 2019. They had three minor children during the course of their marriage. Plaintiff filed a Complaint seeking child custody, child support, and equitable distribution on 8 November 2019. The trial court entered an Order Regarding Temporary Child Custody and Child Support on 23 November 2020 providing: the parties had joint legal custody of the children, Plaintiff had primary physical custody of the children, and Defendant was responsible for child support of $1,071.28 per month and

38.44% of the children's uninsured medical expenses after Plaintiff paid the first $250.00. Plaintiff filed a Motion for Civil Contempt and Motion for Attorney's Fees on 12 April 2021.

The trial court held a hearing on child custody, child support, and Plaintiff's Motions on 9 and 10 September 2021. The trial court entered an Order Regarding Permanent Child Custody, Child Support, Civil Contempt and Attorney's Fees (Permanent Order) on 14 February 2022. Based on evidence presented during the hearing, the trial court found Defendant's child support obligation should be $725.01 per month, but in the decretal portion, the trial court ordered Defendant to pay $881.62 per month in child support. The trial court ordered the new obligation to be effective as of 1 October 2021. The trial court also found Plaintiff had incurred $8,030.00 in attorney fees and ordered Defendant to pay $150.00 per month until he had paid that sum in full.

Plaintiff filed a Motion for Civil Contempt on 23 June 2023, alleging Defendant owed $3,176.48 in unpaid child support, $171.58 in unpaid uninsured medical expenses, and $1,350.00 in attorney fees. The trial court heard arguments on this matter on 5 September 2023. The same day, at oral rendition, the trial court found Defendant in contempt of the Permanent Order and required Defendant pay the total amount of child support and medical expenses he owed—$3,348.06—to purge himself of contempt. On 10 September 2023, Defendant executed a cash bond for the purge amount. The trial court entered its written Contempt Order articulating its Findings and Conclusions on 29 September 2023. In the Contempt Order, the trial court found Defendant in willful contempt of the Permanent Order and that Defendant had already purged himself of that contempt. In the decretal portion of the Contempt Order, the trial court stated: "Defendant/Father is in civil contempt of this Court's Order entered on February 14, 2022." Plaintiff timely filed Notice of Appeal on 11 October 2023.

Issue

The dispositive issue on appeal is whether the trial court erred by holding Defendant in contempt after he had paid the entirety of the purge amount.

Analysis

"In contrast to criminal contempt which 'is administered as punishment for acts already committed that have impeded the administration of justice, . . . [c]ivil contempt, . . . , is employed to coerce disobedient defendants into complying with orders of court.' " *Ruth v. Ruth*, 158 N.C.

App. 123, 126, 579 S.E.2d 909, 912 (2003) (alterations in original) (quoting *Brower v. Brower*, 70 N.C. App. 131, 133, 318 S.E.2d 542, 544 (1984)). In *Ruth*, this Court held the lower tribunal improperly held a party in contempt where she had complied with the underlying court order after issuance of a show cause order. *Id.* at 126-27, 579 S.E.2d at 912.

This Court expanded on *Ruth* in *McKinney v. McKinney*, 253 N.C. App. 473, 799 S.E.2d 280 (2017). There, the Court noted *Ruth* held "a district court 'does not have the authority to impose civil contempt after an individual has complied with a court order, even if the compliance occurs after the party is served with a motion to show cause why he should not be held in contempt of court.' " *Id.* at 476, 799 S.E.2d at 283 (quoting *Ruth*, 158 N.C. App. at 126, 579 S.E.2d at 912). Building on that proposition, this Court held the trial court likewise lacked authority to hold the contemnor in contempt where, between oral rendition of the order and entry of the written order, the contemnor purged himself of the contempt. *Id.* at 477, 799 S.E.2d at 283.

The Court reasoned that because the trial court's contempt order had not been written and entered before the contemnor purged the contempt, it was not effective. *Id. See also* N.C. R. Civ. P., Rule 58 ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court[.]"); *see also Olson v. McMillian*, 144 N.C. App. 615, 619, 548 S.E.2d 571, 574 (2001) ("When a trial court's oral order is not reduced to writing, it is non-existent[.]" (citation and quotation marks omitted)). Therefore, similarly to *Ruth*, the trial court could not hold the contemnor in contempt, even though the trial court had orally rendered its ruling. *McKinney*, 253 N.C. App. at 477, 799 S.E.2d at 283. As a result, this Court vacated the civil contempt order. *Id.* Although this holding goes further than the Court did in *Ruth*—given that *Ruth* solely addressed a contemnor's compliance after issuance of a show cause order where there had not yet been a determination of contempt—where a panel of the Court of Appeals has decided the issue, we are bound by that precedent. *In re Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989).

Here, the trial court heard arguments on Plaintiff's Motion for Civil Contempt on 5 September 2023. The same day, the trial court orally found Defendant was in contempt of its Order. Defendant was incarcerated and ordered to pay the total amount of child support and medical expenses he owed—$3,348.06—to purge himself of contempt. Defendant executed a cash bond for the purge amount on 10 September 2023. On 29 September 2023, the trial court filed its written order finding Defendant in contempt and that Defendant had purged himself of

that contempt. Consistent with *McKinney*, the trial court did not have authority to hold Defendant in contempt because he had purged the contempt prior to entry of the written order. Thus, the trial court erred by holding Defendant in contempt. Therefore, we are compelled to vacate the Contempt Order.[1]

Conclusion

Accordingly, for the foregoing reasons, we vacate the Contempt Order.

VACATED.

Judges COLLINS and CARPENTER concur.

IN THE MATTER OF J.A.S.F., J.A.S.F., M.S.S-F, MINOR CHILDREN

No. COA24-1006

Filed 21 May 2025

Child Abuse, Dependency, and Neglect—permanency planning order—guardianship—no sworn testimony—findings of fact unsupported

In an abuse and neglect proceeding involving three minor children—the older two having been removed from the family home for, among other reasons, their exposure to domestic violence and substance abuse, and the third and youngest child having been removed shortly after his birth—the permanency planning order awarding guardianship of the children to their foster parents was vacated because the district court's findings of fact did not support its conclusions of law or its decree where the court did not receive any sworn oral testimony or take judicial notice of any previous matter but merely received the prospective guardians' affidavits and reports from the county department of social services and the children's guardian ad litem into evidence.

Appeal by respondent-mother from permanency planning orders entered 13 August 2024 by Judge Robert A. Mullinax, Jr. in Caldwell County District Court. Heard in the Court of Appeals 23 April 2025.

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1. Because we conclude the Contempt Order must be vacated, we do not reach the merits of Defendant's other arguments.

Stephen Schoeberle, for petitioner-appellee Caldwell County Department of Social Services.

Michelle F. Lynch, for Guardian ad Litem.

Jeffrey L. Miller, for respondent-appellant mother.

FREEMAN, Judge.

Respondent-mother appeals from the trial court's permanency planning orders awarding guardianship of Ja.A.S.F. ("Jim"), Jo.A.S.F. ("Jed"), and M.S.S.F. ("Mark") to the children's foster parents.[1] On appeal, respondent-mother argues: (1) the permanency planning order was not supported by competent evidence, (2) the trial court failed to find she was unfit or acted inconsistently with her constitutionally protected status, and (3) she received ineffective assistance of counsel. After careful review, we agree the permanency planning order was not supported by competent evidence. Accordingly, we vacate and remand.

I. Factual and Procedural Background

The Caldwell County Department of Social Services ("DSS") became involved with respondent-mother, Jim, and Jed, after the Lenior Police Department received a call on 30 July 2021. Thereafter, law enforcement discovered that respondent-mother was strangled by the children's father, Gerber Salinas Paredes, in the presence of the two children in the family's home. Paredes was subsequently charged with felony assault by strangulation and his bond conditions prohibited conduct with respondent-mother.[2]

On 2 August 2021, DSS assisted respondent-mother to obtain housing at the Caldwell County Shelter Home. But on 23 August 2021, respondent-mother was asked to leave that shelter based on a "lack of cooperation and ongoing contact" with Paredes. DSS began providing case management services to the family on 16 September 2021 and a few days later, Jim and Jed were placed with a temporary safety provider due to continual safety concerns. On 25 September 2021, DSS was notified that respondent-mother had removed the children from the temporary

1. Pseudonyms are used to protect the juveniles' identities pursuant to N.C. R. App. P. 42(b).

2. Though Paredas is the father of all the children in this action, he was later deported to his country of origin and is not a party to this action.

safety provider and ceased communication with the temporary safety provider. DSS located the children's parents and the children around 6 October 2021. While DSS continued to assist respondent-mother and the children locate housing, respondent-mother and the children returned to the home where Paredes resided.

On 2 November 2021 Paredes tested positive for amphetamines, cocaine, methamphetamine, cannabinoids, and benzoylecgonine in a hair follicle screening. On 20 December 2021, Jim and Jed tested positive for amphetamines, cocaine, and methamphetamine in hair follicle screenings.

On 27 January 2022, respondent-mother asked DSS to help her find new housing after reporting a domestic violence incident with Paredes in the presence of the children. On 2 February 2022, respondent-mother and the children left the housing that DSS provided, so respondent-mother could resume a relationship with Paredes. Around 6:45 a.m. that day, Paredes, respondent-mother, and the children were involved in a car accident in which the family's vehicle flipped over. When law enforcement arrived at the scene, they did not find any members of the family. DSS later discovered that the parents left the scene with the children and went to a nearby home. Neither respondent-mother nor Paredes sought medical attention for the children, despite the children not having been buckled into car seats at the time of the accident. DSS notified emergency medical services for the children to receive medical attention and subsequently filed a petition alleging Jim and Jed were neglected and dependent. That same day, the trial court ordered DSS to take non-secure custody of Jim and Jed. On 8 February 2022, the trial court ordered continued non-secure custody to DSS.

On 15 March 2022, the trial court conducted an adjudicatory hearing on DSS's petition. In its 30 March 2022 order following the hearing, the trial court found that Paredes and respondent-mother were living together, respondent-mother was employed, and both parents had received some mental health services. In that order, the trial court adjudicated Jim and Jed as neglected and dependent. Further, the trial court ordered both parents to: enter into and comply with DSS' Out-Of-Home Family Services Agreements; complete and comply with a comprehensive clinical assessments; sign consent agreements for placement providers to release information to DSS; complete a parenting classes and comply with recommendations; comply with random urine and hair follicle drug screens; maintain stable housing and stable employment; and notify DSS "of all medications taken and comply with pill count requests." The trial court ordered the children to remain in DSS custody

and continued placement in foster care. Both parents were individually granted one hour of supervised visitation a week.

On 5 July 2022, the trial court held a permanency planning hearing for Jim and Jed and ordered a primary permanent plan of reunification and a secondary plan of adoption. Specifically, the trial court found that respondent-mother had begun counseling and a domestic violence assessment but had not attended or participated in further recommended sessions; respondent-mother had quit her job; and neither parent had visited the children for a six-week period, but on 22 April 2022, both parents had started visiting weekly. This hearing and order established that the parents had entered into their case plans on 6 April 2022 and required them to complete and comply with the tasks in their respective case plans.

On 15 November 2022, respondent-mother gave birth to Mark and the next day, DSS obtained non-secure custody of Mark after his release from the hospital. Two days later, DSS filed a petition alleging that Mark was neglected and dependent. Mark was adjudicated neglected and dependent on 16 March 2023.

On 6 December 2022, the trial court held another permanency planning hearing for Jim and Jed. In its 6 December 2022 order, the trial court found respondent-mother had made limited progress on her case plan; her visitation with the children was sporadic but going well; and she had tested positive for amphetamine and methamphetamine in August 2022. The trial court ceased reunification efforts, made adoption the primary plan with guardianship as the secondary plan, and awarded respondent-mother one hour of supervised visitation a month. The trial court ceased Paredes' visitation. Then, in the next permanency planning hearing for Jim and Jed held on 1 March 2023, the trial court re-iterated its orders, and the same primary and secondary plans remained in place.

On 6 June 2023, the trial court held permanency planning hearings for all the children. Jim and Jed's primary and secondary plans, respectively, remained adoption and guardianship. Further, the trial court ordered Mark's initial primary plan as reunification and secondary plan to be adoption. At the permanency planning hearings on 5 December 2023 and on 21 May 2024, the primary and secondary plans for all the children remained the same.

At the 13 August 2024 permanency planning hearing, the trial court changed all the children's primary plans to guardianship and secondary plans to adoption. At the hearing, the trial court heard counsel's arguments and spoke with the children's prospective guardians regarding

their legal and financial obligations. Though the trial court received a DSS report, a GAL report, and the prospective guardians' affidavits, it did not hear any oral testimony. Rather, the trial court stated it would "adopt the recommendations contained in the department's reports simply providing guardianship as ordered[.]" Subsequently, the trial court awarded guardianship to the prospective guardians and continued its prior grant of visitation for respondent-mother.

II. Jurisdiction

This Court has jurisdiction to review "[a]ny order, other than a nonsecure custody order, that changes legal custody of a juvenile." N.C.G.S. § 7B-1001(a)(4) (2023). Accordingly, we have jurisdiction to review the trial court's permanency planning order awarding guardianship to Jim, Jed, and Mark's foster parents.

III. Standard of Review

"This Court's review of a permanency planning order is limited to whether there is competent evidence in the record to support the findings and whether the findings support the conclusions of law." *In re P.O.*, 207 N.C. App. 35, 41 (2010). "The trial court's findings of fact are conclusive on appeal if unchallenged or if supported by competent evidence in the record." *In re I.K.*, 377 N.C. 417, 422 (2021) (cleaned up).

A "decision of the trial court regarding best interests of a juvenile," such as a decision on guardianship or visitation, "is within the trial court's discretion and will not be overturned absent an abuse of discretion." *In re L.M.*, 238 N.C. App. 345, 349 (2014). "An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision." *In re A.P.W.*, 378 N.C. 405, 410 (2021) (cleaned up). We review de novo the trial court's conclusions of law. *In re P.O.*, 207 N.C. App. at 41.

IV. Discussion

Respondent-mother first argues the permanency planning order was not supported by competent evidence. Because we agree with respondent-mother's contention that the 13 August 2024 permanency planning order was not supported by competent evidence, we need not reach respondent-mother's remaining arguments.

Chapter 7B of our General Statutes "divides abuse, neglect, and dependency proceedings into two" stages: first the adjudicatory stage, and second, the dispositional stage. *In re J.M.*, 384 N.C. 584, 592 (2023). Such proceedings "require the application of different evidentiary

standards at each stage[.]" *In re O.W.*, 164 N.C. App. 699, 701 (2004) (citations omitted). At the adjudicatory stage, "heightened requirements are in place to protect the rights of . . . the juvenile's parent and assure due process of law," because "the adjudication is a formal, adversarial process, aimed at determining the truth or falsehood of the allegations in the petition." *In re K.W.*, 272 N.C. App. 487, 491–92 (2020) (cleaned up). Therefore, "[t]he trial court must apply the Rules of Evidence, and can find a child abused, neglected, or dependent only if that status is proven by clear and convincing evidence[.]" *Id.* (citations omitted). Our Supreme Court has confirmed this, holding that, in the adjudicatory phase, "the trial court may not rely solely on prior court orders and reports but must receive some oral testimony at the hearing and make an independent determination regarding the evidence presented." *In re T.N.H.*, 372 N.C. 403, 410 (2019).

After the trial court finds and concludes in the adjudicatory phase that a child is abused, neglected, or dependent, "the court then moves on to an initial disposition hearing." *In re K.W.*, 272 N.C. App. at 491 (citation omitted). At the dispositional stage, "the trial court, in its discretion, determines the child's placement based on the best interests of the child." *Id.* Our Court has described that the initial dispositional hearing "may be informal" because—contrary to the adjudicatory phase—the trial court may consider "evidence otherwise barred by the Rules of Evidence[.]" *Id.* at 492 (citations omitted); *see also* N.C.G.S. § 7B-901(a) (2023). Thus, the trial court may "incorporate into its findings information obtained from written reports by the parties," and "findings made at adjudication[,]" as well as "rely on written reports in the disposition hearing even if they have not been admitted into evidence." *Id.* (citation omitted). "If these sources of fact are sufficient to support the trial court's conclusions of law and its ultimate disposition, there is no need for the court to hear additional testimony." *Id.*

Specifically, section 7B-906.1 of our General Statutes, which governs review and permanency planning hearings, provides that "the court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, *or* testimony *or* evidence from any person that is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-906.1(c) (2023) (emphasis added). Therefore, "[a]s a type of dispositional hearing, a permanency planning hearing 'may be informal and the court may consider written reports or other evidence concerning the needs of the juvenile.' " *In re J.H.*, 244 N.C. App. 255, 270 (2015) (citing N.C.G.S. § 7B-901 (2013)).

Our Supreme Court has not held the requirement articulated in *In re T.N.H.*, that the trial court must receive some oral testimony in the adjudicatory phase, applies to the *dispositional* stage of a juvenile proceeding. Nor has our Supreme Court overruled the line of cases from this Court imposing such a requirement despite the tension between those cases and the evidentiary standard articulated in subsection 7B-906.1(c). *See, e.g.*, *In re J.T.*, 252 N.C. App. 19 (2017); *In re D.Y.*, 202 N.C. App. 140 (2010); *In re D.L.*, 166 N.C. App. 574, (2004). Accordingly, we are still bound by this Court's precedent.[3] *See also In re Civil Penalty*, 324 N.C. 373, 384 (1989) ("Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court.").

When a trial court's factual findings in a permanency planning order were solely based on "court reports, prior orders, and the arguments of counsel[,]" we have held that "the trial court's conclusions of law were in error without additional evidence offered to support the trial court's findings of fact[.]" *In re J.T.*, 252 N.C. at 21 (citing *In re D.L.*, 166 N.C. App. 574 (2004); *In re D.Y.*, 202 N.C. App. 140 (2010)). In these cases, "this Court reversed the permanency planning orders" where court reports "were the only admissible evidence offered by DSS at the permanency planning hearings." *Id.* (citing *In re D.L.*, 166 N.C. App. at 582; *In re D.Y.*, 202 N.C. App. at 142–3). Further, this Court has clearly articulated that counsel's statements "are not considered evidence." *Id.* (citing *In re D.L.*, 166 N.C. App. at 582).

Similarly, the trial court in *In re J.T.* did not hear oral testimony, but "only heard statements from the attorneys involved in the case[,]" accepted court reports "submitted by the guardian ad litem and a DSS social worker[,] and incorporated those reports by reference in its orders." 252 N.C. App. at 21. This Court again held that "in the absence of testimony," and where the trial court only heard statements from attorneys and incorporated reports by reference, the trial court's factual findings "were unsupported by competent evidence, and its conclusions

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3. We observe that Section 7B-901(a) of our General Statutes, which governs initial dispositional hearings, articulates an *identical* evidentiary standard to that section which governs permanency planning hearings, declaring that "[t]he court may consider any evidence, including hearsay evidence as defined in G.S. 8C-1, Rule 801, including testimony or evidence from any person who is not a party, that the court finds to be relevant, reliable, and necessary to determine the needs of the juvenile and the most appropriate disposition." N.C.G.S. § 7B-901(a) (2023). However, this Court has reached different holdings as to an oral testimony requirement in initial dispositional hearings and later dispositional hearings, like permanency planning and review hearings. *See In re K.W.*, 272 N.C. App. at 491–93. *Cf. In re J.T.*, 252 N.C. App. 19, 21 (2017).

of law were in error." *Id*. *See also In re S.P.*, 267 N.C. App. 533, 536–7 (2019) (holding such case was indistinguishable from *In re D.L.*, *In re D.Y.*, and *In re J.T.* where the trial court heard no testimony, accepted court reports, swore in the preparers of the court reports, and heard arguments from counsel).

The operative facts of the present case are no different from those in this Court's prior decisions. Here, the trial court did not receive any sworn oral testimony or take judicial notice of any previous matter but merely received reports and the prospective guardians' affidavits into evidence. Therefore, we are constrained to hold that the trial court's factual findings were unsupported by competent evidence and subsequently, its conclusions of law were erroneous.[4]

To the extent that the GAL and DSS argue that requiring oral testimony goes against the evidentiary requirements of permanency planning proceedings as codified in section 7B-901(a) and our Supreme Court's precedent, we are compelled to follow this Court's precedent and similarly vacate the trial court's order in light of *In re D.L.*, *In re D.Y.*, and *In re J.T.*[5]

V. Conclusion

For a permanency planning order to be supported by competent evidence, this Court's precedent requires some oral testimony, and therefore, more than court reports, attorney's statements, and prior orders. In this case, the trial court heard no oral testimony but instead relied on court reports and prospective guardians' affidavits to make its factual findings. Accordingly, we vacate and remand the trial court' permanency panning order so that the trial court may conduct another hearing in compliance with this Court's precedent.

VACATED AND REMANDED.

Judges COLLINS AND MURRY concur.

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4. To the extent that the GAL and DSS argue the guardians' affidavits were testimonial in nature, such affidavits still fail to satisfy this Court's requirement for live "oral testimony" at permanency planning hearings. *See In re J.T.*, 252 N.C. App. at 21.

5. We note our Court clearly stated in *In re K.W.*, "[t]he trial court did not err in proceeding with disposition absent the presentation of sworn testimony at the disposition hearing[,]" because "[s]ection 7B-901(a) explicitly allows the court in its disposition order to rely on written reports, and to incorporate the findings it made at the adjudication hearing." 272 N.C. App. at 487, 493, 492. In other words, "[i]f these sources of fact are sufficient to support the trial court's conclusions of law and its ultimate disposition, there is no need for the court to hear additional testimony." *Id*. at 492.

IN RE: N.M.W. AND A.N.D.

No. COA24-890

Filed 21 May 2025

1. Termination of Parental Rights—right to counsel—waiver—forfeiture—aggressive behavior toward court-appointed counsels

In a termination of parental rights case, respondent-father's right to counsel under N.C.G.S. § 7B-1101.1(a) was not violated where the trial court's findings of fact showed that he had waived his right to counsel through "egregious dilatory or abusive" conduct—namely, verbal harassment and other threatening behavior directed at his multiple court-appointed attorneys (or their staff) throughout the case. Additionally, after respondent-father's final appointed counsel withdrew, respondent-father indicated a willingness to proceed pro se during a colloquy with the trial court, after which he signed a written waiver of counsel. Furthermore, even if respondent-father's waiver was neither knowing nor voluntary, his aggressive behavior toward his appointed attorneys still constituted a clear forfeiture of his right to counsel.

2. Termination of Parental Rights—cessation of reunification efforts—consideration of statutory factors—required findings of fact

After respondent-mother's two children had been adjudicated as neglected and dependent juveniles, the order ceasing reunification efforts with respondent-mother and the subsequent order terminating her parental rights in both children were vacated because, in the former order, the trial court failed to enter statutorily-required findings of fact showing that reunification efforts clearly would be unsuccessful or would be inconsistent with the children's health or safety—specifically, there were no findings showing that it had considered each of the factors enumerated in N.C.G.S. § 7B-906.2(d), such as whether respondent-mother had remained available to the department of social services and the guardian ad litem for her children, or whether she had acted in a manner inconsistent with her parental rights and with the health and safety of her children.

Judge STROUD concurring in part and dissenting in part.

IN RE N.M.W.

[299 N.C. App. 20 (2025)]

Appeal by respondents from orders entered 3 November 2023 and 30 May 2024 by Judge Andrew K. Wigmore in Carteret County District Court. Heard in the Court of Appeals 22 April 2025.

Vitrano Law Offices, PLLC, by Sean P. Vitrano, for the respondent-appellant-Father.

Jason Senges, for the respondent-appellant-Mother.

Stephanie Sonzogni, for the petitioner-appellee Carteret County Department of Social Services.

Parker Poe Adams & Bernstein LLP, by Maya M. Engle, and Stephen V. Carey, for the Guardian ad Litem.

TYSON, Judge.

Respondent-mother appeals from the district court's order ceasing reunification efforts with her daughters, A.N.D. ("Ann") born 2014, and N.M.W. ("Nora"). born 2020. Respondent-mother also appeals the termination of her parental rights to Ann. Respondent-mother and Respondent-father both appeal from the termination of parental rights to Nora. We affirm the order terminating Respondent-father's parental rights to Nora. We vacate the order ceasing Respondent-mother's reunification efforts with daughters Ann and Nora, vacate the termination of Respondent-mother's parental rights to Ann and Nora, and remand for further statutorily-required findings and conclusions.

I. Background

Respondent-mother is the biological mother to R.J.D. ("Robert"), Ann and Nora. Robert lives with his paternal grandmother and is not involved in this process. Ann's biological father died in 2014. Respondent-mother and Respondent-father are parents of Nora.

Respondent-mother has interacted with child protective services since 2013 in three states: Maryland, Ohio, and North Carolina. The Carteret County Department of Health and Human Services ("DHHS") received three complaints about Ann's living conditions, allegations of domestic violence between Respondent-mother and Respondent-father, improper supervision, and sexualized and aggressive behavior by Ann.

The United States Coast Guard was patrolling the Morehead City Channel on 9 August 2019. The Guardsmen observed a sailing vessel,

identified as the "Quest" with Maryland Vessel Registration 8909AH, impeding traffic operating in the channel. The Quest had dragged its anchor from its original position nearer the marsh and south of the Morehead City Marina. The Guardsmen observed Respondent-mother sitting in the open cockpit near the stern.

Respondent-mother was dressed in a grey shirt, blue jeans, and rubber boots. She reported being fourteen weeks pregnant and Ann, her daughter, being aboard. Guardsmen observed approximately one foot of standing water inside the vessel's well, a large amount of live wires exiting storage compartments on the port and starboard sides entering the standing water inside the cabin, a heavy odor of diesel fuel emanating from the cabin, a large amount of garbage inside and outside of the cabin, and an extreme amount of filth located on the deck and inside the cabin. The Guardsmen encountered Ann on the bed inside the forward cabin. The Coast Guard removed the boarding party from the vessel, did not seek the source of the leaks, nor conduct a safety inspection.

Respondent-mother reported to the Guardsmen she resided on the vessel with Respondent-father and Ann. She also told the Guardsmen she and Ann were struggling to make ends meet, had nowhere else to go, and asserted she "was over living on the boat." The Guardsmen removed Respondent-mother and Ann from the vessel with her consent, transported them to the marina, and contacted the Morehead City Police Department for assistance to get them placed into a shelter.

DHHS filed a juvenile petition over a month later on 18 September 2019 alleging Ann to be neglected and dependent. Respondent-mother stipulated to the adjudication, which was entered by the district court on 13 December 2019.

The district court kept custody of Ann with DHHS and set concurrent plans of reunification as a primary plan and secondary plans of adoption and custody. Respondent-mother was ordered, *inter alia*, to maintain stability, find employment, seek counseling, complete a parenting evaluation, follow the recommendations for mental health treatment, and seek domestic violence counseling.

Nora was born on 9 February 2020 and after Ann's disposition hearing. DHHS filed a juvenile petition for two-day-old Nora alleging she was a neglected and dependent juvenile and took the newborn into non secure custody. The juvenile petition made similar allegations contained in Ann's prior petition. Nora was adjudicated as a neglected and dependent juvenile on 10 September 2020. The district court established a

primary plan for Nora of reunification with a secondary concurrent plan of adoption and custody.

Respondent-father of Nora was ordered, *inter alia*, to obtain mental health treatment for any diagnosis, remain sober and drug free, submit to drug tests, participate in a twelve-week substance abuse intensive outpatient program for three hours a day and attend three Alcoholics Anonymous/Narcotics Anonymous meetings per week, attend and complete parenting classes and show skills learned, complete a batterer's intervention program, and to refrain from domestic violence.

Respondent-mother received therapeutic services, completed a comprehensive clinical assessment. She also cleaned the boat and docked it at an appropriate location.

Both Respondent-mother and Respondent-father made progress on their respective plans. Respondent-mother and Respondent-father moved into a home in Onslow County. The district court adopted a plan of reunification with a secondary concurrent plan of custody or guardianship and ordered a gradual reunification working toward a trial home placement in February 2021. Ann was returned to Respondent-mother and Respondent-father's home on 24 April 2021 and Nora was returned a month later on 28 May 2021.

Respondent-mother voluntarily placed both Ann and Nora with Nora's former foster parent on 4 July 2021. Respondent-mother alleged domestic violence by Respondent-father, but later recanted the allegations. Ann alleged sexual abuse by Respondent-father, which was investigated by Onslow County child protective services and was found to be unsubstantiated. The district court suspended the trial home placement and suspended Respondent-mother and Respondent-father's visitation with both their children on 23 July 2021.

Ann purportedly assaulted another child in the foster home, was involuntarily committed to Carteret Health Care, and was later placed in a therapeutic foster home. The district court amended the permanent plan of reunification with a concurrent plan of guardianship. The district court also ordered the home placement to remain suspended until Respondent-mother and Respondent-father had re-engaged in anger management, domestic violence, and couples counseling. Respondent-father was ordered to complete the domestic violence offender assessment with the STOP program and engaged in domestic violence offender and anger management group therapy.

Respondent-father was involuntarily discharged from a domestic violence offender program, but he engaged with an online program. Respondent-mother and Respondent-father's home condition declined, with hazards present. Respondent-mother and Respondent-father were evicted from their home in July 2022 after live marijuana plants were found inside a shed located on the property.

The district court changed the plan to adoption with a concurrent secondary plan of reunification and suspended visitation on 16 September 2022. DHHS filed a petitions to terminate the mother's and father's parental rights to both juveniles on 1 December 2022. The district court ceased reunification efforts for both children on 21 April 2023 by an order entered six months later on 3 November 2023. Respondent-mother preserved her right of appeal.

Following hearings on 3 November 2023, 16 November 2023, and 12 January 2023, the trial court entered an order terminating Respondent-mother's parental rights to Ann and Respondent-mother and Respondent-father's rights to Nora. Respondent-mother and Respondent-father appeal.

II. Jurisdiction

Jurisdiction lies in this Court pursuant to N.C. Gen. Stat. § 7A-27(b)(2) (2023).

III. Issues

Respondent-father argues the district court violated his right to counsel. Respondent-mother argues the district court failed to make the statutory findings required to cease reunification efforts and improperly set a sole plan of adoption.

IV. Respondent-father's appeal

[1] Respondent-father argues he did not knowingly and voluntarily waive his right to counsel. Respondent-father asserts he had received no prior notice of his counsel's intent to withdraw.

A. Standard of Review

Our Supreme Court has held:

> A trial court's determination concerning whether a parent has waived his or her right to counsel is a conclusion of law that must be made in light of the statutorily[-]prescribed criteria, so we review the question of whether the trial court erroneously determined that a parent [had]

> waived or forfeited his or her statutory right to counsel in a termination of parental rights proceeding using a *de novo* standard of review.

In re K.M.W., 376 N.C. 195, 209-10, 851 S.E.2d 849, 860 (2020).

B. Analysis

N.C. Gen. Stat. § 7B-1101.1(a) mandates parents to be represented by counsel during termination of parental rights actions, unless findings and supported conclusions show the parent has forfeited or waived such right. N.C. Gen. Stat. § 7B-1101.1(a) (2023).

After entering an appearance before the court, an attorney may not abandon a client and case without "(1) justifiable cause, (2) reasonable notice [to the client], and (3) the permission of the court." *Smith v. Bryant*, 264 N.C. 208, 211, 141 S.E.2d 303, 305 (1965) (citation omitted). "Where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion. The Court must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal." *Williams & Michael, P.A. v. Kennamer*, 71 N.C. App. 215, 217, 321 S.E.2d 514, 516 (1984).

A parent may waive representation by counsel if findings and conclusions support his actions constitute "egregious dilatory or abusive conduct." *In re K.M.W.*, 376 N.C. at 209, 851 S.E.2d at 860 (citation omitted).

Our Supreme Court explained in *K.M.W.*:

> In order to adequately protect a parent's due process rights in a termination of parental rights proceeding, the General Assembly has created a statutory right to counsel for parents involved in termination proceedings. More specifically, N.C.G.S. § 1101.1(a) provides that "[t]he parent [in a termination of parental proceeding] has the right to counsel, and to appointed counsel in cases of indigency, unless the parent waives the right." Although parents eligible for the appointment of counsel in termination of parental rights proceedings may waive their right to counsel, they are entitled to do so only "after the court examines the parent and makes findings of fact sufficient to show that the waiver is knowing and voluntary."

Id. at 208-09, 851 S.E.2d at 859.

Respondent-father was removed from a Batterer's Intervention Program purportedly due to "threatening behaviors toward the GAL,

the Social Worker and [Respondent-mother's] previous attorney." Respondent-father's first appointed attorney, Joshua Winks, moved for and was allowed to withdraw. Respondent-father's next appointed attorney, Elizabeth Ponder. also moved for and was allowed to withdraw due to Respondent-father's purported harassment.

Respondent-father then waived the assistance of appointed counsel and proceeded *pro se*. Following DHHS's petition to terminate his parental rights to Nora, the trial court suggested appointing him counsel for the TPR proceeding. Respondent-father agreed and the court appointed attorney John Curtis, who also moved and was allowed to withdraw due to alleged irreconcilable differences.

Respondent-father requested yet another attorney, and Michael Barnhill was appointed by the court to represent him. The proceeding was delayed for almost three months to allow Barnhill to review the file, meet with Respondent-father, and prepare for the TPR proceeding.

Respondent-father never met with Barnhill. At the TPR proceeding on 3 November 2023 Barnhill moved to withdraw as counsel. Barnhill told the district court Respondent-father had purportedly verbally abused his staff to the point his assistant felt the need to call law enforcement officers, Respondent-father had left disparaging and aggressive voicemails for him and at the church's phone where Barnhill served as the pastor. Barnhill surmised Respondent-father either had or would perjure himself. Barnhill was allowed to withdraw.

The district court noted Respondent-father's actions and conduct appeared to be a stalling tactic:

> And that's a consent by the Respondent Parent that Barnhill will be allowed to withdraw, and he is ready to proceed without an attorney today. That all efforts to have an attorney for [Respondent-father] have been made by the Court. There's been numerous attorneys through the years of the DSS case that have had to withdraw—have been allowed to withdraw; and although he represented himself through the DSS matter, we thought it necessary to make sure that he had court appointed attorney for the termination of parental rights matter; and he has basically forced two attorneys to withdraw in that matter and has asked to proceed on his own. The court is going to allow it.

The district court conducted a colloquy to determine if Respondent-father could proceed *pro se*. The district court also inquired

of Respondent-father whether he wanted to proceed *pro se*, was prepared to proceed without counsel, and after affirmative responses had Respondent-father to execute a written waiver of counsel. Any issue in the attorney-client relationships resulted from Respondent-father's conduct. Respondent-father expressly consented to the withdrawal of Barnhill, executed a written waiver, and elected to proceed *pro se* for the second time.

The district court's findings show Respondent-father both voluntarily and knowingly waived his right to counsel. Presuming, without deciding Respondent-father did not knowingly and voluntarily waive his right to counsel, his multiple actions and conduct with multiple appointed counsels constituted a forfeiture of counsel. *See State v. Moore*, 290 N.C. 610, 893 S.E.2d 231, *appeal dismissed*, 385 N.C. 624, 895 S.E.2d 402 (2023). The district court noted Respondent-father's conduct had caused three of his prior appointed counsels to withdraw. The order terminating Respondent-father's parental rights to Nora is affirmed.

V. Respondent-mother's Appeal

[2] Respondent-mother argues the district court failed to comply with the statutory mandate of N.C. Gen. Stat. § 7B-906.2 (2023), by failing to make the required findings to support a conclusion to allow it to discontinue and cease reunification efforts. *Id.*

A. Standard of Review

This Court "reviews an order that ceases reunification efforts to determine whether the trial court made appropriate findings, whether the findings are based upon credible evidence, whether the findings of fact support the trial court's conclusions, and whether the trial court abused its discretion with respect to disposition." *In re D.A.*, 258 N.C. App. 247, 249, 811 S.E.2d 729, 731 (2018).

B. Analysis

The General Assembly has mandated: "Reunification *shall remain a primary* or secondary plan unless the court made findings under G.S. 7B-901(c) or makes written findings that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety." N.C. Gen. Stat. § 7B-906.2(b) (2023) (emphasis supplied).

Specific and supported evidentiary findings must show:

(1) Whether the parent is making adequate progress within a reasonable period of time under the plan.

(2) Whether the parent is actively participating in or cooperating with the plan, the department, and the guardian ad litem for the juvenile.

(3) Whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile.

(4) Whether the parent is acting in a manner inconsistent with the health or safety of the juvenile.

N.C. Gen. Stat. § 7B-906.2(d) (2023).

"Subsection . . . 906.2(d) requires written findings which shall demonstrate the degree of success or failure toward reunification. We therefore hold that only those factors which demonstrate the degree of success or failure toward reunification require written findings." *In re L.L.*, 386 N.C. 706, 716, 909 S.E.2d 151, 159 (2024). The trial court failed to find and make the statutory findings and supported conclusions of whether Respondent-mother had remained available to DHHS and the guardian *ad litem* for her children, whether she is acting in a manner inconsistent with her parental rights, and inconsistent with the health or safety of the juvenile, "which demonstrate the degree of success or failure toward reunification." *Id.* The orders of the district court ceasing reunification and terminating Respondent-mother's parental rights to Ann and Nora are vacated.

VI. Conclusion

Respondent-father's right to counsel was not violated after he had expressly consented to his attorney's withdrawal due to his repeated egregious and dilatory behaviors and express waiver of counsel. The order terminating Respondent-father's parental rights to Nora is affirmed.

Statutorily-mandated findings "which demonstrate the degree of success or failure toward reunification" do not support the district court's conclusion to cease reunification efforts with Respondent-mother. *Id.* The district court's order ceasing reunification efforts and order terminating Respondent-mother's parental rights to Ann and Nora are vacated.

Respondent-mother's case is remanded for a prompt permanency planning hearing consistent with the parent's constitutionally-protected rights to the care, custody, and control of her children and for DHHS to provide the statutorily-mandated efforts and services to assist her to reunify with her children. *It is so ordered.*

AFFIRMED IN PART, VACATED IN PART, AND REMANDED.

Judge HAMPSON concurs.

Judge STROUD concurs in part and dissents in part.

STROUD, Judge, concurring in part and dissenting in part.

I concur with the majority opinion affirming the Order terminating Father's parental rights. I dissent from the majority opinion as to Mother's appeal challenging the Permanency Planning Order and the Termination Order. I would affirm the trial court's order based on the many detailed findings of fact in both the Permanency Planning Order and the Termination Order, all of which are binding on appeal. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019). It is apparent from these detailed orders that the trial court properly considered all the factors required under North Carolina General Statute Section 7B-906.2, even if the trial court did not "track the statutory language verbatim[.]" *See In re L.L.*, 386 N.C. 706, 716, 909 S.E.2d 151, 159 (2024) ("[T]he trial court's written findings need not track the statutory language verbatim, but they must make clear that the trial court considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time." (citation and quotation marks omitted)). The findings show that the trial court addressed " 'the degree of success or failure toward reunification[,]' " *id.* (quoting N.C. Gen. Stat. § 7B-906.2(d)), and found that despite years of efforts by the Department of Social Services ("DSS") in North Carolina as well as two other states, there were "concern[s]" Mother was "just checking boxes on her case plan" to the extent she complied, but otherwise did not make any "real change."

Mother has raised no argument on appeal regarding the Termination Order but addresses only the Permanency Planning Order. Mother first argues that the trial court "failed to adhere to the statutory mandates by setting a sole plan of adoption and by failing to make the necessary findings to cease reunification efforts." She contends that under North Carolina General Statute Section 7B-906.2(b), concurrent plans are required "until a permanent plan is or has been achieved." N.C. Gen. Stat. § 7B-906.2(b) (2023). But she also acknowledges that if the Permanency Planning Order fails to include any required findings, we may consider both the Termination Order and the Permanency Planning Order together and any lack of findings in the Permanency Planning Order

can be cured by the findings in the Termination Order. *See In re L.R.L.B.*, 377 N.C. 311, 320, 857 S.E.2d 105, 114 (2021) ("[W]hen reviewing an order that eliminates reunification from the permanent plan in conjunction with an order terminating parental rights pursuant to [North Carolina General Statute Section] 7B-1001(a1)(2), we consider both orders together as provided in [North Carolina General Statute Section] 7B-1001(a2). Based on this statutory directive, we concluded in *In re L.M.T.* that incomplete findings of fact in the cease reunification order may be cured by findings of fact in the termination order. Although [the] respondent-mother contends that a 2017 amendment to [North Carolina General Statute Section] 7B-1001 'abrogated' our ruling in *In re L.M.T.* on this issue, we find her argument unpersuasive." (quotation marks omitted) (citing *In re L.M.T.*, 367 N.C. 165, 170, 752 S.E.2d 453, 457 (2013))).

Mother argues that in the Permanency Planning Order, the trial court "failed to make necessary findings to cease reunification efforts [ ]" as required by North Carolina General Statute Section 7B-906.2(d), but her argument overlooks most of the trial court's other extensive and detailed findings in both the Permanency Planning Order and the Termination Order addressing each factor. Under the standard established by our Supreme Court in *In re L.L.*, the trial court's order is sufficient:

> At the outset, we reiterate this Court's previously articulated standard for written findings under the Juvenile Code. Specifically, the trial court's written findings need not track the statutory language verbatim, but they must make clear that the trial court considered the evidence in light of whether reunification would be clearly unsuccessful or would be inconsistent with the juvenile's health, safety, and need for a safe, permanent home within a reasonable period of time.
>
> Similarly, in keeping with this Court's approach under [North Carolina General Statute Sections] 7B-906.1(e) and 7B-1110(a), we recognize the Juvenile Code's flexibility for written findings that are responsive to each permanency-planning dispute. Subsection . . . 906.2(d) requires written findings which shall demonstrate the degree of success or failure toward reunification. We therefore hold that only those factors which demonstrate the degree of success or failure toward reunification require written findings.

386 N.C. at 716, 909 S.E.2d at 159 (citations and quotation marks omitted).

Mother challenges only one finding in the Permanency Planning Order as unsupported by the evidence, Finding of Fact No. 61, entitled "[e]fforts toward reunification." She challenges none of the other nearly nine pages of findings regarding the grounds for termination of parental rights as unsupported by the evidence. Therefore, all of these unchallenged findings are binding on this Court. *See In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) ("Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal." (citation omitted)). Mother argues Finding of Fact No. 61 does "not make clear the time frame of the efforts of the department and if they have been properly addressed since the last hearing." Finding of Fact No. 61 is supported by the evidence, and this finding summarizes a long series of actions DSS had taken to assist Mother in being able to reunify with her children over the years since they were taken into custody. In the context of the entire order, the time frame is clear; it covers the entire life of the case since Ann was first taken into custody and since Nora's birth. The trial court did not need to make a finding about the date of each action when the evidence clearly supports Finding of Fact No. 61 and the other findings in the Permanency Planning Order make it clear that the trial court addressed the factors under North Carolina General Statute Section 7B-906.2(d).

Mother acknowledges in her brief that the Termination Order "cures any defect with regards to [North Carolina General Statute Section 7B-]906.2(d)(1) and (2)." Thus, her argument remains only as to North Carolina General Statute Section 7B-906.2(d)(3), "[w]hether the parent remains available to the court, the department, and the guardian ad litem for the juvenile[,] and 7B-906.2(d)(4), "[w]hether the parent is acting in a manner inconsistent with the health or safety of the juvenile." N.C. Gen. Stat. § 7B-906.2(d)(3)-(4).

The trial court's nearly nine pages of findings in the Permanency Planning Order do not use these exact words but the findings address both factors. Mother did not attend the permanency planning hearing and attended only the first two days of the three-day termination hearing. However, the findings overall show Mother had been available most of the time to DSS, the GAL, and the court, and she had engaged in some programs and classes over the years, but she failed to demonstrate that she learned anything from these programs. Mother's problem was not her availability; it was her persistent failure to benefit from the "near-continuous" services provided to her over a period of years. Her behaviors remained unchanged. The trial court found that "[g]iven the lack of progress in spite of the services provided, and that the parents have engaged in some services but no change is evident, reunification

efforts at this point would be futile." The Termination Order includes even more findings addressing Mother's long history of assistance from DSS, her limited engagement, and her failure to benefit from these services. The Termination Order also includes extensive and detailed findings regarding the efforts of DSS in North Carolina as well as Maryland and Ohio before this case to address the same recurring issues arising from domestic violence and Mother's mental health concerns. Specifically, the trial court found "[t]he same behaviors" resulting in DSS involvement and removal of the children "remained through the case, and continued through this hearing." Mother "made excuses, blamed others, and failed to take advantage of services in a meaningful way which would show change[ ]" in her behaviors. She was provided "opportunity after opportunity, as well as additional time to make change, and did not take advantage of it." The trial court found this lack of meaningful progress would not "allow[ ] reunification to occur." The trial court noted North Carolina is not the only state where there has been intervention by Child Protective Services ("CPS") but there have been "numerous interventions by CPS (in multiple states) as to [Ann]." "In spite of a myriad of near continuous services and treatment provided, the parents have been unable to remediate the issues that have led to DSS involvement." There is an "extensive [CPS] history in Maryland and Ohio dating back to 2013 with [Mother.]" The same issues with Mother arose in both Maryland and Ohio and remained at the time of the termination hearing.

Also, even if the trial court's findings in the Permanency Planning Order were insufficient, as the majority has determined, the Orders should not be vacated and remanded for a new hearing. At most, the Permanency Planning Order should be remanded for the trial court to make additional findings of fact. Mother has failed to demonstrate that "the trial court's error was material and prejudicial so as to warrant vacating and reversing the permanency planning order at issue and vacating the termination of parental rights order." *In re L.R.L.B.*, 377 N.C. at 326, 857 S.E.2d at 118. Even if the majority's analysis of the Permanency Planning Order is correct, the Order should be remanded to the trial court to make additional findings, as explained in detail by our Supreme Court in *In re L.R.L.B.*:

> We do not discern that the Legislature enacted [North Carolina General Statute Section] 7B-1001(a2) with the intention of disengaging an entire termination of parental rights process in the event that a trial court omits a single finding under [North Carolina General Statute Section] 7B-906.2(d)(1)–(4) from its trial court order which eliminates reunification from a child's permanent plan. Unlike

the specific finding that reunification efforts clearly would be unsuccessful or would be inconsistent with the juvenile's health or safety which is required by [North Carolina General Statute Section] 7B-906.2(b) before eliminating reunification from the permanent plan, no particular finding under [North Carolina General Statute Section] 7B-906.2(d)(3) is required to support the trial court's decision. [North Carolina General Statute Section] 7B-906.2(d) merely requires the trial court to make written findings as to each of the issues enumerated in [North Carolina General Statute Section] 7B-906.2(d)(1)–(4), and to consider whether the issues demonstrate the parent's degree of success or failure toward reunification. A finding that the parent has remained available to the trial court and other parties under [North Carolina General Statute Section] 7B-906.2(d)(3) does not preclude the trial court from eliminating reunification from the permanent plan based on the other factors in [North Carolina General Statute Section] 7B-906.2(d). *Cf. In re R.D.*, 376 N.C. 244, 259, 852 S.E.2d 117 (2020) (concluding that the balancing of the six dispositional factors in [North Carolina General Statute Section] 7B-1110(a) "is uniquely reserved to the trial court and will not be disturbed by this Court on appeal").

To obtain relief on appeal, an appellant must not only show error, but that the error was material and prejudicial, amounting to denial of a substantial right that will likely affect the outcome of an action. It is the trial court's authority as the finder of fact to assign weight to various pieces of evidence . . . in exercising its discretion to determine[ ] that ceasing reunification is in the best interests of the child[.] Upon considering the trial court's order that eliminated reunification from the permanent plan together with its order terminating parental rights, and determining that the trial court's order eliminating reunification may be cured upon remand to the trial court . . . due to insufficient findings of fact contained in the order because it does not address the issue embodied in [North Carolina General Statute Section] 7B-906.2(d)(3) as to "whether the parent remains available to the court, the department, and the guardian ad litem for the juvenile," we conclude that [the] respondent-mother has not shown that the trial

> court's error was material and prejudicial so as to warrant vacating and reversing the permanency planning order at issue and vacating the termination of parental rights order.
>
> *We therefore believe that the appropriate remedy for the trial court's error here is to remand this matter to the trial court for the entry of additional findings in contemplation of [North Carolina General Statute Section] 7B-906.2(d)(3). This Court's precedent . . . regarding the relationship between incomplete findings in an order which ceases reunification efforts and the findings of fact in a subsequent termination of parental rights order[ ] authorizes such a remedy. In the event that the trial court concludes, after making additional findings, that its decision to eliminate reunification from the juvenile[ ]'s permanent plan in its . . . permanency planning order was in error, then the trial court shall vacate said order as well as vacate the order terminating [the] respondent-mother's parental rights, enter a new permanent plan for the juvenile that includes reunification, and resume the permanency planning review process. If the trial court's additional findings under [North Carolina General Statute Section] 7B-906.2(d)(3) do not alter its finding under [North Carolina General Statute Section] 7B-906.2(b) that further reunification efforts are clearly futile or inconsistent with the juvenile's need for a safe, permanent home within a reasonable period of time, then the trial court may simply amend its permanency planning order to include the additional findings, and the . . . order terminating [the] respondent-mother's parental rights may remain undisturbed.*

Id. at 325-27, 857 S.E.2d at 117-18 (emphasis added) (citations, quotation marks, ellipsis, and brackets omitted).

Therefore, I concur in part with the majority opinion as to termination of Father's parental rights but otherwise dissent from the portion vacating the Permanency Planning Order and the Termination Order as to Mother. Both the trial court's Permanency Planning Order and Termination Order made extensive and detailed findings regarding Mother's lack of progress to remedy the behaviors leading to the removal of her children. In reading the findings of both orders together, as prescribed by our Supreme Court in *In re L.R.L.B.*, *see id.* at 320, 857 S.E.2d at 114, they are more than sufficient to support a conclusion to

cease reunification efforts under North Carolina General Statute Section 7B-906.2. And even if the Permanency Planning Order is insufficient, this court should not vacate both orders but should remand to the trial court for additional findings as dictated by *In re L.R.L.B. See id.* at 325-27, 857 S.E.2d at 117-18.

IN THE MATTER OF THE WILL OF FRANKLIN D. ARNETTE, DECEASED

No. COA24-796

Filed 21 May 2025

Wills—caveat proceeding—after-born heirs—putative father—paternity established prior to decedent's death

In a caveat proceeding filed by three of decedent's children (caveators) who had not been named in decedent's will, the trial court properly concluded—albeit on an incorrect basis—that caveators were pretermitted heirs who were entitled to take shares in decedent's estate pursuant to N.C.G.S. § 29-19 (involving succession rights of children born out of wedlock). Although the trial court incorrectly determined that caveators could take under subsection 29-19(b)(1)—which did not apply because caveators had not been finally adjudicated as decedent's heirs prior to reaching the age of majority—caveators were nevertheless entitled to take under subsection 29-19(b)(2), the requirements of which were satisfied by decedent during his lifetime. Decedent acknowledged his paternity of caveators in an affidavit of parentage, consent order, and amended paternity order, all of which were filed with the clerk of superior court in decedent's county of residence while he was alive. Further, caveators provided timely notice of their claim in compliance with section 29-19(b). Therefore, the trial court's order entered in favor of caveators was affirmed as reaching the correct result.

Appeal by Betty Arnette from Order entered 16 February 2024 by Judge Regina M. Joe in Cumberland County Superior Court. Heard in the Court of Appeals 25 February 2025.

Sharon A. Keyes for Propounder-Appellant.

Yarborough, Winters & Neville, P.A., by J. Thomas Neville, for Caveators-Appellees.

HAMPSON, Judge.

Factual and Procedural Background

Betty Arnette (Propounder-Appellant) appeals from an Order entered in favor of Connie Parker, Debra Monk, and Christina McQueen (Caveators-Appellees) granting Caveators-Appellees' Motion to Cause Amendment to Persons Entitled to Share in Decedent's Estate. The Record before us tends to reflect the following:

Franklin D. Arnette (Decedent) executed one will during his lifetime. Following Decedent's death on 29 August 2020, Propounder-Appellant, as the executrix of Decedent's estate, filed an application to probate Decedent's Will on 22 October 2020. In the application, Propounder-Appellant did not list the Caveators-Appellees as Decedent's heirs. At the time the Will was executed, 2 October 2012, Caveators-Appellees were not adjudicated legal heirs of Decedent nor were they included in the Will.

On 15 November 2019, Decedent properly executed and filed an Affidavit of Parentage and Consent Order of Paternity (Consent Order) in Cumberland County as to each of the Caveators-Appellees. An Amended Paternity Order adjudging Decedent "the biological father of the [Caveators-Appellees] in accordance with NCGS § 49-14" was subsequently entered on 12 February 2020. In its Findings of Fact, the trial court found "the sworn, written affidavit[s] of parentage executed by the natural father [and natural mother] of the children" alongside "their sworn signatures to the affidavits and consent order filed on November 15, 2019" to be clear, cogent, and convincing evidence Decedent was the biological father of Caveators-Appellees. Following entry of the Amended Paternity Order, Decedent was listed as the natural father on Caveators-Appellees' respective birth certificates.

On 30 November 2020, after Propounder-Appellant's application to probate the Will, Caveators-Appellees filed a Caveat seeking statutory shares of Decedent's estate. On 9 February 2021, Caveators-Appellees' counsel sent a written letter to Propounder-Appellant's counsel explaining Caveators-Appellees' claim as entitled after-born children of Decedent. The letter contained copies of the Amended Paternity Order, birth certificates with Decedent listed as the father, and DNA tests identifying Decedent as Caveators-Appellees' biological father.

Propounder-Appellant subsequently posted the Notice to Creditors on 11 May 2021 and filed a Motion to Dismiss the Caveat pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the North Carolina Rules of Civil

Procedure. Within Propounder-Appellant's Motion to Dismiss, she acknowledged receipt of the written letter and additional documents from Caveators-Appellees' counsel. The trial court denied the Motion to Dismiss on 29 March 2022. In the Order denying the Motion to Dismiss the Caveat, the trial court concluded "[Caveators-Appellees] are pretermitted heirs, being after-born children born out of wedlock and are heirs to the Decedent pursuant to N.C.G.S. § 29-19(b)."

On 1 April 2022, Caveators-Appellees filed a Motion to Cause Amendment to Persons Entitled to Share in Decedent's Estate (Motion to Amend). Prior to the hearing on the Motion, Propounder-Appellant filed Notice of Appeal from the Order denying the Motion to Dismiss the Caveat entered on 29 March 2022. On 13 October 2023, this Court dismissed the appeal on interlocutory grounds.

The trial court entered an Order granting Caveators-Appellees' Motion to Amend on 16 February 2024 (Order to Amend). Caveators-Appellees subsequently filed a voluntary dismissal of the Caveat on 27 February 2024. Propounder-Appellant timely filed Notice of Appeal from the Order to Amend on 18 March 2024. Propounder-Appellant did not appeal the Order denying the Motion to Dismiss the Caveat entered on 29 March 2022, which concluded Caveators-Appellees are pretermitted heirs of Decedent's estate.

Issue

The dispositive issue on appeal is whether the trial court erred in concluding the Caveators-Appellees are pretermitted heirs under N.C. Gen. Stat. § 29-19(b).

Analysis

When an appeal in a probate matter "contains specific findings of fact or conclusions to which the appellant takes exception, the trial court on appeal is to apply the whole record test." *In re Estate of Mangum*, 212 N.C. App. 211, 212, 713 S.E.2d 18, 20 (2011) (citing *In re Estate of Swinson*, 62 N.C. App. 412, 415-16, 303 S.E.2d 361, 363-64 (1983)). "The standard of review in this Court is the same as in the [trial court]." *Id.* (citing *In re Estate of Pate*, 119 N.C. App. 400, 403, 459 S.E.2d 1, 2-3 (1995)).

Applying the whole record test, we consider "whether the facts found by the trial judge support the judgment." *In re Estate of Swinson*, 62 N.C. App. 412, 417, 303 S.E.2d 361, 364 (1983) (citing *In re Sams' Estate*, 236 N.C. 228, 229-30, 72 S.E.2d 421, 422 (1952)). The whole record test requires the following determinations: "(1) whether the findings of fact are supported by the evidence; (2) whether the conclusions

of law are supported by the findings of fact; and (3) whether the order or judgment is consistent with the conclusions of law and applicable law." *In re Estate of Williams*, 246 N.C. App. 76, 81, 783 S.E.2d 253, 257 (2016) (citing N.C. Gen. Stat. § 1-301.3(d) (2023)). If there is sufficient evidence to support the findings, we must affirm. *Mangum*, 212 N.C. App. at 212, 713 S.E.2d at 20 (citing *Swinson*, 62 N.C. App. at 415, 303 S.E.2d at 363).

"An illegitimate child's right to inherit from her putative father is established only via strict compliance with" statutory requirements. *In re Williams*, 208 N.C. App. 148, 152, 701 S.E.2d 399, 401 (2010). N.C. Gen. Stat. § 29-19(b) provides:

> (b) For purposes of intestate succession, a child born out of wedlock shall be entitled to take by, through and from:
>
> (1) Any person who has been finally adjudged to be the father of the child pursuant to the provisions of G.S. 49-1 through 49-9 or the provisions of G.S. 49-14 through 49-16;
>
> (2) Any person who has acknowledged himself during his own lifetime and the child's lifetime to be the father of the child in a written instrument executed or acknowledged before a certifying officer named in G.S. 52-10(b) and filed during his own lifetime and the child's lifetime in the office of the clerk of superior court of the county where either he or the child resides.
>
> . . . .
>
> Notwithstanding the above provisions, no person shall be entitled to take hereunder unless the person has given written notice of the basis of the person's claim to the personal representative of the putative father within six months after the date of the first publication or posting of the general notice to creditors.

In the case *sub judice*, Propounder-Appellant takes exception to the trial court's Findings of Fact and Conclusions of Law that Caveators-Appellees are after-born children born out of wedlock entitled to take from Decedent's estate. The trial court concluded Caveators-Appellees are entitled to take under N.C. Gen. Stat. § 29-19(b)(1). Upon review, we agree with Propounder-Appellant that Section 29-19(b)(1) does not apply to Caveators-Appellees because they were not finally adjudicated as Decedent's heirs before they reached the age of majority as required by the corresponding statutory provision. *See*

N.C. Gen. Stat. § 49-14(a) (2023) ("The paternity of a child born out of wedlock may be established by civil action at any time prior to such child's eighteenth birthday." (emphasis added)). However, we conclude Caveators-Appellees are entitled to take from Decedent's estate under N.C. Gen. Stat. § 29-19(b)(2). Thus, although the trial court's stated rationale—N.C. Gen. Stat. § 29-19(b)(1)—is inapplicable in this case, the trial court nonetheless reached the correct result: concluding Caveators-Appellees are pretermitted heirs entitled to shares of Decedent's estate. "[W]here a trial court has reached the correct result, the judgment will not be disturbed on appeal even where a different reason is assigned to the decision." *Orlando Residence, Ltd. v. All. Hosp. Mgmt., LLC*, 375 N.C. 140, 150, 846 S.E.2d 701, 708 (2020) (quoting *Eways v. Governor's Island*, 326 N.C. 552, 554, 391 S.E.2d 182, 183 (1990)).[1]

On 12 February 2020, the trial court entered an Amended Paternity Order "adjudging that the Decedent was the biological father of the [Caveators-Appellees]". That Order included the following Finding of Fact:

> The court finds that *the sworn, written affidavit of parentage executed by the natural father of the children named herein*, and the sworn, written affidavit of parentage executed by the natural mother of the children named herein have been executed in accordance with NCGS 110-132(a). The court finds further that by affixing their sworn signatures to the affidavits and consent order filed on November 15, 2019, the natural mother and *natural father of the children named herein do consent to the entry of this amended order approving the affidavit of parentage* pursuant to NCGS 110-132 and understand that such consent will waive any right to revoke the affidavit of parentage.

(emphasis added). On 30 November 2020, Caveators-Appellees filed a Caveat to Decedent's Will. Propounder-Appellant then filed a Motion to Dismiss the Caveat on 15 June 2021. The Order denying Propounder-Appellant's Motion to Dismiss the Caveat, entered on 29 March 2022, made the following Findings of Fact:

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1. Propounder-Appellant raises an additional argument under N.C. Gen. Stat. § 29-19(b)(1) that N.C. Gen. Stat. § 49-14 establishes paternity for child support, rather than legitimation. Given our disposition in this case, we do not reach the merits of Propounder-Appellant's additional argument under N.C. Gen. Stat. § 29-19(b)(1).

> 8. The [Caveators-Appellees] are pretermitted heirs as defined by N.C.G.S. § 29-19(b)(1) or N.C.G.S. § 29-18 and N.C.G.S. § 28A-22-2.
>
> 9. As pretermitted heirs, the [Caveators-Appellees] have a right to share in the Decedent's estate to the same extent the after-born, after-adopted, or entitled after-born child born out of wedlock would have shared if the testator had died intestate.

The trial court concluded, as a matter of law, "[Caveators-Appellees] are pretermitted heirs, being after-born children born out of wedlock and are heirs to the Decedent pursuant to N.C.G.S. § 29-19(b)." This Court dismissed Propounder-Appellant's initial appeal of the Order denying the Motion to Dismiss the Caveat as interlocutory. Since entry of the Order to Amend, Propounder-Appellant has not again appealed the Order denying her Motion to Dismiss the Caveat. Prior to this appeal, Propounder-Appellant did not contest Caveators-Appellees' status as Decedent's after-born children.[2]

Based in part on these prior Orders, the trial court made the following Findings of Fact in the Order to Amend:

> 8. On November 15, 2019, a Consent Order of Paternity was properly executed by the Decedent and filed on November 15, 2019 in the Civil District Court, Cumberland County, North Carolina (19 CVD 6943).
>
> 9. On February 12, 2020, a certain Amended Paternity Order was entered by the Honorable Toni S. King, District Court Judge presiding, in the Civil District Court, Cumberland County, North Carolina (19 CVD 6943) adjudging that the Decedent was the biological father of the [Caveators-Appellees] pursuant to N.C.G.S. § 49-14.
>
> 10. On March 29, 2022, the Honorable Tiffany Powers, presiding Superior Court Judge over the July 21, 2021 Cumberland County Civil Superior Session, signed an order in this case adjudicating and decreeing that the [Caveators-Appellees] were pretermitted heirs with standing to file a caveat without prejudice to their statutory share.

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2. In fact, Propounder-Appellant's counsel stated to the trial court that she was not "arguing the documents that were provided to the District Court in order to legitimate these children . . . [because] there's no question that these children are going to get a share under the law depending on how the estate plays out[.]"

. . . .

> 12. This Court further confirms all previous orders rendered by Judge Powers and Judge King finding that [Caveators-Appellees], Deborah Ann Monk, Connie Francis Monk and Christina Arnette Monk, are lineal descendants and pretermitted heirs.
>
> 13. As heirs of the Decedent, the [Caveators-Appellees] are entitled to share in the Decedent'[s] Estate and are further entitled to an order providing for the amendment of the application for probate allowing for their inclusion as pretermitted heirs of the Decedent.

Applying the whole record test, we consider whether Caveators-Appellees satisfied the criteria under N.C. Gen. Stat. § 29-19(b)(2): (1) acknowledgment of paternity during Decedent's and the children's lifetime (2) in a written instrument executed or acknowledged before a qualifying certifying officer that was (3) filed during his and the children's lifetimes with a superior court clerk in a county where he or the children reside.

Decedent acknowledged himself as Caveators-Appellees' father in the Affidavit of Parentage and subsequent Consent Order. Both the Affidavit of Parentage and Consent Order were executed before a judge, pursuant to N.C. Gen. Stat. § 52-10(b), and filed by Decedent with the clerk of court in Cumberland County. Further, the Amended Paternity Order adjudicating Decedent as Caveators-Appellees' biological father, pursuant to N.C. Gen. Stat. § 52-10(b), was entered with Decedent's consent.

"[N.C. Gen. Stat. § 29-19(b)(2)] does not place any limitations on the type of written instrument" required to acknowledge paternity. *Mangum*, 212 N.C. App. at 213, 713 S.E.2d at 20. In *Mangum*, this Court affirmed an order concluding a voluntary parenting agreement was sufficient evidence of paternal acknowledgment and allowing a biological father to take from his natural child's estate under N.C. Gen. Stat. § 29-19(b)(2). *Id.* at 214-15, 713 S.E.2d at 20-21. Indeed, we have recognized a voluntary support order, filed alongside an affidavit of parentage, constituted paternal acknowledgment to allow a child to inherit from their biological father's estate. *In re Estate of Potts*, 186 N.C. App. 460, 651 S.E.2d 297 (2007). Further, this Court has clarified that an affidavit of parentage filed with the clerk of court meets the statutory requirements for a written acknowledgment of paternity. *See Williams*, 246 N.C. App. at 81, 783 S.E.2d at 257 ("N.C. Gen. Stat. § 29-19(b)(2) allows legitimation to

occur if the unwed father acknowledges the child while both the father and child are living through the signing, notarization, and filing of an Affidavit of Parentage with the office of the clerk of the superior [court] where either the father or child resides.").

Here, Decedent acknowledged his paternity of Caveators-Appellees in the Affidavit of Paternity, Consent Order, and Amended Paternity Order which were all filed in Cumberland County—Decedent's place of residence—during Decedent's lifetime. Upon their filing with the clerk of court, these written instruments satisfied the requirements under N.C. Gen. Stat. § 29-19(b)(2): (1) acknowledgment of paternity during Decedent's and the children's lifetime (2) in a written instrument executed or acknowledged before a qualifying certifying officer that was (3) filed during his and the children's lifetimes with a superior court clerk in a county where he or the children reside. *See also Williams*, 246 N.C. App. at 81, 783 S.E.2d at 257. The Affidavit of Paternity, Consent Order, and Amended Paternity Order are sufficient evidence to support the trial court's Conclusion Caveators-Appellees are pretermitted heirs entitled to share in Decedent's estate. *See* N.C. Gen. Stat. § 29-19(b)(2) (2023); *see also Williams*, 246 N.C. App. at 81, 783 S.E.2d at 257.

Propounder-Appellant also contends "[Caveators-Appellees] did not file any formal claim in the estate for after-born status until April 1, 2022, when [the Motion to Amend] was filed", in violation of N.C. Gen. Stat. § 29-19(b). Propounder-Appellant argues Caveators-Appellees missed the notice requirement by over six months, as the Notice to Creditors was posted on 11 May 2021. However, in the Order to Amend, the trial court made the following Finding of Fact:

> 11. The Caveat was filed on November 30, 2020 and thereby satisfied the notice requirements regarding posting pursuant to N.C.G.S. § 29-19.

As the trial court recognized, Caveators-Appellees filed the Caveat to Decedent's Will *before* the Notice to Creditors was posted. The Caveat alleges Caveators-Appellees' claim as Decedent's heirs. Caveators-Appellees provided further notice of their claim by sending a copy of the Amended Paternity Order and copies of Caveators-Appellees' birth certificates to Propounder-Appellant's counsel on 9 February 2021. Propounder-Appellant affirmed receipt of the copies in her Motion to Dismiss the Caveat. Indeed, Caveators-Appellees written notice of their claim via the Caveat and the written letter to Propounder-Appellant's counsel provides sufficient evidence to support the trial court's Conclusion the timely notice requirements under N.C. Gen. Stat. § 29-19(b) were met.

Thus, Caveators-Appellees are pretermitted heirs under N.C. Gen. Stat. § 29-19(b)(2). Therefore, Caveators-Appellees are entitled to share in Decedent's estate despite being omitted from the Will. Consequently, the trial court did not err in granting the Motion to Amend.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order Granting Motion to Cause Amendment to Persons Entitled to Share in Decedent's Estate.

AFFIRMED.

Chief Judge DILLON and Judge FREEMAN concur.

LEGAL IMPACT FOR CHICKENS, Plaintiff
v.
CASE FARMS, L.L.C., CASE FOODS INC., And
CASE FARMS PROCESSING, INC., Defendants

No. COA24-673

Filed 21 May 2025

Animals—Protection of Animals Act—poultry production process exempt—motion to dismiss proper

The trial court properly dismissed a complaint brought by a nonprofit entity against defendants (businesses engaged in the raising and slaughtering of chickens for consumption) for failure to state a claim upon which relief could be granted where the legislation that defendants were alleged to have violated, section 19A-1 of the General Statutes (the Protection of Animals Act), specifically exempted "lawful activities" conducted for the production of poultry and for the primary purpose of providing food for human or animal consumption. Whether defendants were exempt from suit under the Act was a question of statutory interpretation and, thus, a question of law properly resolved by the court at the pleading stage. Further, plaintiff's argument that some of the systems and steps defendants employed in their poultry-production operation were either unlawful or not for the purpose of producing poultry or food for consumption failed because the plain meaning of "lawful activities" is one's collective acts not contrary to law; accordingly, the legislation's exemption was directed at the entire series of steps undertaken in

producing poultry, rather than requiring consideration of the lawfulness or purpose of any individual step in the process.

Appeal by Plaintiff from order entered 15 December 2023 by Judge Wesley W. Barkley in Burke County District Court. Heard in the Court of Appeals 11 February 2025.

Davis Hartman & Wright, LLP, by R. Daniel Gibson, for Plaintiff-Appellant.

Hamilton Stephens Steele & Martin PLLC, by Rebecca K. Cheny, Mark R. Kutny, and Jacklyn Bragano, for Defendant-Appellees.

Ward and Smith, P.A., by Christopher S. Edwards, for Beautiful Together, Inc., amicus curiae.

Michael Best & Frederich LLP, by Michael G. Schietzelt and Luke Taylor, for Dega Mobile Veterinary Care, Dr. Laura Cochrane, and Dr. Martha Smith-Blackmore, amici curiae.

Milberg Coleman Bryson Phillips Grossman PLLC, by Lucy N. Inman and Katharine W. Batchelor, for The Cornucopia Institute, Farm Animal Concerns Trust, and The Northeast Organic Dairy Producers Alliance, amicus curiae.

Jordan Price Wall Gray Jones & Carlton PLLC, by H. Weldon Jones, III, for The North Carolina Poultry Federation, Inc., amicus curiae.

Phillip Jacob Parker Jr., Stephen A Woodson, Meghan N. Cook, and Stacy Revels Sereno, for North Carolina Farm Bureau Federation, Inc. & North Carolina Pork Counsil, amici curiae.

CARPENTER, Judge.

Legal Impact for Chickens ("Plaintiff") appeals from the trial court's 15 December 2023 order (the "Order") granting the motion to dismiss filed by Case Farms, LLC, Case Foods, Inc., and Case Farms Processing, Inc. (collectively, "Defendants"). On appeal, Plaintiff argues the trial court erred by granting Defendants' motion to dismiss for failure to state a claim under Rule 12(b)(6). After careful review, we affirm the Order.

I. Factual & Procedural Background

This case concerns an action initiated by Plaintiff, a non-profit organization, against: Case Farms LLC, a poultry producer; Case Foods, Inc., Case Farms' parent corporation; and Case Farms Processing, Inc., a subsidiary of Case Foods. Generally speaking, Defendants are in the business of raising and slaughtering broiler-meat chickens for commercial sale. The allegations in Plaintiff's complaint concern Defendants' conduct in connection with the growth, slaughter, and sales process at two locations in Morganton, North Carolina: 5067 Foreman Street (the "Hatchery") and 121 Rand Street (the "Slaughterhouse").

Defendants' process for raising and slaughtering chickens can be summarized as follows. First, chicks gestate as eggs in the "setter room" at the Hatchery. Then, when the eggs are expected to hatch, Defendants move the eggs to a "hatcher." Once the chicks hatch, Defendants place the chicks in rectangular-shaped trays to be transported. Defendants next place the trays on a system of conveyor belts where pistons redirect or push the trays to various locations at the Hatchery. After the chicks are moved using the conveyor-belt system, Defendants drive the chicks to affiliated "grower farms" where they are raised until they are ready to be slaughtered. Once the chickens are ready to be slaughtered, Defendants drive the chickens from the "grower farms" to the Slaughterhouse. At the Slaughterhouse, Defendants paralyze the chickens in a stun bath, cut their necks using automated machinery, and place them in a scalder tank filled with boiling water. Finally, machines process the slaughtered chickens for human consumption.

On 24 May 2023, Plaintiff filed a complaint and request for injunctive relief, alleging Defendants violated section 19A-1 of our General Statutes of North Carolina, entitled the Protection of Animals Act (the "PAA"). Thereafter, on 19 June 2023, Plaintiff filed an amended complaint and request for injunctive relief. On 16 August 2023, Defendants filed a motion to dismiss and answer to Plaintiff's first amended complaint. Then, Plaintiff amended its first complaint with Defendants' written consent. Thereafter, Plaintiff filed its second amended complaint (the "Complaint") alleging Defendants "engaged in intentional, affirmative, and reckless acts of neglect and extreme violence causing unjustifiable and unnecessary physical pain, suffering, and death towards the animals under its care and control."

To summarize, Plaintiff alleged Defendants' treatment of chickens at various stages throughout the hatching and slaughtering process amounted to animal cruelty. Specifically, Plaintiff alleged that

Defendants: (1) starve chicks that hatch early in the setter room; (2) allow chicks to overheat and die in the Hatchery; (3) allow chicks to be maimed and crushed by the conveyor-belt system; (4) crush chicks between transport trays; (5) allow chicks to fall to their death through the floor of transport trucks; (6) intentionally run over chickens with their vehicles; (7) allow chickens to overheat in the transport trucks; (8) bury injured chickens alive under dead chickens; and (9) boil chickens alive. Plaintiff did not allege that Defendants' hatching and slaughtering operation as a whole was illegal or otherwise prohibited by law.

On 15 November 2023, Defendants filed an answer and motion to dismiss under Rule 12(b)(6). On 15 December 2023, following a hearing on the matter, the trial court entered the Order. In the Order, the trial court concluded that the PAA was "inapplicable to Defendants" because they were exempt from suit under sections 19A-1(2) and (3). On 30 January 2024, Plaintiff filed notice of appeal.[1]

II. Jurisdiction

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

III. Issue

The sole issue is whether the trial court erred by granting Defendants' motion to dismiss for failure to state a claim upon which relief may be granted.

IV. Analysis

Plaintiff makes two assertions in support of its primary argument that the trial court erred by granting Defendants' motion to dismiss. First, Plaintiff asserts the trial court improperly considered questions of fact and mixed questions of law and fact at the 12(b)(6) stage. Next, Plaintiff asserts that Defendants are not exempt from suit under the PAA because their individual systems and processes are either unlawful or not conducted for the purpose of producing poultry or food for human or animal consumption. For the reasons outlined below, we disagree with Plaintiff.

A. The PAA

The PAA provides a "civil remedy for the protection and humane treatment of animals in addition to any criminal remedies that are

1. The parties stipulated to the Order being served on Plaintiff on 2 January 2024. Thus, Plaintiff's notice of appeal was timely since the Order was served on Plaintiff more than three days after it was entered. *See* N.C. R. App. P. 3(c)(2).

available . . . ." N.C. Gen. Stat. § 19A-2 (2023). Under this statutory scheme, any "person" can seek a preliminary injunction against "any person who owns or has possession of an animal" by filing a verified complaint alleging "cruelty to an animal." *Id*. at § 19A-3. "Cruelty [to an animal]" and "cruel treatment [of an animal]" are defined by the PAA as "every act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted." *Id*. at § 19A-1. The PAA also provides that "person has the same meaning as in [N.C. Gen. Stat. §] 12-3." *Id*. at § 19A-1(3); *see* N.C. Gen. Stat. § 12-3(6) (2023) ("The word 'person' shall extend and be applied to bodies politic and corporate, as well as to individuals, unless the context clearly shows to the contrary.").

But the PAA does not apply, in pertinent part, to:

> *Lawful activities* conducted . . . for purposes of production of . . . poultry [or]
>
> *Lawful activities* conducted for the primary purpose of providing food for human or animal consumption.

N.C. Gen. Stat. § 19A-1.1(2) and (3) (emphases added).

B. Standard of Review

This Court reviews a trial court's order granting a Rule 12(b)(6) motion to dismiss de novo. *See Taylor v. Bank of America, N.A.*, 382 N.C. 677, 679, 878 S.E.2d 798, 800 (2022) (citing *Bridges v. Parrish*, 366 N.C. 539, 541, 742 S.E.2d 794, 796 (2013)). Likewise, we review issues of statutory construction de novo. *Wilson v. Funeral Directors Inc. v. N.C. Bd. of Funeral Serv.*, 244 N.C. App. 768, 773, 781 S.E.2d 507, 510 (2016) (citations omitted). " 'Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

Motions to dismiss brought under Rule 12(b)(6), "test[] the legal sufficiency of [a] complaint." *Proctor v. City of Jacksonville*, 296 N.C. App. 665, 669, 910 S.E.2d 269, 273 (2024); *see Estate of Graham v. Lambert*, 385 N.C. 644, 656, 898 S.E.2d 888, 899 (2024) ("At the pleading stage, a 12(b)(6) motion tests the law of the claim, not the facts which support it.") (internal quotation marks and citation omitted). When reviewing the trial court's grant of a motion to dismiss, we consider "whether the allegations of the complaint, if treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory." *Bridges*, 366 N.C. at 541, 742 S.E.2d at 794. We treat factual allegations

as true and ignore legal conclusions. *See Proctor*, 296 N.C. App. at 669, 910 S.E.2d at 273.

It is proper for the trial court to dismiss the claim if one of the following is true: "(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim." *Newberne v. Dep't of Crime Control & Pub. Safety*, 359 N.C. 782, 784, 618 S.E.2d 201, 204 (2005) (quotation marks and citation omitted).

C. Rule 12(b)(6) Limitations

First, Plaintiff asserts it was improper for the trial court to conclude Defendants were exempt from suit under the PAA at the 12(b)(6) stage because determining Defendants' exemption status involved questions of fact and mixed questions of law and fact. Specifically, Plaintiff argues the question of whether Defendants activities are *lawful* is a mixed question of law and fact because it requires applying legal principles to the allegations in the complaint. Likewise, Plaintiff argues the determination of the *purpose* of Defendants' activities is a pure question of fact. In Plaintiff's view, these questions should have been presented to a jury for determination.

"Questions of statutory interpretation are ultimately questions of law for the courts . . . ." *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018). Stated differently, "[t]he interpretation of statutory language is a matter of law, and thus, appropriately resolved upon a Rule 12(b)(6) motion." *Peacock v. Shinn*, 139 N.C. App. 487, 497, 533 S.E.2d 842, 849 (2000).

Here, the trial court, in ruling on Defendants' 12(b)(6) motion, resolved the issue of whether Defendants were exempt under the PAA. Before reaching this conclusion, the trial court interpreted the relevant provisions of the PAA and ultimately ruled that Defendants' pertinent activity—commercial raising and slaughtering of chickens—was exempt from suit. Indeed, in the Order the trial court determined the PAA was "inapplicable to Defendants." This language demonstrates the trial court's determination of Defendants' exemption status was rooted in statutory interpretation. *See N.C. Bar & Tavern Ass'n v. Cooper*, 293 N.C. App. 402, 411, 901 S.E.2d 355, 364 (2024) (determining the language used by the trial court in its order indicated the trial court relied on statutory interpretation). Accordingly, the trial court did not improperly resolve issues of fact or mixed issues of law and fact at

the 12(b)(6) stage. Instead, the trial court properly addressed a question of law—whether Defendants were exempt from suit under the PAA.

D. Defendants' Exemption Status

Next, Plaintiff asserts that Defendants are not exempt from the PAA because some of the individual systems and processes Defendants employ in their poultry-production operation are either unlawful or not for the purpose of producing poultry or providing food for consumption. In other words, Plaintiff seeks to narrow our focus from Defendants' operation as a whole to individual steps within Defendants' poultry-production process. According to Plaintiff, every stage in Defendants' operation should be analyzed for its lawfulness and purpose. Conversely, Defendants argue they are exempt because their entire operation—commercial raising and slaughtering of chickens—is both lawful and conducted for the purpose of producing food for consumption.

The parties' arguments require us to interpret the relevant exemptions under the PAA. In doing so, we consider whether our General Assembly intended to exempt Defendants from suit under the circumstances of this case, with the outcome turning on how the relevant "activity" is defined.

"Our primary goal in construing a statute is 'to ensure that the purpose of the legislature, the legislative intent, is accomplished.' " *Wynn v. Frederick*, 385 N.C. 576, 581, 895 S.E.2d 371, 377 (2023) (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)). Because the best indicia of legislative intent is the plain language of the statute, our analysis begins there. *Id.* at 581, 895 S.E.2d at 377. When interpreting the plain language of a statute, "undefined words [] 'must be given their common and ordinary meaning.' " *State v. Rieger*, 267 N.C. App. 647, 649, 833 S.E.2d 699, 701 (2019) (quoting *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202 (1974)). "Absent precedent, we look to dictionaries to discern a word's common meaning." *N.C. Dep't of Env't Quality v. N.C. Farm Bureau Fed'n*, 291 N.C. App. 188, 193, 895 S.E.2d 437, 441 (2023) (citing *Midrex Techs., Inc. v. N.C. Dep't of Rev.*, 369 N.C. 250, 258, 794 S.E.2d 785, 792 (2016)). "If the plain language of the statute is unambiguous, we 'apply the statute[] as written." *Wynn*, 385 N.C. at 581, 895 S.E.2d at 377 (quoting *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 202, 675 S.E.2d 641, 649 (2009)) (alteration in original).

"If the plain language of the statute is ambiguous, however, we then look to other methods of statutory construction such as the broader statutory context, 'the structure of the statute[,] and certain canons of

statutory construction' to ascertain the legislature's intent." *Id.* at 581, 895 S.E.2d at 377 (quoting *Elec. Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991)) (alteration in original). Further, we may also "consider the policy objectives prompting passage of the statute and should avoid a construction which defeats or impairs the purpose of the statute." *O&M Indus. v. Smith Eng'g Co.*, 360 N.C. 263, 268, 624 S.E.2d 345, 348 (2006). "[R]emedial statute[s] must be construed broadly 'in the light of the evils sought to be eliminated, the remedies intended to be applied, and the objective to be attained.' " *Id.* at 268, 624 S.E.2d at 348 (quoting *Puckett v. Sellars*, 235 N.C. 264, 267, 69 S.E.2d 497, 499 (1952)).

This panel appears to be the first to interpret the PAA exemptions at issue in this case. Accordingly, we begin by examining the plain language of the PAA to determine which "activities" the General Assembly intended to exempt from suit. The PAA provides, in pertinent part, that an individual or entity is immune from suit if they are engaging in:

> *Lawful activities* conducted . . . for purposes of production of . . . poultry [or]
>
> *Lawful activities* conducted for the primary purpose of providing food for human or animal consumption.

N.C. Gen. Stat. § 19A-1.1(2) and (3) (emphases added).

The phrase "lawful activities" is not defined by the PAA or precedent. Thus, we consult dictionaries to discern the common meaning of the words "lawful" and "activities." *See N.C. Dep't of Env't Quality*, 291 N.C. App. at 193, 895 S.E.2d at 441 (citing *Midrex Techs., Inc*, 369 N.C. at 258, 794 S.E.2d at 792). According to Black's Law Dictionary, "lawful" means "[n]ot contrary to law; permitted by law." *Lawful*, Black's Law Dictionary (8th ed. 2004). "Activities," the plural form of "activity," means "[t]he collective acts of one person or of two or more people engaged in a common enterprise." *Activity*, Black's Law Dictionary (8th ed. 2004). Thus, the phrase "lawful activities" under the PAA means one's *collective acts* or behaviors, not contrary to law. Accordingly, we find the PAA to be unambiguous and apply the statute as written. *See Wynn*, 385 N.C. at 581, 895 S.E.2d at 377.

The process of raising and slaughtering chickens is comprised of a series of tasks conducted for a common purpose—to produce poultry. Therefore, contrary to Plaintiff's interpretation, we hold the exempted activity is not each individual step within the commercial poultry-production process, but rather the entire process itself.

Defendants' operation involves a collective series of tasks in pursuit of a common outcome—to produce and sell poultry products for profit. Accordingly, we conclude the General Assembly intended to exempt Defendants' commercial poultry-production operation as a whole from suit under the PAA, provided the operation is permitted by law. Because Plaintiff's complaint does not and cannot support a claim that Defendants' operation of raising and processing poultry is illegal or otherwise prohibited by law, the trial court properly granted Defendants' motion to dismiss. *See Newberne*, 359 N.C. at 784, 618 S.E.2d at 204.

V. Conclusion

Under the circumstances of this case, Defendants' poultry-production operation is exempt under the PAA. Accordingly, we affirm the Order.

AFFIRMED.

Judges ARROWOOD and MURRY concur.

ERIK NELSON, PLAINTIFF
v.
LLOYD T. SMITH AND JENNIFER G. SMITH, DEFENDANTS

No. COA24-646

Filed 21 May 2025

1. Workers' Compensation—exclusivity provision—inapplicable to employer's landlords—negligence claim against landlords not barred

In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff had filed a complaint with the Industrial Commission and subsequently entered into a compromise settlement agreement with his employer (a company), the exclusivity provision of the Workers' Compensation Act did not apply to bar plaintiff's claim against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant. Since defendants and the company were separate entities, plaintiff was not barred from asserting his negligence claims against defendants in their individual capacities as property owners and landlords of the workplace. Therefore, the trial court erred by granting defendants' motion to

dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1).

2. Contracts—release agreement between employer and employee —"affiliate"—negligence claims against individuals not barred

In plaintiff's negligence action arising from toxic mold exposure in his workplace, although plaintiff and his employer (a company) entered into a compromise settlement agreement (approved by the Industrial Commission) and signed a general release agreement, the release agreement did not serve to bar plaintiff's claims against defendants—two individuals who, besides being officers in the company, owned the property in which the company leased space as a commercial tenant—where plaintiff asserted his claims against defendants in their individual capacities as property owners and landlords of the workplace. By the plain language and express terms of the release agreement, defendants were not subject to the release: first, as individuals, they did not qualify as affiliates of the company; and second, in the context of plaintiff's claims, they were not acting in their official capacities in the course and scope of their employment with the company. Therefore, the trial court erred by granting defendants' motion to dismiss plaintiff's negligence claim for lack of subject matter jurisdiction under Civil Procedure Rule 12(b)(1).

3. Appeal and Error—preservation of issues—motion to dismiss granted on one basis—no ruling obtained on second basis—second issue dismissed

In an appeal from the trial court's order granting defendants' motion to dismiss plaintiff's negligence action pursuant to Civil Procedure Rule 12(b)(1), where the trial court did not rule on defendants' motion to dismiss pursuant to Civil Procedure Rule 12(b)(6), plaintiff's argument regarding Rule 12(b)(6) was not properly before the appellate court and was dismissed.

Appeal by Plaintiff from order entered 27 March 2024 by Judge Quintin McGee in New Hanover County Superior Court. Heard in the Court of Appeals 26 February 2025.

Perry, Brandt & McLemore, by Holden K. McLemore, and Terrazas PLLC, by Kevin J. Terrazas, pro hac vice, for Plaintiff-Appellant.

Hedrick Gardner Kincheloe & Garofalo LLP, by M. Duane Jones and G. Anderson Stein, for Defendants-Appellees.

COLLINS, Judge.

Plaintiff Erik Nelson appeals from the trial court's order granting Lloyd T. Smith and Jennifer G. Smith's (collectively, "Defendants") motion to dismiss for lack of subject matter jurisdiction. Plaintiff argues that the trial court erred by granting Defendants' motion to dismiss because the exclusivity provision of the Workers' Compensation Act does not bar Plaintiff's claim and the parties' release agreement does not release Defendants from liability. For the following reasons, we reverse the trial court's order granting Defendants' motion to dismiss.

I. Background

Plaintiff commenced this action on 3 July 2023 by filing a complaint against Defendants. Defendants filed a motion to dismiss and a memorandum in support of that motion with attachments, including Plaintiff's Form 18 filed with the North Carolina Industrial Commission, a document listing Cortech Solutions, Inc.'s insurance carriers, and the Commission's order approving Plaintiff's Compromise Settlement Agreement with Cortech. The facts below are drawn from the parties' filings:[1]

Plaintiff began his employment with Cortech in February 2011. Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer. Plaintiff worked at Cortech's principal office ("Workplace"), located in Wilmington, North Carolina. The Workplace was not owned by Cortech; Defendants in their individual capacities owned the commercial property ("Property") in which the Workplace was located. Defendants were the landlords of the Workplace. Cortech was one of several commercial tenants who leased office space in the Property from Defendants.

Throughout the course of Plaintiff's employment with Cortech, the Workplace flooded in some capacity approximately fifteen times. While working, Plaintiff frequently smelled mildew in the Workplace.

Several months after he started working at the Workplace, in the summer of 2011, Plaintiff began experiencing various flu-like symptoms, including dizziness and cognitive difficulty. In August 2012, Plaintiff was diagnosed with Lyme Disease. Plaintiff's symptoms were ongoing; in May 2017, Plaintiff asked Cortech if he could work from home on the

1. In deciding a motion under North Carolina Rule of Civil Procedure 12(b)(1), the court need not confine itself to the face of the pleadings and may consider matters outside of the pleadings. *Harris v. Matthews*, 361 N.C. 265, 271 (2007).

days he did not feel well or was undergoing medical treatment. Cortech denied his request.

In September 2018, Hurricane Florence caused significant damage to the Property, and in the weeks following the hurricane, Plaintiff noticed what he believed was mold emerging from the baseboards of the Property. Defendants never closed the Property or Workplace to allow for proper remediation, nor did they, to Plaintiff's knowledge, consult any professionals regarding the extent of the damage.

In or around March 2019, Plaintiff's doctor requested that Plaintiff order an Environmental Relative Moldiness Index test. Plaintiff paid for the test and performed it in accordance with its instructions. For the test, Plaintiff took dust samples from various areas around his personal workspace, including his desk, phone, and shelves. The test found that Plaintiff's workspace was "beyond the highest level of classification, level 'Q4', for the presence of mold." The results indicated that the tested areas around Plaintiff's workspace were not safe and that "[r]e-occupancy is ill-advised until further remediation and re-assessment are conclusive."

Plaintiff immediately reported the test results to Defendants. Because Defendants took no action, Plaintiff filed a complaint with the Occupational Safety and Health Administration. In response to this complaint, Defendants arranged for an inspection and mold testing of the Workplace in June 2019. The results of that testing indicated that mold was present throughout approximately eighty percent of the Workplace.

Plaintiff filed a Form 18, "Notice of Accident to Employer," with the Commission on 12 August 2019 for his injuries resulting from "ongoing exposure to water damage and mold." One month later, in September 2019, Cortech terminated Plaintiff from his employment.

Plaintiff and Cortech entered into a compromise settlement agreement wherein Cortech agreed to pay Plaintiff $25,000 for any injuries giving rise to his claim; the Commission approved the agreement on 16 March 2021. Plaintiff also signed a general release agreement, wherein Plaintiff agreed "to resolve all current and future disputes concerning Plaintiff's employment with Cortech Solutions, Inc. along with all of its affiliates and subsidiaries" in exchange for additional consideration.

Plaintiff filed a complaint against Defendants on 3 July 2023 for negligence, gross negligence, and punitive damages. Plaintiff alleged that he suffered various health issues as a result of toxic mold exposure while working at the Workplace, "including immune system dysregulation

with autoimmune conditions resulting, hormone dysregulation, cardiac complications, kidney damage, neurologic sequelae identified within an MRI as diffuse white matter damage, weight loss, fatigue, [and] nausea[.]" Defendants moved to dismiss Plaintiff's claims pursuant to Rules 12(b)(1) and 12(b)(6). After a hearing, the trial court granted Defendant's motion under Rule 12(b)(1). Plaintiff appeals.

II. Discussion

Plaintiff argues that the trial court erred by granting Defendants' motion to dismiss for lack of subject matter jurisdiction because the exclusivity provision of the Workers' Compensation Act does not bar Plaintiff's claim and the release agreement does not release Defendants from further liability.

"A Rule 12(b)(1) motion to dismiss represents a challenge to the trial court's subject matter jurisdiction over a plaintiff's claims." *Marlow v. TCS Designs, Inc.*, 288 N.C. App. 567, 572 (2023); N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) (2023). This Court reviews a trial court's grant of a motion to dismiss for lack of subject matter jurisdiction de novo, "under which it views the allegations as true and the supporting record in the light most favorable to the non-moving party[.]" *United Daughters of the Confederacy v. City of Winston-Salem*, 383 N.C. 612, 624 (2022) (cleaned up). "[M]atters outside the pleadings . . . may be considered and weighed by the court in determining the existence of jurisdiction over the subject matter." *Tart v. Walker*, 38 N.C. App. 500, 502 (1978) (citation omitted). "Under a *de novo* review, th[is] [C]ourt considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *McAdoo v. Univ. of N.C. at Chapel Hill*, 225 N.C. App. 50, 51 (2013) (quotation marks and citation omitted).

A. Exclusivity Provision of the Workers' Compensation Act

[1] Plaintiff contends that the exclusivity provision of the Act does not bar his claim because Defendants, in their individual capacities as owners of the Property and landlords of the Workplace, are separate from Cortech, Plaintiff's employer. We agree.

The exclusivity provision of the Act provides, in pertinent part,

> If the employee and the employer are subject to and have complied with the provisions of this Article, then the rights and remedies herein granted to the employee . . . shall exclude all other rights and remedies of the employee . . . as against the employer at common law or otherwise on account of such injury or death.

N.C. Gen. Stat. § 97-10.1 (2023). In other words, the Act "provide[s] certain limited benefits to an injured employee regardless of negligence on the part of the employer, and simultaneously [] deprive[s] the employee of certain rights he had at the common law." *Brown v. Motor Inns of Carolina, Inc.*, 47 N.C. App. 115, 118 (1980) (citations omitted).

"In exchange for these limited but assured benefits, the employee is generally barred from suing the employer for potentially larger damages in civil negligence actions and is instead limited exclusively to those remedies set forth in the Act." *Whitaker v. Town of Scotland Neck*, 357 N.C. 552, 556 (2003) (quotation marks and citations omitted). However, this general rule of exclusivity only bars the employee from bringing additional claims against *his employer*, not separate entities.

For example, in *Phillips v. Stowe Mills, Inc.*, "the owner of a building, a parent corporation of the tenant employer, could not invoke the exclusivity provisions of the [] Act to bar recovery by an injured employee simply because the employer was a wholly owned subsidiary of the parent corporation." *Cameron v. Merisel, Inc.*, 163 N.C. App. 224, 233 (2004) (*citing Phillips*, 5 N.C. App. 150, 154 (1969)). "This Court concluded that, because the parent corporation was not the employer of the plaintiff and the employer corporation and parent corporation were separate entities, the [] Act's exclusivity bar did not apply to the parent corporation." *Id.*

Similarly, in *Cameron v. Merisel, Inc.*, the plaintiff was employed by Merisel, Inc. and Merisel Americas, Inc., who leased the building where plaintiff worked from Merisel Properties, Inc. 163 N.C. App. at 232. The plaintiff filed a negligence claim against Merisel Properties after he suffered serious medical complications as a result of alleged toxic mold exposure within his workplace. *Id.* at 225-26. This Court held, "The allegations in the present case do not reveal that Merisel Properties is anything more than a related, but separate entity, from Merisel and Merisel Americas, and thus does not show at this point an absolute bar to recovery due to the exclusivity provisions of the [] Act." *Id.* at 233.

Here, Plaintiff alleges:

> 2. The parties against whom this action is brought include the owner/landlord of the commercial property (the "Property") located at 1409 Audubon Blvd., Wilmington, NC 28403.
>
> . . . .
>
> 4. At all times relevant herein, Plaintiff timely reported and notified Defendants of all defects, issues, and other

> concerns he experienced during the course of his employment at the Property.
>
> 5. At all times relevant hereto, Defendants knew that the [W]orkplace was contaminated with toxic mold and that exposure to the toxic mold in the [W]orkplace was substantially certain to cause serious injury or death of those exposed to the toxic mold.
>
> 6. Nevertheless, Defendants failed to take any appropriate measures to ensure the proper maintenance and management of the [W]orkplace conditions.
>
> . . .
>
> 10. . . . From 2011 through 2019, Plaintiff worked for Cortech Solutions, Inc. [] which, based upon information and belief, was one of several commercial tenants that leased space in the Property owned by Defendants.
>
> 11. . . . At all times relevant hereto, Defendants were the owners/landlords of the Property. . . . Additionally, at all times relevant hereto, Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer of Cortech.

Although Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer of Cortech, Defendants were not acting as Cortech when they engaged in the duties associated with their ownership of the Property. Defendants owned and operated the Property—where Cortech leased office space—in their individual capacities; they worked for and operated Cortech as a separate business. As in *Phillips* and *Cameron*, the allegations in Plaintiff's complaint reveal that Defendants are separate from Cortech, and thus do not show, at this pleading stage of the litigation, "an absolute bar to recovery due to the exclusivity provisions of the [] Act." *Id.*

B. General Release Agreement

[2] Plaintiff next argues that the release agreement does not release Defendants from liability because, when acting as owners of the Property and landlords of the Workplace, Defendants were not acting in their official capacities within the scope of their employment with Cortech.

"Releases are contractual in nature and their interpretation is governed by the same rules governing interpretation of contracts."

Chemimetals Processing, Inc. v. Schrimsher, 140 N.C. App. 135, 138 (2000) (citation omitted). "The scope and extent of the release should be governed by the intention of the parties, which must be determined by reference to the language, subject matter[,] and purpose of the release." *Id.* (citation omitted).

Here, the release agreement was "made and entered into by Erik Nelson ("Plaintiff") to resolve all current and future disputes concerning Plaintiff's employment with Cortech Solutions, Inc. along with all of its affiliates and subsidiaries (collectively, "Company")." The agreement provided, in pertinent part,

> Plaintiff . . . hereby releases and forever discharges [Cortech along with all of its affiliates and subsidiaries], and its respective officers, directors, present and former Board members, present and former employees, agents, insurance companies or risk pools, successors and assigns . . . from any and all claims, actions or causes of action, demands, damages, costs, interest, judgments, expenses, liabilities, attorneys' fees and legal costs, of any nature whatsoever, without limitation, specifically including any and all claims, known and unknown, arising out of or in any way related to or growing out of [Plaintiff's] employment with, or resignation from, [Cortech]. . . . *This release is intended to release and releases no party other than Cortech, along with all of its affiliates and subsidiaries* [], *and its officers and employees, acting in their official capacities in the course and scope of their employment for Cortech and none other.*

(emphasis added).

The plain language of the release agreement releases "no party other than Cortech, along with all of its affiliates and subsidiaries" from "all claims, actions, or causes of action" related to Plaintiff's employment with Cortech. As explained above, when engaging in the duties associated with their ownership of the Property, Defendants are separate from Cortech. Defendants do not argue that they are a subsidiary of Cortech. The question is therefore whether the allegations in Plaintiff's complaint and evidence before the trial court support a conclusion that Defendants are an affiliate of Cortech.

An affiliate is "a corporation that is related to another corporation by shareholding or other means of control: a subsidiary, parent[,] or sibling corporation." *Procar II, Inc. v. Dennis*, 218 N.C. App. 600,

601 (2012) (quoting *Affiliate*, *Black's Law Dictionary* (8th ed. 2004)). In *Procar II*, this Court concluded that two companies with the same "sole owner, director, and president" were properly classified as "sibling corporations" and therefore were considered "affiliates." *Id.* at 601-02.

Here, Plaintiff alleged,

> 10. . . .From 2011 through 2019, Plaintiff worked for Cortech Solutions, Inc. ("Cortech") which, based upon information and belief, was one of several commercial tenants that leased space in the Property owned by Defendants.
>
> 11. Based upon information and belief, Defendant Lloyd T. Smith and his wife, Defendant Jennifer G. Smith, are residents of the State of North Carolina with a principal place of residence located in New Hanover County, North Carolina. At all times relevant hereto, Defendants were the owners/landlords of the Property located at 1409 Audubon Boulevard, Unit B-1, Wilmington, North Carolina 28403. Additionally, at all times relevant hereto, Defendant Lloyd T. Smith was the President of Cortech and Defendant Jennifer G. Smith was the Secretary and Treasurer of Cortech.

These allegations essentially allege that Defendants owned the Property in their individual capacities. On appeal, Defendants argue that they "are Plaintiff's employer, and at the least, in their capacity as individuals owning the [Property], they are affiliates of Cortech." Defendants cite no authority in support of this statement, and we can find no authority to support a conclusion that an individual can be an "affiliate" of a corporation.

Additionally, the plain language of the agreement releases the officers and employees of Cortech only to the extent they were "acting in their official capacities in the course and scope of their employment for Cortech and none other." In the context of Plaintiff's negligence claim against them, Defendants were not acting within their official duties as Cortech's officers but were instead acting in their capacities as owners of the Property and landlords of the Workplace. The release agreement does not mention Defendants by name nor does it reference Cortech's landlord in the list of individuals covered by the release.

Based upon the plain language and express terms of the release agreement, viewed in the light most favorable to Plaintiff at this pleading stage of the litigation, Plaintiff is not precluded from asserting a

negligence claim against Defendants in their capacities as owners of the Property and landlords of the Workplace.

C. Insurmountable Bar

[3] Finally, Plaintiff argues that, under Rule 12(b)(6), there was no insurmountable bar to Plaintiff's recovery based upon the allegations made in his complaint.

To properly 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). However, "[i]t is also necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion." *Id.*

Here, although Defendants filed a motion to dismiss pursuant to Rules 12(b)(1) and 12(b)(6), the trial court granted Defendants' motion pursuant only to Rule 12(b)(1). As there is no ruling upon Defendants' motion to dismiss pursuant to Rule 12(b)(6), any argument on appeal pertaining to such rule is not properly before us and is dismissed.

III. Conclusion

Because Cortech and Defendants are separate entities, neither the exclusivity provision of the Act nor the parties' release agreement bars Plaintiff's negligence claim against Defendants. Accordingly, the trial court erred by granting Defendants' motion to dismiss.

REVERSED.

Judges ZACHARY and GORE concur.

PALMETTO RTC, LLC, PLAINTIFF
v.
BETH FIELDEN, BRUCE FIELDEN, & THE ESTATE OF JOE FIELDEN
WITH BETH FIELDEN AND BRUCE FIELDEN AS CO-EXECUTORS, DEFENDANTS

No. COA24-911

Filed 21 May 2025

1. Unjust Enrichment—express contract—claim barred—motion to dismiss properly denied—motion for judgment notwithstanding the verdict properly denied

In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing a notice of *lis pendens* concerning the property with the clerk of superior court and defendants asserting a counterclaim for slander of title—where the parties stipulated to the existence of an express contract for the purchase and sale of the property for development purposes, the trial court did not err in dismissing plaintiff's claim for unjust enrichment and denying plaintiff's motion for judgment notwithstanding the verdict (filed after the jury returned verdicts in favor of defendants and awarded damages), because an express contract totally excludes any claim arising under an implied contract, such as a claim for unjust enrichment.

2. Real Property—slander of title—common law—Real Property Marketable Title Act not implicated—jury instructions prejudicial—new trial required

In a lawsuit arising from the failed sale of defendants' real property to plaintiff—which resulted in plaintiff filing an unjust enrichment claim (which was properly dismissed) and a notice of *lis pendens* with the clerk of superior court and defendants asserting a counterclaim for slander of title—defendants sufficiently pled their counterclaim, but the trial court committed prejudicial error in instructing the jury on slander of title pursuant to the Real Property Marketable Title Act (rather than common law slander of title). The statutory scheme was not implicated where plaintiff never filed any notice of *lis pendens* with the register of deeds in the relevant county. Moreover, the jury instruction as given eliminated the burden of proof on two key elements of the common law claim: falsity and malice. Accordingly, the trial court's denial of plaintiff's motion for a new trial was reversed and the matter was remanded for further proceedings.

Appeal by plaintiff from judgment entered 12 January 2024 by Judge Jonathan W. Perry in Union County Superior Court. Heard in the Court of Appeals 30 April 2025, sitting in the historic Cumberland County Courthouse, Fayetteville.

Rayburn Cooper & Durham, PA, by Ashley B. Oldfield, and G. Kirkland Hardymon, for the plaintiff-appellant.

Wilder Pantazis Law Group, by Raboteau Wilder, Jr., for the plaintiff-appellant.

Thurman, Wilson, Boutwell & Galvin, P.A., by W. David Thurman, for the defendant-appellees.

TYSON, Judge.

Palmetto RTC, LLC ("Palmetto") appeals the trial court's dismissal of its unjust enrichment claim and denial of its motion for judgment notwithstanding the verdict and alternatively for a new trial. We affirm the trial court's dismissal of the unjust enrichment claim and the denial of Palmetto's motion for judgment notwithstanding the verdict. We reverse the trial court's judgment in part, award a new trial on Defendants' slander of title counterclaim, and remand.

I. Background

Beth and Bruce Fielden individually, and as executors of the Estate of Joe Fielden (collectively, the "Fieldens"), own approximately sixty-one acres of undeveloped land on Secrest Shortcut Road in Union County as tenants in common. They sought to sell the property, while retaining a life estate for their father, Joe Fielden, on a small portion of the property.

Palmetto engages in the business of entitling and enhancing raw land for resale to third-party developers, structuring the transactions to close and re-sell the property on the same day. Beth Fielden met with an associate of Palmetto, who told her Palmetto was interested in buying the property.

The parties entered into a series of four contracts for the purchase and sale of the property, providing for a closing date of 30 June 2021 and a contract expiration date of 15 July 2021. The Fieldens informed Palmetto the closing date would not be extended again. Palmetto had entered into a purchase agreement with American Homes for Rent

to sell the property to them, combined with a neighboring parcel, for approximately $4.5 million. Palmetto claimed it was ready, willing, and able to close; however, the record reflects American Homes for Rent, Palmetto's purchaser, did not provide authorization to close and performance was never tendered.

The closing and expiration dates passed. The Fieldens notified Palmetto of the contract's expiration on 4 August 2021 and reiterated the contract's termination on 19 August 2021. The Fieldens signed a letter of intent to sell their property to Meritage, a different developer, on 22 September 2021, and they also explored a sale of the timber.

Palmetto filed suit against the Fieldens asserting claims arising from the failed real estate transaction. Palmetto also filed a notice of *lis pendens* concerning the Fieldens' property in the Union County Clerk of Superior Court on 28 September 2021. The Fieldens answered and asserted a counterclaim for, *inter alia*, slander of title.

The trial court granted the Fieldens' motion to dismiss Palmetto's unjust enrichment claim based upon the parties' stipulation to the existence of an express contract. The jury found in favor of the Fieldens on the validity and Palmetto's breach of the express contract claim with default of the earnest money, and for their slander of title counterclaim with an award of $152,001 in damages. The trial court denied Palmetto's motion for JNOV or, in the alternative, for a new trial. Palmetto appeals.

II. Jurisdiction

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

III. Issues

Palmetto argues the trial court erred by dismissing its unjust enrichment claim, submitting the statutory slander of title claim under the Real Property Marketable Title Act to the jury, and denying its motion for JNOV, and alternatively, for a new trial. *See* N.C. Gen. Stat. § 47B-6 (2023).

IV. Unjust Enrichment

[1] The trial court granted the Fieldens' motion to dismiss Palmetto's *quantum meruit*/unjust enrichment claim because the parties had stipulated to the existence of an express contract. Palmetto objected to the ruling and now contends the dismissal was erroneous because the express contract did not cover the same subject matter as its claim for *quantum meruit* or unjust enrichment.

A. Standard of Review

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140, 749 S.E.2d 262, 267 (2013) (citation omitted).

B. Analysis

When an enforceable express contract covering the same subject matter exists between the parties, *quantum meruit* recovery is barred. *Veto Concrete Co. v. Troy Lumber Co.*, 256 N.C. 709, 713, 124 S.E.2d 905, 908 (1962) (an express contract precludes an implied contract with reference to the same matter). This canon is well-established in case law:

> An express contract, executory in its provisions, must totally exclude any such implication [recovery under an implied contract is available]. One party agreed, in consideration of the other to pay, to render the service; the other, in consideration of the promise to render the service, agrees to pay. One is the consideration and motive for the other, and each equally excludes any other consideration, motive, or promise.

Id. at. 715, 124 S.E.2d at 909 (citation omitted).

Here, the parties stipulated the existence of an express contract for the purchase and sale of the property. The parties' contract further contemplated the development of the property. Section 3(a) states, "It is recognized by both Buyer and Seller that there is located on the property a cemetery . . . which shall be isolated from *development*." (emphasis supplied). Section 5 of the contract states, "It is understood that the Seller has granted the Buyer proper time for the property to be rezoned and approved and permitted for *development* by the City Council of Monroe, NC," and the contract reserves a life estate for Joe Fielden to remain "undisturbed during *development*." (emphasis supplied).

Palmetto's planned entitlement and development of the property was clearly contemplated by the contract and constituted part of its consideration and performance, rather than a separate and unrelated service. The Fieldens entered into the contract with the understanding Palmetto would seek to entitle and further develop the property, and they cooperated with Palmetto during the entitlement process. The planned development of the property falls squarely within the subject matter of the express contract and precludes any claim under an implied

contract. *Id.* We affirm the trial court's dismissal of Palmetto's *quantum meruit* or unjust enrichment claim.

V. Statutory Slander of Title

[2] The trial court, over Palmetto's objection, submitted a claim of statutory slander of title to the jury. N.C. Gen. Stat. § 47B-6 (2023). Palmetto had moved for a directed verdict, contending the Fieldens' counterclaim had pled common law slander of title rather than the statutory claim. *Id.* The trial court denied their motion for directed verdict.

Palmetto subsequently filed a motion for JNOV or, alternatively, a new trial after return of the jury's verdict. The trial court denied Palmetto's motion for JNOV and for new trial on the grounds that the statutory slander of title was adequately pled.

A. Standard of Review

A trial court's denial of a motion for JNOV is reviewed de novo to determine "whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Chisum v. Campagna*, 376 N.C. 680, 699, 855 S.E.2d 173, 186 (2021) (citation omitted). A trial court's ruling on a motion for a new trial is reviewed for abuse of discretion. *In re Will of Buck*, 350 N.C. 621, 625, 516 S.E.2d 858, 861 (1999).

"A trial court's conclusions of law are reviewed *de novo*, including legal conclusions contained in jury instructions." *Chappell v. N.C. DOT*, 374 N.C. 273, 281, 841 S.E.2d 513, 520 (2020) (citation omitted). Jury instructions must "present[] the law of the case in such manner as to leave no reasonable cause to believe the jury was misled or misinformed." *Bass v. Johnson*, 149 N.C. App. 152, 160, 560 S.E.2d 841, 847 (2002) (internal quotation marks and citation omitted). "The burden of proof is upon the party assigning error to demonstrate the jury instruction misled the jury or otherwise affected the verdict." *Lail v. Tuck*, 296 N.C. App. 185, 188, 908 S.E.2d 842, 845 (2024). "Questions of statutory interpretation are questions of law and are reviewed de novo." *In re Custodial Law Enf't Agency Recordings*, 287 N.C. App. 566, 570, 884 S.E.2d 455, 458 (2023) (citation omitted).

1. Motion for JNOV

Palmetto contends the trial court erred by denying its motion for JNOV. The Fieldens argue Palmetto failed to preserve the slander of title issue for review. To preserve an issue for appellate review, a party must make "a timely request, objection, or motion to the trial court, stating

the specific grounds for the desired ruling. . . .” N.C. R. App. P. 10(a)(1). Here, Palmetto made a timely motion for directed verdict at the close of evidence, raising two issues: (1) the Fieldens had pled a common law claim of slander of title, not a statutory claim; and (2) the Fieldens had failed to prove special damages.

A motion for JNOV must be based on grounds previously raised in the movant's motion for directed verdict. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) (2023); *Munie v. Tangle Oaks Corp.*, 109 N.C. App. 336, 342, 427 S.E.2d 149, 152 (1993) (citing *Carter v. Parsons*, 61 N.C. App. 412, 418, 301 S.E.2d 405, 409 (1983)). In its motion for JNOV, Palmetto argued: (1) it did not “register[] a notice” claiming the property under the Real Property Marketable Title Act; (2) Section 47B-6 of that statute is not applicable to the facts of this case; (3) the Fieldens did not prove the notice was false; (4) the Fieldens failed to prove they suffered a monetary loss because of the filing, as required; and, (5) slander of title claims must be pled with particularity, which the Fieldens failed to do.

Of these arguments, only the fourth and fifth were properly preserved at the motion for directed verdict. Therefore, Palmetto is limited to these arguments on review of the JNOV. Palmetto argues a claim under N.C. Gen. Stat. § 47B-6 was not asserted or mentioned in the counterclaim and no allegations support special damages that accompany the statute.

North Carolina is a notice pleading jurisdiction. A pleading is sufficient if it gives “notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and . . . to get additional information he may need to prepare for trial.’ ” *N. Carolina State Bar v. Merrell*, 243 N.C. App. 356, 362, 777 S.E.2d 103, 108-09 (2015) (quoting *Sutton v. Duke*, 277 N.C. 94, 104, 176 S.E.2d, 161, 167 (1970)). “It is not necessary to plead the law. The law arises upon the facts alleged.” *Tharpe v. Brewer*, 7 N.C. App. 432, 436, 172 S.E.2d 919, 923 (1970).

The Fieldens' counterclaim alleged sufficient facts to put Palmetto on notice by including facts supporting the substantive elements of a slander of title claim: (1) registration of a notice, (2) for the purpose of asserting false or fictitious claims, and (3) damages suffered. The Fieldens were neither required to specifically reference N.C. Gen. Stat. § 47B-6 (2023) in its counterclaim, nor does the statute require them to specifically plead special damages. *Id.*

The Fieldens' counterclaim was sufficiently pled and Palmetto's arguments for JNOV were not raised and preserved in its motion for

directed verdict. We affirm the trial court's denial of Palmetto's motion for JNOV.

2. Jury Instructions

Jury instructions must address substantive features of a case arising from the evidence, so as "to leave no reasonable cause to believe the jury was misled or misinformed." *Lail*, 296 N.C. App. at 188, 908 S.E.2d at 845 (citation and internal quotation marks omitted). Palmetto objected to the omission of the Fieldens' evidence tending to prove the elements of malice and falsity to show slander of title. The trial court overruled the objection, reasoning N.C. Gen. Stat. § 47B-6 refers to intent, not malice, and acknowledged the lack of clear guidance on the amalgamation of common law and the statutory slander of title claim. N.C. Gen. Stat. § 47B-6 (2023).

The jury was asked: "Did the Defendants suffer a monetary loss as a result of a false or fictitious notice registered by the Plaintiff on the Defendants' property? (referred to as 'slander of title')." It answered the issue on the verdict sheet "yes", and awarded the Fieldens $152,001 as damages.

The elements of statutory slander of title are: (1) the registration of a notice affecting real property; (2) for the purpose of asserting a false or fictitious claim; and (3) special damages. *Id.* Upon a showing of ill intentionality, a claimant may recover attorney's fees and treble damages, provided such damages are alleged. *Burns v. Kingdon Impact Glob. Ministries, Inc.*, 261 N.C. App. 115, 817 S.E.2d 626 (2018) (unpublished).

Instructing the jury on the statutory slander of title claim, rather than on the common law claim, eliminated proof of two key elements: falsity and malice. This reduced the burden of proof on the Fieldens and likely affected the verdict. The omission of malice allows the proponent to show the 'claim' was made with ill intent. Likewise, the Fieldens did not need to prove the statutory claim was actually false, only to show it was registered "*for the purpose of asserting*" a false claim. N.C. Gen. Stat. § 47B-6 (2023).

To construe the statutory claim to require proof of both malice and intent would render the General Assembly's explicit reference to "intent" as superfluous. Our Courts have defined malice in this context as the "malicious intent to injure." *Whyburn v. Norwood*, 47 N.C. App. 310, 315, 267 S.E.2d 374, 377 (1980) (citing *Cardon v. McConnell*, 120 N.C. 461, 462-63, 27 S.E. 109 (1897)). Proof of malice inherently includes proof of intent. If the General Assembly had intended to retain malice as

a separate and necessary element of a statutory slander of title claim, it would not have expressly authorized damages upon a showing of intent, independent of establishing the claim itself. *Id.*

3. Motion for New Trial

North Carolina's Real Property Marketable Title Act exists to promote the free and efficient transfer of real property by extinguishing ancient or nonpossessory claims that may cloud title. The statute provides a 30-year unbroken chain of title is *prima facie* evidence of ownership. Its goal is to reduce litigation and simplify the title examination process. N.C. Gen. Stat. § 47B-1 et. seq. (2023).

Palmetto contends the trial court erred in denying its motion for a new trial because the facts of this case, reviewed in the light most favorable to the non-moving party, do not support submission of the statutory slander of title claim. N.C. Gen. Stat. §§ 1A-1, Rule 59(a)(8); 47B-6 (2023). We agree.

a. Statutory Construction

The first step of statutory construction is to review the plain language of the statute:

> "No person shall use the privilege of *registering notices hereunder* for the purpose of *asserting false or fictitious claims* to real property; and in any action relating thereto if the court shall find that any person has *intentionally registered a false or fictitious claim*, the court may award to the prevailing party all costs incurred by him in such action, including a reasonable attorney's fee, and in addition thereto may award to the prevailing party treble the damages that he may have sustained as a result of the registration of such notice of claim."

N.C. Gen. Stat. § 47B-6 (2023) (emphasis supplied).

> *All such parts of the common law* as were heretofore in force and use within this State, or so much of the common law as is not destructive of, or repugnant to, or inconsistent with, the freedom and independence of this State and the form of government therein established, and which has not been otherwise provided for in whole or in part, not abrogated, repealed, or become obsolete, *are hereby declared to be in full force within this State.*

N.C. Gen. Stat. § 4-1 (2023) (emphasis supplied).

Statutes in derogation of the common law are strictly construed. *Stone v. North Carolina Dept. of Labor*, 347 N.C. 473, 479, 495 S.E.2d 711, 715 (1998). Section 47B-9 provides: "This Chapter shall be liberally construed to effect the legislative *purpose of simplifying and facilitating real property title transactions* by allowing persons to rely on *a record chain of title* of 30 years as described in G.S. 47B-2, subject only to such limitations as appear in G.S. 47B-3." (emphasis supplied). N.C. Gen. Stat. § 47B-3 (2023) lists fourteen exceptions, including six subsections.

Section 47B-6's use of "*registering notices hereunder*" indicates its provisions refer to facts and claims arising under this statute. It refers to procedures established within the broader Marketable Title statutory framework to reduce litigation and simplify the title examination process. N.C. Gen. Stat. § 47B-1-9 (2023).

b. Real Property Marketable Title Act – Lis Pendens

Section 47B-4 outlines the requirements for "registering . . . a notice" under the Real Property Marketable Title Act. N.C. Gen. Stat. § 47B-4 (2023). To preserve a claim to property, a person must file a written, acknowledged notice in the register of deeds' office in the county where the property is located within the 30-year period, specifying the nature of the claimed right or interest. *Id.*

A notice of *lis pendens* is defined under and is controlled by a wholly separate statute and does not qualify as "registering notice" under § 47B-4, as it is not indexed by the Register of Deeds and is not a "claim to property." *Id.* Under N.C. Gen. Stat. § 1-116(a), "Any person desiring the *benefit of constructive notice of pending litigation* must file a separate, independent notice thereof, which notice shall be cross-indexed in accordance with G.S. 1-117" with the clerk of superior court. N.C. Gen. Stat. § 1-116 (a)-(d) (2023) (emphasis supplied).

A *lis pendens* is a procedural device filed with the clerk of superior court in the county where the real estate is located when a party seeks to give the public constructive notice of pending litigation, which may impact ownership, rights or claims. *Id.* The *lis pendens* itself is not a substantive claim to property; rather, it is a "Filing of notice of suit" and serves to preserve *status quo* notice to third parties of an underlying lawsuit, which may assert a substantive claim affecting property at some point in the future.

Lis pendens serves to protect third parties and to promote judicial efficiency. *Id.* As filing a *lis pendens* with the clerk of superior court does

not constitute "registering notice" for the purpose of invoking § 47B-6, it cannot be a "false or fictitious *claim*[] to real property," if it is not a claim at all. N.C. Gen. Stat. §§ 1-116; 47B-6 (2023). Section 47B-6 supplements, rather than displaces, the common law slander of title cause of action. *See* James A. Webster, Jr., *Webster's Real Estate Law in North Carolina* § 25.04 fn.45.1 (Patrick K. Hetrick & James B. McLaughlin, J. eds., 6th ed. 2022). N.C. Gen. Stat. § 47B-6 (2023). The common law remains in effect unless explicitly abrogated by statute. N.C. Gen. Stat. § 4-1 (2023). If individuals with potentially valid claims become fearful that filing a *lis pendens* might expose them to tort liability for "false claims," they may be deterred from filing a *lis pendens* to protect *status quo* altogether.

VI. Conclusion

Palmetto filed a *lis pendens* with the clerk of superior court in Union County, but never filed any notice with the register of deeds in Union County asserting any claim of an ownership interest. As a result, Section 47B-6 is inapplicable to the facts of this case. N.C. Gen. Stat. § 47B-6 (2023). The trial court erred by denying Palmetto's motion for a new trial. *Id.*

We affirm the trial court's dismissal of Palmetto's unjust enrichment claim and its denial of Palmetto's motion for JNOV. We reverse the trial court's denial of Palmetto's motion for a new trial and remand for further proceedings consistent with this opinion. *It is so ordered.*

AFFIRMED IN PART; NEW TRIAL IN PART; AND REMANDED.

Judges WOOD and GORE concur.

STATE BD. OF EXAM'RS OF PLUMBING, HEATING & FIRE SPRINKLER CONTRACTORS v. HUDSON

[299 N.C. App. 71 (2025)]

STATE BOARD OF EXAMINERS OF PLUMBING HEATING AND FIRE SPRINKLER CONTRACTORS, PLAINTIFF
v.
NEEL HUDSON, INDIVIDUAL AND D/B/A HUDSON PLUMBING AND ELECTRIC, DEFENDANT

No. COA24-136

Filed 21 May 2025

1. Contempt—criminal—indirect—violation of injunction—denial of motion to dismiss—standard of review

In an appeal from the trial court's order finding defendant in contempt after a hearing on a motion for order to show cause filed by plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors)—in which plaintiff alleged that defendant had violated a permanent injunction by performing HVAC work without a license—the appellate court reviewed the trial court's denial of defendant's motion to dismiss de novo and determined that, since the case involved indirect criminal contempt, the appropriate standard of review was the substantial evidence standard. Thus, the question was whether plaintiff presented substantial evidence, viewed in the light most favorable to plaintiff, that defendant installed a new HVAC system or that he removed and replaced the duct work of an old HVAC system, either one of which would allow a trier of fact to find a violation of the injunction.

2. Contempt—criminal—violation of injunction—installation of new HVAC unit without a license—circumstantial evidence

In a case in which plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) filed a motion for order to show cause alleging that defendant violated a permanent injunction by performing HVAC work without a license, plaintiff presented substantial evidence from which a trier of fact could conclude that defendant installed a new HVAC system (one of two violations alleged). The evidence, despite being circumstantial, was sufficient to survive defendant's motion to dismiss, and included: an invoice prepared by defendant stating in two places that he had "Replaced unit"; defendant's inconsistent statements regarding whether "unit" referred to just one part or the whole HVAC system and whether he meant to say "repair" instead of "replace"; defendant's prior violations of the injunction; and a payment defendant made to the homeowner for $600.00 to cover a bill by another service provider who worked on the new HVAC system after it was installed, which

defendant explained he did "to be released from anything to do with" the unit.

3. Contempt—criminal—violation of injunction—HVAC repair performed without a license—carve out exception inapplicable

In a case in which plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) filed a motion to show cause alleging that defendant violated a permanent injunction by performing HVAC work without a license, plaintiff presented substantial evidence from which a trier of fact could conclude that defendant's duct work repair on an old HVAC system constituted a violation of the injunction (one of two violations alleged). Contrary to defendant's argument, the work he performed—removing a section of duct board and replacing it—did not qualify under the "carve out exception" contained in N.C.G.S. § 87-21(c) (exempting certain minor repairs to an existing HVAC system from the license requirement).

4. Jurisdiction—trial court—entry of contempt order—no divestment of jurisdiction by prior notice of appeal

The trial court properly exercised its jurisdiction when it entered a criminal contempt order after defendant had entered notice of appeal from a form document in which the trial court checked off a box finding defendant in indirect criminal contempt (albeit for circumstances other than those pertaining to defendant) and which indicated defendant's sentence and fine for the contempt. The form document was not file stamped and was neither a final judgment nor an appealable interlocutory order; therefore, defendant's notice of appeal from that instrument did not divest the trial court of its jurisdiction to memorialize its oral rulings at the contempt hearing in a final written order of contempt.

5. Contempt—criminal—plumbing work performed in violation of injunction—findings of fact—sufficiency of evidence

In an appeal from the trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license, several findings of fact challenged by defendant as being improper or unsupported by the evidence were upheld on appeal, including findings derived from an investigator's observations that an HVAC unit installed by defendant was installed improperly and an ultimate finding of fact that plaintiff (the state licensing board for plumbing, heating, and fire sprinkler contractors) presented sufficient circumstantial evidence that defendant

installed a new HVAC unit and made replacement repairs to an old HVAC unit. Competent evidence supported each finding and, moreover, even if the findings regarding the investigator's opinion were improper—assuming defendant's position that the investigator was not tendered as an expert witness—any error was not prejudicial because plaintiff only needed to prove that defendant installed an HVAC system, regardless of whether it was installed properly.

6. Contempt—criminal—not a misdemeanor—no applicable statute of limitations

The trial court's order finding defendant in criminal contempt for violating a permanent injunction by performing HVAC work without a license was not entered in violation of any statute of limitations. Although an indirect criminal contempt proceeding resembles a conventional criminal bench trial, criminal contempt does not come within the "[a]ny other crime" language in N.C.G.S. § 14-1 (delineating felonies and misdemeanors). Moreover, a criminal contempt determination is not a misdemeanor in North Carolina; therefore, the contempt proceeding was not subject to the two-year statute of limitations set forth in N.C.G.S. § 15-1(a).

Appeal by Defendant from judgment entered 17 August 2023 by Judge Reggie E. McKnight in Burke County Superior Court. Heard in the Court of Appeals 25 September 2024.

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

Young Moore & Henderson, P.A., by Reed N. Fountain and John N. Hutson, III, for Plaintiff-Appellee.

CARPENTER, Judge.

Neel Hudson ("Defendant") appeals from the trial court's 18 July 2023 "Order in Indirect Criminal Proceeding" and the 17 August 2023 "Order of Contempt and Order of Arrest." After careful review, we affirm.

I. Factual & Procedural Background

On 8 June 2001, the State Board of Examiners of Plumbing, Heating, and Fire Sprinkler Contractors ("Plaintiff") filed a complaint alleging Defendant violated sections 87-21(a)(1) and (5) of our General Statutes by engaging in the business of plumbing contracting without a valid license. Defendant did not respond to the complaint. On 30 June 2001,

Plaintiff filed a motion for entry of default. On 2 August 2001, the Burke County Clerk of Court entered default judgment against Defendant. On 15 August 2001, the trial court entered a judgment of permanent injunction (the "Injunction") which prohibited Defendant from "engaging in business as a plumbing, heating, or fire sprinkler contractor at all such times as he is not licensed to do so pursuant to Article 2, Chapter 87, of the General Statutes of North Carolina."

On 23 January 2009, Plaintiff filed a motion for order to show cause alleging Defendant violated the Injunction on four separate occasions between September 2001 and April 2005. On 27 March 2009, the trial court entered an order of contempt, finding beyond a reasonable doubt that Defendant committed the violations alleged by Plaintiff. The trial court sentenced Defendant to 120 days in the Burke-Catawba District Confinement Facility, but Plaintiff consented to Defendant serving a lesser sentence of ten days in confinement consisting of twenty overnight sessions.

On 6 April 2021, after receiving a new complaint concerning Defendant, Thomas Johnston, a field investigator for Plaintiff, travelled to 2107 Woodside Terrace (the "Home") to investigate. Upon his arrival at the Home, Johnston met with Sharon Eller, the homeowner, and took her statement. In the basement of the Home, Johnston observed a gas-fired heating unit (the "new HVAC system") and determined it was installed incorrectly. Johnston also concluded that only someone with a valid license would be authorized to install the new HVAC System.

On 22 April 2021, Jonathan Yerkes, another field investigator for Plaintiff, met with Defendant to discuss the complaint and obtain a statement. In Defendant's statement he acknowledged that he knew Gary Eller, Sharon Eller's late husband, and that he had been "fixing and servicing" the Eller's previous HVAC system (the "old HVAC system") for quite some time. Defendant told Yerkes that the old HVAC system would freeze up and thaw out, which resulted in water draining into the duct board of the plenum and onto the basement floor. To address this problem, Defendant "repaired a 12-inch section of duct board that was soaked from water." Defendant explained this work consisted of "removing [that] section of duct board and replacing it due to it being soaked."

Defendant also told Yerkes that while he was at the Home servicing the old HVAC system, the Ellers asked him if he would replace the old HVAC system with a new one. Defendant told the Ellers he was not authorized to install a new system. According to Defendant, he did

not install the new HVAC system but rather procured the equipment for the Ellers on or about 30 May 2019 for someone else to install. Defendant could not identify the person the Ellers hired to install the new HVAC system. In response to Defendant's remarks, Yerkes informed Defendant that the work he performed on the old HVAC system—replacing and altering duct work—also required a license, but Defendant disagreed, stating he believed the work he performed on the old HVAC system was merely "repair work."

Yerkes and Defendant next discussed an invoice (the "Invoice") Defendant issued to the Ellers on 30 May 2019 for a total of $7,543.56. The Invoice included a $6,278.50 charge for parts and $700.00 charge for labor. Defendant told Yerkes that the $700.00 labor charge was for the duct work repairs he performed on the old HVAC system and the $6,278.50 parts charge was for his procurement of the new HVAC system. On the Invoice, in the section entitled "description of service work," there were four entries: "(1) Replaced unit bad compressor 30y/o unit; (2) Found unit frozen – Replaced unit; (3) Replaced section of ductboard; (4) Return air suction Flooded water." When Yerkes questioned Defendant regarding the first entry—"Replaced unit bad compressor 30y/o unit"—Defendant explained he mistakenly wrote "replaced" and that he meant to write the word "repaired." According to Yerkes, Defendant was "adamant" it was a word mix-up.

On 26 May 2022, Plaintiff filed a motion for order to show cause alleging that on or about 30 May 2019, Defendant, again, violated the Injunction. On 18 July 2023, Defendant appeared before the trial court for a contempt hearing. At the outset, Plaintiff moved to continue because Sharon Eller was not present to testify. The trial court denied Plaintiff's motion. At the close of Plaintiff's evidence, Defendant moved to dismiss, arguing Plaintiff's evidence was insufficient to establish he violated the Injunction since there was no direct evidence he installed the new HVAC system. The trial court denied Defendant's motion stating, "there is, at this point, substantial evidence reasonably necessary to persuade what would be reasonable jury or a trier of fact in this case." At the close of all the evidence, Defendant renewed his motion. The trial court denied the motion and informed Defendant he was being held in criminal contempt for violating the Injunction. The trial court sentenced Defendant to thirty days of active imprisonment and a $250.00 fine. The trial court also informed the parties that it was required, pursuant to section 5A-15(f), to issue written findings in relation to its finding of contempt beyond a reasonable doubt.

That same day, the trial court filled out and signed a form document entitled: "Order in Indirect Criminal Contempt Proceeding" (the "Form"). The check boxes on the Form did not directly correspond to the specific circumstances of Defendant's contempt. The trial court checked a box on the Form stating, "Defendant was able to comply with the subpoena or take reasonable measures to comply and failed to do so without any lawful excuse for failing to appear and testify; and therefore is in indirect criminal contempt[.]" The Form also reflected Defendant's fine of $250.00 and sentence of thirty days of active imprisonment, which was to begin on 7 August 2023.

Also on 18 July 2023, Defendant filed two written notices of appeal: one from the trial court's oral ruling and another concerning the Form. Each notice specified the file number, 01 CVS 952. On 26 July 2023, Defendant filed an amended notice of appeal stating the notices were signed before the file number 23 CRS 703 "had been assigned or was known" to Defendant.

On 17 August 2023, the trial court entered the "Order of Contempt and Order of Arrest" (the "Order") which included thirty-two detailed findings of fact and six conclusions of law. On 7 September 2023, Defendant gave written notice of appeal from the Order.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7A-27(b)(4) (2023).

III. Issues

The issues are whether: (1) the trial court erred by denying Defendant's motion to dismiss; (2) the trial court had jurisdiction to enter the Order; (3) findings of fact 13, 14, 15, 28, 31, and 32 are supported by competent evidence; and (4) the criminal contempt proceeding was barred by a two-year statute of limitations.

IV. Analysis

A. Motion to Dismiss

First, Defendant argues the trial court erred by denying his motion to dismiss. Specifically, Defendant asserts that Plaintiff's evidence was insufficient because Plaintiff presented no direct evidence that Defendant installed the new HVAC system and his conduct regarding the duct work fell within the carve-out exception.

1. Standard of Review

[1] As a threshold matter, we consider which standard of review applies to a trial court's denial of a motion to dismiss during an indirect criminal contempt proceeding. Our consideration necessitates a brief discussion of contempt in its various forms.

We begin with the principle that contempt is " '*sui generis*,' meaning '[o]f its own kind or class.' " *State v. Burrow*, 248 N.C. App. 663, 670, 789 S.E.2d 923, 928 (2016) (quoting *sui generis*, Black's Law Dictionary 1475 (8th ed. 2004)). In other words, contempt generally is not wholly civil or wholly criminal.

There are two "kinds" of contempt: civil and criminal. *O'Briant v. O'Briant*, 313 N.C. 432, 434, 329 S.E.2d 370, 372 (1985). Although "the demarcation between the two may be hazy at best," *id.* at 434, 329 S.E.2d at 372, the distinction becomes apparent when considering the "purpose for which the power is exercised" and the potential range of consequences, *id.* at 434, 329 S.E.2d at 372. If the goal is to punish for a past-act that "interfere[d] with the administration of justice," the contempt is criminal in nature. *Id.* at 434, 329 S.E.2d at 372. On the other hand, if the intention is to "preserve the rights of private parties and to compel obedience," the contempt is civil in nature. *Id.* at 434, 329 S.E.2d at 372. To distinguish between the two, the question is whether the contemnor is subject to punishment for previously disobeying an order of the court or is forewarned to comply in the future with an order of the court.

Complicating matters, there are two "divisions" of contempt: direct and indirect. *State v. Wendorf*, 274 N.C. App. 480, 483, 852 S.E.2d 898, 902 (2020) (citation omitted). Put simply, direct contempt occurs in the presence of the court while indirect contempt occurs outside of the presence of the court. *Id.* at 483, 852 S.E.2d at 902.

Additionally, there are two kinds of criminal contempt proceedings: "summary proceedings, which are for direct criminal contempt, and plenary proceedings, which are for indirect criminal contempt." *Wendorf*, 274 N.C. App. at 486, 852 S.E.2d at 904; *but see O'Briant*, 313 N.C. at 436, 329 S.E.2d at 373 (explaining that summary proceedings are not appropriate for direct criminal contempt "where a court does not act *immediately* to punish acts constituting a direct contempt . . .") (emphasis added).

An indirect criminal contempt proceeding functions similarly to an ordinary criminal trial. For example, in an indirect criminal contempt

proceeding the moving party has the burden of proving the defendant committed the contemptuous acts beyond a reasonable doubt. *State v. Coleman*, 188 N.C. App. 144, 150, 655 S.E.2d 450, 453–54 (2008). Additionally, a show-cause order in a criminal contempt proceeding, while not "equivalent" to a criminal indictment, *Wendorf*, 274 N.C. App. at 486, 852 S.E.2d at 904, is "akin" to one, *Coleman*, 188 N.C. App. at 150, 655 S.E.2d at 453. Further, indirect criminal contempt proceedings trigger certain "constitutional safeguards," including reasonable notice and an opportunity to be heard. *O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373 (citation omitted).

Based on these similarities, we conclude the substantial evidence standard is the appropriate standard to apply here. *See State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980) (citations omitted). Accordingly, we review the trial court's denial of Defendant's motion to dismiss de novo. *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007). " 'Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (quoting *In re Greens of Pine Glen, Ltd. P'ship*, 356 N.C. 642, 647, 576 S.E.2d 316, 319 (2003)).

On a motion to dismiss, the question is whether "there is substantial evidence (1) of each essential element of the offense charged . . . , and (2) of defendant's being the perpetrator of such offense." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117 (citations omitted). "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, 265 S.E.2d 164, 169 (1980); *see State v. Beck*, 385 N.C. 435, 438, 894 S.E.2d 729, 732 (2023) ("Substantial evidence is the amount necessary to persuade a rational juror to accept a conclusion.") (internal quotation marks and citation omitted). Substantial evidence can be direct, circumstantial, or both. *State v. Shelton*, 293 N.C. App. 154, 157, 899 S.E.2d 894, 897 (2024); *State v. Parker*, 354 N.C. 268, 279, 553 S.E.2d 885, 894 (2001) (explaining "[c]ircumstantial evidence and direct evidence are subject to the same test for sufficiency") (citing *State v. Sokolowski*, 351 N.C. 137, 143, 522 S.E.2d 65, 69 (1999)). The distinction can be explained as follows:

> Direct evidence is that which is immediately applied to the fact to be proved, while circumstantial evidence is that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. In other words

> . . . circumstantial evidence is merely direct evidence indirectly applied.

Shelton, 293 N.C. App. at 157, 899 S.E.2d at 897 (quoting *State v. Wright*, 275 N.C. 242, 249–50, 166 S.E.2d 681, 686 (1969) (citation omitted)).

"In reviewing challenges to the sufficiency of evidence, we must view the evidence in the light most favorable to the State, giving the State the benefit of all reasonable inferences." *State v. Fritsch*, 351 N.C. 373, 378–79, 526 S.E.2d 451, 455 (2000) (citing *State v. Benson*, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992)).

Here, under the terms of the Injunction, Defendant was "permanently enjoined from . . . engaging in business as a plumbing, heating or fire sprinkler contractor at all such times as he is not properly licensed to do so[.]" In this proceeding, Plaintiff alleged Defendant violated the Injunction by performing two distinct acts: installing the new HVAC system and removing and replacing the duct work of the old HVAC system. Therefore, to survive Defendant's motion to dismiss, Plaintiff was required to present substantial evidence that Defendant engaged in at least one of these acts. *See Coleman*, 188 N.C. App. at 150, 655 S.E.2d at 453–54 (explaining it is the State's burden to establish that the alleged contemptuous act occurred).

2. New HVAC System Installation

[2] Defendant asserts Plaintiff's evidence was insufficient to establish that he installed the new HVAC system. We disagree.

At the contempt proceeding, Plaintiff presented the following evidence tending to show Defendant installed the new HVAC system: the Invoice, Defendant's written statement, and testimony from Johnston and Yerkes, Plaintiff's field investigators. Plaintiff also introduced evidence that Defendant previously violated the Injunction. Additionally, Defendant testified on direct that he gave Sharon Eller approximately $600.00 to cover a bill from another service provider who worked on the new HVAC system after it was installed. Although there was no direct evidence that Defendant installed the new HVAC system, the circumstantial evidence, when viewed in the light most favorable to Plaintiff, was sufficient to persuade a rational juror that Defendant installed the new HVAC system. *See Shelton*, 293 N.C. App. at 157, 899 S.E.2d at 897.

First, the Invoice prepared by Defendant states Defendant "Replaced unit bad compressor 30y/o unit," and "Found unit frozen – Replaced unit." Although Defendant contends the word "unit" in

"replaced unit" refers only to the "compressor unit"—a component within the old HVAC system—a rational juror, examining the plain language of the Invoice, could interpret the word "unit" to mean the entire system.

Second, Defendant's statements regarding the Invoice and the work performed were inconsistent. For example, during his interview with Yerkes, Defendant explained he meant to write the word "repair[ed]" instead of "replac[ed]" on the Invoice. But when Defendant testified at the contempt hearing, he stated that the first Invoice entry was for his replacement of the compressor "unit" within the old HVAC system, not the "unit" as a whole. Similarly, Defendant's testimony regarding the duct work was also at odds with his prior statement. In his statement, Defendant stated he removed and replaced a 12-inch section of duct work "due to it being soaked." When he testified, however, Defendant stated the duct board was not soaked and that he removed the 12-inch section, allowed it to thaw, and then reinstalled that same section.

Finally, there was additional circumstantial evidence tending to show Defendant installed the new HVAC system, including Defendant's previous violations of the Injunction and his $600.00 payment to Sharon Eller to cover a bill she acquired from another service provider who worked on the new HVAC system after it was installed. When asked why he paid Sharon Eller this money, Defendant testified that he "wanted to be released from anything to do with this unit whatsoever." Defendant's testimony tends to show he did more than just procure equipment for the Ellers.

In sum, although there was no direct evidence that Defendant installed the new HVAC system, the circumstantial evidence was more than sufficient to survive Defendant's motion to dismiss. A rational juror could reasonably infer from the evidence that Defendant installed the new HVAC system. *See Smith*, 300 N.C. at 78-79, 265 S.E.2d at 169. Accordingly, the trial court properly denied Defendant's motion to dismiss.

3. Duct Work Repair

[3] Defendant further argues that the evidence was insufficient to establish the duct work "repair" he performed on the old HVAC system constituted a violation of the Injunction. Specifically, Defendant argues this work falls within the "carve out exception" of section 87-21(c). We disagree.

A license is not required to "make minor repairs or minor replacements to an already installed system of . . . heating or air conditioning[.]" N.C. Gen. Stat. § 87-21(c) (2023). A minor replacement or repair is defined as the "replacement of *parts* in an installed system which do not require any change in energy source, fuel type, or routing or sizing of venting or piping." *Id.* (emphasis added). Section 87-21(c) defines "parts" as "a compressor, coil, contactor, motor, or capacitor." *Id.*

In his statement prepared for Yerkes, Defendant stated the following in regard to the duct work: "[P]rior to the new install I repaired a 12-inch section of duct board that was soaked from water. I state that this work consisted of me removing the section of duct board and replacing it due to it being soaked."

Because the "carve out exception" identifies specific "parts" for which a minor repair or replacement is permissible without a license, and duct work is not included in this list, Defendant's conduct does not fall within the "carve out exception." *See* N.C. Gen. Stat. § 87-21(c). Therefore, Defendant's admission that he "remov[ed] the section of duct board and replac[ed] it" was substantial evidence upon which a rational juror could conclude that Defendant violated the Injunction. *See Smith*, 300 N.C. at 78–79, 265 S.E.2d at 169. Accordingly, the trial court properly denied Defendant's motion to dismiss for insufficient evidence.

B. Jurisdiction

[4] Next, Defendant argues the trial court lacked jurisdiction to enter the Order because he gave notice of appeal before the trial court entered the Order. We disagree.

"Whether the trial court had jurisdiction is a question of law that [this Court] review[s] de novo." *State v. Lebeau*, 271 N.C. App. 111, 113, 843 S.E.2d 317, 319 (2020). " 'Under a *de novo* review, [this Court] considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *Williams*, 362 N.C. at 632–33, 669 S.E.2d at 294 (quoting *In re Greens of Pine Glen*, 356 N.C. at 647, 576 S.E.2d at 319).

Generally, "when a party gives notice of appeal, the trial court is divested of jurisdiction until the appellate court returns a mandate in the case." *SED Holdings, LLC v. 3 Star Properties, LLC*, 250 N.C. App. 215, 219, 791 S.E.2d 914, 919 (2016). When a party gives notice of appeal, "the trial judge becomes *functus officio*." *RPR & Assocs. Inc. v. Univ. of N.C.-Chapel Hill*, 153 N.C. App. 342, 346–47, 570 S.E.2d 510, 513 (2002) (citing *Bowen v. Motor Co.*, 292 N.C. 633, 635, 234 S.E.2d 748,

749 (1977)). "*Functus officio*, which translates from Latin as 'having performed his [or] her office,' is defined as being 'without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.' " *Id.* at 347, 570 S.E.2d at 513 (quoting *functus officio*, Black's Law Dictionary 682 (7th ed.1999)).

This general rule, however, is less straightforward than its language suggests. Indeed, while final judgments are "always appealable," *see SED Holdings, LLC*, 250 N.C. App. at 220, 791 S.E.2d at 919 (citation omitted), "a litigant cannot deprive the trial court of jurisdiction to determine a case on its merits by appealing from a nonappealable interlocutory order of the trial court," *Velez v. Dick Keffer Pontiac-GMC Truck, Inc.*, 114 N.C. App. 589, 591, 551 S.E.2d 873, 875 (2001). In other words, a party's notice of appeal does not automatically divest the trial court of jurisdiction and trigger our jurisdiction if no final judgment or appealable interlocutory order has been entered by the trial court. *See id.* at 591, 551 S.E.2d at 875. Moreover, "the trial court maintains jurisdiction to enter a written order after notice of appeal has been given where the order does not '*affect*[] *the merits*, but rather is a chronicle of the findings and conclusions' decided at a prior hearing." *State v. Fields*, 268 N.C. App. 561, 565, 836 S.E.2d 886, 889 (2019) (quoting *State v. Walker*, 255 N.C. App. 828, 830, 806 S.E.2d 326, 329 (2017)) (emphasis and alteration in original).

In the instant case, the trial court conducted the contempt proceeding on 18 July 2023. At the conclusion of the hearing, the trial court made multiple oral findings of fact to support its determination that Defendant was being held in criminal contempt for violating the Injunction. The trial court also informed the parties that it was required, pursuant to section 5A-15(f), to issue written findings in relation to its finding of contempt beyond a reasonable doubt. That same day, the trial court filled out and signed the Form. On the Form, the trial court checked a box indicating that, Defendant "was able to comply with the subpoena or take reasonable measures to comply and failed to do so without any lawful excuse for failing to appear and testify; and therefore is in indirect criminal contempt[.]" The Form also indicated Defendant's sentence of thirty days of active imprisonment and his $250.00 fine. The Form was not file-stamped.

On 18 July 2023, Defendant filed two notices of appeal. On 26 July 2023, Defendant filed an amended notice of appeal reflecting the correct docket number. On 17 August 2023, thirty days after the contempt proceeding, the trial court entered the Order which included thirty-two

detailed findings of fact and six conclusions of law. Unlike the Form, the Order was file-stamped. On 7 September 2023, Defendant entered written notice of appeal from the Order.

The Order was the trial court's final judgment in this matter. Not only was the Order file-stamped, *see* N.C. Gen. Stat. § 1A-1, Rule 58 (2023) ("[A] judgment is entered when it is reduced to writing, signed by the judge, and filed with the clerk of court pursuant to Rule 5."), it also included the trial court's findings of fact and conclusions of law pursuant to section 5A-15(f), *see* N.C. Gen. Stat. § 5A-15(f) (2023) ("If the person is found to be in contempt, the judge must make findings of fact and enter judgment."). Thus, Defendant's notice of appeal from the Form did not divest the trial court of jurisdiction because the Form was neither a final judgment nor an appealable interlocutory order. *See SED Holdings, LLC*, 250 N.C. App. at 220, 791 S.E.2d at 919. Accordingly, the trial court had jurisdiction to enter the Order.

C. Challenged Findings of Fact

[5] In his next argument, Defendant asserts the following findings of fact are not supported by competent evidence: 13, 14, 15, 28, 31, and 32. We disagree.

"In general, 'our standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.' " *Wendorf*, 274 N.C. App. at 483, 852 S.E.2d at 902 (quoting *State v. Phair*, 193 N.C. App. 591, 593, 668 S.E.2d 110, 111 (2008)). " 'Findings of fact are binding on appeal if there is competent evidence to support them, even if there is evidence to the contrary . . . .' " *Id.* at 483, 852 S.E.2d at 902 (quoting *State v. Salter*, 264 N.C. App. 724, 732, 826 S.E.2d 803, 809 (2019)). "Meanwhile, conclusions of law are reviewed de novo and are subject to full review." *State v. Aguilar*, 287 N.C. App. 248, 252, 882 S.E.2d 411, 415 (2022) (internal quotation marks and citations omitted). The trial court, sitting as the trier of fact, "is in the best position to weigh the evidence, given that he has heard all of the testimony and observed the demeanor of witnesses." *State v. Hughes*, 353 N.C. 200, 207, 539 S.E.2d 625, 631 (2000).

1. Findings of Fact 13, 14, and 15

Defendant asserts the trial court's findings of fact 13, 14, and 15 are not supported by competent evidence. Defendant contends these findings, which all relate to Johnston's observations regarding the condition

of the new HVAC system—a system Defendant denies installing—were not supported by competent evidence because Johnston's testimony was improper as he was not qualified as an expert.

Rule 701 provides that a non-expert witness can testify in the form of an opinion or inference so long as his opinion or inference is "rationally based on [his] perception . . . and helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2023).

In the instant case, Johnston testified that the new HVAC system was installed incorrectly. Specifically, Johnston testified that because the new HVAC system's "venting [was] backwards," the new HVAC system was "exhausting [] carbon monoxide into the occupied space where [Sharon Eller] resides." Defendant objected to Johnston's testimony, arguing Johnston was not qualified to testify regarding the proper installation of the new HVAC system. In essence, Defendant asserted Johnston needed to be admitted as an expert to testify as to the propriety of the installation. The trial court overruled Defendant's objections.

Based on Johnston's testimony, the trial court found that:

> 13. The unit was improperly installed in that the exhaust of the heating system was venting into the basement as opposed to venting outside the home.
>
> 14. As a result of the improper venting of the unit, whenever it was operational, carbon monoxide would vent into the basement. The Court takes notice of the dangers posed by improperly vented carbon monoxide gas into an occupied residence.
>
> 15. Photographs taken by Mr. Johnston and admitted into evidence depict the unit and show its improper ventilation.

Even if we were to assume Johnston's testimony was improper and conclude the trial court erred by making findings of fact 13, 14, and 15, these findings have no bearing on the trial court's ultimate determination that Defendant violated the Injunction. As Johnston explained during the contempt proceeding, different standards apply to licensed and unlicensed service providers. For an unlicensed provider, like Defendant, the only concern is whether the provider did or did not perform the installation. In other words, Plaintiff was not required to demonstrate that Defendant installed the new HVAC system incorrectly to establish he violated the Injunction. Instead, Plaintiff only had to demonstrate

Defendant installed the new HVAC system. Put simply, even if we were to agree with Defendant and set aside these findings, the trial court's remaining findings support the conclusion that Defendant willfully violated the Injunction. Accordingly, even assuming the trial court erred by making findings of fact 13, 14, and 15, any error was not prejudicial.

2. Findings of Fact 28, 31, and 32

Defendant also asserts the trial court's findings of fact 28, 31, and 32 are not supported by competent evidence. Defendant, however, has not provided any supporting argument for his assertion in this section of his brief. Rather he "incorporates . . . by reference" his arguments from the first section of his brief regarding the trial court's denial of his motion to dismiss. Because Defendant makes no mention of findings of fact 28 and 32 in his fourteen pages of motion to dismiss argument, we deem these challenges as abandoned and binding. *See* N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned."). It is not the duty of this Court to craft an appellant's arguments for them. *See Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 606, 615 S.E.2d 350, 358, (2005); *Viar v. N. Carolina Dep't of Transp.*, 359 N.C. 400, 402, 610 S.E.2d 360, 361 (2005).

We will, however, review ultimate finding 31 since Defendant indirectly challenged this finding in the context of his motion to dismiss argument. *See In re G.C.*, 384 N.C. 62, 65 n.3, 884 S.E.2d 658, 661 (2023); *State v. Johnson*, 246 N.C. App. 677, 683, 783 S.E.2d 753, 758–59 (2016) ("[W]e do not base our review of findings of fact and conclusions of law on the label in the order, but rather, on the substance of the finding or conclusion.").

Ultimate finding 31 states:

> 31. The Court acknowledges that Plaintiff did not present direct testimony that Defendant installed the unit; however, Plaintiff presented sufficient circumstantial evidence to lead the court to believe – beyond a reasonable doubt – that Defendant did in fact install the unit and replaced duct board for the unit.

Similar to our reasoning outlined above, ultimate finding 31 is supported by the evidentiary findings which are supported by competent evidence. The trial court found that the plain language of the Invoice contradicted Defendant's statement that he did not install the new HVAC

system and found that the Invoice and Defendant's statement established Defendant replaced the ductwork on the old HVAC system. Further, the trial court found that Defendant's testimony at the contempt hearing contradicted his statement prepared for Yerkes and that Defendant was not a credible witness. These findings are supported by competent evidence, including the Invoice, Johnston and Yerkes' testimony, and circumstantial evidence including, Defendant's previous violations of the Injunction, $600.00 payment to Sharon Eller, and inconsistent statements regarding the Invoice and the work performed. Accordingly, the evidence was adequate to support the trial court's evidentiary findings which support ultimate finding 31 that the circumstantial evidence was sufficient to establish that Defendant installed the new HVAC system and replaced the duct work on the old HVAC system in violation of the Injunction. Thus, ultimate finding 31 is supported by the evidentiary findings which are supported by competent evidence.

D. Statute of Limitations

[6] Finally, Defendant asserts the trial court erred by finding him in criminal contempt because criminal contempt is a misdemeanor subject to a two-year statute of limitations. According to Defendant, the statute of limitations had run because the alleged violations occurred prior to 30 May 2019 and Plaintiff's motion for order to show cause was filed on 26 May 2022, more than two years later. We disagree.

In support of his proposition, Defendant directs our attention to two North Carolina statutes. *See* N.C. Gen. Stat. §§ 15-1(a) and 14-1 (2023). Section 15-1 provides the two-year statute of limitations period for misdemeanors stating, "crimes of deceit and malicious mischief, and the crime of petit larceny . . . , and all misdemeanors except malicious misdemeanors, shall be charged within two years after the commission of the same, and not afterwards[.]" N.C. Gen. Stat. § 15-1(a). According to section 14-1:

> A felony is a crime which: (1) Was a felony at common law; (2) Is or may be punishable by death; (3) Is or may be punishable by imprisonment in the State's prison; or (4) Is denominated as a felony by statute. *Any other crime is a misdemeanor*.

N.C. Gen. Stat. § 14-1 (emphasis added).

Defendant attempts to harmonize these statutes as follows: because criminal contempt is not a felony, it must be a misdemeanor

subject to a two-year statute of limitations. We are not persuaded by Defendant's argument.

First, Defendant's assertion presumes that criminal contempt is, by nature, a "crime" and is therefore encompassed by the "*Any other crime*" language of section 14-1. *See* N.C. Gen. Stat. § 14-1 (emphasis added). Although an indirect criminal contempt proceeding is "punitive or 'criminal in . . . *nature*,' " *State v. Reaves*, 142 N.C. App. 629, 633, 544 S.E.2d 253, 256 (2001) (emphasis in original), contempt itself remains "of its own kind or class," *see Burrow*, 248 N.C. App. at 670, 789 S.E.2d at 928 (citation omitted). Indeed, criminal contempt is not tantamount to a traditional "crime."

To justify affording contemnors the same "constitutional safeguards" as those provided to ordinary criminal defendants, our courts have treated criminal contempts as "crimes." *See O'Briant*, 313 N.C. at 435, 329 S.E.2d at 373. However, in other instances, criminal contempt receives different treatment. For example, criminal contempt has been defined as a "petty offense with no constitutional right to a jury trial," *Blue Jeans Corp. v. Amalgamated Clothing Workers of Am.*, *AFL-CIO*, 275 N.C. 503, 511, 169 S.E.2d 867, 872 (1969), and prior adjudications for criminal contempt do not "constitute [] 'prior conviction[s]' for purposes of the [Structured Sentencing] Act," *Reaves*, 142 N.C. App. at 633, 544 S.E.2d at 256. Thus, despite an indirect criminal contempt proceeding resembling a conventional criminal bench trial, it cannot be said that criminal contempt is encompassed by the "*Any other crime*" language of section 14-1.

Second, Defendant's argument overlooks the fact that this Court has expressly rejected the notion that criminal contempt is a misdemeanor. *See Burrow*, 248 N.C. App. at 669–70, 789 S.E.2d at 928–29. The defendant in *Burrow* advanced a similar argument to the one Defendant presents here. *Id.* at 669, 789 S.E.2d at 928. There, the defendant argued his six consecutive thirty-day terms of imprisonment based on six findings of direct criminal contempt was improper because criminal contempt is a Class 3 misdemeanor for which consecutive sentences are impermissible. *Id.* at 669, 789 S.E.2d at 928. We rejected this argument, noting that it "fail[ed] to take into account the entirety of [section] 14-3, which dictates that the offense *actually be a misdemeanor* before labeling it a Class 3 misdemeanor." *Id.* at 670, 789 S.E.2d at 928 (emphasis added). Ultimately, we determined the defendant's sentences could run consecutively because "a criminal contempt adjudication is *not a misdemeanor* in North Carolina." *Id.* at 670, 789 S.E.2d at 929

(emphasis added) (quoting *State v. Luke*, 207 N.C. App. 749, 701 S.E.2d 403 (2010) (unpublished)).

Finally, the statutory provisions governing contempt are confined to their own chapter of our General Statutes—Chapter 5A. *See* N.C. Gen. Stat. § 5A (2023). Conversely, "the General Assembly has confined provisions of our 'penal law,' . . . primarily to Chapter 14 of the General Statutes." *Reaves*, 142 N.C. App. at 633, 544 S.E.2d at 256. There is no mention of a statute of limitations period in Chapter 5A. *See* N.C. Gen. Stat. § 5A. It is the role of the General Assembly, not this Court to prescribe such a limitation. *See State v. Scoggin*, 236 N.C. 19, 23, 72 S.E.2d 54, 57 (1952) ("It is our duty to interpret and apply the law as it is written, but it is the function and prerogative of the Legislature to make the law.").

Accordingly, because a criminal contempt adjudication is not a misdemeanor and there is no applicable statute of limitations period for criminal contempt, Defendant's statute of limitations argument fails.

V. Conclusion

In sum, the trial court properly denied Defendant's motion to dismiss for insufficient evidence and had jurisdiction to enter the Order. Ultimate finding 31 is supported and the criminal contempt adjudication was not barred by a two-year statute of limitations period. Accordingly, we affirm the Order.

AFFIRMED.

Judges ARROWOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
MICHAEL ANTHONY ASPIOTE

No. COA24-298

Filed 21 May 2025

Contempt—direct criminal contempt—admitted ingestion of impairing substance before hearing—delay of urine sample

After a hearing where defendant—who was there to plead guilty to criminal charges—admitted to consuming an unspecified impairing substance earlier that morning and then provided a urine sample that tested positive for methamphetamine, the trial court erred in holding defendant in direct criminal contempt, since the record did not support the court's finding that defendant falsely claimed that he would not test positive for an impairing substance. Rather, defendant merely represented that he was of clear mind and understood the nature of the proceedings despite having previously ingested the unspecified substance. Further, although the proceedings were delayed a few hours because defendant could not provide a urine sample quicker, this could not serve as the basis for direct contempt, since defendant provided the sample outside the presence of the court.

Appeal by defendant from judgment entered 20 July 2023 by Judge Bob R. Cherry in Carteret County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Dilcy Burton, for the State.

Jarvis John Edgerton, IV, for defendant-appellant.

DILLON, Chief Judge.

Defendant Michael Anthony Aspiote challenges the trial court's judgment holding him in direct criminal contempt. For the reasoning below, we reverse.

I. Background

Defendant was found to be in direct criminal contempt by the trial court during a hearing in which he was appearing to plead guilty to

unrelated charges. During the hearing, Defendant admitted to consuming an unspecified substance earlier that morning, he went into a bathroom in the courthouse and provided a urine sample, and the sample tested positive for methamphetamine.

The record shows as follows: Defendant appeared in Carteret County Superior Court to plead to charges arising from an April 2022 crime.

In the written Transcript of Plea form tendered to the trial court, Defendant responded "Yes" as to whether he was "now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substances," and he indicated that he had done so sometime that morning.

During the colloquy, Defendant responded "Yes" when the trial judge asked if he was "now using or consuming alcohol, drugs, narcotics, medicines, pills, or any other substance," and Defendant responded that he had done so "[f]irst thing [that] morning." Defendant told the trial judge that he knew how the substance(s) he had taken affected his body and that he believed that his mind was clear and that he understood the nature of the hearing. However, during the colloquy the trial judge never asked, nor did Defendant volunteer, *the type* of substance Defendant had consumed that morning.

The trial judge continued the colloquy with Defendant for several minutes, during which Defendant responded "Yes, sir" to over twenty questions regarding his understanding of the hearing and the plea he was entering. During this portion of the hearing, the trial judge did not express any concern that Defendant did not understand the nature of the hearing or the plea agreement, nor does the transcript show Defendant did not comprehend the nature of the hearing or his plea.

In any event, following the colloquy the prosecutor provided the court with the factual basis of the charges against Defendant to which he was pleading. The trial judge then allowed the victim to speak at length uninterrupted (approximately six pages of the transcript), who painted Defendant in a negative light.

After hearing from the victim, the trial judge announced he would require Defendant to be screened for drug use before deciding whether to accept the plea. At about noon, Defendant was led out of the courtroom to provide a urine sample, during which time the hearing stood at ease. When Defendant failed to provide a urine sample by 1:21 p.m., the trial judge announced a lunch break. At 2:31 p.m., the probation officer notified the trial judge Defendant had provided a sample during the break and that the sample tested positive for methamphetamine.

The trial judge then announced he was not going to accept Defendant's plea, explaining that "the plea was not understandingly, knowingly and intelligently entered into because [Defendant had just tested] positive for an impairing substance."

The trial court then found Defendant in direct criminal contempt for delaying the court's proceedings and sentenced Defendant to twenty days in jail.

II. Analysis

On appeal, Defendant argues the trial court erred in holding him in direct criminal contempt. We agree.

"[O]ur standard of review for contempt cases is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment." *State v. Phair*, 193 N.C. App. 591, 593 (2008) (quotations and citations omitted). Conclusions of law are reviewed *de novo*. *See State v. Biber*, 365 N.C. 162, 168 (2011).

Under our General Statutes, a defendant may be held in criminal contempt based on "[w]illful behavior committed during the sitting of a court and directly tending to interrupt its proceedings[,]" and "[w]illful or grossly negligent failure to comply with schedules and practices of the court resulting in substantial interference with the business of the court." N.C.G.S. §§ 5A-11(a)(1), (7).

Criminal contempt may be either "direct" or "indirect." N.C.G.S. § 5A-13. "Direct" criminal contempt occurs where the defendant's contemptuous act delaying or interfering with court proceedings was committed "within the sight or hearing of a presiding judicial officer" *and* within or in the immediate proximity of the courtroom. *Id. See also O'Briant v. O'Briant*, 313 N.C. 432, 435-36 (1985). A trial judge who observes an act of direct criminal contempt may himself punish the defendant summarily. N.C.G.S. § 5A-13.

"Indirect" criminal contempt occurs where a defendant violates a court order outside the presence of a court proceeding. *Id.* A trial judge may not proceed summarily against a defendant suspected of indirect criminal contempt, but rather a hearing may only be held after the defendant is afforded "a reasonable time" to prepare. *Id.* § 5A-15(a).

In his order, the trial judge held Defendant in *direct* criminal contempt in a summary proceeding based on the following finding:

> Defendant tested positive for methamphetamine, and [the] court inquired whether defendant would test positive and defendant said he would not. This inquiry occurred after the plea was taken but before sentence was given. After waiting more than 2 hours, [Defendant tested positive] for methamphetamine, so plea was stricken.

It appears the trial court held Defendant in direct criminal contempt for lying that he would not test positive for a controlled substance, thus wasting the court's time having to wait for Defendant to complete a drug test.

However, nowhere in the record does it show that Defendant ever represented to the trial judge he would not test positive for a controlling substance. He was never asked that question. Rather, the record shows Defendant *admitted* to ingesting a substance earlier that morning. He never was asked or stated the type of substance he ingested. During the colloquy, he did state his mind was clear and that, even though he had ingested a substance, he understood the nature of the proceedings and the effect of his "no contest" plea to certain criminal charges. Further, though Defendant tested positive for methamphetamine, there is nothing in the record to indicate that Defendant was under the influence of that drug during the hearing.

Our Supreme Court has held that the fact that one has tested positive for an impairing substance—in that case, cocaine and marijuana—is not conclusive proof the individual was under the influence of that substance at the time of the test. W*illey v. Williamson Produce*, 357 N.C. 41, 42 (2003) (adopting dissenting opinion from our Court at 149 N.C. App. 74 (2002)). *See also State v. Royall*, 14 N.C. App. 214, 219 (1972) (concluding trial court properly instructed jury it could find a defendant was not under the influence of alcohol despite a positive breathalyzer result).

We reiterate the record does not show *the type* of substance Defendant ingested *on the morning of the hearing*. *See Willey*, 357 N.C. at 42 (recognizing that one can test positive well after its impairing effects have subsided).

In sum, there is no evidence in the record to support the trial court's finding that Defendant represented he would not test positive for an impairing substance. He merely represented he was of clear mind and understood the nature of the proceedings, notwithstanding that he had previously ingested a substance.

We note the trial judge also referenced in his order that Defendant caused the trial proceedings to be delayed a few hours waiting for

Defendant to complete his urine sample. However, Defendant's failure to provide a urine sample quicker cannot be the basis of *direct* criminal contempt, as Defendant's act in providing the sample took place outside the presence of the court. Also, there was no finding that Defendant acted willfully in failing to provide the sample quicker than he did. *See Bank of Zebulon v. Chamblee*, 188 N.C. 417, 418 (1924) (holding that an act is not contemptuous unless it is done willfully).

III. Conclusion

We conclude the record does not support the order holding Defendant in direct criminal contempt. Accordingly, we reverse that judgment and remand for further proceedings.

REVERSED.

Judges HAMPSON and FREEMAN concur.

STATE OF NORTH CAROLINA
v.
TERRENCE TERRELL JOYNER

No. COA24-438

Filed 21 May 2025

1. Judges—impartiality—numerous references to sheriff—no prejudicial error

In defendant's trial for first-degree murder, the trial judge's comments introducing the county sheriff as the "High Sheriff" to the prospective jurors during jury selection and repeatedly thanking the jurors "on behalf of the [s]heriff" throughout the trial did not amount to an improper expression of opinion in violation of N.C.G.S. §§ 15A-1222 and 15A-1232; further, even had any error occurred, defendant could not show prejudicial error in light of the overwhelming evidence of his guilt.

2. Evidence—murder trial—victim's bloody clothing—probative value not substantially outweighed by danger of unfair prejudice

In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not abuse its discretion by allowing the State to introduce into evidence the victim's bloody clothing

because the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. The evidence was used by the State to demonstrate how and where the victim was shot and was not excessively displayed.

3. Evidence—authentication—forensic download of defendant's phone—testimony confirming contents

In defendant's trial for first-degree murder, the trial court did not err, much less plainly err, by allowing the State to introduce into evidence a forensic download of defendant's cell phone. The data extracted, including text messages and call logs, was properly authenticated pursuant to Evidence Rule 901 by the testimony of the sheriff's department sergeant who had examined defendant's phone and its contents prior to initiating the download and therefore had knowledge that the extracted data was what the State claimed it to be.

4. Criminal Law—prosecutor's closing statement—murder trial—no improper assumption of facts not in evidence

In defendant's trial for first-degree murder, the trial court was not required to intervene ex mero motu during the prosecutor's closing argument during which, contrary to defendant's assertion on appeal, the prosecutor argued facts that were properly admitted into evidence—including contents downloaded from defendant's phone—and all reasonable inferences drawn therefrom. Further, the prosecutor's suggestion in closing that defendant learned from a concealed carry class that he could assert self-defense by claiming to be in fear for his life did not constitute reliance on improperly admitted hearsay; therefore, the prosecutor did not violate ethics rules governing attorney conduct.

Appeal by Defendant from judgment entered 22 September 2023 by Judge J. Carlton Cole in Hertford County Superior Court. Heard in the Court of Appeals 26 February 2025.

Attorney General Jeff Jackson, by Senior Deputy Attorney General Amar Majmundar, for the State-Appellee.

The Sweet Law Firm, PLLC, by Kaelyn N. Sweet, for Defendant-Appellant.

COLLINS, Judge.

Defendant Terrence Terrell Joyner appeals from a judgment entered upon a jury's guilty verdict of first-degree murder. Defendant argues that the trial court erred by improperly expressing its alignment with the Hertford County Sheriff's Office in the presence of the jury, admitting the victim's bloody clothing into evidence, admitting a forensic download of Defendant's cell phone into evidence, and failing to intervene ex mero motu during the State's closing remarks. For the following reasons, we find no error.

I. Background

Defendant was charged with first-degree murder for a shooting that occurred on 26 February 2021. The State's evidence at trial tended to show the following:

Defendant and Chyna Swain engaged in a romantic relationship for nearly four years, beginning in 2017 when Chyna was a senior in high school. During this time, they also worked together. Chyna ended the relationship in December 2020; approximately one month later, Chyna met and began a romantic relationship with Vashuan Smith. Despite having limited communication after their break-up, Defendant often told Chyna that he wanted to get back together.

At approximately 4:00 p.m. on 26 February 2021, when Chyna was on her way home from work, Defendant called Chyna and asked if she could return one of his personal belongings to him. Chyna agreed and met Defendant at a hotel with the item. When Chyna returned home, she realized that Defendant had been in her room and laid out on her bed various items she had given him during their relationship. Defendant had not told Chyna about his plans to go to her home or return these items.

Soon after, Vashuan invited Chyna to his house for dinner. A few minutes after arriving at Vashuan's house, Chyna and Vashuan decided to drive to Chyna's aunt's house. Chyna drove, and Vashuan sat in the passenger seat. As they approached Chyna's aunt's house, Chyna received a call from Defendant. Vashuan answered the call. He told Defendant that Chyna was unavailable and hung up the phone. Defendant attempted to call Chyna several more times, but Chyna did not answer.

Chyna visited with her aunt for a short time. As Chyna and Vashuan were driving back to Vashuan's house, Defendant again called Chyna. She answered, and Defendant asked her where she was. When she refused to tell him, Defendant became irritated and said, "Don't worry about it. . . . I know where you're at." Defendant then asked to speak to Vashuan; Vashuan, listening to the conversation on speakerphone, took

the phone and told Defendant, "I'm with my girl." Chyna hung up, but Defendant continued to call.

A few minutes later, as Chyna was stopped at a red light, she saw Defendant's car behind her car. With Defendant following them, Chyna continued driving toward Vashuan's house. At one point, Defendant quickly passed Chyna's car and immediately stopped his car in front of hers. Chyna had to slam her brakes to avoid hitting Defendant's car from behind. Chyna went around Defendant's car and continued to drive toward Vashuan's house. When they arrived at Vashuan's house, Chyna drove her car into the driveway; Defendant stopped his car on the street in front of the house. Vashuan immediately got out of the car and ran toward Defendant's car. Defendant got out of his car and approached Chyna, who was standing in the driveway. Defendant grabbed Chyna by the arm and attempted to lead her back to his car.

Vashuan's mother, Shannon Bell-Harrell, arrived home at this point. Bell-Harrell approached Chyna, Defendant, and Vashuan. Positioned between Defendant and Vashuan, she told Defendant to leave. Defendant pushed Bell-Harrell to the side, and Vashuan hit Defendant in response. Vashuan and Defendant then began to fight.

As they fought, they moved away from the driveway and into the front yard. Chyna, still standing in the driveway, watched the fight. She saw Vashuan suddenly retreat from Defendant by walking backwards. She then saw Defendant fire multiple shots at Vashuan, causing him to fall face-forward on the ground. Defendant fired several more shots at Vashuan, ran to his car, and drove away. Chyna called 911. Vashuan's parents rushed him to the hospital, where he was declared deceased. Eight shell casings from Defendant's gun were found at the scene.

Defendant testified on his own behalf. According to Defendant, he called Chyna multiple times on the night of the shooting because he wanted to return Chyna's belongings to her. When Chyna told him over the phone that she was at her aunt's house, Defendant asked if he could meet her there and began driving in that direction. When he arrived at her aunt's house, however, Chyna had already left. Defendant, who testified that he "was being stubborn," called Chyna and asked if she could pull over somewhere. Stopped at a red light, Defendant realized he was behind Chyna's car, and he flashed his lights and called Chyna in an attempt to get her to pull over. Chyna, however, continued to drive. Defendant began following her, and at one point, he pulled around Chyna's car and slammed his brakes—another attempt to get Chyna to pull over.

After arriving at Vashuan's house, Defendant testified that Vashuan immediately ran to Defendant's car, banged on his windows, and told Defendant to "get out." Vashuan then ran around the back of the house, and Defendant grabbed his gun for safety before he got out of his car. According to Defendant, while he was standing with Chyna in the driveway, Vashuan suddenly ran toward Defendant and attacked him. Vashuan threatened to kill Defendant and repeatedly hit him. Defendant then saw Vashuan reach for something. Not knowing what it was and fearing for his life, Defendant took his gun out of his pocket and shot Vashuan.

Despite fleeing, Defendant also called 911. The dispatcher instructed Defendant to go to the Sheriff's Department, and Defendant remained on the phone with dispatch until he pulled into the Sheriff's Department parking lot. He left his gun on the dashboard of his car before being escorted into the Sheriff's Department by law enforcement.

The jury convicted Defendant of first-degree murder, and the trial court sentenced Defendant to life imprisonment without the possibility of parole. Defendant appeals.

II. Discussion

A. Trial Court's Remarks to the Jury

[1] Defendant first argues that the trial court erred by improperly expressing its alignment with the Hertford County Sheriff in violation of N.C. Gen. Stat. §§ 15A-1222 and 15A-1232.

1. Standard of Review

"The statutory prohibitions against expressions of opinion by the trial court contained in [N.C. Gen. Stat.] § 15A-1222 and [N.C. Gen. Stat.] § 15A-1232 are mandatory." *State v. Young*, 324 N.C. 489, 494 (1989). "A defendant's failure to object to alleged expressions of opinion by the trial court in violation of those statutes does not preclude his raising the issue on appeal." *Id.* (citations omitted). We review this alleged statutory violation for prejudicial error under N.C. Gen. Stat. § 15A-1443(a). *State v. Austin*, 378 N.C. 272, 276-77 (2021). Prejudicial error occurs "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (2023). The defendant bears the burden of showing prejudice. *Id.*

Under this standard of review, we first consider the totality of the circumstances "to determine whether the trial court's comments crossed into the realm of impermissible opinion." *Austin*, 378 N.C. at

277 (cleaned up). If so, we then determine whether "the comments had such a prejudicial effect that there is a reasonable possibility of a different result absent the error." *Id.*; N.C. Gen. Stat. § 15A-1443(a).

2. Analysis

Sections 15A-1222 and 15A-1232 "prohibit a trial court judge from expressing an opinion during trial and when instructing the jury." *Id.* at 276; N.C. Gen. Stat. §§ 15A-1222, 15A-1232 (2023). These statutes impose upon the trial court a strict duty of absolute impartiality, "and this is so even when such expression of opinion is inadvertent." *State v. Hudson*, 295 N.C. 427, 435 (1978) (citation omitted); *Austin*, 378 N.C. at 278. The trial court "may not express an opinion as to the guilt or innocence of a criminal defendant, the credibility of a witness, or any other matter which lies in the province of the jury." *Hudson*, 295 N.C. at 434-35 (citations omitted). "[A]n alleged improper statement will not be reviewed in isolation, but will be considered in light of the circumstances in which it was made." *State v. Jones*, 358 N.C. 330, 355 (2004) (citation omitted).

Here, at the end of the first day of jury selection, the trial court introduced the Sheriff of Hertford County to the potential jurors: "Before y'all leave, the High Sheriff has come to the courtroom. Sheriff, stand up. This is Dexter Hayes. I'm sure all of you know him." Throughout the rest of the five-day trial, the trial court thanked the jurors for their service "on behalf of the Sheriff" approximately sixteen times.

The State called three deputies from the Hertford County Sheriff's Office to testify on behalf of the State against Defendant. Although introducing the Sheriff to the jury and repeatedly thanking the jury for their service "on behalf of the Sheriff" was more than usual in this case, we cannot say that the trial court made an improper "expression of judicial leaning." *Hudson*, 295 N.C. at 434-35.

Furthermore, even had the remarks been erroneous, Defendant is unable to show prejudicial error. The evidence of Defendant's guilt was overwhelming: the State called a total of eleven witnesses, two of whom personally witnessed Defendant shoot the victim, and also introduced physical evidence. The trial court also instructed the jury as follows:

> The law requires that the presiding judge be impartial. You should not infer from anything that I've done or said that the evidence is to be believed or disbelieved, that a fact has been proved, or what your findings ought to be. It is your duty to find the facts and render a verdict reflecting the truth.

Considering the trial court's comments "in light of the circumstances in which [they were] made," *Jones*, 358 N.C. at 355, Defendant has failed to show that the trial court's improper comments "had such a prejudicial effect that there is a reasonable possibility of a different result absent the error." *Austin*, 378 N.C. at 277-78 (citations omitted).

B. Evidence of the Victim's Clothing

[2] Defendant next contends that the admission of Vashuan's bloody clothing into evidence violated Rule 403 because the evidence's probative value was substantially outweighed by the danger of unfair prejudice. This argument is without merit.

This Court reviews Rule 403 rulings for abuse of discretion. *State v. Hennis*, 323 N.C. 279, 285 (1988). "An abuse of discretion results when the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Whaley*, 362 N.C. 156, 160 (2008) (quotation marks and citation omitted). A defendant advancing such an argument must also prove "that absent the error a different result would have been reached at trial." *State v. Ferguson*, 145 N.C. App. 302, 307 (2001) (citation omitted).

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." N.C. Gen. Stat. § 8C-1, Rule 403 (2023). All probative evidence offered against a defendant by the State has some prejudicial effect; however, "the fact that evidence is prejudicial does not mean that it is necessarily *unfairly* prejudicial." *State v. Rainey*, 198 N.C. App. 427, 433 (2009) (emphasis added and citations omitted). "Unfair prejudice," in the context of Rule 403, means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *State v. Buchanan*, 288 N.C. App. 44, 48 (2023) (citation omitted).

Here, the bloody shirt, shorts, and pants that Vashuan was wearing at the time of the shooting were admitted into evidence to illustrate the testimony of Major Scott Cofield of the Hertford County Sheriff's Office. This clothing was "not excessively displayed or discussed at trial," and the State used this evidence to show how and where Vashuan was shot. *State v. Knight*, 340 N.C. 531, 560 (1995) (admission of the victim's bloody shirt did not violate Rule 403 where it "was not excessively displayed or discussed at trial and was used to illustrate the testimony of the doctor who performed the autopsy on the victim's body"); *see State v. Holder*, 331 N.C. 462, 485-86 (1992) (admission of the victim's

bloody shirt did not violate Rule 403). We agree with the trial court that the probative value of Vashuan's bloody clothing was not substantially outweighed by the danger of unfair prejudice and conclude that the trial court did not abuse its discretion by admitting this clothing into evidence at trial.

C. Forensic Download of Defendant's Cell Phone

[3] Defendant next argues that the trial court plainly erred by admitting a forensic download of Defendant's cell phone. Specifically, Defendant contends that the State failed to lay a proper foundation for the admission of this evidence, in violation of Rule 901. This argument lacks merit.

We review an unpreserved issue regarding an error in the admissibility of evidence for plain error. *State v. Cummings*, 346 N.C. 291, 313-14 (1997); N.C. R. App. P. 10(a)(4). For a trial court's error to amount to 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 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).

"The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." N.C. Gen. Stat. § 8C-1, Rule 901(a) (2023). Various means may be used to authenticate evidence, including "testimony of a witness with knowledge that a matter is what it is claimed to be." *State v. Taylor*, 178 N.C. App. 395, 413 (2006) (quotation marks omitted); N.C. Gen. Stat. § 8C-1, Rule 901(b) (2023). Therefore, it is not error under Rule 901 for a trial court to admit evidence so long as it can "reasonably determine that there was sufficient evidence to support a finding that the matter in question is what its proponent claims." *State v. Wiggins*, 334 N.C. 18, 34 (1993) (citation omitted).

Here, the forensic download of Defendant's cell phone was admitted into evidence through the testimony of William Keith Lassiter, Sergeant

of Investigations for the Hertford County Sheriff's Office. Sergeant Lassiter testified that he himself examined Defendant's phone and performed the forensic extraction of the phone. Sergeant Lassiter then testified as to what was found on Defendant's phone, which included text messages and call logs. Sergeant Lassiter, having been the person who examined the phone and performed its data extraction, sufficiently showed that he had "knowledge that [the] matter is what it is claimed to be" and therefore properly authenticated the evidence before the trial court admitted it. *Taylor*, 178 N.C. App. at 413; N.C. Gen. Stat. § 8C-1, Rule 901.

Defendant argues that the evidence was not properly authenticated because Sergeant Lassiter never testified as to when he conducted the forensic download and what particular method was used. This argument, however, fails to accurately reflect the law. All that is required under Rule 901 is that a witness with knowledge about the evidence in question testifies that "the matter in question is what its proponent claims." *Wiggins*, 334 N.C. at 34 (citation omitted) (noting that the defendant is free to introduce any competent evidence of his own relevant to the weight or credibility of the properly authenticated evidence in question). Accordingly, the trial court did not err, much less plainly err, by admitting the forensic download of Defendant's cell phone into evidence.

D. State's Closing Remarks

[4] Defendant finally argues that the trial court erred by failing to intervene ex mero motu during the State's closing remarks. Specifically, Defendant argues that the State's closing remarks improperly assumed facts not in evidence in violation of N.C. Gen. Stat. § 15A-1230 and the Rules of Professional Conduct. These arguments lack merit.

Because Defendant failed to object at trial to this portion of the State's closing argument, the proper 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. Mitchell*, 353 N.C. 309, 324 (2001). "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." *State v. Anthony*, 354 N.C. 372, 423 (2001) (citation omitted). "[T]he 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).

"During a closing argument to the jury an attorney may not . . . make arguments on the basis of matters outside the record except for matters concerning which the court may take judicial notice." N.C. Gen. Stat. § 15A-1230(a) (2023). Nevertheless, "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).

Defendant argues that the State's closing remarks were improper for several reasons. First, Defendant contends that the State argued in favor of premeditation and deliberation based on the forensic download of Defendant's cell phone that was improperly admitted into evidence. As we have determined that the forensic download of Defendant's cell phone was properly authenticated and admitted, this argument lacks merit.

Second, Defendant contends that the State relied on improperly admitted hearsay to argue in its closing remarks that Defendant's assertion of self-defense was a "calculated ruse." During the State's cross-examination of Defendant, Defendant answered "yes" when the State asked, "And in your carrying a concealed weapon class they told you that if you were in fear for your life you could shoot?" Subsequently, in its closing remarks, the State argued, "[Defendant] was told in that class: If you're in fear of your life you can use your weapon. So he knew all he had to do was say he was in fear for his life. . . . [H]e created the situation so he could say that."

Defendant did not object at trial to the statement he now asserts is erroneously-admitted hearsay, and Defendant has failed to argue on appeal that the admission of the statement amounts to plain error. Accordingly, the statement was properly admitted, and the State properly argued "the facts in evidence[] and all reasonable inferences drawn therefrom." *Phillips*, 365 N.C. at 135 (quotation marks and citations omitted).

Furthermore, Rule 3.4(e) of the Rules of Professional conduct prohibits an attorney from alluding to any matter that "the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." N.C. R. Prof. Conduct 3.4(e). Because the State did not rely on improperly admitted hearsay during its closing remarks, the State did not violate Rule 3.4(e). Accordingly, the trial court did not abuse its discretion by failing to intervene ex mero motu during the State's closing remarks.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
DANA ALDEN LATTA, JR., DEFENDANT

No. COA24-407

Filed 21 May 2025

Criminal Law—motion to withdraw guilty plea—twenty-year delay—properly denied before sentencing—greater sentence improperly imposed

In a criminal case that was reinstated twenty years after defendant had gone missing, where defendant had pleaded guilty to multiple charges (including robbery with a dangerous weapon) with the condition that he would receive an active sentence of 61 to 83 months, the trial court did not err in denying defendant's motion to withdraw his plea agreement prior to sentencing, since several factors—particularly the twenty-year time span between his plea agreement and his motion to withdraw—weighed heavily against a finding that he had a fair and just reason for withdrawing his guilty plea. However, because the court failed to inform defendant of his statutory right (under N.C.G.S. § 15A-1024) to withdraw his plea after it imposed a greater sentence than what defendant had agreed to in his plea agreement, the court's judgment was vacated and the case was remanded for a new sentencing hearing.

Appeal by defendant from order entered 18 January 2024 by Judge Michael O'Foghludha in Durham County Superior Court. Heard in the Court of Appeals 12 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Arneatha James, for the State.

Darren Jackson for defendant-appellant.

DILLON, Chief Judge.

Defendant Dana Latta appeals from an order denying his motion to withdraw his plea. We vacate and remand.

I. Background

In November 2001, Defendant Dana Latta was indicted in Durham County for three counts of robbery with a dangerous weapon, two counts of attempted robbery with a dangerous weapon, and second-degree kidnapping.

In June 2002, Defendant entered into a plea agreement with the condition that he would testify against his co-defendant and receive an active sentence of 61 to 83 months. Defendant was a prior record level (PRL) I at the time of the plea agreement.

When Defendant failed to appear at his sentencing hearing in November 2002, the trial court issued a warrant for his arrest. Defendant's co-defendant, though, did plead guilty at a probationary hearing. The charges against Defendant were ultimately dismissed.

Defendant went missing from North Carolina for twenty years, during which he gained multiple criminal convictions in other states. In March 2022, Defendant was arrested in Vance County for possession of a Schedule II substance and was served with his Order for Arrest issued in the 2002 Durham County cases.

In May 2022, Defendant was transferred to the Durham County Detention Center, and all his previously dismissed cases were reinstated.

In January 2024, Defendant filed a motion to set aside his 2002 plea agreement and/or dismiss those charges. After a hearing on the matter, the trial court denied Defendant's motion. Upon this guilty plea, Defendant was sentenced as a PRL IV in the mitigated range of 71 to 95 months. Defendant timely appealed.

II. Analysis

Defendant makes two arguments on appeal. The first argument concerns the trial court's failure *before pronouncing sentence* to grant Defendant's motion to withdraw from the 2002 plea agreement based on Defendant's change of heart regarding that agreement. Defendant's second argument concerns the trial court's failure *after pronouncing sentence* to inform Defendant of his right to withdraw from the 2002 plea agreement, a right which sprang from the trial court's imposition of a sentence greater than Defendant had agreed to. We address each issue in turn.

A. Motion to vacate plea agreement

Defendant argues that the trial court erred in denying his motion to set aside his 2002 plea agreement or otherwise dismiss the matter prior to the trial court pronouncing sentence.

"In reviewing a trial court's denial of a defendant's motion to withdraw a guilty plea made before sentencing, the appellate court does not apply an abuse of discretion standard but instead makes an independent review of the record." *State v. Chery*, 203 N.C. App. 310, 312 (2010) (internal quotation omitted). There is no absolute right to withdraw a guilty plea. *Id*. However, a defendant may seek to withdraw a guilty plea prior to sentencing and is "generally accorded that right if he can show any fair and just reason." *State v. Handy*, 326 N.C. 532, 536 (1990). When a defendant files a motion to withdraw a guilty plea, he has the burden to show it is supported by a "fair and just reason." *State v. Meyer*, 330 N.C. 738, 743 (1992).

Our Supreme Court in *State v. Handy* set forth (non-exclusive) factors to consider when determining whether there is a fair and just reason to withdraw a guilty plea:

> whether the defendant has asserted legal innocence, the strength of the State's proffer of evidence, the length of time between entry of the guilty plea and the desire to change it, and whether the accused has had competent counsel at all relevant times. Misunderstanding of the consequences of a guilty plea, hasty entry, confusion, and coercion are also factors for consideration.

326 N.C. 532, 539 (1990).

Here, Defendant fails to address any of these factors. Instead, his only argument is that he fully cooperated with the investigation and aided in the apprehension of another felon. Our Supreme Court has stated that when a defendant fails to show any fair or just reason for the withdrawal of a guilty plea, the trial court may deny the motion for withdrawal. *See State v. Taylor*, 374 N.C. 710, 725 (2020). Based on an independent review of the record, we conclude there is no evidence to indicate that Defendant ever asserted legal innocence, nor was there evidence of incompetent counsel or misunderstanding of what a guilty plea entails.

Additionally, the twenty-year time span between his agreement and the motion to withdraw the plea weighs heavily against Defendant. When reviewing a motion to withdraw a guilty plea, our Court "place[s] heavy reliance on the length of time between a defendant's entry of the

guilty plea and motion to withdraw the plea." *State v. Robinson*, 177 N.C. App. 225, 229 (2006). The reasoning is that:

> A swift change of heart is itself strong indication that the plea was entered in haste and confusion; furthermore, withdrawal shortly after the event will rarely prejudice the Government's legitimate interests. By contrast, if the defendant has long delayed his withdrawal motion, and has had the full benefit of competent counsel at all times, the reasons given to support withdrawal must have considerably more force.

Handy, 326 N.C. at 539. In *Handy*, the defendant requested to withdraw his guilty plea less than twenty-four hours after its entry. *Id.* at 540. Here, twenty years passed between Defendant's plea and his motion to withdraw. During this time, there was no indication that he wavered on his decision. Therefore, this factor weighs heavily against Defendant.

The remaining factor, whether there is prejudice to the State, is only addressed if "defendant has carried his burden of proof that 'fair and just' reason supports his motion to withdraw." *State v. Hatley*, 185 N.C. App. 93, 101 (2007). Here, Defendant failed to provide any fair and just reason to withdraw the guilty plea. Therefore, this factor is not addressed.

Because there was no fair or just reason provided to support the motion to withdraw the guilty plea, we hold the trial court did not err in denying the motion.

B. Failure to comply with N.C.G.S. § 15A-1024

In his second argument, Defendant contends the trial court erred by failing to comply with N.C.G.S. § 15A-1024, specifically by failing to allow him to withdraw from the 2002 plea agreement after the trial court decided to impose a sentence greater than that which Defendant had agreed to.

"A question of statutory interpretation is ultimately a question of law," *Brown v. Flowe*, 349 N.C. 520, 523 (1998), which we review de novo, *see Blue v. Bhiro*, 381 N.C. 1, 5 (2022).

Section 15A-1024 reads as follows:

> If at the time of sentencing, the judge for any reason determines to impose a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of that fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

"Under the express provisions of this statute a defendant is entitled to withdraw his plea and as a matter of right have his case continued until the next term." *State v. Williams*, 291 N.C. 442, 446-47 (1976). *See also State v. Puckett*, 299 N.C. 727, 730-31 (1980). "[A]ny change by the trial judge in the sentence that was agreed upon by the defendant and the State. . . requires the judge to give the defendant an opportunity to withdraw his guilty plea." *State v. Marsh*, 265 N.C. App. 652, 655 (2019).

Defendant contends that the judge failed to inform Defendant of his right to withdraw his plea when the judge decided to impose a sentence other than that agreed to in Defendant's 2002 plea agreement. Specifically, in the original plea agreement, Defendant agreed to a term of 61 to 83 months. At the time of sentencing in 2022, the trial court sentenced Defendant to a minimum term of 71 to 95 months. Although the sentencing occurred during the same hearing that Defendant separately moved to withdraw the guilty plea, the trial judge did not inform Defendant that he may withdraw his plea because the sentencing would be different than that which he agreed to. Therefore, we conclude the trial court failed to comply with N.C.G.S. § 15A-1024. Accordingly, we vacate the judgment and remand for further proceedings.

III. Conclusion

We hold that the trial court did not err in denying Defendant's motion to withdraw his plea prior to sentencing or otherwise to dismiss the charges altogether, as Defendant failed to meet his burden of showing the existence of a fair and just reason to allow him to withdraw his plea.

However, because the trial court decided later in the hearing to impose a sentence greater than that agreed to by Defendant in his plea agreement, we conclude the court erred by failing to inform Defendant of Defendant's *right* under Section 15A-1024 of our General Statutes to then withdraw his plea. We, therefore, must vacate the judgment sentencing Defendant to 71 to 95 months.

We, therefore, vacate and remand the matter for a new sentencing hearing. On remand, the trial court may reconsider and sentence Defendant to a term not to exceed that which Defendant agreed on in the 2002 plea agreement. Or, if the trial court maintains that a greater sentence is warranted, Defendant shall be afforded the opportunity to withdraw his plea and proceed under Section 15A-1024.

VACATED AND REMANDED.

Judges COLLINS and FLOOD concur.

STATE v. MANEY

[299 N.C. App. 108 (2025)]

STATE OF NORTH CAROLINA
v.
JOHNATHON MICAH MANEY, DEFENDANT

No. COA24-894

Filed 21 May 2025

1. Evidence—against a child—Evidence Rule 404(b)—no error—Evidence Rule 403—no abuse of discretion

In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not err, let alone plainly err, in admitting evidence from defendant's ex-wife about defendant's abusive, erratic, and threatening behavior against her where that evidence met the criteria for admission under Evidence Rule 404(b) because it was: (1) temporally proximate to charged offenses against defendant's daughter; (2) probative of why defendant's ex-wife did not report an incident in which defendant sexually assaulted both his daughter and his then-wife and why his daughter did not initially report being abused; and (3) sufficiently similar to the charged offenses, in that both involved sexual abuse against family members, sometimes took place in the same locations, often involved force and threats, and included vaginal rape. Further, the trial court did not abuse its discretion in admitting the testimony under Evidence Rule 403 after reviewing the ex-wife's testimony outside the presence of the jury, hearing opposing arguments from counsel, and explaining the reasons for admitting the evidence.

2. Criminal Law—prosecutor's argument—urging jurors to "walk in the victim's shoes"—remarks improper but not prejudicial

In a prosecution for numerous sexual offenses against a child—defendant's daughter, whose abuse by defendant from an early age escalated until she had a panic attack in high school and disclosed defendant's behavior—the trial court did not reversibly err in failing to intervene, in the absence of an objection by defendant, during closing arguments when the prosecutor urged the jurors to "walk in [the victim's] shoes." Although those remarks were improper, they did not prejudice defendant given the overwhelming evidence of his guilt.

3. Constitutional Law—right to speedy trial—Barker factors—nineteen-month delay in signing appellate entries—no violation

After being convicted of numerous sexual offenses against a child, the trial court's nineteen-month delay in signing defendant's appellate entries did not violate defendant's right to a speedy trial where, although the length of the delay was presumptively prejudicial, the balance of the other factors set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), did not establish the right to a new trial: the reason for the delay (related to the retirement of the trial judge) was not the sort of deliberate act to weigh in favor of a defendant; defendant did not assert the right during the delay; and defendant could not show that he was prejudiced by his post-judgment, pre-appeal incarceration (which he alleged was a result of the delay) where he did not assert that his appeal was hampered by the delay and where his appellate arguments all proved to be without merit.

Judge ARROWOOD concurring in result only.

Appeal by Defendant from judgments entered 23 August 2022 by Judge William H. Coward in Jackson County Superior Court. Heard in the Court of Appeals 22 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kristin Cook McCrary, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Kathryn L. VandenBerg, for Defendant.

GRIFFIN, Judge.

Defendant Johnathon Micah Maney appeals from judgments entered upon jury verdicts finding him guilty of numerous sexual offenses against a child. Defendant contends he is entitled to a new trial because: (1) the trial court plainly erred in admitting improper evidence under Rule 404(b) of the North Carolina Rules of Evidence; (2) the State made improper prejudicial statements throughout his trial; and (3) the trial court failed to sign documents requisite to this appeal in a timely manner. We disagree and hold Defendant received a fair trial, free from error and prejudice.

I. Factual and Procedural Background

This case arises from Defendant's repeated sexual abuse of his minor daughter, Rebecca.[1] Evidence presented at trial tended to show the following:

Rebecca was born in 2004. Her mother was absent from her life and, because of Defendant's inability to maintain a stable lifestyle, she moved in with her paternal grandparents and her aunt at age four. Growing up, she maintained a relationship with her father by visiting him whenever he had a place to live. Defendant sexually abused her during these visits. Rebecca was young when the abuse began—Defendant forced her to watch sexually explicit videos involving fathers and daughters. As she got older, Defendant's abuse towards her and others in their family escalated.

In 2013, Defendant met Sarinna Parish, a missionary at their church. The two married in the summer of 2014 and moved into her parent's trailer in Jackson County. Their marriage began normally, but things changed when Sarinna became pregnant. Defendant began pressuring Sarinna to abort their child and, when she refused out of her moral and religious convictions, he became violent. Defendant began physically abusing Sarinna, sexually assaulting her, threatening to kill her if she left him, and pointing loaded firearms at her and their child's head. Defendant would also frequently stay out until late at night and return home with hypodermic needles in his pockets, which Sarinna found when doing their laundry.

Shortly after Sarinna gave birth to their child in 2015, she and Defendant moved into their own trailer near her parents. During this period, Defendant's behavior became more erratic and paranoid. Friends of Defendant would often come back to the trailer after long nights out and stay there for extended periods of time. He painted the walls of their trailer colors he called "Joker Purple" and "Joker Green" in reference to the villain from Batman. Frequently, he would pace around their apartment carrying a loaded AR-15 because he feared he was being watched by the "Mexican Mafia." At one point, Defendant hung blackout curtains over the windows to prevent the mafia from watching them. Defendant also nailed boards over the trailer's doorframes and confined Sarinna to their bedroom whenever she was not attending school or making him meals.

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1. We use a pseudonym to protect the identity of the minor child and for ease of reading. N.C. R. App. P. 42(b).

While living in this trailer, Defendant began raping Sarinna. He would force her into sexual acts by threatening to make her watch him kill their child before killing her. In the winter of 2015, while Rebecca was visiting at Sarinna's parents' trailer, Defendant sexually assaulted her and Sarinna together. Sarinna failed to report the assault because of Defendant's continuous threats to hurt her, her child, and Rebecca. Eventually, in 2019, Sarinna escaped the trailer with the help of the Department of Social Services.

Rebecca, however, continued to suffer from Defendant's abuse. She developed depression and anxiety, began harming herself, and started having panic attacks. During her freshman year of high school, while in gym class, Rebecca had a panic attack prompting her to disclose Defendant's abusive behaviors to her teacher, after which she discussed the abuse with her principal as well. Her school conveyed the report to law enforcement, resulting in further interviews at the Heart-to-Heart Child Advocacy Center and with medical examiners. Law enforcement also interviewed Sarinna in South Carolina to corroborate Rebecca's account.

On 18 June 2020, a Jackson County grand jury indicted Defendant on: (1) two counts of statutory rape of a child by an adult; (2) four counts of statutory sex offense; and (3) seven counts of taking indecent liberties with a minor. Prior to trial, Defendant filed a motion in limine seeking to exclude portions of Sarinna's testimony. Defendant's matter came on for trial on 15 August 2022 in Jackson County Superior Court. Following trial, on 23 August 2022, the jury returned verdicts finding Defendant guilty on: (1) one count of statutory rape of a child; (2) two counts of statutory sex offense with a child; and (3) four counts of taking indecent liberties with a child.

After being convicted, Defendant filed a notice of appeal and an affidavit of indigency. The trial judge failed to sign Defendant's appellate entries. On 20 March 2024, the Senior Resident Superior Court Judge for Jackson County entered an order finding that the trial judge refused to sign the entries and signing them himself—initiating Defendant's appeal.

II. Analysis

Defendant argues the trial court plainly erred in admitting Rule 404(b) evidence. Defendant also contends the trial court committed reversible error by failing to intervene *ex mero motu* when the State made multiple statements about "walking in Rebecca's shoes." Finally, Defendant alleges his right to a speedy appeal was violated by the trial court's nineteen-month delay in signing forms necessary for this appeal. We discern no error in allowing the 404(b) evidence, no prejudice caused

by the trial court's failure to intervene in the State's remarks, and no violation of Defendant's rights to a speedy appeal.

A. 404(b) Evidence

[1] Defendant asserts the trial court plainly erred by allowing Rule 404(b) evidence at trial. Specifically, Defendant argues his ex-wife's testimony about his acts: (1) urging her to abort her pregnancy; (2) threatening to physically harm, and even kill her, if she tried to leave; (3) holding a knife and gun to her head; (4) throwing a sword at her; (5) raping her; (6) holding a gun to their baby's head; (7) staying out and allowing others to live in their trailer; (8) acting paranoid; and (9) boarding up and locking her within their trailer bedroom was inadmissible.

Defendant contends these acts were irrelevant and unfairly prejudicial because they were not similar to the crimes he was on trial for. Defendant concedes he failed to preserve this issue for appeal.

1. Plain Error

A defendant who files a motion in limine to exclude evidence at trial, but fails to object to the testimony during trial, leaves the issue unpreserved for appellate review. *State v. Hayes*, 350 N.C. 79, 80, 511 S.E.2d 302, 303 (1999) (citations omitted). We review an unpreserved issue for plain error. *State v. Lawrence*, 365 N.C. 506, 512, 723 S.E.2d 326, 330 (2012); N.C. R. App. P. 10(a)(4). The plain error rule necessitates a three step analysis:

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

State v. Reber, 386 N.C. 153, 158, 900 S.E.2d 781, 786 (2024) (cleaned up). This is a high standard and "should be applied cautiously and only in the exceptional case" where the error "amounts to a denial of a fundamental right of the accused" resulting "in a miscarriage of justice or the denial of a fair trial." *Id.* (citations and internal marks omitted).

2. Rule 404(b)

We review a trial court's "legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b)" de novo. *State v. Jones*, 288 N.C.

App. 175, 179, 884 S.E.2d 782, 788 (2023) (citation and internal marks omitted). Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith." N.C. R. Evid. 404(b) (2023). However, evidence of other crimes, wrongs, or acts is "admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident." *Id.* It is also admissible "if it forms part of the history of the event or serves to enhance the natural development of the facts." *State v. Agee*, 326 N.C. 542, 547–48, 391 S.E.2d 171, 174 (1990) (citations and internal marks omitted). "Rule 404(b) is a general rule of inclusion of relevant evidence[,]" but safeguards exist to ensure the propriety of admitting the evidence. *State v. Gillard*, 386 N.C. 797, 811, 909 S.E.2d 226, 245 (2024) (citations and internal marks omitted). "Specifically, 404(b) evidence is constrained by the requirements of similarity and temporal proximity[,]" *Id.* (citation and internal marks omitted), but our courts "have been 'markedly liberal in admitting evidence of similar sex offenses to show one of the purposes enumerated in Rule 404(b)[,]' " *State v. Houseright*, 220 N.C. App. 495, 498, 725 S.E.2d 445, 447 (2012) (quoting *State v. Thaggard*, 168 N.C. App. 263, 270, 608 S.E.2d 774, 780 (2005)). Acts need not "rise to the level of the unique and bizarre" to be sufficiently similar for purposes of Rule 404(b). *State v. Beckelheimer*, 366 N.C. 127, 131, 726 S.E.2d 156, 159 (2012) (citation and internal marks omitted). Instead, the "[p]rior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Id.* (citation and internal marks omitted). Additionally, we focus not on the differences between the two acts but the similarities. *State v. Pickens*, 385 N.C. 351, 359, 893 S.E.2d 194, 200 (2023) (citing *Beckelheimer*, 366 N.C. at 131–32, 726 S.E.2d at 159–60). Rule 404(b) evidence "is admissible unless the only reason that the evidence is introduced is to show the defendant's propensity for committing a crime like the act charged." *Id.*

In sum, three requirements must be met for the admission of Rule 404(b) evidence. *Jones*, 288 N.C. App. at 181, 884 S.E.2d at 789. "First, relevant evidence of the past acts by a defendant must have probative value beyond showing the defendant has the propensity or disposition to commit an offense of the nature of the crime charged." *Id.* (cleaned up). Next, "the past act must be similar enough to the charged crime to distinguish the acts from any generalized commission of the crime." *Id.* (cleaned up). Finally, "the past act must be temporally proximate to the presently charged act." *Id.* (citation omitted).

Returning to the merits here, admission of Sarinna's testimony was not error; much less does its admission rise to the level of plain error. As a threshold matter, Defendant conceded at trial, and does not contest on appeal, that Sarinna's testimony was temporally proximate to the crimes for which he was charged. Thus, we only address whether Sarinna's testimony of past acts by Defendant had probative value beyond showing Defendant's propensity or disposition to commit the crimes against his daughter for which he was charged and whether those acts were similar enough to the crime charged. *Pickens*, 385 N.C. at 359, 893 S.E.2d at 200.

Despite Defendant's argument, Sarinna's testimony had substantial probative value, and was similar enough to the crime charged, to be admissible under Rule 404(b). Specifically, Sarinna's testimony was probative of numerous aspects of the State's case because it added context and illustrated Defendant's state of mind when victimizing members of his family.

Sarinna testified that Defendant engaged in a pattern of threatening behaviors, such as using weapons and verbal threats and barricading her inside of their room, to coerce her into sexual acts and remaining silent about him raping both her and Rebecca. Sarinna also testified to Defendant allowing people to stay with them, against her will, and his erratic and paranoid behavior which prompted him to paint their house strange colors, hang blackout curtains over all the windows, and pace around with a loaded gun. This testimony was probative of the context surrounding Sarinna's failure to report the rape she witnessed—she was afraid Defendant would follow through on his past threats of physically harming her, her child, and Rebecca. In the same vein, Sarinna's testimony about Defendant's erratic behavior—painting their trailer walls purple and hanging blackout curtains, allowing people to stay with them despite her protests, finding needles in his pockets, and pacing around their house with a gun because of his fear of the "Mexican Mafia"— helped explain her fear by providing concrete examples of times where he acted violent for no reason and imposed his will on her. *See Agee*, 326 N.C. at 548, 391 S.E.2d at 174 (holding evidence admissible if it "forms an integral and natural part of an account of the crime, or is necessary to complete the story of the crime for the jury" (citation and internal marks omitted)). Sarinna's testimony about Defendant urging her to obtain an abortion after learning of her pregnancy was similarly probative of Defendant's state of mind when coercing her into taking actions she resisted.

Further, a rational jury could have questioned why Sarinna failed to report the abuse, thereby undermining her testimony about the rape, but the State utilized the challenged testimony to illustrate Defendant's

erratic, violent, and threatening behavior to explain Sarinna's failure to report the abuse. This testimony also helped explain why Rebecca did not report her father's abuse earlier. She witnessed acts of violence committed by Defendant towards Sarinna and stated that she did not tell anybody because she was "afraid that [she] would get hurt in some way." Thus, the Rule 404(b) evidence had probative value beyond showing Defendant's propensity or disposition to commit the crimes against his daughter—it provided the context in which Defendant committed the crimes and was integral to the story of why Rebecca did not report her abuse. Moreover, the testimony explained Defendant's erratic state of mind during the time period he was committing the crimes. Simply put, Sarinna's testimony painted the broader picture illustrating the context in which Defendant committed the crimes against his daughter and the aftermath of those crimes.

Next, we must address whether the acts testified to were sufficiently similar to the crimes for which Defendant was on trial. *Jones*, 288 N.C. App. at 181, 884 S.E.2d at 789. To reiterate, the similarities do not need to "rise to the level of unique and bizarre" and are sufficiently similar "if there are some unusual facts present in both crimes that would indicate that the same person committed them." *Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (citations and internal marks omitted); *see also Pickens*, 385 N.C. at 359, 893 S.E.2d at 200 ("Our Rule 404(b) standard does not require identical or even near-identical circumstances between the charged offense and the prior bad act for evidence of the prior bad act to be admissible." (citation omitted)).

Defendant relies on this Court's opinion in *State v. Dunston*, 161 N.C. App. 468, 588 S.E.2d 540 (2003), to argue "a defendant's sexual behavior with other adults is not similar under Rule 404(b) to sexual abuse of children." This assertion misapprehends and unduly broadens the scope of the holding in *Dunston*. There, the State elicited testimony of a specific sexual act which the defendant and his wife consensually engaged in. *Id.* at 473, 588 S.E.2d at 545–55. We concluded, however, that the testimony referring to the act "*by itself*" was not sufficiently similar to engaging in the act "with an underage victim beyond characteristics inherent to both, i.e., they both involve [the same sexual act], to be admissible under Rule 404(b)." *Id.* (emphasis added). As explained below, the repeated rapes Defendant committed here on his wife and child share more commonalities than just simply "the characteristics inherent to both" rapes. *Id.*

Here, there are enough similarities between the acts Sarinna testified to and the crimes Defendant committed against his daughter to

warrant admission of Sarinna's testimony. Specifically, the acts testified to by both Sarinna and Rebecca occurred in the trailer, and in the room, that Defendant and Sarinna lived in with Sarinna's parents and in the trailer they moved into after leaving Sarinna's parents' home. Rebecca also remembered the "purpled wall trailer," which Sarinna's testimony helped to explain. *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 (holding "the location of the occurrence" to be a key similarity). Both victims were also members of Defendant's family. *See State v. Frazier*, 344 N.C. 611, 616, 476 S.E.2d 297, 300 (1996) ("All of the victims were related to [the] defendant[.]").

Defendant also "exerted control over both victims during the assaults despite their protests [] and resistance." *Pickens*, 385 N.C. at 359, 893 S.E.2d at 200. Rebecca, on one hand, testified that she told him she was in pain during the rape and that she did not like it. She also testified Defendant used force when making her use a sexual device and while attempting to make her perform certain sexual acts. Sarinna, on the other hand, similarly testified Defendant would use force by holding weapons to her head when forcing her into sexual acts. Finally, the acts referred to also included vaginal intercourse with both victims. *See id.* ("[The d]efendant engaged in vaginal intercourse or tried to engage in vaginal intercourse with both victims.").

These similarities support the trial court's finding that the acts were sufficiently similar to be admitted under Rule 404(b). *See Beckelheimer*, 366 N.C. at 131, 726 S.E.2d at 159 ("Prior acts are sufficiently similar if there are some unusual facts present in both crimes that would indicate that the same person committed them." (citation and internal marks omitted)). Consequently, admission was also consistent with this State's liberal policy of " 'admitting evidence of similar sex offenses by a defendant.' " *Id.* at 130–31, 726 S.E.2d at 159 (quoting *State v. Bagley*, 321 N.C. 201, 207, 362 S.E.2d 244, 247 (1987)).

Even if the Rule 404(b) evidence was not sufficiently similar, it did not prejudice Defendant to the extent necessary to show plain error because there was additional, overwhelming evidence of Defendant's guilt. *See Reber*, 386 N.C. at 158–59, 900 S.E.2d at 786–87 ("[A] defendant must establish prejudice—that, after examination of the entire record, the error had a *probable impact* on the jury's finding that the defendant was guilty." (quoting *Lawrence*, 365 N.C. at 518, 723 S.E.2d at 334) (internal marks omitted)). The jury heard testimony from Rebecca describing the sexual assaults and Defendant forcing her to watch explicit, adult materials in gross detail. Sarinna also provided non-404(b) testimony about witnessing one of the rapes. Rebecca herself provided

Rule 404(b) evidence, which Defendant does not contest, of a different time Defendant sexually assaulted her while living on the Cherokee Reservation, providing further evidence of the context in which Defendant continuously assaulted her. A forensic interviewer also testified about interviewing Rebecca after her disclosure, a recording of which was submitted into evidence and published to the jury. The jury heard additional testimony from a pediatrician who examined Rebecca and determined "her characteristics were consistent with a child who had experienced sexual abuse."

This additional, overwhelming evidence provides ample basis for the jury to have returned guilty verdicts even if Rule 404(b) evidence had been excluded. As such, we cannot say the jury probably would have returned a different verdict had the challenged testimony been excluded. Accordingly, we hold the trial court did not commit error, much less plain error, in admitting Sarinna's testimony.

3. Rule 403

If the requirements of Rule 404(b) are met, the trial court must " 'balance the danger of unfair prejudice against the probative value of the evidence, pursuant to Rule 403.' " *State v. Carpenter*, 361 N.C. 382, 388–89, 646 S.E.2d 105, 110 (2007). Rule 403 states in part that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" N.C. R. Evid. 403 (2023). Evidence probative of the State's case "will have a prejudicial effect on the defendant; the question is one of degree." *State v. Cagle*, 346 N.C. 497, 506, 488 S.E.2d 535, 542 (1997) (citation and internal marks omitted). Unfair prejudice, in the Rule 403 context, "means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." *Id.* (cleaned up).

We review a "trial court's Rule 403 determination for an abuse of discretion." *Jones*, 288 N.C. App. at 179, 884 S.E.2d at 788 (citation and internal marks omitted). An abuse of discretion occurs when "the [trial] court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Robinson*, 383 N.C. 512, 521, 881 S.E.2d 260, 266 (2022) (citation and internal marks omitted). But, "[w]hether to exclude evidence under Rule 403 is a matter left to the sound discretion of the trial court." *State v. Coffey*, 326 N.C. 268, 281, 389 S.E.2d 48, 56 (1990) (citation omitted).

Here, "a review of the record reveals that the trial court was aware of the potential danger of unfair prejudice to [D]efendant and was careful to give a proper limiting instruction to the jury." *Beckelheimer*, 366 N.C.

at 133, 726 S.E.2d at 160 (quoting *State v. Hipps*, 348 N.C. 377, 406, 501 S.E.2d 625, 642 (1998) (internal marks omitted)). Like in *Beckelheimer*, the trial court also reviewed Sarinna's testimony during voir dire, heard opposing arguments from counsel and questioned counsel about the evidence, and provided its reasoning for denying Defendant's motion in limine. 366 N.C. at 133, 726 S.E.2d at 160. Having done so, the trial court's decision was the result of balancing the potential of unfair prejudice against the probative value of the evidence and is therefore not an abuse of discretion.

Accordingly, we hold the trial court did not abuse its discretion in admitting the contested 404(b) evidence. Consequently, Defendant has failed to carry his burden in showing plain error occurred at trial and is therefore not entitled to a new trial on this issue.

B. Prosecutor's Statements

[2] Next, Defendant contends the trial court committed reversible error by failing to intervene *ex mero motu* during the closing arguments whenever the prosecutor urged the jury to "walk in Rebecca's shoes." Specifically, Defendant argues these statements inflamed the passion of the jury to the point of prejudice.

Defendant concedes he did not object to these statements, so our review addresses "whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Huey*, 370 N.C. 174, 179, 804 S.E.2d 464, 469 (2017) (quoting *State v. Jones*, 355 N.C. 117, 133, 558 S.E.2d 97, 107 (2002)). This standard requires us to engage in a two-step analysis and address whether: (1) "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." *Id.* In doing so, we remain cognizant that our State gives prosecutors "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, 711 S.E.2d 122, 145 (2011) (citations and internal marks omitted). It is, however, improper for a prosecutor to become "abusive, inject their personal experiences, express their personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant." *State v. Hembree*, 368 N.C. 2, 18, 770 S.E.2d 77, 88 (2015) (cleaned up).

A defendant is prejudiced by improper statements only if there is "extreme impropriety on the part of the prosecutor[.]" *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (citations and internal marks omitted). To determine if the statements rise to this high level, we look at "whether the

prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Id.* (cleaned up). Like the plain error standard, if we determine there was overwhelming evidence against a defendant, we will not reverse the judgment entered upon a duly given jury verdict. *Id.* at 181, 804 S.E.2d at 470.

At the first step, whether the prosecutor's statements were improper, we have binding precedent compelling the conclusion that they were. In *State v. McCollum*, the prosecutor asked jurors to imagine the juvenile victim was their child numerous times. 334 N.C. 208, 224, 433 S.E.2d 144, 152 (1993). When addressing whether these statements were improper, our Supreme Court stated "[a]n argument asking the jurors to put themselves in place of the victim[] will not be condoned[.]" *Id.* (citations internal marks omitted)); *see also State v. Prevatte*, 356 N.C. 178, 244, 570 S.E.2d 440, 476 (2002) ("Arguments that ask the jurors to place themselves in the victim's shoes are improper." (citing *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152)). The Court then held the statements did not prejudice the defendant because of the overwhelming evidence presented against him. *McCollum*, 334 N.C. at 224–25, 433 S.E.2d at 152–53.

Here, the record reflects the prosecutor asked jurors to place themselves in Rebecca's shoes throughout the closing argument. We conclude these statements were improper. *Prevatte*, 356 N.C. at 244, 570 S.E.2d at 476; *McCollum*, 334 N.C. at 224, 433 S.E.2d at 152. Although improper, they did not rise to the level of extreme impropriety to so infect "the trial with unfairness as to make the resulting conviction a denial of due process." *Huey*, 370 N.C. at 180, 804 S.E.2d at 470 (citations and internal marks omitted). For the reasons stated above in our analysis of the contested Rule 404(b) evidence, there was overwhelming evidence of Defendant's guilt. As such, we will not reverse the judgment entered upon the jury's unanimous verdicts finding Defendant guilty.

Accordingly, while the prosecutor's statements asking the jury to "walk in Rebecca's shoes" were improper, they did not prejudice Defendant to the level necessary to warrant a new trial.

C. Delay in Signing Appeal

[3] Defendant argues the trial court's nineteen-month delay in signing his appellate entries violated his Sixth Amendment right to a speedy trial.

"We review alleged violations of constitutional rights de novo." *State v. Neal*, 280 N.C. App. 101, 112, 866 S.E.2d 311, 319 (2021) (citing *State v. Graham*, 200 N.C. App. 204, 214, 683 S.E.2d 437, 444 (2009)).

An "undue delay in processing an appeal *may* rise to the level of a due process violation." *State v. Hammonds*, 141 N.C. App. 152, 164, 541 S.E.2d 166, 176 (2000) (citations and internal marks omitted). The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial[.]" U.S. Const. amend VI. The right to speedy appeals in state criminal proceedings are not guaranteed under the Sixth Amendment or any other provision of the Constitution; they are a product of statute. *See State v. Berryman*, 360 N.C. 209, 213–14, 624 S.E.2d 350, 354–55 (2006) (collecting cases standing for the proposition that criminal appeals are provided for by state authority). Where a state has adopted an appellate process, the procedures "must comport with the demands of the Due Process and Equal Protection Clauses of the [United States] Constitution." *Id.* at 213, 624 S.E.2d at 354 (quoting *Evitts v. Lucey*, 469 U.S. 387, 393 (1985)) (internal marks omitted).

Our State has adopted the four-factor test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), "to address issues concerning whether an individual's rights to an appeal were violated." *Berryman*, 360 N.C. at 218, 624 S.E.2d at 357. The *Barker* factors require analysis of: " '(1) the length of the delay, (2) the reason for the delay. (3) the defendant's assertion of the right to a speedy [appeal], and (4) prejudice resulting from the delay.' " *State v. Webster*, 337 N.C. 674, 678, 447 S.E.2d 349, 351 (1994) (quoting *State v. Willis*, 332 N.C. 151, 164, 420 S.E.2d 158, 163 (1992)). The first factor, the length of delay, also acts as a trigger for analysis of the latter three factors—if the length of delay is not presumptively prejudicial, then there is no need to analyze the remaining factors. *Doggett v. U.S.*, 505 U.S. 647, 651–52 (1992); *see also State v. Kivett*, 321 N.C. 404, 410, 364 S.E.2d 404, 408 (1988) (" 'This Court has held that a delay of twenty-two months is not of great significance but is merely the "triggering mechanism" that precipitates the speedy trial issue.' " (quoting *State v. Jones*, 310 N.C. 716, 721, 314 S.E.2d 529, 533 (1984))).

After determining presumptive prejudice exists, none of the factors are dispositive and we analyze each as part of a "difficult and sensitive balancing process below." *State v. Spinks*, 277 N.C. App. 554, 562, 860 S.E.2d 306, 315 (2021) (citation and internal marks omitted).

1. Length of Delay

Our Courts have consistently held delays exceeding one year to be presumptively prejudicial, thus triggering analysis of the remaining *Barker* factors. *State v. Spivey*, 357 N.C. 114, 119, 579 S.E.2d 251, 255 (2003). *See Webster*, 337 N.C. at 679, 447 S.E.2d at 351 ("While not

enough in itself to conclude that a constitutional speedy trial violation has occurred, this delay [of sixteen months] is clearly enough to cause concern and to trigger examination of the other factors."). Here, the nineteen-month delay exceeds the threshold of one year as well as the sixteen-month delay triggering analysis in *Webster*. Being so, we hold the delay was presumptively prejudicial and proceed with the rest of the analysis.

2. Reason for the Delay

A "defendant has the burden of showing that the delay was caused by the *neglect or willfulness* of the prosecution." *Spivey*, 357 N.C. at 119, 579 S.E.2d at 255. This "proscription is against purposeful or oppressive delays and those which the prosecution could have avoided by reasonable effort." *Hammonds*, 141 N.C. App. at 160, 541 S.E.2d at 173 (citing *State v. Johnson*, 275 N.C. 264, 273, 167 S.E.2d 274, 280 (1969)). Here, Defendant argues delay resulted from the trial court's intentional failure to sign the required documents. The record, however, is not clear that this was an intentional act of the trial court judge.

The judge presiding over Defendant's trial retired approximately one year and five months after Defendant entered his notice of appeal, but did not take any action on Defendant's filings. The Senior Resident Superior Court Judge then entered an order on 20 March 2024, around one month after the presiding judge's retirement, finding as fact that the presiding judge refused to rule on this matter. Without more, we cannot consider this the sort of "deliberate delay" which weighs heavily against the government. *Barker*, 407 U.S. at 531. Instead, as the focus of this factor is on the State's conduct in the prosecutorial capacity, we conclude this is more akin to neutral reasons, like negligence or overcrowding, which should be weighed less heavily. *Id.*; *see also Neal*, 280 N.C. App. at 113, 866 S.E.2d at 319 ("Even if none of the delay is attributable to [the] defendant, that does not necessarily make the delay attributable to the State.").

3. Assertion of Right

"A defendant's assertion of his speedy appeal right 'is entitled to strong evidentiary weight in determining whether the defendant is being deprived of the right.' " *Neal*, 280 N.C. App. at 113, 866 S.E.2d at 319 (quoting *Hammonds*, 141 N.C. App. at 162, 541 S.E.2d at 174). In contrast, failure to assert this right weighs against him. *Id.* (citation omitted).

Here, "[D]efendant's silence is deafening." *State v. China*, 150 N.C. App. 469, 474, 564 S.E.2d 64, 68 (2002). The record reflects a lack of effort on Defendant's part in asserting his right. The Clerk of Court did

forward the appellate documents to the presiding judge a second time, but the record does not show that this action was taken at Defendant's request. Moreover, the "special letter" Defendant sent to the presiding judge, which Defendant argues amounts to assertion of his rights, was sent contemporaneously with his affidavit of indigency as part of the initial appeal filing. Instead of filing his appeal and then doing nothing, Defendant could have "contacted his attorney, the trial court, or the Clerk of Court to determine the status of his appeal at any time between the time he gave notice of appeal" and when the Senior Resident Superior Court Judge entered her order while signing the filings. *Id.*

Despite Defendant's contention that he "had no additional duty under these circumstances to move his appeal forward[,]" his acquiescence in the delay weighs against him. *See id.* at 474–75, 564 S.E.2d at 68 ("[The d]efendant's failure to stay informed concerning the status of his appeal of right and to assert his rights weighs heavily against his contention that his due process rights were violated."); *Neal*, 280 N.C. App. at 113, 866 S.E.2d at 319–20 ("Nothing in the record before us indicates that [the d]efendant asserted his right to a speedy appeal prior to his brief on appeal."); *Berryman*, 360 N.C. at 221, 624 S.E.2d at 359 (holding that despite the record including "a letter, a written request, and an affidavit drafted by defense counsel which document [the] defendant's assertions of his right to an appeal[,]" the factor weighed against him because "[n]one of defense counsel's efforts were directed to the State, to the trial court, to the clerk of superior court or to the clerk of the Court of Appeals[]").

4. Prejudice

The same factors we use when addressing prejudice resulting from an alleged violation of the right to a speedy trial are applicable here: (1) preventing oppressive pretrial incarceration; (2) minimizing anxiety and concern of the accused; and (3) limiting the possibility that the defense will be impaired. *Berryman*, 360 N.C. at 222, 624 S.E.2d at 359. We do not presume that a delay necessarily results in prejudice to a defendant; the defendant shoulders this burden as well. *Neal*, 280 N.C. App. at 114, 866 S.E.2d at 320 (citing *State v. Hughes*, 54 N.C. App. 117, 120, 282 S.E.2d 504, 506 (1981)).

As we do not find merit in Defendant's other arguments on appeal, his concern about post-judgment but pre-appeal incarceration is frivolous. *Berryman*, 360 N.C. at 212, 624 S.E.2d 353 ("The Court of Appeals' majority opinion held that [the] defendant's assignments of error aside from his right to a timely appeal were without merit. Accordingly, the first interest or concern cited above, prevention of oppressive pretrial incarceration, is not applicable to the case at bar.").

Similarly, Defendant states in his brief that "the factors of anxiety and uncertainty are present for anyone whose case remains on appeal." We agree, but that is insufficient. *See China*, 150 N.C. App. at 475, 564 S.E.2d at 69 ("Defendant has failed to show that he suffered any more anxiety than any other appellant."); *see also Berryman*, 360 N.C. at 222, 624 S.E.2d at 359–60 ("We agree with the Court of Appeals' majority opinion that a review of the record does not divulge any evidence to support [the] defendant's allegation of experiencing 'maximum anxiety.' ").

Lastly, Defendant does not argue his appeal was hampered in any way by the presiding judge's failure to sign his appellate entries. *See id.* at 223, 624 S.E.2d at 360 ("[A]lthough a defendant's failure to assert his right to a speedy trial earlier in the process does not preclude the argument later, such failure is considered when determining whether the defendant was prejudiced."). He only argues his "case presents a serious issue about a remedy for a vindictive or capricious trial judge." The record contains no facts supporting these accusations. Moreover, in contradiction of Defendant's argument, the United States Supreme Court made apparent in *Barker* that the remedy for a violation of the right to a speedy trial, the standards for which have been adapted for an alleged violation of the right to a speedy appeal, is the "unsatisfactorily severe remedy of dismissal[.]" *Barker*, 407 U.S. at 522.

In sum, the above analysis does not weigh in favor of the unsatisfactorily severe remedy of dismissal. Accordingly, Defendant's argument that his Due Process and Equal Protection rights were violated is meritless.

III. Conclusion

For the aforementioned reasons, we hold the trial court did not commit plain error by admitting Rule 404(b) evidence of Defendant's prior bad acts. We also hold Defendant was not prejudiced by the prosector's improper remarks during trial or by the trial court's failure to sign his appellant entries.

NO ERROR.

Judge ZACHARY concurs.

Judge ARROWOOD concurs in result only.

STATE OF NORTH CAROLINA
v.
NATHAN TYLER MONTGOMERY

No. COA24-291

Filed 21 May 2025

1. Motor Vehicles—felonious operation of a motor vehicle to elude arrest—reckless driving—evidence sufficient

In a prosecution for felonious operation of a motor vehicle to elude arrest, the State presented evidence of reckless driving (a statutory aggravating factor, two of which are required to elevate the offense to a felony) sufficient to send the charge to the jury: defendant drove into a lane closed to regular traffic where multiple construction workers were working on foot and paving was underway, disregarded the commands of a uniformed police officer who initiated a traffic stop, drove his truck in reverse and in the wrong direction through the construction zone, increased his speed, ran over the officer's foot, struck the officer's hip and thigh, and knocked the officer to the ground. Taken in the light most favorable to the State, that evidence indicated that defendant drove his truck in willful disregard of the safety of others and/or in a manner likely to endanger others.

2. Motor Vehicles—felonious operation of a motor vehicle to elude arrest—jury instructions—plain error not shown

In a prosecution for felonious operation of a motor vehicle to elude arrest—which requires the State to prove the existence of two or more statutory aggravating factors to elevate the offense to a felony—where defendant stipulated to the existence of one factor (driving while license revoked) and the State offered evidence of another (reckless driving), the trial court gave instructions regarding the State's burden of proof for the felony versus misdemeanor levels of the offense that were correct as a matter of law and clearly informed the jury that the State still bore the burden to prove beyond a reasonable doubt that defendant drove recklessly; the jury's request, during deliberations, for clarification of the difference between the misdemeanor and felony levels of the offense did not render the instructions erroneous, let alone demonstrate plain error by the trial court.

Appeal by Defendant from judgment entered 16 June 2022 by Judge L. Todd Burke in Forsyth County Superior Court. Heard in the Court of Appeals 18 March 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Eric. R. Hunt, for the State-Appellee.

MK Mann Law, by Mikayla Mann, for Defendant-Appellant.

COLLINS, Judge.

Defendant Nathan T. Montgomery appeals from a judgment entered upon a jury's guilty verdict of felonious operation of a motor vehicle to elude arrest and his plea of guilty to attaining habitual felon status. Defendant argues that the trial court erred by denying his motion to dismiss for insufficient evidence and plainly erred because its charge to the jury was confusing. Because the State presented sufficient evidence of each essential element of the offense, and because the trial court's jury instruction as a whole was correct, we find no error.

I. Background

Defendant was indicted on 7 June 2021 for felonious operation of a motor vehicle to elude arrest and assault with a deadly weapon on a government officer. The case came for trial on 13 June 2022, and the State's evidence at trial tended to show the following:

On the evening of 8 August 2020, Officer Scott Wallace of the Winston-Salem Police Department was working off-duty at a construction site. The construction workers were re-paving a portion of Peters Creek Parkway, located in Winston-Salem. Officer Wallace, in uniform and in his marked patrol vehicle, was assigned to help with lane closures and security.

The construction workers had placed several signs leading up to and around the construction zone indicating that the right lane of Peters Creek Parkway was closed to regular traffic. Other indicators included Officer Wallace's patrol vehicle, which had its blue lights activated; construction workers working on foot; orange cones; and flashing orange lights from various construction vehicles. At the time of the incident, there were approximately five construction workers out on foot. Another construction worker was operating a paving machine, actively paving the road.

At approximately 1:40 a.m., Officer Wallace was sitting in his patrol vehicle when he heard yelling from the construction workers and saw Defendant drive a red pickup truck into the closed lane. Officer Wallace drove toward the truck and initiated a traffic stop. As he exited his patrol vehicle to approach the driver's side of the truck, Defendant began slowly driving the truck forward. Officer Wallace ran to keep up with Defendant and shined his flashlight into the truck to get Defendant's attention. Once he caught up with Defendant, Officer Wallace asked Defendant to provide his driver's license. Defendant refused and stated that "he was just going to back out of the situation." Officer Wallace ordered Defendant not to move his truck, but Defendant began driving his truck in reverse.

Officer Wallace ran alongside Defendant's truck and ordered him to stop driving. Defendant ignored Officer Wallace's commands. In an attempt to get Defendant to stop the truck, Officer Wallace reached into the open driver's side window and struck Defendant in the face. Defendant, however, continued driving in reverse, slowly increasing his speed as he drove. As he accelerated, Defendant ran over Officer Wallace's foot with his truck's front tire. The front panel of Defendant's truck struck Officer Wallace in the hip and thigh, causing Officer Wallace to fall to the ground.

Defendant continued driving in reverse, in the wrong direction and in the lane closed to regular traffic. As he approached the entrance to the construction zone, Defendant quickly made a "J-turn" and fled the scene. Officer Wallace estimated that while backing out of the construction zone, Defendant's speed increased from around five miles per hour to approximately fifteen miles per hour.

After Defendant fled, a construction worker gave Officer Wallace a photograph he had taken of the license plate on Defendant's truck. Officer Wallace used the license plate to identify and locate Defendant.

The jury convicted Defendant of felonious operation of a motor vehicle to elude arrest and found him not guilty of assault with a deadly weapon on a government officer. Defendant pled guilty to attaining habitual felon status, and the trial court sentenced him to 67 to 93 months in prison. Defendant appeals.

II. Discussion

A. Defendant's Motion to Dismiss

[1] Defendant first argues that the trial court erred by denying his motion to dismiss the charge of felonious operation of a motor vehicle

to elude arrest because the State failed to present sufficient evidence that Defendant engaged in reckless driving at the time of the offense. This argument lacks merit.

When reviewing a motion to dismiss for insufficient evidence, we must determine "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215 (1990) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Bradshaw*, 366 N.C. 90, 93 (2012) (citation omitted). Evidence is to be viewed "in the light most favorable to the State, drawing all reasonable inferences in the State's favor." *State v. Miller*, 363 N.C. 96, 98 (2009) (citation omitted). "[S]o long as the evidence supports a reasonable inference of the defendant's guilt, a motion to dismiss is properly denied even though the evidence also permits a reasonable inference of the defendant's innocence." *Id.* at 99 (quotation marks and citation omitted).

"Whether the State presented substantial evidence of each essential element of the offense is a question of law; therefore, we review the denial of a motion to dismiss de novo." *State v. Tucker*, 380 N.C. 234, 236 (2022) (citation omitted). Under a de novo review, "the court considers the matter anew and freely substitutes its own judgment for that of the trial court." *State v. McVay*, 287 N.C. App. 293, 296 (2022) (citation omitted).

It is a misdemeanor "for any person to operate a motor vehicle on a street, highway, or public vehicular area while fleeing or attempting to elude a law enforcement officer who is in the lawful performance of his duties." N.C. Gen. Stat. § 20-141.5(a) (2023). The crime is upgraded to a felony if two or more aggravating factors "are present at the time the violation occurs." N.C. Gen. Stat. § 20-141.5(b) (2023). Several aggravating factors are enumerated in the statute, including "[r]eckless driving as proscribed by [N.G. Gen. Stat. §] 20-140" and "[d]riving when the person's drivers license is revoked." *Id.* Reckless driving is defined as driving any vehicle on a highway or public vehicular area "carelessly and heedlessly in willful or wanton disregard of the rights or safety of others" or "without due caution and . . . in a manner so as to endanger or be likely to endanger any person or property[.]" N.C. Gen. Stat. § 20-140 (2023).

Here, viewing the evidence in the light most favorable to the State, sufficient evidence of reckless driving was presented. The evidence

indicates that Defendant drove into a lane closed to regular traffic where multiple construction workers were working on foot and another worker was actively operating a paving machine. Defendant repeatedly disregarded Officer Wallace's commands after Officer Wallace initiated a traffic stop. Defendant then drove his truck in reverse in the construction zone, going the wrong direction, increasing his speed as he drove. In doing so, Defendant ran over Officer Wallace's foot with the front tire of his truck and struck Officer Wallace in the hip and thigh with the front panel of his truck. When viewed in the light most favorable to the State, this evidence indicates that Defendant operated his vehicle carelessly in a willful "disregard of the rights or safety of others" and "in a manner so as to endanger or be likely to endanger any person or property." *Id.*

Accordingly, as the State presented sufficient evidence of each element of felonious operation of a motor vehicle to elude arrest, the trial court did not err by denying Defendant's motion to dismiss.

B. Jury Instructions

[2] Defendant next argues that the trial court plainly erred "by providing confusing jury instructions" that "failed to adequately convey the difference between the aggravating factor that was stipulated to and the one that had to be proven during trial."

Defendant failed to object to the trial court's jury instructions, and his argument is therefore unpreserved. *See* N.C. R. App. P. 10(a)(1). However, "unpreserved issues related to jury instructions are reviewed under a plain error standard" so long as the defendant "specifically and distinctly" argues plain error on appeal. *State v. Collington*, 375 N.C. 401, 410 (2020) (citations omitted); N.C. R. App. P. 10(a)(4). Because Defendant specifically argues that the jury instructions here were plainly erroneous, we will review the trial court's jury instructions for plain error.

Under the plain error standard of review,

> 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 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 a 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). A trial court's instruction is to be viewed in its entirety; this Court "will not hold a portion of the charge prejudicial if the charge as a whole is correct." *State v. Fowler*, 353 N.C. 599, 624 (2001) (citation omitted). So long as the trial court's instruction "presents the law fairly and clearly to the jury, the fact that some expressions, standing alone, might be considered erroneous will afford no ground for reversal." *State v. Rich*, 351 N.C. 386, 393-94 (2000) (citation omitted). "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." *Fowler*, 353 N.C. at 624 (citation omitted).

As explained above, operation of a motor vehicle to elude arrest is upgraded from a misdemeanor to a felony if the State proves the existence of two or more aggravating factors. N.C. Gen. Stat. § 20-141.5(b). Two of the enumerated aggravating factors include "[r]eckless driving as proscribed by [N.C. Gen. Stat. §] 20-140" and "[d]riving when the person's drivers license is revoked." *Id.*

Here, because Defendant stipulated that his license was revoked, the State only had to prove beyond a reasonable doubt that Defendant was driving recklessly at the time of the incident for the offense to get upgraded to a felony. At the beginning of its charge to the jury, the trial court explained,

> You're going to be determining whether the defendant is guilty of felony flee to elude arrest. . . . But, [] if certain elements have not been proven, you will be determining whether the defendant is guilty of a misdemeanor of flee to elude arrest[.]
>
> . . . .
>
> As far as the flee to elude arrest, if the defendant is operating a vehicle while his license is revoked, if his driving is reckless, then that rises it to the level of a felony . . . .
>
> . . . And as far as the flee to elude arrest, ladies and gentlemen, *the State has no burden of proving to you that the*

> *defendant's license was revoked*. That element has been deemed proven because the defense and the State have agreed, the defendant agreed that his license was revoked, so the State doesn't have to prove that particular element beyond a reasonable doubt because it's already deemed proven, but the circumstance as it concerns the driving, whether it was reckless, *the burden is still on the State to prove to you beyond a reasonable doubt that the defendant's driving was reckless* as it concerns the charge of flee to elude arrest.

(emphasis added).

After explaining this to the jury, the trial court utilized the Pattern Jury Instructions for the offense of felonious operation of a motor vehicle to elude arrest and instructed the jury as follows:

> The defendant has been charged with felonious operation of a motor vehicle to elude arrest. For you to find the defendant guilty of this offense, the State must prove four things beyond a reasonable doubt.
>
> First, that the defendant was operating a motor vehicle.
>
> Second, that the defendant was operating that motor vehicle on a street, highway, a public vehicular area in Forsyth County.
>
> Third, that the defendant was fleeing and attempting to elude a law enforcement officer who was in lawful performance of his duties. . . .
>
> And four, that two or more of the following factors were present at that time: That the defendant's driving was reckless; that the defendant drove the vehicle in a reckless manner, and that in doing so, he acted carelessly and heedlessly in willful or wanton disregard of the rights and safety of others. And what is deemed to have already been proven, what the defendant has agreed to, his license was in a state of revocation. The State does not have to prove that element beyond a reasonable doubt because it is agreed and is stipulated that the defendant was driving that vehicle while his license was in a state of revocation.

The trial court's instructions are correct as a matter of law and clearly explain that the State had the burden of proving reckless driving

beyond a reasonable doubt. The trial court properly instructed that Defendant will be guilty of a felony "if the defendant is operating a vehicle while his license is revoked, [and] if his driving is reckless." The trial court explained that if one of those two factors cannot be established, Defendant would be convicted of "only misdemeanor flee to elude arrest." The trial court then clearly articulated that "the State has no burden of proving to you that the defendant's license was revoked," but that "the burden is still on the State to prove to you beyond a reasonable doubt that the defendant's driving was reckless[.]" The trial court instructed the jury several times on this issue, and at each point the instruction clearly articulated what the jury would have to find in order to convict Defendant of felonious operation of a motor vehicle to elude arrest.

Although the jury asked for clarification regarding "the differences between felony and misdemeanors for each charge," its inquiry does not render the trial court's instructions erroneous. In response to the jury's question, the trial court further clarified the requirements for felony flee to elude arrest in this case:

> For it to be a felony flee to elude arrest, the State also has the burden of proving beyond a reasonable doubt that at the time the defendant was operating the vehicle, his license was revoked. Now, that already been deemed proven. The State doesn't have to put on evidence. The defendant, his counsel, they agreed, yes, my license was revoked. They don't have to put on evidence as to that element. It's deemed already proven. There's an agreement. There's a stipulation, yes, my license was revoked.
>
> But they have to prove 2, and the second one is that his license -- that his driving was reckless. So they have proven one. His license was revoked by a stipulation by agreement. The other that the State has to prove beyond a reasonable doubt, that the manner in which the defendant was operating his vehicle was careless and reckless.

The trial court then repeated its instruction for the charge of felonious operation of a motor vehicle to elude arrest, again utilizing the Pattern Jury Instructions.

Taken as a whole, the trial court's instruction to the jury on felonious operation of a motor vehicle to elude arrest is correct. It accurately and fairly articulated the legal standard for the offense and explained that while the State did have the burden of proving that Defendant was

driving recklessly, it did not have to prove that Defendant's license was revoked. Accordingly, the trial court did not err, much less plainly err, in its instructions to the jury.

III. Conclusion

For the foregoing reasons, we find no error.

NO ERROR.

Judge STROUD and ZACHARY concur.

STATE OF NORTH CAROLINA
v.
J'MAL RASHAD TOWNSEND

No. COA24-431

Filed 21 May 2025

1. Criminal Law—murder trial—jury instructions—self-defense—disqualifying felonious conduct—causal nexus established

The trial court did not commit plain error in defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana) by instructing the jury that if it found an immediate causal nexus between defendant's use of force and the attempt to commit, commission of, or escape after the commission of a felony, defendant would be disqualified from asserting self-defense. Despite defendant's argument to the contrary, the contemporaneous criminal conduct engaged in by defendant in this case, attempting to possess two ounces of marijuana and attempting to possess any amount of marijuana with the intent to sell or deliver, were felonies that could negate a claim of self-defense upon a showing by the State that, but for defendant's felonious conduct, the fatal confrontation with the victim would not have occurred.

2. Evidence—lay opinion testimony—admissibility—bullet trajectory—detective not qualified as ballistics expert—no abuse of discretion

In defendant's trial for second-degree murder (which arose from the fatal shooting of a man from whom defendant sought to buy marijuana), the trial court did not abuse its discretion by allowing

testimony from a detective regarding the trajectory of bullets based on dowel rods that he had placed in bullet holes at the crime scene. In addressing this issue of first impression, the appellate court noted that, although the detective was not qualified as an expert in ballistics or projectiles, his testimony was properly admitted as lay opinion testimony pursuant to Evidence Rule 701, since his opinion was based on his own personal observations, training, and experience.

3. Evidence—lay opinion testimony—bullet trajectory—detective not qualified as ballistics expert—not subject to statutory disclosure requirement

In defendant's trial for second-degree murder (which arose from the shooting of a man from whom defendant sought to buy marijuana), where a detective's testimony regarding bullet trajectories was properly admitted as lay opinion testimony and where the detective was not qualified as an expert witness at the trial, the disclosure requirements in N.C.G.S. § 15A-903(a)(2) (requiring the State to provide expert witness materials to defendants prior to trial) did not apply.

Appeal by Defendant from Judgment entered 28 December 2022 by Judge Michael D. Duncan in Guilford County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Zachary K. Dunn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Brandon Mayes, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

J'Mal Rashad Townsend (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Second-Degree Murder. The Record before us, including evidence presented at trial, tends to reflect the following:

On 3 October 2017, Brandon Frye, the victim in this case, received a phone call informing him someone was "on the way" to buy marijuana from him. Frye was in his apartment with his roommate, Nolan Clarke. Frye then went to the kitchen to weigh an ounce of marijuana for sale. Frye answered a knock at the door and Defendant entered the

apartment. Defendant asked Frye if he could buy more than the one ounce of marijuana Frye had prepared. Frye went to prepare another ounce, and Defendant left the apartment to get more money.

During this exchange, Clarke also left the apartment through the back door to take their dog out. While outside, Clarke "heard multiple gun shots" fired "in rapid succession." Clarke entered the apartment and heard Frye "in the bathroom moaning" and saw "dust from a bullet that went through the wall." Clarke observed the front door was open, found Frye injured in the bathroom, and called 911. First responders attempted to render aid, but they were unable to revive Frye. It was later determined Frye died of a gunshot wound to the chest.

Detective Jarrod Waddell of the Greensboro Police Department investigated the scene. Detective Waddell used dowel rods placed in the bullet holes to determine the trajectory of the gunshots.

Defendant was indicted for First-Degree Murder and Robbery with a Dangerous Weapon in connection with this incident on 22 January 2018. This matter came on for trial on 28 November 2022. At trial, Detective Waddell testified about his investigation and specifically about certain bullet holes and the trajectories of the bullets that caused them. The State repeatedly questioned Detective Waddell about the "significance" of different photographs of bullet holes from the crime scene. In one such exchange, for example, the State asked about State's Exhibit 118—a photograph from the scene. Detective Waddell explained:

> [Detective Waddell]: That is the dowel rod with the through and through of the front door from the perspective inside the hallway you can see where it creates an angle as it[']s coming from the bathroom from the right side to the left to the closet door.
>
> [The State]: All right. So the door was in – is this door lined up if we were to do a – if you were to do a line?
>
> [Detective Waddell]: Yes, our – our attempt was to position the door wherever the door had been at what position of open would it have been, our closest proximity to open to achieve that angle.

Detective Waddell acknowledged he is not an expert in ballistics nor bullet trajectory. Counsel for Defendant objected repeatedly to Detective Waddell's testimony regarding the trajectory of the bullets on the basis that he is not an expert in projectiles or ballistics. The trial court overruled these objections, stating: "Ladies and gentlemen, the Court is

going to allow this individual to testify. He's not been qualified as an expert witness, but based upon his training and experience he may be able to give some explanation, some testimony of these photographs."

During the charge conference, the parties and trial court discussed a possible self-defense instruction at length. The parties specifically discussed the North Carolina Supreme Court's holding in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022) and its impact on the State's burden of proof with respect to self-defense. Defense counsel ultimately agreed with the jury instruction on self-defense as the trial court gave it, which included an instruction self-defense is not available to a person "who used defensive force and who was attempting to commit or committing a felony." The trial court further instructed the jury the State must prove "an immediate causal nexus between the Defendant's use of force and felony conduct used to disqualify the Defendant from use of defensive force." The trial court also informed the jury, among other things, that attempting to possess two ounces of marijuana and attempting to possess any amount of marijuana with the intent to sell or deliver are felonies.

On 8 December 2022, the jury returned a verdict finding Defendant not guilty of Robbery with a Dangerous Weapon and First-Degree Murder; however, the jury found Defendant guilty of Second-Degree Murder. The trial court sentenced Defendant to 300 to 372 months of imprisonment. Defendant gave oral Notice of Appeal in open court on 8 December 2022.

Issues

The issues on appeal are whether the trial court erred by (I) instructing the jury as to the causal nexus requirement and (II) admitting Detective Waddell's testimony; and whether (III) Detective Waddell's testimony was subject to statutory disclosure requirements.

Analysis

I. Jury Instruction

[1] Defendant contends the trial court erred in instructing the jury on the issue of self-defense because, in his view, felony possession of marijuana could not serve as a disqualifying felony to negate his self-defense claim. We disagree.

As Defendant acknowledges, he did not object to the jury instructions at trial. Thus, our review is limited to plain error. N.C. R. App. P. 10(a)(4) (2024) ("In criminal cases, an issue that was not preserved

by objection noted at trial and that is not deemed preserved by rule or law without any such action nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error."). "For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (emphasis in original) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)).

"The prime purpose of a court's charge to the jury is the clarification of issues, the elimination of extraneous matters, and a declaration and an application of the law arising on the evidence." *State v. Kuhns*, 260 N.C. App. 281, 284, 817 S.E.2d 828, 830 (2018) (quoting *State v. Cameron*, 284 N.C. 165, 171, 200 S.E.2d 186, 191 (1973)). Accordingly, "it is the duty of the trial court to instruct the jury on all substantial features of a case raised by the evidence." *State v. Shaw*, 322 N.C. 797, 803, 370 S.E.2d 546, 549 (1988) (citation omitted)). "Whether a jury instruction correctly explains the law is a question of law, reviewable by this Court *de novo*." *State v. Barron*, 202 N.C. App. 686, 694, 690 S.E.2d 22, 29 (2010), *disc. review denied*, 364 N.C. 327, 700 S.E.2d 926 (2010). "This Court reviews jury instructions contextually and in [their] entirety." *State v. Blizzard*, 169 N.C. App. 285, 296, 610 S.E.2d 245, 253 (2005) (citation omitted). "[A]n error in jury instructions is prejudicial and requires a new trial only if 'there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises.' " *State v. Castaneda*, 196 N.C. App. 109, 116, 674 S.E.2d 707, 712 (2009) (quoting N.C. Gen. Stat. § 15A-1443(a)).

In certain circumstances, a person "is justified in the use of deadly force and does not have a duty to retreat in any place he or she has the lawful right to be[,]" including if that person "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself or herself or another." N.C. Gen. Stat. § 14-51.3(a)(1) (2023).

The affirmative defense of self-defense is not available, however, to a defendant who used defensive force and "[w]as attempting to commit, committing, or escaping after the commission of a felony." N.C. Gen. Stat. § 14-51.4(1) (2023). The North Carolina Supreme Court clarified in *State v. McLymore*, 380 N.C. 185, 868 S.E.2d 67 (2022), that Section 14-51.4(1) incorporates a causal nexus requirement. There, the Court held "in order to disqualify a defendant from justifying the use of force as self-defense pursuant to N.C.G.S. § 14-51.4(1), the State must prove the existence of an immediate causal nexus between the defendant's disqualifying conduct and the confrontation during which the defendant used force." *Id.* at 197, 868 S.E.2d at 77. "The State must introduce evidence that 'but for the defendant' attempting to commit, committing, or escaping after the commission of a felony, 'the confrontation resulting in injury to the victim would not have occurred.' " *Id.* at 197-98, 868 S.E.2d at 77 (quoting *Mayes v. State*, 744 N.E.2d 390 (Ind. 2001)).

During the charge conference, counsel for both parties discussed a potential self-defense instruction. After hearing arguments from both parties, the trial court gave a proposed instruction to which each side agreed.

Defendant contends there was no causal nexus between Defendant's felony possession of marijuana and the circumstances leading to Frye's death. In *McLymore*, however, our Supreme Court noted "whether or not a defendant was engaged in disqualifying conduct bearing an immediate causal nexus to the circumstances giving rise to his or her use of force" is ordinarily a jury question. 380 N.C. at 198, 868 S.E.2d at 77 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 2356, 147 L. Ed. 2d 435 (2000)). Indeed, this Court has stated "Where the State introduces such evidence, the existence of a causal nexus is a jury determination[.]" *State v. Vaughn*, 293 N.C. App. 770, 777, 901 S.E.2d 260, 266 (2024).

Here, the trial court properly instructed the jury on the causal nexus requirement:

> Additionally, self-defense is not available to a person who used defensive force and who was attempting to commit or committing a felony. *The law requires an immediate causal nexus between the Defendant's use of force and felony conduct used to disqualify the Defendant from use of defensive force.* The State of North Carolina must prove beyond a reasonable doubt that the existence of an immediate causal nexus between the Defendant's disqualifying

> conduct, i.e., attempting to commit a felony or committing a felony, and the confrontation during which the Defendant used force. *The State must prove beyond a reasonable doubt that but for the Defendant attempting to commit or committing a felony, the confrontation resulting in the injury to the victim would not have occurred.* There would be an immediate causal nexus between the felony of robbery with a dangerous weapon and the Defendant's use of force, and therefore, the Defendant would be disqualified from using defensive force if he was committing or attempting to commit robbery with a dangerous weapon. Attempting to possess two ounces of marijuana, attempting to possess any amount of marijuana with the intent to sell or deliver are all felonies.
>
> . . . .
>
> [S]elf-defense is not available to a person who used defensive force and who was attempting to commit or committing a felony. The law in the State of North Carolina requires an immediate causal nexus between the Defendant's use of force and felony conduct used to disqualify the Defendant from the use of defensive force. The State of North Carolina must prove beyond a reasonable doubt the existence of an immediate causal nexus between the Defendant's disqualifying conduct, i.e., attempting to commit a felony or committing a felony and the confrontation during which the Defendant used force. The State must prove beyond a reasonable doubt that, but for the Defendant attempting to commit or committing a felony, the confrontation resulting in injury to the victim would not have occurred.

(emphasis added). The trial court also instructed the jury that "[a]ttempting to possess two ounces of marijuana, attempting to possess any amount of marijuana with the intent to sell or deliver are felonies."

These instructions closely follow the guidance set forth in *McLymore* regarding the causal nexus requirement, including expressly articulating the State's burden to prove but-for causation between Defendant's felonious conduct and the confrontation resulting in Frye's death. Thus, on the Record before us, the trial court's instruction on the causal nexus requirement does not rise to the level of plain error.

II. Detective Waddell's Testimony

[2] Generally, a trial court's evidentiary rulings are reviewed for abuse of discretion. *See State v. Tellez*, 200 N.C. App. 517, 526, 684 S.E.2d 733, 739 (2009) ("The standard of review for this Court assessing evidentiary rulings is abuse of discretion." (citations and quotation marks omitted)). However, "[w]hen the issue is whether 'the trial court's decision is based on an incorrect reading and interpretation of the rule governing admissibility of expert testimony, the standard of review on appeal is *de novo*.' " *State v. Phillips*, 268 N.C. App. 623, 634, 836 S.E.2d 866, 873 (2019) (quoting *State v. Parks*, 265 N.C. App. 555, 563, 828 S.E.2d 719, 725 (2019)). Here, Defendant contends the trial court erred in admitting portions of Detective Waddell's testimony regarding the trajectory of the bullets under Rule 701 because, in his view, Detective Waddell offered expert opinions where he had not been qualified as an expert and his testimony did not satisfy the requirements for expert testimony under Rule of Evidence 702.

Under Rule 701, a witness may offer lay opinion testimony so long as it is "limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." N.C. Gen. Stat. § 8C-1, Rule 701 (2023). Our courts have consistently held "the testimony of an investigating officer was properly admitted at trial where it was 'based on his personal observations' and 'helpful to a clear understanding of his testimony' concerning the facts in question." *State v. Delau*, 381 N.C. 226, 237, 872 S.E.2d 41, 48 (2022) (citing *State v. Dickens*, 346 N.C. 26, 46, 484 S.E.2d 553, 564 (1997) and *State v. Lloyd*, 354 N.C. 76, 109, 552 S.E.2d 596, 620 (2001)).

Neither party has presented, nor have we found, any North Carolina case addressing whether bullet trajectory testimony is admissible under Rule 701. Thus, whether a law enforcement officer may offer lay opinion testimony on the use of dowel rods to determine bullet trajectory is a matter of first impression before this Court. In reaching our conclusion, we consider how courts in other jurisdictions have treated such bullet trajectory evidence under similar or identical rules of evidence.

Notably, the Superior Court of Pennsylvania addressed precisely this issue in *Commonwealth v. Kennedy*, 151 A.3d 1117 (Pa. Super. Ct. 2016). There, the court considered several cases with similar facts to the case before us and ultimately concluded the testimony at issue was admissible. *Id*. at 1127. First, the *Kennedy* court identified *United States v. Beckford*, 211 F.3d 1266 (4th Cir. 2000) (per curiam) (unpublished). In

Beckford, "one of the investigating detectives inserted a pencil into bullet holes found in the . . . apartment to ascertain the angle of the bullet path." *Id.* at *6. Based on those observations and crime scene photographs, the government created a computer-generated diagram showing red lines tracing the bullet path "suggested by the pencil angle." *Id.* The defendant objected, arguing this evidence required specialized knowledge under Federal Rule of Evidence 702.[1] The district court overruled the defendant's objection. The Fourth Circuit affirmed, stating "the district court reasonably concluded that the detective's testimony concerning his findings, as aided by the diagram, was rationally based on his perceptions and helpful to a clear understanding of his investigation and observations." *Id.*

Similarly, in *People v. Caldwell*, 43 P.3d 663 (Colo. App. 2001), the Colorado Court of Appeals addressed a case in which a former police officer, who was a crime scene technician at the time of the underlying shooting, testified about the trajectory of the bullets. There, the witness' testimony was based on "his own observations and the use of a dowel and string" to track the paths of the bullets. *Id.* at 667. As here, the defendant objected to the testimony, claiming the witness' testimony required an expert opinion, and the trial court overruled the objection. *Id.* On appeal, the court affirmed, reasoning:

> [T]he witness' testimony included only his observations about the entry locations of the bullets and the path they traveled inside the vehicle. Such observations could just as easily have been made by the jury from the photographs. No special expertise is required to look at the hole made by the bullet and realize that it followed a straight-line path.

Id. (citation omitted).

Likewise, the Special Court of Appeals of Maryland reached the same conclusion in a case where a police officer "examined [the victim]'s car . . . and, as part of his examination, placed 'trajectory rods' through the bullet holes in the car and photographed the rods in place." *Prince v. State*, 216 Md. App. 178, 186, 85 A.3d 334, 339 (2014). The defendant in that case challenged the admissibility of that evidence under Maryland's version of Rule 701, arguing the evidence was exclusively within the purview of expert witnesses. *Id.* at 198, 85 A.3d at 346. The court rejected

1. Federal Rule of Evidence 702 is identical to North Carolina Rule of Evidence 702.

that argument, reasoning "[a] police officer who does nothing more than observe the path of the bullet and place trajectory rods (in the same manner as any layman could) need not qualify as an expert to describe that process." *Id.* at 202, 85 A.3d at 348 (emphasis removed).

As the *Kennedy* court observed, although several courts have seemingly required expert testimony as to bullet trajectory under Rule 702, these cases are distinguishable from those above and the case at bar. For example, the First Circuit in *McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), concluded photographs of bullet holes in a windshield were insufficient to prove bullet trajectory absent expert testimony. There, however, there was no lay opinion testimony offered on the issues; rather, the plaintiff relied solely upon photographs of the windshield, and the only testimony offered came from an expert witness for the defense who stated the bullet trajectories could not be determined based on the photographs in that specific case. *Id.* at 26-27. Likewise, a factually similar case arising from the Fifth Circuit, *Hathaway v. Bazany*, 507 F.3d 312 (5th Cir. 2007), did not address the question of lay opinion testimony at all. There, the issue on appeal centered on whether an officer's methodology in determining bullet trajectory was sufficient under Rule 702—not whether the testimony would be admissible under Rule 701. *Id.* at 317. And, as in *McGrath*, there were no dowel rods or other type of trajectory rod placed in the bullet holes to help determine trajectory. *Id.* at 318-19.

We are persuaded by our own reading of these cases that, based on the facts of this case, Detective Waddell's testimony was properly deemed lay opinion testimony. As in *Kennedy*, *Prince*, and *Caldwell*, Detective Waddell used dowel rods at the crime scene to help him determine the trajectory of the bullets fired. And although his testimony was based on his training and experience, "[t]he mere fact that a witness is a law enforcement officer does not automatically transform his testimony into expert testimony." *Prince*, 216 Md. App. at 201, 85 A.3d at 348. Rather, Detective Waddell's testimony was based on observation appropriate for lay opinion testimony; "[h]e conducted no experiments, made no attempts at reconstruction, and 'was not conveying information that required a specialized or scientific knowledge to understand.' " *Id.* at 202, 85 A.3d at 348 (quoting *Caldwell*, 43 P.3d at 668). Indeed, our caselaw recognizes a law enforcement officer may offer lay opinion testimony based on their training and experience in other contexts. *See, e.g.*, *State v. Garnett*, 209 N.C. App. 537, 546, 706 S.E.2d 280, 286 (2011) (noting a law enforcement officer may testify to visual identification of marijuana based on their training and experience).

Thus, Detective Waddell's testimony was properly considered lay opinion testimony. Therefore, the trial court did not err in admitting this testimony under Rule 701.

III. Disclosure of Detective Waddell's Testimony

[3] Defendant contends that because, in his view, Detective Waddell's testimony was expert opinion testimony, it was subject to N.C. Gen. Stat. § 15A-903(a)(2). That statute provides, in pertinent part: "Upon motion of the defendant, the court must order . . . [t]he prosecuting attorney to give notice to the defendant of any expert witnesses that the State reasonably expects to call as a witness at trial. Each such witness shall prepare, and the State shall furnish to the defendant, a report of the results of any examinations or tests conducted by the expert." N.C. Gen. Stat. § 15A-903(a)(2) (2023). However, because we conclude Detective Waddell's testimony was lay opinion testimony, Section 15A-903(a)(2) does not apply.

Defendant points to *State v. Davis*, 368 N.C. 794, 785 S.E.2d 312 (2016), for the proposition that a witness' opinions may be expert opinions subject to Section § 15A-903(a)(2) even where this Court concludes they were not expert opinions. *Davis* is readily distinguishable. In *Davis*, the witness at issue had been "accepted without objection as an expert" and answered questions with "opinions based on his expertise." *Id.* at 807-08, 785 S.E.2d at 320. In contrast, Detective Waddell was not qualified as an expert witness at trial and we concluded his testimony regarding the trajectory of the bullets was lay opinion testimony. Thus, the case sub judice is materially different from *Davis*. We, therefore, conclude Detective Waddell's testimony was not subject to disclosure under Section 15A-903. Consequently, the State did not violate its disclosure requirements by failing to disclose Detective Waddell's testimony.

Conclusion

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

NO ERROR.

Chief Judge DILLON and Judge FREEMAN concur.

RICHARD THOMPSON AND TINA THOMPSON, PLAINTIFFS
v.
ROCK BARN PROPERTIES, INC., JEFF KEEVER CONSTRUCTION, INC., AND KEVIN CHEEK (RIDGELINE INSTALLATIONS), DEFENDANTS

No. COA24-958

Filed 21 May 2025

Appeal and Error—record on appeal—insufficient for meaningful review—trial court judgment affirmed

In a case arising from alleged defects in the construction of plaintiffs' home (and the efforts undertaken to remediate them), the trial court's denial of plaintiffs' motions—for directed verdict, to reconsider, for judgment notwithstanding the verdict, and for a new trial—were affirmed where plaintiffs failed to provide the record on appeal necessary to properly review (much less support) their appellate arguments and because the appellate court was unable to discern any error in the trial below.

Appeal by plaintiffs from final judgment entered 16 January 2024 by Judge Michael D. Duncan in Superior Court, Catawba County. Heard in the Court of Appeals 22 April 2025.

Matthew K. Rogers, for plaintiffs-appellants.

Bolster Rogers, PC, by Jeffrey S. Bolster and Melissa R. Monroe, for defendant-appellee Jeff Keever Construction, Inc.

Morgan Law, PLLC, by William E. Morgan, for defendant-appellee Kevin Cheek (Ridgeline Installations).

ARROWOOD, Judge.

Richard and Tina Thompson ("plaintiffs") appeal from the trial court's final judgment denying their renewed directed verdict motion, motion to reconsider, motion for judgment notwithstanding the verdict and motion for new trial. This final judgment followed the trial court granting a motion for summary judgment in favor of defendant Kevin Cheek ("Cheek") on a breach of contract claim, directed verdict in favor of Cheek and defendant Jeff Keever ("Keever") (together, "defendants")[1]

1. Defendant Rock Barn Properties, Inc. settled with plaintiffs before trial and is therefore not a party to this appeal. It is referred to as "Rock Barn" within the factual background.

on fraud claims and unfair and deceptive trade practices claims, a jury verdict in Keever's favor on all other claims, and an order granting defendants' motions for costs. For the following reasons, we affirm the judgment of the trial court.

I. Factual Background

The settled record on appeal tends to show the following. Rock Barn contracted with Keever to serve as the general contractor to construct a home in Conover, North Carolina. In March 2019, plaintiffs became interested in this home, performed two walk-throughs, and signed a purchase offer, closing on 11 April 2019.

Later that year, issues relating to moisture and flooring began to develop. Keever began working to address these issues, first subcontracting with Startown Carpet ("Startown"), and later involving Cheek to install replacement flooring. The repairs stretched over the next year and a half, resulting in multiple conflicts between the various parties involved. Keever's involvement with the home repairs ended in November 2020, and plaintiffs' relationship with Rock Barn continued to degrade into early 2021.

Plaintiffs subsequently initiated this case with a seven-claim complaint filed 4 May 2021. Their complaint alleged breaches of contract (including breaches of express and implied warranties), fraud, negligent misrepresentation, and unfair and deceptive trade practices. Defendants responded with a variety of motions to dismiss, defenses, and, in Keever's case, a third-party complaint against Startown. It appears that two years of discovery followed defendants' responses before Cheek filed a motion for summary judgment. On 26 July 2023, the trial court granted Cheek's motion for summary judgment as to the breach of contract claim, but denied it as to the claims for fraud and deceptive trade practices.[2]

The case went to trial, and a jury was empaneled 31 July 2023. At the close of plaintiffs' evidence, Cheek moved for, and the trial court granted, a directed verdict on all claims against him: fraud, unfair and deceptive trade practices, and punitive damages. At the close of Keever's evidence, plaintiffs moved for a directed verdict, which was denied. The only issues remaining for the jury were those concerning Keever; using

2. This order was amended *sua sponte* on 27 July 2023 to reflect that Cheek's motion for summary judgment on plaintiffs' claim for negligent misrepresentation was also granted.

an issue sheet, the jury, on 15 July 2023, found that there was a contract between plaintiffs and Keever, that Keever did not breach the contract or the express warranty, that there was an implied warranty of habitability created, and that Keever did not breach this warranty.

On 24 August 2023, plaintiffs renewed their motion for a directed verdict, and moved for reconsideration, JNOV, and a new trial. The trial court denied all these motions on 16 January 2024, denied defendants' motions for attorney's fees, and granted defendants' motions for costs. Plaintiffs gave notice of appeal on 15 February 2024.

II. Discussion

Plaintiffs raise five issues on appeal: (1) that the trial court erred in directing a verdict in favor of defendants on plaintiffs' claims of fraud; (2) that the trial court erred in directing a verdict in favor of defendants on plaintiffs' claims of unfair and deceptive trade practices; (3) that the trial court erred in failing to direct a verdict and enter a judgment notwithstanding the verdict that Keever breached the builder's warranty in the purchase contract and the implied warranty of habitability; (4) that the foregoing trial court errors, combined with the court's refusal to submit specific issues of fact and jury instructions, inclusion of other jury instructions, and comments made by Keever's counsel during closing arguments, confused and prejudiced the jury; and (5) that the trial court erred in awarding defendants' costs. Because plaintiffs have failed to provide this Court with the record necessary to properly review, much less support their arguments, we affirm the judgment of the trial court.

"The standard of review of directed verdict is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green v. Freeman*, 367 N.C. 136, 140 (2013) (quoting *Davis v. Dennis Lilly Co.*, 330 N.C. 314, 322 (1991)). "If there is evidence to support each element of the nonmoving party's cause of action, then the motion for directed verdict and any subsequent motion for JNOV should be denied." *Id.* at 140–41 (cleaned up).

Our review of an appeal is based solely on the record and transcripts provided us by the parties. N.C. R. App. P. Rule 9(a). An appellant is not required to provide the entire transcript, but if they elect to provide only portions, "so much of the testimonial evidence must be designated as is necessary for an understanding of all issues presented on appeal." *Id.* Rule 9(c)(2).

In the case *sub judice*, plaintiffs have elected to provide us with only a portion of the transcript from the trial. The jury was empaneled

on 31 July 2023, yet the transcript in the record begins on 7 August 2023, a full week after the trial had begun. Plaintiffs have not indicated what occurred during these days. Additionally, plaintiffs have chosen to only include certain one-sided parts of testimony from critical witnesses, including both defendants and plaintiff Richard Thompson. Defendants' counsel's examination of Cheek is absent, as is the entirety of Keever's direct examination. All cross-examination of Richard Thompson is missing. These omissions clearly do not satisfy Rule 9's requirement to provide enough testimony to understand all the issues or the proceedings below.

Defendants each recognize this, and in their briefs, request the Court dismiss plaintiffs' appeal. We agree that plaintiffs' provided transcript is insufficient and ultimately fatal to their appeal, but we do not find support in our case law that dismissal is an appropriate remedy. However, plaintiffs' response to defendants' request to dismiss provides us with the appropriate framing for our disposition.

Plaintiffs engage in a blatant misstatement of our caselaw regarding the burden of creating and settling the record. Plaintiffs contend that in *Scott v. Scott*, 293 N.C. App. 639 (2024), this Court "found that Rule 9(c) of the North Carolina Rules of Appellate Procedure *places the burden on each respective party* to include in the record sufficient evidence and transcripts necessary to prevail on the issues presented." (emphasis added). That is not what *Scott* holds, and this purported interpretation of Rule 9 has no support in our jurisprudence, particularly in the context of a directed verdict.

In *Scott*, we held that the appellant's failure to provide a transcript bound us to accept the trial court's findings of fact as supported by the evidence for the simple reason that "that the *appellant* – not the appellee – has the duty to ensure that the record is complete." *Id.* at 646 (emphasis in original) (citation omitted). *Scott* is one of many cases that recognizes the burden of compiling a sufficient record rests *squarely on the appellant*, not on either "respective party." *See*, *e.g.*, *State v. Alston*, 307 N.C. 321, 341 (1983) ("It is the appellant's duty and responsibility to see that the record is in proper form and complete.").

Plaintiffs have failed to sustain their burden by neglecting to provide us with the entire transcript of the trial proceedings, leaving us with no option but to affirm the trial court decisions and the jury verdict. It is impossible to properly evaluate plaintiffs' arguments when they have omitted vital portions of the testimony, the jury charge and the closing arguments of counsel.

The central point of review on a motion for directed verdict "is whether the evidence, taken in the light most favorable to the non-moving party, is sufficient as a matter of law to be submitted to the jury." *Green*, 367 N.C. at 140 (citation omitted). Plaintiffs' appellate counsel's failure to include essential and relevant record materials in asking the question of *whether the evidence is sufficient to be submitted to the jury* is difficult to understand.

In addition, while complaining about a jury charge and counsel arguments, it is impossible to show error without tendering transcripts of those portions of the trial for our review. *See State v. Deese*, 127 N.C. App. 536, 538 (1997) ("In the present case, the record does not contain a transcript of the entire jury charge. In fact, no part of the court's instructions is included in the record. Therefore, we are unable to determine whether when taken as a contextual whole, the instructions given to the jury fairly and accurately set forth the essential elements of the offenses and defenses warranted by the evidence."); *Joines v. Moffitt*, 226 N.C. App. 61, 69 (2013) ("When the closing arguments of counsel are not transcribed and included in the record, an appellate court is precluded from addressing issues relating to the content of those arguments."). Failure to include the necessary portions of the record can only lead to one result: the affirmation of the judgment below.

Any appellant's failure to properly prepare the record pursuant to Rule 9 or any attempts to present a record which only support materials favorable to the appellant is a certain path to failure. In the present case this failure is exacerbated by trying to excuse the omissions from the record by an obvious misstatement of our case law regarding Rule 9. In view of the insufficiency of the Record we are unable to discern any error in the trial below.

III. Conclusion

Plaintiffs have failed to properly prepare the Record, therefore, we affirm the trial court's judgment.

AFFIRMED.

Judges ZACHARY and GRIFFIN concur.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 21 MAY 2025)

AMATO v. MILLER No. 24-417-2	New Hanover (21CVS776)	Affirmed in Part Reversed in Part, and Remanded
EPIC-NRG, LLC v. RAGLE No. 24-162	Buncombe (22CVS1510)	Affirmed
HAZEN v. PETERS No. 23-488	Alamance (22CVS432)	Affirmed
IN RE B.E.R. No. 24-974	Davie (22JT000057) (22JT000058)	Affirmed
IN RE K.A.S. No. 24-776	Haywood (22JT000009) (22JT000010) (22JT000011)	Affirmed
IN RE K.B.I. No. 24-874	Caswell (23JA000025-160) (23JA000026-160) (23JA000027-160) (23JA000028-160)	Affirmed.
IN RE K.L.S-L. No. 24-1013	Henderson (17JT000190) (21JT000013) (21JT000014)	Affirmed
IN RE N.P. No. 24-908	Cumberland (21JA000039)	Affirmed
IN RE SALGADO No. 24-757	Forsyth (22JRI000004)	Vacated and Remanded.
IRA CLUB FBO MELISSA DAHLQUIST IRA 2000487 v. DANZY No. 24-480	Mecklenburg (23CVD006702-590)	REVERSED IN PART; AFFIRMED IN PART; VACATED IN PART AND REMANDED.
LITTLE v. CLAY No. 24-956	New Hanover (22CVS000353)	Affirmed
MANN v. GOSHEN MED. CTR., INC. No. 24-679	Harnett (21CVS000283)	Affirmed in Part, Vacated in Part, and Remanded

McGRAW v. MAYER No. 24-577	Forsyth (23CVD000220)	Affirmed.
SCHAEFER v. CLARKE No. 24-1099	Guilford (22CVS006664)	Affirmed
STATE v. BULLOCK No. 24-632	Pitt (22CRS050665) (22CRS050666) (22CRS051169)	Dismissed
STATE v. CLOTEZ No. 24-588	Onslow (19CRS052653) (19CRS055890)	No Error
STATE v. COOK No. 24-532	Catawba (21CR052730-170)	No Error
STATE v. DAVIS No. 24-616	Hoke (22CRS050597) (22CRS050598)	No Error.
STATE v. ELLER No. 24-819	Wilkes (22CRS051421-22) (23CRS000011) (23CRS000222) (23CRS210474) (23CRS286190) (23CRS700215) (23CRS700217)	Affirmed.
STATE v. HAWKINS No. 24-825	Columbus (21CRS052284-85)	Affirmed
STATE v. OLLIS No. 24-606	Avery (21CRS050567) (22CRS000103)	No Error
STATE v. PITTMAN No. 24-771	Gaston (21CRS54547)	No Error
STATE v. POULIN No. 24-810	Onslow (21CRS055908) 21CRS055910)	Vacated and Remanded
STATE v. ROUSE No. 24-767	Davidson (21CRS055431) (21CRS055435) (22CRS354557)	AFFIRMED; REMANDED FOR CORRECTION OF JUDGMENT.
STATE v. WATSON No. 24-828	Wake (21CR210675-910) (21CR210676-910)	No Prejudicial Error In Part, and Dismissed In Part

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