299 N.C. App.—No. 2 Pages 150-303

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

JANUARY 29, 2026

MAILING ADDRESS: The Judicial Department
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[4] Term ended 31 December 2024. [5] Term ended 31 December 2024.

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COURT OF APPEALS

CASES REPORTED

FILED 4 JUNE 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

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Petition for writ of certiorari—voluntariness of guilty plea—no probable error—In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's petition for writ of certiorari—in which he asserted that his plea was not knowingly, intelligently, and voluntarily made—was denied. Defendant failed to demonstrate probable error by the trial court when advising defendant during the plea colloquy of his right to appeal the denial of his pretrial motion to suppress. Contrary to defendant's assertion that he was led to believe he could appeal from the denial all of his pretrial motions—some of which were not appealable—the full colloquy demonstrated that the nature and consequences of the plea were explained to defendant in open court and that he received the benefit of his bargain. **State v. Hannah, 266.**

brief identifying only one potential issue and respondent-father did not file a pro se brief, the appellate court conducted an independent review of the record and concluded that the trial court made the statutorily required findings and properly considered respondent-father's decision to voluntarily return to incarceration rather than remain on parole and that the trial court did not abuse its discretion in ceasing reunification efforts or in granting guardianship to the foster parents based on the minor child's best interest. **In re M.L.H., 189.**

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Effective assistance of counsel—failure to raise constitutional issues at trial—dismissed without prejudice to file MAR—In an appeal from judgment entered upon defendant's conviction of assault on a female, defendant's claim that his counsel was constitutionally ineffective for failing to raise two constitutional issues at trial was dismissed without prejudice to reassert the claim in a motion for appropriate relief in the trial court; based on the cold record, the appellate court could not decide the issue on the merits without further development of the facts. **State v. Gardner, 251.**

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defendant's guilt triggered a *Harbison* inquiry, counsel's discussion—and the trial court's colloquy at the outset of trial—with defendant demonstrated defendant's knowing and voluntary consent to her counsel's admission. Second, the failure of defendant's trial counsel to object to the trial court's jury instruction on the defense of insanity, despite defendant's clear desire that such a defense not be asserted, even if error, was not prejudicial in light of the jury's verdict—declining to find defendant not guilty by reason of insanity. **State v. Copenhaver, 217.**

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Defenses—insanity—jury instruction given against defendant's wishes—plain error not shown—In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, defendant did not establish prejudice in the trial court's instruction to the jury on the defense of insanity—assuming, without deciding, that the instruction constituted error—even though defendant repeatedly refused to argue insanity at trial and contended on appeal the evidence did not support such an instruction. The jury, in returning a verdict of guilty of first-degree murder, rejected both of the affirmative defenses it was instructed on—insanity and diminished capacity—after the State, in its closing argument, accurately distinguished between the defenses and emphasized that neither defendant nor the State was seeking a verdict of not guilty by reason of insanity. **State v. Copenhaver, 217.**

Guilty pleas—recitation of specific information from allegations in indictments—minor misstatements and omissions—factual basis sufficient—Where defendant's notice of appeal from the judgment entered after he pled guilty to twenty-five offenses was defective, but his intent to appeal was clear and the State was not misled, the Court of Appeals, in its discretion, allowed defendant's petition for writ of certiorari to reach the merits of defendant's argument and reject it; the prosecutor's recitation of specific details and information from the allegations in the indictments was sufficient for the trial court to determine that there was a factual basis for defendant's guilty pleas, despite minor misstatements and omissions by the prosecutor in the recitation. **State v. Owens, 290**.

Jury deliberations—court's response to jury's questions—defense counsel's request for clarifying instruction—no prejudicial error—In a prosecution for charges including robbery with a dangerous weapon, the trial court did not commit prejudicial error by declining to answer the jury's questions during deliberations concerning an essential element of armed robbery—whether the victim's life was threatened or endangered—and in declining defense counsel's subsequent request for an instruction aimed at addressing the jury's questions. The issue was preserved for appellate review where defense counsel objected to the court's jury instructions before and after they were given; however, because defendant could not show a reasonable possibility that the jury would have returned a different verdict absent the purported error, such error was harmless. **State v. Gamble, 242.**

Prosecutor's closing argument—murder trial—credibility of witness—In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not commit reversible error by failing to intervene ex mero motu during the State's closing argument when the prosecutor stated that one of the witnesses "was the most credible witness that testified" in the trial, that the witness "never lied," and that the witness told the jury the truth. The statements were not improper because they were made in the context of showing that the witness gave specifics in his

testimony that matched the physical evidence and, as such, did not constitute improper statements of the prosecutor's personal beliefs but were made in order to give the jury reasons to believe the witness by arguing his truthfulness. **State v. Arrington, 211.**

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PROCESS AND SERVICE

Change of parties on default judgment—void for lack of personal jurisdiction—no summons issued to individual—Rule 60 motion inappropriate—In a negligence case in which the trial court entered an order for entry of default judgment against a corporation, but plaintiff, after discovering that the corporation had been administratively dissolved years earlier, filed a Rule 60 motion to change the name of the judgment defendant from the corporate name to an individual ("Taylor"), the trial court abused its discretion by allowing the motion. First, the trial court had no personal jurisdiction over Taylor because, although plaintiff had served the summons and complaint on Taylor in his capacity as the corporation's registered agent, no summons had been issued or directed to Taylor in his individual capacity and, therefore, valid service of process did not occur. Moreover, plaintiff's attempt to use a Rule 60 motion to name a different judgment defendant could not cure the defective process because, rather than merely correcting a clerical error, the name change amounted to an improper substitution or entire change of parties. Accordingly, the trial court's amended order was vacated as void. **Russell v. Taylor, 207.**

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With a dangerous weapon—evidence of endangerment to victim's life—lesser-included offense instruction not warranted—In a prosecution for charges including robbery with a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury on the lesser-included offense of common law robbery where the State had presented sufficient evidence that the victim's life was threatened or endangered during the robbery—more specifically, that the victim saw defendant holding a rifle with both hands from the time he entered her bedroom

in the middle of the night to steal two purses (after having already entered the home uninvited earlier that evening) until the victim escaped the scene. Further, no conflicting evidence was offered to negate the victim's claim that she felt so threatened by defendant brandishing the rifle that she thought she was going to die that night. **State v. Gamble, 242.**

With a dangerous weapon—sufficiency of evidence—possession of firearm threatening or endangering victim's life—jury instruction on mere possession unwarranted—In a prosecution for charges including robbery with a dangerous weapon, for which one of the essential elements was that the victim's life be threatened or endangered by defendant's use of a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury that defendant's mere possession of a weapon during the course of a robbery, without more, is insufficient to support a finding that the victim's life was endangered or threatened. Defendant's request for this instruction was not supported by the evidence, which showed that defendant brandished a rifle in plain sight throughout the commission of the robbery—which occurred in the middle of the night in the victim's bedroom after defendant had already entered the victim's house uninvited earlier that evening—and the victim was not only aware of defendant brandishing the weapon but also felt so threatened by it that she thought she was going to die. **State v. Gamble, 242.**

SEARCH AND SEIZURE

Consent to search phone—voluntariness—lawful detention—probable cause—lack of coercion—In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's argument that the trial court erred by denying his motion to suppress content from his phone—based on defendant's contention that probable cause did not exist to continue his detention at the time he gave consent for his phone to be searched—had no merit. Where law enforcement had reasonable suspicion or probable cause of multiple crimes during its investigation of defendant—including gun and drug charges, in addition to the sexual offenses—defendant's continued detention was justified; therefore, since he was not unconstitutionally seized or illegally detained, his consent to the phone search was voluntary. Moreover, officers' statement that they would obtain a search warrant unless defendant consented to the search did not amount to coercion because they had the legal authority to do so under the circumstances of the case. **State v. Hannah, 266.**

TAXATION

Real property—revocation of tax-deferred status—due process—actual notice and opportunity to be heard—In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where the county Board of Equalization and Review upheld the parcels' removal from the program, the Commission—in affirming the Board's decision—properly determined that appellant's constitutional due process rights had been adequately preserved where it received actual notice of the change in the parcels' tax status and subsequently participated at a hearing before the Board. Appellant's argument that it was provided insufficient time between the notice and the hearing to prepare its case before the Board was meritless where: appellant chose the hearing date; appellant's manager presented all the evidence appellant intended to

produce at the hearing; nothing in the record indicated that appellant had sought more time to hire counsel or obtain additional evidence; appellant's argument that, had it been given more time, it could have developed a different theory of the case fell flat where the proposed theory was itself meritless; and appellant failed to show that it was harmed by the timing of the notice. **In re Trade Land Co., LLC, 197.**

Real property—revocation of tax-deferred status—notice—statute allowing for "immaterial irregularities"—not unconstitutional—In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where appellant contended that it received untimely notice of the change, the Commission properly affirmed the county Board of Equalization and Review's decision (upholding the parcels' removal from the program) under N.C.G.S. § 105-394, which provides that a failure to give proper notice is an "immaterial regularit[y]" for purposes of property tax assessments. Contrary to appellant's contention, section 105-394 had not been held unconstitutional by the Supreme Court in a case that (1) involved an as-applied rather than facial challenge to the statute, and (2) was factually distinguishable from appellant's case in that it involved a total failure to provide notice. **In re Trade Land Co., LLC, 197.**

Real property—revocation of tax-deferred status—sufficiency of notice—the Machinery Act—timing provisions not implicated—In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program (upon discovering that the parcels never qualified for the program in the first place), the Commission properly affirmed the county Board of Equalization and Review's decision upholding the revocation of the parcels' tax-deferred status. Appellant contended that it did not receive proper notice of the tax assessor's decision under the Machinery Act, which required notice prior to the Board's first meeting of the year whenever a property received a new "appraisal" or "assessment." However, this timing requirement was inapplicable because appellant's parcels had not been reappraised or reassessed; rather, the tax assessor simply changed the status of appellant's already-assessed taxes from deferred to due. Thus, the notice provided to appellant was sufficient under the Act. **In re Trade Land Co., LLC, 197.**

TERMINATION OF PARENTAL RIGHTS

Termination not in juvenile's best interest—father thwarted by adoption agency—no abuse of discretion—In a termination of parental rights proceeding involving a mother who relinquished her parental rights to place her infant for adoption and a father who wished to raise the child, the district court did not abuse its discretion in determining that termination of the father's parental rights was not in the child's best interest, even though grounds existed that would support termination (the father had not legitimized the child or established paternity prior to the filing of a petition by an adoption agency). The court's unchallenged dispositional findings of fact were that the father expressed his desire for custody before the child's birth, made continuous efforts to obtain custody and prevent the child's adoption, would be a great father, had a plan of care for the child, and had a strong support system to help him raise the child; moreover, it was appropriate for the court to consider that grounds existed that would support termination due to factors that were largely outside of the father's control—including efforts by petitioner adoption agency to thwart the father's attempts to gain custody. **In re B.B.A., 179.**

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.

B.C. AND M.B., PLAINTIFFS
v.
PALMETTO WELLNESS GROUP NC, LLC D/B/A
MASSAGE ENVY – FAYETTEVILLE; AND BRYANT WHITEHEAD; DEFENDANTS

No. COA24-335

Filed 4 June 2025

1. Negligence—jury instructions—joint and several liability—assault by massage therapist—negligent hiring by employer—new trial granted on damages

In an action in which plaintiff brought intentional tort claims against a massage therapist for alleged sexual assault and negligent hiring claims against the therapist's employer, the trial court committed reversible error by failing to give plaintiff's requested jury instruction on joint and several liability, under which defendant employer could be held jointly and severally liable for its employee's intentional wrongful acts. The requested instruction was supported by the evidence and correct as a matter of law. Joint and several liability does not require a distinction between negligent and intentional acts, but may attach where independent acts committed by separate parties unite to proximately cause a single, indivisible injury. The dismissal of plaintiff's respondeat superior claim was of no effect, since liability under that doctrine would be merely derivative and, here, the jury found both defendants directly liable for plaintiff's injury. Where the trial court's given instruction did not accurately reflect the law and may have misled the jury with regard to the damages award, the judgment was reversed and the matter remanded for a new trial on damages only.

2. Civil Procedure—Rule 59 motion to amend judgment—jury instruction error of indeterminate effect—abuse of discretion analysis

In an action in which plaintiff brought intentional tort claims against a massage therapist for alleged sexual assault and negligent hiring claims against the therapist's employer, the trial court did not abuse its discretion by denying plaintiff's Rule 59 motion to amend the judgment even though the trial court erred by failing to instruct the jury properly on joint and several liability (as a result of which plaintiff was entitled to a new trial on damages). Where the jury was tasked with determining damages based on causes of action rather than plaintiff's injuries—and awarded plaintiff damages for each cause of action—and where the verdict sheet was not clear on

whether the jury awarded plaintiff duplicative damages for the same injuries or instead apportioned the damages between the defendants, the appellate court upheld the trial court's denial because it was not apparent from the record if the jury would have reached the same result even if the proper instructions had been given.

Appeal by Plaintiff M.B. from judgment entered 8 February 2023 and order entered 6 April 2023 by Judge Claire V. Hill in Cumberland County Superior Court. Heard in the Court of Appeals 28 January 2025.

Patterson Harkavy LLP, by Narendra K. Ghosh and Christopher A. Brook, and Macam Law PLLC, by Victor Macam, for Plaintiff-Appellant M.B.

Jackson Lewis P.C., by Kathleen K. Lucchesi, Denaa J. Griffin, and Jonathan R. Cavalier (pro hac vice), for Defendant-Appellee Palmetto Wellness Group NC, LLC d/b/a Massage Envy – Fayetteville.

COLLINS, Judge.

This appeal arises from a sexual assault at a massage establishment. Plaintiff M.B. argues that the trial court erred by failing to give a requested jury instruction on joint and several liability and abused its discretion by denying Plaintiff's Rule 59 motion to amend the judgment entered upon the jury's verdict. For the following reasons, we reverse the trial court's judgment and remand the matter for a new trial on damages. We affirm the trial court's order denying Plaintiff's Rule 59 motion.

I. Background

In or around June 2016, Defendant Bryant Whitehead was employed as a massage therapist at Hand & Stone Massage and Facial Spa in Fayetteville, North Carolina. While employed there, Whitehead sexually assaulted another employee, Becca.[1] Becca did not immediately report the incident to her employer and instead sought employment elsewhere. In November 2016, Becca began working at Massage Envy in Fayetteville, which was owned and operated by Defendant Palmetto Wellness Group NC, LLC.

1. "Becca" is a pseudonym. Although Becca was involved in the underlying proceeding, she is not a party to this appeal.

Not long after, Whitehead applied to work as a massage therapist at Massage Envy. Upon realizing this, Becca told her manager at Massage Envy about Whitehead assaulting her. Despite this, Palmetto hired Whitehead.

On 11 September 2017, Plaintiff arrived at Massage Envy for a massage. Massage Envy told Plaintiff that Whitehead was the only massage therapist available at the time and asked Plaintiff if she would agree to receiving a massage from a male massage therapist. Plaintiff agreed. Throughout the course of her massage, Whitehead sexually assaulted Plaintiff. Plaintiff did not immediately report being assaulted, and Whitehead remained employed at Massage Envy.

On 27 November 2017, Whitehead assaulted another female client of Massage Envy. That client immediately reported it, and as a result, the North Carolina Board of Massage and Bodywork Therapy ("Board") placed Whitehead on probation.

Plaintiff reported being assaulted by Whitehead to Massage Envy, the Board, and the police in October 2018. The Board revoked Whitehead's license to practice massage therapy in North Carolina on 10 December 2018.

Plaintiff commenced this action on 6 April 2020 by filing a complaint against a number of defendants, including Palmetto and Whitehead. Plaintiff alleged the following causes of action against Palmetto: negligence; negligent hiring, retention, and supervision ("negligent hiring"); respondeat superior; premises liability; negligent misrepresentation; unfair and deceptive trade practices; and fraudulent concealment. She alleged claims against Whitehead for battery and intentional infliction of emotional distress. In Plaintiff's prayer for relief, she asked that "judgment be entered against all Defendants, jointly and severally."

Whitehead failed to respond to the complaint or otherwise appear, and the trial court entered default against him. The case came for trial on 9 January 2023. Whitehead was not present at trial. At the close of Plaintiff's evidence, the trial court granted Palmetto's motion for a directed verdict as to Plaintiff's claims for respondeat superior, premises liability, and unfair and deceptive trade practices.

At the jury charge conference, Plaintiff requested the trial court instruct the jury on joint and several liability for all damages resulting from her claims against Whitehead and Palmetto. The trial court agreed to instruct the jury on joint and several liability for the damages resulting

from Plaintiff's negligence-based claims against Palmetto but denied the request as to Plaintiff's intentional tort claims against Whitehead.

In charging the jury, the trial court instructed that, by his default, Whitehead had admitted certain facts and thus Whitehead's liability for battery and intentional infliction of emotional distress had been established.

The trial court submitted the following issues relevant to this appeal to the jury:

- the amount of damages Plaintiff was entitled to recover from Whitehead for his battery;
- the amount of damages Plaintiff was entitled to recover from Whitehead for his intentional infliction of emotional distress;
- Plaintiff's liability for negligence, negligent hiring, and fraudulent concealment;
- the amount of damages, if any, Plaintiff was entitled to recover from Whitehead and Palmetto for Palmetto's negligence;
- the amount of damages, if any, Plaintiff was entitled to recover from Whitehead and Palmetto for Palmetto's negligent hiring; and
- the amount of damages, if any, Plaintiff was entitled to recover from Whitehead and Palmetto for Palmetto's fraudulent concealment.

The jury determined Plaintiff was entitled to recover from Whitehead $100,000 for battery; $250,000 for intentional infliction of emotional distress; and $250,000 in punitive damages. The jury found Palmetto liable for negligence and negligent hiring, but not liable for fraudulent concealment. The jury determined Plaintiff was entitled to recover jointly and severally from Whitehead and Palmetto $40,000 for Palmetto's negligence and $20,000 for Palmetto's negligent hiring.

Plaintiff filed a timely Rule 59 motion to amend the trial court's judgment, asking the trial court to "amend the judgment making the proper conclusions of law so as to apply joint and several liability to all damages awarded in Plaintiff['s] [] favor against joint tortfeasors Defendants Whitehead and [Palmetto.]" After a hearing, the trial court denied the motion by written order entered 6 April 2023. Plaintiff appeals.

II. Discussion

A. Jury Instructions

[1] Plaintiff first argues that the trial court erred by "failing to instruct the jury on joint and several liability for all damages awarded to Plaintiff." Specifically, Plaintiff contends that the trial court erred by refusing to instruct the jury that Palmetto could be held jointly and severally liable for the damages awarded to Plaintiff for Whitehead's intentional torts of battery and intentional infliction of emotional distress.

1. Standard of Review

"[This] Court reviews a trial court's decisions regarding jury instructions *de novo*." *Littleton v. Willis*, 205 N.C. App. 224, 228 (2010) (citation omitted). "Under a *de novo* review, the [C]ourt considers the matter anew and freely substitutes its own judgment for that of the trial court." *N.C. Indus. Capital, LLC v. Clayton*, 185 N.C. App. 356, 370 (2007) (brackets and citation omitted). For an error in jury instructions to require a new trial, "it must be shown that a different result would have likely ensued had the error not occurred." *Chappell v. N.C. DOT*, 374 N.C. 273, 282 (2020) (quotation marks and citations omitted).

A requested jury instruction should be given when "(1) the requested instruction was a correct statement of law and (2) was supported by the evidence, and [] (3) the instruction given, considered in its entirety, failed to encompass the substance of the law requested and (4) such failure likely misled the jury." *Outlaw v. Johnson*, 190 N.C. App. 233, 243 (2008) (citation omitted). "When a request is made for a specific jury instruction that is correct as a matter of law and is supported by the evidence, the trial court is required to give an instruction expressing at least the substance of the requested instruction." *Walker v. Town of Stoneville*, 211 N.C. App. 24, 40 (2011) (cleaned up).

2. Joint and Several Liability

"Joint and several liability is allowed [in a civil case] when (1) defendants have acted in concert to commit a wrong that caused an injury; or (2) defendants, even without acting in concert, have committed separate wrongs that still produced an indivisible injury." *GE Betz, Inc. v. Conrad*, 231 N.C. App. 214, 235 (2013) (citation omitted). Under the second scenario, where "the independent wrongful acts of two or more persons unite in producing a single indivisible injury, the parties are joint tortfeasors within the meaning of the law, and the injured party may sue only one or all the tortfeasors, as he may elect." *Phillips v. Hassett Mining Co.*, 244 N.C. 17, 22 (1956) (citations omitted); *see also Denny*

v. Coleman, 245 N.C. 90, 92 (1956) ("[W]hen the acts of defendants concur to produce a single injury, thus making them joint tort-feasors, plaintiff may sue them jointly or separately.") (citation omitted).

> Where the damage complained of is the indivisible result of several causes, full recovery by a plaintiff does not depend on his ability to apportion the damages; plaintiff needs only to show that the negligence of one defendant was a proximate cause of some of the damage complained of. In order to hold defendant liable for the entire injury, it is not necessary that his negligence be the sole proximate cause of the injury, or the last act of negligence.

Casado v. Melas Corp., 69 N.C. App. 630, 635 (1984) (citations omitted).

The law on joint and several liability does not distinguish between negligent acts and intentional acts committed by defendants. Rather, the law provides that multiple defendants may be treated as joint tortfeasors if they, "independently and without concert of action or unity of purpose, commit separate acts which concur as to time and place and unite in proximately causing the injury." *Ipock v. Gilmore*, 73 N.C. App. 182, 186 (1985) (citation omitted); *see also* Restatement (Second) of Torts § 875 (1977) ("Each of two or more persons whose *tortious conduct* is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm.") (emphasis added). "The focus is on the indivisibility of the injury[.]" *Id.* (citation omitted).

Our Uniform Contribution Among Tort-Feasors Act, which codifies the right of contribution among joint tortfeasors, also supports this determination. *See* N.C. Gen. Stat. §§ 1B-1–1B-6 (2023). The Act specifically denies the right of contribution "in favor of any tort-feasor who has intentionally caused or contributed to the injury or wrongful death." *Id.* § 1B-1(c). In doing so, the statute implicitly acknowledges that defendants who "intentionally caused" an injury may be considered joint tort-feasors under the law. *Id.* Accordingly, if the "independent wrongful acts of two or more persons unite in producing a single indivisible injury," whether the wrongful acts were intentional or negligent, the injured party may recover damages from the defendants, jointly and severally. *See Phillips*, 244 N.C. at 22 (citations omitted); *see also Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 87 (Tenn. 2001) (concluding that "where the intentional actor and the negligent actor are both named defendants and each are found to be responsible for the plaintiff's injuries, then each defendant will be jointly and severally responsible for the plaintiff's total damages") (citation omitted).

An indivisible injury is one that "renders apportionment of damages among the individual tort-feasors impossible." *Ipock*, 73 N.C. App. at 186 (citation omitted); *see also* Restatement (Second) of Torts § 879 (1977) ("If the tortious conduct of each of two or more persons is a legal cause of harm that cannot be apportioned, each is subject to liability for the entire harm, irrespective of whether their conduct is concurring or consecutive."). Apportionment of damages is only feasible where "(a) there are distinct harms, or (b) there is a reasonable basis for determining the contribution of each cause to a single harm." Restatement (Second) of Torts § 433A (1965). It is for the trial court to determine whether a plaintiff's injury is indivisible. *See Casado*, 69 N.C. App. at 635.

3. Requested Jury Instruction

The North Carolina Pattern Jury Instructions provide the following instruction on joint and several liability for concurring acts of negligence:

> People may be held jointly and severally liable for their separate acts of negligence.
>
> In defining proximate cause I explained that there may be two or more proximate causes of [an injury] [damage]. This occurs when separate and independent acts or omissions of different people concur, that is, combine, to produce a single result. Thus, if the negligent acts or omissions of two (or more) people concur to produce the [injury] [damage] complained of, the conduct of each person is a proximate cause. Each person is jointly and severally liable for the [injury] [damage] that results, even though one person may have been more or less negligent than another.

N.C.P.I.—Civil 102.60 (2005).

In this case, Plaintiff submitted the following proposed instruction that modified N.C.P.I. 102.60 to include intentional acts:

> People may be held jointly and severally liable for their separate *intentional and/or* negligent acts.
>
> In defining proximate cause I explained that there may be two or more proximate causes of [an injury] [damage]. This occurs when separate and independent acts or omissions of different people concur, that is, combine, to produce a single result. Thus, if the *intentional and/or* negligent acts or omissions of two (or more) people concur to produce the [injury] [damage] complained of, the

> conduct of each person is a proximate cause. Each person is jointly and severally liable for the [injury] [damage] that results, even though one person may have been more or less *intentional and/or* negligent than another.

(emphasis added).

Plaintiff's requested instruction is "a correct statement of law." *Outlaw*, 190 N.C. App. at 243 (citation omitted). As explained above, joint and several liability does not apply only to negligence-based claims; rather, it applies to wrongful acts, whether negligent or intentional, that have united in causing a single, indivisible injury. *See Phillips*, 244 N.C. at 22. Plaintiff's proposed instruction clarifies that multiple defendants may be held jointly and severally liable "for their separate *intentional and/or* negligent acts." (emphasis added).

Plaintiff's requested instruction also "was supported by the evidence." *Outlaw*, 190 N.C. App. at 243 (citation omitted). Here, the evidence shows that Whitehead's intentional conduct was a foreseeable risk created by Palmetto's negligent conduct. Palmetto's negligence and negligent hiring combined with Whitehead's battery to produce a single, indivisible injury to Plaintiff. Likewise, Palmetto's negligence and negligent hiring combined with Whitehead's intentional infliction of emotional distress to produce a single, indivisible injury to Plaintiff. Furthermore, because the trial court instructed the jury on joint and several liability for damages caused by Palmetto's negligence and negligent hiring, the trial court implicitly—and correctly—determined that Plaintiff's injuries were indivisible. This instruction necessarily required Whitehead's intentional torts and Palmetto's negligent acts to have produced the same, indivisible injuries.

By failing to give Plaintiff's requested instruction and instead instructing the jury that joint and several liability may apply to injury that results only from concurring negligent acts or omissions, the trial court's given instruction "failed to encompass the substance of the law requested." *Id.*

Finally, "such failure likely misled the jury" because the jury could not award all damages jointly and severally. *Id.*

Accordingly, the trial court reversibly erred by failing to instruct the jury on joint and several liability for all damages awarded to Plaintiff.

4. Respondeat Superior

Palmetto argues that the dismissal of Plaintiff's respondeat superior claim shows that joint and several liability cannot apply in this case.

This argument is misguided; joint and several liability and respondeat superior are separate and independent doctrines.

Under the doctrine of joint and several liability, "although there is a single damage done, there are several wrongdoers. The act inflicting injury may be single, but [behind] that, and essential to liability, lies some wrong done by each tort-feasor contributing in some way to the wrong complained of." *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 491-92 (1967).

Under the doctrine of respondeat superior, on the other hand, "employers are liable for torts committed by their employees who are acting within the scope of their employment[.]" *Hendrix v. Town of W. Jefferson*, 273 N.C. App. 27, 32 (2020) (citation omitted). The doctrine relies upon agency principles where "the principal is responsible for the tort of his agent[.]" *Bowen*, 270 N.C. at 492 (citations omitted). The principle's liability is not based on any fault of its own; instead the principle's liability is derivative, based on the agency relationship between the principle and its tortious agent. *Id.* at 491-92.

Here, despite the agency relationship between Palmetto and Whitehead, Palmetto's liability was not merely derivative; rather, Palmetto's liability was based on its own negligence and negligent hiring that combined with Whitehead's wrongs to cause Plaintiff's injuries. *See id.* Accordingly, dismissal of Plaintiff's respondeat superior claim does not defeat the application of joint and several liability in this case.

5. Conclusion

In summary, the trial court committed reversible error by failing to give Plaintiff's requested jury instruction on joint and several liability. Plaintiff's requested instruction was correct as a matter of law and was supported by the evidence, and the trial court's given instruction "failed to encompass the substance of the law requested." *Outlaw*, 190 N.C. App. at 243 (citation omitted). Furthermore, this error likely misled the jury in its damages award.

Joint and several liability is not a theory of liability; rather, it determines from whom a plaintiff can recover once he proves that the wrongful acts or omissions of two or more defendants concurred to produce a single, indivisible injury. *See Connette v. Charlotte-Mecklenburg Hosp. Auth.*, 382 N.C. 57, 79 (2022). Here, Whitehead's liability was established as a matter of law, and the jury found Palmetto liable for negligence and negligent hiring. Whitehead's and Palmetto's liability need not be relitigated. Further, the trial court correctly determined that Plaintiff's

injuries were indivisible. The trial court's judgment is thus reversed and remanded for a new trial on damages only.

B. Plaintiff's Rule 59 Motion

[2] Plaintiff next argues that the trial court erred by failing to amend its judgment on the basis of the grounds set forth in N.C. Gen. Stat. § 1A-1, Rule 59. Specifically, Plaintiff contends that the jury's verdict is contrary to law because it failed to hold Palmetto jointly and severally liable for all damages awarded to Plaintiff. Plaintiff asks this Court to remand the case to the trial court with instructions to enter an amended judgment holding both defendants jointly and severally liable for all damages awarded by the jury to Plaintiff, including those resulting from Whitehead's intentional torts.

"Rule 59(e) governs motions to alter or amend a judgment, and such motions are limited to the grounds listed in Rule 59(a)." *N.C. Alliance for Transp. Reform, Inc. v. N.C. DOT*, 183 N.C. App. 466, 469 (2007); N.C. Gen. Stat. § 1A-1, Rule 59 (2023). Rule 59(a) provides a number of grounds upon which a motion to alter or amend judgment may be granted, including: "the verdict is contrary to law," Rule 59(a)(7); there was "[e]rror in law occurring at the trial and objected to by the party making the motion," Rule 59(a)(8); and "[a]ny other reason heretofore recognized as grounds for new trial," Rule 59(a)(9).

Whether to grant or deny a Rule 59(e) motion is within the sound discretion of the trial court. *Young v. Lica*, 156 N.C. App. 301, 304 (2003). "However, where the motion involves a question of law or legal inference, our standard of review is *de novo*." *Kinsey v. Spann*, 139 N.C. App. 370, 372 (2000) (citation omitted). Accordingly, whether a verdict is contrary to law under Rule 59(a)(7) or an error in law occurred at trial under Rule 59(a)(8) will be reviewed de novo on appeal. *Young*, 156 N.C. App. at 304; *Greene v. Royster*, 187 N.C. App. 71, 78 (2007). The standard of review under Rule 59(a)(9) is abuse of discretion. *Boykin v. Wilson Med. Ctr.*, 201 N.C. App. 559, 561 (2009).

As determined above, the trial court erred by failing to instruct the jury on joint and several liability, and as a result, Plaintiff is entitled to a new trial on damages. However, we cannot say that, had the jury been correctly instructed and the verdict sheet reflected these instructions, the jury would have returned the same award.

"The objective of compensatory damages is to restore the plaintiff to his original condition or to make the plaintiff whole." *Watson v. Dixon*, 352 N.C. 343, 347 (2000) (citation omitted). "[W]here there

are joint tort-feasors there can be but one recovery for the same injury or damage . . . ." *Holland v. S. Pub. Utils. Co.*, 208 N.C. 289, 291 (1935) (citation omitted).

Here, the jury was asked to determine damages based on causes of action rather than Plaintiff's injuries; the jury awarded Plaintiff damages for each cause of action. We cannot tell from the face of the verdict sheet whether the jury awarded duplicative damages for the same injuries or instead apportioned the damages between the defendants.

Accordingly, the trial court did not abuse its discretion by denying Plaintiff's motion.

III. Conclusion

For the foregoing reasons, the trial court's judgment is reversed in part and the matter remanded for a new trial on damages. The trial court's order denying Plaintiff's Rule 59 motion is affirmed.

REVERSED IN PART AND REMANDED; AFFIRMED IN PART.

Judges WOOD and GRIFFIN concur.

BESSIE PEACOCK CLOER, Widow and Administrator of the Estate of JAMES RICHARD CLOER, Employee, Plaintiff

v.

KING ARTHUR INC., Employer; THONET INDUSTRIES INC., Employer; SCH LIQUIDATING CORP., Employer; SHELBY WILLIAMS INDUSTRIES, INC., Self-Insured Employer, and NORTH CAROLINA SELF-INSURANCE SECURITY ASSOCIATION, Defendants

No. COA24-587

Filed 4 June 2025

Workers' Compensation—North Carolina Self-Insurance Security Association—covered claim—requirements not met

In a workers' compensation matter where plaintiff, the administrator of the estate of her deceased husband—a longtime employee at a furniture factory who died from mesothelioma sixteen years after he last worked for the factory, allegedly as a result of asbestos exposure throughout his employment—entered into settlement agreements releasing the factory's owner (and the surviving entity resulting from various mergers involving the factory) from

any and all liabilities, which in turn were approved by the Industrial Commission, the Commission did not err in denying plaintiff's motion to add the North Carolina Self-Insurance Association as a defendant. The Association—a nonprofit unincorporated legal entity created by statute to provide mechanisms for the payment of a "covered claim" against a member self-insurer—was not a proper party because plaintiff's claim failed to satisfy two of the four requirements set forth in N.C.G.S. § 97-130(4) for a "covered claim": (1) the member self-insurer was not insolvent, even though the original owner of the factory had gone through bankruptcy, because the surviving entity of a post-reorganization merger was liable for the original owner's liabilities and was not itself insolvent; and (2) the claim was not unpaid, as plaintiff had settled with the surviving entity.

Judge HAMPSON dissenting.

Appeal by Plaintiff from opinion and award entered 13 March 2024 by the North Carolina Industrial Commission. Heard in the Court of Appeals 28 January 2025.

Wallace and Graham, P.A., by Edward L. Pauley, for Plaintiff-Appellant.

Stuart Law Firm, PLLC, by William A. Piner, II, and Catherine R. Stuart, for Defendant-Appellee North Carolina Self-Insurance Security Association.

COLLINS, Judge.

Plaintiff Bessie Peacock Cloer, as administrator of the estate of her deceased husband, James Richard Cloer, appeals from the North Carolina Industrial Commission's opinion and award denying Plaintiff's motion to add the North Carolina Self-Insurance Security Association as a party. As there is no "covered claim" for Plaintiff to pursue against the Association, the Commission did not err by denying Plaintiff's motion to add the Association as a party.

I. Background

James Richard Cloer ("Decedent") worked at a furniture factory for many years, including from 1987 to 1997. The factory was owned and operated by Shelby Williams from 1987 through 30 June 1999. From June 1987 to 30 June 1988, Shelby Williams had workers' compensation

coverage with Hartford Accident and Indemnity Company. Shelby Williams was approved to self-insure its workers' compensation claims liabilities by the North Carolina Department of Insurance and was a member of the Association from 1 July 1989 through 30 June 1999.

On 5 May 1999, Shelby Williams and Falcon Products, Inc. executed an "Agreement and Plan of Merger" whereby Shelby Williams was acquired by Falcon and became Falcon's affiliate. Falcon was never a licensed North Carolina self-insurer and maintained workers' compensation insurance coverage during the period it operated in North Carolina.

On 1 January 2005, Falcon and its affiliates, including Shelby Williams, filed a Chapter 11 voluntary petition for bankruptcy in the United States Bankruptcy Court of the Eastern District of Missouri. All pre-petition workers' compensation claims, including those incurred against Shelby Williams, were paid. The bankruptcy plan made no provision for workers' compensation claims that had been incurred but not yet reported. The bankruptcy court approved Falcon's plan for reorganization, and on 28 November 2005, Falcon officially changed its name to Commercial Furniture Group, Inc. ("CFG"). Shelby Williams then merged with CFG in December 2005. As a result, Shelby Williams ceased to exist, and CFG became the sole surviving entity.

Approximately sixteen years after his last date of employment with Shelby Williams, in February 2013, Decedent was diagnosed with mesothelioma. Decedent filed a Form 18B with the Commission, alleging that his diagnosis was the result of asbestos exposure throughout his employment. Decedent died from mesothelioma on 6 July 2013, and Plaintiff filed an Amended Form 18B with the Commission in October 2013 to add Shelby Williams as a defendant and a claim for death benefits.

Five years later, Plaintiff moved to add CFG as a defendant; the motion was granted by the Executive Secretary of the Commission in August 2018. Plaintiff then moved to add the Association as a defendant; the motion was granted by the Executive Secretary of the Commission in November 2020. The Association filed a Form 33, Request that the Claim be Assigned for Hearing, alleging that the Association is not a proper party.

Plaintiff, Shelby Williams, and Hartford executed a "Final Compromise Settlement Agreement" on 9 February 2022 to settle Plaintiff's claim against Shelby Williams and Hartford for $50,000 for "any and all periods of coverage, known or unknown, for which Hartford could be liable." Additionally, Plaintiff and CFG executed a "Final Compromise Settlement Agreement and Release" on 27 August

2022 to settle Plaintiff's claim against CFG for $3,000 for "the period of self-insurance by Shelby Williams for which [CFG] may be liable." This settlement agreement released CFG "from any and all future responsibility or liability for [Decedent's mesothelioma] during the period of Shelby Williams' self-insurance." Both settlement agreements were approved by the Commission.

A deputy commissioner filed an opinion and order on 20 April 2023 denying Plaintiff's motion to add the Association as a defendant. Plaintiff appealed to the Full Commission. After a hearing, the Full Commission filed an opinion and award on 13 March 2024 denying Plaintiff's motion to add the Association as a defendant. Plaintiff appeals.

II. Discussion

Plaintiff argues that the Commission erred by denying its motion to add the Association as a party to this matter.

A. Standard of Review

This Court's review of an opinion and award of the Commission "is limited to consideration of whether competent evidence supports the Commission's findings of fact and whether the findings support the Commission's conclusions of law." *Richardson v. Maxim Healthcare/Allegis Grp.*, 362 N.C. 657, 660 (2008) (citation omitted). Evidence is to be viewed "in the light most favorable to the plaintiff, giving him the benefit of every reasonable inference." *Goodson v. P.H. Glatfelter Co.*, 171 N.C. App. 596, 602 (2005) (citation omitted). "Findings of fact are conclusive on appeal when supported by competent evidence, despite evidence that would support contrary findings, and conclusions of law are reviewed *de novo*." *Id.* Under a de novo review, this Court "considers the matter anew and freely substitutes its own judgment for the agency's." *Sellers v. FMC Corp.*, 216 N.C. App. 134, 138 (2011) (cleaned up).

B. The Workers' Compensation Act

Under the Workers' Compensation Act, in cases "where compensation is payable for an occupational disease, the employer in whose employment the employee was last injuriously exposed to the hazards of such disease, and the insurance carrier, if any, which was on the risk when the employee was so last exposed under such employer, shall be liable." N.C. Gen. Stat. § 97-57 (2023). The statutory phrase "last injuriously exposed" means "an exposure which proximately augmented the disease to any extent, however slight." *Penegar v. United Parcel Serv.*, 259 N.C. App. 308, 318 (2018) (citing *Rutledge v. Texas Corp.*, 308 N.C. 85, 89 (1983)).

The Act authorizes claims to be paid through settlement agreements executed between an employee and employer. N.C. Gen. Stat. § 97-17(a) (2023). A settlement agreement approved by the Commission "is as binding on the parties as an order, decision[,] or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Pruitt v. Knight Pub. Co.*, 289 N.C. 254, 258 (1976) (citations omitted).

C. Insuring Workers' Compensation Liability

An employer is primarily liable to its employees for the payment of benefits under the Act, and this liability remains regardless of whether "the employer has the necessary insurance, is self-insured, or has no insurance at all." *Ryles v. Durham County Hosp. Corp.*, 107 N.C. App. 455, 461 (1992); N.C. Gen. Stat. § 97-95 (2023). Nevertheless, "[e]very employer is required to secure its obligations under the Act by either insuring its workers' compensation liability or self-insuring where it has the financial ability to pay for benefits." *Goodson*, 171 N.C. App. at 605; N.C. Gen. Stat. § 97-93 (2023).

To self-insure under the Act, the employer must apply for and receive a license from the Commissioner of Insurance. N.C. Gen. Stat. §§ 97-170, 97-165(4) (2023). "Only an applicant whose total fixed assets amount to five hundred thousand dollars ($500,000) or more may apply for a license." N.C. Gen. Stat. § 97-170(c). An employer applying for a license to self-insure must file its application both with the Commissioner of Insurance and the Association. N.C. Gen. Stat. § 97-170(b).

D. The Association

"All . . . self-insurers are required to be members of the [] Association as a condition of being licensed to self-insure by the Commissioner of Insurance." *Ketchie v. Fieldcrest Cannon, Inc.*, 243 N.C. App. 324, 327 (2015); N.C. Gen. Stat. § 97-131(b) (2023). The Association is not an insurance carrier. Rather, it is a "nonprofit unincorporated legal entity" created by statute to "provide mechanisms for the payment of covered claims against member self-insurers . . . to avoid financial loss to claimants because of the insolvency of a member self-insurer[.]" N.C. Gen. Stat. § 97-131(a) (2023). A self-insurer "shall be deemed to be a member of the Association for purposes of its own insolvency if it is a member when the compensable injury occurs." N.C. Gen. Stat. § 97-131(b)(2) (2023).

The Association incurs liability only for "covered claims" as defined by statute. *Id.* A "covered claim" is "an unpaid claim against an insolvent . . . self-insurer that relates to an injury that occurs while the . . . self-insurer is a member of the Association and that is compensable

under [the Act]." N.C. Gen. Stat. § 97-130(4) (2023). Accordingly, the Association can be liable for a claim against one of its member self-insurers only when the following four requirements are met: (1) the self-insurer is insolvent; (2) the claim is unpaid; (3) the claim relates to an injury that occurred while the self-insurer was a member of the Association; and (4) the claim is otherwise compensable under the Act. *Id.*

E. Analysis

Here, the Commission concluded that the Association is not a proper party because Plaintiff's claim does not meet all four requirements of a covered claim. We agree.

At the outset, we note that the third and fourth requirements of a "covered claim" have been met. The parties stipulated that "Shelby Williams was a member self-insurer of the Association from 1 July 1989 to 30 June 1999" and that Plaintiff's "last date of employment with Shelby Williams and last alleged injurious exposure to asbestos were both in 1997 during the Shelby Williams period of self-insurance." Therefore, Plaintiff's claim relates to an injury that occurred while Shelby Williams was a member of the Association. *See id.* Second, Decedent's injury—mesothelioma resulting from asbestos exposure—constitutes an occupational disease covered under the Act. *See* N.C. Gen. Stat. § 97-53(13) (2023); *Rutledge*, 308 N.C. at 93. The parties do not dispute that Plaintiff's claim is compensable under the Act. *See* N.C. Gen. Stat. § 97-130(4).

However, the remaining first two requirements—the member self-insurer is insolvent and the claim is unpaid—have not been met.

Shelby Williams was self-insured and a member of the Association on the date of Decedent's last injurious exposure to asbestos in 1997. Shelby Williams was acquired by Falcon in May 1999, and Falcon, including Shelby Williams, filed for bankruptcy in 2005. All Shelby Williams' pre-petition workers' compensation claims were paid, and the bankruptcy plan for reorganization made no provisions for the payment of claims against Shelby Williams that had been incurred but not yet reported. The bankruptcy court approved Falcon's plan for reorganization in October 2005, and Falcon officially changed its name to CFG in November 2005. Shelby Williams merged into CFG in December 2005, and CFG became the surviving entity. As the surviving entity, CFG is responsible for Shelby Williams' liabilities and obligations, including Plaintiff's claim relating to Decedent's asbestos exposure that was incurred when Shelby Williams was self-insured but was not reported until Decedent was diagnosed with mesothelioma in 2013. As Shelby

Williams, the self-insurer, is now CFG, and CFG is not insolvent, there is no "covered claim" for which the Association could be liable.

Furthermore, Plaintiff agreed to settle its claims against CFG for $3,000 for "the period of self-insurance by Shelby Williams for which [CFG] may be liable." The settlement agreement provides, in part:

> 11. There currently exists a dispute among [Plaintiff and CFG]:
>
> a. Plaintiff contends that [CFG], for the period of Shelby Williams' period of self-insurance, is liable, in whole or in part, for []Decedent's mesothelioma and resulting death, entitling her to benefits under N.C. Gen. Stat. § 97-38.
>
> b. [CFG], on the other hand, disputes and denies any liability whatsoever. . . .
>
> c. [Plaintiff and CFG] agree that unless they are able to dispose of the matters and things in dispute in the case by agreement among themselves, hearings before the North Carolina Industrial Commission and subsequent appeals to the Full Commission and perhaps to the Court of Appeals will likely result and the matters will have to be decided as disputed claims.

The settlement agreement released CFG from any further liability resulting from "the period of Shelby Williams' self-insurance" from July 1989 through the end of Decedent's employment in 1997. This settlement agreement was approved by the Commission. As CFG had assumed liability for claims arising from Shelby Williams' period of self-insurance, and Plaintiff agreed to settle its claims against CFG for $3,000, this claim is not unpaid. *See* N.C. Gen. Stat. § 97-17(a) (authorizing claims to be paid through settlement agreements); *see also Pruitt*, 289 N.C. at 258 (emphasizing that settlement agreements approved by the Commission are binding). Accordingly, as CFG is not insolvent, and Plaintiff's claim is not unpaid, there is no "covered claim" for which the Association could be liable.

Because there is no "covered claim" for which the Association could be liable, the Commission did not err by denying Plaintiff's motion to add the Association as a party.

F. Plaintiff's Remaining Arguments

Plaintiff argues that the Commission made other errors in its opinion and award. We address each in turn.

First, Plaintiff argues that the Commission erred by determining that "the date which establishes who is liable for this claim is when the claim arose in 2013 (the death of Decedent and the filing of the claim) as opposed to the last date of exposure." Plaintiff mischaracterizes the Commission's findings and conclusions.

The parties stipulated that Decedent's "last date of employment with Shelby Williams and last alleged injurious exposure to asbestos were both in 1997 during the Shelby Williams (sic) period of self-insurance." It is also undisputed that Decedent was not diagnosed with mesothelioma until 2013. The Commission's challenged findings and conclusions establish that Plaintiff's cause of action against Shelby Williams for Decedent's last injurious asbestos exposure in 1997 accrued in 2013, at which point, CFG was responsible for claims related to Shelby William's period of self-insurance. Thus, the Commission did not erroneously determine "the date which establishes who is liable for this claim."

Plaintiff also argues that the Commission erred by using Delaware mergers and acquisitions law "to define the rights of the parties and whether the workers' compensation liabilities of Shelby Williams had transferred to Falcon and then CFG." Specifically, Plaintiff argues that questions arising from a workers' compensation claim should be governed solely by the Act, not mergers and acquisitions law. We disagree. Although the Act controls the adjudication of workers' compensation claims, the issue presented on appeal to this Court involves the effect that a corporate merger had on the liabilities of the entities involved.

Here, Shelby Williams merged with CFG in December 2005, and CFG is the surviving entity. Both Shelby Williams and CFG were created and incorporated pursuant to Delaware law. Under both North Carolina and Delaware law, all liabilities of each merged entity are retained in the surviving corporation. *See* N.C. Gen. Stat. § 55-11-06(a)(3) (2023); *see also Lee v. Scarborough*, 164 N.C. App. 357, 360-61 (2004) ("When a merger takes effect, the merging corporation ceases to exist; all assets and liabilities of the merging corporation are vested in the surviving corporation. . . .") (citation omitted); *see also* Del. Code Ann. tit. 8, § 259 (West 2023). Therefore, the Commission correctly concluded that as a result of the merger, Shelby Williams ceased to exist, and its liabilities were retained in CFG.

Finally, Plaintiff argues that N.C. Gen. Stat. § 97-6 bars CFG from assuming Shelby Williams' workers' compensation liabilities. Specifically, Plaintiff contends that Shelby Williams' merger with CFG improperly constituted an agreement that intended to relieve Shelby

Williams from its workers' compensation liabilities. Plaintiff's reliance on this provision is misguided.

N.C. Gen. Stat. § 97-6 provides, "No contract or agreement, written or implied, no rule, regulation, or other device shall in any manner operate to relieve an employer in whole or in part, of any obligation created by this Article, except as herein otherwise expressly provided." N.C. Gen. Stat. § 97-6 (2023). However, compromise settlement agreements approved by the Commission do not implicate this statute. *See* N.C. Gen. Stat. § 97-17; *see also Tellado v. Ti-Caro Corp.*, 119 N.C. App. 529, 533 (1995).

Here, the 2005 merger between Shelby Williams and CFG did not "operate to relieve" Shelby Williams of any liability; CFG's liability for claims related to Shelby William's period of self-insurance remained after the merger. The settlement agreement executed between Plaintiff and CFG relieved CFG of further liability. Therefore, the Commission was correct in concluding that N.C. Gen. Stat. § 97-6 does not apply to this matter.

III. Conclusion

Accordingly, for the reasons stated above, we affirm the Commission's opinion and award denying Plaintiff's motion to add the Association as a party.

AFFIRMED.

Judge WOOD concurs.

Judge HAMPSON dissents by separate opinion.

HAMPSON, Judge, dissenting.

The limited issue before this Court is not whether the Association should ultimately be held liable for the payment of benefits under Plaintiff's claim, but rather whether the Association is properly a party to this matter. In my view, the Full Commission erred in dismissing the Association as a party. The Opinion and Award should be reversed and this matter remanded for further proceedings. Therefore, I respectfully dissent.

The Record before us demonstrates Decedent's employer—Shelby Williams—was self-insured and a member of the Association during

Decedent's employment and at the time of his alleged last exposure to asbestos in 1997, leading to his 2013 mesothelioma diagnosis and that Shelby Williams later became insolvent.[1] Shelby Williams made no payment on the claim prior to its insolvency and there is no evidence Falcon—which was not a self-insured employer—provided workers' compensation insurance to retroactively cover claims against Shelby Williams, or otherwise assumed any statutory liability for workers compensation benefits, upon acquiring Shelby Williams and prior to entering bankruptcy. As such, this claim meets all four requirements of a "covered claim" under the Act: (1) the self-insurer is insolvent; (2) the claim is unpaid; (3) the claim relates to an injury that occurred while the self-insurer was a member of the Association; and (4) the claim is otherwise compensable under the Act. *See* N.C. Gen. Stat. § 97-130(4) (2023). Thus, the Association has the statutory obligation to: "Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation[.]" N.C. Gen. Stat. § 97-133(a)(7) (2023). This should be where the analysis ends and this matter should move forward with the Association as a party to determine the extent, if any, of the Association's liability for this claim.

However, the Full Commission also erred in concluding Plaintiff's settlement with CFG forecloses any claim against the Association. It is apparent from the face of the settlement agreement—approved by the Commission—that Plaintiff was not discharging any potential liability of the Association.[2] Indeed, it was CFG's position that the Falcon/Shelby Williams bankruptcy discharged liability for the claim. It is evident from the face of the settlement agreement this was a disputed claim, CFG did not accept compensability of the claim, and was simply resolving the claim only to the extent it had any exposure. The settlement agreement provided:

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1. By statute, a self-insured member of the Association becomes insolvent, *inter alia*, upon: "Institution of bankruptcy proceedings by or regarding the member self-insurer." N.C. Gen. Stat. § 97-135(2) (2023).

2. Likewise, Plaintiff's earlier settlement with The Hartford Insurance Company—also approved by the Commission provided:

> A dispute has arisen concerning the alleged self-insured period for Shelby Williams Industries, Inc. Commercial Furniture Group ("CF Group") and the North Carolina Self-Insurance Security Association ("NCSISA") have both been added as party-Defendants to this claim for the period during which Shelby Williams was allegedly self-insured. CF Group and NCSISA are not parties to this Agreement, and Plaintiff maintains her right to pursue this claim against only CF Group and NCSISA for their alleged responsibility for Shelby Williams' period of self-insurance.

> 12. The North Carolina Self-Insurance Security Association is not a party to this Agreement, and Plaintiff reserves her right to pursue these claims against the North Carolina Self-Insurance Security Association as a result. Additionally, the Agreement also does not resolve and is not a release of any claim Plaintiff may have against insurance policies, bonds, trusts, or other sum of earmarked funds, not in the control of, administered by, or otherwise held by Employer-Defendant or Shelby Williams during the period of its self-insurance, which may be available to pay this claim.
>
> . . . .
>
> 14. The Parties acknowledge and agree that this Agreement does not contain any findings or stipulations with respect to insurance coverage or self-insurance for any other Employer-Defendant and shall not be used as evidence of coverage in these claims or any future claim, proceeding, or dispute. The Parties further acknowledge and agree that this Agreement is intended to include only the period of self-insurance by Shelby Williams for which Employer-Defendant may be liable. This Agreement fully releases Employer-Defendant, and all of its subsidiaries or other legal entities, from any and all future responsibility or liability for the alleged occupational injury, disease, and/or condition that gave rise to the claims to which this Agreement pertains during the period of Shelby Williams' self-insurance.

The subsequent Consent Order dismissing CFG from the action also makes clear both CFG's position and the fact neither the parties to the agreement nor the Commission itself believed the settlement with CFG resolved the potential liability of the Association. The Consent Order entered by the Commission provides: "Further, there is a significant issue over whether Employer-Defendant could have any responsibility for Plaintiff's claims given Shelby Williams' bankruptcy and rebranding, with other entities, as Employer-Defendant." It goes on to state:

> The Parties to this Consent Order acknowledge that Plaintiff still maintains her right to pursue these claims against the North Carolina Self-Insurance Security Association for its alleged responsibility for Shelby Williams' period of self-insurance. The Parties' compromised agreement

> does not serve to resolve any of the issues between Employee-Decedent and the North Carolina Self-Insurance Security Association. Further, the Parties' Agreement does not resolve and is not a release of any claim Plaintiff may have against insurance policies, bonds, trusts, or other sum of earmarked funds, not in the control of, administered by, or otherwise held by Employer-Defendant or Shelby Williams during the period of its self-insurance, which may be available to pay the death claim.

"A 'clincher' or compromise agreement is a form of voluntary settlement recognized by the Commission and used to finally resolve contested or disputed workers' compensation cases." *Chaisson v. Simpson*, 195 N.C. App. 463, 474, 673 S.E.2d 149, 158 (2009) (citation and quotation marks omitted)). "It is well established that '[c]ompromise agreements are governed by the legal principles applicable to contracts generally.' " *Malloy v. Davis Mech., Inc.*, 217 N.C. App. 549, 553, 720 S.E.2d 739, 742 (2011) (quoting *Dixie Lines v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953)). "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." *Chemimetals Processing, Inc. v. Schrimsher*, 140 N.C. App. 135, 138, 535 S.E.2d 594, 596 (2000). Settlement agreements in the Industrial Commission carry an additional requirement: "Pursuant to N.C. Gen. Stat. § 97–17(a) and Rule 502, all settlement agreements must be approved by the Commission. The Commission must undertake a 'full investigation' to determine that a settlement agreement 'is fair and just [.]' " *Malloy*, 217 N.C. App. at 553, 720 S.E.2d at 742 (citations omitted).

Here, the express language of the settlement agreement with CFG expressly limits the scope of its release. There is a clear dispute—left unresolved by the Industrial Commission—as to whether the Shelby Williams/Falcon bankruptcy discharged any liability by CFG for Plaintiff's claim.[3] Moreover, there is a dispute as to which of either CFG or the Association, or both, is liable for Plaintiff's claim following Shelby Williams insolvency upon filing for bankruptcy and its subsequent re-organization as part of CFG. The settlement agreement resolved the

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3. If the claim was discharged in bankruptcy, then CFG is not responsible for the claim. Any discharge of the claim in bankruptcy would not have any impact on the Association's statutory duty triggered by Shelby Williams filing for bankruptcy to "Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation[.]" N.C. Gen. Stat. § 97-133(a)(7).

potential claim against CFG—and specifically is a lump sum payment not tied to any death benefit—and the Commission expressly approved the agreement allowing Plaintiff to pursue claims against the Association.

Thus, the Association is properly a party to Plaintiff's claim for death benefits. Therefore, the Commission erred by dismissing Plaintiff's claim against the Association. Consequently, the Opinion and Award should be reversed and remanded to the Commission for further proceedings to establish the Association's liability, if any, for Plaintiff's claim.

H/S NEW BERN, LLC, PLAINTIFF
v.
FIRST BERKSHIRE PROPERTIES, LLC, DEFENDANT

No. COA24-173

Filed 4 June 2025

Trespass—recurring trespass—stormwater runoff into retention pond—adjacent retail properties—nominal damages affirmed—removal of all impervious surfaces reversed

In an appeal and a cross-appeal arising from trial court orders entered in an action brought by plaintiff (the owner of a retail property) against defendant (the owner of an adjacent retail property) for trespass based on stormwater runoff from defendant's tract flowing into a retention pond on plaintiff's tract, the appellate court: (1) affirmed the judgment awarding plaintiff only $1,000 in nominal damages for defendant's recurring trespass because plaintiff failed to present evidence supporting compensatory damages—such as diminished rental value due to defendant's use of the pond or the costs to restore or repair the pond—and did not seek punitive damages; but (2) reversed one section of a separate order—requiring defendant to remove all impervious surfaces from its property—because there was insufficient evidence showing that such action was appropriate to address the recurring trespass.

Appeal by plaintiff from judgment entered 29 May 2023 and cross-appeal by defendant from order entered 21 August 2023, both by Judge Joshua W. Willey, Jr., in Craven County Superior Court. Heard in the Court of Appeals 29 January 2025.

Hull Property Group, LLC, by John M. Markwalter, and Davis Hartman Wright PLLC, by I. Clark Wright, Jr., for plaintiff-appellant/cross-appellee.

White & Allen, P.A., by John P. Marshall, for defendant-appellee/cross-appellant.

DILLON, Chief Judge.

Defendant First Berkshire Properties, LLC, and Plaintiff H/S New Bern, LLC, own adjacent retail properties that have historically been part of the same shopping center. Each has appealed from separate orders entered following a bench trial.

Plaintiff brought this action alleging Defendant was essentially trespassing based on stormwater runoff from Defendant's tract into a retention pond located on Plaintiff's tract. Plaintiff appeals from a judgment entered at the conclusion of the trial awarding it only $1,000.00 in nominal damages for Defendant's trespass.

Defendant appeals from a separate order requiring Defendant to build a stormwater retention pond on its own land.

I. Background

Plaintiff and Defendant own adjacent tracts that were developed decades ago by their predecessors in interest as part of the same shopping complex. Plaintiff owns a 34.45-acre parcel containing the New Bern Mall. Defendant owns a 5.183-acre parcel, upon which a K-Mart store was developed immediately adjacent to the Mall. Defendant's parcel is surrounded by Plaintiff's parcel.

In the late 1970s, the parties' predecessors in interest entered into a Two-Party Construction, Operation and Reciprocal Easement Agreement (the "COREA") as the Mall and K-Mart were being developed.

Pursuant to the COREA, portions of both Plaintiff's Mall parcel and Defendant's K-Mart parcel were to be developed and used as roads for ingress and egress from the public road and as parking lots and walkways, to be available for use by *all* shoppers. (That is, K-Mart shoppers could use the portion of the parking lot located on the Mall parcel, and vice versa.) Also, a portion of Plaintiff's parcel was developed as a retention pond to capture stormwater runoff from *both* Plaintiff's Mall parcel and Defendant's K-Mart parcel.

Under the COREA, Plaintiff was obligated to maintain *all* such "common" areas on both parcels *in exchange for* Defendant and other property owners paying Plaintiff a monthly fee (the "Common Area Provision"). Under the terms of the COREA, the exterior common area included all retention ponds.

By its terms, the COREA expired in September 2019 and was not renewed.

Plaintiff commenced this action in 2019 seeking, in relevant part, damages for trespass based on the stormwater from Defendant's parcel that continued to flow onto Plaintiff's tract and into Plaintiff's retention pond after Defendant's contractual right to use the pond under the COREA had terminated.

During the litigation, Defendant admitted to the trespass, though Defendant disagreed as to the amount of damages Plaintiff was seeking for the trespass. Also, Defendant consented to an order being entered directing it to develop a retention pond on its own tract to handle the stormwater accumulating on Defendant's tract.

In May 2023, at the conclusion of the bench trial, the trial court entered its judgment awarding Plaintiff $1,000.00 in nominal damages for trespass for Defendant's unauthorized use of Plaintiff's stormwater retention pond. The trial court indicated that it would enter a separate order concerning Defendant's obligation to take action to handle the stormwater accumulating on Defendant's tract. Plaintiff noticed its appeal from the May 2023 judgment, based on the small verdict.

In August 2023, after Plaintiff noticed its appeal from the May 2023 judgment, the trial court entered its separate order, directing Defendant to take certain actions on its land to handle accumulating stormwater. Defendant separately noticed its appeal from that August 2023 order.

II. Analysis

In this opinion, we address both Plaintiff's appeal and Defendant's cross-appeal in turn below.

A. Plaintiff's Appeal

Plaintiff appeals from the May 2023 judgment in which the trial court awarded a mere $1,000.00 in nominal damages for Defendant's admitted trespass based on Defendant's continued reliance on the retention pond on Plaintiff's tract to handle the stormwater from Defendant's tract.

On appeal, Plaintiff argues the trial court erred in relying on *Bishop v. Reinhold*, 66 N.C. App. 379 (1984), because *Bishop* dealt with a

continuing trespass, whereas the trespass here is an intermittent/renewing/recurring trespass. *See Galloway v. Pace Oil Co.*, 62 N.C. App. 213, 217 (1983) ("[I]f water is not diverted to a person's land so that it is permanently there, it is not a continuing trespass."); *Duval v. Atl. Coast Line R.R. Co.*, 161 N.C. 448, 449 (1913) ("The injury caused by wrongfully ponding or diverting water on the land of another, causing damage, is regarded as a renewing rather than a continuing trespass.").

Because the present case deals with a *recurring* trespass, Plaintiff argues the trial court should have measured damages according to other cases that dealt with recurring trespasses, namely *Phillips v. Chesson*, 231 N.C. 566 (1950), and *Casado v. Melas Corp.*, 69 N.C. App. 630 (1984). However, those cases are not clear as to how to measure damages for recurring trespasses. In *Phillips*, our Supreme Court stated that damages for recurrent trespasses should *not* be measured based on diminution in market value, but the Court declined to instruct as to how damages for recurring trespasses *should* be measured. 231 N.C. at 571. Rather, the Court stated that "[v]arious other rules are applied, such as [1] diminished rental value, [2] reasonable costs of replacement or repair, or [3] restoring the property to its original condition with added damages for other incidental items of loss[.]" *Id.*

Here, Plaintiff failed to present evidence for any of these potential measurements. Plaintiff put on no evidence of diminished rental value due to Defendant's use of the pond. And Plaintiff similarly failed to present evidence of the costs to replace or repair the pond or restore the pond to its original condition. We note the following finding of fact by the trial court:[1]

> Photographic evidence established the existence of damage to pavement and curbing as well as minor erosion around the pond. However, Plaintiff failed to establish a causal relationship between the damage and Defendant's trespass. The damage was no worse than in other areas of [the road bordering the retention pond] and the pond which were prone to flooding. Moreover, even if a causal relationship could be established, Plaintiff failed to offer any evidence of the cost of the repairs shown in the photographs.

1. When a party appeals the trial court's findings of fact from a bench trial, the contested findings are conclusive on appeal if supported by any competent evidence. *See Cherry Cnty. Org. v. Sellars*, 381 N.C. 239, 251-52 (2022) (citation omitted). We conclude this finding of fact is supported by competent evidence and, thus, conclusive.

Under a theory that it would take a one-acre stormwater retention pond to retain the surface water generated by Defendant's Parcel, Plaintiff offered evidence showing the rental value of *one acre of Plaintiff's undeveloped real property within Plaintiff's Parcel*. But that evidence is not relevant to the damages issue here. Here, the question is the rental value of the property actually occupied—not the rental value of a hypothetical new property. It is Plaintiff's burden to show how it was damaged, which Plaintiff failed to do here. *See Olivetto Corp. v. Ames Bus. Sys., Inc.*, 319 N.C. 534, 547 (1987). Accordingly, the trial court only awarded nominal damages.

Plaintiff did attempt to put on evidence, including expert testimony, to prove its damages and argues on appeal that the trial court erred in not allowing much of this into evidence. Specifically, Plaintiff attempted to offer evidence that Defendant would need a one-acre retention pond to handle its stormwater, that the value of one acre of land was about $116,700.00; that it would cost $750,000.00 to construct a one-acre retention pond to handle stormwater; and that it would cost about $2,700.00 per month to rent an acre of land. However, none of this evidence is relevant to establish Plaintiff's *compensatory* damages: The evidence does not show the "diminished rental value" of *Plaintiff's* tract caused by Defendant's use of Plaintiff's retention pond; the "reasonable costs of . . . repair" for damage to Plaintiff's retention pond caused by Defendant's stormwater runoff; or the cost to "restor[e] [Plaintiff's] property to its original condition[.]" *Phillips*, 231 N.C. at 571.

That is not to say that Plaintiff's evidence would not be relevant to establish Defendant's liability for *punitive* damages if Plaintiff otherwise showed it was entitled to an award of punitive damages. Indeed, one aspect of property ownership is the right to exclude others from its use. *See Hildebrand v. S. Bell Tel. & Tel. Co.*, 219 N.C. 402, 408 (1941) (recognizing the right to exclude as an integral aspect of property ownership). And evidence of what Defendant would have to pay to develop or rent its own retention pond is evidence of the minimal punitive damage award which would deter Defendant or similar parties in Defendant's position from trespassing. For instance, in a case studied by many first-year law students, the Wisconsin Supreme Court upheld a jury's punitive award of $100,000.00 against a defendant who trespassed across the plaintiff's property to deliver a mobile home to another property to avoid a more costly delivery route, reasoning:

> [The defendant's] intentional trespass reveals an indifference and a reckless disregard for the law, and for the rights of others. . . . We are further troubled by [the defendant's]

> utter disregard for the rights of [the plaintiff]. Despite numerous unambiguous refusals by [the plaintiff] to allow [the defendant] access to their land, [the defendant] delivered the mobile home across [the plaintiff's land].
>
> Furthermore, . . . [the defendant] acted deviously. [After repeated assuring the plaintiff that it would not trespass to deliver the mobile home, the defendant's manager told his employees] to use any means to deliver the mobile home. . . .
>
> We feel certain that the $100.000 [punitive damage award, notwithstanding the fact that the plaintiff suffered only nominal damages otherwise] will serve to encourage [the defendant to obey the law in the future] by removing the profit from the intentional trespass.

Jacque v. Steenberg Homes Inc., 563 N.W.2d 154, 164–65 (Wisc. 1997).

In North Carolina, our General Assembly has provided that punitive damages may be awarded "in an appropriate case . . . to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar wrongful acts." N.C.G.S. § 1D-1. And our Court, quoting our Supreme Court, has held that an award of punitive damages is appropriate based on a trespass claim " 'where the wrong is done willfully or under circumstances of rudeness, oppression or in a manner which evinces a reckless and wanton disregard of plaintiff's rights[.]' " *Huberth v. Holly*, 120 N.C. App. 348, 355 (1995) (quoting *Van Leuven v. Akers Motor Lines, Inc.*, 261 N.C. 539, 546 (1964)).

In this present case, Plaintiff did seek punitive damages. However, the trial court made no award for punitive damages. And Plaintiff has made no argument on appeal that it was entitled to any punitive damages award. Accordingly, we hold that the trial court did not reversibly err in not considering the evidence of damages it sought to offer. And we affirm the May 2023 judgment awarding Plaintiff $1,000.00 in nominal damages.

A. Defendant's Cross-Appeal

During the trial, Defendant represented to the trial court that it would begin the process of constructing a stormwater retention pond on its own tract and would take any other necessary actions as soon as reasonably possible. Defendant stated that it would be willing to join in a consent order; however, Plaintiff and Defendant failed to reach any definitive agreement. In August 2023, after Plaintiff had noticed an appeal from the May 2023 judgment and following a hearing regarding

injunctive relief, the trial court entered an order titled "Order Addressing Injunctive Relief." This was not a consent order. One provision in the order requires Defendant to remove *all existing impervious surfaces* on its property and plant suitable grass cover within forty-five days. Defendant appeals this provision.

One could argue that the trial court lacked jurisdiction to enter the August 2023 order, as Plaintiff had already noticed an appeal from the May 2023 judgment. And, normally, the notice of an appeal divests the trial court of jurisdiction to do anything. *See Bower v. Hodge Motor Co.*, 292 N.C. 633, 635 (1977). However, our Court has held that an appeal from a non-appealable order does not divest the trial court from acting in the matter. *RPR & Assocs., Inc. v. Univ. of N. Carolina-Chapel Hill*, 153 N.C. App. 342, 347 (2002).

Here, Plaintiff's appeal was from an interlocutory judgment, as the trial court had indicated that it was still to rule on whether to grant injunctive relief. Therefore, based on our Court's decision in *RPR & Assocs.*, we must conclude that the trial court had jurisdiction to enter the August 2023 order.

Turning to the merits of Defendant's appeal from the August 2023 order, Defendant only challenges the portion of the order (paragraph 2 of that order) requiring it to remove all existing impervious surfaces on its parcel and plant suitable grass cover on the entire parcel. Defendant has not appealed the other provisions in that order which essentially direct Defendant to take action to build features on its property preventing its stormwater from escaping onto Plaintiff's property. After careful review of the record, we agree with Defendant that the trial court erred in requiring Defendant to remove all its impervious surfaces, as there was insufficient evidence showing that such action was appropriate. Accordingly, we reverse paragraph 2 of the August 2023 order but affirm it in all other respects.

III. Conclusion

We affirm the trial court's May 2023 judgment. We affirm in part and reverse in part the trial court's August 2023 order.

AFFIRMED IN PART; REVERSED IN PART.

Judges STROUD and ZACHARY concur.

IN RE B.B.A.

[299 N.C. App. 179 (2025)]

IN THE MATTER OF B.B.A.

No. COA24-951

Filed 4 June 2025

Termination of Parental Rights—termination not in juvenile's best interest—father thwarted by adoption agency—no abuse of discretion

In a termination of parental rights proceeding involving a mother who relinquished her parental rights to place her infant for adoption and a father who wished to raise the child, the district court did not abuse its discretion in determining that termination of the father's parental rights was not in the child's best interest, even though grounds existed that would support termination (the father had not legitimized the child or established paternity prior to the filing of a petition by an adoption agency). The court's unchallenged dispositional findings of fact were that the father expressed his desire for custody before the child's birth, made continuous efforts to obtain custody and prevent the child's adoption, would be a great father, had a plan of care for the child, and had a strong support system to help him raise the child; moreover, it was appropriate for the court to consider that grounds existed that would support termination due to factors that were largely outside of the father's control—including efforts by petitioner adoption agency to thwart the father's attempts to gain custody.

Appeal by Petitioner from Order entered 15 July 2024 by Judge Ashleigh S. Parker in Wake County District Court. Heard in the Court of Appeals 22 April 2025.

Heyward Wall Law, P.A., by Heyward G. Wall, for Petitioner-Appellant.

Parent Defender Wendy C. Sotolongo, by Deputy Parent Defender Annick Lenoir-Peek, for Respondent-Appellee Father.

No brief filed for Guardian ad litem.

HAMPSON, Judge.

Factual and Procedural Background

Amazing Grace Adoptions (Petitioner) appeals from an Order denying its Petition for Termination of Respondent-Father's parental rights to B.B.A.[1] The Record before us tends to reflect the following:

Respondent-Father and Respondent-Mother began a relationship together in 2022.[2] At that time, Respondent-Father and Respondent-Mother both lived in California. Respondent-Mother later joined the military; Respondent-Father remained in California. Respondent-Mother learned she was pregnant in January or February 2023, while she was at a military "schoolhouse" in Florida. Respondent-Mother informed Respondent-Father of her pregnancy and initially indicated she was considering an abortion. Later, Respondent-Mother told Respondent-Father she wanted to give the child up for adoption. Respondent-Father opposed putting the child up for adoption, instead desiring to raise the child himself.

Respondent-Father offered to support Respondent-Mother and expressed a desire to be at the hospital when the baby was born. Respondent-Father inquired about the baby's due date and gender, but Respondent-Mother would not give him the information—outside of an "estimate" the child would be born in July or August. In March 2023, Respondent-Mother gave Respondent-Father Petitioner's contact information—the adoption agency she was working with, located in Raleigh, North Carolina. Soon after, Respondent-Mother began ignoring Respondent-Father's attempts to contact her.

On or about 9 March 2023, Respondent-Father contacted Petitioner and spoke with Respondent-Mother's pregnancy counselor. Respondent-Mother had informed the counselor Respondent-Father was the child's biological father, but the counselor refused to give Respondent-Father any information because she was "bound by confidentiality." Respondent-Father was adamant he did not want the child to be adopted, and the pregnancy counselor told him he would "have to get an attorney[.]"

Respondent-Father traveled to Raleigh, where he remained for approximately the next seven months, to continue his efforts to obtain custody of the unborn baby. On 1 May 2023, Respondent-Father went to Petitioner's office, waited outside, and called about speaking in person

1. The parties did not agree on a pseudonym for the minor child.

2. Respondent-Mother is not a party to this appeal.

to someone about the baby. Petitioner's staff indicated they were "busy" and there was no one who could help Respondent-Father. The following day, Respondent-Father returned to Petitioner's office but was told the staff "were in meetings all day" and there was no one available to talk to him. While Respondent-Father was waiting outside, Petitioner's director called him and threatened to "call the cops" on him.

After Petitioner continued to refuse to provide Respondent-Father with information, Respondent-Father hired a lawyer. Respondent-Father's counsel was also unsuccessful in obtaining information from Petitioner. Respondent-Father's counsel was told it was not possible to file a paternity action or request custody of the child until after the child was born.

When the baby was born on 30 June 2023, Respondent-Mother did not tell Respondent-Father. Respondent-Mother executed a relinquishment of her rights to the minor child the following day, on 1 July 2023. The minor child was placed with an adoptive family on 2 July 2023. That same day, Respondent-Father went to Petitioner's office and spoke to Respondent-Mother's pregnancy counselor, who did not tell him the baby had been born. Respondent-Father spoke to Petitioner's director on 3 July 2023, who also did not tell Respondent-Father the baby had been born. "[A]lmost a month" later, when Respondent-Father learned about the minor child's birth and placement with an adoptive family, he requested and was denied visitation.

On 3 July 2023, Petitioner filed a Petition for termination of Respondent-Father's parental rights. In the Petition, Petitioner alleged Respondent-Father's parental rights were subject to termination pursuant to N.C. Gen. Stat. § 7B-1111(a)(5), in that Respondent-Father had not legitimated the child or established paternity. The Petition further alleged it was in the minor child's best interest that Respondent-Father's parental rights be terminated because Respondent-Mother believed it was in the child's best interest, the child was less than one month old, the child had no bond with Respondent-Father, the child had bonded with his adoptive parents, and terminating Respondent-Father's parental rights would aid in the successful adoption of the child by his adoptive parents. On 25 October 2023, Respondent-Father filed an Answer and Counterclaim for Paternity, Legitimation, and Temporary and Permanent Child Custody. Results of the subsequent paternity testing confirmed Respondent-Father is the minor child's biological father.

The hearing on the Petition was held on 13 June 2024. At the time of the hearing, Respondent-Father still had not met the minor child. At the hearing, the Guardian ad litem testified he thought Respondent-Father

"could accommodate having a child living with him and take care of the child." Respondent-Mother testified she believed the adoptive family would be "better" caretakers, but there was nothing to make her think Respondent-Father would not be a good father. Respondent-Father testified he had a plan for the child's care and family to support him. Respondent-Father admitted he did not file for legitimation or paternity prior to the filing of the Petition.

On 15 July 2024, the trial court entered an Order concluding grounds existed to terminate Respondent-Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5). The trial court further concluded it was not in the best interest of the minor child to terminate Respondent-Father's parental rights, and "it is absolutely in the best interest for the minor child to be in the care, custody, and control of his father and to have the opportunity to bond with his paternal biological family." On 13 August 2024, Petitioner timely filed Notice of Appeal.

Issue

The issue on appeal is whether the trial court abused its discretion in determining it was not in the juvenile's best interest to terminate Respondent-Father's parental rights.

Analysis

"A proceeding to terminate parental rights is a two step process with an adjudicatory stage and a dispositional stage." *In re D.R.B.*, 182 N.C. App. 733, 735, 643 S.E.2d 77, 79 (2007). "In the adjudicatory stage, the burden is on the petitioner to prove by clear, cogent, and convincing evidence that one of the grounds for termination of parental rights set forth in N.C. Gen. Stat. § 7B-1111(a) exists." *Id.*

"If the petitioner meets its burden of proving at least one ground for termination of parental rights exists under N.C. Gen. Stat. § 7B-1111(a), the court proceeds to the dispositional phase and determines whether termination of parental rights is in the best interests of the child. The standard of review of the dispositional stage is whether the trial court abused its discretion in terminating parental rights." *In re C.C.*, 173 N.C. App. 375, 380-81, 618 S.E.2d 813, 817 (2005) (citation omitted). " 'Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision.' " *In re C.J.H.*, 240 N.C. App. 489, 492-93, 772 S.E.2d 82, 86 (2015) (quoting *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

"The trial court's dispositional findings of fact are reviewed under a competent evidence standard." *In re K.N.K.*, 374 N.C. 50, 57, 839

S.E.2d 735, 740 (2020) (citations and quotation marks omitted); *see also Stephens v. Stephens*, 213 N.C. App. 495, 503, 715 S.E.2d 168, 174 (2011) ("As long as there is competent evidence to support the trial court's findings, its determination as to the child's best interests cannot be upset absent a manifest abuse of discretion." (citation and quotation marks omitted)). Unchallenged findings of fact are "deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58 (2019) (citing *Koufman v. Koufman*, 330 N.C. 93, 97, 408 S.E.2d 729, 731 (1991)).

The parties do not challenge the trial court's determination grounds existed to terminate Respondent-Father's parental rights under N.C. Gen. Stat. § 7B-1111(a)(5). Rather, Petitioner contends the trial court abused its discretion by declining to terminate those rights.

When determining whether termination of parental rights is in the best interest of a juvenile, N.C. Gen. Stat. § 7B-1110(a) requires the trial court consider:

> (a) After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest. . . . In each case, the court shall consider the following criteria and make written findings regarding the following that are relevant:
>
> (1) The age of the juvenile.
>
> (2) The likelihood of adoption of the juvenile.
>
> (3) Whether the termination of parental rights will aid in the accomplishment of the permanent plan for the juvenile.
>
> (4) The bond between the juvenile and the parent.
>
> (5) The quality of the relationship between the juvenile and the proposed adoptive parent, guardian, custodian, or other permanent placement.
>
> (6) Any relevant consideration.

N.C. Gen. Stat. § 7B-1110(a) (2023). "[T]he language of [N.C. Gen. Stat. § 7B-1110(a)] requires the trial court to consider all six of the listed factors, and . . . any failure to do so would constitute an abuse of discretion." *In re D.H.*, 232 N.C. App. 217, 220-21, 753 S.E.2d 732, 735 (2014) (quotation marks omitted). However, "the court must enter written

findings in its order concerning only those factors that are relevant." *Id.* (citations and quotation marks omitted).

It is well established that "[a]fter the trial court has determined grounds exist for termination of parental rights at adjudication, the court is required to issue an order of termination in the dispositional stage, *unless it finds the best interests of the child would be to preserve the parent's rights*." *In re Blackburn*, 142 N.C. App. 607, 613, 543 S.E.2d 906, 910 (2001) (emphasis added) (citation omitted). Here, the trial court concluded it was in the minor child's best interest to uphold Respondent-Father's parental rights:

> 4. That after considering all relevant factors for best interest and weighing them accordingly, it is not in the best interest of the minor child that the parental rights of the Respondent Father . . . be terminated.
>
> 5. That the relevant consideration is that it is absolutely in the best interest for the minor child to be in the care, custody, and control of his father and to have the opportunity to bond with his paternal biological family.

The trial court further concluded "Respondent Father has a paramount constitutional right to the care, custody, and control of his child and has not acted contrary to that right."

In support of its Conclusions, the trial court made the following Findings:

> 20. The Mother sought out the adoption agency despite the request from the Father to allow him to keep the child.
>
> 21. Respondent Father learned of the mother's intent to place the child for adoption when he received a packet from the Adoption Agency and then called and spoke with the Agency. He told the agency as early as April/May 2023 that he did not want his minor child to be adopted.
>
> 22. Respondent Father then flew from Los Angeles, California, to North Carolina several times to try to figure out what was happening with the adoption agency and how he could prevent the adoption of the minor child from happening.
>
> 23. Respondent Father even moved to North Carolina for seven months and hired an attorney to try and stop his child from being adopted.

24. Despite several attempts by Respondent Father and his attorney, the Adoption Agency would not speak with Respondent Father nor his attorney regarding the minor child, per their "policy" and the Agency's duty of confidentiality to pregnant clients. The Adoption Agency also would not speak with Respondent Father because he was hanging around their parking lot, the child had not yet been born, and they did not have any real information to give the Respondent Father. The Adoption Agency even threatened to have him trespassed because he sought answers on how to stop his child from being adopted.

25. The Adoption Agency ignored Respondent Father's and his attorney's requests to establish a bond with the minor child as they refused to let the Respondent father meet and spend time with the minor child.

26. Respondent Father has tried everything he can to create a bond with the minor child, including asking for visitation, but has been thwarted by the Adoption Agency in his attempts to create a bond with the minor child.

27. The Adoption Agency's only reason for denial of his attempts is that it is not in their "policy" to speak to or allow Respondent Father communication or visitation with the minor child.

28. An adoption agency does not have a carte blanche right to terminate a parent's parental rights simply because the child has been placed with a prospective adoptive family.

29. Respondent father was not afforded the opportunity to send the minor child gifts or financial assistance because the Adoption Agency would not accept them.

30. Respondent father has not been afforded an opportunity to foster the bond [between] a biological parent and child, despite his multiple efforts.

31. Mother stated that there was nothing wrong with Respondent Father and that while he would be a good father to their son, the family that she "chose" for him would give him a better life.

32. Respondent Father has a plan for the minor child and a strong support system of family members who reside with him and would assist him with his child.

> 33. The Guardian ad Litem said the child would do well in either home and could not make a determination on who would be in the child['s] best interest to remain with.

Petitioner challenges Findings 21, 28, and 29 as unsupported by the evidence.[3] Even assuming, without deciding, each of the challenged Findings is unsupported, the remaining unchallenged Findings are sufficient to support the trial court's Conclusions. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58-59.

The trial court's unchallenged Findings show Respondent-Father desired custody of the minor child before the minor child was born, made continuous efforts to obtain custody of the minor child and prevent the child's adoption, "would be a good father[,]" has a plan of care for the minor child, and has a "strong support system" to help him raise the minor child. The trial court considered—as it was allowed to do—that the reason grounds existed under N.C. Gen. Stat. § 7B-1111(a)(5) for termination of Respondent-Father's parental rights was largely due to circumstances outside Respondent-Father's control. *See Stephens*, 213 N.C. App. at 503, 715 S.E.2d at 174 ("[A]ny evidence which is competent and relevant to a showing of the best interest of that child must be heard and considered by the trial court . . . [because] trial courts are vested with broad discretion in child custody matters." (quotation marks and citations omitted)). The trial court found Respondent-Father had not acted contrary to his constitutionally protected right to the care, custody, and control of the minor child.[4] Accordingly, the trial court appropriately concluded it would not be in the minor child's best interest to terminate Respondent-Father's parental rights. *See Owenby v. Young*, 357 N.C. 142, 145, 579 S.E.2d 264, 266 (2003) ("[A]bsent a finding that parents (i) are unfit or (ii) have neglected the welfare of their children, the constitutionally protected paramount right of parents to custody, care, and control of their children must prevail." (citation omitted)).

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3. Petitioner also challenges adjudicatory Finding 8. This Finding concerns whether grounds to terminate Respondent-Father's parental rights exist; because the parties do not challenge the trial court's Conclusion as to grounds for termination, Finding 8 is irrelevant to our analysis. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58-59 ("[W]e review only those findings necessary to support the trial court's determination that grounds existed to terminate respondent's parental rights." (citation omitted)).

4. Although the trial court labeled this determination a Conclusion of Law, it is more properly characterized as a Finding of Fact, and thus we review it as such. *See Walsh v. Jones*, 263 N.C. App. 582, 589, 824 S.E.2d 129, 134 (2019) ("The labels 'findings of fact' and 'conclusions of law' employed by the trial court in a written order do not determine the nature of our review." (citation and alteration omitted)).

Petitioner contends Respondent-Father's right to parent his child is irrelevant to the minor child's best interest and the trial court's Conclusions improperly favor Respondent-Father's interests over those of the minor child. In support of this assertion, Petitioner cites *In re Blackburn* for the premise that "[i]n all cases where the interests of the child and those of the child's parents or guardians are in conflict, . . . action which is in the best interests of the child should be taken." 142 N.C. App. at 612, 543 S.E.2d at 910 (citation omitted); *see also* N.C. Gen. Stat. § 48-1-100(c) (2023) ("Any conflict between the interests of a minor adoptee and those of an adult shall be resolved in favor of the minor."); *id.* § 7B-1100(3) (2023) ("Action which is in the best interests of the juvenile should be taken in all cases where the interests of the juvenile and those of the juvenile's parents or other persons are in conflict.").

Here, however, there is no evidence Respondent-Father's and the minor child's interests conflict; nor is there evidence indicating allowing Respondent-Father to bond with the minor child is not in the minor child's best interest. Rather, the Record tends to show terminating Respondent-Father's parental rights would be an unnecessary severance of Respondent-Father's relationship with the minor child. *See* N.C. Gen. Stat. § 7B-1100(2) (2023) (recognizing "the need to protect all juveniles from the unnecessary severance of a relationship with biological or legal parents.").

Moreover, we cannot say Respondent-Father's right to the care and custody of the minor child is irrelevant to the minor child's interests. As the Supreme Court of the United States in *Lehr v. Robertson* recognized:

> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and *make uniquely valuable contributions to the child's development*.

463 U.S. 248, 262, 103 S. Ct. 2985, 2993, 77 L. Ed. 2d 614 (1983) (emphasis added) (footnote omitted); *see also Owenby*, 357 N.C. at 145, 579 S.E.2d at 266 (recognizing the presumption a fit parent will act in the best interest of their child). While upholding parental rights is not always in a juvenile's *best* interest, having a relationship with his or her biological parents is certainly relevant to a juvenile's interests. And here, as the trial court recognized, there was no evidence having a relationship with Respondent-Father would not be in the minor child's best interest.

Petitioner further makes the unsupported assertion the trial court acted on a belief a parent's constitutional right to custody and control of their child is "unbreakable" and "absolute." Nowhere in its Order, nor in the transcript of the hearing, nor anywhere else in the Record does the trial court purport to hold such a belief. To the contrary, the trial court concluded it was not in the minor child's best interest to terminate Respondent-Father's parental rights in part because Respondent-Father had "not acted contrary to" those rights. Thus, the trial court clearly recognized those rights were not absolute.

Lastly, Petitioner argues the trial court's decision means "[e]ven the most disinterested biological fathers could prevent adoptions merely by stating their opposition." This argument is a gross manipulation of the facts at bar. The trial court's unchallenged Findings do not indicate Respondent-Father is a "disinterested" parent, nor that Respondent-Father merely "announced" he wanted to preserve his parental rights. Quite the opposite, the trial court's Findings show Respondent-Father expressed an active desire to be involved in the minor child's life—before the minor child was born and continuing through the present. Indeed, all evidence tends to show Respondent-Father persistently advocated for his right to parent his child, including moving across the country to try to obtain custody of the minor child.

In light of the ample, competent evidence showing Respondent-Father's unwavering desire to parent his child—and the complete lack of evidence showing a relationship with Respondent-Father would not be in the minor child's best interest—we cannot say the trial court's decision to uphold Respondent-Father's parental rights was unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *See In re C.J.H.*, 240 N.C. App. at 492-93, 772 S.E.2d at 86. Thus, the trial court properly concluded termination of Respondent-Father's parental rights was not in the minor child's best interest. Therefore, the trial court did not err in denying the Petition.

Conclusion

Accordingly, for the foregoing reasons, we affirm the trial court's Order.

AFFIRMED.

Judges STROUD and TYSON concur.

IN RE M.L.H.

[299 N.C. App. 189 (2025)]

IN THE MATTER OF M.L.H.

No. COA24-520

Filed 4 June 2025

Child Abuse, Dependency, and Neglect—no-merit brief—permanency planning order—reunification efforts ceased—guardianship awarded to foster parents

In a child neglect matter, the trial court's permanency planning order ceasing reunification efforts with respondent-father and granting permanent guardianship of the minor child to the child's foster parents was affirmed where, after respondent-father's counsel filed a no-merit brief identifying only one potential issue and respondent-father did not file a pro se brief, the appellate court conducted an independent review of the record and concluded that the trial court made the statutorily required findings and properly considered respondent-father's decision to voluntarily return to incarceration rather than remain on parole and that the trial court did not abuse its discretion in ceasing reunification efforts or in granting guardianship to the foster parents based on the minor child's best interest.

Appeal by Respondent-Father from order entered 14 March 2024 by Judge Pauline Hankins in Brunswick County District Court. Heard in the Court of Appeals 14 January 2025.

Batch, Poore & Williams, PC, by Sydney J. Batch, for Respondent-Appellant-Father.

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

Wake Forest University School of Law, by John J. Korzen, for Other-Appellees.

Campbell University School of Law, by Robert C. Montgomery, for the Guardian ad Litem.

CARPENTER, Judge.

Respondent-Father appeals from the trial court's 14 March 2024 permanency-planning order (the "Order") granting permanent guardianship of his son, M.L.H. ("Michael") to Michael's foster family (collectively, the "Sullivans").[1] Respondent-Father's appointed appellate counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure. After careful review, we affirm.

I. Factual & Procedural Background

Michael was born in September 2020 and lived with his biological mother, who is not a party to this appeal. On 8 September 2020, the Brunswick County Department of Social Services ("DSS") received a family assessment report alleging Michael was neglected, tested positive for THC at birth, and was a substance affected infant. The report also alleged Michael's mother had untreated substance abuse issues.

On 9 September 2020, a social worker responded to the report and met with Michael's family at their home. Michael and his mother were living in a home with several individuals, including Michael's maternal aunt, maternal aunt's boyfriend, boyfriend's brother, and the brothers' mother. When the social worker arrived, she observed Michael lying on a pull-out couch surrounded by several pillows, blankets, bottles, and bibs. The social worker identified this as an inappropriate sleeping environment that posed a risk to Michael's safety. During the visit, Michael's mother told the social worker that she used marijuana while pregnant with Michael, was currently using marijuana twice daily, and was not currently taking her medication for her mental health conditions. Michael's mother agreed, pursuant to a safety plan, that she would not use substances while caring for Michael and that Michael would be provided a sober caregiver. Before leaving, the social worker provided Michael's mother with a pack-n-play and safe-sleeping recommendations for Michael.

On 29 September 2020, DSS received a second family assessment report regarding Michael, which alleged continued neglect, improper supervision, substance abuse, and an injurious environment. Specifically, the report alleged Michael's mother placed Michael in the same inappropriate sleeping environment observed during the initial visit, failed to respond to Michael's feeding cries at night, and placed Michael in a car seat during the night on more than one occasion. Following the report, the social worker responded to the home a second time. During this

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

visit, Michael's mother, Michael's maternal aunt, and their respective boyfriends, all admitted to the allegations in the report.

On 30 September 2020, DSS filed a petition alleging Michael was a neglected and dependent juvenile. Although paternity had not yet been established, the petition listed an individual ("putative father") as Michael's father based on Michael's mother's belief regarding paternity. That same day, the trial court placed Michael in the custody of DSS, who temporarily placed Michael with the Sullivans.

On 12 November 2020, the trial court conducted an adjudication hearing. At the hearing, Michael's mother and putative father admitted that Michael tested positive for marijuana at birth, lacked proper care and supervision, lived in unstable housing, and was often placed in unsafe conditions. After DSS voluntarily dismissed the dependency allegation, the trial court entered an order adjudicating Michael as a neglected juvenile. On 3 December 2020, the trial court conducted a disposition hearing where it ordered that Michael remain in DSS custody and continue living with the Sullivans. Additionally, the trial court ordered DSS to continue reunification efforts with Michael's mother and putative father.

On 20 January 2021, the trial court conducted a review hearing. Prior to the hearing, putative father participated in DNA testing which revealed he was not Michael's biological father. Consequently, the trial court removed putative father as a party and ordered that DSS continue reunification efforts with Michael's mother. After several permanency-planning hearings, Michael's mother relinquished her parental rights as to Michael on 12 October 2022.

On 10 January 2023, DSS filed a motion to establish paternity after Michael's mother named Respondent-Father as a potential father. The motion indicated that Respondent-Father was incarcerated in Illinois and unable to participate in DNA testing without a court order. On 2 February 2023, following a hearing on the matter, the trial court ordered that Respondent-Father participate in DNA testing. Respondent-Father complied, and the DNA testing indicated a 99.99% probability that Respondent-Father was Michael's biological father. Accordingly, on 6 July 2023, the trial court adjudicated Respondent-Father as Michael's biological father.

On 31 July 2023, a notice of hearing was mailed to Respondent-Father. On 16 August 2023, the trial court conducted the first permanency-planning hearing since Respondent-Father was found to be Michael's biological father. Respondent-Father did not participate in the hearing, but his

attorney was present and offered a proffer in that Respondent-Father was presently incarcerated. Respondent-Father's attorney informed the trial court that Respondent-Father was scheduled to be released to a halfway house on 22 August 2023 where he would remain for two months. Respondent-Father planned to live with his mother in Illinois upon his release from the halfway house.

The trial court entered a permanency-planning order on 11 October 2023, making several findings regarding Michael's foster placement with the Sullivans. Specifically, the trial court found that Michael had been living with the Sullivans since he was twenty-nine days old and was "thriving." The trial court also found that the Sullivans were "the only home and family [Michael] knows." The trial court adopted a primary plan of reunification with Respondent-Father and a secondary plan of guardianship with the Sullivans.

On 11 September 2023, Respondent-Father executed an out-of-home services agreement with DSS that addressed mental health, employment, and housing. Then, on 26 September 2023, the trial court conducted a second permanency-planning hearing. Respondent-Father attended the hearing via Webex and testified. He informed the trial court that he had been released from incarceration and was living in a halfway house in Illinois as a condition of his parole, with his release contingent on his good behavior. The trial court entered a permanency-planning order on 30 November 2023, finding, again, that Michael was "thriving" with the Sullivans. The trial court maintained the primary plan of reunification with Respondent-Father and secondary plan of guardianship with the Sullivans.

In December 2023, however, Respondent-Father voluntarily returned to incarceration rather than remain on parole. According to Respondent-Father, he chose to return to incarceration because his parole officer was "writing him up for the littlest things."

On 22 January 2024, the trial court conducted another permanency-planning hearing. Respondent-Father appeared via Webex and testified that he voluntarily returned to incarceration and would be released in July 2024. Respondent-Father further testified that upon his release from incarceration he would be living with his significant other and that he hoped to be reunified with Michael even though he had never met him.

On 14 March 2024, the trial court entered the Order finding Respondent-Father acted in a manner inconsistent with Michael's health and safety, failed to make any measurable progress toward his case plan or reunification, and voluntarily returned to incarceration at a time when

it was critical for him to work on his case plan goals. The trial court further found that Respondent-Father demonstrated a disregard for Michael's best interest by voluntarily returning to incarceration rather than remaining in the halfway house where he could have made progress toward his case plan goals. The trial court found that reunification with Respondent-Father within the next six months was not possible and would clearly be unsuccessful due to Respondent-Father's decision to return to incarceration until July 2024. Accordingly, the trial court ceased reunification efforts and awarded guardianship of Michael to the Sullivans. The trial court did, however, grant Respondent-Father telephone contact and supervised monthly visits with Michael upon Respondent-Father's release from incarceration. On 28 March 2024, Respondent-Father filed written notice of appeal.

II. Jurisdiction

This Court has jurisdiction under N.C. Gen. Stat. § 7B-1001(a)(4) (2023).

III. Analysis

Respondent-Father's appellate counsel filed a no-merit brief pursuant to Rule 3.1(e) of the North Carolina Rules of Appellate Procedure after concluding "the record contains no issues of merit on which to base an argument for relief." As required under Rule 3.1(e), counsel advised Respondent-Father of his right to file *pro se* written arguments on his own behalf with this Court and provided him with the documents necessary to do so. *See* N.C. R. App. P. 3.1(e). Respondent-Father has not submitted a written argument to this Court.

Under Rule 3.1(e), this Court conducts an independent review of the issues identified by counsel in a no-merit brief. *See In re L.E.M.*, 372 N.C. 396, 402, 831 S.E.2d 341, 345 (2019); N.C. R. App. P. 3.1(e). Respondent-Father's appellate counsel specified one issue for our independent review: whether the trial court abused its discretion by awarding guardianship of Michael to the Sullivans.

"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 C.M.*, 183 N.C. App. 207, 213, 644 S.E.2d 588, 594 (2007). "Findings of fact not challenged by [the] respondent are deemed supported by competent evidence and are binding on appeal." *In re T.N.H.*, 372 N.C. 403, 407, 831 S.E.2d 54, 58

(2019). "We review a trial court's determination as to the best interest of the child for an abuse of discretion." *In re D.S.A.*, 181 N.C. App. 715, 720, 641 S.E.2d 18, 22 (2007). "Abuse of discretion results where the court's ruling is manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *In re A.H.F.S.*, 375 N.C. 503, 513, 850 S.E.2d 308, 317 (2020) (citing *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988)).

The longstanding rule that "incarceration, standing alone, is neither a sword nor a shield[,]" is applicable in the context of this case. *See In re K.N.*, 373 N.C. 274, 282, 837 S.E.2d 861, 867 (2020) (cleaned up); *In re E.B.*, 298 N.C. App. 311, 912 S.E.2d 884 (2024) (unpublished). In the same way a parent's incarceration, on its own, "cannot serve as clear, cogent, and convincing evidence of neglect," incarceration, on its own, cannot support the trial court's decision to eliminate reunification with a parent as a primary or secondary plan. *See In re K.N.*, 372 N.C. at 283, 837 S.E.2d at 867. The degree to which a parent's incarceration supports the trial court's decision to cease reunification depends on the facts and circumstances of each case, including the length of the incarceration and, as is relevant here, whether it was undertaken voluntarily. *See id.* at 283, 837 S.E.2d at 867–68.

As a general rule, the trial court is permitted to cease reunification efforts following a permanency-planning hearing if it "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). To make such a determination, the trial court must make written findings concerning:

> (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.

Id. § 7B–906.2(d) (2023); *see also In re D.C.*, 275 N.C. App. 26, 29–30, 852 S.E.2d 694, 697 (2020). The trial court exercises discretion when making written findings under section 7B–906.2(b) but is required to make written findings for the factors that demonstrate the degree of a parent's

progress, or lack thereof, toward reunification. *In re L.L.*, 386 N.C. 706, 718–19, 909 S.E.2d 151, 161 (2024).

Here, the unchallenged findings support the trial court's decision to cease reunification efforts with Respondent-Father and grant guardianship of Michael to the Sullivans. In accordance with section 7B–906.2(b), the trial court found that continued reunification efforts with Respondent-Father would be "clearly futile and [] unsuccessful." *See* N.C. Gen. Stat. § 7B–906.2(b). To support this finding, the trial court made the required findings under section 7B–906.2(d) demonstrating Respondent-Father's lack of progress toward reunification. *See In re L.L.*, 386 N.C. at 718–19, 909 S.E.2d at 161.

Specifically, the trial court found that Respondent-Father made inadequate progress toward his case plan within a reasonable period of time and failed to actively participate in the plan or cooperate with the Guardian ad Litem. *See* N.C. Gen. Stat. § 7B-906.2(d)(1)–(2). The trial court also found that Respondent-Father was not consistently available to the Guardian ad Litem, despite his availability to the trial court. *See* N.C. Gen. Stat. § 7B-906.2(d)(3). Further, the trial court found that Respondent-Father acted in a manner inconsistent with Michael's health and safety, highlighting Respondent-Father's choice to return to incarceration at a time when it was critical for him to work on his case plan goals. *See* N.C. Gen. Stat. § 7B-906.2(d)(4); N.C. Gen. Stat. § 7B-906.2(b). Finally, because placement with Respondent-Father was not possible at the time of the hearing or within the following six months due to his incarceration, the trial court found that continued reunification efforts were inconsistent with Michael's need for a safe and permanent home. *See* N.C. Gen. Stat. § 7B-906.1(g); N.C. Gen. Stat. § 7B-906.2(b).

Moreover, the trial court's reliance on Respondent-Father's incarceration in the Order was warranted under these circumstances. *See In re K.N.*, 373 N.C. at 282, 837 S.E.2d at 867; *In re E.B.*, 298 N.C. App. 311, 912 S.E.2d 884 (2024) (unpublished). Respondent-Father's choice to return to incarceration demonstrated a lack of genuine commitment to reunification and was the ultimate manifestation of neglect. *See In re G.B.*, 377 N.C. 106, 115, 856 S.E.2d 510, 517 (2021) (explaining the father's choices while incarcerated hindered his ability to comply with his case plan resulting in the father "construct[ing] the very barriers to the achievement of his case plan goals about which now he complains"). Similarly, here, Respondent-Father created the very obstacles that possibly prevented him from achieving his case plan goals.

Thus, because the trial court made the required findings and properly considered Respondent-Father's voluntary incarceration, it did not

abuse its discretion by ceasing reunification efforts. *See In re T.N.H.*, 372 N.C. at 407, 831 S.E.2d at 58.

Likewise, the trial court did not abuse its discretion by awarding guardianship of Michael to the Sullivans. *See In re D.S.A.*, 181 N.C. App. at 720, 641 S.E.2d at 22. The unchallenged findings establish Michael has been living with the Sullivans since he was twenty-nine days old and has never met Respondent-Father. Further, the findings establish that Michael is "thriving and meeting all developmental milestones" and that the Sullivans' home is the only home Michael has ever known. Finally, the Sullivans testified they understand the legal significance of guardianship, have adequate resources to continue providing proper care for Michael, and are committed to facilitating a relationship between Michael and his biological family. *See* N.C. Gen. Stat. § 7B-906.1(j) (2023) (providing that the trial court shall verify that the person being appointed guardian understands the legal significance of the appointment and will have adequate resources).

Thus, the trial court's decision to award guardianship of Michael to the Sullivans based on Michael's best interest was not "so arbitrary that it could not have been the result of a reasoned decision." *See In re A.H.F.S.*, 375 N.C. at 513, 850 S.E.2d at 317. Therefore, the trial court did not abuse its discretion by awarding guardianship of Michael to the Sullivans.

IV. Conclusion

After careful consideration of the issue presented in the no-merit brief and following our independent review of the record, we conclude the trial court made the required findings and did not abuse its discretion by ceasing reunification efforts with Respondent-Father and awarding guardianship to the Sullivans. Accordingly, we affirm the Order.

AFFIRMED.

Judges STROUD and GRIFFIN concur.

IN RE TRADE LAND CO., LLC

[299 N.C. App. 197 (2025)]

IN THE MATTER OF THE APPEAL OF

TRADE LAND COMPANY, LLC, APPELLANT

FROM THE DECISION OF THE PITT COUNTY BOARD OF EQUALIZATION AND REVIEW

No. COA24-884

Filed 4 June 2025

1. Taxation—real property—revocation of tax-deferred status—sufficiency of notice—the Machinery Act—timing provisions not implicated

In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program (upon discovering that the parcels never qualified for the program in the first place), the Commission properly affirmed the county Board of Equalization and Review's decision upholding the revocation of the parcels' tax-deferred status. Appellant contended that it did not receive proper notice of the tax assessor's decision under the Machinery Act, which required notice prior to the Board's first meeting of the year whenever a property received a new "appraisal" or "assessment." However, this timing requirement was inapplicable because appellant's parcels had not been reappraised or reassessed; rather, the tax assessor simply changed the status of appellant's already-assessed taxes from deferred to due. Thus, the notice provided to appellant was sufficient under the Act.

2. Taxation—real property—revocation of tax-deferred status—notice—statute allowing for "immaterial irregularities"—not unconstitutional

In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where appellant contended that it received untimely notice of the change, the Commission properly affirmed the county Board of Equalization and Review's decision (upholding the parcels' removal from the program) under N.C.G.S. § 105-394, which provides that a failure to give proper notice is an "immaterial regularit[y]" for purposes of property tax assessments. Contrary to appellant's contention, section 105-394 had not been held

unconstitutional by the Supreme Court in a case that (1) involved an as-applied rather than facial challenge to the statute, and (2) was factually distinguishable from appellant's case in that it involved a total failure to provide notice.

3. Taxation—real property—revocation of tax-deferred status —due process—actual notice and opportunity to be heard

In an appeal brought by a corporate landowner (appellant) before the Property Tax Commission after a county tax assessor removed eleven of appellant's parcels from the Present-Use Value tax-deferral program, where the county Board of Equalization and Review upheld the parcels' removal from the program, the Commission—in affirming the Board's decision—properly determined that appellant's constitutional due process rights had been adequately preserved where it received actual notice of the change in the parcels' tax status and subsequently participated at a hearing before the Board. Appellant's argument that it was provided insufficient time between the notice and the hearing to prepare its case before the Board was meritless where: appellant chose the hearing date; appellant's manager presented all the evidence appellant intended to produce at the hearing; nothing in the record indicated that appellant had sought more time to hire counsel or obtain additional evidence; appellant's argument that, had it been given more time, it could have developed a different theory of the case fell flat where the proposed theory was itself meritless; and appellant failed to show that it was harmed by the timing of the notice.

Judge FREEMAN concurring in result only.

Appeal by appellant from decision of North Carolina Property Tax Commission entered 22 March 2024. Heard in the Court of Appeals 9 April 2025.

Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., by Daniel L. Colston, S. Leigh Rodenbough IV, and Ashley Hodges Morgan, for appellant.

Pitt County Legal Department, by R. Matthew Gibson, for appellee.

ARROWOOD, Judge.

Trade Land Company, LLC ("appellant") appeals from the decision of the North Carolina Property Tax Commission ("the Commission")

affirming the decision of the Pitt County Board of Equalization and Review ("the Board") to revoke the Present-Use Value ("PUV") status of appellant's property subject to the decision. For the following reasons, we affirm the decision of the Commission.

I. Factual Background

This case concerns the County assessor's alleged failure to provide proper notice to a corporate landowner before revoking its tax-deferred status as to certain properties it owns. The following facts are established by the Record and Transcript of the hearing before the Commission. The facts for the most part are not in dispute.

Brothers Joshua and Will Clark, along with their father Edwin, are members and managers of appellant, a limited liability company, which owns 47 tax parcels in Pitt County, North Carolina. For four years, between 2018 and 2021, appellant participated in the PUV tax-deferral program for 11 of these parcels. The PUV program allows for the appraisal of property that is used primarily for agriculture, horticulture, or forestry at that property's present use value, and for the deferral of excess taxes that would be otherwise due under the property's standard valuation. N.C.G.S. §§ 105-277.4, -277.3 (2020).

If a business entity is seeking a PUV deferment, its "principal business" must be one of the above qualifying uses. *Id.* § 105-277.2(4)(b)(1). Appellant's 11 parcels had qualifying uses; however, as its counsel conceded at the hearing before the Commission, the appellant's overall principal business did not. Therefore it is undisputed under the Record before us that these properties did not qualify for PUV treatment. Despite this fact, the Pitt County tax assessor at the time of appellant's first application to the PUV program advised one of appellant's managers that it did qualify for the program, and, following a 2021 audit, appellant was allowed continued participation on 25 January 2022.

That changed in December 2022. In August 2022, Russell Hill ("Hill") was appointed as tax assessor for Pitt County. Thereafter, when appellant sought to sell a portion of one its tax-deferred parcels, Hill began to investigate appellant's PUV qualification. As a part of his investigation, Hill discovered that appellant was primarily a real estate business. On 5 December 2022, Hill called Joshua Clark to inform him that he had determined that appellant's properties did not qualify for PUV treatment. That same day, Cynthia Moore, the Pitt County Special Property Analyst, informed appellant by letter that it did not qualify, that its 11 parcels that had previously been granted PUV status were being removed from the PUV program, and that the deferred taxes were now due. Hill emailed

Will Clark on 6 December, explaining that if he would like to appeal the revocation decision, he could either have it heard at the final meeting of the Board on 12 December, or when the Board began meeting again in the spring of 2023.

Will Clark elected to attend the 12 December hearing and offered evidence and presented arguments in support of the LLC's appeal. The Board affirmed Hill's decision to disqualify appellant from the PUV program. The LLC appealed to the North Carolina Property Tax Commission on 11 January 2023 and the appeal was heard on 10 January 2024.

At the hearing, appellant argued that it had not been provided proper notice under N.C.G.S. § 105-296(i), which requires notice prior to the Board's first meeting of the year when a property receives a new appraisal or assessment. The Commission affirmed the decision of the Board. It concluded that N.C.G.S. § 105-394 was dispositive in the matter, which defines a failure to give notice as an immaterial irregularity for purposes of tax assessment and therefore the lack of proper notice would not affect the decision of the Board. The Commission further concluded that appellant had actual notice and the opportunity to be heard before the Board. Appellant filed a notice of appeal to this Court on 18 April 2024.

II. Discussion

Appellant raises two issues on appeal: whether the Commission erred as a matter of law by relying on N.C.G.S. § 105-394(9), which appellant claims was ruled unconstitutional by the North Carolina Supreme Court; and whether the Commission erred as a matter of law in failing to apply the notice requirements of N.C.G.S. § 105-296(i). We address these arguments as follows: first, we determine whether the statutory notice requirements were met; second, even assuming these requirements were not, we answer whether the Commission reliance on N.C.G.S. § 105-394(9) was in error; and finally, we address whether the notice and opportunity to be heard that appellant received was in keeping with constitutional strictures.

A. Standard of Review

The scope of our review of a decision of the Property Tax Commission is as follows:

> So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the

> decision of the Commission, declare the decision null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions, or decisions are any of the following:
>
> (1) In violation of constitutional provisions.
>
> (2) In excess of statutory authority or jurisdiction of the Commission.
>
> (3) Made upon unlawful proceedings.
>
> (4) Affected by other errors of law.
>
> (5) Unsupported by competent, material, and substantial evidence in view of the entire record as submitted.
>
> (6) Arbitrary or capricious.

N.C.G.S. § 105-345.2(b) (2023). We review questions of law *de novo*, where we freely substitute our own judgment, while issues of sufficiency of evidence are reviewed in light of the whole record. *In re Appeal of Greens of Pine Glen Ltd.*, 356 N.C. 642, 647 (2003). "Issues of statutory construction are questions of law, reviewed *de novo* on appeal." *McKoy v. McKoy*, 202 N.C. App. 509, 511 (2010) (citation omitted).

B. Notice Under the Machinery Act

[1] This first inquiry seems simple on its face: whether appellant was provided with the proper notice required under Subchapter II of the N.C.G.S. Ch. 105, also known as the Machinery Act. However, the Machinery Act itself is a labyrinthine compilation of statutes that requires careful interpretation. Our primary purpose in this endeavor is to give effect to the legislature's intent. *First Bank v. S & R Grandview, L.L.C.*, 232 N.C. App. 544, 546 (2014). Further, "[s]tatutes dealing with the same subject matter must be construed *in pari materia*, as together constituting one law, and harmonized to give effect to each." *Williams v. Williams*, 299 N.C. 174, 180–181 (1980) (internal citations omitted).

Under the Machinery Act, when an assessor determines that property is no longer eligible for the PUV program, the assessor must provide written notice to the taxpayer as required by N.C.G.S. § 105-296(i). N.C.G.S. § 105-277.4(b1) (2020). This notice statute provides:

> Prior to the first meeting of the board of equalization and review, the assessor may, for good cause, change the appraisal of any property subject to assessment for the current year. Written notice of a change in assessment

> shall be given to the taxpayer at his last known address prior to the first meeting of the board of equalization and review.

N.C.G.S. § 105-296(i) (2024).

This notice requirement could be argued to be in conflict with the timing for losing PUV eligibility and the resultant tax bill:

> The deferred taxes for the preceding three fiscal years are due and payable in accordance with G.S. 105-277.1F when the property loses its eligibility for deferral as a result of a disqualifying event. A disqualifying event occurs when the land fails to meet any condition or requirement for classification or when an application is not approved.

N.C.G.S. § 105-277.4(b1). N.C.G.S. § 105-277.1F makes deferred taxes "due and payable *on the day* the property loses its eligibility for the deferral program as a result of a disqualifying event." (emphasis added). Therefore, as soon as land fails to meet a condition for PUV status, it is disqualified, and the deferred taxes are due the day the disqualification occurs. However, it would be impossible to follow the requirements of N.C.G.S. § 105-296(i) if the disqualifying event occurs after the first meeting of the board of equalization and review, therefore creating an apparent conflict between the statutory provisions.

However, a harmonization between these statutes is possible through reference to the definition section of the Machinery Act, and additional aspects of the PUV program. The Machinery Act defines "appraisal" as the "true value of property or the process by which true value is ascertained," while "assessment" is the "tax value of property or the process by which the assessment is determined." N.C.G.S. § 105-273(2), (3) (2016). Applying these definitions to appellant, when Hill, as a result of his investigation, disqualified the property because the LLC was not a qualifying business, he changed neither the appraisal nor the assessment of the LLC's properties. These determinations had already occurred; indeed, they were what allowed Pitt County to determine the amount of tax that appellant was permitted to defer. On 5 December 2022, when Hill generated a new tax bill that was immediately due, this was neither a new appraisal nor a new assessment; rather, it was simply changing the status of appellant's already-assessed taxes from deferred to due. Thus, we find the timing requirements of N.C.G.S. § 105-296(i) were not implicated when appellant lost its PUV status.

The placement of N.C.G.S. § 105-296(i) within the Machinery Act further confirms our view. This statute is not situated merely within

the instructions for the PUV program but is part of the general description of the powers and duties of the assessor. *See* N.C.G.S. § 105-296. Because subsection (i) is the only reference to the assessor's duties in situations where a property's tax burden changes, it was logical for the General Assembly to reference this section when creating this PUV system that involved the potential for an assessor to change a property's tax burden, albeit, critically, one that involved a different mechanism than re-appraisal or re-assessment.

When the requirements implicated upon a new appraisal or assessment are set aside, the notice required when property loses its PUV status is simply that: notice. Because Hill provided appellant with notice that it was disqualified from the program and provided it with the opportunity to appeal that disqualification, we conclude that the requirements of the Machinery Act were satisfied. As a result of Hill's provision of notice, appellant was able to be heard before the Board, and before the Commission. As discussed below, we find the notice appellant was provided sufficient.

We note that an earlier notice requirement in the case of a re-appraisal or re-assessment, as opposed to deferred taxes coming due, comports with common sense. When a property is reappraised or the value is reassessed, the early notice requirement allows the property owner to appeal the value of the property on which the taxes are based near the beginning of the tax year; however, when there is a change in the determination of whether a property qualifies for PUV status, the question is not the value of property or the amount of taxes to be assessed, but rather whether the property owners will lose the benefit of a lower tax rate. The issue then is not the value of the property but whether the property qualifies under the PUV statute for a deferral of some of the taxes already assessed. Given that a loss of PUV status can occur at any time within a tax year, there is no logical reason to require a hearing at the first meeting of the Board, as opposed to another meeting after the loss of PUV status has been noted.

C. Constitutionality of N.C.G.S. § 105-394(9)

[2] Assuming, *arguendo*, that a change in PUV status could be considered a change in appraisal or assessment, we consider the Commission's holding that N.C.G.S. § 105-394(9) was sufficient to affirm the ruling of the Board. Appellant challenges the Commission's reliance on § 105-394(9), which they argue has been held unconstitutional by the North Carolina Supreme Court in *Henderson Cnty. v. Osteen*, 292 N.C. 692 (1977). At issue in *Osteen* was the application of § 105-394(9) to Henderson County's failure to provide any notice to a deceased taxpayer

that the county was selling land owned by him on which the county had a tax lien. *Id.* at 710.

The statute at issue provides: "[i]mmaterial irregularities in the listing, appraisal, or assessment of property for taxation" do not invalidate taxes imposed as a result. N.C.G.S. § 105-394. The section provides eleven example of immaterial irregularities, including "failure to make or serve any notice mentioned in this Subchapter." *Id.* § 105-394(9). The *Osteen* Court held that the county was not permitted to dispense with notice by relying on this statute, since the failure to give notice was in conflict with Article 1 § 19 of the North Carolina Constitution. *Osteen*, 292 N.C. at 708, 710.

The challenge to § 105-394(9) in *Osteen* was an as-applied challenge, rather than a facial challenge. The difference between these challenges is "that an as-applied challenge represents a plaintiff's protest against how a statute was applied in the particular context in which plaintiff acted or proposed to act, while a facial challenge represents a plaintiff's contention that a statute is incapable of constitutional application in any context." *Town of Beech Mountain v. Genesis Wildlife Sanctuary, Inc.*, 247 N.C. App. 444, 460 (2016) (quotations and citation omitted). Rather than abrogate the statute, the *Osteen* Court held that the statute's *application* to the action taken by the county in that particular case was unconstitutional. *Osteen*, 292 N.C. at 710.

What distinguishes the as-applied challenge in *Osteen* from the facts of the case *sub judice* is the total failure to provide notice in the former, and the alleged failure to provide the notice at the appropriate time, as required under the Machinery Act, in the latter. As the issue of sufficient notice was not before the *Osteen* Court, its opinion is silent as to what would constitute proper notice. Because the facts in the case *sub judice* and the facts in *Osteen* are substantially different, we conclude that *Osteen* is not controlling authority and the Commission did not err in relying on § 105-394(9).

D. Actual Notice and Opportunity to Be Heard

[3] Finally, we address the fact that the Commission, while holding that § 105-394(9) was dispositive, also noted that appellant received actual notice and a hearing before the Board, and participated in that hearing. We hold, even assuming, *arguendo*, that the Board or the Commission erred in their statutory reliance, that appellant's constitutional rights were preserved by the notice and hearing they were provided by the Board.

"The fundamental premise of procedural due process protection is notice and the opportunity to be heard." *Peace v. Emp. Sec. Comm'n of*

N.C., 349 N.C. 315, 322 (1998) (citation omitted). This notice and opportunity must be meaningful, although the exact mechanism according to which these are provided depends on the circumstances of each case. *Id*. We have previously held that where a plaintiff knew of the existence and scope of a hearing, and while present at the hearing asked questions and presented testimony, his procedural due process rights had not been violated. *Lipinski v. Town of Summerfield*, 230 N.C. App. 305, 309 (2013). While we recognize that the particular facts of a meaningful notice case are not dispositive for future cases, we note that the appellant, in the case *sub judice*, received the same opportunity to be heard as the appellant in *Lipinski*.

Appellant's current challenge as to whether the notice provided was sufficient is the alleged insufficient time between the notice and the hearing. Appellant received notice of the property's loss of PUV status 5 December, and on 6 December was informed that it could appeal Hill's decision at the 12 December meeting of the Board, or the first meeting of the Board in 2023. Having been provided with two dates from which to choose, appellant's manager chose the hearing date which it now complains was insufficient to comport with due process. Appellant's manager attended and presented all the evidence appellant sought to produce. Nowhere in the record is there any indication that appellant sought more time to obtain counsel or marshal additional evidence. Nor is there any indication that it sought to continue the date of the hearing that it had selected.

Appellant now argues that the notice was not sufficient to comport with due process because there was not enough time to hire counsel and marshal the evidence needed to properly represent its case before the Board. The appellant has not documented any attempts it made to hire counsel, instead simply averring that there was not enough time. Appellant further contends that, in essence, had it had more time, it would have had the opportunity to develop a theory of the case based on Trade Land's total income that would have allowed it to challenge Hill's decision more thoroughly. However, appellant had the opportunity to argue this before the Board but did not do so. Further, counsel never raised the issue of lack of procedural due process before the Commission. In fact, appellant has not presented this argument in its briefs to this Court. The argument related to the inability to marshal the necessary evidence was presented for the first time in its oral arguments before us.

Appellant consistently stipulated that Trade Land LLC was not primarily engaged in a qualifying business in its 2021 audit and before

the Board and the Commission. Its arguments before the Commission appeared to rely on an estoppel theory that the county, having initially found the properties to be eligible for PUV status, could not in the same tax year after receiving additional information and a change in the tax assessor change its determination, because it was too late to have that determination challenged before the April meeting of the Board as required by the Machinery Act. Having determined that this argument now fails we find the Commission properly rejected the contention.

Appellant has now changed horses midstream to argue that the notice it received does not comport with due process because had it been given more time, it *might have been able* to develop evidence that the tax assessor was incorrect in the determination that appellant was not a qualifying business. Further, appellant has not alleged that this line of inquiry would have been successful. In fact, this argument fails given the multiple times appellant conceded that Trade Land LLC was not a qualifying business, both before the Board and later to the Commission.

Next, appellant claims it was harmed because the timing of the notice gave insufficient time to proactively address the loss of PUV status by placing the properties that could qualify for PUV status into a separate entity that only owned those properties. However, at oral argument, appellant admitted it did create this new entity, Trade Family Farms, LLC, was created and that, although its application was initially denied, this decision was overturned by the Board and those properties now enjoy deferred-tax status for the new tax year. Additionally, such change, if it were effected earlier in the prior tax year, would not have been sufficient to save the tax status for the previous disqualification.

In sum, when examining all the evidence in this case, we conclude that appellant's constitutional rights to due process were not violated by Pitt County.

III. Conclusion

For the foregoing reasons, we affirm the decision of the North Carolina Property Tax Commission.

AFFIRMED.

Judge ZACHARY concurs.

Judge FREEMAN concurs in result only.

RUSSELL v. TAYLOR

[299 N.C. App. 207 (2025)]

TONY RUSSELL, PLAINTIFF
v.
GEORGE WILLIAM BAGBY TAYLOR JR. D/B/A NATIONAL SPEED OF WILMINGTON, INC. A/K/A NATIONAL SPEED, INC., DEFENDANT

No. COA24-745

Filed 4 June 2025

Process and Service—change of parties on default judgment—void for lack of personal jurisdiction—no summons issued to individual—Rule 60 motion inappropriate

In a negligence case in which the trial court entered an order for entry of default judgment against a corporation, but plaintiff, after discovering that the corporation had been administratively dissolved years earlier, filed a Rule 60 motion to change the name of the judgment defendant from the corporate name to an individual ("Taylor"), the trial court abused its discretion by allowing the motion. First, the trial court had no personal jurisdiction over Taylor because, although plaintiff had served the summons and complaint on Taylor in his capacity as the corporation's registered agent, no summons had been issued or directed to Taylor in his individual capacity and, therefore, valid service of process did not occur. Moreover, plaintiff's attempt to use a Rule 60 motion to name a different judgment defendant could not cure the defective process because, rather than merely correcting a clerical error, the name change amounted to an improper substitution or entire change of parties. Accordingly, the trial court's amended order was vacated as void.

Appeal by Defendant from order entered 27 March 2024 by Judge Keith O. Gregory in Johnston County Superior Court. Heard in the Court of Appeals 9 April 2025.

Fox Rothschild LLP, by Matthew Nis Leerberg and Brian C. Bernhardt, for Defendant-Appellant.

Wicker Law Firm, P.L.L.C., by Harrison L. Wicker and Jackson D. Wicker, for Plaintiff-Appellee.

COLLINS, Judge.

George William Bagby Taylor appeals from the trial court's order entering default judgment against him. Taylor argues that the trial court erred by changing the name of the judgment debtor on an Order for Entry of Default Judgment from "National Speed of Wilmington, Inc." to Taylor in his individual capacity, as requested by Plaintiff in his amended Rule 60 motion, and by entering an Order for Entry of Default Judgment against Taylor in his individual capacity. We agree and vacate the Order for Entry of Default Judgment entered against Taylor.

I. Background

Plaintiff Tony Russell filed a complaint against National Speed of Wilmington, Inc. ("NSW, Inc.") on 11 January 2022. Plaintiff alleged that NSW, Inc. negligently tuned his vehicle, causing substantial damage to the vehicle, and Plaintiff sought redress. Summons was issued on that date. Plaintiff served the summons and complaint on NSW, Inc. by serving Taylor in his capacity as NSW, Inc.'s registered agent. NSW, Inc. filed an answer to the complaint on 25 March 2022.

Plaintiff filed a motion for leave to file a first amended complaint and served the motion on Lamar Armstrong, Jr., as counsel for NSW, Inc. Armstrong subsequently moved to withdraw as counsel. The trial court granted Armstrong's motion to withdraw and ordered that Plaintiff serve NSW, Inc. by first class mail addressed to: "National Speed of Wilmington, Inc., 6779 Gordon Road, Wilmington, NC 28411."

Plaintiff served the first amended complaint via mail on NSW, Inc. at the address ordered. After receiving no response, Plaintiff moved for entry of default against NSW, Inc. The trial court entered an order of default against NSW, Inc. on May 2023. Plaintiff moved for default judgment against NSW, Inc. and served the motion via mail to NSW, Inc. at the address ordered.

The trial court entered an Order for Entry of Default Judgment against NSW, Inc. for $81,833.68. Plaintiff served the Order for Entry of Default Judgment on NSW, Inc. at the address ordered.

Plaintiff began collection efforts, including docketing the judgment in New Hanover County. At some point during these efforts, Plaintiff learned that NSW, Inc. had been administratively dissolved in 2012 for failure to file its annual report.

Plaintiff filed a Rule 60 motion to amend the Order for Entry of Default Judgment, asking the trial court to change the name of the judgment defendant from "National Speed of Wilmington Inc." to "George William Bagby Taylor, Jr. d/b/a National Speed of Wilmington." Plaintiff

later filed a second Rule 60 motion to amend the Order for Entry of Default Judgment, asking the trial court to change the name of the judgment defendant from "National Speed of Wilmington, Inc." to "George William Bagby Taylor, Jr. d/b/a National Speed of Wilmington f/k/a National Speed, Inc."

After a hearing on Plaintiff's amended motion, the trial court announced orally that it would allow the motion under Rule 60(a), which permits a trial court to correct clerical errors. Although there was talk of a written order, none appears in the record. What does appear in the record is a red-lined version of the Order for Entry of Default Judgment, which changes the name of the judgment defendant from "National Speed of Wilmington, Inc." to "George William Bagby Taylor, Jr. d/b/a National Speed of Wilmington f/k/a National Speed, Inc" and indicates the entered date as "nunc pro tunc July 11th 2023," the date the Order for Entry of Default Judgment against NSW, Inc. was signed by the trial court. The amended order was filed 27 March 2024.

Taylor timely filed a Notice of Appeal.

II. Discussion

Taylor contends that the trial court erred for numerous reasons by changing the name of the judgment debtor on the Order for Entry of Default Judgment from "National Speed of Wilmington, Inc." to Taylor in his individual capacity, as requested by Plaintiff in his amended Rule 60 motion, and entering an Order for Entry of Default Judgment against Taylor in his individual capacity. We agree.

This Court reviews a trial court's grant of a Rule 60 motion for abuse of discretion. *Lumsden v. Lawing*, 117 N.C. App. 514, 518 (1995). "[A]n error of law is an abuse of discretion" and is reviewed de novo. *Miller v. Carolina Coast Emergency Physicians, LLC*, 382 N.C. 91, 104 (2022) (internal quotation marks omitted).

Taylor first argues that the trial court erred by entering an Order for Entry of Default Judgment against him in his individual capacity because the trial court lacked personal jurisdiction. We agree.

For a court to obtain personal jurisdiction over a defendant, a summons must be issued in the name of that individual and service of process secured on that individual by one of the statutorily specified methods. *Grimsley v. Nelson*, 342 N.C. 542, 545 (1996); N.C. Gen. Stat. § 1A-1, Rule 4(j) (2023). If a party fails to obtain valid service of process, "a court does not acquire personal jurisdiction over the defendant and

the action must be dismissed." *Bentley v. Watauga Bldg. Supply, Inc.*, 145 N.C. App. 460, 462 (2001).

Under Rule 4 of the North Carolina Rules of Civil Procedure, "[u]pon the filing of the complaint, summons shall be issued forthwith, and in any event within five days." N.C. Gen. Stat. § 1A-1, Rule 4(a) (2023). The summons "shall be directed to the defendant or defendants," *id.* § 1A-1, Rule 4(b) (2023), and service of the summons must be made in a time and manner consistent with Rule 4.

Here, the complaint named NSW, Inc. as the defendant and summons was issued in that name. Plaintiff served the complaint and summons on NSW, Inc. by certified mail to Taylor in his capacity as registered agent for NSW, Inc., not in his individual capacity. Plaintiff amended the complaint and served it on NSW, Inc. as the defendant.

At no point was a summons issued or directed to Taylor in his individual capacity. Thus, valid service of process did not occur, and the trial court did not have personal jurisdiction over Taylor. Accordingly, the Order for Entry of Default Judgment naming Taylor in his individual capacity as defendant is void and is vacated. *See Jones v. Wallis*, 211 N.C. App. 353, 356 (2011) (a default judgment is void if there was a defect in the service of process).

Taylor also argues that Plaintiff's attempt to establish proper service of process on him by substituting him in his individual capacity for NSW, Inc., under the guise of correcting a misnomer, is invalid. We agree.

Rule 4(i) of the Rules of Civil Procedure permits trial courts to allow, in their discretion, the amendment of any process or proof of service thereof "unless it clearly appears that material prejudice would result to substantial rights of the party against whom the process issued." N.C. Gen. Stat. § 1A-1, Rule 4(i) (2023). "[T]he discretionary powers of amendment permit the courts to allow amendment to correct a misnomer or mistake in the name of a party." *Harris v. Maready*, 311 N.C. 536, 546 (1984) (citation omitted). "If the amendment amounts to a substitution or entire change of parties, however, the amendment will not be allowed." *Id.* (citation omitted).

Here, NSW, Inc. was a North Carolina Corporation that was administratively dissolved in November 2012; Taylor is a natural person. By his Rule 60 amended motion, Plaintiff did not seek to merely correct a misnomer or mistake in NSW, Inc.'s name. Instead, Plaintiff's attempt to amend the Order for Entry of Default Judgment against NSW, Inc. to name Taylor in his individual capacity as the judgment defendant

"amounts to a substitution or entire change of parties" and "will not be allowed." *Id.* Accordingly, the trial court abused its discretion by granting Plaintiff's amended Rule 60 motion.

III. Conclusion

The trial court did not have personal jurisdiction over Defendant. Therefore, the Order for Entry of Default Judgment against Taylor in his individual capacity is vacated.

VACATED.

Judges HAMPSON and CARPENTER concur.

STATE OF NORTH CAROLINA
v.
RAYMOND DERRICK ARRINGTON

No. COA24-688

Filed 4 June 2025

Criminal Law—prosecutor's closing argument—murder trial—credibility of witness

In defendant's trial for first-degree murder arising from a fatal shooting, the trial court did not commit reversible error by failing to intervene ex mero motu during the State's closing argument when the prosecutor stated that one of the witnesses "was the most credible witness that testified" in the trial, that the witness "never lied," and that the witness told the jury the truth. The statements were not improper because they were made in the context of showing that the witness gave specifics in his testimony that matched the physical evidence and, as such, did not constitute improper statements of the prosecutor's personal beliefs but were made in order to give the jury reasons to believe the witness by arguing his truthfulness.

Appeal by Defendant from judgments entered 6 November 2023 by Judge Paul C. Ridgeway in Wake County Superior Court. Heard in the Court of Appeals 26 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Lindsay Vance Smith, for the State-Appellee.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Emily Holmes Davis, for Defendant-Appellant.

COLLINS, Judge.

Defendant Raymond Derrick Arrington appeals from judgments entered upon guilty verdicts of first-degree murder and possession of a firearm by a felon, and upon his guilty plea to having attained habitual felon status. Defendant argues that the trial court erred by failing to intervene ex mero motu during the State's closing argument. We find no error.

I. Background

Defendant was indicted on 13 September 2021 on the charges of murder and possession of a firearm by a felon. On 25 October 2022, Defendant was indicted for having attained habitual felon status. Defendant's case came on for jury trial on 30 October 2023 and concluded on 6 November 2023. The evidence at trial tended to show the following:

At approximately 10:26 p.m. on 9 August 2021, law enforcement officers with the Raleigh Police Department responded to 911 calls reporting a shooting near 1204 Boyer Street in Raleigh, North Carolina. Upon arriving at the scene, officers found Robert Taylor on the ground and receiving CPR by paramedics; Taylor was unresponsive after having been shot five times. Taylor was transported by ambulance to the hospital, where he ultimately died as a result of the gunshot wounds. Following an investigation into Taylor's death, officers concluded that they had probable cause to arrest Defendant for Taylor's murder.

Officers discovered that, approximately eight months prior to the shooting, Taylor had robbed Defendant; during the robbery, Defendant sustained a "bleeding" "gash" wound to the head and was "angry" about the incident. The night before the shooting, Defendant went to Boyer Street in search of Taylor. Defendant could not find Taylor, but he encountered Zachary Sanders. Defendant asked Sanders where Taylor was, and Sanders replied that Taylor had just left. Defendant "walked to his car, came back with a rifle[,]" and stated, "Man, I'm going to ask you one more time. I know you all are hiding him out here. Now, where is he at?" Sanders again told Defendant that Taylor was not there and had just left; Defendant brandished the rifle that he was carrying and replied, "Well, when you see him again, tell him he's a dead man."

Sanders saw and spoke with Taylor the following morning. Sanders told Taylor about the encounter with Defendant, stating, "You need to

stop coming on Boyer. You need to get low for a while, get out of sight . . . I'm telling you now, you need . . . to stay off Boyer." Taylor said that Defendant was "scared of [him]" and Sanders replied, "[Defendant] ain't scared of you. I'm telling you something for your own good, stay off Boyer."

Later that evening, Sanders witnessed someone shoot Taylor shortly after he parked his car on Boyer Street. Taylor and his girlfriend parked his car in front of 1204 Boyer Street, and his girlfriend decided to nap in the backseat while Taylor stepped out of the car to talk with a friend. Sanders was standing across the street from Taylor when he heard gunshots and heard Taylor "grunt twice." Sanders heard more gunshots and Taylor "grunted twice more[,]" and he "figured [Taylor] got hit two more times." Sanders watched Taylor run across the street towards him, up a driveway, and behind the house next door to Sanders. Sanders then saw a shooter in the street, wearing a mask, who then disappeared.

Sanders testified that, when the first shots rang out, Taylor was standing in front of his car; because of Taylor's positioning, the shooter "had to be laying" in the woods on the other side of Taylor's car when the shots were fired. Sanders testified that the gun used by the shooter was the "same size" and the "same rifle" as the one that Defendant brandished in front of him the day before.

The State's forensic investigators concluded that eleven shell casings retrieved from the scene of the shooting all came from the "same firearm" – a .22 caliber "long rifle." Investigators also concluded that the shots had all been fired from the direction of a set of trash cans near 1204 Boyer Street, the house in front of which Defendant had parked his car. The State presented detailed call records from Defendant's cell phone which showed that he was on Boyer Street at the time of the shooting. Specifically, the call records showed that, at 10:04 p.m., Defendant traveled from his home towards the area of Boyer Street; at 10:21 p.m., just before the shooting occurred, Defendant's phone registered in the immediate vicinity of Boyer Street. At 10:25 p.m., Defendant's phone began traveling away from Boyer Street and back towards Defendant's home, arriving back at his home at 10:55 p.m.

Defendant's girlfriend, Britney Johnson, took the stand and testified that, upon his arrival home at approximately 10:55 p.m., Defendant told her that she should turn on the news because "somebody [was] shot, found dead on Boyer Street[.]" When asked whether Defendant told her that he murdered Taylor, Johnson testified, "Yeah, I just said I didn't remember verbatim what he said, but basically he did say he did it." When asked if she knew that Defendant had committed the murder

of Taylor, Johnson testified, "I did." Johnson stated that Defendant "killed" Taylor "[be]cause of their past issue" with "the gash on his head" that took place approximately eight months prior. Johnson further testified that she knew Defendant had committed the murder when she was interviewed by detectives, but that she was not honest with them at that time because she "was in love and stupid and just making bad decisions." Johnson also admitted to providing a false cell phone number to detectives because she was "trying to protect [Defendant]."

Following the presentation of the State's evidence, the jury heard closing arguments from the prosecutor; at no point during the State's closing arguments did Defendant object to any portion of the prosecutor's arguments. The jury found Defendant guilty of first-degree murder and possession of a firearm by a felon, and Defendant pled guilty to having attained habitual felon status. The trial court sentenced Defendant to life in prison without parole for the first-degree murder conviction, and it sentenced him as a habitual felon to a concurrent term of 88 to 118 months in prison for the possession of a firearm by a felon conviction. Defendant gave proper oral notice of appeal.

II. Discussion

Defendant argues that the trial court committed reversible error by failing to intervene ex mero motu when the prosecutor stated in closing arguments that Sanders told the jury the truth, that Sanders did not lie, and that Sanders was the most credible witness who testified at trial.

"The standard of review for assessing alleged improper closing arguments that fail to provoke timely objection from opposing counsel is whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*." *State v. Jones*, 355 N.C. 117, 133 (2002) (citation omitted). To establish such error, "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). This Court will grant relief "[o]nly when it finds both an improper argument and prejudice[.]" *State v. Huey*, 370 N.C. 174, 179 (2017) (citation omitted).

N.C. Gen. Stat. § 15A-1230 provides that, during a closing argument to the jury,

> an attorney may not become abusive, inject his personal experiences, express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, or make arguments on the basis of matters

> outside the record except for matters concerning which the court may take judicial notice. An attorney may, however, on the basis of his analysis of the evidence, argue any position or conclusion with respect to a matter in issue.

N.C. Gen. Stat. § 15A-1230 (2023). Our Court has further explained that an attorney may not make statements that "place before the jury the personal beliefs or knowledge of counsel which are not supported by evidence presented at trial." *State v. Craig*, 308 N.C. 446, 462 (1983) (citations omitted). However, this Court has long held that "prosecutors are allowed to argue that the State's witnesses are credible" in order to "giv[e] the jury reasons to believe the State's evidence[.]" *State v. Augustine*, 359 N.C. 709, 725 (2005) (citation omitted); *see State v. Wiley*, 355 N.C. 592, 621-22 (2002) (a prosecutor's statements to the jury that a witness "pretty much told the truth" and that "he's told the truth" were not improper). A prosecutor's statement regarding a witness's truthfulness that relates to the evidence presented is thus not improper because it "merely giv[es] the jury reasons to believe the state's witnesses . . . ." *Id.* at 622 (citations omitted). Additionally, a prosecutor's statement made during closing argument "should not be viewed in isolation but must be considered in the context in which the remarks were made and the overall factual circumstances to which they referred." *Augustine*, 359 N.C. at 725-26 (cleaned up).

Applying these principals here, we determine that the two challenged statements made by the prosecutor did not stray outside the bounds of proper argument. The prosecutor first told the jury that

> [Sanders] . . . was the most credible witness that testified in this trial. He said -- He told you how it is. [Sanders] gave you specific details. I want you to remember that when I was questioning [Sanders], I never approached him with shell casings. I never asked him about the physical evidence. But did you notice how everything that he said matched up with all of the physical evidence?

The prosecutor then said:

> [Sanders] told you the truth. And [he] never lied. Let's make that clear. He told you, "I didn't want to be involved." He never gave a statement. He didn't want to talk to Detective Morgan. While we wish he would have, he didn't. He never lied. He told you all the truth.

These statements were made in the context of the prosecutor's arguments to the jury that Sanders' testimony was credible because specific

portions of his testimony matched the physical evidence presented in the case. As in *Wiley*, the prosecutor here was not impermissibly "vouching" for Sanders, but instead "was merely giving the jury reasons to believe the state's witness[]" by arguing Sanders' truthfulness. *Id.* at 622 (citations omitted).

Defendant relies on *State v. Phillips*, 365 N.C. 103 (2011), and *State v. Locklear*, 294 N.C. 210 (1978), to argue that the prosecutor's statements here were improper and prejudicial. However, these cases are distinguishable from the present facts. In *Phillips*, our Supreme Court determined that the prosecutor's statement that an expert witness was "wholly unbelievable" was an improper "flat statement" of the prosecutor's personal belief. *Id.* at 139. In *Locklear*, our Supreme Court determined that the prosecutor's statement, "[Y]ou are lying through your teeth and you know you are playing with a perjury count[,]" was improper because the prosecutor was "assert[ing] his opinion that a witness [was] lying." *Id.* at 217. However, the Court explained that the prosecutor could have "argue[d] to the jury that they should not believe a witness, but he should not call him a liar." *Id.* (citation omitted).

In both *Phillips* and *Locklear*, the prosecutors' improper remarks were flat statements of their personal beliefs and, unlike here, the statements were not made in the context of providing the jury reasons to believe a witness's testimony because specific portions of the testimony matched the physical evidence presented by the State. Moreover, even if we were to assume that the prosecutor's statements about Sanders' truthfulness were improper, Defendant has failed to demonstrate prejudice by showing how these statements "infected the trial with unfairness and thus rendered the conviction fundamentally unfair." *State v. Carroll*, 356 N.C. 526, 537 (2002) (citation omitted).

III. Conclusion

Because the prosecutor's statements were not improper, the trial court did not commit reversible error by failing to intervene ex mero motu during the State's closing arguments.

NO ERROR.

Judges ZACHARY and GORE concur.

STATE OF NORTH CAROLINA
v.
JULIA LOUISE COPENHAVER

No. COA24-221

Filed 4 June 2025

1. Constitutional Law—defenses—first-degree murder—diminished capacity—potential consequences—colloquy with defendant—correct statement of law

In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, the trial court's statements during a colloquy with defendant and her counsel about the affirmative defense of diminished capacity, taken as a whole, correctly informed defendant that, in order to assert the defense, defendant must admit her guilt to the murder, and, further, that such an admission and defense could potentially result in an instruction to the jury on second-degree murder.

2. Criminal Law—defenses—insanity—jury instruction given against defendant's wishes—plain error not shown

In a prosecution for first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, defendant did not establish prejudice in the trial court's instruction to the jury on the defense of insanity—assuming, without deciding, that the instruction constituted error—even though defendant repeatedly refused to argue insanity at trial and contended on appeal the evidence did not support such an instruction. The jury, in returning a verdict of guilty of first-degree murder, rejected both of the affirmative defenses it was instructed on—insanity and diminished capacity—after the State, in its closing argument, accurately distinguished between the defenses and emphasized that neither defendant nor the State was seeking a verdict of not guilty by reason of insanity.

3. Constitutional Law—effective assistance of counsel—Harbison error—jury instruction—prejudice not shown

In defendant's appeal from her conviction of first-degree murder, arising from defendant having stabbed and bludgeoned her mother to death, the record was sufficient for the Court of Appeals to resolve her ineffective assistance of counsel claims. First, to the extent defendant's trial counsel's admission of defendant's guilt triggered a *Harbison* inquiry, counsel's discussion—and the trial court's

colloquy at the outset of trial—with defendant demonstrated defendant's knowing and voluntary consent to her counsel's admission. Second, the failure of defendant's trial counsel to object to the trial court's jury instruction on the defense of insanity, despite defendant's clear desire that such a defense not be asserted, even if error, was not prejudicial in light of the jury's verdict—declining to find defendant not guilty by reason of insanity.

Judge HAMPSON concurring in part and dissenting in part.

Appeal by Defendant from Judgment entered 30 May 2023 by Judge Jason C. Disbrow in Brunswick County Superior Court. Heard in the Court of Appeals 30 January 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Michael T. Henry, for the State.

Parry Law, PLLC, by Edward Eldred, for Defendant-Appellant.

STADING, Judge, delivers the opinion of the Court in part II and announces the judgment of the Court, in which Judge FLOOD concurs and Judge HAMPSON concurs in part and dissents in part by separate opinion. HAMPSON, Judge, delivers the opinion of the Court in part I in which Judges FLOOD and STADING concur.

I.

HAMPSON, Judge.

Factual and Procedural Background

Julia Louise Copenhaver (Defendant) appeals from a Judgment entered upon a jury verdict finding her guilty of First-Degree Murder. The Record before us tends to reflect the following:

Following Hurricane Florence, Defendant's mother, Susan Copenhaver, went to the family's vacation home in Oak Island, North Carolina, alone to inspect it for damage on 24 October 2018. She spoke with Defendant's aunt by phone around 9:30 p.m., and they discussed that Defendant had recently left her Virginia home—where she had been staying—without explanation and was not responding to calls or text messages.

On 25 October 2018, Officers William Bopst and Lloyd Hames with the Oak Island Police Department went to the family's vacation home to

conduct a welfare check because Defendant's family believed something was wrong. According to Officer Bopst, Defendant's family had called 911 and reported Defendant had told them her mother had attacked her and was deceased and in the closet. When Officers Bopst and Hames arrived, Defendant answered the door and told Officer Bopst her mother had attacked her. Officer Bopst asked where Defendant's mother was and Defendant pointed toward a bedroom. The officers found Defendant's mother's body in the closet; she had been stabbed approximately 95 times and also suffered "blunt force injuries."

At the scene, Defendant was "calm" and "[q]uiet." However, after Defendant was taken into custody and brought to a detention center, she became "extremely agitated" and had to be secured in a restraint chair.

Upon motion of defense counsel, the trial court committed Defendant to Central Regional Hospital for preparation of a mental health report. On 20 August 2019, Dr. Teresa Wise, a clinical psychologist, submitted a report concluding Defendant was incapable of proceeding to trial. Based on this report, the trial court found there were reasonable grounds to believe Defendant was incapable of proceeding to trial and committed her to Cherry Hospital for treatment and capacity restoration. On 4 May 2020, the trial court was notified Defendant's capacity had been restored. After this, however, her mental state "declined significantly." A report prepared by Dr. Wise on 8 July 2021 found Defendant had "persistent deficiencies in understanding the facts and evidence relating to her charges." The trial court concluded Defended was incapable of proceeding and committed her again to Cherry Hospital for capacity restoration. On 20 December 2022, Dr. Holly Manley, Senior Psychologist with Cherry Hospital, submitted a report concluding Defendant was capable of proceeding. On 6 January 2023, the trial court found Defendant was capable of proceeding.

In March 2023, Defendant gave notice of her intent to present a defense of diminished capacity. Defense counsel had previously advised Defendant to plead not guilty by reason of insanity (NGRI), but Defendant rejected that defense. On 23 May 2023, the morning of trial, defense counsel informed the trial court that Defendant still intended to present a diminished capacity defense. Defense counsel stated she had discussed the differences between NGRI and diminished capacity with Defendant at length. This included explaining to Defendant that asserting diminished capacity required admitting to killing the victim but disputing the ability to form the specific intent required for first-degree murder.

The trial court conducted a colloquy to ensure Defendant understood asserting a defense of diminished capacity involved admitting she

was "responsible for the death of the victim." Responding to Defendant's questions around receiving instructions for lesser offenses than second-degree murder, the trial court explained that whether Defendant would receive an instruction on voluntary manslaughter was "fact-specific" but, at a minimum, evidence of diminished capacity would "guarantee an instruction for second-degree murder." Defendant replied that she still had "issues" with her attorney admitting her guilt. The trial court explained, "[b]ut you understand that if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder[.]" Defendant then agreed her counsel could admit to her guilt in order to utilize a diminished capacity defense.

At trial, Defendant presented evidence tending to show she "had long exhibited evidence of mixed personality disorders exhibiting [a] clinically relevant degree of narcissism[.]" Defendant was diagnosed with Attentive Deficit Hyperactivity Disorder as a child, for which she was prescribed a stimulant, and had also received numerous sports-related concussions, resulting in "chronic post-concussive syndrome." Both the use of stimulant medications and head injuries are risk factors for psychosis. Further, in late September 2018, Defendant experienced a "sudden precipitous onset of very significant paranoia" and was ultimately diagnosed with "unspecified psychosis." Defendant also presented evidence regarding her behavior during the time between her initial diagnosis of psychosis and the time of the killing.

Following the charge conference, in which the parties largely agreed on the jury instructions to be given, the trial court emailed counsel to inform them the jury would also receive an instruction on NGRI. Both over email and in person prior to closing arguments, defense counsel agreed to the instruction. There were no objections to the trial court's final instructions or verdict form.

During closing arguments, the State emphasized the premeditated nature of Defendant's actions. The State addressed both diminished capacity and NGRI. With respect to diminished capacity, the State told the jury: "You may find evidence that the defendant lacked mental – mental capacity at the time of the murder, whether the condition affected the defendant's ability to formulate the specific intent which is required for first-degree murder. It means you can consider second-degree murder, because it doesn't require specific intent. We covered that. She had the intent." The State contrasted this with NGRI and expressly noted Defendant had not asked for NGRI: "The defense did not ask you to find her not guilty by reason of insanity. Just to make sure you picked up on

that. That's not what they're asking you for. . . . She's not raising insanity. She did not raise that defense." The trial court then instructed the jury, including providing instructions on first-degree murder, second-degree murder, diminished capacity, and NGRI.

On 30 May 2023, the jury returned a verdict finding Defendant guilty of First-Degree Murder. The trial court sentenced her to life imprisonment without parole. Defendant gave oral Notice of Appeal in open court the same day.

Issues

The issues on appeal reviewed in Part I are whether: (A) Defendant gave her knowing and voluntary consent to allow her attorney to tell the jury Defendant killed the victim; and (B) the trial court erred by providing a jury instruction on the defense of insanity. In Part II we determine whether the Record is sufficient to review Defendant's ineffective assistance of counsel (IAC) claims on direct review.

Analysis

A. Consent to Admission

[1] Defendant contends the trial court misstated the law regarding the requirement she admit guilt to the murder in order to assert a defense of diminished capacity. Thus, in her view, her consent to her counsel making that admission of guilt was uninformed and, therefore, prejudicial error per se under *State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985).

Although Defendant alleges a *Harbison* error occurred in her trial, the action she complains about is the trial court's colloquy with Defendant. We conclude the trial court's statements of law were not erroneous. However, to the extent Defendant's alleged error on this issue relates to the conduct of her attorney in admitting her guilt, we view Defendant's argument on appeal as an ineffective assistance of counsel claim. Coupled with her other allegations of IAC, we address that issue separately.

"An instruction on diminished capacity is warranted where the evidence of defendant's mental condition is sufficient to cause a reasonable doubt in the mind of a rational trier-of-fact as to whether defendant had the ability to form the necessary specific intent to commit the crimes for which he is charged." *State v. Lancaster*, 137 N.C. App. 37, 44, 527 S.E.2d 61, 66-67 (2000) (citing *State v. Clark*, 324 N.C. 146, 163, 377 S.E.2d 54, 64 (1989)). "Diminished capacity is a means of negating the 'ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation.' " *State v. Roache*, 358

N.C. 243, 282, 595 S.E.2d 381, 407 (2004) (quoting *State v. Page*, 346 N.C. 689, 698, 488 S.E.2d 225, 231 (1997), *cert. denied*, *Page v. North Carolina*, 522 U.S. 1056, 118 S. Ct. 710, 139 L. Ed. 2d 651 (1998)); *see also State v. Staten*, 172 N.C. App. 673, 685, 616 S.E.2d 650, 659 (2005) ("The defense of diminished capacity neither justifies nor excuses the commission of an offense, but rather negates only the element of specific intent[.]" (citing *State v. Holder*, 331 N.C. 462, 473-74, 418 S.E.2d 197, 203-04 (1992)). As such, it is "clearly inconsistent with a claim of innocence." *State v. Poindexter*, 359 N.C. 287, 291, 608 S.E.2d 761, 764 (2005). Indeed, an affirmative defense is "of the nature of a plea of confession and avoidance[.]" *State v. Caddell*, 287 N.C. 266, 282, 215 S.E.2d 348, 358 (1975) (quoting *State v. Creech*, 229 N.C. 662, 673, 51 S.E.2d 348, 356 (1949)). "An affirmative defense is one in which the defendant says, 'I did the act charged in the indictment, but I should not be found guilty of the crime charged because * * *.' " *Id.* at 289, 215 S.E.2d at 363.

Defendant contends the trial court erroneously informed her that evidence of diminished capacity would "guarantee" the jury would be instructed on second-degree murder and that receipt of a second-degree murder instruction "depend[ed] on" there being evidence of diminished capacity. Defendant argues no instruction can be guaranteed before evidence is presented and diminished capacity is not the only reason to instruct on second-degree murder.

In a colloquy with Defendant and her counsel, the trial court repeatedly referred to second-degree murder as a possible or potential instruction:

> [Trial Court]: However, that [diminished capacity defense] would require your attorney to make admission – to make an admission that you did in fact commit the murder; however, that it wasn't first-degree murder due to your diminished mental capacity. . . . Do you understand what I'm telling you?
>
> [Defendant]: Yeah. But then would – what would be considered then?
>
> [Trial Court]: *Potentially* second-degree murder.
>
> . . . .
>
> [Trial Court]: And did you inform [Defendant] at that time that [diminished capacity] would result in *potentially* a second-degree murder charge to the jury?

> [Defense Counsel]: Potentially. And it could also result in a life-without-parole sentence.
>
> . . . .
>
> [Trial Court]: I haven't heard – the problem is I haven't heard the evidence to know whether or not this case would involve an instruction for voluntary manslaughter. I'm not trying to dance around your question; I don't know. . . . Maybe that's something [defense counsel] can enlighten you on. I'm certain she can enlighten you on that better than I can. She knows your case. She's been representing you on it. She knows what the facts are. I don't.
>
> [Defendant]: All right.
>
> [Trial Court]: But it would guarantee – a diminished capacity defense would guarantee an instruction for second-degree murder.
>
> [Defendant]: But nothing less? That's what I don't understand.
>
> [Trial Court]: I don't know if there would be anything less that would follow that. . . . Well it sounds like [defense counsel] told you that by utilizing diminished capacity a jury instruction for second-degree murder *is what would likely result*[.]

(emphasis added). The transcript reflects the trial court repeatedly communicated that an instruction on second-degree murder was possible if Defendant produced evidence of her diminished capacity. This is an accurate statement of the law. *See State v. Davis*, 349 N.C. 1, 35, 506 S.E.2d 455, 473-74 (1998) ("[T]he trial court properly instructed that if the jury found defendant could not form the specific intent required for first-degree murder, then it '*would* consider second degree murder.' Thus, the trial court properly conveyed the mandatory nature of this instruction." (emphasis in original)).

Defendant also contends the trial court incorrectly suggested only evidence of diminished capacity could result in a second-degree murder instruction. Again, the transcript reflects the trial court's efforts to accurately explain the law to Defendant.

> [Trial Court]: Do you have any issue with [defense counsel] admitting that you are responsible for the homicide of the victim? So that – I'm sorry?

> [Defendant]: Yeah. I have issues with that.
>
> [Trial Court]: All right. Explain why you have issues with that.
>
> [Defendant]: Because it's her admitting.
>
> [Trial Court]: Okay. But you understand that if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder?
>
> [Defendant]: All right. She can use it.
>
> . . . .
>
> [Trial Court]: You do want [defense counsel] to utilize the diminished capacity defense?
>
> [Defendant]: Yes.
>
> [Trial Court]: So that the jury can receive an instruction for second-degree murder? Yes?
>
> [Defendant]: Yeah.

The trial court's statements, taken as a whole, accurately state the law with respect to diminished capacity and Defendant's entitlement to an instruction on second-degree murder.

Thus, the trial court's statements to Defendant were correct statements of law. Therefore, the trial court did not err in instructing Defendant.

B. Jury Instruction

[2] Defendant contends the trial court committed plain error by instructing the jury on the defense of insanity without Defendant's consent and "in the absence of any evidence supporting the instruction." Importantly, Defendant's trial counsel agreed to the NGRI instruction, although Defendant had previously declined to plead NGRI.

Defendant contends we should apply a structural error analysis to these issues to consider how our courts should "protect a defendant's constitutional right to direct her own defense when the defendant's counsel throws away that right 'at trial.' " "Structural error is a rare form of constitutional error resulting from 'structural defects in the constitution of the trial mechanism' which are so serious that 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence.' " *State v. Garcia*, 358 N.C. 382, 409, 597 S.E.2d 724, 744

(2004) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10, 111 S. Ct. 1246, 1264-65, 113 L. Ed. 2d 302 (1991) (citation and quotation marks omitted)). But again, to the extent Defendant's complaint relies upon her counsel's acquiescence to the instruction, it is really about her trial counsel's conduct. Thus, we consider it another claim for ineffective assistance of counsel. We, therefore, limit our review of this issue here to the instruction the trial court gave the jury on NGRI.

As Defendant acknowledges, she did not object to the instruction 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 . . . nevertheless may be made the basis of an issue presented on appeal when the judicial action questioned is specifically and distinctly contended to amount to plain error.").

"For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial." *State v. Lawrence*, 365 N.C. 506, 518, 723 S.E.2d 326, 334 (2012) (citation omitted). Further, "[t]o show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error 'had a probable impact on the jury's finding that the defendant was guilty.' " *Id.* (quoting *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted)). Thus, plain error is reserved for "the exceptional case where, after reviewing the entire record, it can be said the claimed error is a '*fundamental* error, something so basic, so prejudicial . . . that justice cannot have been done,' or 'where [the error] is grave error which amounts to a denial of a fundamental right of the accused[.]' " *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982)) (emphasis in original).

Defendant's argument is two-fold: the trial court erred by instructing the jury, first because Defendant had repeatedly refused to argue insanity, and second because the evidence did not support the instruction. Even assuming arguendo the trial court's instruction was erroneous, Defendant has not established the prejudice necessary to meet the bar for plain error.

The trial court instructed the jury on the issues of diminished capacity and NGRI as follows:

> You may find there is evidence which tends to show that the defendant lacked mental capacity at the time of the acts alleged in this case. If you find that the defendant lacked mental capacity, you should consider whether this condition affected the defendant's ability to formulate

> the specific intent which is required for conviction of first-degree murder. In order for you to find the defendant guilty of first-degree murder, you must find beyond a reasonable doubt that the defendant killed the deceased with malice and in the execution of an actual, specific intent to kill formed after premeditation and deliberation. If, as a result of lack of mental capacity, the defendant did not have the specific intent to kill the deceased, formed after premeditation and deliberation, the defendant is not guilty of first-degree murder. Therefore, I charge that if, upon considering the evidence with respect to the defendant's lack of mental capacity, you have a reasonable doubt as to whether the defendant formulated the specific intent required for conviction of first-degree murder, you will not return a verdict of guilty of first-degree murder.
>
> . . . .
>
> When there is evidence which tends to show that the defendant was legally insane at the time of the alleged offense, you will consider this evidence *only if you find that the State has proved beyond a reasonable doubt each of the things about which I have already instructed you* [the elements of first-degree murder]. Even if the State does prove each of these things beyond a reasonable doubt, the defendant would nevertheless be not guilty if she was legally insane at the time of the alleged offense. I instruct you that sanity or soundness of mind is the natural and normal condition of people. Therefore, everyone is presumed sane until the contrary is made to appear. The test of insanity as a defense is whether the defendant, at the time of the alleged offense, was laboring under such a defect of reason, from disease or deficiency of the mind, as to be incapable of knowing the nature and quality of the act or, if the defendant did know this, whether the defendant was, by reason of such defect of reason, incapable of distinguishing between right and wrong in relation to that act.

(emphasis added).

First and foremost, the jury in this case clearly rejected all affirmative defenses instructed upon because they found Defendant guilty of first-degree murder. Importantly, the instruction Defendant challenges

correctly stated the law. *See State v. Evangelista*, 319 N.C. 152, 161, 353 S.E.2d 375, 382 (1987) (explaining elements of defense of insanity). And, indeed, the trial court instructed the jury it could only consider evidence of insanity if it first found the State had proven first-degree murder beyond a reasonable doubt. This includes—as the trial court expressly instructed—specific intent. Finding Defendant had a specific intent to kill means the jury rejected the defense of diminished capacity. *See Page*, 346 N.C. at 698, 488 S.E.2d at 231 ("A defendant is entitled to present evidence that a diminished mental capacity not amounting to legal insanity negated his ability to form the specific intent to kill required for a first-degree murder conviction on the basis of premeditation and deliberation." (citing *State v. Shank*, 322 N.C. 243, 249, 367 S.E.2d 639, 643 (1988))). Thus, to find Defendant guilty of first-degree murder, the jury must have first rejected the defense of diminished capacity and then rejected the defense of insanity.

Defendant contends the jury instruction on insanity, coupled with the State's closing argument, may have confused the jury as to the defense of diminished capacity. However, in its closing argument, the State expressly differentiated between NGRI and diminished capacity:

> Let's talk about diminished capacity. This is essentially what [defense counsel] argued to you. Diminished capacity. You may find evidence that the defendant lacked mental – mental capacity at the time of the murder, whether the condition affected the defendant's ability to formulate the specific intent which is required for first-degree murder. It means you can consider second-degree murder, because it doesn't require the specific intent. We covered that. She had the intent.
>
> . . . .
>
> We've talked about not guilty by reason of insanity. Which [Defendant]'s not asking for. The defense did not ask you to find her not guilty by reason of insanity. Just to make sure you picked up on that. That's not what they're asking you for. . . . She's not raising insanity. She did not raise that defense.

These statements demonstrate that, taken as a whole, the State's closing argument differentiated NGRI and diminished capacity as separate defenses, correctly articulated which Defendant had asserted, and correctly stated the elements of the defenses.

Thus, based on the Record before us, Defendant has not shown the allegedly erroneous instruction "had a probable impact on the jury's finding that the defendant was guilty." *Lawrence*, 365 N.C. at 517, 723 S.E.2d at 333 (quoting *Odom*, 307 N.C. at 660, 300 S.E.2d at 378 (citation omitted)). Therefore, any error in the trial court's jury instruction does not constitute plain error.

II. Ineffective Assistance of Counsel

STADING, Judge.

[3] For Defendant to successfully assert a claim for ineffective assistance of counsel, she must satisfy a two-part test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Defendant must first show that her attorney's performance "fell below an objective standard of reasonableness." *State v. Blakeney*, 352 N.C. 287, 307, 531 S.E.2d 799, 814–15 (2000) (citation omitted). She must next show the error committed was so serious that "a reasonable probability exists that the trial result would have been different absent the error." *Id.* at 307–08, 531 S.E.2d at 815 (citation omitted). That said, in *State v. Harbison*, our Supreme Court held, "that a criminal defendant suffers a per se violation of his constitutional right to effective assistance of counsel when his counsel concedes the defendant's guilt to the jury without his prior consent." *State v. McAllister*, 375 N.C. 455, 456, 847 S.E.2d 711, 712 (2020).

A. Admission of Guilt

Defendant challenges the assertion that her attorney, Ms. Gibson, had permission to admit her guilt. *See State v. Harbison*, 315 N.C. 175, 337 S.E.2d 504 (1985). However, the trial court conducted an inquiry sufficiently showing Defendant knowingly and voluntarily consented to her attorney's admission of her guilt—in furtherance of her defense. *See State v. McAllister*, 375 N.C. at 477, 847 S.E.2d at 724 (citation omitted) ("This Court has stated 'that an on-the-record exchange between the trial court and the defendant is the preferred method of determining whether the defendant knowingly and voluntarily consented to an admission of guilt . . . .' "). Although Defendant initially expressed confusion and disagreement with admitting guilt, the trial court's complete colloquy with Defendant at the outset of trial provides a clear display of her understanding and consent to her attorney's admission:

> THE COURT: You've spoken to Ms. Gibson about the diminished capacity defense; is that correct?
>
> DEFENDANT: Yeah.

THE COURT: All right. Are you satisfied you, at least in your mind, understand the diminished capacity defense that Ms. Gibson has spoken to you about?

DEFENDANT: For the most part.

THE COURT: All right. Is there something you don't understand about that diminished capacity defense?

DEFENDANT: No. No.

THE COURT: There's not?

DEFENDANT: No.

THE COURT: Okay. Do you understand that in order -- at least Ms. Gibson's position is in order to utilize that diminished capacity defense, that will require an admission on your part?

DEFENDANT: No. I don't really understand that part.

THE COURT: All right. It will require an admission that you in fact did -- you were responsible for the death of the victim.

DEFENDANT: Well, she really didn't explain all that to me so --

THE COURT: Do you understand that?

DEFENDANT: Not exactly. I don't understand why it's part of the defense.

THE COURT: Well, Ms. Gibson has provided notice that you lacked the proper mental capacity to commit first-degree murder in that you were not able to form the state of mind necessary for that type of murder. That your mental capacity was diminished to the point that you could not do that. Do you understand that part?

DEFENDANT: Yeah.

THE COURT: However, that would require your attorney to make admission -- to make an admission that you did in fact commit the murder; however, that it wasn't first-degree murder due to your diminished mental capacity.

DEFENDANT: Okay.

THE COURT: Do you understand that? Do you understand what I'm telling you?

DEFENDANT: Yeah. But then would – what would be considered then?

THE COURT: Potentially second-degree murder.

DEFENDANT: No. I don't understand that part.

THE COURT: You don't understand that part?

DEFENDANT: No.

THE COURT: All right. Second-degree murder does not require premeditation or deliberation. First-degree murder requires premeditation and deliberation. So Ms. Gibson's defense -- by utilizing diminished capacity, her position on your behalf would be that you did not have the mental capacity to form premeditation and deliberation.

DEFENDANT: But it can't be anything lesser than that?

THE COURT: Anything lesser than that?

DEFENDANT: Than second? So it's not the paper that she showed me?

THE COURT: What's the paper that Ms. Gibson showed you?

DEFENDANT: Diminished capacity.

THE COURT: Ms. Gibson, do you want to enlighten me? I'm not sure --

MS. GIBSON: What I have verbally explained to Miss Copenhaver -- I gave her an article that was written -- I'm not sure if it was Jeff Wel[t]y or another person that --

THE COURT: John Rubin?

MS. GIBSON: Yes.

THE COURT: Okay.

MS. GIBSON: Gave her that. And then about three weeks ago, I sent her a three-page letter explaining the different options, and one of the sections was diminished capacity, explaining that by asserting that defense she would be

admitting that she committed the murder, but lacked the intent to form premeditation.

THE COURT: Okay. And did you inform Miss Copenhaver at that time that that would result in potentially a second-degree murder charge to the jury?

MS. GIBSON: Potentially. And it could also result in a life-without-parole sentence.

THE COURT: Okay.

DEFENDANT: And also something could be lesser than that too. That's what the article says.

MS. GIBSON: I think she's probably thinking of manslaughter.

THE COURT: Yes.

MS. GIBSON: Because I think, as you said --

THE COURT: That's fact-specific, Miss Copenhaver. That doesn't mean that necessarily in your case that it would result in a jury instruction for voluntary manslaughter.

DEFENDANT: Yeah. I'm just trying to understand like if that's possible in this defense with regards to those two options.

THE COURT: I haven't heard -- the problem is I haven't heard the evidence to know whether or not this case would involve an instruction for voluntary manslaughter. I'm not trying to dance around your question; I don't know.

DEFENDANT: Okay.

THE COURT: Maybe that's something Ms. Gibson can enlighten you on. I'm certain she can enlighten you on that better than I can. She knows your case. She's been representing you on it. She knows what the facts are. I don't.

DEFENDANT: All right.

THE COURT: But it would guarantee -- a diminished capacity defense would guarantee an instruction for second-degree murder.

DEFENDANT: But nothing less? That's what I don't understand.

THE COURT: I don't know if there would be anything less that would follow that. So -- yes, ma'am?

MS. GIBSON: I think I should put on the record now that I do not believe that the evidence is going to support a jury instruction of manslaughter.

. . . .

DEFENDANT: That's not what she told me about when I agreed to this defense.

THE COURT: Well, it sounds like Ms. Gibson told you that by utilizing diminished capacity a jury instruction for second-degree murder is what would likely result, which is significantly different than a jury instruction for first-degree murder. First-degree murder jury instruction -- well, first-degree punishment is life in prison without parole. Do you understand that?

DEFENDANT: Yeah.

THE COURT: For second-degree -- and that's no matter what your prior record level is.

For second-degree murder, of course, it's still potentially life in prison without parole. However, depending on your prior record, it does not require life without parole. First-degree murder conviction requires life without parole; second-degree murder does not require life without parole. Do you understand that?

DEFENDANT: Yeah.

THE COURT: So knowing that, are you authorizing Ms. Gibson to make that admission and utilize the defense of diminished capacity on your behalf as a trial strategy?

DEFENDANT: I don't know. She didn't really explain that much to me, so I guess I have to think about it.

THE COURT: Well, you don't really have time to think about it, Miss Copenhaver. This is your day of trial. It starts today.

DEFENDANT: Then yes.

THE COURT: I'm sorry?

DEFENDANT: Yes.

THE COURT: Ms. Gibson, for the record, when did you have this conversation with Miss Copenhaver?

MS. GIBSON: We've been having the conversation for months. Her consent, I believe, came probably six weeks ago. My letter explaining it to her was three weeks ago. I met with her last Thursday at the jail to again talk about NGRI versus diminished capacity. I was not received well. So I will put on the record that counsel has made every effort possible to explain this to her. And she has not been cooperative or talkative with me. So I've made every effort. But I will say this on the record also: If she has any doubt about the defense of diminished capacity and making the admissions that she committed the murder, I do not and will not go forward with that defense.

THE COURT: Miss Copenhaver, I'm not trying to be difficult. Take your mask off for me. Okay? Do you have any issue with Ms. Gibson admitting that you are responsible for the homicide of the victim? So that – I'm sorry?

DEFENDANT: Yeah. I have issues with that.

THE COURT: All right. Explain why you have issues with that.

DEFENDANT: Because it's her admitting.

THE COURT: Okay. But you understand that if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder?

DEFENDANT: All right. She can use it.

THE COURT: I'm sorry?

DEFENDANT: She can use it then.

THE COURT: So what I'm hearing you say is you want the jury to receive an instruction for second-degree murder, and in order for –

DEFENDANT: Diminished capacity defense.

THE COURT: You do want her to utilize the diminished capacity defense?

> DEFENDANT: Yes.
>
> THE COURT: So that the jury can receive an instruction for second-degree murder? Yes?
>
> DEFENDANT: Yeah.
>
> THE COURT: Are you sure?
>
> DEFENDANT: Yeah.

Considering the above exchange, it is clear Defendant's counsel informed her of the requirements for the defense of diminished capacity. Defendant was informed of these requirements weeks before her decision, and the trial court obtained her consent upon a clear and careful explanation. The trial court conducted an additional colloquy with Defendant after the charge conference and before closing arguments:

> THE COURT: All right. And prior to trial -- Miss Copenhaver, if you'll stand up for me, please, ma'am. Prior to trial, Miss Copenhaver, you and I had a discussion about potential admissions by Ms. Gibson as it relates to diminished capacity. Do you remember that discussion?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you approved that admission; is that correct?
>
> THE DEFENDANT: Yes.
>
> THE COURT: Regarding potentially admitting the murder but with diminished capacity. Is that an accurate statement on my part?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And you still approve of the same?
>
> THE DEFENDANT: Yeah.
>
> THE COURT: All right. You can be seated.

Here, since the record contains sufficient information to resolve Defendant's allegation, it is properly reviewed by this Court. *See id*. In view of the record, we hold Defendant's attorney's performance did not amount to a *Harbison* error. *See State v. Bryant*, 281 N.C. App. 116, 126–27, 867 S.E.2d 580, 587 (2021) ("[W]e conclude to the extent defense trial counsel's admissions in opening statements triggered *Harbison*, the trial court's colloquy with Defendant in this case was adequate

to ascertain Defendant's consent to those admissions. Consequently, Defendant was not per se denied effective assistance of counsel."); *see also State v. Foreman*, 270 N.C. App. 784, 792, 842 S.E.2d 184, 189 (2020) ("As Defendant's consent to his attorney's concession of guilt was knowing and voluntary, he was not denied effective assistance of counsel in violation of *Harbison*.").

B. Jury Instruction

Defendant also argues that she was denied effective assistance of counsel because her attorney did not object to the trial court's jury instruction on not guilty by reason of insanity. Defendant claims her attorney was bound to comply with her desire to object to the instruction. Her ineffective assistance of counsel argument on this basis fares no better than her first. Even if her attorney was bound to follow her request, she cannot show prejudice to her defense. *See Strickland*, 466 U.S. at 671, 104 S. Ct. at 2056 ("With regard to the required showing of prejudice, the proper standard requires the defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.").

We also acknowledge Defendant's alternative argument alleging her attorney's failure to object to the not guilty by reason of insanity jury instruction contributed to structural error under *State v. Payne*, 256 N.C. App. 572, 808 S.E.2d 476 (2017). The dissent similarly suggests *Payne* is applicable to resolve Defendant's IAC claim. But *Payne* does not consider whether the Defendant received IAC. Instead, it addresses whether the trial court erred in "allow[ing] her lawyer to pursue a pre-trial insanity defense against [the defendant's] wishes . . . ." *Id.* at 577, 808 S.E.2d at 480–81.

Even if *Payne* applied, it applied *Harbison*:

> Though *Harbison* dealt with the consequences of a defendant's attorney admitting defendant's guilt to certain charges without the defendant's consent, in light of . . . precedent, we find the following reasoning in *Harbison* applicable to the present case:
>
> This Court is cognizant of situations where the evidence is so overwhelming that a plea of guilty [or NGRI] is the best trial strategy. However, the gravity of the consequences demands that the decision to plead guilty [or NGRI]

> remain in the defendant's hands. When counsel admits his client's guilt [or moves for a pretrial determination of NGRI] without first obtaining the client's consent, the client's rights to a fair trial and to put the State to the burden of proof are completely swept away. . . . [ ] Counsel in such situations denies the client's right to have the issue of guilt or innocence decided by a jury.

Payne, 256 N.C. App. at 584–85, 808 S.E.2d at 485 (citing *Harbison*, 315 N.C. at 180, 337 S.E.2d at 507). But *Payne* is inapplicable to instant case for other reasons.

In *Payne*, the defendant's attorney, against the defendant's express wishes, "moved for a pretrial determination of NGRI pursuant to N.C. [Gen. Stat.] § 15A-959(c), the State consented, and the trial court agreed—purportedly dismissing the charges against Defendant based upon its determination that she was NGRI." *See generally Payne*, 256 N.C. App. at 578, 808 S.E.2d at 480. Then, the trial court "entered 'an order finding that [D]efendant ha[d] been found not guilty by reason of insanity of a crime and committ[ed her] to a Forensic Unit . . .' until such time as Defendant should be released 'in accordance with Chapter 122C of the General Statutes.' " *Id.* (brackets in original). On appeal, this Court concluded, "by allowing Defendant's counsel to seek and accept a pretrial disposition of NGRI, the trial court 'deprived [Defendant] of [her] constitutional right to conduct [her] own defense.' " *Id.* at 585, 808 S.E.2d at 485 (citation omitted) (brackets in original).

The *Payne* Court determined, "[b]y ignoring Defendant's clearly stated desire to proceed to trial rather than moving for a pretrial verdict of NGRI . . . the trial court allowed . . . the 'waiver' of her fundamental rights . . . ." *Id.* at 585, 808 S.E.2d at 485. The Court continued, "[t]he denial of Defendant's right to counsel advocating for her wishes, which resulted in the denial of Defendant's right to trial and her indefinite involuntary commitment pursuant to N.C.G.S. § 15A-959(c) and N.C.G.S. § 15A-1321(b), constituted reversible error." *Id.* at 586, 808 S.E.2d at 486. In this matter, Defendant's attorney made no such concession that led to her commitment. This Court has since followed *Payne*, yet has not extended its ruling to the present situation—IAC by failure to object to jury instructions. *See In re T.S.P.*, 260 N.C. App. 127, 814 S.E.2d 923 (2018); *see also State v. Myrick*, 277 N.C. App. 112, 113, 857 S.E.2d 545, 546 (2021). Given the patent factual and procedural differences, we decline to expand the boundaries of the *Payne* ruling to this case. *Strickland* is the proper paradigm for this analysis. 466 U.S. 668, 687, 104 S. Ct. 2052, 2064.

Here, applying *Strickland*, the cold record does not contain the requisite information to determine whether Defendant's trial counsel's performance was deficient. *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citing *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064) ("An IAC claim must establish both that the professional assistance defendant received was unreasonable and that the trial would have had a different outcome in the absence of such assistance."). Assuming *arguendo*, that Defendant's attorney rendered deficient performance, the record reveals Defendant cannot establish prejudice to her defense. *See State v. Oglesby*, 382 N.C. 235, 248, 876 S.E.2d 249, 260 (2022) ("[The defendant's] IAC claim is properly disposed of on prejudice grounds alone."). Defendant cannot show a reasonable probability that the trial result would have been different absent her attorney's failure to object to this instruction. *See Blakeney*, 352 N.C. at 307–08, 531 S.E.2d at 815 ("Second, once defendant satisfies the first prong, he must show that the error committed was so serious that a reasonable probability exists that the trial result would have been different absent the error."). The jury's verdict likewise supports this outcome since it shows the jury did not find Defendant not guilty by reason of insanity. Since Defendant cannot show her attorney's performance, even if deficient, prejudiced her defense, she cannot meet the second prong of the *Strickland* test. 466 U.S. at 687, 104 S. Ct. at 2064. We therefore hold Defendant has not established a claim for ineffective assistance of counsel.

Conclusion

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

NO ERROR IN PART; DISMISSED IN PART.

Judge FLOOD concurs.

Judge HAMPSON concurs in part and dissents in part by separate opinion.

HAMPSON, Judge, dissenting in part.

This Court's consistent practice is to dismiss IAC claims without prejudice to allow defendants to have their claims considered through a motion for appropriate relief. *See State v. Dockery*, 78 N.C. App. 190,

192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415[.]"). This is not to say this Court may never consider IAC claims on direct appeal, but rather that the cases in which direct review is appropriate are limited—particularly in light of the gravity of defendants' interests at stake.

"IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). But a "cold record," however lengthy, does not enable us to ascertain significant, non-verbal aspects of communication, such as tone and body language. Thus, "[s]imply stated, the trial court is in a better position to determine whether a counsel's performance: (1) was deficient so as to deprive defendant of 'counsel' guaranteed under the Sixth Amendment; and (2) prejudiced defendant's defense to such an extent that the trial was unfair and the result unreliable." *State v. Streater*, 197 N.C. App. 632, 649, 678 S.E.2d 367, 378 (2009) (quoting *State v. Duncan*, 188 N.C. App. 508, 517, 656 S.E.2d 597, 603 (2008) (Hunter, J., dissenting), *disc. rev. improvidently allowed*, *reversed*, 362 N.C. 665, 666, 669 S.E.2d 738, 738 (2008) ("For the reasons stated in the dissenting opinion of the Court of Appeals, the decision of the Court of Appeals is reversed[.]")). We have repeatedly recognized the trial court is best positioned to make credibility determinations and, accordingly, we limit our forays into such issues.

Moreover, "because of the nature of IAC claims, defendants likely will not be in a position to adequately develop many IAC claims on direct appeal." *Fair*, 354 N.C. at 167, 557 S.E.2d at 525. Further, in order to "defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's *thoughts*, *concerns*, *and demeanor*." *State v. Buckner*, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citation omitted) (emphasis added). "Only when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance." *Id.* (quoting *State v. Taylor*, 327 N.C. 147, 161, 393 S.E.2d 801, 810 (1990) (Meyer, J., dissenting) (citation omitted)). I do not believe the issues involved in this case are as clear-cut as the majority

suggests. Recognizing the limitations of our review on appeal, I would dismiss Defendant's IAC claim without prejudice to the filing of a motion for appropriate relief in the trial court.

Here, Defendant's IAC claim is two-fold: first, her colloquy with the trial court regarding her understanding of the requirements to assert a defense of diminished capacity; second, her attorney's acquiescence to the trial court's instruction on NGRI.

As to Defendant's colloquy with the trial court regarding the use of a diminished capacity defense, although I do not believe the trial court's statements were incorrect, the transcript reflects potential confusion on Defendant's part as to the nature of the defense and her admission of guilt. Defendant stated she understood the diminished capacity defense "[f]or the most part," yet when the trial court asked specifically about the admission of guilt required to use that defense, Defendant replied "No. I don't really understand that part." Defendant told the trial court her attorney "didn't explain all that to me" about the admission of guilt. Although the trial court attempted to explain the required admission of guilt to Defendant, her attorney claimed she had done so as well; the Record, however, reflects Defendant had potentially lingering confusion. And, indeed, although Defendant stated at multiple points that her attorney had not explained aspects of diminished capacity to her, her attorney told the trial court "We've been having the conversation for months. . . . My letter explaining [diminished capacity] to her was three weeks ago. . . . I will put on the record that counsel has made every effort possible to explain this to her."

To be sure, the above reflects efforts to explain diminished capacity to Defendant. What it does not clearly and unequivocally show, however, is whether Defendant in fact understood. The Record reflects Defendant's attorney spent weeks attempting to explain diminished capacity to her—yet she expressed continued confusion. To infer she entirely understood the trial court's explanation across ten pages of the transcript when she did not understand after repeated conversations with her attorney is too far of a leap for this Court to make.

I believe this leap is particularly inappropriate in light of the constraints of the conversation between Defendant and the trial court. Defendant expressly stated she needed time to think about the admission of guilt required for diminished capacity, to which the trial court responded: "Well, you don't really have time to think about it[.] This is your day of trial. It starts today." The Record does seem to reflect Defendant wanted the jury to be instructed on a lesser offense than

first-degree murder, as she repeatedly asked about second-degree murder and voluntary manslaughter. Defendant agreed to the admission of guilt only *after* the trial court told her "if you do not make that admission, she cannot utilize the diminished capacity defense, which would mean the jury will not get an instruction for second-degree murder[.]" I do not suggest the trial court behaved improperly here; rather, I believe this transcript alone, considering the pressures Defendant may have felt to decide in the moment—which we cannot know or judge—is not sufficient to definitively dismiss her IAC claim on this issue.

As to Defendant's IAC claim regarding the trial court's instruction on NGRI and her counsel's failure to object to the instruction, the majority quickly disposes of Defendant's claim because, in their view, she cannot show she was prejudiced by the instruction. It is unclear why they believe this is so. But in any event, not every error requires a showing of prejudice. In *Harbison*, our Supreme Court concluded a defendant whose attorney admits guilt without their consent "need not show any specific prejudice in order to establish his right to a new trial due to ineffective assistance of counsel." 315 N.C. at 179, 337 S.E.2d at 507. Whether a trial court instructing the jury on a defense a defendant has affirmatively stated she does not wish to raise is structural error, *Harbison* error, or simply subject to our typical error/plain error analysis is not clear from our caselaw.

In *Harbison*, our Supreme Court acknowledged "there exist 'circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified.' " *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 658, 104 S. Ct. 2039, 2046, 80 L. Ed. 2d 657 (1984)). *Harbison* merely identified one such circumstance. Then, in *State v. Payne*, 256 N.C. App. 572, 808 S.E.2d 476 (2017), this Court considered whether a competent defendant has the right to refuse to pursue a defense of NGRI. That case presented an issue of first impression for North Carolina Courts, and we looked to other jurisdictions for guidance. The *Payne* Court first noted the D.C. Circuit Court of Appeals had "initially held 'a defendant may not keep the issue of insanity out of the case altogether. He may, if he wishes, refuse to raise the issue of insanity, but he may not, in a proper case, prevent the court from injecting it.' " *Id.* at 579, 808 S.E.2d at 482 (quoting *Whalem v. United States*, 346 F.2d 812, 818 (D.C. Cir. 1965)). However, the D.C. Circuit later overturned *Whalem*, recognizing "[n]o other federal court of appeals has imposed a duty upon the district court to raise the insanity defense; indeed, only a few have even considered the issue." *United States v. Marble*, 940 F.2d 1543, 1545 (D.C. Cir. 1991) (citations omitted).

In concluding a competent defendant has the right to determine whether or not to plead NGRI, the *Payne* Court pointed to the structure of the Sixth Amendment:

> The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make h[er] defense. . . . The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant[.]

Payne, 256 N.C. App. at 581, 808 S.E.2d at 483 (quoting *Faretta v. California*, 422 U.S. 806, 819-20, 95 S. Ct. 2525, 2533, 45 L. Ed. 2d 562 (1975)).

Here, although defense counsel did not enter a plea of NGRI on Defendant's behalf, she did acquiesce without objection to the trial court giving that instruction despite Defendant's repeated, unwavering statements she did not wish to present NGRI to the jury. If, as both federal and North Carolina caselaw make clear, a defendant's counsel is her "assistant," is such a failure to act in contravention of a defendant's known and expressed wishes, ineffective assistance per se? In such circumstances, should a defendant be required to show prejudice? Or is this, as in *Harbison*, a situation "so likely to prejudice the accused that the cost of litigating [its] effect in a particular case is unjustified"? 315 N.C. at 179, 337 S.E.2d at 507 (citation and quotation marks omitted). I do not believe this Court can or should answer that question absent additional proceedings in the trial court. Again, although the trial court's instruction was a correct statement of law, we have no way of knowing what would have happened had Defendant's counsel objected to the NGRI instruction. And the extent to which failing to act in accordance with a defendant's express wishes constitutes prejudice per se is an inquiry properly fleshed out in the trial court.

Further, in my view, the trial court is the proper venue for the parties to make their arguments with respect to whether defense counsel's inaction in this case constitutes structural error or *Harbison* error or neither. These claims should be developed in the trial court to create an adequate record in case of appeal. This is borne out by the majority's failure to reckon with Defendant's contentions regarding structural and *Harbison* error or to meaningfully explain why they believe this is neither structural error nor *Harbison* error.

I would thus conclude further development of the arguments is required before we can properly apply the *Strickland* test or determine whether another test is appropriate in this case. Therefore, I would dismiss Defendant's IAC claims without prejudice to permit Defendant to pursue a motion for appropriate relief in the trial court. Consequently, I respectfully dissent.

STATE OF NORTH CAROLINA
v.
AMARI DIJAI GAMBLE

No. COA24-842

Filed 4 June 2025

1. Robbery—with a dangerous weapon—evidence of endangerment to victim's life—lesser-included offense instruction not warranted

In a prosecution for charges including robbery with a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury on the lesser-included offense of common law robbery where the State had presented sufficient evidence that the victim's life was threatened or endangered during the robbery—more specifically, that the victim saw defendant holding a rifle with both hands from the time he entered her bedroom in the middle of the night to steal two purses (after having already entered the home uninvited earlier that evening) until the victim escaped the scene. Further, no conflicting evidence was offered to negate the victim's claim that she felt so threatened by defendant brandishing the rifle that she thought she was going to die that night.

2. Robbery—with a dangerous weapon—sufficiency of evidence—possession of firearm threatening or endangering victim's life—jury instruction on mere possession unwarranted

In a prosecution for charges including robbery with a dangerous weapon, for which one of the essential elements was that the victim's life be threatened or endangered by defendant's use of a dangerous weapon, the trial court did not abuse its discretion by declining to instruct the jury that defendant's mere possession of a weapon during the course of a robbery, without more, is insufficient to support a finding that the victim's life was endangered or threatened. Defendant's request for this instruction was not supported

by the evidence, which showed that defendant brandished a rifle in plain sight throughout the commission of the robbery—which occurred in the middle of the night in the victim's bedroom after defendant had already entered the victim's house uninvited earlier that evening—and the victim was not only aware of defendant brandishing the weapon but also felt so threatened by it that she thought she was going to die.

3. Criminal Law—jury deliberations—court's response to jury's questions—defense counsel's request for clarifying instruction—no prejudicial error

In a prosecution for charges including robbery with a dangerous weapon, the trial court did not commit prejudicial error by declining to answer the jury's questions during deliberations concerning an essential element of armed robbery—whether the victim's life was threatened or endangered—and in declining defense counsel's subsequent request for an instruction aimed at addressing the jury's questions. The issue was preserved for appellate review where defense counsel objected to the court's jury instructions before and after they were given; however, because defendant could not show a reasonable possibility that the jury would have returned a different verdict absent the purported error, such error was harmless.

Appeal by defendant from judgment entered 18 January 2024 by Judge Justin N. Davis in Mecklenburg County Superior Court. Heard in the Court of Appeals 10 April 2025.

Attorney General Jeff Jackson, *by Assistant Attorney General Natalia K. Isenberg*, *for the State.*

Office of the Public Defender, *Assistant Public Defender*, *by Julie Ramseur Lewis*, *for the defendant-appellant.*

TYSON, Judge.

Amari Dijai Gamble ("Defendant") appeals from convictions and judgments entered upon a jury's verdicts of guilty of robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon and felonious fleeing to elude. We discern no error.

I. Background

Dorothy Newton ("Newton") resided in her townhome with her eight-year-old son and her seventeen-year-old daughter, Kamya Little

("Little"). Late one evening, Newton was going to lock the back door to her townhouse when she discovered an unknown black male inside of her kitchen. He was dressed in all black and his face was concealed by a mask with only his eyes being visible. When Newton demanded for the man to leave her home, Little asked her mother not to make him leave, and she threatened to go with the man, if she did. Little ultimately left the home with the unknown male, at which point Newton locked the door and went upstairs to bed.

Later that night, Newton awoke to sounds of footsteps coming up the stairs towards her room. Little and the unknown male – still masked and now holding a rifle – entered her room. The male did not speak or make demands and never pointed the rifle directly in her direction. In recalling the incident to responding Charlotte-Mecklenburg Police Officer Alexa Odom, Newton reported the unknown male was "pointing the gun out and it was held by two hands" while he was in her bedroom. Newton testified she pleaded with Little and the unknown male to leave and not harm her, and she "thought she was going to die."

When Newton saw Little walk around the bed and grab her purse, she grabbed her phone, pushed the man to the side to reach the bedroom door, and ran down the stairs. After Newton ran out of her house, she witnessed Little and the unknown male together exited her townhouse with Little carrying two purses belonging to Newton. Little and the male entered Newton's Ford Escape vehicle and drove off. After watching them drive away, Newton re-entered her house and called 911 to report the incident.

Charlotte-Mecklenburg Police Officer Steven Hesseman responded to the 911 call and intercepted the Ford Escape while traveling towards Newton's home. Officer Hessman made a U-turn and followed the vehicle. After an erratic chase involving multiple officers, the vehicle was intercepted at the 800 block of 8th Street in Charlotte and the unknown male was arrested and detained. The male in the vehicle was identified as Defendant.

Defendant was indicted for robbery with a dangerous weapon, felonious fleeing to elude arrest, and conspiracy to commit robbery with a dangerous weapon. The jury convicted Defendant of all indicted charges. Defendant's convictions for robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon were consolidated for judgment. He was sentenced as a prior record level I offender with 0 points to an active term of 64 to 89 months imprisonment. Defendant was also sentenced to an active term of 6 to 17 months imprisonment for his conviction for felony fleeing to elude. The sentences were ordered to run consecutively. Defendant appeals.

II. Jurisdiction

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

III. Issues

Defendant argues the trial court erred by refusing to instruct the jury on the lesser-included offense of common law robbery, on mere possession of a firearm, and by the trial court's response to the jury's questions concerning the threatening and endangering element of robbery with a dangerous weapon.

IV. Lesser Included Offense of Common Law Robbery

[1] Defendant argues the trial court erred by refusing to instruct the jury on the lesser-included offense of common law robbery.

A. Standard of Review

Trial court jury instructions are reviewed on appeal *de novo*. *State v. Redmond*, 266 N.C. App. 580, 582, 831 S.E.2d 650, 652 (2019). Under *de novo* review, the appellate 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) (citation and quotation marks omitted).

"Choice of instruction is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *State v. Nicholson*, 355 N.C. 1, 66, 448 S.E.2d 109, 152 (2002) (citation omitted). "An instruction on a lesser-included offense must be given only if the evidence would permit the jury rationally to find [the] defendant guilty of the lesser offense and to acquit him of the greater." *State v. Millsaps*, 356 N.C. 556, 561, 572 S.E.2d 767, 771 (2002).

B. Analysis

1. Lesser-Included Offense

Defendant contends the instruction of the lesser-included offense of common law robbery was warranted by the evidence because the State failed to unequivocally demonstrate Newton's life was threatened or endangered during the course of the robbery. Threatening or endangering the life of a person is an essential element to the crime of robbery with a dangerous weapon. *See State v. Oldroyd*, 380 N.C. 613, 618, 869 S.E.2d 193, 197 (2022) (citation omitted); *see also* N.C. Gen. Stat. § 14-87(a) (2023). Defendant claims the lack of evidence to support those elements warranted the lesser-included instruction on common law robbery.

"If . . . the State's evidence is clear and positive with respect to each element of the offense charged and there is no evidence showing the commission of the lesser included offense, it is not error for the trial judge to refuse to instruct the jury on the lesser offense." *State v. Clevenger*, 249 N.C. App. 383, 392, 791 S.E.2d 248, 255 (2016) (citing *State v. Hardy*, 299 N.C. 445, 456, 263 S.E.2d 711, 718-19 (1980)) (internal quotation omitted).

It is necessary to instruct the jury of a lesser-included offense "when and only when the jury could find that such [an] included crime of lesser degree was committed." *Id.* at 393, 263 S.E.2d at 255-56 (citation omitted). "Hence, there is no such necessity if the State's evidence tends to show a completed robbery and there is no conflicting evidence relating to elements of the crime charged." *Id.*

2. Armed Robbery

Armed robbery is a three-element offense requiring: (1) the unlawful taking or attempt to take personal property from the person or in the presence of another; (2) by use or threatened use of a firearm or other dangerous weapon; and, (3) whereby the life of a person is endangered or threatened. *State v. Hill*, 365 N.C. 273, 275, 715 S.E.2d 841, 843 (2011) (citation omitted). This Court has previously held "in cases where the State's evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the course of the robbery, the third element of armed robbery is satisfied." *State v. Wright*, 252 N.C. App. 501, 508, 798 S.E.2d 785, 790 (2017).

A dangerous weapon in the possession of a defendant held in a "manner and circumstance[]" that alludes to a harmful purpose provides sufficient evidence to support submission of a robbery with a dangerous weapon charge. *See State v. Whisenant*, 249 N.C. App. 456, 459, 791 S.E.2d 122, 125 (2016) (explaining that a defendant wielding an unopened knife during the commission of a robbery along with threats was sufficient to endanger the victim and uphold a charge of robbery with a dangerous weapon).

Following a jury charge conference with counsel, the trial court declined to give the common law robbery instruction in light of the totality of the evidence presented. The trial court noted Defendant's openly brandishing a deadly weapon is different than mere possession and the lesser-included offense instruction was inappropriate in light of the circumstances. *Id.*

Defendant does not contest the evidence produced by the State was sufficient to satisfy elements one and two of the robbery with a

dangerous weapon charge. Defendant argues the State failed to present sufficient evidence tending to show Newton's life was endangered or threatened by the presence of the rifle during the robbery. *Id.* The police report taken after the robbery and the testimony at trial both reflect Newton visibly saw Defendant holding the rifle with both hands from the time he entered her bedroom in the middle of the night until she ran past him in the bedroom and out of the house. No conflicting evidence was offered to negate Newton's assertion she was visually aware of and threatened by Defendant's possession of the rifle during the commission of the robbery to the point Newton "thought she was going to die." Sufficient evidence was proffered to support element three. *Id.*

The State produced sufficient evidence to support each of the three elements of robbery with a dangerous weapon. A lesser-included offense instruction was not warranted or required to be given by the trial court. *Clevenger*, 249 N.C. App. at 392, 791 S.E.2d at 255. The trial court did not err by denying Defendant's request for the instruction on lesser-included common law robbery. *Id.*

V. Mere Possession of a Firearm

[2] Defendant argues the trial court erred by refusing his request to instruct the jury that mere possession of a firearm, in itself, does not constitute endangering or threatening a victim. Defendant requested for the jury instructions to include language distinguishing mere possession of a weapon from possession that endangers or threatens the life of the victim as is referenced in Footnote 7 of the North Carolina Pattern Jury Instructions. N.C.P.I. – Crim. 217.20 fn. 7.

The trial court denied Defendant's request for inclusion of the mere possession language, reasoning the evidence clearly indicated the deadly weapon was brandished by Defendant during the robbery, and instructing the jury on mere possession might cause confusion.

A. Standard of Review

"[C]hoice of instruction[] is a matter within the trial court's discretion and will not be overturned absent a showing of abuse of discretion." *Nicholson*, 355 N.C. at 66, 558 S.E.2d at 152 (citation omitted). If a request is made for a special instruction, "which is correct in itself and supported by evidence, the court must give the instruction at least in substance." *State v. Blair*, 181 N.C. App. 236, 242, 638 S.E.2d 914, 919 (2007). The evidence must support the defendant's requested instruction, otherwise the trial court is not required to give it. *See id.*

B. Analysis

A "defendant's mere possession of a weapon – without more – during the course of a robbery is insufficient to support a finding that the victim's life was endangered or threatened." *State v. Wright*, 252 N.C. App. at 507, 798 S.E.2d at 789 (citing *State v. Gibbons*, 303 N.C. 484, 488, 279 S.E.2d 574, 577 (1981)). To satisfy the elements of robbery with a dangerous weapon, the State must present evidence "aside from the mere fact of the weapon's presence." *Id.* at 507-08, 798 S.E.2d at 789 (citation omitted). An instruction on mere possession is appropriate in situations where a gun is present but neither the victim nor any bystanders actually saw the weapon during the course of the robbery. *See id.* at 252 N.C. App. at 508, 798 S.E.2d at 790 (citation omitted).

The State's evidence is unequivocal tending to show Defendant was holding the rifle in plain sight during the commission of the robbery in Newton's bedroom during the middle of the night after an earlier home intrusion. Because Newton clearly saw the rifle and was threatened by Defendant's brandishing the firearm, to the point she "thought she was going to die," Defendant's request for a mere possession instruction was not supported by evidence. The trial court did not err in denying Defendant's request for a mere possession of a weapon instruction. *Id.*

VI. Jury Instructions and Response to Jury's Questions

[3] Defendant next argues the trial court committed prejudicial or plain error by failing to answer the jury's questions concerning an essential element of robbery with a firearm.

A. Standard of Review

The trial court's decision to answer a jury question, or to choose to repeat previously given instructions, is reviewed for an abuse of discretion. *See State v. Hazel*, 243 N.C. App. 741, 744, 779 S.E.2d 171, 173-74 (2015); *see also State v. Smith*, 194 N.C. App. 120, 126, 669 S.E.2d 8, 12-13 (2008). After the jury retires for deliberation, the court may provide additional instructions to correct or withdraw an erroneous instruction, clarify an ambiguous instruction, or instruct the jury on a point of law which should have been covered in the original instructions. N.C. Gen. Stat. § 15A-1234(a) (2023). Failure to object to an erroneous instruction or to erroneous failure to give an instruction does not constitute a waiver of the right to appeal on that error in accordance with N.C. Gen. Stat. § 15A-1446(d)(13). N.C. Gen. Stat. § 15A-1231(d) (2023).

Preserved and unpreserved errors are treated differently on appeal. *State v. Lawrence*, 356 N.C. 506, 512, 723 S.E.2d 326, 330 (2012). Issues are preserved for appeal by Defendant's timely objection at trial and are

sufficient to serve as the basis for error. *State v. Black*, 308 N.C. 736, 739, 303 S.E.2d 804, 806 (1983). "No party may [argue] as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection." *Id.* Preserved legal errors are reviewed under the harmless error standard. N.C. Gen. Stat. § 15A-1443(a) (2023).

Plain error review allows appellate courts to bypass preservation rules in certain "exceptional circumstances." *See Lawrence*, 356 N.C. at 514-15, 723 S.E.2d at 332. Our Supreme Court has held the plain error standard applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the unpreserved error rises to the level of plain error. *See State v. Melvin*, 364 N.C. 589, 593-94, 707 S.E.2d 629, 632-33 (2010).

> [T]he plain error rule…is always to be applied cautiously and only in the exceptional case where, after reviewing the entire record, it can be said the claimed error is "fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right or the accused," or the error has "resulted in a miscarriage of justice or in the denial to appellant of a fair trial"…or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty."

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (citation omitted).

The plain error standard does not require every improper instruction to mandate reversal of the judgment or set aside the verdict. *Lawrence*, 356 N.C. at 517, 723 S.E.2d at 333-34. It is a rare case where improper instructions will justify reversal of a criminal conviction judgment when no objection has been made in the trial court. *Id.*

B. Analysis

Defendant contends the trial court's response to the jury's questions during deliberation was prejudicial error. Defendant also argues if the jury instruction issue is determined to be improperly preserved, the trial court committed plain error in instructing or responding to the jury.

The trial judge and counsel discussed how to respond to questions presented by the jury during deliberations. The trial judge decided to call the jury back into the courtroom to re-read the initial jury instructions,

to re-watch the police officer's body camera footage, and then address the jury's questions related to the threatening and endangering element of robbery with a firearm. At this time, defense counsel formally objected and requested an instruction to be given stating that mere possession of a weapon alone does not satisfy the elements for robbery with a firearm.

Alternatively, defense counsel argued if mere possession of a weapon was not instructed over objection, the jury should be told arguments by counsel are permitted. The trial judge proceeded with instructing the jury over defense counsel's objection. After the jury was dismissed to deliberate following further instruction, defense counsel verbally renewed his prior objections to preserve the record.

Defendant's argument regarding the purported impropriety of the trial court's response to the jury's question was properly preserved by objection before and after the instruction was given. Preserved legal errors are reviewed under the harmless error standard of review. *State v. Jenrette*, 236 N.C. App. 616, 637, 763 S.E.2d 404, 417 (2014).

A defendant must show a reasonable possibility of a different result at trial had the error in question not been committed. *Lawrence*, 365 N.C. at 513, 723 S.E.2d at 331. Defendant has not shown the jury would have reasonably returned a different verdict if the mere possession instruction had been given in response to the jury's questions. Defendant failed to show he was prejudiced by the trial court's jury instructions to award a new trial. We discern no prejudicial error.

VII. Conclusion

No conflicting evidence negates the three elements to establish submission of robbery with a dangerous weapon to require an instruction on mere possession. Defendant cannot demonstrate the evidence required the trial court to instruct the jury on the lesser-included offense of common law robbery. Defendant cannot show he was prejudiced by the trial court's responses to addressing the jury's clarifying questions.

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

It is so ordered.

NO ERROR.

Chief Judge DILLON and Judge GORE concur.

STATE OF NORTH CAROLINA
v.
JONATHAN LAMONT GARDNER

No. COA24-685

Filed 4 June 2025

1. Appeal and Error—defective notice of appeal—petition for writ of certiorari granted—discretionary decision

In a criminal case in which defendant was found guilty of assault on a female, where defendant's oral notice of appeal was defective because it was made prematurely (prior to entry of the final judgment), the appellate court lacked jurisdiction to hear defendant's appeal. However, because defendant clearly expressed an intent to appeal and lost his right to appeal without fault, the appellate court exercised its discretion to grant defendant's petition for writ of certiorari to consider the merits of his arguments and to prevent manifest injustice.

2. Appeal and Error—preservation of issues—constitutional issues not raised at trial—waiver—lack of extraordinary circumstances

In an appeal from defendant's conviction of assault on a female, where defendant failed to raise two constitutional issues at trial—that the statute under which he was convicted is constitutionally vague and that the provision under which he was convicted impermissibly discriminates on the basis of sex—those issues were waived. The appellate court determined that defendant did not show extraordinary circumstances to support invoking Appellate Rule 2 (suspending the appellate rules in order to reach the merits).

3. Assault—assault on a female—evidence that defendant is a male—sufficiency of evidence

The trial court properly denied defendant's motion to dismiss the charge of assault on a female where the State presented sufficient evidence, even if circumstantial, from which a jury could infer that defendant was a male person for purposes of the offense under N.C.G.S. § 14-33(c)(2). All parties, including defense counsel, referred to defendant using "Mr." and the pronouns "he" and "him"; defense counsel asked the prosecuting witness whether defendant was "not a large man"; and defense counsel raised no objection to any characterization of defendant as a male.

4. Constitutional Law—effective assistance of counsel—failure to raise constitutional issues at trial—dismissed without prejudice to file MAR

In an appeal from judgment entered upon defendant's conviction of assault on a female, defendant's claim that his counsel was constitutionally ineffective for failing to raise two constitutional issues at trial was dismissed without prejudice to reassert the claim in a motion for appropriate relief in the trial court; based on the cold record, the appellate court could not decide the issue on the merits without further development of the facts.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by Defendant from Judgment entered 4 May 2022 by Judge Robert Broadie in Forsyth County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Raymond W. Goodwin, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Sterling Rozear, for Defendant-Appellant.

HAMPSON, Judge.

Factual and Procedural Background

Jonathan Lamont Gardner (Defendant) appeals from a Judgment entered upon a jury verdict finding him guilty of Assault on a Female. The Record before us, including evidence presented at trial, tends to reflect the following:

On 26 June 2021 at approximately 1 p.m. to 2 p.m., Defendant and Lovella Collins, Defendant's girlfriend, were at Defendant's apartment when "an unexpected guest" arrived. This guest was "a female friend" of Defendant. The three began talking and "a lot of disagreements" ensued. After about twenty minutes, the friend left and Collins decided to leave shortly thereafter.

According to Collins, Defendant began yelling at her for letting the friend into the apartment. After some discussion between the two, Defendant physically threw Collins out of the apartment. Collins went back into the apartment and Defendant continued "screaming and

hollering." Defendant then went to Collins and "started choking" her with his hands around her neck. Collins testified Defendant applied "a lot of force[.]" Eventually, Defendant let Collins go and she fell to the floor, struggling to breathe. Collins left the apartment to go to the hospital. At the emergency room, medical personnel called the police.

At trial, the State and its witness repeatedly referred to Defendant as "Mr.," "he," and "him," with no objection by defense counsel. In one such exchange, Collins described beginning her relationship with Defendant: "He [Defendant] had got him a place after that one year and moved out of his mom['s] house. Got his own place. Told me he had his place and that's when I came by. That's how we started talking, when he got his own apartment." Indeed, defense counsel likewise repeatedly and exclusively referred to Defendant using masculine pronouns. During cross-examination of Collins, defense counsel asked: "Mr. Gardner is not a large man, he is not very big and tall, is that correct?"

At the close of the State's case in chief, Defendant moved to dismiss the charge for insufficient evidence. The trial court denied the Motion. Defendant elected not to present any evidence. At the close of all evidence, Defendant again moved to dismiss the charge. Defendant argued specifically that the State had not presented sufficient evidence Defendant was a male. The trial court again denied Defendant's Motion.

On 4 May 2023, the jury returned a verdict finding Defendant guilty of Assault on a Female. Defendant orally entered Notice of Appeal the same day. The trial court entered a Judgment sentencing Defendant to 75 days of imprisonment and suspended that sentence, placing Defendant on supervised probation for 18 months. The trial court also ordered Defendant have no contact with Collins and to participate in a substance abuse program.

Appellate Jurisdiction

[1] "Notice of appeal shall be given within the time, in the manner and with the effect provided in the rules of appellate procedure." N.C. Gen. Stat. § 15A-1448(b) (2023). Rule 4(a) of the North Carolina Rules of Appellate Procedure provides "appeal from a *judgment* or order of a superior or district court" may be taken by "giving oral notice of appeal at trial[.]" (emphasis added). "An oral notice of appeal given before entry of the final judgment violates Rule 4 and does not give this Court jurisdiction to hear the defendant's direct appeal." *State v. Jones*, 296 N.C. App. 512, 515, 909 S.E.2d 373, 376 (2024) (citing *State v. Smith*, 292 N.C. App. 662, 665, 898 S.E.2d 909, 912 (2024) and *State v. Lopez*, 264 N.C. App. 496, 503, 826 S.E.2d 498, 503 (2019)).

The Record in this case reflects that after the jury announced its verdict but prior to sentencing, counsel for Defendant stated, "At the appropriate time we would respectfully give notice of appeal[.]" The trial court responded, "So noted." Thus, as Defendant prematurely entered oral Notice of Appeal before entry of the final Judgment in violation of Rule 4, this Court does not have jurisdiction to hear Defendant's appeal. *See Jones*, 909 S.E.2d at 376; *Lopez*, 264 N.C. App. at 503, 826 S.E.2d at 503. Defendant, acknowledging this defect, filed a petition for writ of certiorari to allow us to hear this appeal. "The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]" N.C. R. App. P. 21(a)(1) (2024). Here, it is clear Defendant expressed an intent to appeal although he failed to do so at the proper time. In our discretion, we allow Defendant's Petition for Writ of Certiorari and reach the merits of his appeal.

Our dissenting colleague's concerns about this issue of certiorari are misplaced. Indeed, although he points to *Cryan v. National Council of Young Men's Christian Associations of United States*, 384 N.C. 569, 887 S.E.2d 848 (2023), for the proposition that we are required to find error was probably committed before granting certiorari, a full reading of that case reveals our Supreme Court affirmed this Court's grant of certiorari where the determination looked much the same as here. *Id.* at 573, 887 S.E.2d at 851. In considering whether to grant the defendant's petition for writ of certiorari, this Court in *Cryan* noted certiorari is issued only upon a showing of appropriate circumstances, such as where "there is merit to an appellant's substantive arguments and it is in the interests of justice to treat an appeal as a petition for writ of certiorari." *Cryan v. Nat'l Couns. of Young Men's Christian Assocs. of United States*, 280 N.C. App. 309, 315, 867 S.E.2d 354, 359 (2021) (quoting *Zaliagiris v. Zaliagiris*, 164 N.C. App. 602, 606, 596 S.E.2d 285, 289 (2004)). In short, *Cryan* simply reaffirms our discretion to allow petitions for writ of certiorari in appropriate cases—the scope of which is guided by our precedent and our understanding of the equitable concerns in each case.

To that end, this Court has routinely granted certiorari in precisely this type of case: where a defendant's intent to appeal was clear and their right to appeal would otherwise be lost through a technical mistake by their attorney. *See*, *e.g.*, *State v. Springle*, 244 N.C. App. 760, 762-64, 781 S.E.2d 518, 520-21 (2016) (granting certiorari where defendant's trial counsel prepared notice of appeal omitting certificate of service on the State); *State v. Smith*, 292 N.C. App. 662, 665, 898 S.E.2d 909,

912 (2024) (granting certiorari where defendant's trial counsel entered oral notice of appeal before entry of final judgment); *Jones*, 296 N.C. App. at 515-16, 909 S.E.2d at 376 (same); *Lopez*, 264 N.C. App. at 503-04, 826 S.E.2d at 503-04 (same); *State v. Robinson*, 279 N.C. App. 643, 645, 865 S.E.2d 745, 748 (2021) (granting certiorari where defendant's trial counsel failed to give timely notice of appeal from denial of motion to suppress); *State v. Perez*, 275 N.C. App. 860, 865, 854 S.E.2d 15, 20 (2020) (granting certiorari where defendant's trial counsel entered oral notice of appeal at sex offender registration hearing rather than at trial); *State v. Holanek*, 242 N.C. App. 633, 640, 776 S.E.2d 225, 231-32 (2015) (granting certiorari where defendant's trial counsel entered oral notice of appeal appearing before the trial court six days after entry of judgment); *State v. Hammonds*, 218 N.C. App. 158, 162-63, 720 S.E.2d 820, 822-23 (2012) (granting certiorari where defendant's trial counsel failed to list all convictions from which defendant was appealing in written notice of appeal and attempted to enter oral notice of appeal several days after trial); *State v. Price*, 290 N.C. App. 480, 891 S.E.2d 661, 2023 WL 5938676, *2 (2023) (unpublished) (granting certiorari where defendant's trial counsel entered oral notice of appeal before entry of final judgment); *State v. O'Neil*, 296 N.C. App. 158, 905 S.E.2d 924, 2024 WL 4356330, *1-*2 (2024) (unpublished) (granting certiorari where defendant's written notice of appeal was untimely filed).[1]

These decisions serve as guideposts to help us exercise our discretion and determine in which cases a grant of certiorari is appropriate. The consistent through-line of the above cases demonstrates this Court has repeatedly concluded that minor, technical errors by a defendant's attorney can be such circumstances—not that it necessarily is or always must be. The routineness of this type of grant is far from creating a "per se rule," as the dissent asserts. Rather, it is a reflection of the fact that many members of this Court have long agreed this situation is an "appropriate circumstance" qualifying for relief. Some may disagree and, indeed, they are allowed to do so because this rule is *discretionary.* Granting certiorari in this type of case protects defendants, whose liberty is at stake, from losing their right to judicial review "through no fault of [their] own[.]" *Hammonds*, 218 N.C. App. at 163, 720 S.E.2d at 823. Indeed, in these cases, "failure to issue a writ of certiorari would be

1. While our dissenting colleague takes issue with the longstanding precedent of "panels" of this Court granting certiorari in their discretion, such is the operation of this Court. Indeed, while this Court is authorized to sit *en banc*, by statute this Court operates in three-judge panels. N.C. Gen. Stat. § 7A-16 (2023). There is nothing inherently suspect about a panel of our Court deciding a case or petition.

manifestly unjust[.]" *Id*. As such, this is one of the "appropriate circumstances" in which we may, in our discretion, issue our writ of certiorari. *See* N.C. R. App. P. 21(a)(1) (2024); N.C. Gen. Stat. § 7A-32(c) (2023).

Despite our dissenting colleague's assertions, we are in no way creating a per se rule. To the contrary, our colleague creates a per se rule requiring a showing that error was committed below. However, recognizing the equities in this situation, this Court does not necessarily require a showing of absolute merit on a defendant's part. Moreover, "merit" does not necessarily mean a defendant will win their appeal. "Indeed, it is not uncommon for our Court to issue a writ in order to review a defendant's appeal where there is a jurisdictional defect in his or her notice of appeal, where the State has not been prejudiced by the defect, *even where said defendant's appeal has little, if any merit*." *State v. Ore*, 283 N.C. App. 524, 535, 874 S.E.2d 222, 230 (2022) (Dillon, J., concurring) (emphasis in original), *vacated in part*, *State v. Ore*, 383 N.C. 676, 678, 880 S.E.2d 677, 678 (2022) ("The concurring opinions in the Court of Appeals [regarding certiorari] . . . accurately reflect the law."). *See also State v. Powers*, 288 N.C. App. 272, 884 S.E.2d 505, 2023 WL 2770243, *3 (2023) (unpublished) ("The State does not argue that [defendant]'s appeal is so lacking in merit that allowing his petition would amount to an abuse of discretion; to the contrary, the State acknowledges that we have discretion to grant *certiorari* review in this case. Consistent with the reasoning set forth in the above caselaw and in light of the State's concession, we dismiss [defendant]'s appeal and grant his petition for writ of *certiorari* in our discretion." (citing *Robinson*, 279 N.C. App. at 645, 865 S.E.2d at 748)).

For example, in several of the above cases, this Court granted certiorari but concluded there had been no error in the defendant's trial or otherwise dismissed the appeal after reviewing the merits. *Smith*, 292 N.C. App. at 669, 898 S.E.2d at 914; *Jones*, 909 S.E.2d at 378; *Robinson*, 279 N.C. App. at 647, 865 S.E.2d at 749; *Price*, 2023 WL 5938676 at *6; *O'Neil*, 2024 WL 4356330 at *2. Sometimes, as here, there is good reason for doing so: "Our Court does not always allow such writs, especially where the issues raised have little merit. But we might choose to do so, for instance, where considering and resolving the issues would promote judicial economy by eliminating the need for the trial court to have to consider a subsequent motion for appropriate relief or ineffective assistance of counsel." *Ore*, 283 N.C. App. at 535, 874 S.E.2d at 230 (Dillon, J., concurring).

Such was also the case in one of the opinions our Supreme Court cited in *Cryan* for the proposition that a writ of certiorari "should only

issue if the petitioner can show merit or that error was probably committed below." 384 N.C. at 572, 887 S.E.2d at 851 (quotation marks omitted) (citing *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835, 839 (2021) and *State v. Grundler*, 251 N.C. 177, 189, 111 S.E.2d 1, 9 (1959)). In *Grundler*, our Supreme Court allowed a petition for writ of certiorari despite expressly finding the trial court had not committed any error: "We are constrained to allow the petition. We wish to emphasize that we are not induced so to do by reason of any error on the part of [the trial court], for there was none." *Grundler*, 251 N.C. at 189, 111 S.E.2d at 9. The Supreme Court allowed the petition, however, in order to address the merits of the defendant's arguments. *Id.* Thus, our caselaw is clear that "merit" is not synonymous with a likelihood of success on appeal.[2]

Further, our grant of certiorari is neither *sua sponte* nor pursuant to Rule 2, which allows us to suspend the Rules of Appellate Procedure in order to prevent "manifest injustice." Rather, in this case a petition for writ of certiorari was filed because Defendant's right to appeal had been lost—a circumstance expressly set out in our Rules of Appellate Procedure. *See* N.C. R. App. P. 21(a)(1) (2024) ("The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action. . ."). And—although the State opposes issuance of the writ in this case—the State does not argue granting certiorari would be an abuse of our discretion but expressly concedes: "it is within this court's discretion whether to allow the petition for writ of certiorari to review the judgment[.]"[3]

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2. Indeed, in an early decision, our Supreme Court explained:

> The writ of *certiorari* is an extraordinary remedy, and is said to be grantable at the discretion of the Court. The meaning of this is, that it is not a matter of right, like a writ of error or an appeal. It is very often used as a substitute for an appeal, and in so using it, the courts have exercised their discretion, in such a manner as, on the one hand, to prevent a party from being deprived of a just defense, and on the other, to prevent its being made a mere instrument of delay. Where a party has lost his appeal by the neglect of an officer of the law, the contrivance of the opposite party, or the improper conduct of the inferior court, the cause will be re-examined by the Superior Court upon a writ of *certiorari*, without reference to the merits of the case. This is put upon the ground that he has been deprived of a right, to wit, of an appeal, without his fault[.]

McConnell v. Caldwell, 51 N.C. 469, 470 (1859); *see also* N.C. Gen. Stat. § 1-269 (2023).

3. The State's opposition rests on whether Defendant preserved a constitutional issue in the trial court. We address that issue below.

Our caselaw recognizes this Court should err on the side of adjudicating these cases on the merits rather than punishing defendants for mistakes over which they had no control—particularly where, as here, the defendant's intent to appeal was clear. *See Springle*, 244 N.C. App. at 763, 781 S.E.2d at 521 ("[A] defect in a notice of appeal 'should not result in loss of the appeal as long as the intent to appeal . . . can be fairly inferred from the notice and the appellee is not misled by the mistake.' " (quoting *Phelps Staffing, LLC v. S.C. Phelps, Inc.*, 217 N.C. App. 403, 410, 720 S.E.2d 785, 791 (2011) (citation omitted)); *Robinson*, 279 N.C. App. at 645, 865 S.E.2d at 748 ("Because defendant has lost the right to appeal without fault, we dismiss his appeal and exercise our discretion to grant defendant's petition for *writ of certiorari* and address the merits of defendant's appeal.").

Issues

The issues on appeal are whether: (I) Defendant's constitutional claims are preserved for our review; (II) the trial court erred by denying Defendant's Motions to Dismiss; and (III) the Record is sufficient to review Defendant's ineffective assistance of counsel (IAC) claim on direct review.

Analysis

I. Constitutional Claims

[2] Defendant raises two constitutional claims regarding his conviction. First, he argues the statute under which he was convicted is unconstitutionally vague. Second, he contends the provision under which he was convicted impermissibly discriminates on the basis of sex. We do not reach the merits of either argument as they are waived.

Our Courts have consistently stated, "a constitutional question which is not raised and passed upon in the trial court will not ordinarily be considered on appeal." *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982) (citations omitted); *see also State v. Chapman*, 359 N.C. 328, 366, 611 S.E.2d 794, 822 (2005) ("[C]onstitutional error will not be considered for the first time on appeal." (citations omitted)). Indeed, "Constitutional errors not raised by objection at trial are deemed waived on appeal." *State v. Forte*, 257 N.C. App. 505, 511, 810 S.E.2d 339, 343, *disc. rev. denied*, 371 N.C. 339, 813 S.E.2d 858 (2018). The Record before us reveals Defendant made no objection or argument as to either constitutional claim before the trial court. Thus, consistent with our caselaw, we conclude Defendant's constitutional claims are waived. Defendant argues, however, this Court should invoke Rule 2 of the North Carolina Rules of Appellate Procedure to adjudicate the merits of his claims.

Rule 2 of our Rules of Appellate Procedures provides this Court may, "[t]o prevent manifest injustice to a party, or to expedite decision in the public interest, . . . suspend or vary the requirements or provisions of any of these rules in a case pending before it[.]" "Rule 2 discretion should be exercised 'cautiously' and only in 'exceptional circumstances.' " *State v. Baldwin*, 240 N.C. App. 413, 422, 770 S.E.2d 167, 174 (2015) (quoting *State v. Williams*, 201 N.C. App. 161, 173, 689 S.E.2d 412, 418 (2009)). "[W]hether an appellant has demonstrated that his matter is the rare case meriting suspension of our appellate rules is always a discretionary determination to be made on a case-by-case basis." *State v. Campbell*, 369 N.C. 599, 603, 799 S.E.2d 600, 603 (2017) (citations omitted), *disc. rev. allowed on add'l issues*, 371 N.C. 343, 813 S.E.2d 849 (2018). After reviewing Defendant's arguments and the Record on appeal, Defendant has not shown extraordinary circumstances meriting the invocation of Rule 2. In the exercise of our discretion, we decline to invoke Rule 2 and dismiss Defendant's arguments as to the constitutionality of the underlying statute.

II. Motions to Dismiss

[3] "This Court reviews the trial court's denial of a motion to dismiss *de novo*." *State v. Smith*, 186 N.C. App. 57, 62, 650 S.E.2d 29, 33 (2007) (citation omitted). "Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied." *State v. Fritsch*, 351 N.C. 373, 378, 526 S.E.2d 451, 455 (2000) (citation omitted). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Brown*, 310 N.C. 563, 566, 313 S.E.2d 585, 587 (1984) (citation omitted). "If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion [to dismiss] should be allowed." *Fritsch*, 351 N.C. at 378, 526 S.E.2d at 455 (citation omitted). Evidence may be either direct evidence, "that which is immediately applied to the fact to be proved," or circumstantial evidence, "that which is indirectly applied, by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred." *State v. Wright*, 275 N.C. 242, 249-50, 166 S.E.2d 681, 686 (1969). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

Defendant contends the trial court erred by denying his Motions to Dismiss the charge of Assault on a Female. Our statutes make it unlawful for a defendant, "in the course of the assault, assault and battery, or affray," to "[a]ssault[] a female, he being a male person at least 18 years of age[.]" N.C. Gen. Stat. § 14-33(c)(2) (2023). Thus, the State must prove beyond a reasonable doubt that a defendant (1) assaulted (2) a female, and the defendant was (3) male and (4) at least 18 years of age. In this case, Defendant contends there was insufficient evidence only as to the element of his sex. We disagree.

Every party in this case, including the State, Collins—its witness—, and defense counsel repeatedly referred to Defendant as "Mr." and using masculine pronouns. At no point did defense counsel object to these pronouns or characterizations. Indeed, defense counsel, in cross-examining Collins, asked questions such as: "I mean, you were in a relationship with him [Defendant], right?" and "Now, the lady came to talk to him. You didn't have a gentleman come to speak to you, right?" and "And that was a female friend of Mr. Gardner's, right?" Defense counsel also asked: "Mr. Gardner is not a large man, he is not very big and tall, is that correct?" Collins answered affirmatively to each question. Further, Collins—the only witness presented at trial—consistently testified about Defendant using masculine pronouns, for example: "He [Defendant] was the one that kept saying it was my fault for opening the door. Me and him standing there screaming and shouting" and "No, I didn't say he came up behind me. He came in front of me like this" and "He grabbed me by my neck." Defense counsel also played a recording of Collins' statement to police following the incident in which she told the officer, "He [Defendant] put his hands around my neck[.]" Although this evidence is circumstantial, it is sufficient to go to the jury. *See State v. Davy*, 100 N.C. App. 551, 556, 397 S.E.2d 634, 636-37 (1990) ("In order to overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense[.]").

Thus, the evidence, taken in the light most favorable to the State, could support an inference Defendant is male. Therefore, there was sufficient evidence to submit the charge to the jury. Consequently, the trial court did not err in denying Defendant's Motions to Dismiss.

III. Ineffective Assistance of Counsel

[4] Defendant also contends his trial counsel was constitutionally deficient based on her failure to raise the above-noted constitutional challenges to the Assault on a Female statute. In general, claims of IAC should be considered through motions for appropriate relief and not on

direct appeal. *See State v. Dockery*, 78 N.C. App. 190, 192, 336 S.E.2d 719, 721 (1985) ("The accepted practice is to raise claims of ineffective assistance of counsel in post-conviction proceedings, rather than direct appeal."); *State v. Ware*, 125 N.C. App. 695, 697, 482 S.E.2d 14, 16 (1997) (dismissing the defendant's appeal because issues could not be determined from the record on appeal and stating that to "properly advance these arguments, defendant must move for appropriate relief pursuant to G.S. 15A-1415[.]"). A motion for appropriate relief is preferable to direct appeal because in order to

> defend against ineffective assistance of counsel allegations, the State must rely on information provided by defendant to trial counsel, as well as defendant's thoughts, concerns, and demeanor. [O]nly when all aspects of the relationship are explored can it be determined whether counsel was reasonably likely to render effective assistance.

State v. Buckner, 351 N.C. 401, 412, 527 S.E.2d 307, 314 (2000) (citations and quotation marks omitted). "IAC claims brought on direct review will be decided on the merits when the cold record reveals that no further investigation is required, i.e., claims that may be developed and argued without such ancillary procedures as the appointment of investigators or an evidentiary hearing." *State v. Fair*, 354 N.C. 131, 166, 557 S.E.2d 500, 524 (2001) (citations omitted). However, "should the reviewing court determine that IAC claims have been prematurely asserted on direct appeal, it shall dismiss those claims without prejudice to the defendant's right to reassert them during a subsequent MAR proceeding." *Id.* at 167, 557 S.E.2d at 525 (citation omitted).

In order to prevail on an IAC claim, Defendant "must show that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068, 80 L. Ed. 2d 674, 693, 698 (1984); *see also State v. Braswell*, 312 N.C. 553, 562-63, 324 S.E.2d 241, 248 (1985) (adopting *Strickland* standard for IAC claims under N.C. Const. art. I, §§ 19, 23). Here, we are unable to decide Defendant's IAC claim based on the "cold record" on appeal. *Fair*, 354 N.C. at 166, 557 S.E.2d at 524 (citations omitted). We thus conclude "further development of the facts would be required before application of the *Strickland* test[.]" *State v. Allen*, 360 N.C. 297, 316, 626 S.E.2d 271, 286 (2006) (citation omitted). Therefore, we dismiss any IAC claims without prejudice to permit Defendant to pursue a motion for appropriate relief in the trial court.

Conclusion

Accordingly, for the foregoing reasons, we conclude there was no error in Defendant's trial and affirm the Judgment. We dismiss Defendant's ineffective assistance of counsel claim without prejudice to the filing of a motion for appropriate relief.

NO ERROR IN PART; DISMISSED WITHOUT PREJUDICE IN PART.

Chief Judge DILLON concurs.

Judge FREEMAN concurs in part and dissents in part by separate opinion.

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

I concur with the majority's reasoning and conclusions as to the merits of defendant's arguments. However, because defendant's notice of appeal was defective, binding precedent from our Supreme Court instructs us that we cannot reach the merits unless defendant's petition for writ of certiorari establishes both probable error and extraordinary circumstances. As defendant's petition establishes neither, this Court should deny his petition and dismiss his appeal. Because I do not agree with the majority's decision to reach and address the merits of defendant's purported appeal, I respectfully dissent from the majority's grant of certiorari.

Our Supreme Court recently stated:

> The writ of certiorari is one of the prerogative writs that the Court of Appeals may issue in aid of its own jurisdiction. It is intended as an extraordinary remedial writ to correct errors of law.
>
> The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued. Instead, the decision to issue a writ is governed solely by statute and by common law.

Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S., 384 N.C. 569, 572 (2023) (cleaned up). While our General Statutes grant this

Court authority to issue the writ of certiorari, the "practice and procedure shall be provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(c) (2023). The common law governing the issuance of the writ has long required two things "to appear on application for *certiorari*: [f]irst, diligence in prosecuting the appeal . . . ; and, second, merit, or that probable error was committed on the hearing." *State v. Angel*, 194 N.C. 715, 717 (1927). While certiorari "is a discretionary writ," it is "to be issued *only* for good or sufficient cause shown, and it is not one to which the moving party is entitled as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927) (emphasis added).

Rather, "the party seeking it is required . . . to show merit or that he has reasonable grounds for asking that the case be brought up and reviewed on appeal." *In re Snelgrove*, 208 N.C. 670, 671–72 (1935). "A petition for the writ *must* show merit or that error was probably committed below." *State v. Grundler*, 251 N.C. 177, 189 (1959) (emphasis added). " 'A writ of certiorari is not intended as a substitute for a notice of appeal' because such a practice would 'render meaningless the rules governing the time and manner of noticing appeals.' " *State v. Ricks*, 378 N.C. 737, 741 (2021) (quoting *State v. Bishop*, 255 N.C. App. 767, 769 (2017)).

In other words:

> Our precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate. First, a writ of certiorari should issue *only* if the petitioner can show merit or that error was probably committed below. This step weighs the likelihood that there was some error of law in the case.
>
> Second, a writ of certiorari should issue *only* if there are extraordinary circumstances to justify it. We require extraordinary circumstances because a writ of certiorari is not intended as a substitute for a notice of appeal. If courts issued writs of certiorari solely on the showing of some error below, it would render meaningless the rules governing the time and manner of noticing appeals.
>
> There is no fixed list of extraordinary circumstances that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake.

> Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court. Thus, when the Court of Appeals issues a writ of certiorari, we review solely for abuse of discretion, examining whether the decision was manifestly unsupported by reason, or so arbitrary that it could not have been the result of a reasoned decision.

Cryan, 384 N.C. at 572–73 (emphasis added) (cleaned up).

Here, the majority acknowledges this Court does not have jurisdiction to consider defendant's appeal but issues the writ in its "discretion" without applying the two-factor test. *See In re S.D.H.*, 908 S.E.2d 868, 874 (N.C. Ct. App. 2024) ("A petitioner *must* satisfy a two-part test before we will issue a PWC." (emphasis added)). It does so in direct contravention of our common law as expressed by our Supreme Court. This Court may not ignore binding Supreme Court precedent and label such conduct an exercise of its "discretion."[1] While our issuance of the writ is reviewed "solely for abuse of discretion," *id.* at 573, "[a]n error of law constitutes an abuse of discretion," *Slattery v. Appy City, LLC*, 385 N.C. 726, 729 (2024), and this Court abuses its discretion when it fails to apply a legal test mandated by our Supreme Court.

Rather than engage with our Supreme Court's precedent in Cryan, the majority asserts that because "[t]his Court has routinely granted certiorari in precisely this type of case," my concerns are "misplaced." While I agree with my colleagues that adjudication on the merits is preferable where a criminal defendant has lost their right to appeal due to their attorney's technical error, our preferences may not trump Supreme Court precedent. The majority's approach is in effect a *per se* rule that, under these circumstances, the writ will issue regardless of any showing of merit.

There is no language in *Cryan* that permits this Court to pick and choose when to apply the test and there is no precedent from our Supreme Court supporting this *per se* rule. As troubling as my colleagues' refusal to engage with *Cryan* is, the majority's apparent belief that the *per se* rule is legally sound because this Court—or, more accurately, a

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1. The discretionary nature of certiorari does not render it outside the bounds of legal tests or frameworks. This Court routinely reviews the discretionary decisions of trial courts, such as those under Rule 403, to ensure the decision was made in accordance with the applicable legal frameworks.

panel of this Court—routinely applies it is even more concerning. The repetition of an error does not transform that error into good law.

If my colleagues have any remaining doubt as to the applicability of *Cryan* or the two-part test to criminal cases, I respectfully direct them to our Supreme Court's unanimous decision in *State v. Lancaster*, 385 N.C. 459 (2023), decided only months after *Cryan*. There, the Supreme Court reviewed an opinion of this Court in which the majority of our Court noted "it [was] not apparent from the record that Defendant properly noticed his appeal." *State v. Lancaster*, 284 N.C. App. 465, 466 n.1 (2022), *rev'd*, 385 N.C. 459 (2023). This Court—in a footnote and apparently sua sponte—issued the writ of certiorari "in aid of [its] jurisdiction" without any elaboration or analysis. *Id.* Our Supreme Court reversed this Court's opinion on the merits and specifically addressed this Court's issuance of the writ:

> The Court of Appeals noted that it was "not apparent from the record that [d]efendant properly noticed his appeal," but that court nevertheless issued a writ of certiorari to remedy any jurisdictional question. *State v. Lancaster*, 284 N.C. App. 465, 466 n.1, 876 S.E.2d 101 (2022). Although the State has not argued that the Court of Appeals abused its discretion in issuing this writ, "a writ of certiorari 'is not intended as a substitute for a notice of appeal.' " *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 573, 887 S.E.2d 848 (2023) (quoting *State v. Ricks*, 378 N.C. 737, 741, 862 S.E.2d 835 (2021)). This is so because "[i]f courts issued writs of certiorari solely on the showing of some error below, it would 'render meaningless the rules governing the time and manner of noticing appeals.' " *Id.* (quoting *Ricks*, 378 N.C. at 741, 862 S.E.2d 835).

State v. Lancaster, 385 N.C. at 460 n.1.

This admonishment indicates that my concerns regarding the majority's approach are unanimously shared by our Supreme Court—which is unsurprising given my position is informed by that Court's precedent, not this Court's practice. Unless our Supreme Court says otherwise, I am bound to follow *Cryan*'s test.

The *per se* rule shrugs off our Supreme Court's precedent because it effectively entitles petitioners in these circumstances to certiorari as a matter of right—but only if that petitioner's case falls to a panel applying the *per se* rule. On the other hand, if that petitioner's case falls

to a panel properly applying the two-part test, their petition may be denied. Although I believe *Cryan* is crystal clear in its articulation of the two-part test and its universal applicability, this case demonstrates that at least some of my colleagues prefer to eschew the test in favor of a *per se* rule. To ensure even-handed treatment of parties and consistent application of the law, I would invite our Supreme Court to revisit this issue and provide further guidance.

When binding precedent establishes a two-factor test to assess whether certiorari review by an appellate court is appropriate, following the test in each case is the only way to ensure fairness to all who petition for writ of certiorari. Instead of ignoring binding precedent and effectively treating defendant's petition as a substitute for proper notice of appeal, I would deny defendant's petition for writ of certiorari and dismiss defendant's appeal. Accordingly, I respectfully dissent from the majority's decision to reach the merits of defendant's purported appeal.

STATE OF NORTH CAROLINA
v.
JONATHAN JERMANE HANNAH, DEFENDANT

No. COA23-902

Filed 4 June 2025

1. Appeal and Error—petition for writ of certiorari—voluntariness of guilty plea—no probable error

In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's petition for writ of certiorari—in which he asserted that his plea was not knowingly, intelligently, and voluntarily made—was denied. Defendant failed to demonstrate probable error by the trial court when advising defendant during the plea colloquy of his right to appeal the denial of his pretrial motion to suppress. Contrary to defendant's assertion that he was led to believe he could appeal from the denial all of his pretrial motions—some of which were not appealable—the full colloquy demonstrated that the nature and consequences of the plea were explained to defendant in open court and that he received the benefit of his bargain.

2. Appeal and Error—preservation of issues—denial of motion to suppress—probable cause grounds sufficiently raised

In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant preserved for appeal his argument that the trial court erred by denying his pretrial motions to suppress the content of his phone, based on defendant's contention that there was no probable cause for his continued detention at the time he gave consent for his phone to be searched. Defendant sufficiently raised probable cause and relevant search and seizure law in his motions before the trial court.

3. Search and Seizure—consent to search phone—voluntariness—lawful detention—probable cause—lack of coercion

In an appeal from judgment entered upon defendant's guilty plea to multiple sexual offenses against a minor and obstruction of justice, defendant's argument that the trial court erred by denying his motion to suppress content from his phone—based on defendant's contention that probable cause did not exist to continue his detention at the time he gave consent for his phone to be searched—had no merit. Where law enforcement had reasonable suspicion or probable cause of multiple crimes during its investigation of defendant—including gun and drug charges, in addition to the sexual offenses—defendant's continued detention was justified; therefore, since he was not unconstitutionally seized or illegally detained, his consent to the phone search was voluntary. Moreover, officers' statement that they would obtain a search warrant unless defendant consented to the search did not amount to coercion because they had the legal authority to do so under the circumstances of the case.

Appeal by Defendant from judgment entered 16 March 2023 by Judge Thomas H. Lock in Onslow County Superior Court. Heard in the Court of Appeals 20 March 2024.

Attorney General Jeff Jackson, by Special Deputy Attorney General Meredith L. Britt, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for Defendant-Appellant.

CARPENTER, Judge.

Jonathan Jermane Hannah ("Defendant") appeals from a judgment entered upon his guilty plea to statutory rape of a person fifteen years

old or younger, statutory sex offense of a person fifteen years old or younger, sexual exploitation of a minor, and obstruction of justice. On appeal, Defendant argues his plea was not entered knowingly, intelligently, and voluntarily because certain issues purportedly preserved for appeal as part of his guilty plea are not appealable. Further, Defendant argues the trial court erred in denying his motions to suppress evidence obtained from his cell phone, where consent was unlawfully obtained. After careful review, we deny Defendant's petition for writ of certiorari ("PWC") and affirm the trial court's denial of Defendant's motions to suppress.

I. Factual & Procedural Background

On 10 July 2018, an Onslow County grand jury returned true bills of indictment against Defendant, charging him with: statutory rape of a person fifteen years old or younger, in violation of N.C. Gen. Stat. § 14-27.25(a); statutory sex offense of a person fifteen years old or younger, in violation of N.C. Gen. Stat. § 14-27.30(a); and three counts of first-degree sexual exploitation of a minor, in violation of N.C. Gen. Stat. § 14-190.16. On 7 June 2022, a grand jury returned a subsequent true bill of indictment, charging Defendant with three counts of common-law obstruction of justice.

During pretrial hearings, the trial court ruled on several pretrial motions from Defendant. Specifically, the trial court denied: Defendant's Motion for Bill of Particulars; Defendant's motion in *limine* to prohibit references to indictments against Defendant, in part; and Defendant's motion in *limine* regarding the State's failure to file a notice of expert witness for the Cellebrite extraction of Defendant's cell phone. The trial court later denied Defendant's motions to suppress evidence of: the search and Cellebrite extraction from his cell phone; statements at Jacksonville Police Department on 20 October 2017; and statements to Detective Keith Johnston at Dunkin' Donuts and the Onslow County Sheriff's Office. The trial court allowed Defendant's motion to suppress recorded statements of a conversation between Defendant and his sister in an interview room. On 8 May 2023, the trial court entered a written order with findings and conclusions on Defendant's motions to suppress.

The evidence from the suppression hearing tends to show the following. On 19 October 2017, the Jacksonville Police Department responded to a call from Guerrilla Armament, a gun shop, regarding a suspicious transaction potentially involving a stolen gun. The police ran the serial numbers, found that one of the guns—a Glock 26 pistol—was stolen, and launched an investigation to locate Defendant, who sold it to

Guerrilla Armament. The police were able to identify Defendant's name through the phone number that he used to contact Guerrilla Armament.

The following day, on 20 October 2017, the gun shop provided the police with a description of Defendant and photographs of Defendant's Cadillac and license plate. Officers determined the license plate was fictitious. Later that day, Lieutenant Porter received a call from a fellow detective regarding a red Cadillac matching the description of Defendant's vehicle at an apartment complex. Lieutenant Porter proceeded to the location and surveilled the car, confirmed it was Defendant's car from the photographs, and later initiated a traffic stop based on displaying the fictitious plate.

Inside the Cadillac, Lieutenant Porter discovered Defendant, three other males, and a 14-year-old female, Q.M.[1] A large quantity of drugs was found in the vehicle. Officers arrested and transported Defendant to the Jacksonville Police Department as a suspect in the stolen firearm investigation. Lieutenant Porter placed Defendant in an interview room, read him his *Miranda* rights from a *Miranda* warning form, and had Defendant sign the form.

While investigating the stolen firearm, Lieutenant Porter retrieved Defendant's phone at Defendant's request to support his claim of lack of knowledge about the stolen firearm. Lieutenant Porter noticed the lock screen of Defendant's phone was a photo of Q.M., who was found in the red Cadillac during Defendant's arrest. After consulting with other detectives, he confirmed Q.M.'s name and learned that she was a passenger in a recent car chase with Defendant.

After Lieutenant Porter examined Defendant's text messages exchanged with "yay fein," the individual who supplied him with the gun, Porter requested consent from Defendant to search the phone. Lieutenant Porter informed Defendant that his phone would not be immediately returned without consenting to a search of its contents, or else the police would obtain a search warrant. Defendant signed the consent to search form, which stated the search may extend to any illegal activity found on the phone. Captain Kellum downloaded the contents of Defendant's phone using Cellebrite software and examined its contents.

Lieutenant Porter observed text messages between Defendant and Q.M. that were romantic in nature and saw a thumbnail image of a video

1. A pseudonym used to protect the identity of the juvenile.

depicting Q.M. performing fellatio on a man. Lieutenant Porter informed the Special Victims Unit and the on-call Criminal Investigation Division detective, Vincent Waddell, about the findings from Defendant's phone. Detective Waddell arrived to interview Defendant about the contents of his phone. Before speaking with Defendant, Detective Waddell confirmed with Lieutenant Porter that Defendant had been advised of and waived his *Miranda* rights.

Upon entering the interview room, Detective Waddell verified with Defendant that he had given consent to search his phone and then began questioning him about specific information relating to Q.M. Defendant identified Q.M. as the female in the videos. After Detective Waddell interviewed Defendant, he allowed Defendant to leave.

On 27 February 2018, Defendant voluntarily met with Detective Johnston, with the Onslow County Sheriff's Office, at a Dunkin' Donuts in Jacksonville. During this meeting, Defendant and Detective Johnston discussed Defendant's relationship with Q.M. After inconsistencies emerged in Defendant's story, Detective Johnston ultimately informed Defendant he was under arrest, again advised him of his *Miranda* rights, and transported him to an interview room at the Onslow County Sheriff's Office.

Inside the interview room, officers permitted Defendant to use his cell phone. In the presence of Detective Johnston, Defendant made several calls during which he made incriminating statements about his relationship with Q.M., including that he "got with" an underage girl. Defendant later made incriminating statements to his sister in the interview room in Detective Johnston's presence. Defendant's sister then asked to speak with her brother privately, and Detective Johnston left the room, stating that the conversation would be "as private as I can make it." Defendant made additional incriminating statements during this recorded conversation with his sister.

The matter came on for trial on 13 March 2023 in Onslow County Superior Court. At the outset, the trial court heard and ruled on Defendant's pretrial motions. Following the denial of his motions, pursuant to a plea agreement with the State, Defendant pled guilty to the remaining charges. During his plea colloquy, the trial court stated that, in pleading guilty, "you are, this is very important to you, you are preserving the right to appeal the [c]ourt's denial of your pretrial motions. The ones that the [c]ourt denied. I did allow one of them."

The trial court sentenced Defendant to mitigated sentences of: a minimum term of 204 months and the corresponding maximum term

of 305 months of imprisonment for the statutory rape and statutory sex offense charges; a minimum term of 60 months with a corresponding maximum term of 132 months for the sexual exploitation charges; and a minimum term of five months with a corresponding maximum term of 15 months for the obstruction of justice charges. Additionally, the trial court ordered Defendant to register as a sex offender for a period of 30 years. Defendant gave oral notice of appeal in open court.

II. Jurisdiction

[1] "In North Carolina, a defendant's right to appeal in a criminal proceeding is purely a creation of state statute." *State v. Smith*, 193 N.C. App. 739, 741, 668 S.E.2d 612, 613 (2008). Section 15A-1444(e) provides, "[e]xcept as provided in subsections (a1) and (a2) of this section and [N.C. Gen. Stat. §] 15A-979, and except when a motion to withdraw a plea of guilty or no contest has been denied, the defendant is not entitled to appellate review as a matter of right when he has entered a plea of guilty or no contest to a criminal charge in the superior court, but he may petition the appellate division for review by writ of certiorari." N.C. Gen. Stat. § 15A-1444(e) (2023). "Notwithstanding these statutory guidelines, however, our Supreme Court has held that when a trial court improperly accepts a guilty plea, the defendant may obtain appellate review of this issue only upon *grant* of a writ of certiorari." *State v. Demaio*, 216 N.C. App. 558, 562, 716 S.E.2d 863, 866 (2011) (emphasis added) (quoting *State v. Bolinger*, 320 N.C. 596, 601, 359 S.E.2d 459, 462 (1987)). A PWC is a "prerogative writ[ ]" which we may issue to aid our jurisdiction. *See* N.C. Gen. Stat. § 7A-32(c) (2023).

Here, Defendant filed a PWC contemporaneously with his brief. Since this Court's holding in *Demaio*, our Supreme Court has both dispensed with the fiction that Rule of Appellate Procedure 21 imposes any jurisdictional limits on the General Assembly's grant of authority in our appellate courts to issue writs of certiorari, *State v. Killette*, 381 N.C. 686, 691, 873 S.E.2d 317, 320 (2022); *see* N.C. Gen. Stat. § 7A-32(c), and articulated a two-factor test which provides a mandatory framework for how and when to properly exercise our discretion to issue writs of certiorari, *Cryan v. Nat'l Council of YMCAs*, 384 N.C. 569, 572–73, 887 S.E.2d 848, 851 (2023). To harmonize *Demaio* with recent developments in our common law, we examine Defendant's contention that his guilty plea was not the product of a knowing, voluntary, and informed choice under the *Cryan* test. *See id.* at 572–73, 887 S.E.2d at 851.

First, the appellant must show "merit or that error was probably committed below." *Id.* at 572, 887 S.E.2d at 851. This factor weighs the

likelihood that an error of law occurred below. *Id.* at 572, 862 S.E.2d at 851 (citing *Button v. Level Four Orthotics & Prosthetics, Inc.*, 380 N.C. 459, 465–66, 869 S.E.2d 257, 264 (2022)). Next, "extraordinary circumstances" warranting issuance of the PWC must exist. *Id.* at 572–73, 887 S.E.2d at 851. An extraordinary circumstance "generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice.' " *Id.* at 573, 887 S.E.2d at 851 (quoting *Doe v. City of Charlotte*, 273 N.C. App. 10, 23, 848 S.E.2d 1, 11 (2020)).

In his PWC, Defendant maintains the writ should issue to determine whether his guilty plea was knowingly, intelligently, and voluntarily made. Specifically, Defendant argues that his plea was not knowing, intelligent, and voluntary because "he pled guilty on the explicit assurance that he was reserving his right to appeal the denial of pretrial motions – some of which were not appealable." After careful review, we conclude Defendant's PWC fails to demonstrate that an error of law was probably committed below.

> [A] plea of guilty . . . may not be considered valid unless it appears affirmatively that it was entered voluntarily and understandingly. Hence, a plea of guilty . . . unaccompanied by evidence that the plea was entered voluntarily and understandingly, and a judgment entered thereon, must be vacated . . . . If the plea is sustained, it must appear affirmatively that it was entered voluntarily and understandingly . . . [and that] the nature and consequences of the plea [had] been explained to defendant *in open court*.

State v. Tinney, 229 N.C. App. 616, 621, 748 S.E.2d 730, 734 (2013) (emphasis in original) (quoting *State v. Ford*, 281 N.C. 62, 67–68, 187 S.E.2d 741, 745 (1972)).

Generally, "[a] defendant who pleads guilty is entitled to receive the benefit of his bargain." *Demaio*, 216 N.C. App. at 564, 716 S.E.2d at 867 (citation omitted). In *Demaio*, we held that, "[i]f a defendant does not have an appeal as of right . . . on issues the defendant was promised would be preserved for appeal, then the plea agreement violates the law." *Id.* at 565, 716 S.E.2d at 867. In this situation, "the appellate court must place the defendant back in the position he was in before he struck his bargain." *Id.* at 565, 716 S.E.2d at 867 (internal quotation marks and citation omitted). This would require vacating the judgment and remanding "the case to the trial court where defendant may withdraw his guilty plea and proceed to trial on the criminal charges or withdraw his plea and attempt to negotiate another plea agreement that does not violate State law." *Id.* at 565, 716 S.E.2d at 867–68.

On the other hand, in *Tinney*, this Court noted the facts presented were "[u]nlike the situation present in *Demaio* and a number of other cases in which this Court has determined that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue had the effect of rendering a plea agreement unenforceable." 229 N.C. App. at 622, 748 S.E.2d at 735. We distinguished *Demaio*, where "the defendant was never advised that the 'preservation of rights' provision in his plea agreement was invalid," reasoning that in *Tinney*,

> the trial court interrupted the taking of [the] [d]efendant's plea, examined the issue of whether a defendant could seek appellate review of the lawfulness of an order transferring a case from the juvenile courts to the Superior Court under such circumstances, and specifically informed [the] [d]efendant that there was a 'good chance, though I can't speak for the Court of Appeals, that the decision by [the trial court judge regarding the transfer order] is not reviewable and—by a later court. And I want to make sure you've had a chance to talk with him about that and [the defendant] understands it.'

Id. at 625, 748 S.E.2d at 736.

In *Tinney*, "[b]oth the prosecutor and the trial court cited the controlling decision of this Court and clearly informed [the] [d]efendant that the likelihood that he would be able to obtain appellate review of the transfer order was extremely low." *Id.* at 625, 748 S.E.2d at 737. Unlike *Demaio*, the defendant in *Tinney* "had ample notice that the provision in his plea agreement reserving his right to challenge the validity of the transfer order on appeal was, in all probability, unenforceable and elected to proceed with his guilty plea in spite of the fact that he knew that the provision in question was of questionable validity." *Id.* at 622, 748 S.E.2d at 735. This Court concluded that, in "light of the steps taken by the trial court to advise [the] [d]efendant of the likelihood that his attempt to reserve his right to seek appellate review of the transfer order would prove unsuccessful," the defendant was "not entitled to relief from the trial court's judgment on the basis of the principle enunciated in *Demaio*." *Id.* at 622, 748 S.E.2d at 735.

Here, at first glance, the portions of transcript found in Defendant's PWC appear to show merit. Indeed, the transcript of plea form clearly indicates Defendant "preserves his right to appeal the denial of all pretrial motions." Several of Defendant's pretrial motions were not appealable. Nevertheless, consistent with *Tinney*, we examine the form alongside Defendant's colloquy with the trial court to contextualize whether it

affirmatively appears that Defendant's plea "was entered voluntarily and understandingly" and whether "the nature and consequences of the plea [were] explained to [D]efendant *in open court*." *See Tinney*, 229 N.C. App. at 621, 748 S.E.2d at 734 (emphasis in original) (citing *Ford*, 281 N.C. at 67–68, 187 S.E.2d at 745).

Evidently, Defendant educated himself on certain principles of criminal law and took an active role in his own defense, including the filing of a pretrial pro se motion to suppress. On 16 March 2023, after an extended colloquy concerning Defendant's opinion of defense counsel and the inherent risks of Defendant proceeding to trial pro se, Defendant and the State reached a last-minute plea agreement. The conversation unfolded, in relevant part:

> THE COURT: Counsel, I understand that you, [defense counsel], need to speak with your client a little further concerning a possibility of a resolution in the case by possible plea. Does anyone have an objection if I have the bailiff releases the jury and have them return at 11:30?
>
> [PROSECUTOR]: No, Judge.
>
> THE COURT: Mr. Sheriff, without any comment release the jury until 11:30. We will be at ease until 11:30.
>
> (The Court was at ease at 10:47 a.m. and resumed at 11:28 a.m.)
>
> [DEFENSE COUNSEL]: Judge, may I approach?
>
> THE COURT: Yes, sir, Counsel. I know that there is a statute that specifically authorizes a defendant to plead guilty and to reserve his right to appeal the motions to suppress. I can't find it. Do either of you know the statutes?
>
> [DEFENSE COUNSEL]: I don't, Judge.
>
> THE COURT: Do you remember, [prosecutor]?
>
> [PROSECUTOR]: I don't, Judge.
>
> THE COURT: I'm trying to find it.
>
> [PROSECUTOR]: I believe it is 15A-979 subsection b.
>
> THE COURT: That is correct. Thank you very much. I understand, [defense counsel], your client wishes to withdraw his plea of not guilty and plead guilty pursuant to this plea transcript?
>
> [DEFENSE COUNSEL]: Yes, Your Honor.
>
> THE CLERK: If you will raise your right hand and place your left hand on the bible. Do you swear or affirm to

truthfully answer the questions about to be propounded to you by his honor concerning the matter now before the Court so help you God?

DEFENDANT: Yes, ma'am.

THE COURT: [Defendant], let's go over this transcript of plea. If at any time you don't understand these questions or need to further talk with your lawyer let me know.

. . .

[Defendant], are you able to hear and understand me?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that you have the right to remain silent and that any statement you make may be used against you?

DEFENDANT: Yes, sir.

. . .

THE COURT: Have the charges been explained to you by your lawyer, and do you understand the nature of the charges, and do you understand every element of each charge?

DEFENDANT: Yes, sir.

THE COURT: Have you and your lawyer discussed the possible defenses, if any, to the charges?

DEFENDANT: Yes, sir.

THE COURT: At this time, sir, are you satisfied with [defense counsel's] legal services?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that you do have the right to plead not guilty and have your case tried before a jury that has been selected in this case?

DEFENDANT: Yes, sir.

THE COURT: Do you understand that at such trial you would have the right to confront and cross-examine the witnesses against you?

DEFENDANT: Yes, sir.

THE COURT: Do you understand by your pleas of guilty you're giving up those and other important constitutional rights relating to a trial by jury?

DEFENDANT: Yes, sir.

> . . .
>
> THE COURT: All right. *Do you understand that following a plea of guilty there are limitations on your right to appeal?*
>
> DEFENDANT: Limitations?
>
> THE COURT: There will be limitations on your right to appeal. *You will have the right to appeal the Court's denial of your motion to suppress* and we will talk about that in a few minutes. Do you understand that?
>
> DEFENDANT: Yes, sir.
>
> THE COURT: *You may not appeal the plea of guilty or the sentence, but you may appeal and I expect based on what your lawyer has told me you probably will appeal, the denial of the motions to suppress; is that correct?*
>
> DEFENDANT: Yes, sir.

(emphasis added). On appeal, Defendant conveniently disregards the above exchange, instead fixating on the following exchange with the trial court, which occurred moments later.

> THE COURT: All right. The sentences imposed today will be in the discretion of the Court after hearing the evidence from the State, and any evidence your lawyer wishes to present in mitigation, either immediately after the adjudication or sometime today. You will receive credit -- this is not in the transcript, but you will receive credit against the sentences imposed for any time spent in confinement awaiting trial. *And you are, this is very important to you, you are preserving your right to appeal the Court's denial of your pretrial motions. The ones that the Court denied. I did allow one of them.* Is that correct as being your full plea agreement?
>
> THE DEFENDANT: Yes, sir. Can I ask a question?
>
> THE COURT: Yes, sir.
>
> THE DEFENDANT: I didn't see that part on the paper that I will appeal the motion. And then when you sign it, I just ask you before I leave that I can get a copy so I can take it with me.
>
> THE COURT: We will make sure you get a copy of it. Yes, sir. I will -- assuming that you do give notice of appeal in open court after you are sentenced, we will make sure that the appellate entries are entered and if you want counsel, I

> will appoint counsel for you. It will be someone other than [defense counsel]. It will be the [P]ublic Defender's office. Any questions about that?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Okay. Do you now personally accept this arrangement?
>
> THE DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: You enter this plea of your own free will fully understanding what you're doing?
>
> THE DEFENDANT: Yes, sir.
>
> . . .
>
> THE COURT: All right. At this point do you have any other questions about anything I've said to you or about anything else connected to your case?
>
> THE DEFENDANT: No, sir.

(emphasis added).

Contrary to Defendant's assertions, when considered in context, the trial court's statements in the second exchange provide additional support for our reading of the first exchange. Specifically, the trial court's statement, "I did allow one of them," clearly refers to the one favorable ruling Defendant received on his motions to suppress—the suppression of Defendant's conversation with his sister recorded in the interview room. In light of the foregoing, Defendant cannot show that he failed to receive the benefit of his bargain or that his plea was not knowingly, voluntarily, and intelligently made. Conversely, the record reveals Defendant's plea "was entered knowingly, voluntarily, and understandingly" and "the nature and consequences of the plea [were] explained to [D]efendant *in open court*." *See Tinney*, 229 N.C. App. at 620–21, 748 S.E.2d at 734.

Because Defendant cannot establish merit or probable error below, we deny his PWC in our sound discretion. *See Cryan*, 384 N.C. at 573, 887 S.E.2d at 851 (citing *Ricks*, 378 N.C. at 740, 862 S.E.2d at 838). Nevertheless, as recognized by the trial court, prosecutor, and defense counsel, we have jurisdiction to review the denials of Defendant's motions to suppress. *See* N.C. Gen. Stat. § 15A-979(b) (2023).

III. Issue

The issue is whether the trial court erred in denying Defendant's motions to suppress.

IV. Analysis

Defendant appeals from the trial court's denial of his motions to suppress, arguing his consent to the search of his phone was invalid because: (1) his consent was given during unlawful detention where probable cause no longer existed; and (2) his consent was obtained through coercion. We disagree with Defendant.

A. Preservation

[2] Before addressing the motion to suppress evidence from his cell phone's search, we must first determine if Defendant properly preserved his right to appeal the motions to suppress on probable cause grounds. The State argues that Defendant did not raise the lack of probable cause argument below and therefore Defendant did not preserve the argument for appeal. We disagree with the State.

We have consistently held that "where a theory argued on appeal was not raised before the trial court, the law does not permit parties to swap horses between courts in order to get a better mount in the appellate courts." *State v. Walker*, 252 N.C. App. 409, 411, 798 S.E.2d 529, 530 (2017) (quoting *State v. Holliman*, 155 N.C. App. 120, 123, 573 S.E.2d 682, 685 (2002)). The "swapping horses" rule applies where issues on appeal are "grounded on separate and distinct legal theories than those relied upon at the trial court, or when a sufficiency of the evidence challenge on appeal concerns a conviction different from a charge challenged before the trial court." *See id.* at 411, 798 S.E.2d at 530 (citing *Holliman*, 155 N.C. App. at 123–24, 573 S.E.2d at 685–86 (rejecting the defendant's motion to suppress argument on appeal for lack of probable cause when, at the hearing, he only argued coercion)).

Here, we conclude that Defendant's argument regarding the lack of probable cause for his continued detention does not amount to "swapping horses." *See id.* at 411, 798 S.E.2d at 530. The alleged illegality of Defendant's detention after the gun investigation concluded was a recurring source of pretrial discussion. Defendant's motions to suppress sufficiently referenced search and seizure caselaw, including the topic of probable cause. Therefore, probable cause cannot be said to be a "separate and distinct" legal theory from those relied upon below. *See id.* at 411, 798 S.E.2d at 530.

B. Standard of Review

This Court reviews a trial court's denial of a motion to suppress by determining whether "the trial court's findings are supported by the evidence and whether the findings of fact support the conclusions of

law." *State v. Byrd*, 287 N.C. App. 276, 279, 882 S.E.2d 438, 440 (2022) (quoting *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020)). "In reviewing the denial of a motion to suppress, we examine the evidence introduced at trial in the light most favorable to the State[.]" *State v. Duncan*, 272 N.C. App. 341, 345, 846 S.E.2d 315, 320 (2020) (alteration in original) (quoting *State v. Moore*, 152 N.C. App. 156, 159, 566 S.E.2d 713, 715 (2002)).

Unchallenged findings of fact are binding on appeal. *State v. Fizovic*, 240 N.C. App. 448, 451, 770 S.E.2d 717, 720 (2015) (citing *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982)). The trial court's conclusions of law are reviewed de novo. *Byrd*, 287 N.C. at 279, 882 S.E.2d at 440 (citing *State v. Wiles*, 270 N.C. App. 592, 595, 841 S.E.2d 321, 325 (2020)). Under a de novo review, this Court " 'considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 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)).

C. Motions to Suppress

[3] Under the United States Constitution, the Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . . " *State v. Logan*, 278 N.C. App. 319, 323–24, 861 S.E.2d 908, 912 (2021) (quoting U.S. Const. amend. IV). Likewise, Article I, Section 20 of the North Carolina Constitution prohibits unreasonable searches and seizures, requiring that warrants be issued only upon probable cause. *See State v. Allman*, 369 N.C. 292, 293, 794 S.E.2d 301, 302–03 (2016) (citing *State v. Arrington*, 311 N.C. 633, 643, 319 S.E.2d 254, 260–61 (1984)); N.C. Const. art. I, § 20.

"In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 382, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014). This Court "recognizes consent searches as an exception to the general warrant requirement." *State v. Duran-Rivas*, 294 N.C. App. 603, 611, 904 S.E.2d 171, 178 (2024) (quoting *State v. Hagin*, 203 N.C. App. 561, 564, 691 S.E.2d 429, 432 (2010)). "Where 'consent to search . . . was the product of an unconstitutional seizure,' it is involuntary." *State v. Johnson*, 279 N.C. App. 475, 484, 865 S.E.2d 673, 680 (2021) (quoting *State v. Cottrell*, 234 N.C. App. 736, 752, 760 S.E.2d 274, 285 (2014)).

A seizure of a person is reasonable if the seizing officer has probable cause to believe the person seized committed a crime. *See U.S.*

v. Watson, 423 U.S. 411, 423–24, 96 S. Ct. 820, 827–28, 46 L. Ed. 2d 598, 608–09 (1976). Similarly, an object is subject to a seizure pursuant to a search warrant if there is "probable cause to believe that the item to be seized constitutes evidence of an offense or the identity of a person who participated in the crime." *State v. Carter*, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988) (citing N.C. Gen. Stat. § 15A-242(4)).

"Probable cause is 'a suspicion produced by such facts as indicate a fair probability that the person seized has engaged in or is engaged in criminal activity.' " *State v. Wilson*, 155 N.C. App. 89, 94, 574 S.E.2d 93, 97–98 (2002) (quoting *State v. Schiffer*, 132 N.C. App. 22, 26, 510 S.E.2d 165, 167 (1999)). Probable cause equates to a "reasonable ground of suspicion," supported by circumstances strong enough to warrant a cautious man to believe the accused person is guilty. *See State v. Harris*, 279 N.C. 307, 311, 182 S.E.2d 364, 367 (1971). Such suspicion is determined by "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 311, 182 S.E.2d at 367 (citation omitted). Probable cause requires our courts to "make a practical, common-sense decision based on the totality of the circumstances, whether there is a fair probability that evidence will be found in the place to be searched." *Byrd*, 287 N.C. App. at 279–80, 882 S.E.2d at 441 (quoting *State v. Worley*, 254 N.C. App. 572, 576, 803 S.E.2d 412, 416 (2017)).

A seizure occurs when an officer "terminates or restrains" a person's movement through "physical force or a show of authority." *State v. Isenhour*, 194 N.C. App. 539, 542, 670 S.E.2d 264, 267 (2008) (quoting *Brendlin v. California*, 551 U.S. 249, 254, 127 S. Ct. 2400, 2405, 168 L. Ed. 2d 132, 138 (2007)). In other words, a seizure means "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 543, 670 S.E.2d at 267 (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497, 509 (1980)). This objective inquiry considers whether physical or psychological barriers erected by law enforcement would cause a reasonable person to believe he was not free to leave. *Id.* at 543, 670 S.E.2d at 268 (citing *State v. Christie*, 96 N.C. App. 178, 184, 385 S.E.2d 181, 184 (1989)).

Here, Defendant first contends that his continued detention was unlawful. He argues that Lieutenant Porter did not have enough evidence to charge him with knowing the gun was stolen after reviewing the texts with "yay fein." Therefore, he maintains that any subsequent detention was illegal, rendering his consent invalid. Defendant's argument is without merit.

The State developed reasonable suspicion or probable cause of multiple crimes at different points in the investigation, justifying Defendant's continued detention. After the traffic stop, Lieutenant Porter had probable cause of gun and drug charges sufficient to arrest Defendant and transport him to the police department for interrogation. During the interrogation, Lieutenant Porter could have charged Defendant with possession of a stolen gun at any point. Defendant incorrectly asserts that Lieutenant Porter had no remaining suspicions about Defendant's gun case after reviewing Defendant's text messages with "yay fein." Rather, Lieutenant Porter still "needed to do some work" to "quell [his] suspicion about [Defendant's] involvement in the gun trade," indicating that probable cause concerning weapons charges had not fully dissipated.

When Lieutenant Porter retrieved Defendant's phone and observed the lock screen, he thought it was "odd" to see an image of a young girl he recognized. After consulting with other detectives, Lieutenant Porter confirmed Q.M.'s identity and presence in the same car during a recent car chase. This information, coupled with the fact that Lieutenant Porter's phone has a "picture of a Chevy because [he] love[s] [his] Chevy truck" and most of his "friends' lock screens are pictures of their wives and kids because they love their wife and kids" led him to develop reasonable suspicion and detain Defendant for further investigation. *See Harris*, 279 N.C. at 311, 182 S.E.2d at 367.

Lieutenant Porter also had probable cause to seize the phone concerning the gun charges, given the significant role it played during the investigation. Defendant was initially identified as the suspect in the gun case through his phone number and later voluntarily handed over his phone, seeking to prove his lack of culpability as to the stolen gun by showing his text messages with "yay fein." These factors contributed to the likelihood that Defendant's phone contained additional evidence related to the gun case. Because Defendant was neither unconstitutionally seized nor illegally detained when he consented to the search of his phone, Defendant cannot establish that his consent was involuntary. *See Johnson*, 279 N.C. App. at 484, 865 S.E.2d at 680.

Defendant next argues that his consent to search his phone was coerced because, even though he was free to leave, officers "held [the] phone hostage" by threatening to obtain a warrant. We disagree.

Lawful consent is an exception to the warrant requirement. *See State v. Kuegel*, 195 N.C. App. 310, 315, 672 S.E.2d 97, 100 (2009) (quoting *State v. Smith*, 346 N.C. 794, 798, 488 S.E.2d 210, 213 (1997)). Warrantless searches based on consent are constitutional "as long as the consent is

given freely and voluntarily, without coercion, duress or fraud." *State v. Cummings*, 188 N.C. App. 598, 603, 656 S.E.2d 329, 333 (2008) (quoting *State v. Powell*, 297 N.C. 419, 425–26, 255 S.E.2d 154, 158 (1979)). The determination of whether consent to search was voluntary is made upon the totality of the circumstances. *Id.* at 603, 656 S.E.2d at 333; *see State v. Hernandez*, 170 N.C. App. 299, 310, 612 S.E.2d 420, 427 (2005).

Although not favored, "[t]he use of false statements and trickery by police officers during interrogations is not illegal as a matter of law." *See State v. Barnes*, 154 N.C. App. 111, 114, 572 S.E.2d 165, 167–68 (2002) (quoting *State v. Jackson*, 308 N.C. 549, 574, 304 S.E.2d 134, 148 (1983)). "As a general rule, it is not duress to threaten to do what one has a legal right to do. Nor is it duress to threaten to take any measure authorized by law and the circumstances of the case." *State v. McMillan*, 214 N.C. App. 320, 331, 718 S.E.2d 640, 648 (2011) (quoting *State v. Paschal*, 35 N.C. App. 239, 241, 241 S.E.2d 92, 94 (1978)); *see also Kuegel*, 195 N.C. App. at 316, 672 S.E.2d at 101 (finding no coercion where the defendant was told that if he did not grant consent, the officers would obtain a search warrant).

Defendant's contention his consent was coerced merely because his phone was his only means of leaving the station is unavailing. Unlike a valid driver's license, which is necessary to lawfully drive a car, Defendant was under no obligation to carry a cell phone. *See State v. Thompson*, 267 N.C. App. 101, 104, 832 S.E.2d 510, 512 (2019). Further, officers had a lawful right to seek a search warrant for the phone if Defendant refused to consent, which, under the facts of this case, was not coercive.

Simply put, Defendant did not *want* to leave the police station without his cell phone, which is understandable. The law, however, distinguishes between subjectively not wanting to leave and objectively not being free to leave. *See State v. Isenhour*, 194 N.C. App. at 543, 670 S.E.2d at 268; *State v. Hall*, 268 N.C. App. 425, 430, 836 S.E.2d 670, 674 (2019) ("The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of objective reasonableness.") (quoting *State v. Romano*, 369 N.C. 678, 691, 800 S.E.2d 644, 652 (2017)). Thus, Defendant cannot assert that his ability to leave the police station was unreasonably restricted solely due to officers' retention of his phone.

Accordingly, under the totality of the circumstances, Defendant's consent to the search of his phone was voluntary and without illegal duress or coercion. Defendant's attempts to challenge the lawfulness of his consent to search his phone are without merit.

V. Conclusion

In sum, we deny Defendant's PWC and affirm the trial court's denial of Defendant's motions to suppress.

AFFIRMED.

Judges TYSON and STADING concur.

STATE OF NORTH CAROLINA
v.
LAKEVIS ANTRUAN MALOYE, DEFENDANT

No. COA24-772

Filed 4 June 2025

Assault—assault with deadly weapon inflicting serious injury—gunshot—serious injury element—sufficiency of evidence

In defendant's trial for assault with a deadly weapon with intent to kill inflicting serious injury (defendant was ultimately convicted of the lesser included offense of assault with a deadly weapon inflicting serious injury) arising from an incident in which defendant shot the victim in the leg, the trial court properly denied defendant's motion to dismiss where the State presented substantial evidence from which a jury could infer that the victim suffered a serious injury. The victim suffered a physical or bodily injury as a result of defendant's assault with a revolver; although the victim did not go to a hospital for treatment, his gunshot wound was treated at the scene after an ambulance was called; he experienced "a lot of pain" and took daily pain medication after the incident; with his wife's help, he cleaned the wound with hydrogen peroxide and changed "nasty bandages" regularly; he had trouble sitting, walking, and laying down; and he was out of work for over a month.

Appeal by Defendant from judgment entered 26 January 2024 by Judge Matthew Osman in Mecklenburg County Superior Court. Heard in the Court of Appeals 23 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Kimberly M. Lott, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender David S. Hallen, for defendant-appellant.

STADING, Judge.

Lakevis Antruan Maloye ("Defendant") appeals from final judgment after a jury convicted him of assault with a deadly weapon inflicting serious injury ("AWDWISI") and possession of a firearm by a felon. Defendant pled guilty to obtaining habitual felon status. On appeal, Defendant asserts the trial court committed error by denying his motion to dismiss since there was insufficient evidence he inflicted serious injury. For the reasons below, we discern no error.

I. Background

A Mecklenburg County grand jury returned true bills of indictment charging Defendant with assault with a deadly weapon with intent to kill inflicting serious injury ("AWDWIKISI"), possession of a firearm by a felon, and having obtained habitual felon status. *See* N.C. Gen. Stat. §§ 14-7.1, 14-32(a), and 14-415.1 (2023). Defendant's trial commenced on 23 January 2024, and the evidence tended to show the following:

At around 10:30 p.m. on 17 May 2022, Ruby and Jerome Stewart drove to a local convenience store to "get some cigarettes and a case of beer." Mrs. Stewart remained in the front passenger seat of the vehicle while Mr. Stewart went into the store; at the time, Mr. Stewart possessed a .380 caliber handgun holstered on his person. After purchasing "a pack of Newports and a 12-pack of Coronas," Mr. Stewart exited the store and walked back to his vehicle. Mr. Stewart heard "somebody say . . . something" while walking, prompting him to turn his head. Immediately after, Mr. Stewart saw a masked assailant pointing a revolver at his face.

Mr. Stewart attempted to grab the assailant's gun without success. In doing so, the assailant's "gun went off," striking Mr. Stewart in the leg. Mr. Stewart then threw his beer at the assailant, ran away, and started shooting at the assailant with his own firearm. Throughout this time, the assailant continued firing shots at Mr. Stewart while ducking behind a car. The assailant eventually "took off and ran around the building" before the police arrived. However, Mr. and Mrs. Stewart instantly identified the assailant as Defendant. Mr. Stewart recognized Defendant based on his voice, beard, and eyes, and Mrs. Stewart recognized Defendant based on prior dealings at her place of employment. Officer Mario Soares of the Charlotte-Mecklenburg Police Department also "immediately recognized" Defendant as the masked assailant upon reviewing the surveillance footage based on "prior history" and "daily interactions."

Law enforcement arrived on the scene shortly after the firefight ceased. Officer James Tindall of the Charlotte-Mecklenburg Police Department was the first to arrive, observing "a broken case of beer in the center of the parking lot" and Mr. Stewart "leaning on his right leg." Upon closer inspection, Officer Tindall saw "a bullet graze wound" to Mr. Stewart's left thigh, prompting him to call for medical assistance. The paramedics placed Mr. Stewart in an ambulance to treat his gunshot wound. However, Mr. Stewart did not go to the hospital at this time because he was worried about his "son that was at home and had seizures . . . ."

Following the incident, Mr. Stewart "went to the doctor," but treated the injury by himself at home; he never attended a hospital for treatment. Mr. Stewart testified he treated the gunshot wound daily by taking 800 milligrams of ibuprofen and cleaning it with hydrogen peroxide. He also testified to missing "a little over a month" of work because of the injury. Mr. Stewart added the gunshot wound did not "start hurting [until] the next day," attributing it to a surge of adrenaline at the time of the shooting. Mrs. Stewart similarly noted that following the incident:

> [MRS. STEWART]: [Mr. Stewart] was in a lot of pain. It hurt to walk being that it was his inner thigh. We had to clean it a whole lot, a whole lot being that he didn't go to the hospital. So it was a lot of cleaning, a lot of nasty bandages. It was pretty bad. It was -- he had a lot of trouble walking like.
>
> [PROSECUTOR]: For about how long afterwards?
>
> [MRS. STEWART]: Maybe a month.
>
> [PROSECUTOR]: Okay. And when you're saying trouble walking because that kind of – you can take that one of two ways.
>
> [MRS. STEWART]: Right. He could walk. He could walk. It just hurts to walk because it rubbed that wound.

By the time of trial, Mr. Stewart still felt "burning" and "tingling" sensations in his thigh as a result of the shooting.

At the close of the State's evidence, Defendant moved for dismissal of his AWDWIKISI charge, arguing the State failed to present sufficient evidence as to each element of the offense. Defendant maintained "the State ha[d] not proven that [he] was the person who committed the crime," and there was a "lack of evidence" demonstrating Mr. Stewart suffered a serious injury—a necessary element of AWDWIKISI. The trial

court denied the motion. Defendant elected not to present evidence in his defense, rested, and renewed his motion to dismiss at the close of all evidence. Again, the trial court denied the motion.

Upon deliberation, the jury convicted Defendant of AWDWISI, a lesser included offense of AWDWIKISI, and possession of a firearm by a felon. Defendant then pled guilty to obtaining habitual felon status. The plea arrangement provided the following pertinent details:

> Defendant was found guilty by a jury of the class E felony of Assault with Deadly Weapon Inflicting Serious Injury (22 CR 215746) and the class G felony of Possession of Firearm by Felon (22 CR 215747). Defendant admits his status as an Habitual Felon (23 CR 9591), statutorily enhancing his sentence under the North Carolina Structured Sentencing Act to a Class C felony for both of the underlying felonies. The underlying felonies will be consolidated for sentencing under 22 CR 215746. Defendant will be sentenced in the presumptive range in the discretion of the Court.

Accounting for Defendant's habitual felon status and prior record level, he received a consolidated sentence of 131 to 170 months imprisonment for all offenses. Defendant entered an oral notice of appeal in open court.

II. Jurisdiction

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

III. Analysis

Defendant submits one issue for our consideration: Whether the trial court committed error by denying his motion to dismiss the AWDWIKISI charge. Defendant maintains "the State failed to present substantial evidence demonstrating he inflicted serious injury." After careful consideration, we disagree.

"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, 867 S.E.2d 924, 927 (2022) (quoting *State v. Crockett*, 368 N.C. 717, 720, 782 S.E.2d 878, 881 (2016)). " 'Under a *de novo* review, the court

considers the matter anew and freely substitutes its own judgment' for that of the lower tribunal." *State v. Williams*, 362 N.C. 628, 632–33, 669 S.E.2d 290, 294 (2008) (citation omitted).

"The question for a court on a motion to dismiss for insufficient evidence 'is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense.' " *Tucker*, 380 N.C. at 236, 867 S.E.2d at 927 (quoting *State v. Powell*, 299 N.C. 95, 98, 261 S.E.2d 114, 117 (1980)). "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, 265 S.E.2d 164, 169 (1980); *see also State v. Winkler*, 368 N.C. 572, 574, 780 S.E.2d 824, 826 (2015) ("Substantial evidence is that amount of relevant evidence necessary to persuade a rational juror to accept a conclusion."). When there is substantial evidence, "the motion is properly denied." *Powell*, 299 N.C. at 98, 261 S.E.2d at 117. But "[i]f the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed." *Id.*

"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." *Tucker*, 380 N.C. at 237, 867 S.E.2d at 927. "Any contradictions or conflicts in the evidence are resolved in favor of the State, and evidence unfavorable to the State is not considered." *State v. Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347 (2012) (citation omitted); *see also Tucker*, 380 N.C. at 237, 867 S.E.2d at 927 ("Contradictions and discrepancies do not warrant dismissal of the case but are for the jury to resolve."). In determining whether evidence is substantial, a court must apply the following test:

> The trial court is not required to determine that the evidence excludes every reasonable hypothesis of innocence prior to denying the defendant's motion to dismiss. The test of the sufficiency of the evidence to withstand the motion is the same whether the evidence is direct, circumstantial or both. That test is whether a reasonable inference of the defendant's guilt may be drawn from the evidence. If so[,] the evidence is substantial and the defendant's motion to dismiss must be denied.

State v. Malloy, 309 N.C. 176, 178–79, 305 S.E.2d 718, 720 (1983) (internal citations omitted). "Thus, the evidence need only give rise to a

reasonable inference of guilt for the case to be properly submitted to the jury." *State v. Barnett*, 141 N.C. App. 378, 383, 540 S.E.2d 423, 427 (2000).

In the instant case, Defendant was charged with AWDWIKISI, but convicted of AWDWISI—a lesser included offense of AWDWIKISI. *Compare* N.C. Gen. Stat. § 14-32(a) ("Any person who assaults another person with a deadly weapon with intent to kill and inflicts serious injury shall be punished as a Class C felon."), *with* N.C. Gen. Stat. § 14-32(b) ("Any person who assaults another person with a deadly weapon and inflicts serious injury shall be punished as a Class E felon."); *see also State v. Nickerson*, 365 N.C. 279, 282, 715 S.E.2d 845, 847 (2011) (In determining whether a crime is a lesser-included offense, "the test is whether the essential elements of the lesser crime are essential elements of the greater crime. If the lesser crime contains an essential element that is not an essential element of the greater crime, then the lesser crime is not a lesser included offense."); *see also State v. Cromartie*, 177 N.C. App. 73, 76, 627 S.E.2d 677, 680 (2006) ("The only difference in what the State must prove for the offense of assault with a deadly weapon inflicting serious injury and assault with a deadly weapon with intent to kill inflicting serious injury is the element of intent to kill."). "The elements of AWDWISI are: (1) an assault, (2) with a deadly weapon, (3) inflicting serious injury, (4) not resulting in death." *State v. Jones*, 353 N.C. 159, 164, 538 S.E.2d 917, 922 (2000). Defendant solely contests the sufficiency of the evidence as to the serious injury element—a necessary element to support a conviction for both AWDWISI and AWDWIKISI. *See* N.C. Gen. Stat. § 14-32(a)–(b); *see also Cromartie*, 177 N.C. App. at 76, 627 S.E.2d at 680.

"We have repeatedly defined the serious injury element of N.C. [Gen. Stat.] § 14-32 to mean a physical or bodily injury." *State v. Everhardt*, 326 N.C. 777, 780, 392 S.E.2d 391, 392 (1990); *see also State v. Alexander*, 337 N.C. 182, 188–89, 446 S.E.2d 83, 87 (1994) (citations omitted) ("The term 'inflicts serious injury,' under G.S. 14-32(b), means physical or bodily injury resulting from an assault with a deadly weapon."); *see also State v. Bagley*, 183 N.C. App. 514, 526, 644 S.E.2d 615, 623 (2007); *see also State v. Joyner*, 295 N.C. 55, 65, 243 S.E.2d 367, 373 (1978); *see also State v. Jones*, 258 N.C. 89, 91, 128 S.E.2d 1, 3 (1962). "[W]hether an injury is serious within the meaning of AWDWISI is usually a factual determination that rests with the jury." *Bagley*, 183 N.C. App. at 526, 644 S.E.2d at 623; *see also State v. Woods*, 126 N.C. App. 581, 592, 486 S.E.2d 255, 261 (1997) ("Whether serious injury has been inflicted turns on the facts of each case and is generally a determination for the jury.").

"A jury may consider such pertinent factors as hospitalization, pain, loss of blood, and time lost at work in determining whether an injury

is serious. Evidence that the victim was hospitalized, however, is not necessary for proof of serious injury." *State v. Hedgepeth*, 330 N.C. 38, 53, 409 S.E.2d 309, 318 (1991) (internal citation omitted); *see also Woods*, 126 N.C. App. at 592, 486 S.E.2d at 261; *see also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374. "[A]s long as the State presents evidence that the victim sustained a physical injury as a result of an assault by the defendant, it is for the jury to determine the question of whether the injury was serious." *Alexander*, 337 N.C. at 189, 446 S.E.2d at 87; *see also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374 ("[T]here being evidence of physical or bodily injury to the victim, the question of the nature of these injuries was also properly submitted to the jury.").

Contrary to Defendant's urging, the State presented substantial evidence, allowing a juror to reasonably infer he inflicted a serious injury upon Mr. Stewart. *See Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318; *see also Smith*, 300 N.C. at 78, 265 S.E.2d at 169. The record evidence shows Defendant shot Mr. Stewart in the leg with a revolver during the altercation and suffered a "physical or bodily injury resulting from" Defendant's "assault with a deadly weapon." *Alexander*, 337 N.C. at 188–89, 446 S.E.2d at 87. In addition, Mr. Stewart testified to missing "a little over a month" of work because of the injury—one of the pertinent factors a jury may consider in determining whether the injury was serious. *See Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318. Moreover, when discussing the gunshot wound, Mr. Stewart testified to being in pain following the incident, including having trouble walking, sitting, and laying down. *See Tucker*, 380 N.C. at 237, 867 S.E.2d at 927; *see also Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318.

Mrs. Stewart similarly testified as a result of the gunshot wound: Mr. Stewart "was in a lot of pain"; Mr. Stewart had trouble walking; her and Mr. Stewart had to clean the wound "a whole lot being that he didn't go to the hospital"; and the cleaning produced "a lot of nasty bandages." This testimony speaks to several other pertinent factors a jury may consider when determining whether an injury was serious. *See Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318. Although Defendant challenges the lack of evidence demonstrating Mr. Stewart was hospitalized, our previous decisions reflect "[e]vidence of hospitalization . . . is not necessary for proof of serious injury." *Woods*, 126 N.C. App. at 592, 486 S.E.2d at 261; *see also Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318; *see also Joyner*, 295 N.C. at 65, 243 S.E.2d at 374.

Viewing the evidence in the light most favorable to the State, resolving any contradictions in the evidence in favor of State, substantial evidence demonstrates Mr. Stewart sustained a serious injury as a result of

Defendant's assault with a deadly weapon. *Tucker*, 380 N.C. at 237, 867 S.E.2d at 927; *see also Bradshaw*, 366 N.C. 90, 93, 728 S.E.2d 345, 347; *see also Smith*, 300 N.C. at 78, 265 S.E.2d at 169. Substantial evidence includes the testimonies of Mr. and Mrs. Stewart articulating his pain, "nasty bandages," difficulty with daily tasks, and time lost at work. *See also Hedgepeth*, 330 N.C. at 53, 409 S.E.2d at 318; *see also Alexander*, 337 N.C. at 189, 446 S.E.2d at 87. Accordingly, we hold the trial court did not commit error by denying Defendant's motion to dismiss and submitting the charge for the jury's consideration.

IV. Conclusion

Since the State presented substantial evidence demonstrating Defendant inflicted a serious injury on Mr. Stewart, the trial court did not commit error by denying Defendant's motion to dismiss.

NO ERROR.

Chief Judge DILLON and Judge WOOD concur.

STATE OF NORTH CAROLINA
v.
CARROL LEE OWENS

No. COA24-699

Filed 4 June 2025

Criminal Law—guilty pleas—recitation of specific information from allegations in indictments—minor misstatements and omissions—factual basis sufficient

Where defendant's notice of appeal from the judgment entered after he pled guilty to twenty-five offenses was defective, but his intent to appeal was clear and the State was not misled, the Court of Appeals, in its discretion, allowed defendant's petition for writ of certiorari to reach the merits of defendant's argument and reject it; the prosecutor's recitation of specific details and information from the allegations in the indictments was sufficient for the trial court to determine that there was a factual basis for defendant's guilty pleas, despite minor misstatements and omissions by the prosecutor in the recitation.

Judge FREEMAN concurring in part and dissenting in part.

Appeal by defendant from judgment entered 30 January 2024 by Judge William T. Stetzer in Superior Court, Henderson County. Heard in the Court of Appeals 13 February 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Maria Bruner Lattimore, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Jillian C. Franke, for defendant.

ARROWOOD, Judge.

Carrol[1] Lee Owens ("defendant") appeals from judgment entered after pleading guilty to twenty-five offenses. Defendant contends the trial court erred by accepting his guilty plea where the State "merely read the indictments" in presenting the factual basis for the offenses. Defendant has additionally filed a petition for writ of certiorari requesting appellate review. For the following reasons, we grant defendant's petition for writ and affirm the trial court's judgment.

I. Background

Defendant was charged with a total of twenty-five offenses on the following dates: 19 March 2018; 8 November 2021; 15 December 2021; 1 March 2023; and 5 May 2023. Defendant filed a motion to proceed pro se on 28 July 2023,[2] which the trial court granted by order entered 6 September 2023.

The matter came on for trial on 29 January 2024, with defendant representing himself and his formerly appointed counsel on standby. Defendant filed several pretrial motions which were heard and ruled upon.

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1. We note that the warrants for arrest, defendant's motion to proceed pro se, waiver of counsel form, defense counsel's motion to withdraw, transcript of plea, prior record worksheet, and pro se notice of appeal each list defendant's first name as "Carrol," while the orders for arrest, indictments, order granting motion to proceed pro se, judgment and commitment, and appellate entries list defendant's first name as "Carroll." Additionally, it appears several of defendant's underlying felonies were addressed by this Court in *State v. Owens*, 178 N.C. App. 742 (2006) (unpublished), which lists defendant's first name as "Carrol." Although this spelling differs from the judgment on appeal, we recognize and adopt the spelling from defendant's motions and prior proceedings.

2. Defendant's trial counsel filed a motion to withdraw on 15 August 2023, and defendant signed a waiver of counsel form on 18 August 2023.

On 30 January 2024, the State offered defendant the opportunity to plead guilty as charged and be sentenced to a term of 117 to 153 imprisonment for common law robbery, elevated from a Class G to a Class C by nature of habitual felon charges. Defendant agreed to plead guilty, and the trial court conducted a plea colloquy, explaining the charges and the maximum sentences associated with each charge.

Following the plea colloquy, the prosecutor recited a factual basis for each of the twenty-five charges. The prosecutor proceeded to provide a brief description of defendant's conduct and details of the offense relevant to each specific charge. For the habitual felon offenses, the prosecutor read aloud the three underlying convictions, including the case file numbers, and the counties of arrest and conviction. Several recitations are included in relevant part:

> In 21 CRS 347 as to habitual felon, having completed this date of offense being July 25th of 2021, he did, on May 26th of 1997, commit the felony larceny in 97 CRS 23344, was convicted of same on December 10th of 1997. That on November 26, 2004, as to the felony flee to arrest[sic] in 04 CRS 57653, he did commit the offense of felony flee to elude, conviction date of May 4th, 2005. Date of offense of that was 11/26/04.
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> . . . .
>
> In 18 CRS 159, as to habitual felon, completed on January 18th of 2018. Defendant was convicted on December 10th of 1997 of felony larceny in File Number 97 CRS 23344, date of offense being on 5/26, 1997. The second offense being convicted on November 26th of 2004, a felony flee to elude arrest in File Number 4 CRS 57653. Date of . . . conviction would have been on May 4th of 2005, date of offense on November 26th of '04.
>
> And, finally, in felony forgery of an instrument in 07 CR 56348, conviction date of that of December 21st of 2007, date of occurrence of that of October 21st of 2007.
>
> In 18 CRS 153, as to habitual felon, the defendant having committed that offense on January 10th of 2018. He did commit felony larceny on May 26th of 1997, was convicted of same on December 10th of 1997 in the Superior Court of Henderson County. That on the date of offense of 11/26/04, he did commit that felony flee to elude arrest in File Number 4 CRS 57653, being convicted of same on May 4th of 2005

> in the Superior Court of Henderson County. And that on October 21st of 2007, as to felony forgery of an instrument, in 07 CR 56348, being convicted of same on December 21st of 2007, in the District Court of Henderson County.
>
> Finally, in 18 CRS 156 as to habitual felon, the defendant did commit this offense on January 10th of 2018, in that he did commit the crime of felony larceny on May 26, 1997, in File Number 97 CRS 23344, being convicted of the same on December 10th of 1997, in the Superior Court of Henderson County. That on November 26, 2004, he did commit the crime of felony flee to elude arrest in File Number 04 CRS 57653, being convicted of same on May 4th of 2005 in the Superior Court of Henderson County. And that on August 18th of 2013, did commit the offense of felony larceny of a motor vehicle in 13 CR 59399, being convicted of same on November 13, 2013, in the District Court of Buncombe County.

Based on the record and factual presentation, the trial court found that there was a factual basis for defendant's guilty plea. The trial court asked defendant if there was anything he would like to say about the factual basis; defendant responded, "No, sir. That covers it." The trial court sentenced defendant to an active sentence of 117 to 153 months imprisonment.

Defendant filed a written notice of appeal *pro se* on 31 January 2024. Defendant additionally filed a petition for writ of certiorari on 23 September 2024.

II. Discussion

Defendant contends the trial court erred in accepting his guilty plea where the State "merely read the indictments" as its presentation of the factual basis. We first address defendant's petition for writ of certiorari.

A. Petition for Writ of Certiorari

A criminal defendant's notice of appeal must comply with Rule 4 for this Court to have jurisdiction over a defendant's appeal. *State v. Hughes*, 210 N.C. App. 482, 484 (2011). When considering a defective notice of appeal,

> The writ of certiorari may be issued in appropriate circumstances by either appellate court to permit review of the judgments and orders of trial tribunals when the right

> to prosecute an appeal has been lost by failure to take timely action, or when no right of appeal from an interlocutory order exists, or for review pursuant to N.C.G.S. § 15A-1422(c)(3) of an order of the trial court ruling on a motion for appropriate relief.

N.C. R. App. P. 21(a)(1).

"The Court of Appeals has jurisdiction . . . to issue the prerogative writs, including . . . certiorari, . . . in aid of its own jurisdiction[.]" N.C.G.S. § 7A-32(c) (2024). "This statute empowers the Court of Appeals to review trial court rulings on motions for appropriate relief by writ of certiorari unless some other statute restricts the jurisdiction that subsection 7A-32(c) grants." *State v. Thomsen*, 369 N.C. 22, 25 (2016) (citing *State v. Stubbs*, 368 N.C. 40, 42–43 (2015)). "The practice and procedure shall be as provided by statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of the common law." N.C.G.S. § 7A-32(c).

Certiorari is a discretionary writ which may "be issued only for good or sufficient cause shown," and must "show merit or that [petitioner] has reasonable grounds for asking that the case be brought up and reviewed on appeal." *In re Snelgrove*, 208 N.C. 670, 671–72 (1935) (citation omitted). Additionally, a writ of certiorari "should issue only if there are 'extraordinary circumstances' to justify it." *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572 (2023) (quoting *Moore v. Moody*, 304 N.C. 719, 720 (1982)). "There is no fixed list of 'extraordinary circumstances' that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or 'wide-reaching issues of justice and liberty at stake.' " *Id.* at 573 (citation omitted).

Although our Courts have not specifically defined what is required to show extraordinary circumstances, substantial harm may be shown where "the fundamental rights of a [party] are at stake" in the balance of the appeal. *See In re S.D.H.*, 908 S.E.2d 868, 875 (N.C. Ct. App. 2024) ("Further, the gravity of such error, where the fundamental rights of a parent are at stake, could result in substantial harm to both Respondent-Father and the Juveniles."). An assessment of judicial economy and efficient use of judicial resources may include considering "the need for the trial court to have to consider a subsequent motion for appropriate relief or ineffective assistance of counsel." *See State v. Ore*, 283 N.C. App. 524, 535 (Dillon, J., concurring), *vacated in part*, 383 N.C. 676, 678 (2022) ("The concurring opinions in the Court of

Appeals [regarding certiorari] . . . accurately reflect the law.").[3] Wide-reaching issues of justice and liberty at stake may include allegations of "serious misconduct and abuse of power by the government in violation of both the U.S. Constitution and our State's common law." *Doe v. City of Charlotte*, 273 N.C. App. 10, 23 (2020); *see also State v. Hamrick*, 110 N.C. App. 60, 63 (1993) ("Nonetheless, because of the important issues raised by this appeal, we allow defendant's petition for writ of certiorari[.]").

"A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would render meaningless the rules governing the time and manner of noticing appeals." *State v. Ricks*, 378 N.C. 737, 741 (2021) (cleaned up). "Ultimately, the decision to issue a writ of certiorari rests in the sound discretion of the presiding court[,]" and such decision is reviewed solely for abuse of discretion. *Cryan*, 384 N.C. at 573 (citing *Ricks*, 378 N.C. at 740).

In *State v. Killette*, this Court determined the defendant's petition showed "no basis to grant his requested discretionary writ[,]" where the defendant filed a pro se handwritten notice of appeal which failed to identify this Court or properly notice the State. 268 N.C. App. 254, 258 (2019) ("The fact this Court possesses the jurisdictional power to allow in our discretion, does not compel us to do so under Defendant's burden to show prejudicial reversible error and the clearly unmeritorious facts before us."), *vacated and remanded*, 381 N.C. 686 (2022). The Supreme Court overruled *Killette* and several other Court of Appeals decisions which held or implied that this Court lacked jurisdiction or authority to issue a writ of certiorari or which suggested "that Rule 21 limited its jurisdiction or authority to do so."[4] *State v. Killette*, 381 N.C. 686, 691 (2022). The Supreme Court emphasized that the Court of Appeals erred in "concluding it is procedurally barred from exercising its jurisdiction"

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3. Judge Dillon further noted that "it is not uncommon for our Court to issue a writ in order to review a defendant's appeal where there is a jurisdictional defect in his or her notice of appeal, where the State has not been prejudiced by the defect, *even where said defendant's appeal has little, if any merit*." *Ore*, 283 N.C. App. at 535 (Dillon, J., concurring) (emphasis in original).

4. The Supreme Court agreed with the State's brief, which acknowledged the Supreme Court had "made clear in *Stubbs*, *Thomsen*, and *Ledbetter* that the Court of Appeals 'maintains broad jurisdiction to issue writs of certiorari unless a more specific statute revokes or limits that jurisdiction' and that 'Rule 21 does not prevent the Court of Appeals from issuing writs of certiorari or have any bearing upon the decision as to whether a writ of certiorari should be issued.' "

and by setting "its own limitations on its jurisdiction to issue writs of certiorari." *Id.* at 690 (quoting *State v. Ledbetter*, 371 N.C. 192, 196 (2018)).

We further note that this Court has permitted review of appeals where it could be "fairly inferred that Defendant intended to appeal to this Court" and where the State has not been misled by this deficiency. *See State v. Rankin*, 257 N.C. App. 354, 356 (holding that "failure to designate this Court in her notice of appeal does not warrant dismissal" and denying petition for writ of certiorari as moot), *writ allowed*, 370 N.C. 570 (2018), and *aff'd*, 371 N.C. 885 (2018). Similarly, this Court has granted petitions for writ of certiorari where petitioners demonstrated good faith efforts in making a timely appeal and because the appeal had merit. *State v. Myrick*, 277 N.C. App. 112, 114 (2021).

Defendant dated his written notice of appeal 31 January 2024 and filed on 8 February 2024, which was timely. The notice contained file numbers "23 CRS 41-44," and stated that defendant was appealing "Judgment entered against the defendant in Superior Court finding the defendant guilty of Common Law Robbery etc. and Sentencing under habitual felon statute on 1-30-24." The record includes a letter directing the Clerk of Superior Court to "transmit [the notice of appeal] to [the] Court of Appeals[,]" however there is no indication that notice was served upon the State.

Defendant's notice of appeal does not include all of the file numbers from his underlying cases, does not state the court to which the appeal was being taken, and does not appear to have been served on the State. However, the pro se written notice of appeal was timely filed, listed some of the file numbers including the lead charge of common law robbery, and the supplemental cover letter did direct the Clerk to transmit the notice to this Court. It does not appear that the State has suffered any prejudice by not being served with the original written notice of appeal.

Defendant's petition for writ of certiorari alleges the prosecutor misspoke several times during the factual basis with differences from the indictments, which is a sufficient showing of meritorious issue for review on appeal. Furthermore, in the interest of judicial economy, considering and resolving the issues presented in this case eliminates the potential need for the trial court to consider any subsequent motions or further proceedings in this matter. Although defendant's notice of appeal does not comply with Rule 4, defendant demonstrated a good faith effort to appeal his case to this Court, and we exercise our discretion under Rule 21 to address the merits of defendant's appeal.

The dissent characterizes this discretionary decision as following a per se rule to issue writ where a criminal defendant fails to properly notice an appeal despite making a good faith effort to do so. "Our Court does not always allow such writs, especially where the issues raised have little merit. But we might choose to do so" in appropriate circumstances, including in the interest of judicial economy. *Ore*, 283 N.C. App. at 535 (Dillon, J., concurring).

> Our Supreme Court in *Stubbs* recognized that our Court has been granted the authority by our General Assembly to issue a writ of certiorari to review an order in a situation where our General Assembly provided the party no *right* to appeal. Just like in *Stubbs*, the fact that the General Assembly has expressly stated that the defendant here has *no right* to appeal does not strip *our Court* of our authority to issue a writ of certiorari, which was granted to us by the General Assembly.

Id. at 536 (Dillon, J., concurring) (cleaned up).

The dissent relies on *Cryan*, which directs that "a writ of certiorari should issue only if the petitioner can show merit or that error was probably committed below." *Cryan*, 384 N.C. at 572. However, *Cryan* also reaffirms that the decision to issue writ "rests in the sound discretion of the presiding court[,]" and notably affirmed this Court's decision to issue writ of certiorari in that matter. *Id.* at 573. Furthermore, our Supreme Court affirmed this Court's "authority to review [the] issue by certiorari," in *State v. Ore* in accordance with the concurring opinions. *State v. Ore*, 383 N.C. 676 (2022); *see also Killette*, 381 N.C. at 690 ("the Court of Appeals possessed jurisdiction and authority to exercise its discretion in reviewing and deciding to allow or deny defendant's petition."). We do not establish a per se rule that any good faith effort may be rewarded by issuance of writ following a defective appeal; we simply exercise our discretion to address the merits of this case.

B. Factual Basis

Defendant contends there was an insufficient factual basis for the trial court to accept his guilty plea, arguing the prosecutor's recitation only consisted of him reading allegations from the indictments, with incomplete or incorrect recitations on four of the charges. We disagree.

"Because a guilty plea waives certain fundamental constitutional rights such as the right to a trial by jury, our legislature has enacted laws

to ensure guilty pleas are informed and voluntary." *State v. Agnew*, 361 N.C. 333, 335 (2007).

> The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:
>
> (1) A statement of the facts by the prosecutor.
>
> (2) A written statement of the defendant.
>
> (3) An examination of the presentence report.
>
> (4) Sworn testimony, which may include reliable hearsay.
>
> (5) A statement of facts by the defense counsel.

N.C.G.S. § 15A-1022(c) (2024).

The trial court "may consider any information properly brought [its] attention[,] [but] such information must appear in the record, so that an appellate court can determine whether the plea has been properly accepted." *Agnew*, 361 N.C. at 336, (citations and interior quotations omitted). Further, in enumerating these five sources, the statute "contemplate[s] that some substantive material independent of the plea itself appear of record which tends to show that defendant is, in fact, guilty." *Id.* (citing *State v. Sinclair*, 301 N.C. 193, 199 (1980)). Additionally, this Court has held that indictments providing significant factual details beyond the charge alleged contained enough information for an independent judicial determination of defendant's guilt. *State v. Crawford*, 278 N.C. App. 104, 118 (2021).

In *Agnew*, there was an insufficient factual basis to accept a defendant's guilty plea when "the trial court had before it the indictment, defendant's Transcript of Plea, and defense counsel's oral stipulation that a factual basis existed." 361 N.C. at 336. "[T]he indictment simply stated the charge and did not provide any further factual description of defendant's particular alleged conduct." *Id.* Thus, the trial court had insufficient information to make "an independent judicial determination of defendant's actual guilt[.]" *Id.* In *Crawford*, however, the indictment provided a "factual description of defendant's particular alleged conduct[,]" including the year, make, and model of a stolen vehicle and the names of the rightful owners. *Crawford*, 278 N.C. App. at 118.

In this case, for defendant's non-habitual felon charges, including financial card theft and larceny of a motor vehicle, the prosecutor recited specific information, such as a description of the item that was stolen, the name of the rightful owner, the dates that defendant committed the

offenses, and addresses of buildings broken into. Although much of the prosecutor's recitations were taken from the indictments, the factual details go beyond the charge alleged and were sufficient to show independent of the plea that defendant was guilty.

Defendant asserts the trial court erred in accepting recitations that were incomplete or incorrect, specifically as to 21 CRS 347, 18 CRS 159, 18 CRS 153, and 18 CRS 156.[5] Although it appears the prosecutor made several minor misstatements, we decline to find the trial court erred because all of the necessary information for the factual bases was presented at some point during the recitations.

In the factual basis for 21 CRS 347, the prosecutor did not state the counties of conviction for two of the three underlying offenses. However, the prosecutor had already recited the counties of conviction for those underlying offenses in the factual basis for 23 CRS 41. Similarly, in 18 CRS 159, the prosecutor failed to specify the courts of conviction for the underlying offenses; however, those were the same underlying offenses as in 18 CRS 153 and 18 CRS 156, and the prosecutor recited the courts of conviction for each offense during the factual basis for 18 CRS 153. In 18 CRS 153, although the prosecutor did not recite a file number for the first felony in the habitual felon indictment, the prosecutor had already stated the file number for that offense in previous factual bases. And finally regarding 18 CRS 156, although the prosecutor misstated that felony forgery was the underlying offense and not felony larceny of a motor vehicle, the trial court had heard the correct statement of the underlying felony in the immediately preceding recitation for 18 CRS 153. Accordingly, the trial court had enough information to determine there was a sufficient factual basis to support the charges.

Although several of the prosecutor's statements included minor inaccuracies or omissions, the trial court was presented with all of the necessary information throughout the factual presentations, several of which related to each other as underlying offenses. The factual basis was sufficient for the trial court to make an independent judicial determination of defendant's guilt. Furthermore, defendant has not shown that he was prejudiced by the prosecutor's misstatements and omissions, and offered no facts to show that he would have pled otherwise.

III. Conclusion

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

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5. We address the recitations in the order they were presented to the trial court.

AFFIRMED.

Judge STROUD concurs.

Judge FREEMAN concurs in part and dissents in part by separate opinion.

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

I concur with the majority's reasoning and conclusion as to the merits of the case. However, the majority correctly notes that because defendant failed to properly notice his appeal, this Court may only obtain jurisdiction over defendant's purported appeal by issuing a writ of certiorari. A writ of certiorari "is not intended as a substitute for a notice of appeal," *State v. Ricks*, 378 N.C. 737, 741 (2021), and "should issue *only* if the petitioner can show merit . . . [and] extraordinary circumstances to justify it." *Cryan v. Nat'l Council of Young Men's Christian Ass'ns of U.S.*, 384 N.C. 569, 572–73 (2023) (cleaned up). As defendant's petition fails to show extraordinary circumstances justifying issuance of the writ, I would deny defendant's petition and dismiss this appeal. Because I would not reach the merits of this case, I respectfully dissent from the majority's decision to grant defendant's petition for writ of certiorari.

Our Supreme Court recently stated:

> The procedure governing writs of certiorari is found in Rule 21 of the Rules of Appellate Procedure. But Rule 21 does not prevent the court of appeals from issuing writs or have any bearing upon the decision as to whether a writ of certiorari should be issued. Instead, the decision to issue a writ is governed solely by statute any by common law.

Cryan, 384 N.C. at 572 (cleaned up).

Our General Assembly has provided that this Court may issue the writ of certiorari subject to "statute or rule of the Supreme Court, or, in the absence of statute or rule, according to the practice and procedure of common law." N.C.G.S. § 7A-32(c) (2023). Though we may exercise our discretion in granting the writ of certiorari, it is "to be issued only for good or sufficient cause shown, and it is not one to which the moving party is entitled to as a matter of right." *Womble v. Moncure Mill & Gin Co.*, 194 N.C. 577, 579 (1927). "A writ of certiorari is not intended as a substitute for a notice of appeal because such a practice would

render meaningless the rules governing the time and manner of noticing appeals." *Ricks*, 378 N.C. at 741 (citations omitted).

Thus, to determine whether this Court should issue the writ of certiorari, we must apply the following two-factor test:

> First, a writ of certiorari should issue *only* if the petitioner can show merit or that error was probably committed below. This step weighs the likelihood that there was some error of law in the case.
>
> Second, a writ of certiorari should issue *only* if there are extraordinary circumstances to justify it. We require extraordinary circumstances because a writ of certiorari is not intended as a substitute for notice of appeal. If court issued writs of certiorari solely on the showing of some error below, it would render meaningless the rules governing the time and manner of noticing appeals.
>
> There is no fixed list of extraordinary circumstances that warrant certiorari review, but this factor generally requires a showing of substantial harm, considerable waste of judicial resources, or wide-reaching issues of justice and liberty at stake.

Cryan, 384 N.C. at 572–73 (cleaned up) (emphasis added).

Here, defendant's petition for writ of certiorari fails to identify any extraordinary circumstances justifying issuance of the writ. Though I commend the majority for addressing whether defendant's petition shows merit, the majority nevertheless appears to fall back on a per se rule that the writ shall issue where a criminal defendant fails to properly notice an appeal despite his or her "good faith effort to appeal." Although I understand the temptation of this sympathetic approach, a "writ of certiorari is not intended as a substitute for a notice of appeal," *Ricks*, 378 N.C. at 741, nor is it a writ "to which the moving party is entitled to as a matter of right," *Womble*, 194 N.C. at 579. Neither our preferences nor our outdated caselaw trump current Supreme Court precedent. I therefore respectfully dissent from the majority's decision to reach the merits of defendant's asserted appeal.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 4 JUNE 2025)

CARLSON v. J.E. DUNN CONSTR. CO. No. 24-180	Mecklenburg (21CVS20535)	Affirmed
HORST v. ROBINSON No. 24-1026	Wake (24CV004000-910)	Dismissed
IN RE B.A.S. No. 24-954	Davie (22JB000062-290)	No prejudicial error.
IN RE K.J.B.L. No. 24-1040	Henderson (23JT000018-440)	Affirmed
IN RE L.D.E. No. 24-783	Cabarrus (24JA000042)	Vacated and Remanded
IN RE M.S. No. 24-570	Buncombe (19JA000165)	Affirmed
MOONEY v. N.C. DEP'T OF HEALTH & HUM. SERVS. No. 24-613	Transylvania (23CVS000222)	AFFIRMED; REMANDED FOR CORRECTION OF CLERICAL ERRORS.
STARLING v. STARLING No. 24-667	Orange (21CVD000974)	Affirmed
STATE v. BLISS No. 24-92	Buncombe (21CRS90691) (21CRS90695)	No Error
STATE v. ELLIS No. 24-806	Randolph (21CRS053240)	No Error.
STATE v. GRAY No. 24-389	Mecklenburg (18CRS238325) (20CRS15595-97)	No Error
STATE v. HAHN No. 24-424	Buncombe (21CRS89660-64)	Dismissed
STATE v. HARKEY No. 23-811	Cabarrus (19CRS53376)	New Trial
STATE v. HATLEY No. 24-612	Rowan (21CRS051631) (21CRS051632)	No Error

STATE v. KELLY No. 24-313	Cabarrus (20CRS51099) (21CRS50005-6) (22CRS693)	No Error in Part; No Plain Error in Part
STATE v. LEOPARD No. 24-244	Stanly (21CRS265) (21CRS268-69)	No Error
STATE v. WHITE No. 24-534	Iredell (20CR053638-480) (20CR054286-480)	Dismissed

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