300 N.C. App.—No. 2 Pages 126-241

ADVANCE SHEETS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

APRIL 9, 2026

MAILING ADDRESS: The Judicial Department
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OF

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[1] Died 18 November 2025.

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COURT OF APPEALS

CASES REPORTED

FILED 6 AUGUST 2025

CASES REPORTED WITHOUT PUBLISHED OPINIONS

HEADNOTE INDEX

APPEAL AND ERROR

Petition for writ of certiorari—denied as unnecessary—Civil Procedure Rules 59 and 60—motions withdrawn—notice of appeal timely—Where plaintiff filed motions pursuant to Civil Procedure Rules 59 and 60 following the trial court's entry of an order modifying child custody, defendant filed a notice of appeal from the modification order within 30 days of its entry, and plaintiff subsequently withdrew his Rule 59 and Rule 60 motions, defendant's petition for writ of certiorari—filed with the appellate court out of an abundance of caution—was denied as unnecessary because her notice of appeal was timely. **Sinnett v. Sinnett, 141.**

Preservation of issues—jury instructions in criminal prosecution—failure to object at trial—failure to allege plain error—In a prosecution for discharging a firearm into an occupied dwelling, defendant failed to preserve for appellate review his argument challenging the propriety of the trial court's jury instructions—specifically, questioning whether the instructions created a substantial possibility that defendant was convicted without proof of an essential element of the offense—where, at trial, defendant neither objected to the trial court's jury instructions nor requested any special instructions despite the trial court's explicit inquiry—directed at defense counsel—if any such instructions were desired. Additionally, defendant failed to specifically and distinctly allege on appeal that the trial court had committed plain error. **State v. Leopard, 199.**

Preservation of issues—partial denial of motion to suppress—notice of intent to appeal—given before guilty plea negotiations finalized—In a prosecution for charges of trafficking in fentanyl and possession of a firearm by a felon, where defendant decided to plead guilty in an *Alford* plea shortly after his jury trial

had begun, defendant preserved for appellate review his argument challenging the trial court's order partially denying his motion to suppress evidence seized from his house, where the plea transcript—which was signed by the prosecutor and the trial judge—showed that defendant expressly reserved his right to appeal the order. Since defendant's appeal did not challenge the presentation of the seized evidence to the jury, defendant's failure to object to the evidence's admission at trial was not a failure to preserve his argument regarding the suppression issue; rather, it was sufficient that defendant filed a timely motion to suppress and notified the State and the trial court of his intention to appeal its denial before plea negotiations were finalized. **State v. Stevens, 208.**

Preservation of issues—self-defense instruction—invited error—waiver—In a prosecution for attempted first-degree murder and related charges arising from a shooting incident, defendant's argument that the trial court erred by instructing the jury on self-defense—which defendant contended constituted an improper opinion by the trial court—was not preserved for appeal. Since defense counsel did not object to the self-defense instruction as given despite having multiple opportunities to do so, the issue was waived; any error was invited because defense counsel repeatedly affirmed his satisfaction with the jury instructions. **State v. Jenkins, 168.**

Untimely notice of appeal—postal service failure—certiorari granted—In a civil action arising from a home sale, where plaintiffs lost their right to appeal through no fault of their own—their notice of appeal was not timely filed as required by Appellate Rule 3 because of a delivery failure by the U.S. Postal Service—but demonstrated a clear intent to appeal the trial court's order granting defendants' motion for summary judgment, the appellate court granted plaintiffs' petition for writ of certiorari to review the merits of plaintiffs' appeal. **Eberhardt v. Meletich, 126.**

ASSAULT

With a deadly weapon inflicting serious injury—lesser-included offense of misdemeanor assault—jury instruction—not warranted—In a prosecution for felonious assault with a deadly weapon inflicting serious injury—arising from defendant stabbing another man twice in the back, once under the arm, and once in the stomach—the trial court properly refused defendant's request to instruct the jury on the lesser included offense of misdemeanor assault with a deadly weapon (and instead gave a peremptory instruction that the stab wounds were serious injuries per se) where there was no evidence that would have supported a determination by the jury that the victim's injuries from the stabbings were not serious. Specifically, the evidence tended to show that the victim was hospitalized for three months due to his injuries, was initially placed in the intensive care unit, and required a breathing tube for a period of that time. **State v. Wagner, 225.**

CHILD CUSTODY AND SUPPORT

Custody modification order—proper standard for modification employed—no special wording required—In a child custody modification order, the trial court's use of the phrases "there have been substantial changes that have occurred that affect the best interest of the minor children" and "the above changes are substantial and have affected the minor children's best interest" did not reflect an improper blurring of the standard for modification of child custody: a determination whether a substantial change in circumstances that affects the children had occurred and, if so, whether a modification of custody would be in the children's

best interest. The findings of fact and conclusions of law, read as a whole, showed that the trial court applied the proper standard; no special wording or language was required. **Sinnett v. Sinnett, 141.**

Custody modification—constitutional right to freedom of religion—argument regarding religious or spiritual questions waived—modification not based on religious preference—In a child custody modification proceeding in which plaintiff contended that defendant had converted from Christianity to Buddhism (which defendant denied), defendant waived her appellate arguments regarding questions she was asked about her religious and spiritual beliefs and practices where she did not object or raise the issue of her constitutionally protected rights to religious freedom at trial. Defendant's preserved argument—that the modification order demonstrated a preference for one religion over another—was overruled where: (1) the trial court found that defendant remained a Christian; (2) the findings of fact defendant characterized as touching on her religious beliefs were actually focused on the effect her actions had on the children's health and wellbeing (for example, that defendant's discussions about animal welfare were not age-appropriate and caused some "push back" by the children about eating meat when at plaintiff's home); and (3) while the trial court directed the parties to consult each other about major decisions regarding the children, defendant retained final decision-making authority. **Sinnett v. Sinnett, 141.**

Custody modification—substantial change in circumstances—findings about beneficial changes—conclusion supported—In a child custody modification proceeding, findings of fact made by the trial court about beneficial changed circumstances—such as the children's positive relationship with plaintiff's new wife, the ability of the children to attend a private school where the new wife worked (and where the children were thriving academically) at a reduced cost, and alterations to plaintiff's work schedule that permitted him to spend more time with the children—supported its conclusion of law that a substantial change in circumstances had occurred and warranted a modification of child custody. **Sinnett v. Sinnett, 141.**

Custody modification—substantial change in circumstances—findings of fact sufficient—In a child custody modification proceeding, the trial court made sufficient findings of fact regarding changed circumstances (since a previous consent custody order was entered) and their impacts on the children—including the re-marriage of one parent and a new relationship for the other, resulting in friction between defendant and plaintiff's new wife; the movement of the children to a new school; alterations to plaintiff's work schedule; and defendant's discussions about reincarnation and Buddhist principles with the children—to support its conclusion of law that substantial changed circumstances existed and warranted a modification of child custody. **Sinnett v. Sinnett, 141.**

CRIMINAL LAW

Defenses—justification—possession of a firearm by a felon—no entitlement to jury instruction—The trial court properly refused to instruct the jury on the affirmative defense of justification to the offense of possession of a firearm by a felon where the evidence at trial did not establish the first of four factors required to entitle defendant to such an instruction: that defendant was under imminent and impending threat of death or serious bodily injury at the time he took possession of the firearm. To the contrary, the evidence tended to show that defendant possessed the gun with which he killed a man during an altercation well before the fight took

EVIDENCE

Alleged hearsay character evidence—erroneously admitted witness credibility evidence—no cumulative error shown—In a trial that resulted in convictions on charges of first-degree murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury (arising from the attempted robbery of a convenience store by defendant and two others), the overwhelming evidence supporting defendant's convictions overshadowed any testimony that was or may have been improperly admitted; accordingly, defendant's argument that he was entitled to a new trial based on cumulative errors was rejected. **State v. Jones, 186.**

Asking witness whether he testified truthfully—error—prejudice not shown—In a trial that resulted in convictions on charges of first-degree murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury (arising from the attempted robbery of a convenience store by defendant and two others), the trial court erred in allowing a witness—another perpetrator who was the only other person present when the fatal shooting occurred—to answer the prosecutor's question at the end of direct examination about whether he had testified truthfully; such an inquiry invaded the jury's province as the sole judge of witness credibility. However, defendant could not demonstrate a reasonable possibility that, had the error not occurred, the jury would have reached different verdicts where, although there was no physical evidence about which perpetrator shot the victim: (1) the trial court correctly instructed the jury that it could find defendant guilty of any crime committed by another in the common purpose of robbing the store with a firearm; and (2) regardless of who shot the victim, overwhelming evidence showed that defendant and the witness planned to commit robbery at gunpoint and that shooting into the victim's car was done in furtherance of that common purpose. **State v. Jones, 186.**

Hearsay—defendant's character—prejudice not shown—no plain error—ineffective assistance of counsel claim dismissed—In a trial that resulted in convictions on charges of first-degree murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury (arising from the attempted robbery of a convenience store by defendant and two others), defendant failed to show that the jury's verdicts would have been different but for the admission of excerpts from a pretrial statement by defendant's cousin (to which defendant did not object at trial)—that defendant was a "lowlife" who had been arrested for fighting and who was part of a group that robbed people—where the cousin had already offered unchallenged testimony to the same effect. Defendant's related ineffective assistance of counsel claim could not be resolved on the cold record; therefore, it was dismissed without prejudice. **State v. Jones, 186.**

FIREARMS AND OTHER WEAPONS

Discharging a firearm into an occupied dwelling—multiple offenses—sufficiency of evidence—four bullets fired—In a prosecution for four separate counts of discharging a firearm into an occupied dwelling, where, about an hour after calling the police to complain about his neighbor and a friend shooting targets on the neighbor's property, defendant fired four bullets into the neighbor's home, the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence. Specifically, the court did not engage in improper "judicial fact-finding" by submitting all four charges to the jury, since there was sufficient evidence—including bullet holes in the neighbor's home, shell casings recovered from the scene,

and testimony from eyewitnesses and experts—to support four separate offenses. Importantly, it was undisputed that defendant shot into his neighbor's home using a semi-automatic weapon, which required one trigger pull per shot, and therefore each of the four shots he fired was a distinct and separate act. **State v. Leopard, 199.**

Discharging a firearm into an occupied dwelling—sufficiency of evidence—knowledge that dwelling was occupied—In a prosecution for discharging a firearm into an occupied dwelling, where, about an hour after calling the police to complain about his neighbor and a friend shooting targets on the neighbor's property, defendant fired four bullets into the neighbor's home, the trial court properly denied defendant's motion to dismiss because the State had presented substantial evidence of each essential element of the crime as defined in N.C.G.S. § 14-34.1(b). Contrary to defendant's argument on appeal, the statute did not require the State to prove that defendant had actual knowledge that his neighbor's home was occupied when he shot into it. Even so, the evidence at trial—including testimony that lights were on inside the neighbor's home and were visible from defendant's porch at the time of the shooting—showed that defendant had reasonable grounds to believe that his neighbor's home might have been occupied during the shooting. **State v. Leopard, 199.**

Discharging a firearm within occupied vehicle—firing gun from one car into another—statutory interpretation—In a prosecution for attempted first-degree murder and related charges arising from an incident in which defendant pulled his car next to the victim's and fired his gun into her car, the State presented substantial evidence to support each element of discharging a firearm within an occupied vehicle with intent to incite fear pursuant to N.C.G.S. § 14-34.10, where the statute's use of "within" did not require both the perpetrator and the victim to be in the same vehicle. Here, where defendant discharged his firearm from within his own vehicle, the State's evidence was sufficient to send the matter to the jury. **State v. Jenkins, 168.**

REAL PROPERTY

Home sale—mold discovered—broker's duty to disclose—no material misrepresentation or omission—In an action by plaintiffs arising from their discovery of mold after they purchased a house, the trial court did not err by granting summary judgment in favor of defendants (the seller's licensed real estate broker and the broker's employer) on plaintiffs' negligent misrepresentation and fraud claims because plaintiffs failed to proffer evidence demonstrating that defendants made a material misrepresentation or omission during the sale of the home. Defendant broker had no duty to disclose a prior repair that addressed a soft spot in the subfloor, which was fixed at the time of listing, or to disclose who had performed renovations on the house; even had there been a duty to disclose information about prior repairs, not only did plaintiffs fail to inquire about the numerous renovations set forth in the sales listing, but they also had their own independent inspection performed, which did not raise sufficient concerns to conduct additional inspection or to delay the closing. Further, contrary to plaintiffs' argument, the broker did not fail to disclose the presence of farm animals in the home based on one incident of the seller temporarily placing a box of chicks on the kitchen countertop. **Eberhardt v. Meletich, 126.**

ROBBERY

Robbery with a dangerous weapon—hammer—manner of use—The trial court properly denied defendant's motion to dismiss the charges of robbery with a dangerous weapon and conspiracy to commit the same offense where the State presented substantial evidence from which a jury could determine that defendant's use of a hammer constituted the use of a dangerous weapon. Defendant threatened the victim with a metal hammer while demanding money and, when the victim refused to give up his money, defendant hit the victim on the back of his head and neck, which knocked the victim to the ground and caused him to lose consciousness. The fact that the victim did not seek medical treatment after the attack was irrelevant for purposes of determining the motion to dismiss. **State v. Blackburn, 163.**

SEARCH AND SEIZURE

Probable cause—search warrant—supporting affidavit—sufficiency—In a prosecution for charges of trafficking in fentanyl and possession of a firearm by a felon, where, while attempting to arrest defendant for shooting into an occupied vehicle about eight days earlier, officers observed defendant leaving his house in a white SUV, the trial court properly denied the portion of defendant's motion seeking to suppress evidence (including multiple firearms and suspected narcotics) seized from his house pursuant to a search warrant, which was supported by an affidavit from a lead detective in the case. The affidavit included sufficient information showing probable cause to suspect that incriminating items would be found inside defendant's home, including that the detective: saw video footage of defendant kicking the door of the victim's house days before defendant's arrest; saw footage of defendant, a convicted felon, carrying what resembled a shotgun; interviewed the victim's wife, who was dating defendant and knew him to maintain firearms inside his home; and interviewed the victim, who gave a first-hand account of defendant shooting at him while driving the white SUV. Since the detective had investigated the case throughout the eight days following the shooting incident, the facts included in his affidavit were not too stale. Further, the affidavit sufficiently established that the victim and his wife were reliable informants by mentioning video footage, independent eyewitness testimony, and other evidence corroborating their testimonies. **State v. Stevens, 208.**

SENTENCING

Firearm conviction—other offenses with greater sentences for same conduct—judgment arrested—In a prosecution for multiple offenses arising from a shooting incident, where defendant was convicted of offenses carrying greater sentences for the same conduct than his conviction for discharging a firearm within an occupied vehicle to incite fear (pursuant to N.C.G.S. § 14-34.10, punishable as a Class F felon), the trial court erred by sentencing defendant for that firearm offense—and, since defendant was prejudiced, the issue was automatically preserved despite defendant's lack of objection. As a result of the error, the appellate court vacated defendant's sentence and remanded to the trial court with instructions to arrest judgment on the offense of discharging a firearm within an occupied vehicle and to resentence defendant consistent with the opinion. **State v. Jenkins, 168.**

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.

EBERHARDT v. MELETICH

[300 N.C. App. 126 (2025)]

JOSEPH EBERHARDT AND JORDYN EBERHARDT, PLAINTIFFS
v.
JESICA MELETICH, RHONDA REID, EMILY ALBERTSON, ANCHOR REAL ESTATE OF EASTERN NORTH CAROLINA, INC., AND HARRISON DORN INNOVATIVE PROPERTY SPECIALISTS, INC., DEFENDANTS

No. COA25-72

Filed 6 August 2025

1. Appeal and Error—untimely notice of appeal—postal service failure—certiorari granted

In a civil action arising from a home sale, where plaintiffs lost their right to appeal through no fault of their own—their notice of appeal was not timely filed as required by Appellate Rule 3 because of a delivery failure by the U.S. Postal Service—but demonstrated a clear intent to appeal the trial court's order granting defendants' motion for summary judgment, the appellate court granted plaintiffs' petition for writ of certiorari to review the merits of plaintiffs' appeal.

2. Real Property—home sale—mold discovered—broker's duty to disclose—no material misrepresentation or omission

In an action by plaintiffs arising from their discovery of mold after they purchased a house, the trial court did not err by granting summary judgment in favor of defendants (the seller's licensed real estate broker and the broker's employer) on plaintiffs' negligent misrepresentation and fraud claims because plaintiffs failed to proffer evidence demonstrating that defendants made a material misrepresentation or omission during the sale of the home. Defendant broker had no duty to disclose a prior repair that addressed a soft spot in the subfloor, which was fixed at the time of listing, or to disclose who had performed renovations on the house; even had there been a duty to disclose information about prior repairs, not only did plaintiffs fail to inquire about the numerous renovations set forth in the sales listing, but they also had their own independent inspection performed, which did not raise sufficient concerns to conduct additional inspection or to delay the closing. Further, contrary to plaintiffs' argument, the broker did not fail to disclose the presence of farm animals in the home based on one incident of the seller temporarily placing a box of chicks on the kitchen countertop.

Appeal by plaintiffs from order entered 16 July 2024 by Judge Ricardo Jensen in Onslow County Superior Court. Heard in the Court of Appeals 11 June 2025.

Agosta Law, PLLC, by Vincent J. Agosta, for Plaintiffs-Appellants.

Manning, Fulton & Skinner, P.A., by William C. Smith, Jr., and Lawrence D. Graham, Jr., for Defendants-Appellees Rhonda Reid and Harrison Dorn Innovative Property Specialists, Inc.

COLLINS, Judge.

This appeal arises out of the sale of a home. Plaintiffs Joseph and Jordyn Eberhardt appeal from the trial court's order granting Defendants Rhonda Reid and Harrison Dorn Innovative Property Specialists, Inc.'s motion for summary judgment. Plaintiffs argue that the trial court erred because Defendants made material omissions that influenced Plaintiffs' decision to purchase the home. For the following reasons, we affirm the trial court's order.

I. Background

Plaintiffs commenced this action on 11 July 2023 by filing a complaint against Defendants and several other parties. In their complaint, Plaintiffs brought the following claims against Defendants: negligence, negligent misrepresentation, fraud, fraud in the inducement, and fraud in the concealment. Defendants filed a motion for summary judgment on 10 June 2024. The record evidence, which includes pleadings, affidavits, depositions, answers to interrogatories, and other documentary evidence, tends to show the following:

Jesica Meletich was the owner of a home located in Jacksonville, North Carolina, from approximately July 2008 through October 2022. Meletich hired Reid, a licensed real estate broker working for Harrison Dorn, to assist Meletich in selling the home.

Reid saw the home for the first time on 15 May 2022. During this walk-through, Reid noticed "a soft spot in front of the front door." Reid told Meletich that the spot would have to be fixed and recommended that Meletich "call a flooring company." Reid stated that although sellers' agents "can't require sellers to perform inspections, [Reid] strongly recommended [Meletich] have the structure evaluated due to the soft spot in front of the door." Meletich told Reid that she would have her boyfriend inspect and repair the floor, stating that he "worked for a builder" and had "done that before."

Several months later, Meletich told Reid that various renovations had been performed on the home, including repairing the subfloor damage that had caused the soft spot on the floor. Reid visited the home and

noted that the spot in the floor "was no longer soft" and "was no longer giving way with [her] weight." At no point during the process of listing the home for sale did Reid ever see mold in the home, nor was she ever told by Meletich of any mold, water intrusion, defects, damage, or issues with the home that had not been repaired. On or about 9 September 2022, Reid posted online a listing for the home, which included a general description of the home and several photographs of both the interior and exterior of the home.

Plaintiffs, who were relocating to North Carolina from California, had contracted with Emily Albertson of Anchor Real Estate of Eastern North Carolina, Inc. to serve as their agent for the purchase of a house in North Carolina. Upon seeing the listing for Meletich's home, Albertson visited the home on Plaintiffs' behalf, as they were still living in California. Without having visited the home in person, Plaintiffs submitted a purchase offer. On or about 22 September 2022, Plaintiffs and Meletich executed a purchase agreement for the home.

A home inspection was conducted on Plaintiff's behalf on 30 September 2022. The inspection report revealed "[s]light sloping of the floor" likely due to a "past/present moisture intrusion condition where the subfloor absorbed and swelled from its original state." The inspection report recommended that Plaintiffs hire a qualified specialist to evaluate the crawlspace, areas with possible prior moisture stains, and sloped floors. The inspection report did not indicate the presence of mold in the home.

Plaintiffs and Meletich closed on the sale of the home on 21 October 2022. Plaintiffs visited the home in person for the first time the morning of the closing, at which time they did not discover anything that warranted delaying the sale. Approximately three days after closing, Plaintiffs discovered mold inside the home. Upon further investigation, Plaintiffs discovered mold under the kitchen floor, behind kitchen cabinets, inside the kitchen walls, under the bathroom floor, inside the primary bedroom closet, and under the laundry room floor.

In her affidavit, Meletich stated that she did not have any actual knowledge of the presence of mold in the home at any point during the time which she owned it, and therefore, she did not disclose the existence of mold to Defendants when she hired them as her agents. She also stated that she did not receive any notice from those conducting renovations on the home about a discovery or suspicion of mold.

Defendants submitted the affidavit of Christina Asbury, a licensed real estate broker with approximately twenty years of experience

as a licensed real estate agent in North Carolina. In her affidavit, Asbury stated,

> 10. I have reviewed the facts of this case, including the complaint and answer, applicable documents, and the deposition of Rhonda Reid, and I do not believe Rhonda Reid or her agency Harrison Dorn Innovative Property Specialists, Inc. has breached any duty owed to [Plaintiffs] in their service as listing/sellers agents in the transaction at issue.
>
> 11. Specifically, there is no duty by [Reid] to disclose to a buyer repairs successfully completed on the property she listed. In this case, she would have no duty to disclose that a soft spot in the floor had been repaired by replacing a plywood sheet or sheets in the mobile home. In fact, [Reid] has a fiduciary duty to her seller not to discourage potential buyers. Such a repair would not signify an increased likelihood of persisting water intrusion or mold.

(emphasis omitted).

On 16 July 2024, the trial court entered written orders granting Defendants' motion for summary judgment.[1] Plaintiffs appeal.

II. Discussion

A. Jurisdiction

[1] We first address our jurisdiction to hear this appeal.

In civil actions, a party generally must file a notice of appeal with the clerk of superior court and serve copies thereof upon all other parties within thirty days after entry of the judgment. N.C. R. App. P. 3. A writ of certiorari, however, "may be issued in appropriate circumstances . . . 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).

"[A] showing that the right of appeal has been lost through no fault of the petitioner [is] generally sufficient to support the issuance of a writ of certiorari." *In re Z.T.W.*, 238 N.C. App. 365, 368 (2014) (cleaned

1. Plaintiffs voluntarily dismissed with prejudice their claims against Albertson and Anchor Real Estate on 2 January 2024. Plaintiffs voluntarily dismissed with prejudice their claims against Meletich on 16 September 2024.

up). Moreover, this Court may issue a writ of certiorari for an untimely filing of a notice of appeal when there was a clear intent to appeal on behalf of the petitioner. *See*, *e.g.*, *State v. Loftis*, 264 N.C. App. 652, 655 (2019) ("Because [Petitioner's] actions indicate[d] an unmistakable intent to appeal [w]hat was lost solely because of the failure to timely act, we exercise our discretion and allow the petition for a writ of certiorari.") (citation omitted).

Here, the order granting Defendants' motion for summary judgment was reduced to writing on 10 July 2024 and filed on 16 July 2024. Plaintiffs delivered their notice of appeal to the US Postal Service on 9 August 2024 to be sent to and filed with the Onslow County clerk. The Postal Service, however, sent the notice of appeal to the wrong address. Upon realizing this, Plaintiffs sent another notice of appeal that was time stamped and filed on 16 August 2024, thirty-one days after entry of the summary judgment order. Plaintiffs' original notice of appeal was not filed until 20 August 2024.

The Postal Service has since confirmed that the given address on Plaintiffs' original notice of appeal was correct, and "the incorrect delivery was solely and exclusively the fault of the United States Postal Service." Additionally, copies of Plaintiffs' notice of appeal were delivered to the opposing parties on 9 August 2024, sufficiently providing them with notice of Plaintiffs' clear intent to appeal. Accordingly, as the untimely nature of Plaintiffs' appeal occurred through no fault of their own, and Plaintiffs demonstrated a clear intent to appeal the trial court's order, we grant Plaintiffs' petition and proceed to the merits of their appeal.

B. Analysis

[2] Plaintiffs argue that the trial court erred by granting Defendants' motion for summary judgment on Plaintiffs' claims for negligent misrepresentation and fraud[2] "because there are disputed material facts."

Summary judgment shall be granted when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

2. Although the original complaint alleged various causes of action against Defendants including negligence, negligent misrepresentation, fraud, fraud in the inducement, and fraud in the concealment, Plaintiffs did not brief the negligence, fraud in the inducement, and fraud in the concealment claims before this Court and thereby abandoned them. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Accordingly, our analysis narrows to whether summary judgment was proper on Plaintiffs' negligent misrepresentation and fraud claims.

material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). An issue is genuine if "it is supported by substantial evidence," and an issue is material if "the facts alleged would constitute a legal defense, or would affect the result of the action, or if its resolution would prevent the party against whom it is resolved from prevailing in the action." *DeWitt v. Eveready Battery Co.*, 355 N.C. 672, 681 (2002) (citations omitted).

"In evaluating the appropriateness of a trial court's decision to grant or deny a summary judgment motion in a particular case, we view the pleadings and all other evidence in the record in the light most favorable to the nonmovant and draw all reasonable inferences in that party's favor." *Cummings v. Carroll*, 379 N.C. 347, 358 (2021) (quotation marks and citation omitted). Upon a motion for summary judgment,

> an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

N.C. Gen. Stat. § 1A-1, Rule 56(e) (2023). Therefore, to survive a summary judgment motion, the burden is on the party opposing the motion to present some evidence beyond the mere allegations in the pleadings establishing a genuine issue of material fact. *Id.*

"The tort of negligent misrepresentation occurs when a party justifiably relies to his detriment on information prepared without reasonable care by one who owed the relying party a duty of care." *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988) (citations omitted). "[W]hether liability accrues is highly fact-dependent, with the question of whether a duty is owed a particular plaintiff being of paramount importance." *Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 220 (1999) (citation omitted). As such, summary judgment should only be granted when "the evidence is free of material conflict, and the only reasonable inference that can be drawn therefrom is that there was no negligence on the part of defendant, or that his negligence was not the proximate cause of the injury." *Id.* (citation omitted).

The elements of fraud are well established: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Forbis v. Neal*, 361 N.C.

519, 526-27 (2007) (citation omitted). "A claim for fraud may be based on an affirmative misrepresentation of a material fact, or a failure to disclose a material fact relating to a transaction which the parties had a duty to disclose." *Hardin v. KCS Int'l, Inc.*, 199 N.C. App. 687, 696 (2009) (quotation marks and citation omitted).

Generally, a duty to disclose arises where "there is no fiduciary relationship and one party has knowledge of a latent defect in the subject matter of the negotiations about which the other party is both ignorant and unable to discover through reasonable diligence." *Id.* (quotation marks and citation omitted). Specifically, a real estate broker has a duty to disclose "all material facts that he or she knows to the potential buyer, with such 'material facts' including those that an agent knows or should know would reasonably affect the purchaser's judgment." *Cummings*, 379 N.C. at 364 (cleaned up). No fiduciary relationship exists between a seller's agent and a buyer in a sale for real estate. *See Greene v. Rogers Realty & Auction Co.*, 159 N.C. App. 665, 668-69 (2003). Moreover, a defendant can "not, of course, be liable for concealing a fact of which it was unaware." *Ramsey v. Keever's Used Cars*, 92 N.C. App. 187, 190 (1988).

Here, Plaintiffs contend that Defendants negligently and fraudulently failed to disclose the following "material facts": (1) "that there were defects in the subfloor," (2) that "farm animals" were present in the home, and (3) "that the entirety of the renovations lauded by [] Reid on the listing were conducted by individuals not qualified to make such repairs." Plaintiffs argue that these are material facts that, if known by them, would have influenced their decision to purchase the home.

First, Plaintiffs have failed to show that Reid knew of "defects in the subfloor." The evidence shows that the only defect in the subfloor Reid was aware of was a "soft spot" on a sheet of plywood on the floor. Reid discovered this during her first walk-through of the home and promptly recommended that Meletich consult a flooring company to have the spot fixed. Moreover, several months later, Meletich assured Reid that the spot had been fixed, and Reid visited the home and confirmed that there was no longer a soft spot in the floor. Therefore, at the time she listed the home for sale, Reid had no knowledge of "defects in the subfloor," and she was under no duty to disclose the former repairs to the subfloor to Plaintiffs, the potential buyers.

Second, Plaintiffs have failed to show that Reid's knowledge of "farm animals" in the home is a material fact that would have impacted Plaintiffs' decision to purchase the home. When Reid visited the home for the first time, she saw a box of baby chicks on a countertop in the

kitchen. Meletich informed Reid that the chicks were in the kitchen temporarily and were soon going to be moved outside. Reid had no knowledge of any other animals, with the exception of dogs, being present in the home, nor did she have any knowledge of the baby chicks—even assuming they are "farm animals"—causing damage to the home. Plaintiffs have therefore failed to show that the box of baby chicks temporarily sitting on a kitchen countertop constitutes a fact "that an agent knows or should know would reasonably affect the purchaser's judgment." *Cummings*, 379 N.C. at 364 (cleaned up).

Finally, the online listing created by Reid stated that renovations to the home had been completed, including "new flooring, new paint, new bathroom sinks, new kitchen [] counter-tops and backsplash complete with a new [] sink and new faucet[.]" Plaintiffs presented no evidence, other than their mere allegations, tending to show that any of these renovations required a permit or must have been completed by "qualified" individuals. Furthermore, Plaintiffs did not inquire into who had completed the renovations or whether such renovations had been completed properly. Defendants, on the other hand, presented evidence in the form of Asbury's affidavit demonstrating that "[t]he work done to the house for the renovations that [Reid] was aware of or listed in the [listing] for the [home] would not require a building permit from Jacksonville or Onslow County, or require a licensed contractor."

Even if Reid had been under a duty to disclose to Plaintiffs who had performed the renovations, Plaintiffs have failed to demonstrate that such a disclosure would have impacted their decision to purchase the home. Plaintiffs admitted that when they first viewed the home, they confirmed that all the renovations advertised in the listing had in fact been completed. Plaintiffs' agents did not raise any concerns regarding the renovations, and Plaintiffs had an independent home inspection performed on the home which did not reveal any information Plaintiffs deemed concerning enough to either inspect further or delay the sale. Therefore, Plaintiffs have provided no evidence tending to show that the identities of the individuals who performed the renovations, even if material, would have reasonably affected their decision to purchase the home.

Accordingly, Plaintiffs have failed to demonstrate that Defendants made a material misrepresentation or omission when they represented Meletich throughout the sale of the home. The trial court therefore did not err by granting Defendants' motion for summary judgment.

III. Conclusion

For the foregoing reasons, we review the merits of Plaintiffs' appeal and affirm the trial court's order granting Defendants' motion for summary judgment.

AFFIRMED.

Judges TYSON and ZACHARY concur.

CONNOR P. FRALEY, PLAINTIFF
v.
ORANGE COUNTY BOARD OF ELECTIONS, DEFENDANT

No. COA23-298

Filed 6 August 2025

Elections—nomination by petition—unaffiliated candidate—county commissioner for particular district—statutory requirements

In a declaratory judgment action brought against the Orange County Board of Elections (defendant) by an unaffiliated candidate (plaintiff) seeking nomination by petition—pursuant to N.C.G.S. § 163-122(a)(3)—to the office of County Commissioner for District 2, after defendant had denied plaintiff's petition, the trial court erred in granting summary judgment to defendant where the court erroneously interpreted section 163-122(a)(3) as requiring plaintiff to secure signatures from four percent of all qualified voters in Orange County before having his name placed on the general election ballot. Under the statute's plain language, since the office that plaintiff was running for pertained to "a district consisting of less than the entire county" such that "only the voters in that district vote for that office," plaintiff was only required to secure signatures from four percent of the qualified voters in District 2 alone. Orange County Code § 13-3(b)(2) mirrored this statutory framework in that it required qualified voters of each district to nominate candidates for seats apportioned to their district.

Appeal by Plaintiff from order entered 23 March 2023 by Judge Allen Baddour in Orange County Superior Court. Heard in the Court of Appeals 22 August 2023.

Connor P. Fraley, Pro Se, for plaintiff-appellant.

Joseph E. Herrin and Martha C. Bordogna, for defendant-appellee.

STADING, Judge.

This case concerns North Carolina's law governing the procedure for an unaffiliated candidate's name to appear on the general election ballot for a county office. Connor P. Fraley ("Plaintiff") appeals from an order granting summary judgment for the Orange County Board of Elections ("Defendant"). After careful consideration, we hold the trial court committed error and therefore reverse its order and remand for entry of an order granting Plaintiff's motion for summary judgment.

I. Background

During the 2022 election cycle, Plaintiff "sought nomination to and the placement of his name on the ballot for the office of Orange County Commissioner, District 2, by petition in accordance with N.C. Gen. Stat. § 163-122(a)(3) [(2023)]." Upon receipt of Plaintiff's written petition, Defendant consulted the county attorney, who determined that "a successful nomination petition for placement on the ballot as an unaffiliated candidate for the District 2 seat required . . . four percent of the full-county registered voter population rather than four percent of the nominating district[.]" After the filing period closed, Defendant sent a letter to Plaintiff stating "that the petition had failed."

On 19 January 2023, Plaintiff filed a complaint against Defendant seeking a declaratory judgment. The complaint requested that:

> Declaratory Judgment be entered establishing that in order for a qualified citizen to be nominated by petition pursuant to N.C. Gen. Stat. § 163-122(a)(3) and have their name placed on the general election ballot for County Commissioner in a seat nominated by District pursuant to Orange County Code of Ordinances § 13-2(b)(2), the number of valid signatures required on such petition shall be four percent (4%) of the total number of registered voters in the nominating district according to the voter registration records of the State Board of Elections as of January 1 of the year in which the general election is to be held.

The complaint also requested that Plaintiff "recover the costs and expenses of this action from Defendant," and that he "recover any further relief that the [trial court] deems appropriate."

On 1 February 2023, Defendant moved for summary judgment, and on 7 February 2023, Plaintiff moved for summary judgment. Upon consideration of the matter, the trial court granted summary judgment for Defendant, denied Plaintiff's motion for summary judgment, and dismissed Plaintiff's action. The trial court also ordered that each party pay their own costs for the action. Plaintiff timely appealed on 23 March 2023.

II. Jurisdiction

There is an appeal of right to our Court under N.C. Gen. Stat. § 7A-27(b)(1) (2023) from "any final judgment of a superior court," with exceptions not relevant here.

III. Analysis

Plaintiff asks us to interpret the statutory requirements for nomination by petition of an unaffiliated candidate seeking to appear on the ballot in the general election for District 2 on the Orange County Board of Commissioners. Plaintiff maintains the trial court committed error by interpreting N.C. Gen. Stat. § 163-122(a)(3) as requiring him to secure four percent of the qualified voters in the county when filing his written petition of candidacy. Plaintiff argues N.C. Gen. Stat. § 163-122(a)(3) and Orange County Code § 13-3(b)(2) require him to only secure four percent of the qualified voters in District 2 when filing his written petition of candidacy.[1] After careful consideration, we agree.

A. Standard of Review

A party is entitled to summary judgment as a matter of law "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (2023). "The movant is entitled to summary judgment . . . when only a question of law arises based on undisputed facts." *Daughtridge v. Tanager Land, LLC*, 373 N.C. 182, 186, 835 S.E.2d 411, 415 (2019) (quoting *Ussery*

1. Plaintiff also argues N.C. Gen. Stat. § 163-122(a)(3) is unconstitutional because it violates the Equal Protection Clause of the U.S. Constitution's Fourteenth Amendment. "Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal." *State v. Lloyd*, 354 N.C. 76, 86–87, 552 S.E.2d 596, 607 (2001) (citation omitted). Plaintiff's declaratory judgment action sought a statutory interpretation and did not raise a constitutional challenge during the trial court's proceedings. Additionally, since we resolve this matter on statutory grounds, we need not address Plaintiff's argument regarding the constitutional implications of the trial court's ruling.

v. Branch Banking & Tr., 368 N.C. 325, 335, 777 S.E.2d 272, 278 (2015)). "The standard of review for summary judgment is de novo." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 385 (2007). Questions of statutory interpretation are reviewed de novo. *In re Ernst & Young, LLP*, 363 N.C. 612, 616, 684 S.E.2d 151, 154 (2009) (citations omitted). "Under a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the lower tribunal." *Lynn v. Fannie Mae*, 235 N.C. App. 77, 81, 760 S.E.2d 372, 375 (2014) (citation omitted).

"The primary objective of statutory interpretation is to ascertain and effectuate the intent of the legislature." *McCracken & Amick, Inc. v. Perdue*, 201 N.C. App. 480, 485, 687 S.E.2d 690, 694 (2009). "When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required." *Diaz v. Div. of Soc. Servs.*, 360 N.C. 384, 387, 628 S.E.2d 1, 3 (2006) (citation omitted).

B. Statutory Framework

Plaintiff argues the trial court committed error by interpreting N.C. Gen. Stat. § 163-122(a)(3) to require his collection of at least four percent of all qualified Orange County voters' signatures before appearing on their general-election ballot as an unaffiliated candidate.

Under North Carolina law, there are three paths for a candidate to secure placement on a general election ballot for "any federal, state, county, or municipal office: (1) by becoming the nominee of a major political party selected by primary election; (2) by becoming the nominee of a 'new' political party selected at that party's state convention; and (3) by being nominated by petition as an unaffiliated candidate." *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1218 (4th Cir. 1995); *see also* N.C. Gen. Stat. § 163-122 (titled "Unaffiliated candidates nominated by petition."). "Each avenue to ballot access comes with its own requirements imposed by state election law in order to protect the state's interest in having a fair, ordered election." *Greene v. Bartlett*, No. 5:08-CV-088-GCM, 2010 U.S. Dist. LEXIS 87309, at *2 (W.D.N.C. Aug. 24, 2010). Relevant here, "[a]n unaffiliated or independent candidate is not a candidate of a political party as defined by N.C. Gen. Stat. § 163-96. States commonly require unaffiliated candidates to show a minimum level of support by garnering a certain number of petitions supporting their candidacy[.]" *Id.* at *2–3.

In structuring its board of commissioners, a county may adopt one or any combination of the options prescribed by N.C. Gen. Stat.

§ 153A-58. Subsection 153A-58(3) provides the "[m]ode of election" of the board of commissioners:

> a. The qualified voters of the entire county shall nominate all candidates for and elect all members of the board.
>
> For options b, c, and d, the county shall be divided into electoral districts, and board members shall be apportioned to the districts so that the quotients obtained by dividing the population of each district by the number of commissioners apportioned to the district are as nearly equal as practicable.
>
> b. The qualified voters of each district shall nominate candidates and elect members who reside in the district for seats apportioned to that district; and the qualified voters of the entire county shall nominate candidates and elect members apportioned to the county at large, if any.
>
> c. The qualified voters of each district shall nominate candidates who reside in the district for seats apportioned to that district, and the qualified voters of the entire county shall nominate candidates for seats apportioned to the county at large, if any; and the qualified voters of the entire county shall elect all the members of the board.
>
> d. Members shall reside in and represent the districts according to the apportionment plan adopted, but the qualified voters of the entire county shall nominate all candidates for and elect all members of the board.
>
> If any of options b, c, or d is adopted, the board shall divide the county into the requisite number of electoral districts according to the apportionment plan adopted, and shall cause a delineation of the districts so laid out to be drawn up and filed as required by G.S. 153A-20. No more than half the board may be apportioned to the county at large.

This subsection addresses both method of nomination and method of election for each seat, referring to nomination and election separately.

Defendant structures its mode of elections for the board of commissioners in accordance with subsection 153A-58(3)(c), which provides:

> The qualified voters of each district shall ***nominate*** candidates who reside in the district for seats apportioned to that district, and the qualified voters of the entire county

> shall ***nominate*** candidates for seats apportioned to the county at large, if any; and the qualified voters of the entire county shall ***elect*** all the members of the board.

Id. (emphasis added); *see* Orange County, N.C., Code § 13-3(b)(2) (titled "Structure of and mode of electing board of commissioners."). Accordingly, "the county shall be divided into electoral districts, and board members shall be apportioned to the districts so that the quotients obtained by dividing the population of each district by the number of commissioners apportioned to the district are as nearly equal as practicable." N.C. Gen. Stat. § 153A-58(3)(a). Additionally, "the board shall divide the county into the requisite number of electoral districts according to the apportionment plan adopted, and shall cause a delineation of the districts so laid out to be drawn up and filed as required by G.S. 153A-20." *Id.* § 153A-58(3)(d).

As noted above, Orange County Code § 13-3(b)(2) structures its mode of elections for the board of commissioners to mirror subsection 153A-58(3)(c). Subsection 13-3(b)(2) delineates a structure whereby the voters of District 1 ***nominate*** candidates for three district-representative Board seats; the voters of District 2 ***nominate*** candidates for two district-representative Board seats; and the entire County electorate ***nominates*** candidates for two at-large Board seats. It states, however, the entire county ***elects*** all the members of the Board:

> Now, therefore, be it resolved, by the Orange County Board of Commissioners, pursuant to N.C. Gen. Stat. § 153-A-58 . . . Change from the qualified voters of the entire County nominating all candidates for and electing all members of the board to a structure in which there is one three-member district (District 1), one two-member district (District 2) and two members at large; members shall reside in and represent the districts according to the apportionment plan adopted; *the qualified voters of each district shall* ***nominate*** *candidates who reside in the district for seats apportioned to that district*, and the qualified voters of the entire county shall ***nominate*** candidates for seats apportioned to the county at large; and the qualified voters of the entire county shall ***elect*** all the members of the board.

Id. (emphasis added).

Our law further provides specific rules pertaining to unaffiliated candidates who are nominated by petition. *See* N.C. Gen. Stat. § 163-122.

A voter who desires to have their name printed on the general election ballot as an unaffiliated candidate for a county office or single county legislative district shall:

> [F]ile written petitions with the chair or director of the county board of elections supporting the voter's candidacy for a specified county office. These petitions must be filed with the county board of elections on or before 12:00 noon on the day of the primary election and must be signed by qualified voters of the county equal in number to four percent (4%) of the total number of registered voters in the county as reflected by the voter registration records of the State Board of Elections as of January 1 of the year in which the general election is to be held, *except if the office is for a district consisting of less than the entire county and only the voters in that district vote for that office*, the petitions must be signed by *qualified voters of the district* equal in number to four percent (4%) of the total number of voters in the district according to the voter registration records of the State Board of Elections as of January 1 of the year in which the general election is to be held.

Id. § 163-122(a)(3) (emphasis added).

"If the office is *a county office or a single county legislative district*," an unaffiliated candidate must file a written petition "signed by qualified voters of the county equal in number to four percent (4%) of the total number of registered voters in the county" to have their name listed on the general election ballot. *Id.* (emphasis added). However, "if the office is for *a district consisting of less than the entire county and only the voters in that district vote for that office*"—such as Orange County District 2—subsection 163-122(a)(3) provides that an unaffiliated candidate must file a written petition "signed by qualified voters *of the district* equal in number to four percent (4%) of the total number of voters *in the district*[.]" *Id.* (emphasis added).

Here, the trial court erroneously determined that Plaintiff, an unaffiliated candidate who desired to appear on the general election ballot for an office "for a district consisting of less than the entire county," was required to obtain four percent of the total number of qualified voters in the whole county under subsection 163-122(a)(3). But a plain reading of the statute supports an interpretation that to be *nominated* for District 2, Plaintiff was only required to garner signatures "by qualified

voters of the district equal in number to four percent (4%) of the total number of voters in the district[.]" *Id.* To that end, Orange County Code § 13-3(b)(2) expressly provides, "the qualified voters of each district shall ***nominate*** candidates who reside in the district for seats apportioned to that district, and the qualified voters of the entire county shall ***nominate*** candidates for seats apportioned to the county at large[.]" (emphasis added). The requirement that "only the voters in that district vote for that office" is referring to the nomination process, not the election process, in the context of the ordinance. Accordingly, the trial court committed error by awarding summary judgment for Defendant.

IV. Conclusion

For the reasons above, the trial court's order granting Defendant's motion for summary judgment is reversed, and this matter is remanded for entry of an order granting Plaintiff's motion for summary judgment.

REVERSED AND REMANDED.

Judges STROUD and FLOOD concur.

BRYAN SINNETT, PLAINTIFF
v.
LANDIS SINNETT, DEFENDANT

No. COA24-445

Filed 6 August 2025

1. Appeal and Error—petition for writ of certiorari—denied as unnecessary—Civil Procedure Rules 59 and 60—motions withdrawn—notice of appeal timely

Where plaintiff filed motions pursuant to Civil Procedure Rules 59 and 60 following the trial court's entry of an order modifying child custody, defendant filed a notice of appeal from the modification order within 30 days of its entry, and plaintiff subsequently withdrew his Rule 59 and Rule 60 motions, defendant's petition for writ of certiorari—filed with the appellate court out of an abundance of caution—was denied as unnecessary because her notice of appeal was timely.

2. Child Custody and Support—custody modification—constitutional right to freedom of religion—argument regarding

religious or spiritual questions waived—modification not based on religious preference

In a child custody modification proceeding in which plaintiff contended that defendant had converted from Christianity to Buddhism (which defendant denied), defendant waived her appellate arguments regarding questions she was asked about her religious and spiritual beliefs and practices where she did not object or raise the issue of her constitutionally protected rights to religious freedom at trial. Defendant's preserved argument—that the modification order demonstrated a preference for one religion over another—was overruled where: (1) the trial court found that defendant remained a Christian; (2) the findings of fact defendant characterized as touching on her religious beliefs were actually focused on the effect her actions had on the children's health and wellbeing (for example, that defendant's discussions about animal welfare were not age-appropriate and caused some "push back" by the children about eating meat when at plaintiff's home); and (3) while the trial court directed the parties to consult each other about major decisions regarding the children, defendant retained final decision-making authority.

3. Child Custody and Support—custody modification—substantial change in circumstances—findings of fact sufficient

In a child custody modification proceeding, the trial court made sufficient findings of fact regarding changed circumstances (since a previous consent custody order was entered) and their impacts on the children—including the re-marriage of one parent and a new relationship for the other, resulting in friction between defendant and plaintiff's new wife; the movement of the children to a new school; alterations to plaintiff's work schedule; and defendant's discussions about reincarnation and Buddhist principles with the children—to support its conclusion of law that substantial changed circumstances existed and warranted a modification of child custody.

4. Child Custody and Support—custody modification—substantial change in circumstances—findings about beneficial changes—conclusion supported

In a child custody modification proceeding, findings of fact made by the trial court about beneficial changed circumstances—such as the children's positive relationship with plaintiff's new wife, the ability of the children to attend a private school where the new wife worked (and where the children were thriving academically) at a reduced cost, and alterations to plaintiff's work schedule that

permitted him to spend more time with the children—supported its conclusion of law that a substantial change in circumstances had occurred and warranted a modification of child custody.

5. Child Custody and Support—custody modification order—proper standard for modification employed—no special wording required

In a child custody modification order, the trial court's use of the phrases "there have been substantial changes that have occurred that affect the best interest of the minor children" and "the above changes are substantial and have affected the minor children's best interest" did not reflect an improper blurring of the standard for modification of child custody: a determination whether a substantial change in circumstances that affects the children had occurred and, if so, whether a modification of custody would be in the children's best interest. The findings of fact and conclusions of law, read as a whole, showed that the trial court applied the proper standard; no special wording or language was required.

Appeal by defendant from order entered 14 September 2023 by Judge Julie L. Bell in District Court, Wake County. Heard in the Court of Appeals 29 January 2025.

Smith Debnam Narron Drake Saintsing & Myers, L.L.P., by Alicia Jurney, for plaintiff-appellee.

Connell & Gelb PLLC, by Michelle D. Connell, for defendant-appellant.

STROUD, Judge.

Defendant appeals the trial court's order modifying child custody as to her two minor children. Defendant argues the trial court erred by infringing on her constitutionally protected right to freedom of religion in both the inquiry into this issue at trial and in the order on appeal, by making insufficient findings to conclude there was a substantial change of circumstances, and by using the incorrect standard as to modification of custody. Plaintiff's motion to modify custody alleged several substantial changes of circumstances, including Defendant's alleged conversion from Christian to Buddhist and her discussion of her new beliefs with the children, without first consulting Plaintiff as required under the existing custody order. Because Defendant raised no objections at trial regarding questions about her religious beliefs or practices and made no argument at trial of impairment of her constitutional rights, she has

waived any argument on appeal regarding infringement upon her constitutional rights based on questioning at trial. The trial court's order showed no preference for a particular religion as the basis for modification of custody and the modification of the legal custody provisions increased Defendant's control over making decisions regarding the children if she and Plaintiff cannot agree. The trial court also made sufficient findings as to substantial changes in circumstances affecting the minor children to support its conclusion of law regarding modification. We affirm the trial court's order.

I. Background

Plaintiff ("Father") and Defendant ("Mother") were married in July 2008. The parties had two children during their marriage: B.S.S., born in 2012, and F.W.S., born in 2015.[1] The parties separated in 2018 and are now divorced. Father "is a real estate broker" and during the marriage "he had to work weekends showing houses." On 11 October 2019, the parties entered into a consent order for permanent child custody and child support which "provide[d] that [Father] and [Mother] have joint legal custody to make all major decisions concerning the general health, welfare, education, development, and extracurricular activities" for the children and "joint physical custody of the minor children as they agree but if they cannot agree every other weekend [Father] will have from Friday afterschool to Monday before school and every Tuesday after school to Wednesday at school." The consent order included extensive detailed provisions regarding the parties' "joint responsibility and authority with respect to all major decisions affecting the minor children's health, education and welfare." They were required to "notify and discuss all major decisions affecting the minor children with the other party" and to "reach a mutual agreement prior to making any change or decision, except in emergency situations if the other party cannot be reached in time." The consent order specifically required the parties to "consult together" and to "adopt, insofar as possible, a harmonious policy regarding the children's upbringing."

The consent order did not include detailed provisions as to the children's religious practice or training, but as to "religious activities" of the children, both parties were allowed to "attend and participate," to "keep one another informed" about events and provide information about the children's activities. If the parties were unable to agree on something "that requires mutual consent," they were to "follow the recommendations

1. Pseudonyms are used to protect the identities of the minor children.

of the children's providers if the children would suffer harm without a timely decision. For matters in which the children will not suffer harm" without a timely decision, the "the children shall be maintained in the existing situation pending further order of the court." Thus, the joint legal custody provisions of the consent order did not grant either parent exclusive decision-making authority in the event of an impasse as to "major decisions" regarding the children's "general health, welfare, education, development, and extracurricular activities[.]"

After entry of the consent order, Father remarried to Avera. Also after the consent order, Mother began a committed relationship with Gui. On 8 December 2022, Father filed a motion to modify custody alleging "since the entry of [the 2019 consent order] there have occurred substantial and material changes in circumstances affecting the best interest and general welfare of the minor children" which included nineteen alleged changes. These alleged changes included Father's remarriage to Avera; Avera's positive relationship with the children; Mother's switch from Christianity to Buddhism; Father's belief that Mother's switch to Buddhism "creates confusion for the children[,]" outlining questions from the children to Father about Buddhism; Mother's change "to a vegan diet" which "greatly impacts what the minor children are served in [Mother's] home[;]" Father's concern that the children were not getting sufficient nutrition in their diet; conversations between Mother and the children about the treatment of animals, which Father contends are inappropriate for the children's age; the children's change since the prior order to a private school with a different schedule; and changes to Father's work schedule increasing his ability to spend time with his children.

Father's motion to modify custody was heard on 28-30 August 2023. The trial court entered the "Order Modifying Custody" ("Modification Order") 14 September 2023. The trial court made sixty-two detailed findings of fact in the Modification Order. After making detailed findings on all these matters, finding of fact 56 summarizes several changes in circumstances affecting the children's best interests:

> Since the entry of the prior Order, there have been substantial changes that have occurred that affect the best interest of the minor children specifically: [Father] is remarried, to Avera, [Father] has a coworker that is available to do showings on the weekends so he has more time to devote to the children, [Mother] allowed the minor children to be exposed to reincarnation and Buddhism concepts through a movie she allowed them to watch and she shared a book regarding these concepts and now encourages them to

> say "gratitudes" which is a Buddhist concept rather than prayers. This has exposed the minor children to a different religion than the parties previously practiced in their marital household. [Mother] no longer cooks meat in her house and has discussed adult concepts about cows with the minor children.

Due to the substantial change of circumstances found by the trial court, it modified physical custody to an alternating week schedule. Father and Mother retained joint legal custody, but the trial court changed some of the joint decision-making provisions of the consent order. In particular, the Modification Order decreed that

> [a]ll major decisions regarding the minor children's schooling, extracurricular activities, medical care etc. shall be discussed between [Father] and [Mother] and decided together. They shall strive to agree upon the same. If they cannot agree and it is a medical decision where the children would suffer harm without a timely decision than the parties shall follow the recommendations of the treating medical provider. If the minor children will not suffer harm, the parties can seek Court intervention regarding the same. If it is a decision, such as education or other non-medical decision, than (sic) after reasoning together if they cannot agree, [Mother] shall have final decision-making authority.

On 25 September 2023, Father filed Rule 59 and Rule 60 motions. Mother filed written notice of appeal of the Modification Order on 11 October 2023. The trial court never ruled on the Rule 59 and 60 motions and they were withdrawn by Father on 29 May 2024.[2]

II. Petition for Writ of Certiorari

[1] We first address Mother's petition for writ of certiorari ("PWC") filed with this Court. Mother filed her PWC with this Court, "if necessary," since "[t]here was no decision by the [trial] court or any orders entered ruling on either motion." After the Modification Order was entered, Father filed Rule 59 and 60 motions on 25 September 2023. Mother filed written notice of appeal on 11 October 2023, after Father filed the motions. In the "Statement of Grounds for Appellate Relief" section of

2. While our record does not contain the Notice of Withdrawal, it is included as an appendix in Mother's initial brief and petition for writ of certiorari.

her brief, Mother argues her written notice of appeal was timely and proper since Father's Rule 59 motion was improper and did not toll her time to file a notice of appeal.[3] Essentially, Mother argues since the Rule 59 motion was not a proper Rule 59 motion which would toll the time for filing notice of appeal, had she waited to file notice of appeal it would have been untimely. Mother argues her notice of appeal was timely since the Rule 59 motion was improper but she filed the PWC in case the Rule 59 motion was considered proper. Father does not challenge this Court's jurisdiction in his responsive brief, nor did he file a response with this Court to Mother's PWC.

Under North Carolina Rule of Appellate Procedure 3(c)(3):

> (c) Time for Taking Appeal. In civil actions and special proceedings, a party must file and serve a notice of appeal:
>
> . . . .
>
> > (3) if a timely motion is made by any party for relief under Rules 50(b), 52(b) or 59 of the Rules of Civil Procedure, *the thirty-day period for taking appeal is tolled as to all parties until entry of an order disposing of the motion* and then runs as to each party from the date of entry of the order or its untimely service upon the party, as provided in subdivisions (1) and (2) of this subsection (c).

N.C. R. App. P. 3(c)(3) (emphasis added). However, whether Father's Rule 59 motion was proper or not, he withdrew the motion and thus there was never any need for "entry of an order disposing of the motion[.]" *Id.*

In *Lovallo v. Sabato*, the defendant filed Rule 52, 59, and 60 motions on 31 March 2010 and subsequently filed a notice of appeal on 17 August 2010. 216 N.C. App. 281, 282, 715 S.E.2d 909, 910 (2011). In determining whether the notice of appeal was timely, we noted the

> defendant made a timely motion to the trial court under Rules 52(b) and 59 of the Rules of Civil Procedure, and therefore, the provision of Appellate Rule 3 allowing the tolling of the time for taking appeal would have applied in this case. However, *Rule 3(c)(3) clearly contemplates a*

3. We will only discuss Father's Rule 59 motion in this section as "[m]otions entered pursuant to Rule 60 do not toll the time for filing a notice of appeal." *Lovallo v. Sabato*, 216 N.C. App. 281, 283, 715 S.E.2d 909, 911 (2011) (citation omitted).

> *ruling by the trial court on such motions in order for the tolling period to apply.*

Id. at 283, 715 S.E.2d at 911 (emphasis added). But the defendant "filed her notice of appeal before the trial court ruled on her pending motions" and

> to timely perfect her appeal from the trial court's 24 March 2010 order, [the] defendant's notice of appeal should have been filed, at the very latest, within 30 days from the date of 31 March 2010, when [the] defendant was obviously served with a copy of the trial court's order.

Id. at 284, 715 S.E.2d at 911. This Court noted the defendant could have waited for the trial court to rule on her motions before appealing both the underlying order and the order on her motions:

> On the other hand, [the] defendant could have allowed the trial court to rule on her pending Rule 52(b) and 59 motions, thereby affording her the opportunity to appeal both the trial court's rulings on her motions, as well as the underlying 24 March 2010 judgment, so long as she filed her notice of appeal within the time limits prescribed by Rule 3(c)(3) following entry of the trial court's rulings on those motions. However, [the] defendant is unable to utilize the tolling provisions in this case, as the trial court never ruled on her Rule 52(b) or Rule 59 motions.

Id. at 284, 715 S.E.2d at 911-12. As the defendant did not either file a notice of appeal within 30 days of the order or allow the trial court to rule on her motions and file her notice of appeal after the trial court's order on the motions, this Court was without jurisdiction to hear the appeal. *See id.* We also noted

> upon filing a notice of appeal, [the] defendant improvidently set in motion the appellate review process. Although filing the notice of appeal did not divest the trial court of jurisdiction to hear and rule on [the] defendant's Rule 52(b) motion, such action did divest the trial court of jurisdiction to hear and rule on her Rule 59 and 60 motions.

Id. at 285, 715 S.E.2d at 912 (citations omitted). However, this case differs from *Lovallo* since Father filed Rule 59 and 60 motions, and Mother filed notice of appeal based on her belief that Father's motions would not actually toll the time for appeal; in *Lovallo* the defendant filed both the motions and the notice of appeal. *See id.* at 282, 715 S.E.2d at 910.

This Court also addressed the proper time for filing notice of appeal after Rule 59 and 60 motions were filed in *Reeder v. Carter*, 226 N.C. App. 270, 273, 740 S.E.2d 913, 916 (2013). In *Reeder*, the plaintiff filed Rule 52, 59, and 60 motions on 2 March 2012 and then filed "timely written notice of appeal" on 20 March 2012 while the Rule 52, 59, and 60 motions were pending. *Id.* We cited *Lovallo* and concluded

> [i]n *Lovallo*, we held the defendant did not file a timely appeal. We further determined [the] defendant could have pursued two alternatives for timely appeal: (i) the defendant could have appealed the final order within thirty days of its filing; or (ii) the defendant could have allowed the trial court to decide the Rule 52(b) and 59 motions and then appeal both the final order *and* the motions rulings. In the instant case, [the p]laintiff pursued the first route offered in *Lovallo* by timely appealing the 24 February 2012 final order within thirty days of its filing.

Id. at 273-74, 740 S.E.2d at 917 (emphasis in original) (citations and footnote omitted).

This case is again distinguishable from *Reeder* as Father first filed his Rule 59 and 60 motions and then Mother filed notice of appeal within thirty days after entry of the Modification Order instead of the same party filing the motions and the notice of appeal. But the basic reasoning in *Lovallo* and *Reeder* still applies. Although Father filed the Rule 59 and 60 motions, the trial court never entered "an order disposing of the motion[s]" because Father withdrew them. N.C. R. App. P. 3(c)(3). Had Mother waited for the trial court to rule on the motions and Father instead withdrew them without a ruling after 30 days from the entry of the Modification Order and this Court considered Father's Rule 59 motion not to toll the time for appeal, Mother may have lost her right to appeal. In any event, Mother was placed in a situation where she could not be sure if her notice of appeal would be considered timely. If that happened, a PWC would have been her only avenue for appellate review. Instead, Mother filed timely notice of appeal within 30 days from the Modification Order based on her belief the Rule 59 motion would not toll the time for appeal. We need not discuss whether Father's Rule 59 motion was actually a proper motion that would have tolled time for appeal since he ultimately withdrew the motion without obtaining a ruling. Thus, we conclude Mother filed timely notice of appeal. We deny her PWC as it is unnecessary since this Court has jurisdiction over the appeal under North Carolina General Statute Section 7A-27(b).

III. Analysis

Mother argues (1) the trial court violated her constitutional right to freedom of religion; (2) the trial court's findings of fact made it "impossible for this reviewing court to determine whether or not there has been a substantial change of circumstance since the original order[;]" (3) there has not been a substantial change of circumstances; and (4) the trial court "failed to use the correct standard of review to modify permanent child custody." For the following reasons, we disagree and affirm the Modification Order.

A. Standard of Review

> When reviewing a trial court's decision to grant or deny a motion for the modification of an existing child custody order, the appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence. Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.
>
> Our trial courts are vested with broad discretion in child custody matters. This discretion is based upon the trial courts' opportunity to see the parties; to hear the witnesses; and to detect tenors, tones, and flavors that are lost in the bare printed record read months later by appellate judges[.] Accordingly, should we conclude that there is substantial evidence in the record to support the trial court's findings of fact, such findings are conclusive on appeal, even if record evidence might sustain findings to the contrary.
>
> In addition to evaluating whether a trial court's findings of fact are supported by substantial evidence, this Court must determine if the trial court's factual findings support its conclusions of law. With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests. If we determine that the trial court has properly concluded that the facts show that a substantial change of circumstances has affected the

> welfare of the minor child and that modification was in the child's best interests, we will defer to the trial court's judgment and not disturb its decision to modify an existing custody agreement.

Shipman v. Shipman, 357 N.C. 471, 474-75, 586 S.E.2d 250, 253-54 (2003) (citations and quotation marks omitted). We review the trial court's conclusion that a substantial change of circumstances has occurred *de novo*. *See In re K.J.M.*, 288 N.C. App. 332, 339, 886 S.E.2d 589, 595 (2023) ("[W]e review the trial court's conclusions of law *de novo*." (citation and brackets omitted)).

We first note Father contends Mother challenged none of the trial court's findings of fact as unsupported by competent evidence so the findings are binding on appeal. Mother argues in her reply brief that "Father inaccurately alleges that Mother did not challenge 36 findings of fact; to the contrary, Mother challenged 26 of those 36 findings[,]" citing to the record but not her initial brief. The "Proposed Issues on Appeal" part of our record contains a proposed issue challenging certain findings of fact, but Mother never directly addressed these findings as unsupported in her initial brief. And in her reply brief, shortly after arguing she did, in fact, challenge 26 findings of fact, Mother states she "does not argue that the facts were unsupported by the evidence, she argues that the facts do not support modification of custody." But these are two separate arguments with different standards of review. *See Shipman*, 357 N.C. at 474, 586 S.E.2d at 253 ("[T]he appellate courts must examine the trial court's findings of fact to determine whether they are supported by substantial evidence."); *see also In re K.J.M.*, 288 N.C. App. at 339, 886 S.E.2d at 595 (reviewing conclusions of law *de novo*). Whether the trial court's findings of fact are supported by the evidence is a different argument than whether the findings of fact support the conclusions of law, and Mother's argument addresses the conclusions of law.

Since Mother did not challenge the findings as unsupported, they are binding on appeal. *See Fecteau v. Spierer*, 277 N.C. App. 1, 9, 858 S.E.2d 123, 129 (2021) ("Where no exception is taken to a finding of fact made by the trial court, the finding is presumed to be supported by competent evidence and is binding on appeal." (citation and brackets omitted)). And even considering the "Proposed Issues on Appeal" as to whether the trial court erred in specific findings, Mother has abandoned any argument those findings are unsupported by the evidence since this was not argued in Mother's initial brief. *See* N.C. R. App. P. 28(a) ("Issues not presented and discussed in a party's brief are deemed abandoned."). Therefore, we need not review whether the findings are supported by

substantial evidence and will only review whether "the trial court's factual findings support its conclusions of law." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254.

B. Mother's Constitutional Right to Freedom of Religion

[2] Mother's first substantive argument is

> [t]he trial court violated Mother's Constitutional right to freedom of religion when it modified child custody because Mother allowed the children to watch the Disney movie Soul, used stories in a children's book about Buddhism to answer questions about reincarnation, and encouraged the children to be thankful by saying "gratitudes."

Under the First Amendment to the United States Constitution, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof[.]" U.S. Const. amend. I. The North Carolina Constitution has similar protections for religion. *See* N.C. Const. art. I, § 13. "Our courts have stated that although a court may consider a child's spiritual welfare as part of the best interest determination, a court may not base its findings on its preference for any religion or particular faith." *Petersen v. Rogers*, 111 N.C. App. 712, 718, 433 S.E.2d 770, 774 (1993) (citations omitted), *rev'd on other grounds*, 337 N.C. 397, 445 S.E.2d 901 (1994).

We first note that Mother's argument overstates the extent of the trial court's reliance on the facts about the movie, the book, and saying "gratitudes." The trial court did not modify custody "because Mother allowed the children to watch the Disney movie Soul, used stories in a children's book about Buddhism to answer questions about reincarnation, and encouraged the children to be thankful by saying gratitudes" as Mother contends. In the trial court's findings addressing religion or religious practices, the trial court focused on the effect of Mother's actions on the children's health or welfare. For example, the trial court found that Mother's discussions about cows and animals were not age-appropriate for children, but the trial court did not find these topics were inappropriate based on any religious beliefs. The trial court also found that the discussions about cows and animals were causing the children to give Father "some push back about eating meat at his house at times." And most important, despite these findings of fact, the trial court did not reduce Mother's decision-making authority as to the children's religious training or practices in any way. Although the parties still share joint legal custody and must consult with one another regarding major decisions about the children, the Modification Order

grants Mother "final decision-making authority" if the parties cannot agree on issues such as "education or other non-medical decision[s]."

The trial court's findings of fact addressed many changes in circumstances alleged by Father in support of his motion to modify custody, including but certainly not limited to questions regarding the alleged change in Mother's religious practices and the effect of this change on the children. The trial court findings generally showed that both Avera and Gui have positive relationships with the children. Initially, "[t]he parties were able to talk and text freely about the minor children without tension" but

> when Avera started posting about the children as being hers and about her being a mom, when she made several decisions at the minor children's school, including helping [B.S.S.] pick out her electives, and offered the thought that [Mother] should let the minor child rest after he had been sick, things soured between [Mother] and Avera.

This resulted in "a lot of tension between [Mother] and Avera and resulting tension between [Mother] and [Father]."

During the COVID-19 pandemic, the children began attending a private school where Avera is a teacher. Since Avera is an employee at the private school, the children "are able to attend [the school] for half the tuition and there is no reenrollment fee assessed each year." "Neither [Father] nor [Mother] would be able to afford [the school] without the discount afforded by Avera working there." The children are "thriving academically" at the school.

The trial court found that after Mother met Gui she began teaching the children on many aspects of Buddhism. The trial court found Mother began allowing the children to "watch a movie that featured reincarnation and bought a book and discussed and or read to the minor children about reincarnation and Buddhism." Mother also "has the children say 'gratitudes' rather than prayers which is a practice/concept that is a part of Buddhism" and had "talked with the minor children about the fact that cows have to be pregnant to give milk, and other topics concerning animals that are more appropriate adult topics rather than with children." "As a result of the conversations, the minor children are giving [Father] some push back about eating meat at his house at times." While Mother "does not cook meat in her household," she allows the children to eat meat "if they request it." Mother "will buy meat already cooked and she will reheat it if they don't finish everything bought for another meal later."

Although Father alleged Mother had converted to Buddhism since entry of the prior order, the trial court did not so find. Mother testified that she was Christian; in closing, her counsel argued that Father's suggestions that she was not Christian were "hurtful" and "offensive." And the trial court found Mother's testimony about her faith to be credible since the trial court found that Mother is a Christian, and not Buddhist. Mother did not challenge this finding of fact. Thus, to the extent Mother contends that the trial court's order infringed on Mother's right to practice a preferred religion of Buddhism, this argument overlooks the trial court's findings of fact and Mother's joint legal custody with final decision-making authority if she and Father cannot agree. Instead, Mother's argument seems to focus more on the inquiry into her religious beliefs and practices. She argues that "the trial court allowed extensive religious examinations which violated Mother's fundamental rights. The transcript has at least 42 pages of testimony addressing the religious beliefs and practices of Mother (and her partner, Gui). Even the trial judge herself directly questioned Mother about her religious beliefs." Mother then notes several instances of questions from Father's counsel or the trial court regarding her religious beliefs or practices.

As to Mother's argument regarding "extensive religious examinations which violated her fundamental rights[,]" we first note that Mother did not object to *any* questions at trial based on her constitutionally protected right to freedom of religion. At trial, she never even mentioned any constitutional objection or concern regarding the extent of inquiry as to her religious beliefs or practices, nor did she argue that the trial court should limit its consideration of the allegations of Father's motion to modify custody or exclude inquiry into the parties' religious beliefs and practices. Therefore, Mother has waived her right to argue on appeal about questions asked at trial since she did not object to these questions. *See Venters v. Albritton*, 184 N.C. App. 230, 240, 645 S.E.2d 839, 846 (2007) ("[I]t is the well-established rule that the admission of evidence without objection waives any prior or subsequent objection to the admission of evidence of a similar character." (citations omitted)).

Mother's argument also addresses questions by the trial court, as she contends the trial court's questions about her religious beliefs or practices infringed upon her constitutional rights. Again, Mother did not object to the trial court's questions, but even beyond the questions asked, Mother raised no argument to the trial court about impairment of her constitutional rights, so she is not permitted to argue this issue "for the first time on appeal." *See USA Trouser, S.A. de C.V. v. Williams*, 258 N.C. App. 192, 200-01, 812 S.E.2d 373, 379 (2018) ("It is well settled in this jurisdiction that a party cannot argue for the first time on appeal

a new ground that he did not present to the trial court." (citation, quotation marks, brackets, and ellipsis omitted)).

As Mother did not raise any argument or objection to the trial court that the inquiry into her religious beliefs infringed upon her constitutional right to freedom of religion, she has waived appellate review of this issue. *See id.* Our Supreme Court has recently reiterated the rule that an appellant cannot argue an issue on appeal that was not raised before the trial court, even if the issue involves "a constitutional protection":

> But the existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal. *See State v. Lloyd*, 354 N.C. 76, 86-87, 552 S.E.2d 596, 607 (2001) ("Constitutional issues not raised and passed upon at trial will not be considered for the first time on appeal."); *State v. Fernandez*, 346 N.C. 1, 18, 484 S.E.2d 350, 361 (1997) (holding that [the] defendant waived confrontation and due process arguments by not first raising the issues in the trial court); *Dep't of Transp. v. Haywood Oil Co.*, 195 N.C. App. 668, 677-78, 673 S.E.2d 712, 718 (2009) (holding that arguments pertaining to Fourteenth Amendment to the United States Constitution and law of the land clause of the North Carolina Constitution, although constitutional issues, were not raised before the trial court and therefore not properly preserved for appeal); *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002) ("It is well settled that an error, even one of constitutional magnitude, that is not brought to the trial court's attention is waived and will not be considered on appeal.").

In re J.N., 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022) (brackets omitted).

Although we cannot consider Mother's argument regarding the extent of the "inquiry" into her religious beliefs and practices on appeal due to her failure to raise any constitutional objection at trial, we can consider her argument that the Modification Order demonstrated a preference for one religion over another and modified custody based on this unconstitutional preference. While Mother contends that "the trial court's blatant preference for one religion resulted in a modification of custody[,]" the findings of fact do not support Mother's characterization of the trial court's comments at the trial and the Modification Order does not demonstrate any preference for either religion. Instead, the

trial court found Mother was Christian, the religion Mother argues the trial court favored, and Mother still has joint legal custody with Father. In fact, the trial court changed the joint legal custody provisions of the consent order to give Mother more authority over decisions for the children, not less, as she has final decision-making authority in the event of an impasse. The trial court's findings of fact and conclusions of law do not support Mother's argument that the trial court modified the physical custodial schedule or the terms of the joint legal custody based on any preference or prejudice to either religion. The trial court's findings focused on the children's welfare, including Mother's failure to consult with Father before presenting the movie and book addressing issues which may conflict with their existing religious training; discussions which were not appropriate for the children at their ages; the children's subsequent confusion about this information; and the effect this had on the children's willingness to eat meat although they had routinely eaten meat in the past. This argument is overruled.

C. Findings of Fact as to Substantial Change of Circumstances

[3] Next, Mother argues

> [t]he trial court's order must be reversed because it failed to make findings of fact to support the circumstances existing at the time of the original child custody consent order thereby making it impossible for this reviewing court to determine whether or not there has been a substantial change of circumstance since the original order.

Mother contends the trial court did not "make adequate findings of the circumstances existing at the time the original order was entered, therefore, this Court cannot compare the prior existing circumstances with the current existing circumstances to determine whether a substantial change of circumstances has occurred." We disagree.

> Modification of a custody decree must be supported by findings of fact based on competent evidence that there has been a substantial change of circumstances affecting the welfare of the child. If the evidence supports the findings of fact by the trial court and those findings of fact form a valid basis for the conclusions of law, the judgment entered will not be disturbed on appeal. While it is well established that the trial judge is in the best position to observe the parties and witnesses and to hear the evidence,

> it is not sufficient that there may be evidence in the record sufficient to support findings that could have been made. The trial court is required to make specific findings of fact with respect to factors listed in the statute. Such findings are required in order for the appellate court to determine whether the trial court gave "due regard" to the factors listed.

Benedict v. Coe, 117 N.C. App. 369, 377, 451 S.E.2d 320, 324 (1994) (citations, brackets, and ellipses omitted), *disapproved on other grounds by Pulliam v. Smith*, 348 N.C. 616, 501 S.E.2d 898 (1998).

Plaintiff cites *Benedict* to assert the findings made by the trial court did not adequately discuss the substantial changes of circumstances since entry of the 2019 consent order. In *Benedict*, we noted

> [t]he record shows that no evidence was presented as to the circumstances of the parties on 16 December 1991, 6 January 1993, or 13 July 1993. Rather, all evidence presented concerned the parties' and minor child's then current circumstances. Moreover, the 29 July 1993 Order contains no findings as to the existing circumstances on 16 December 1991, 10 November 1992, 6 January 1993 or 13 July 1993. It contains no findings of changed circumstances since these dates. It contains no Conclusion of Law that a substantial change of circumstances affecting the welfare of the child has occurred.

Id. at 377, 451 S.E.2d at 325. We vacated and remanded the modification order as

> [t]he trial court's order [wa]s deficient in that it contain[ed] insufficient findings and no conclusion of law that "a substantial change of circumstances affecting the welfare of the child has occurred." Without such finding, a modification based solely on the ground that the defendant mother is over-protective is improper. In this case, additional findings of fact and conclusions of law were in order.

Id. at 378, 451 S.E.2d at 325.

This case is quite different from *Benedict*. First, the trial court clearly identified in finding of fact 27 that "[t]he parties are operating under a [consent order] that was entered on October 11, 2019." That consent order included a few findings of fact and a detailed physical and legal custody schedule as to the minor children. As to the changes identified

by the trial court in the Modification Order, the trial court found that since the prior order, Father had remarried and Mother was in a relationship with Gui. The trial court made findings about how the circumstances had changed due to their new relationships, addressing Father's new marriage to Avera and the positive impacts of that relationship on the minor children and Mother's new relationship with Gui, which has been overall positive for the children. The findings identify the public school the children were to attend before 2020, and the parties agreed to send the children to the private school "during the pandemic when public schools were closed to in-person learning due to Covid." The trial court made findings about changes in that the children were able to attend private school due to Avera's employment at the school and that the children were benefiting from this educational opportunity.

The trial court made findings about the parties' religious training of the children as of the time of the prior order. The trial court found that during the marriage, the parties "raised the minor children in a 'Christian household' " and the older child was baptized, although the parties were not members of a particular church and "did not attend church every Sunday." In 2019, the children routinely ate meat. The trial court made findings regarding the effects Mother's discussion of reincarnation and Buddhist principles had on the children's diet and confusion as to their beliefs. In 2019, Father had to work on weekends, limiting his time to care for the children on weekends. The trial court found a change of circumstances as Father is no longer required to work on weekends due to adding a new employee at his job. The trial court also made findings about friction between Avera and Mother which did not exist in 2019 or even when Father and Avera were first married. Specifically, just after Father's remarriage, "the parties all got along wonderfully well[,]" but later "tension between [Mother] and Avera" and Mother and Father had developed. Then, importantly, the trial court unequivocally found these circumstances were "substantial changes that have occurred that affect the best interest of the minor children" and again summarized the circumstances in finding of fact 56. Thus, unlike *Benedict*, where "[t]he trial court's order [wa]s deficient in that it contain[ed] insufficient findings and no conclusion of law that 'a substantial change of circumstances affecting the welfare of the child ha[d] occurred[,]' " *id.*, the trial court made sufficient findings and a clear conclusion there was a substantial change of circumstances. And we note "[t]he trial court did not need to cite to specific evidence in its findings or to make a finding of fact on each and every piece of evidence presented" for the Modification Order to be valid. *Deanes v. Deanes*, 294 N.C. App. 29, 36, 901 S.E.2d 880, 886 (2024) (citation omitted). This argument is overruled.

D. Conclusion of Substantial Change of Circumstances

[4] Next, Mother asserts "[b]ecause there has been no substantial change of circumstances affecting the welfare of the children since entry of the original order, the trial court's order must be reversed." As the trial court found several changes and its findings support the conclusion of law, we disagree.

> It is well established in this jurisdiction that a trial court may order a modification of an existing child custody order between two natural parents if the party moving for modification shows that a substantial change of circumstances affecting the welfare of the child warrants a change in custody. The party seeking to modify a custody order need not allege that the change in circumstances had an adverse effect on the child. While allegations concerning adversity are acceptable factors for the trial court to consider and will support modification, a showing of a change in circumstances that is, or is likely to be, beneficial to the child may also warrant a change in custody.

Shell v. Shell, 261 N.C. App. 30, 33, 819 S.E.2d 566, 570 (2018).

While "remarriage, in and of itself, is not a sufficient change of circumstance affecting the welfare of the child to justify modification of the child custody order without a finding of fact indicating the effect of the remarriage of the children[,]" the trial court made several findings explaining the effect of Father's remarriage and Mother's new relationship on the children. *Id*. at 36, 819 S.E.2d at 572. Not only did the trial court find Father remarried, the trial court found that the relationship between Avera and the children was "a positive relationship" and she was "determined to have a positive relationship with the minor children[.]" The trial court found "having the love and support of multiple people besides their parents is a positive situation for the minor children." Mother addresses the trial court's findings as to Father's remarriage but merely states the finding Father remarried is insufficient, citing the same caselaw we cited above. But, as explained above, the trial court went further than merely stating Father was remarried; the trial court found the new relationship was a positive change for the children. These findings are similar to the findings in *Shell*, where the father made a similar argument as Mother is making here, and we concluded

> the trial court found this relationship had become stronger and was beneficial to the children: "Since the entry of the prior Order Thomas McKiernan has developed a strong

> bond with the children and is very involved in their lives during periods of visitation provided to" [the m]other. . . . The trial court's finding of the stepfather's development of a strong relationship with the children and his positive involvement in the children's lives is a change of circumstances that affects the children's welfare.

Id. (emphasis omitted). Father's remarriage and the positive relationship between Avera and the children support the trial court's conclusion that there has been "a change of circumstances that affects the children's welfare." *Id.* We also note the trial court made findings as to the positive relationship between the children and Gui, which could also support the conclusion of substantial change of circumstances.

The trial court also found that Father used to have to work weekends but he "now has a co-worker who can work weekends instead of him, when the minor children are with him." And while Mother contends "the finding states that the coworker is available. There is no finding that the coworker has actually been showing houses. Similarly, just because Father has more time to devote to the children does not mean he is actually spending time with the children." Mother's argument is more of an attack on Father's credibility, as he contended he would spend more time with the children on weekends due to the addition of a coworker to help him, but the trial court is the sole judge of credibility. *See In re K.W.*, 282 N.C. App. 283, 290, 871 S.E.2d 146, 152 (2022) ("A trial judge passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom." (citations and quotation marks omitted)). The trial court found Father's evidence that the change in his workplace would give him more availability on weekends and that he would spend more time with the children to be credible. Finding 56 specifically states Father "has a coworker that is available to do showings on the weekends *so he has more time to devote to the children*[.]" (Emphasis added.) Mother still argues that since Father previously had "custody of the children 'every other weekend from the conclusion of the school day on Friday until school resumes on the following Monday morning' " and since "Father is still working the same hours during the work week without a coworker to help[,]" Father does not have increased availability with the children. But the trial court did not find Father was only working every other weekend, so by not having to work every weekend, Father would have increased availability with the children on the weekends he had them. The trial court did not err in finding Father's more flexible work schedule to be a substantial change of circumstances affecting the best interests of the children. *See Mitchell v. Mitchell*, 199 N.C. App. 392, 408, 681 S.E.2d 520,

530 (2009) (concluding "[a]gain, there was substantial evidence in the transcript to support the trial court's findings as to the benefits to the children *from [the] plaintiff's flexible work schedule*" and this finding was properly considered in concluding there was a substantial change of circumstances (emphasis added)).

The trial court found the children are now able to attend private school based on Avera's employment at the school and the discount in tuition from her employment. Mother argues this finding does not show the public school was inferior, and "[t]here is no presumption that private schools are better than public schools or if the parents have the ability to send their children to a private school, they *will* send their children to a private school." (Emphasis in original.) The trial court's findings did not compare the public and private schools and did not find the public school inferior. The findings show that the parties jointly decided to change to the private school during the Covid-19 pandemic and the extended closure of the public school. The trial court found this change in schools was beneficial for the children and it was a substantial change of circumstances since entry of the prior order. Father's remarriage is also related to the school issue, since the parties could not afford the private school without the tuition discount provided by Avera's employment.

Even with none of the findings regarding religion, the trial court's findings as to Father's remarriage and the relationship between his new wife and the children, Father's new work schedule which gives him greater flexibility to spend time with the children, and the children attending a new school since the family gets a discount due to Avera's employment, support the trial court's conclusion of a substantial change of circumstances affecting the welfare of the children. The trial court did not err in concluding there was a substantial change of circumstances affecting the welfare of the children.

E. Trial Court's Standard to Modify Child Custody

[5] Finally, Mother argues "[t]he trial court should be reversed because it failed to use the correct standard of review to modify permanent child custody." Mother contends the trial court erred because it stated in the Modification Order that "there have been substantial changes that have occurred that affect the best interest of the minor children" and "[t]he above changes are substantial and have affected the minor children's best interest." Mother argues "the trial court melds the two prongs of 'affecting the welfare of the child' with 'it is in the best interest of the child to modify custody.' " We disagree.

As stated above in our discussion of the standard of review:

> With regard to the trial court's conclusions of law, our case law indicates that the trial court must determine whether there has been a substantial change in circumstances and whether that change affected the minor child. Upon concluding that such a change affects the child's welfare, the trial court must then decide whether a modification of custody was in the child's best interests.

Shipman, 357 N.C. at 475, 586 S.E.2d at 254. But while Mother quibbles with the wording of the trial court's findings and conclusions, it is clear the trial court used the correct standard, and the trial court was not required to use specific language. *See McConnell v. McConnell*, 151 N.C. App. 622, 629-30, 566 S.E.2d 801, 806 (2002) ("Though [the] plaintiff relies on *Brewer v. Brewer*, 139 N.C. App. 222, 533 S.E.2d 541 (2000) and *Browning v. Helff*, 136 N.C. App. 420, 524 S.E.2d 95 (2000), for the proposition that the court must make specific findings as to any effect a change in circumstance has on the welfare of the child, we do not read *Brewer* or *Browning* to require that the court use specific language in its order. Rather, the order must demonstrate that the court has considered the effect on the child's welfare, which was clearly done here.").

Here, the trial court first noted several substantial changes of circumstances that had occurred, outlining the specific changes in finding of fact 56. Even though the trial court initially did not use the exact wording these changes "affected the minor child[ren,]" the trial court noted throughout the Modification Order the effects these changes were having on the welfare of the children, such as Father's remarriage and the relationship Avera has with the children, the children's ability to go to private school due to Avera's job, the effect of Mother's dietary discussions and "adult conversations" she was having with the children, and Father's availability to care for the children on weekends. Considering all these changes together, the trial court concluded it was in the best interest of the children to modify the custody order, even though the trial court did not use the exact words that "a modification of custody was in the child[ren's] best interests." *Shipman*, 357 N.C. at 475, 586 S.E.2d at 254. The trial court sufficiently concluded changing the custodial schedule was in the children's best interests. The trial court used the proper standard and this argument is overruled.

IV. Conclusion

Mother waived any argument as to impairment of her constitutional right to freedom of religion by her failure to raise any objection

or argument at trial as to the extent of the inquiry at the trial into the parties' religious beliefs or practices. In the Modification Order, the trial court properly considered Father's allegations regarding Mother's religious practices particularly as to the effect on the children, and the trial court's order did not exhibit any preference or prejudice to any religion. Mother continues to have joint legal custody of the children and she has final decision-making authority in the event of an impasse between her and Father as to the children's religious practices, further indicating her right to freedom of religion was not infringed. The trial court also made sufficient findings to support its conclusion that there had been a substantial change of circumstances affecting the welfare of the children and that modification of custody is in the best interest of the children. We thus affirm the Modification Order.

AFFIRMED.

Chief Judge DILLON and Judge ZACHARY concur.

STATE OF NORTH CAROLINA
v.
ANTHONY KEITH BLACKBURN

No. COA24-1016

Filed 6 August 2025

Robbery—robbery with a dangerous weapon—hammer—manner of use

The trial court properly denied defendant's motion to dismiss the charges of robbery with a dangerous weapon and conspiracy to commit the same offense where the State presented substantial evidence from which a jury could determine that defendant's use of a hammer constituted the use of a dangerous weapon. Defendant threatened the victim with a metal hammer while demanding money and, when the victim refused to give up his money, defendant hit the victim on the back of his head and neck, which knocked the victim to the ground and caused him to lose consciousness. The fact that the victim did not seek medical treatment after the attack was irrelevant for purposes of determining the motion to dismiss.

Appeal by Defendant from a judgment entered 6 November 2023 by Judge Hugh B. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 June 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Taylor H. Crabtree, for the State.

Ryan Legal Services, PLLC, by John E. Ryan, III, for the Defendant.

WOOD, Judge.

Anthony Keith Blackburn ("Defendant") appeals from judgment following a jury verdict finding him guilty of robbery with a dangerous weapon and conspiracy to commit robbery with a dangerous weapon. On appeal, Defendant contends the trial court erred when it denied Defendant's Motion to Dismiss at the close of the State's evidence. After careful review of the record, we conclude Defendant received a fair trial free from error.

I. Factual and Procedural Background

On 19 December 2022 Larry Johnson ("Johnson") was sleeping in the driver's seat of his Mazda CX7 as he did every night. As usual the car was parked in front of his friend's home in Charlotte, North Carolina. When sleeping, Johnson would cover his car with a tarp to maintain some privacy. In the early morning hours of 19 December 2022 people started banging on the outside of the car. Initially, Johnson thought it was someone that he knew but as the banging grew much harder, he realized something different was going on and began to open the door. As soon as the door opened two men pulled Johnson out of the car, pressed him against the outside of the car, and held a gun to his head. Three men in ski masks demanded Johnson's money, threatening to shoot him if he did not hand it over. He responded that he had no money so they would have to shoot him. The men then grabbed Johnson, pushed him around so that he faced the car, and stood behind him. One of the masked men then hit Johnson with a hammer. Defendant contends he hit Johnson on the back of the shoulder and then Johnson fell to the ground. Johnson testified that he was hit on the back of the head and neck, fell to the ground, and lost consciousness for a short time. When he regained awareness, the men were driving away in his car. Johnson called the police but did not seek medical attention.

A few hours later, at approximately 3:18 a.m., officers located the stolen car, which was on the side of the road with its hazard lights

on. Officers observed an individual wearing a checkered shirt pacing in front of the car and waving a stick. Officers parked in front of the car and approached the individual later identified as Defendant. During that time, the car backed up and drove away. Officers radioed the information concerning the fleeing vehicle so other available officers could respond and arrested Defendant, who remained at the scene.

Defendant was brought to the police station where he consented to an interview with detectives. During questioning, Defendant admitted that he and two friends, whom he referred to as Daniel and Owen, were at Johnson's car and had with them a hammer and a BB gun. Defendant stated he struck Johnson with the hammer because Johnson was yelling and reaching in his pants, which made him nervous. Defendant stated that he got into the car to get away from Johnson.

The next day, Johnson's neighbor informed him that he had seen Johnson's car a few streets away. Johnson called the police, who responded to the vehicle. The police processed the vehicle and noted the catalytic converter had been removed. After police left, Johnson found two ski masks and a hammer that did not belong to him, so he called the police back out to the scene. The police returned and conducted further analysis.

On 3 January 2023, Defendant was indicted on one count of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon. The matter came on for trial on 31 October 2023, and on 6 November 2023, the jury returned a verdict of guilty on both counts. Defendant was sentenced to 64 to 89 months of active confinement for robbery with a dangerous weapon, and 25 to 42 months of active confinement on the conspiracy charge to run concurrently. Defendant gave oral notice of appeal.

II. Analysis

Defendant raises one issue on appeal, whether the trial court erred by denying Defendant's Motion to Dismiss at the close of the State's evidence. "This Court must conduct a *de novo* review of the pleadings to determine their legal sufficiency and to determine whether the trial court's ruling on the motion to dismiss was correct." *Leary v. N.C. Forest Prods., Inc.*, 157 N.C. App. 396, 400, 580 S.E.2d 1, 4 (2003). In reviewing a motion to dismiss, our Supreme Court has instructed courts to apply

> long-established legal principles that the evidence must be considered in the light most favorable to the State upon a defendant's motion to dismiss a criminal charge, that the State is entitled to every reasonable inference from the

> evidence in the face of a defendant's motion to dismiss, and that evidence which supports a contrary inference is not determinative on a motion to dismiss[.]

State v. Blagg, 377 N.C. 482, 490, 858 S.E.2d 268, 274 (2021).

Defendant contends that the State could not establish the necessary elements to support the charges of robbery with a dangerous weapon or conspiracy to commit robbery with a dangerous weapon because the State failed to submit substantial evidence to show that the hammer used by Defendant was used in a way that endangered or threatened the life of Johnson. We disagree.

North Carolina General Statutes § 14-87 defines robbery with a firearm or dangerous weapon as, the unlawful taking, or attempted taking, of personal property while "having in possession or with the use or threatened use of any firearms or other dangerous weapon, implement or means, whereby the life of a person is endangered or threatened[.]" N.C. Gen. Stat. § 14-87(a) (2024). "If a weapon is not a firearm, then to be considered dangerous under this statute, the determinative question is whether the evidence was sufficient to support a jury finding that a person's *life* was in fact endangered or threatened." *State v. Williamson*, 272 N.C. App. 204, 211, 845 S.E.2d 876, 882 (2020) (cleaned up). "A dangerous or deadly weapon is generally defined as any article, instrument or substance which is likely to produce death or great bodily harm." *State v. Morgan*, 156 N.C. App. 523, 529, 577 S.E.2d 380, 385 (2003) (cleaned up). However, the victim need not receive serious bodily injury. "[T]he State need only show that the [weapon] was used in a manner which is likely to cause death or serious bodily injury." *State v. Chavis*, 278 N.C. App. 482, 489, 863 S.E.2d 225, 230 (2021) (cleaned up). The "allegedly deadly character" of a weapon is generally one of fact to be determined by the jury. *Morgan*, 156 N.C. App. at 529, 577 S.E.2d at 385.

This Court has considered previously whether a hammer was a dangerous weapon stating, "[i]n determining whether a hammer was dangerous to [a] life . . . , you would consider the nature of the hammer, the manner in which the defendant used it or threatened to use it, and the size and strength of the defendant as compared to [the victim]." *State v. Jackson*, 85 N.C. App. 531, 532, 355 S.E.2d 224, 225 (1987).

In the *sub judice* case, taking the testimony in the light most favorable to the State, Defendant threatened Johnson with violence, while brandishing a hammer, if he refused to give up his money. When Johnson refused, stating he had no money, Defendant hit Johnson on the back of the head and neck from behind, knocking him to the ground and

causing him to lose consciousness. At the time of this event, Defendant was a nineteen-year-old young man, and Johnson was in his mid-sixties. Defendant swung a metal hammer at Johnson with enough force to knock him to the ground and cause Johnson to lose consciousness. It is irrelevant that Johnson did not seek medical treatment after the attack. The State presented sufficient evidence from which a jury could find the hammer was used as a dangerous weapon. The trial court did not err in denying Defendant's motion to dismiss, thereby submitting the issue of whether the hammer was a dangerous weapon to the jury.

III. Conclusion

For the foregoing reasons, we conclude the trial court did not err in denying Defendant's motion to dismiss, thereby allowing the jury to determine whether Defendant used a dangerous weapon in the commission of a robbery. Thus, Defendant received a fair trial free from error. However, we note the judgment is dated 3 November 2023 instead of 6 November 2023 as recorded by the trial transcripts. Accordingly, we remand the judgment to the trial court for correction of the clerical error.

NO ERROR; REMANDED FOR CORRECTION OF CLERICAL ERROR.

Judges ARROWOOD and FLOOD concur.

STATE OF NORTH CAROLINA
v.
TELVIN JENKINS, DEFENDANT

No. COA24-889

Filed 6 August 2025

1. Appeal and Error—preservation of issues—self-defense instruction—invited error—waiver

In a prosecution for attempted first-degree murder and related charges arising from a shooting incident, defendant's argument that the trial court erred by instructing the jury on self-defense—which defendant contended constituted an improper opinion by the trial court—was not preserved for appeal. Since defense counsel did not object to the self-defense instruction as given despite having multiple opportunities to do so, the issue was waived; any error was invited because defense counsel repeatedly affirmed his satisfaction with the jury instructions.

2. Discovery—criminal trial—witness identification of defendant—section 15A-903—no abuse of discretion

In a prosecution for attempted first-degree murder and related charges arising from a shooting incident, the trial court did not abuse its discretion by denying defendant's motion to dismiss based on the State's alleged discovery violations under N.C.G.S. § 15A-903. The State did not violate pretrial discovery rules where the victim's in-court testimony identifying defendant as the perpetrator was not significantly new or different than the statement provided to defendant pretrial that the witness "believe[d] it was [Defendant]" who shot her; therefore, defendant had sufficient notice that he had been identified at the scene to mount a proper defense.

3. Firearms and Other Weapons—discharging a firearm within occupied vehicle—firing gun from one car into another—statutory interpretation

In a prosecution for attempted first-degree murder and related charges arising from an incident in which defendant pulled his car next to the victim's and fired his gun into her car, the State presented substantial evidence to support each element of discharging a firearm within an occupied vehicle with intent to incite fear pursuant to N.C.G.S. § 14-34.10, where the statute's use of "within" did not require both the perpetrator and the victim to be in the same vehicle. Here, where defendant discharged his firearm from within

his own vehicle, the State's evidence was sufficient to send the matter to the jury.

4. Sentencing—firearm conviction—other offenses with greater sentences for same conduct—judgment arrested

In a prosecution for multiple offenses arising from a shooting incident, where defendant was convicted of offenses carrying greater sentences for the same conduct than his conviction for discharging a firearm within an occupied vehicle to incite fear (pursuant to N.C.G.S. § 14-34.10, punishable as a Class F felon), the trial court erred by sentencing defendant for that firearm offense—and, since defendant was prejudiced, the issue was automatically preserved despite defendant's lack of objection. As a result of the error, the appellate court vacated defendant's sentence and remanded to the trial court with instructions to arrest judgment on the offense of discharging a firearm within an occupied vehicle and to resentence defendant consistent with the opinion.

Appeal by Defendant from judgment entered 12 February 2024 by Judge Brenda Green Branch in Edgecombe County Superior Court. Heard in the Court of Appeals 22 May 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Jeanne Washburn, for the State.

Appellate Defender Glenn Gerding, by Assistant Appellate Defender Anne M. Gomez, for Defendant–Appellant.

MURRY, Judge.

Telvin Jenkins (Defendant) appeals the trial court's (1) jury instruction on self-defense, (2) finding that the State did not violate pretrial discovery rules, (3) denial of his motion to dismiss for purportedly misinterpreting N.C.G.S. § 14-34.10, and (4) entry of judgment under that same statute. For the reasons below, we dismiss in part on the first issue, hold no error in part on the second and third issues, and vacate and remand for resentencing in part on the fourth issue.

I. Background

On 13 June 2020, Rosa Powell Harris was driving on a local road when Defendant pulled up beside her and fired into her vehicle. The bullet shattered Harris's window, entered her left arm, and lodged into her

back near her right scapula. After being shot, Harris drove herself home where her daughter called the police.

Harris purportedly identified Defendant by name prior to her hospital transfer. First to arrive at the scene, Detective Austin V. Holland spoke with Harris before paramedics arrived. After Harris's departure for the hospital, Harris's daughter identified Defendant as the shooter to Detective Holland. Captain Bryan T. Corey interviewed Harris at the hospital later that day, at which point she identified Defendant as the shooter. Captain Corey noted in the post-interview report that Harris "believed it was" Defendant who shot her and that, when "asked . . . why . . . she th[ought]" so, she "stated her grandson and [Defendant] ha[d] been having problems."

On 24 July 2020, Defendant moved to compel discovery by requesting "copies of all statements of any . . . witnesses for the State." In June 2022, the State informed Defendant's counsel that discovery was available through North Carolina Criminal Discovery Automated System, that he could view physical evidence in-person, and that supplemental discovery remained available. The State provided discovery related to Harris's statements that she "believe[d] it was [Defendant]" who shot her. On 31 May 2022, a grand jury indicted Defendant for attempted first-degree murder, assault with a deadly weapon with intent to kill and inflicting serious injury (AWDWIKISI), discharging a weapon into a conveyance in operation (DW-Into), discharging a firearm within an occupied enclosure to incite fear (DW-Within), and possession of a firearm by a convicted felon. N.C.G.S. § 14-17(a) (attempted murder); *id.* § 14-32(a) (AWDWIKISI); *id.* § 14-34.1(b) (DW-Into); *id.* § 14-34.10 (DW-Within); *id.* § 14-415.1(a) (firearm possession). The matter came to trial on 12 February 2024.

In its opening statement, the State noted Harris's intent to identify Defendant in open court as the individual who shot her. Harris so identified him, testifying that she would never "forget the face [she] saw that day when that person was shooting at [her]" and that she had no "doubt in [her] mind about who [she] saw [shoot] her." She also purported to identify Defendant to law enforcement on the day of the incident. Detective Holland testified that Harris did not identify any suspect when he interviewed her, while Captain Corey testified that Harris identified the shooter at the hospital because her grandson and Defendant "ha[d] problems." At the close of the State's evidence, Defendant moved to dismiss all indictments. The trial court denied Defendant's motion, finding "ample evidence to go before the jury and let the jury decide at this time." Defendant offered no evidence in his own defense.

Thereafter, the trial court conducted a charge conference, where the State submitted its requested jury instructions. The trial court asked Defendant's counsel if he had anything to add. Defendant's counsel affirmed that "everything else [was] fine." With all parties present, the trial court went through each charge individually. At the conclusion of the conference, Defendant's counsel reaffirmed his "satisf[action] with the way the instructions are to be read to the jury." The trial court then instructed the jury on all charges, including first-degree murder, stating that a finding of self-defense would preclude a guilty verdict as to that charge. It instructed the jury, in relevant part, to a possible self-defense claim if Defendant "believed it . . . necessary to use potentially deadly force against the victim in order to save himself from death or great bodily harm." The trial court stated that it made this instruction because, "for you to find . . . [him] guilty of attempted first-degree murder, the State must first prove beyond a reasonable doubt, . . . that . . . [D]efendant did not act in self-defense."

On 14 February 2024, the jury found Defendant guilty of Class B2 felony attempted first-degree murder, Class C felony AWDWKISI, Class C felony DW-Into, Class F felony DW-Within, and Class G felony possession of a firearm by a felon. Following the jury verdict, Defendant's counsel renewed his motion to dismiss, this time arguing that the State violated pretrial discovery rules by failing to disclose that Harris would identify Defendant in the courtroom. He argued that Harris's in-court identification "was something that we had not had, in any sort of clear and concise way, been given additional discovery after there had been a meeting between the State and [Harris]." In response, the State argued that it was unnecessary to "spell out" Harris's testimony and that "the State [wa]s allowed to elicit in-court identification." The trial court denied Defendant's motion, finding that "enough was said to put [Defendant's counsel] on notice that [Defendant] had been identified at the scene." Finding Defendant a prior offender with a prior record level (PRL) III, the trial court consolidated the convictions for AWDWIKISI, DW-Into, and DW-Within and sentenced him to 96–128 months to run consecutively to the attempted murder conviction.[1] Defendant timely appealed.

II. Jurisdiction

Under N.C.G.S. § 7A-27, this Court has jurisdiction to hear Defendant's appeal of the trial court's "final judgment." N.C.G.S. § 7A-27(b) (2023).

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1. The trial court also sentenced Defendant to 207–261 months for attempted first-degree murder and 17–30 months for possession of firearm by felon.

III. Analysis

On appeal, Defendant argues that the trial court erred by (1) instructing the jury on an opinionated self-defense theory,[2] (2) ruling that the State complied with pre-trial disclosure requirements, (3) misinterpreting § 14-34.10 to find sufficient evidence of the underlying charge, and (4) entering judgment in violation of the " 'unless covered' provision" in § 14-34.10. *See* N.C.G.S. § 14-34.10 (2023). We review the first, third, and fourth issues *de novo*, *see, e.g.*, *State v. Chavis*, 278 N.C. App. 482, 487 (2021) (expressed opinions); *State v. Bediz*, 269 N.C. App. 39, 42 (2019) (evidence sufficiency); *State v. Grappo*, 271 N.C. App. 487, 491 (2020) (statutory mandate), but review discovery-violation claims only for an abuse of discretion. *State v. Gillespie*, 362 N.C. 150, 154–55 (2008). For the reasons below, this Court holds that the trial court did not err in determining the first three issues but did err in part by sentencing Defendant under § 14-34.10.

A. Self-Defense Instruction

[1] First, Defendant claims that "the trial court expressed an opinion on the evidence by instructing the jury on self-defense . . . [without] evidence [to] support[ ] the instruction." We dismiss Defendant's argument as invited error.

The State argues that Defendant invited error by agreeing to the jury instructions, thereby barring appellate review. Generally, we review jury instructions for plain error if a defendant fails to object at trial. *State v. Plotz*, 295 N.C. App. 404, 411 (2024). But where a defendant fails to object to the jury instructions and instead expressly agrees with them, he waives any "right to all appellate review concerning the invited error, including plain[-]error review." *State v. Barber*, 147 N.C. App. 69, 74 (2001); *see State v. White*, 349 N.C. 535, 570 (1998) ("Where a defendant tells the trial court that he has no objection to an instruction, he [can]not . . . complain on appeal."). Here, Defendant did not object to the self-defense instruction, despite having at least three opportunities to do so. Defendant confirmed his satisfaction "with the way the instructions are to be read to the jury" and had "nothing to add [or] take away,

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2. In his reply brief, Defendant raises an ineffective-assistance-of-counsel claim if, "alternatively, . . . this Court rules that Defendant's counsel invited the erro[neous]" jury instruction. Because an appellant must limit his reply brief to *only* "a concise rebuttal" of those "arguments set out in the appellee's brief" left unaddressed in his "principal brief," N.C. R. App. P. 28(h), Defendant waives this claim of ineffective assistance of counsel, *see id.* 28(b)(6).

or [any] concern[s] with the jury charge." Because his counsel repeatedly affirmed the jury instructions, Defendant waives the right to appellate review on this issue. *See Barber*, 147 N.C. App. at 74. Thus, this Court dismisses Defendant's argument as unpreserved.

B. Discovery Violations

[2] Second, Defendant argues that the trial court abused its discretion by denying his motion to dismiss based on the State's discovery violations under N.C.G.S. § 15A-903. For the following reasons, we disagree with Defendant and find no abuse of discretion on this point.

Our discovery statutes and "procedures . . . protect the defendant from unfair surprise." *State v. Tucker*, 329 N.C. 709, 716 (1991). Upon a defendant's motion, the State must "make available to . . . [him] the complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices involved in the investigation of the crimes committed or [his] prosecution." N.C.G.S. § 15A-903(a)(1) (2023). Discovery documents generally include oral statements except those "made by a witness to a prosecuting attorney outside the presence of a law enforcement officer," in which case her statement must be provided only if it contains "*significantly* new or different information" from her prior statements. *Id.* § 15A-903(a)(1)(c) (emphasis added); *see id.* § 15A-907 (recognizing State's "continuing duty to disclose").

As noted above, questions of discovery-rule compliance are within the trial court's sound discretion. *See Denton v. Peacock*, 97 N.C. App. 97, 100 (1990). Defendant claims Harris's in-court testimony conflicts with her prior statement that "she believe[d] it was" Defendant because "her grandson and [Defendant] ha[d] been having problems." Defendant's argument is two-fold: (1) Harris's prejudicial identification of him evolved from a circumstantial assumption to an eyewitness identification amounting to "significantly new or different," *id.*, information, and (2) the State's failure to disclose it forced him to present "a defense on the fly."

The trial court did not abuse its discretion here. Defendant was on notice that he "had been identified at the scene . . . as being the perpetrator." The trial court found that the State did not violate discovery rules because there were "enough indicators" for the Defendant "to prepare and mount a proper defense . . . based on what was in discovery." The trial court's determination that the State complied with discovery under N.C.G.S. § 15A-903 was not so "manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision." *Hammond v. Saini*, 229 N.C. App. 359, 370 (2013), *aff'd*, *modified*

on other grounds, 367 N.C. 607 (2014). Thus, this Court holds that the trial court did not abuse its discretion in finding that the State complied with discovery.

C. Evidence Insufficiency

[3] Third, Defendant argues that the trial court erred in denying his motion to dismiss because the State offered insufficient evidence to support the charge of "discharging a firearm within an occupied enclosure with intent incite fear." N.C.G.S. § 14-34.10 (citation modified). Both he and the State characterize this argument as a matter of statutory misinterpretation, suggesting that the "evidence . . . support[s] a conviction for discharging a weapon *into* an occupied property" à la N.C.G.S. § 14-34.1(b) "but *not* [for] discharging a weapon *within* a vehicle" under N.C.G.S. § 14-34.10.[3] (Second emphasis added).

Defendant expressly recognizes the sufficiency of the State's evidence under the former interpretation, just not the latter. We thus analyze this question only in terms of the challenged statutory language because his motion to dismiss hinges on § 14-34.10's meaning. If § 14-34.10 required the trial court to instruct the jury that both Defendant *and* Harris must have been "within [*one*] occupied motor vehicle" as of "discharge" to merit conviction, then it erred by instructing the jury on that count. N.C.G.S. § 14-34.10. But if that same statute requires that *only* he "discharge[d] a firearm within" either his *or* Harris's "occupied . . . vehicle," then the trial court did not so err. *Id.* For the reasons discussed below, we read § 14-34.10 as the latter meaning and thus find no error.

1. Statutory Interpretation Generally

Given our heightened responsibility to prudentially interpret punitive statutes, we pause to outline certain principles that guide our comparative analysis of §§ 14-34.9 and -34.10. *See*, *e.g.*, Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 296 (1st ed.

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3. As discussed further below, § 14-34.10 criminalizes multiple separate elements. On appeal, Defendant purports to challenge only whether he "discharge[d] a firearm within any occupied . . . motor vehicle" as a question of statutory interpretation. N.C.G.S. § 14-34.10 (2023). Thus, we assume *arguendo* that Defendant stipulates to the remaining elements. We also make no distinction between a "motor vehicle" and any of the statute's other five types of enumerated "enclosure[s]" for the purposes of this analysis. *Id.*; *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (1st ed. 2012) [hereinafter Scalia & Garner, *Reading Law*] ("When there is a straightforward, parallel construction . . . [of] all nouns in a series, a . . . modifier normally applies to [its] entire[ty].").

2012) [hereinafter Scalia & Garner, *Reading Law*] ("The rule of lenity . . . rest[s] . . . at least on the judge-made public policy that a legislature *ought* not to" "decree punishment without making clear what conduct incurs [it] . . . ."). When interpreting statutes, we first "examin[e] . . . the[ir] plain words." *Belmont Ass'n v. Farwig*, 381 N.C. 306, 310 (2022) (quotation omitted). The foundational statute relevant for our purposes, § 14-34.1, criminalizes "[a]ny person who willfully discharges any firearm into any vehicle while it is occupied." N.C.G.S. § 14-34.1(a) (2023) (emphases added; ellipses omitted), *enacted as amended by* Act of Apr. 28, 1969, ch. 341, 1969 N.C. Sess. Laws 291. A subsequent statute built upon § 14-34.1's language, § 14-34.9, similarly sanctions "any person who willfully discharges a firearm, as a part of criminal gang activity, *from within* any motor vehicle *toward* a person *not within* that [vehicle]." *Id.* § 14-34.9 (emphases added; ellipses omitted), *amended by* Act of Dec. 1, 2017, S.L. 2017-194, sec. 6, 2017 N.C. Sess. Laws 1370, 1372 [hereinafter 2017 Amendment] (amending "*a pattern of* criminal *street* gang activity" to only "criminal gang activity" (emphases added)). Finally, the statute directly challenged by Defendant here, § 14-34.10, criminalizes "any person who willfully discharges a firearm *within* any occupied motor vehicle with the intent to incite fear *in another*." *Id.* § 14-34.10 (emphases added; ellipses omitted), *enacted by* Act of June 19, 2013, S.L. 2013-144, 2013 N.C. Sess. Laws 351.

We apply "[o]rdinary rules of grammar" to construe these material terms so emphasized "according to the context and approved usage of the[ir] language." *Dunn v. Pac. Emps. Ins. Co.*, 332 N.C. 129, 134 (1992). We further "employ[ ] canons of statutory interpretation" to supplement these grammatical strictures,[4] *State v. Campbell*, 285 N.C. App. 480, 487 (2022), all of which we presume "the General Assembly . . . to have acted . . . with a knowledge of," *People's Bank v. Loven*, 172 N.C. 666, 670 (1916). One general canon most appropriately applies here: the Related-Statutes Canon,[5] *see* Scalia & Garner, *Reading Law* 252, where

4. By "canons," we mean only those generally accepted jurisprudential "rules of interpretation . . . so commonsensical" as to merit blackletter status themselves. Antonin Scalia, *A Matter of Interpretation* 25–26 (new ed. 2018). We recognize that "[e]very canon is simply *one indication* of meaning" that "must yield" to "more contrary indications." *Id.* at 27. *See generally* 27 N.C. Index 4th *Statutes* § 25, Westlaw (database updated July 2025) (outlining North Carolina's "[b]asic principles of statutory construction").

5. Although it goes by many names, this canon reflects the longstanding principle that "statutes addressing the same subject matter generally should be read" "*in pari materia*" "as if they were one law." Lisa Schultz Bressman et al., *The Regulatory State* 208–09 (3d ed. 2020) (describing various "Whole Code Canons") (quotation omitted). *But see* Scalia & Garner, Reading Law 167 (defining as singular "whole-text canon").

"statute[s] dealing with the same subject matter must be considered and interpreted as" a single organic act. *State v. Rankin*, 371 N.C. 885, 889 (2018) (quotation omitted). Within these challenged statutes, basic and complex grammar rules govern "[t]he particular meaning of a qualifying modifier," Günter Radden & René Dirven, *Cognitive English Grammar* 144 (Cognitive Linguistics in Prac. Vol. 2, 2007) [hereinafter Radden & Dirven, *Grammar*], *i.e.*, "within any occupied . . . motor vehicle," N.C.G.S. § 14-34.10. Certain secondary interpretive canons also reflect these core indications of syntax, *e.g.*, the "last-antecedent canon," Scalia & Garner, *Reading Law* 144, the "series-qualifier canon," *id.* at 147, and the "nearest-reasonable-referent canon," *id.* at 152. And as a last resort before finding a particular statute ambiguous, we "examine . . . clarifying . . . amendments" to its "previously enacted words" for reliable "evidence of legislative intent" in concert with these interpretive tools. *Hanson v. Charlotte–Mecklenburg Bd. of Educ.*, 387 N.C. 445, 446–47 (2025) (Newby, C.J., concurring). With these principles in mind, we now turn to the relevant General Statutes' article on firearm discharges as interpreted *in pari materia*. N.C.G.S. ch. 14, subch. III, art. 8 [hereinafter Article 8]. This Court has not specifically interpreted *within* as used in Article 8 and thus reviews it now as an issue of first impression.

2. Section 14-34.10 Considered

As noted above, Defendant asserts that he could not have "discharg[ed] a weapon *within* a vehicle" under § 14-34.10 because, even though he "was inside *a* vehicle and fired a gun 'into' Harris's occupied vehicle[, n]either . . . [he] nor the gun were *within*" the latter vehicle as of the discharge. (Emphases in original.) As shown below, we disagree with Defendant because his argument incorrectly interprets this statute on its own terms.

In relevant part, § 14-34.10 states that (1) "any person" (2) "who willfully" (3) "discharge[s] a firearm" (4) "within any occupied motor vehicle" (5) "with the intent to incite fear" (6) "in another" is guilty of a felony. N.C.G.S. § 14-34.10 (ellipses omitted). The question is to what extent, if any, the fourth element of *within any occupied motor vehicle* modifies its surrounding elements. The contextual meaning of *within* as either a "prenominal . . . or postnominal modifier[ ]" is "determined by three elements: its lexical meaning[ ], its grammatical form, and its syntactic position *relative to the head noun*." Radden & Dirven, *Grammar* 144 (emphasis added; boldface omitted). No one contests either the lexical meaning or grammatical form of *within* in a vacuum, at least as part of

its core prepositional phrase.[6] It denotes a required position "inside the limits" or "interior part of" a vehicle; nothing less, nothing more. *Within*, *Black's Law Dictionary* (6th ed. 1990) [hereinafter *Black's Law*]. That leaves us to identify the statute's head noun that *within* syntactically modifies by "analy[zing] . . . the position of these words in the sentence" itself. Ingo Plag et al., *Introduction to the English Linguistics* 126–27 (3d rev. & enl'd ed. 2015) [hereinafter Plag et al., *Introduction*]; *accord* Elly van Gelderen, *An Introduction to the Grammar of English* 45 (rev. ed. 2010) (describing a prepositional "phrase [a]s a group of words . . . united around a head, *e.g.*, a noun or a verb").

a. Plain Meaning of "Within"

To determine § 14-34.10's plain meaning of *within*, we contextualize the statutory language "in a manner which harmonizes . . . the other provisions of the statute and . . . gives effect to [its] reason and purpose." *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 215 (1990). The General Statutes' Chapter 14 does not define *within* despite using it 281 times throughout. *See* N.C.G.S. ch. 14 (delineating "Criminal Law"); *e.g.*, *id.* § 14-27.20 (defining material terms of Article 7B's "Rape and Other Sex Offenses"). Therefore, our interpretation of § 14-34.10 begins with a grammatical analysis of its terms.

The prepositional phrase *within any occupied motor vehicle* most reasonably modifies its head noun *person* because, although a "postpositive modifier normally applies only to [its] nearest reasonable referent," Scalia & Garner, *Reading Law* 152, "the head projects its properties onto the phrase *as a whole*," Plag et al., *Introduction* 125 (emphasis added; boldface omitted); *cf.*, *e.g.*, Bryan A. Garner, *Garner's Modern English Usage* 1213 (5th ed. 2022) [hereinafter Garner, *Modern English*] ("For example, in *the tall man in the front row*, the word *man* is the head of the noun phrase.").

First, *firearm* is logically closer to the postpositive modifier *within* than either of the two other possible head nouns, *person* or *another*.

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6. Nor could they in any plausible sense. *See*, *e.g.*, *Within*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020) (defining as "into the interior" and "as a function word to indicate enclosure or containment"); *Within*, *Cambridge Advanced Learner's Dictionary* (4th ed. 2013) (defining as "inside or not beyond (a particular area)"); *Within*, *American Heritage College Dictionary of the English Language* (5th ed. 2011) (defining prepositional form as "[i]n the inner parts or parts of; inside").

The phrase could plausibly modify *a firearm* in addition to *any person*[7] but certainly not the subsequent *in another* that already postpositively modifies its own head noun, *fear*. *Second*, *person* forms a syntagm with *within any occupied motor vehicle*. N.C.G.S. § 14-34.10. This adjunct adverbial prepositional phrase syntactically "answers the questions" of " 'when?', 'where?', and 'how?' " Defendant must "express the place or manner" of his firearm discharge. Laurel J. Brinton & Donna M. Brinton, *The Linguistic Structure of Modern English* 220 (rev. ed. 2010) (citation modified) [hereinafter Brintons, *Linguistic Structure*]. And as a postpositive modifier, the phrase forms a "one-way dependency" with *person* as the "essential center of the constituent" syntax. *Id.* at 188. *Within* likely does not act upon either *firearm* or *person* when comparing the grammatical integrity of would-be § 14-34.10s that respectively omit *any person who*, *a firearm*, and *in another*:

> (1) . . . [W]illfully discharges a firearm within any occupied motor vehicle with the intent to incite fear in another shall be punished.
>
> (2) Any person who willfully discharges . . . within any occupied motor vehicle with the intent to incite fear in another shall be punished.
>
> (3) Any person who willfully discharges a firearm within any occupied motor vehicle with the intent to incite fear . . . shall be punished.

N.C.G.S. § 14-34.10 (citation modified). The statutory "sentence is grammatical without" either *a firearm* or *in another*. Brintons, *Linguistic Structure* 220. An element that requires "the intent to incite," N.C.G.S. § 14-34.10, an abstract "negative feeling that *a person* experiences," *Fear*, *Black's Law* (12th ed. 2024) (emphasis added), also more readily implies *in another* than would *any person* imply absent *a firearm*, N.C.G.S. § 14-34.10. *Within any occupied motor vehicle* clearly "expresses some quality" of *person* and "can[ ] occur without" *another* in the same sentence. Brintons, *Linguistic Structure* 188. By contrast, a *pre*modified

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7. Addressing this secondary distinction would hardly be an exercise in hair-splitting. In *State v. Mancuso*, 321 N.C. 464 (1988), our Supreme Court had to assess "discharging a firearm *into* any vehicle" when "the gun was inside the victim's car when discharged" but "the defendant was standing *outside* of it." *Id.* at 468 (emphases added; citation modified) (quoting N.C.G.S. § 14-34.1(2) (1987)). But because Defendant here only asserts that "discharge . . . within any motor vehicle" must occur with both him and Harris *in the same* vehicle, we need not conclusively resolve this possible "modification ambiguity" here. Bryan A. Garner, *Garner's Modern English Usage* 1192 (5th ed. 2022).

reading of this prepositional phrase would impermissibly broaden the plain text of this statute. *See* Scalia & Garner, *Reading Law* 152.

b. Plain Meaning of "Occupied"

Having addressed the meaning of *within*, we now turn to *occupied*. Sections 14-34.1(b), 14-34.9, and 14-34.10 do not define this latter term despite all requiring it as part of an element. Absent a compelling contextual or controlling judicial definition, our courts rely on accepted dictionaries to determine plain meaning. *See* Scalia & Garner, *Reading Law* 415–24; *Clark v. Sanger Clinic, PA*, 142 N.C. App. 350, 356 (2001). Reflecting this principle, an individual "occupies a particular place," Garner, *Modern English* 769, by "tak[ing] possession" or "control of [that] place," however "briefly," *Occupy*, *Black's Law* (parentheses omitted). *Accord Occupy*, *American Heritage Dictionary of the English Language* (5th ed. 2011) ("To fill up (time or space)"); *Occupy*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2020) ("To take up (a place or extent in space)").

Here, Defendant admits to "firing a gun 'into' Harris's occupied vehicle" while "inside his vehicle," *i.e.*, while "occupying" it. (Brackets omitted.) Coupled with § 14-34.10's textual allowance for "*any* motor vehicle" and thus *not* only the victim's, the plain meaning of "discharg[ing] a firearm within any motor vehicle" clearly encompasses these facts for the purpose of characterizing Defendant's conduct. N.C.G.S. § 14-34.10 (ellipses omitted). He would have this Court rewrite the statute to instead punish "discharg[ing] a firearm within any occupied motor vehicle with the intent to incite fear in [some] [ ]other" (person also located within the occupied vehicle). *Id.* (ellipses omitted). In reviewing Defendant's motion to dismiss on appeal, we need only determine whether the State offered sufficient evidence that Defendant himself fired his gun "within *any* occupied motor vehicle"—a standard it met here. *Id.* (emphasis added). Thus, we hold that *only* the "person who willfully . . . discharges a firearm" must be "within a[ ] vehicle" according to the plain, self-contained meaning of N.C.G.S. § 14-34.10. *Id.*

3. Section 14-34.9 Contrasted

Filtered through jurisprudential canons more abstract than basic English grammar, though, § 14-34.9's specific language further implies § 14-34.10's more general applicability to Defendant's conduct. As noted above, the former statute punishes "any person who willfully discharges a firearm *from within* any motor vehicle *toward* a person *not within* that enclosure" "as part of criminal gang activity." N.C.G.S. § 14-34.9 (2023) (emphases added; ellipses omitted). Read *in pari materia* with

§ 14-34.10, § 14-34.9's "material variation" in prepositional phrasing, Scalia & Garner, *Reading Law* 170—to say nothing of its gang-related "subsequent enactment," *id.* at 255—support our conclusion that both Defendant and the State too strictly construe the former statute to match the latter in meaning.

At the outset, § 14-34.9 is a conspicuously detailed statute relative to its comparable proscriptions. It specifically forbids anyone from firing a gun using three discrete adjunct adverbial prepositional phrases, *from within*, *toward*, and *not within*, which collectively denote an interaction between two distinct "person[s] . . . from within any enclosure" and "not within that [same] enclosure." N.C.G.S. § 14-34.9. But its sibling statutes merely forbid *one* "person" from doing so either "into," *id.* § 14-34.1(b), "at or into," *id.* § 14-34.1A(b), or "within any occupied . . . motor vehicle," *id.* § 14-34.10.

We presume that the General Assembly "purposefully . . . includes or excludes" "particular language in one section" when "omitting it in another section of the same Act." *N.C. Dep't of Rev. v. Hudson*, 196 N.C. App. 765, 768 (2009) (quotation and brackets omitted). Our appellate courts over the decades have interpreted § 14-34.1's use of *into* to the exclusion of any other directional preposition. *E.g.*, *State v. Mancuso*, 321 N.C. 464, 468 (1988) (interpreting N.C.G.S. § 14-34(2) (1987)); *State v. Canady*, 191 N.C. App. 680, 687 (2008) (interpreting N.C.G.S. § 14-34(a) (2007)); *State v. Hicks*, 241 N.C. App. 345, 353 (2015) (interpreting N.C.G.S. § 14-34.1 (2013)). Our research reveals only one decision to so much as mention *within*, *State v. McLean*, 251 N.C. App. 850 (2017), which threw out the defendant's conviction because his original "indictment alleged that [he] discharged a firearm 'into' an occupied structure" even though § 14-34.10 required he do so "within" one. *Id.* at 854 (citing N.C.G.S. § 14-34.10(a) (2015)).

Albeit elongated, the multi-prepositional phrase "from within any motor vehicle toward a person not within that enclosure" collectively modifies "any person," N.C.G.S. § 14-34.9 (2023) (ellipses omitted), in the same way as does "within any occupied vehicle" alone, *id.* § 14-34.10 (ellipses omitted). The additional *not within that enclosure* subclause does not change this analysis because it merely postmodifies *a person* as a secondary "phrasal preposition" within the larger sentence, Garner, *Modern English* 1234 (boldface omitted). One leading English grammar treatise helpfully analogizes two distinct prepositional modifications of the example phrase *a book in the library on campus*:

> Here, "in the library" modifies "book" and "on campus" modifies "the library." *A cat on the mat in the hallway*

> would have the same structure, but the superficially similar *a cat on the mat with long whiskers* would not since "with long whiskers" modifies "the cat," not "the mat."

Brintons, *Linguistic Structure* 201 (citation modified). Section 14-34.9 uses the same syntax as this feline example while addressing a much weightier issue. *From within* and *toward* jointly modify *any person* in the same way as *with long whiskers* and *on the mat* jointly modify *cat*. The additional specificity of *from* and *toward* merely gild the lily of the General Assembly's textualized intent to address "criminal gang activity," N.C.G.S. § 14-34.9, occurring between "premises owned by one person [and] premises owned by another," *From One Place to Another*, *Black's Law* (6th ed. 1990). They do not retroactively alter Article 8's use of *within* to describe the "interior part of," *Within*, *Black's Law*, "*any* . . . motor vehicle." N.C.G.S. §§ 14-34.9–.10 (emphasis added).

The General Assembly's 2017 "altering amendment" to further particularize § 14-34.9's focus on gang activity informs this choice of detailed verbiage. *Hanson*, 387 N.C. at 446. Our courts frequently look to "statutory history" to interpret a particular statute because "a change in [its] language . . . presumably connotes a change in meaning." Scalia & Garner, *Reading Law* 256 (emphasis omitted); *e.g.*, *Ray v. N.C. Dep't of Transp.*, 366 N.C. 1, 8–9 (2012) (distinguishing between "clarifying amendments" that merely inform a "law's application from its original enactment" and "altering amendments" that actually "change its substance" (citation modified)); *State v. Dickerson*, 125 N.C. App. 592, 595 (1997). The original § 14-34.9 punished the aforementioned conduct only if committed "as a part of ~~a pattern of~~ criminal ~~street~~ gang activity." North Carolina Street Gang Suppression Act, S.L. 2008-214, sec. 2, 2008 N.C. Sess. Laws 935, 935 (strikethroughs added). In pursuit of "enhanced punishment of criminal gang activity" at a more granular level, 2017 Amendment pmbl. at 1370, the General Assembly deleted the "pattern of" language from § 14-34.9 and other related statutes while leaving § 14-34.10 entirely untouched between then and now, *e.g.*, *id.* sec. 6, § 14-34.9; *id.* sec. 12, § 14-50.23(a). These materially specific legislative changes to § 14-34.9's substantive language speak to a General Assembly that sought to address the specific public policy issue of drive-by shootings. The similarly tightened "from within . . . toward" language thus does not constrict the meaning of comparable conduct otherwise "[un]related to gang activity." N.C.G.S. § 14-34.10. Instead, we read § 14-34.10 as an umbrella statute that intentionally captures fear-causing gunfire from *any* occupied enclosure.

4. Facts at Hand

As noted above, Defendant acknowledges the evidence's tendency to show that he "fired a gun 'into' Harris's occupied vehicle" while "inside [his] vehicle." He shot "within *any* occupied . . . motor vehicle," *id.*—here, his own. Viewing "the evidence in the light most favorable to the State," *State v. Franklin*, 327 N.C. 162, 171 (1990), Defendant "pulled up beside [Harris] and opened fire" from the "interior part of," *Within*, *Black's Law*, his own "Gray Honda" into Harris's occupied "white Dodge Caravan" "to incite fear in" her, N.C.G.S. § 14-34.10. The State's evidence "reasonably leads" to a "logical and legitimate deduction," *Franklin*, 327 N.C. at 171, satisfiable to "a reasonable juror," *id.* at 173, that Defendant "discharge[d] a firearm within" his own "occupied . . . motor vehicle" when he shot at Harris "with intent to incite fear," N.C.G.S. § 14-34.10. Thus, this Court holds that the trial court did not err in denying his motion to dismiss on contrary grounds.

D. Conviction under N.C.G.S. § 14-34.10

[4] Fourth and finally, Defendant argues that the trial court erred by convicting him of DW-Within when other statutes cover his conduct and "provid[e] greater punishment," *compare id.* § 14-34.10 ("punished as a Class F felon"), *with id.* § 14-17(b) ("punished as a Class B2 felon"), *id.* § 14-32(a) ("punished as a Class C felony"), *and id.* § 14-34.1(b) ("guilty of a Class D felony").[8] We agree with Defendant on this point. Although the trial court did not err by finding sufficient evidence for the DW-Within offense, it did err by sentencing him under the organic statute when others carried greater sentences within the same indictment. Once the trial court sentenced Defendant for attempted murder, AWDWIKISI, and DW-Into, it should have arrested judgment on his DW-Within conviction. Thus, this Court vacates the DW-Within sentence and remands in part with instructions to arrest judgment and resentence Defendant.

1. Preservation

At the outset, Defendant impliedly concedes that he did not expressly object to the alleged error at trial. As a result, "we must decide whether [he] preserved his argument[ ] for appellate review." *State v. Davis*, 364

8. We thus note the trial court misclassified Defendant's DW-Into conviction as a Class C felony instead of a Class D felony. *See* N.C.G.S. § 14-34.1(b) (2023). Although not raised on appeal, this error is harmless because Defendant's consolidated sentence includes AWDWIKISI as a Class C felony. While the trial court may wish to correct this judgment for accuracy, doing so will not change Defendant's sentence. We more appropriately characterize Defendant's DW-Into conviction as a Class D felony throughout this opinion.

N.C. 297, 301 (2010). Section 14-34.10 (among other statutes) prohibits a trial court from entering a sentencing judgment if "some other provision of law provid[es] greater punishment" for the statute's proscribed conduct. N.C.G.S. § 14-34.10; *accord*, *e.g.*, *id.* § 20-141.4 (criminal death by vehicle); *id.* § 50B-4.1(d), (f)–(g1) (protective-order violation). This prefatory clause is "a statutory mandate" that a trial court must follow. *State v. Ashe*, 314 N.C. 28, 39 (1985). The record does not indicate whether the trial court "review[ed] [D]efendant's argument that . . . [it] lacked statutory authority to sentence him for" the felony DW-Within. *Davis*, 364 N.C. at 302. Because a possible conclusion that it lacked this authority could have resulted in at least one less sentence, this lack of documented assessment prejudiced Defendant's case at bar. *Id.* Thus, his "right to appeal the [trial] court's action is preserved, notwithstanding [his] failure to object at trial." *Ashe*, 314 N.C. at 39.

2. Interpretation

We implement a clear and unambiguous statute "according to the plain meaning of its terms so long as it is reasonable to do so." *N.C. Farm Bureau Mut. Ins. Co. v. Lunsford*, 378 N.C. 181, 189 (2021) (quotation omitted). Section 14-34.10's proscribed conduct is punishable "[u]nless covered under some other provision of law providing greater punishment." N.C.G.S. § 14-34.10. The trial court may enter judgment for this Class F felony *only* when the conduct remains unpunished by a higher-class offense. Because we "presum[e] that [our] legislature carefully chose each word used" in this statute, this language indicates that the General Assembly knew higher-class offenses might apply to the same conduct at issue here. *N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009) (citing *Rhyne v. K-Mart Corp.*, 358 N.C. 160, 188 (2004)). By incorporating this prefatory clause, "the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable" § 14-34.1(b) conduct "*or* for the" less heavily punishable § 14-34.10 conduct, "but not both." *Davis*, 364 N.C. at 304.

Our Supreme Court's *State v. Davis* decision controls our analysis of this issue. In *Davis*, the defendant was driving down a highway when he collided with a family of three. *Id.* at 298–99. The husband and wife died at the scene, while the daughter suffered severe injuries but ultimately survived. *Id.* at 300. A grand jury indicted the defendant in relevant part for Class B2 felony second-degree murder, Class E felony assault, Class D felony death by vehicle, and Class F felony serious injury by vehicle. *Id.* The trial court entered judgment after the jury convicted him on all counts, to which he "did not object at sentencing." *Id.* Even so, the defendant appealed to the Supreme Court after this Court held

that he "did not preserve his objection to a purported double[-]jeopardy violation."[9] *Id.* (quotation omitted).

The *Davis* Court reversed the trial court's affirmation of the two vehicle-related felony convictions because § 20-141.4 conditioned their respective punishment levels on no "*other provision of law providing greater punishment*." *Id.* at 302 (quoting N.C.G.S. § 20-141.4(b) (2009)). The Court reasoned that its prefatory clause demonstrated the General Assembly's awareness of "other, higher[-]class offenses" that "might apply to the same conduct" "when it enacted the [then-]current version of [§] 20-141.4." *Id.* at 304. "In such situations, as in this case, the General Assembly intended an alternative: that punishment is *either* imposed for the more heavily punishable offense *or* for the [vehicular-injury] offense, but not both." *Id.* So too with § 14-34.10's identical provision relative to § 14-34.1(b), this challenged language limits "a trial court's authority to impose punishment for th[at] . . . offense[ ] when punishment is imposed for higher[-]class offenses that apply to the same conduct." *Id.* at 302.

Here, Defendant's conviction under § 14-34.1(b) carries a presumptive Class D felony sentence that is higher than the one stemming from his simultaneous conviction under § 14-34.10, which carries its own Class F felony sentence.[10] *See* N.C.G.S. § 15A-1340.17(c) tbl. (2023) (listing sentencing ranges by offense class and PRL). Based on Defendant's PRL III, his felony convictions under § 14-34.1(b) and § 14-34.10 subjected him to presumptive sentencing ranges of 67–84 and 17–21 months, respectively. *Id.* Both statutes "punish the same conduct," *Davis*, 364 N.C. at 305, even though the former "provision of law provid[es] greater punishment" than the latter. N.C.G.S. § 14-34.10. Because § 14-34.10 "does not authorize the trial court to impose" [a] sentence[ ]" for its violation, this Court holds that the trial court erred in part by sentencing Defendant for discharging a weapon within an enclosure to incite fear. *Davis*, 364 N.C. at 305.

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9. Although both the *Davis* defendant and Defendant here "advanced . . . double[-]jeopardy argument[s] on appeal," both "analys[e]s turn[ ] on" whether "some other provision of law providing greater punishment" covered each defendants' conduct. *State v. Davis*, 364 N.C. 297, 304–05 (quoting N.C.G.S. § 14-32.4(a)–(b) (2009)). Thus, we do not read this opinion as a double-jeopardy analysis.

10. Defendant's Class B2 felony conviction under § 14-17(a) and Class C felony conviction under § 14-32(a) also subjects him to a presumptive sentencing range of 165–207 months and 77–96 months, respectively. N.C.G.S. § 15A-1340.17(c) tbl. (2023).

3. Arresting Judgment

As noted above, we vacate Defendant's sentence and remand to the trial court with instructions to arrest judgment on Defendant's sentence under N.C.G.S. § 14-34.10. *See State v. Fields*, 374 N.C. 629, 636–37 (2020) (arresting judgment when a defendant was convicted under an "unless covered" and greater offense). Arresting a defendant's judgment can have one of two effects: (1) vacating the underlying judgment "because of a fatal flaw which appears on the face of the record, such as a substantive error on the indictment," *State v. Pakulski*, 326 N.C. 434, 439 (1990), or (2) "withhold[ing] the entry of judgment based on a valid jury verdict," *State v. Pendergraft*, 238 N.C. App. 516, 528 (2014) (citing *Pakulski*, 326 N.C. at 439), *aff'd by an equally divided court*, 368 N.C. 314 (2015). The latter occurs "for the purpose of addressing double jeopardy or *other concerns*"; in those cases, "the underlying guilty verdict remains intact." *Pendergraft*, 238 N.C. App. at 529 (emphasis added); *see Fields*, 374 N.C. at 636 ("Although . . . not directly based upon principles of double jeopardy," arresting judgment when convicting a defendant contrary to a statute's prefatory language "applies with equal force.").

The trial court's lack of authority to sentence Defendant for his DW-Within conviction is not due to any defect in the record. Rather, "it is based on the effect of the prefatory language" in § 14-34.10 "coupled with" Defendant's convictions arising from the same conduct. *Fields*, 374 N.C. at 637. We do not disturb Defendant's guilty verdict. *See Pendergraft*, 238 N.C. App. at 529. Thus, this Court vacates Defendant's DW-Within conviction and remands it to the trial court with instructions to arrest judgment and resentence consistent with this opinion. *See State v. Wortham*, 318 N.C. 669, 674 (1987).

IV. Conclusion

For the reasons above, this Court dismisses Defendant's challenge to the jury instructions as an invited error. This Court holds that the trial court did not err (1) by finding that the State adhered to pretrial discovery rules and (2) by denying Defendant's motion to dismiss for purportedly misinterpreting N.C.G.S. § 14-34.10. But this Court also holds that the trial court erred in part by entering judgment under that same statute, thus vacating and remanding Defendant's sentence under § 14-34.10 with instructions to arrest judgment and resentence consistent with this opinion.

DISMISSED IN PART; NO ERROR IN PART; VACATED AND REMANDED IN PART.

Judges FLOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
FRANKLIN COY JONES

No. COA24-503

Filed 6 August 2025

1. Evidence—hearsay—defendant's character—prejudice not shown—no plain error—ineffective assistance of counsel claim dismissed

In a trial that resulted in convictions on charges of first-degree murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury (arising from the attempted robbery of a convenience store by defendant and two others), defendant failed to show that the jury's verdicts would have been different but for the admission of excerpts from a pretrial statement by defendant's cousin (to which defendant did not object at trial)—that defendant was a "lowlife" who had been arrested for fighting and who was part of a group that robbed people—where the cousin had already offered unchallenged testimony to the same effect. Defendant's related ineffective assistance of counsel claim could not be resolved on the cold record; therefore, it was dismissed without prejudice.

2. Evidence—asking witness whether he testified truthfully—error—prejudice not shown

In a trial that resulted in convictions on charges of first-degree murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury (arising from the attempted robbery of a convenience store by defendant and two others), the trial court erred in allowing a witness—another perpetrator who was the only other person present when the fatal shooting occurred—to answer the prosecutor's question at the end of direct examination about whether he had testified truthfully; such an inquiry invaded the jury's province as the sole judge of witness credibility. However, defendant could not demonstrate a reasonable possibility that, had the error not occurred, the jury would have reached different verdicts where, although there was no physical evidence about which perpetrator shot the victim: (1) the trial court correctly instructed the jury that it could find defendant guilty of any crime committed by another in the common purpose of robbing the store with a firearm; and (2) regardless of who shot the

victim, overwhelming evidence showed that defendant and the witness planned to commit robbery at gunpoint and that shooting into the victim's car was done in furtherance of that common purpose.

3. Evidence—alleged hearsay character evidence—erroneously admitted witness credibility evidence—no cumulative error shown

In a trial that resulted in convictions on charges of first-degree murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury (arising from the attempted robbery of a convenience store by defendant and two others), the overwhelming evidence supporting defendant's convictions overshadowed any testimony that was or may have been improperly admitted; accordingly, defendant's argument that he was entitled to a new trial based on cumulative errors was rejected.

Judge HAMPSON concurring in result only.

Appeal by defendant from judgment entered 2 February 2023 by Judge Cy A. Grant, Sr., in Hertford County Superior Court. Heard in the Court of Appeals 25 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General Steven Armstrong, for the State.

Joseph P. Lattimore for defendant.

FREEMAN, Judge.

Defendant appeals from judgment entered upon a jury verdict of guilty on the charges of first-degree murder on the basis of felony murder and lying in wait, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury. On appeal, defendant argues the trial court (1) plainly erred by permitting excerpts of a testifying witness's written statement to law enforcement officers to be read at trial; and (2) erred by allowing a witness to answer the prosecutor's question about whether he had testified truthfully. After careful review, we conclude that the trial court did not plainly err by allowing the statements to be read at trial and did not reversibly err by allowing the witness to testify that he had told the truth.

I. Factual and Procedural Background

The evidence presented at trial tended to show the following. In September 2016, defendant and two friends, Bobby Askew and Nicholas Cooper, decided to rob Uday Manik, the owner of a local grocery store and gas station. On 23 September 2016, defendant and his cousin, Joy Lee, had a conversation about the planned robbery. Lee worked at Manik's store. Lee testified:

> I stopped [at Manik's store] and I saw [defendant]. He would come out, so I had automatically reached in my pocketbook. I figured he wanted some money because he was entitled—he was staying around Aulander, and I had got the money out and he had come to the car . . . He saw me go in the store and come out, and I had the money in my hand and it wasn't the money he was looking for. And then he said to me—he said he wanted to talk to me about something. And I was like of what? And [defendant] said somebody was trying to get a lick. And I was like, what's that? And then he said, well, they say your boss has money. And I told him, I said, [defendant], you should never consider doing anything somewhere where your family works. I said, you know I work there. I said he wouldn't have money like that. I said we cash checks, I said, but you know I work there, you should never—if you're talking to somebody and they're talking about you coming and robbing where you've got somebody that works—that's your family, you shouldn't even consider that.

Lee then told Manik about the conversation she had with defendant. Lee asked Manik where his gun was, and told him, "You've got somebody watching you . . . so you need to be careful." Manik subsequently started carrying the store's money in a bag that he kept hidden on his person.

On the evening of 29 September 2016, Askew went to Manik's store to buy gas. Lee was working at the store and paid particular attention to Askew, as she was "on pins and needles" from her previous conversation with defendant. Askew returned ten minutes later to put gas in a different vehicle, and "he came back three times that night." During this time, defendant was at the home of Dominican Watford, a friend of defendant, Askew, and Cooper. Watford overheard defendant make a phone call in which defendant discussed robbing someone. Watford did not know who was on the other end of the phone call.

At around 10:00 or 11:00 that evening, Askew picked up defendant from Watford's home. Askew drove Cooper and defendant to

an intersection where they knew Manik would drive by after leaving his store. Before they got out of the car, Askew placed his Hi Point 40-caliber gun on the backseat next to defendant. After defendant and Cooper got out of the car, Askew drove away. Cooper and defendant waited at the intersection for Manik, and when Manik drove up, one of them began shooting into Manik's car. Cooper and defendant then ran into the woods near the intersection without approaching Manik; they did not take anything from Manik's car or his person. Manik was shot three times and died of a perforating gunshot wound to the chest. Manik still had the store's money on his person.

After the shooting, defendant and Cooper ran into the woods near the intersection. Defendant and Cooper spent the night in a vacant house, and early the next morning they walked along a road towards the Town of Aulander. Lee was driving on the road when she saw two men walking towards Aulander, and she thought one of them looked like defendant. Lee reported this observation to State Bureau of Investigation agent John Taylor. Agent Taylor found the two men and identified them as defendant and Cooper. Cooper got into Agent Taylor's car, while defendant continued walking.

Near the location where Agent Taylor found defendant and Cooper, investigators discovered "a black semi-automatic Hi Point 40-caliber firearm." Investigators found the gun "just inside a wood line that was closer to where [Manik's] vehicle was located." Investigators also recovered four "FC16 40-caliber S and W shell casings" and Cooper's cell phone from the scene. A forensics expert testified that the cartridge cases and bullets found at the scene "were fired from the submitted firearm," which was the Hi Point. There was not enough DNA recovered from the firearm to compare to Cooper or defendant's DNA.

On 30 September 2016, Lee provided a written statement to the police, wherein she described her relationship with defendant and what he had told her about the robbery. Later that day, police arrested defendant and Askew while they were at a party at Watford's house. On 31 October 2016, defendant was indicted on the charges of first-degree murder; robbery with a dangerous weapon; and discharging a weapon into an occupied vehicle, while in operation, causing serious injury. On 27 October 2021, Askew pleaded guilty to one count of second-degree murder. On 10 November 2021, Cooper similarly pleaded guilty to one count of second-degree murder.

Defendant's matter came on for trial on 30 January 2023. After Lee testified, Agent Taylor read Lee's written statement out loud. Relevant here, Agent Taylor read:

> Lee advised [defendant] lived with his girlfriend, but she did not know where that was. Lee described [defendant] as a "lowlife" that "hangs with lowlife." He had previously been arrested for fighting and he "hangs" with some of the boys robbing people in the town. Lee did not know the identities of those "boys."
>
> [Defendant] normally wore white shirts and jeans.
>
> Lee had never seen [defendant] with a gun, but it would not surprise her if he had one. She also had not seen Askew with a gun. Lee thought they did have guns.

Pursuant to their plea agreements, both Askew and Cooper testified against defendant. Askew testified that while at Watford's party the day they were arrested, he and defendant had a conversation about the botched robbery. Askew testified that defendant told him he had discarded the gun. Askew further testified that defendant said he "started shooting, and he kept shooting because [Manik] kept moving."

Cooper testified that defendant had the gun while they waited for Manik to arrive at the intersection. Once Manik approached the intersection, defendant started shooting into the car. Cooper dropped his phone at the intersection and then ran into the woods because he was "scared" of the gunshots, as "[s]hots was not supposed to be fired." After they were in the woods, Cooper started "panicking" and asked defendant, "why did he do it." Cooper testified that defendant responded that "he got scared and didn't know what else to do." Cooper and defendant then began "tussling" because defendant "messed up" Cooper's life, and Cooper wanted to retrieve his phone from the intersection. Defendant apologized but told Cooper not to get his phone because "there was too many people out there."

At the end of Cooper's direct examination, the following exchange occurred:

> Q: So the information that you provided them at the time [of Cooper's first interview with law enforcement] is not consistent with what you've testified to today?
>
> A: No, ma'am.
>
> Q: And so the information that you've testified to in court today, is that the truth, is that what happened?
>
> [Defense Counsel]: Objection.
>
> THE COURT: Overruled.
>
> A: That's correct.

On 2 February 2023, the jury found defendant guilty of first-degree murder on the theories of felony murder and lying in wait. The jury found the underlying felonies to support the felony murder conviction were discharging a weapon into an occupied vehicle causing serious bodily injury and attempted robbery with a dangerous weapon. The jury also found defendant guilty of attempted robbery with a dangerous weapon and discharging a weapon into an occupied vehicle causing serious bodily injury.

The trial court sentenced defendant to life in prison without the possibility of parole on the conviction of first-degree felony murder, with discharging a weapon into an occupied vehicle causing serious bodily injury as the underlying felony. The trial court arrested judgment on the first-degree murder conviction on the theory of lying in wait and on the conviction for discharging a weapon into an occupied vehicle causing serious bodily injury. The trial court sentenced defendant to 64–89 months imprisonment on the conviction for attempted robbery with a dangerous weapon. Defendant gave oral notice of appeal in open court after the judgment was pronounced.

II. Jurisdiction

This Court has jurisdiction over defendant's appeal of right from the superior court's final judgment. N.C.G.S. § 7A-27(b)(1) (2023); *see also id.* § 15A-1444(a) (2023).

III. Standard of Review

We review unpreserved objection to admitted hearsay statements for plain error. *State v. Hocutt*, 289 N.C. App. 562, 568 (2023). Preserved issues regarding interference with a jury's credibility determinations are reviewed de novo. *State v. Martinez*, 212 N.C. App. 661, 664 (2011); *see also State v. Clemons*, 274 N.C. App. 401, 416 (2020).

IV. Discussion

Defendant argues that the trial court plainly erred by not excluding hearsay evidence about defendant's character. Defendant also argues that the trial court erred by allowing testimony about the credibility of the witness. We address each argument in turn.

A. Corroborative Statements

[1] Defendant first contends that the trial court plainly erred by not excluding hearsay testimony about defendant's character for violence. Specifically, defendant argues that excerpts from Lee's written statement read at trial, saying that defendant was a " 'lowlife' who had been

arrested for fighting and who was part of a group that robbed people," were not introduced by Lee's testimony and therefore were inadmissible as corroborative evidence.

"Ordinarily, to preserve an [evidentiary] issue for appellate review, a litigant must raise the issue and secure a ruling from the trial court" by making a "timely objection." *State v. Reber*, 386 N.C. 153, 157 (2024) (citing N.C. R. App. P. 10(a)(1)). "Without an objection, [an] error is deemed unpreserved, and the issue is therefore waived on appeal." *Id.* Plain error, therefore,

> should be "applied cautiously and only in the exceptional case," . . . is reserved for "grave error which amounts to a denial of a fundamental right of the accused," and . . . focuses on error that has "resulted in a miscarriage of justice" or the denial of a "fair trial."

Id. at 158 (quoting *State v. Lawrence*, 365 N.C. 506, 516–17 (2012)). A defendant must satisfy a three-step test to show that plain error was committed below.

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

Id. (cleaned up). To satisfy the probable impact prong, the defendant must make "a showing that the outcome is significantly more likely than not. In ordinary English usage, an event will probably occur if it is *almost certainly* the expected outcome[.]" *Id.* at 159 (emphasis added) (cleaned up).

"Statements properly offered to corroborate former statements of a witness are not offered for their substantive truth and consequently are not hearsay." *State v. Johnson*, 209 N.C. App. 682, 692 (2011) (cleaned up). However, a "witness's prior statements as to facts not referred to in his trial testimony and not tending to add weight or credibility to it are not admissible as corroborative evidence." *State v. Ramey*, 318 N.C. 457, 469 (1986) (emphasis omitted). If the content of a corroborative statement is "far beyond the witness's in-court testimony," then the statement is inadmissible. *State v. Harrison*, 328 N.C. 678, 682 (1991). Any "new

or additional information" must "strengthen and add credibility to the testimony it corroborates." *State v. Ligon*, 332 N.C. 224, 237 (1992) (cleaned up).

Here, prior to Agent Taylor's reading of Lee's written statement, defense counsel cross-examined Lee and asked questions about her written statement and what defendant had told her about the robbery.

> Q: Okay. So—and he didn't say he wanted to or Bobby Askew wanted to. He just said somebody?
>
> A: He said he knew somebody that was trying to get a quick lick and get out of town. And I said—when I said what's that, he said, well, they said your boss got money, he cashed checks.
>
> . . .
>
> Q: And I believe later on when you talked to Agent Taylor here and you gave him a statement, he asked you if you knew who he was referring to, correct? Do you remember him asking you that, when he said "somebody"? You didn't think he was talking about himself, did you?
>
> A: I knew the people that he hung around, so I figured he was talking about him, and I knew—I didn't know who he was talking about, okay, but I knew who he hung around.
>
> . . .
>
> Q: So you were upset at that point in time that he was even talking about [the robbery]?
>
> A: I wasn't upset, but I mean I was like—I thought I had told him and I was hoping he had listened to me.
>
> Q: But at that point in time, again, he—according to what you told Agent Taylor you didn't think he was talking about him. You thought—I believe you said he was talking about somebody who had beaten up an autistic kid.
>
> A: Oh, yeah, he was hanging with that guy.

Subsequently, Agent Taylor read Lee's written statement aloud to corroborate her testimony. As relevant here, Agent Taylor read excerpts stating that Lee said defendant was a " 'lowlife' that 'hangs with lowlife,' " had "previously been arrested for fighting," and " 'hangs' with some of the boys robbing people in town."

In essence, Lee's testimony, which was introduced before her written statement was read aloud, showed that: (1) defendant was considering robbing Manik; and (2) defendant associated with people who had committed violent crimes and were involved in planning robberies. Presuming without deciding that the challenged excerpts of Lee's written statement did not corroborate testimony, Lee's unchallenged testimony still supported the same idea: that defendant was a "lowlife" who associated with violent people. Thus, presuming the trial court erred in not intervening *ex mero motu* to strike the challenged testimony, defendant cannot show that absent the challenged portions of Lee's statements, the jury "almost certainly" would have reached a different outcome.

Defendant alternatively argues that trial counsel's failure to object to the excerpts from Lee's written statement that were read at trial by Agent Taylor constituted ineffective assistance of counsel. "A criminal defendant's right to counsel pursuant to the Sixth Amendment to the United States Constitution includes the right to the effective assistance of counsel." *State v. Gillard*, 386 N.C. 797, 866 (2024) (cleaned up). To demonstrate ineffective assistance of counsel, a defendant must satisfy a two-part test:

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

Strickland v. Washington, 466 U.S. 668, 687 (1984); *accord State v. Braswell*, 312 N.C. 553, 562 (1985).

"[P]rejudice under the ineffective assistance of counsel test requires a showing of 'reasonable probability' that 'but for *counsel's* unprofessional errors, the result of the proceeding would have been different.' " *State v. Lane*, 271 N.C. App. 307, 313 (2020) (quoting *Strickland*, 466 U.S. at 694). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. "While under the reasonable probability standard the likelihood of a different

result must be substantial, not just conceivable, it is something less than required under plain error." *Lane*, 271 N.C. App. at 314 (cleaned up).

Though there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[,] . . . this presumption is rebuttable." *State v. Oglesby*, 382 N.C. 235, 243 (2022) (cleaned up). Even so, ineffective assistance of counsel "claims should only be decided on the merits in a direct appeal when the cold record reveals no further investigation is required[.]" *Gillard*, 386 N.C. at 867 (cleaned up). "Because the reasonableness of counsel's performance at trial is a fact-intensive inquiry, the proper course is generally to dismiss the claim without prejudice to allow for a hearing and further fact finding." *Id.* (cleaned up).

Our examination of the "cold record" does not establish whether counsel's failure to object to the statements amounted to a failure to give reasonable professional assistance. Accordingly, we dismiss defendant's ineffective assistance of counsel claim without prejudice.

B. Truthfulness Testimony

[2] Next, defendant contends that the trial court prejudicially erred by allowing Cooper to answer the prosecutor's question about whether he had testified truthfully. "The question of whether a witness is telling the truth is a question of credibility and is a matter for the jury alone." *State v. Solomon*, 340 N.C. 212, 221 (1995). "[U]nder our prior case law, it is improper for . . . counsel to ask a witness (who has already sworn an oath to tell the truth) whether he has in fact spoken the truth during his testimony." *State v. Chapman*, 359 N.C. 328, 364 (2005); *see also State v. Warden*, 376 N.C. 503, 510 (2020) ("But concern for the fairness and integrity of criminal proceedings requires trial courts to exclude testimony which purports to answer an essential factual question properly reserved for the jury."). However, once a defendant has questioned a witness's truthfulness on cross-examination, "the defendant has opened the door, and the witness has the right to respond." *State v. Crocker*, 197 N.C. App. 358, 364 (2009).

For example, our Supreme Court held that a "trial court correctly sustained the prosecutor's objection to the question, 'Are you telling the truth?' " *State v. Skipper*, 337 N.C. 1, 39 (1994) (citing *State v. Ford*, 323 N.C. 466, 469 (1988), *cert. denied*, 513 U.S. 1134 (1995), *superseded on other grounds by statute*, N.C.G.S. § 15A-2002, *as recognized in State v. Price*, 337 N.C. 756 (1994), *cert. denied*, 514 U.S. 1021 (1995)). In another case, a trial court erred by allowing a witness to answer the question, "Have you told the truth to these folks today?" *State v. Streater*,

197 N.C. App. 632, 646 (2009). However, this issue had not been properly preserved at trial and therefore had to survive the exacting plain error analysis. *Id.* at 638–40. Because there was physical evidence to support the witness's testimony, this Court held the trial court did not plainly err by allowing the witness to answer the improper question. *Id.* at 646–47.

On the other hand, our Supreme Court held that it was a prejudicial error to admit an expert's testimony about the victim's credibility when the only evidence of the defendant's guilt was the victim's testimony. *State v. Aguallo*, 318 N.C. 590, 598–99 (1986). The prosecutor asked, "After talking to . . . [the victim], did you form an opinion about whether she was believable or not?" *Id.* at 599 (alteration in original). Opposing counsel objected to the question, and the trial court overruled the objection. *Id.* Our Supreme Court held that:

> The evidence of the defendant's guilt was strong but not overwhelming. Based on the victim's testimony, a jury could reasonably conclude that the defendant was guilty[.] . . . [T]he State's case hinged on the victim's testimony and thus upon her credibility. Cross-examination of the victim raised some doubts about the victim's credibility. Because it is likely that any doubts the juror's may have had about the victim's credibility were allayed by the [expert's] testimony that she found the victim to be "believable," we conclude that absent this testimony, there is a reasonable possibility that a different result would have been reached by the jury.

Id. at 599–600.

Here, at the end of Cooper's direct examination, the prosecutor asked, "And so the information that you've testified to in court today, is that the truth, is that what happened?" After the trial court overruled defense counsel's objection to the question, Cooper responded, "That's correct."

The trial court undoubtedly erred by overruling defense counsel's objection to the prosecutor's question. Binding precedent from both this Court and our Supreme Court mandates that the credibility of a witness's testimony is to be decided by the jury alone, and asking if a witness had testified truthfully violates that mandate. *See*, *e.g.*, *Solomon*, 340 N.C. at 221; *Streater*, 197 N.C. App. at 646. By allowing the prosecutor to ask Cooper if he had testified truthfully over defense counsel's objection—and before defense counsel "opened the door" to the truthfulness of Cooper's testimony by questioning him about his inconsistent

statements—the trial court interfered with the jury's ability to make its own credibility determination about Cooper's testimony. But to obtain relief on appeal based on this preserved error, defendant must demonstrate "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2023).

In this case, the trial court instructed the jury:

> Now, for a defendant to be guilty of a crime, it is not necessary that the defendant do all of the acts necessary to constitute the crime. If two of more persons join in a common purpose to commit a robbery with a firearm, each of them, if actually or constructively present, is guilty of the crime and also guilty of any other crime committed by the other in pursuance of the common purpose to commit a robbery with a firearm, or as a natural or probable consequence thereof.

Following this instruction, the trial court explained each charge.

Cooper's testimony was the most meaningful evidence that defendant was the shooter, since Cooper was the only other witness and there was no physical evidence to prove that defendant pulled the trigger. But the trial court instructed the jury that it could find defendant guilty of "any crime committed by the other in pursuance of the common purpose to commit a robbery with a firearm[.]" Therefore, the jury could still find that defendant was guilty of discharging a weapon into an occupied vehicle causing serious injury without deciding that he was the one who actually pulled the trigger. Even without Cooper's testimony, the evidence that defendant and Cooper joined together for the "common purpose" of robbing Manik at gunpoint was overwhelming. Further, shooting into Manik's vehicle was done in furtherance of that common purpose. Despite the error in allowing Cooper to answer that he had testified truthfully, defendant cannot demonstrate that, absent this error, there is a reasonable possibility that the jury would have reached a different result on any of the charges against him.

C. Cumulative Errors

[3] Defendant alternatively argues that if "the errors individually were not sufficiently prejudicial to warrant a new trial, the cumulative effect requires a new trial[.]" Specifically, defendant contends that all identified "errors . . . impacted the live issue of who shot and killed [Manik]."

If an individual error by a trial court is not prejudicial to a defendant, "[c]umulative errors lead to reversal when 'taken as a whole' they 'deprived the defendant of his due process right to a fair trial free from prejudicial error.' " *State v. Wilkerson*, 363 N.C. 382, 426 (2009) (quoting *State v. Canady*, 355 N.C. 242, 254 (2002) (cleaned up)). In *Wilkerson*, the defendant identified approximately twenty issues on appeal, and our Supreme Court found three errors. Our Supreme Court held:

> [T]hese errors, individually or collectively, do not fatally undermine the State's case. We have reviewed the record as a whole and, after comparing the overwhelming evidence of defendant's guilt with the evidence improperly admitted, we conclude that, taken together, these errors did not deprive defendant of his due process right to a fair trial.

Wilkerson, 363 N.C. at 426.

And so too here. Though *who* shot Manik was heavily contested, the jury did not need to decide that defendant was the shooter in order to find him guilty of felony murder, attempted robbery with a dangerous weapon, and discharging a weapon into an occupied vehicle causing serious bodily injury. Our review of the entire record indicates that the overwhelming evidence supporting defendant's convictions overshadows any testimony that was or may have been improperly admitted. Therefore, "taken together, these errors did not deprive defendant of his due process right to a fair trial." *Id.* at 426.

V. Conclusion

The trial court did not plainly err by admitting portions of Lee's written statement to law enforcement officers to be read at trial, and it did not prejudicially err by allowing Cooper to testify that he had told the truth at trial.

NO PLAIN ERROR IN PART; NO PREJUDICIAL ERROR IN PART.

Chief Judge DILLON concurs.

Judge HAMPSON concurs in result only.

STATE OF NORTH CAROLINA
v.
GENE ALLEN LEOPARD, DEFENDANT

No. COA24-749

Filed 6 August 2025

1. Firearms and Other Weapons—discharging a firearm into an occupied dwelling—sufficiency of evidence—knowledge that dwelling was occupied

In a prosecution for discharging a firearm into an occupied dwelling, where, about an hour after calling the police to complain about his neighbor and a friend shooting targets on the neighbor's property, defendant fired four bullets into the neighbor's home, the trial court properly denied defendant's motion to dismiss because the State had presented substantial evidence of each essential element of the crime as defined in N.C.G.S. § 14-34.1(b). Contrary to defendant's argument on appeal, the statute did not require the State to prove that defendant had actual knowledge that his neighbor's home was occupied when he shot into it. Even so, the evidence at trial—including testimony that lights were on inside the neighbor's home and were visible from defendant's porch at the time of the shooting—showed that defendant had reasonable grounds to believe that his neighbor's home might have been occupied during the shooting.

2. Appeal and Error—preservation of issues—jury instructions in criminal prosecution—failure to object at trial—failure to allege plain error

In a prosecution for discharging a firearm into an occupied dwelling, defendant failed to preserve for appellate review his argument challenging the propriety of the trial court's jury instructions—specifically, questioning whether the instructions created a substantial possibility that defendant was convicted without proof of an essential element of the offense—where, at trial, defendant neither objected to the trial court's jury instructions nor requested any special instructions despite the trial court's explicit inquiry—directed at defense counsel—if any such instructions were desired. Additionally, defendant failed to specifically and distinctly allege on appeal that the trial court had committed plain error.

3. Firearms and Other Weapons—discharging a firearm into an occupied dwelling—multiple offenses—sufficiency of evidence—four bullets fired

In a prosecution for four separate counts of discharging a firearm into an occupied dwelling, where, about an hour after calling the police to complain about his neighbor and a friend shooting targets on the neighbor's property, defendant fired four bullets into the neighbor's home, the trial court did not err in denying defendant's motion to dismiss for insufficiency of the evidence. Specifically, the court did not engage in improper "judicial fact-finding" by submitting all four charges to the jury, since there was sufficient evidence—including bullet holes in the neighbor's home, shell casings recovered from the scene, and testimony from eyewitnesses and experts—to support four separate offenses. Importantly, it was undisputed that defendant shot into his neighbor's home using a semi-automatic weapon, which required one trigger pull per shot, and therefore each of the four shots he fired was a distinct and separate act.

Appeal by defendant from judgment entered 9 February 2024 by Judge Thomas H. Lock in Superior Court, Jackson County. Heard in the Court of Appeals 8 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Lisa B. Finkelstein, for the State.

Devereux & Banzhoff, PLLC, by Andrew B. Banzhoff, for defendant-appellant.

STROUD, Judge.

Defendant Gene Allen Leopard appeals from a judgment entered upon a jury's verdict finding him guilty of four counts of discharging a weapon into an occupied property. On appeal, Defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence and in determining that multiple shots of a firearm constituted multiple offenses. After careful review, we conclude that Defendant received a fair trial, free from prejudicial error.

I. Factual Background and Procedural History

On 28 April 2018, Jeremiah Nicholson and a friend were shooting targets on Nicholson's property. Defendant was a neighbor of Nicholson

and had been for about twelve years. That evening, Defendant called 911 to report gunshots; at about 7:48 p.m., a law enforcement officer responded to the call. The law enforcement officer spoke with Defendant and Nicholson, and Nicholson informed officers that he was "shooting in a safe manner[,]" and left the scene.

About one hour later, at 8:54 p.m., Nicholson called 911 and reported shots fired into his home. At trial, Nicholson testified that "[o]ne bullet came by the TV, through the window, right over the top of my head, and in the wall at the front door." When law enforcement returned to the scene, officers observed a broken window in Nicholson's home, a bullet, and bullet fragments in the living room. Law enforcement officers then obtained search and arrest warrants for Defendant, who ultimately gave himself up for arrest. After he was arrested, Defendant denied that he had fired into the house, claiming instead that he had fired into the air.

Law enforcement recovered a pistol and an AR-10 rifle in Defendant's home. One of the two magazines for the AR-10 was empty, and spent shell casings of the same caliber as Defendant's AR-10 were found on Defendant's porch. Moreover, law enforcement officers observed that light from Nicholson's kitchen was visible from Defendant's porch. A ballistics expert testified that although ballistics testing did not prove conclusively that the bullet and bullet fragments found in Nicholson's home had come from Defendant's AR-10, testing showed that they were consistent with being shot from Defendant's AR-10 rifle.

A detective testified that a trajectory analysis determined that the shots had come from the direction of Defendant's home and that the muzzle velocity for an AR-10 exceeds 2000 feet per second. Shortly after the evening of the incident, another bullet was discovered in a tree between Defendant's home and Nicholson's home, consistent with rifle fire between the two properties.

On 18 June 2020, Defendant was indicted upon a true bill of indictment by a Jackson County Grand Jury on four separate counts of discharging a firearm into an occupied dwelling. The matter came on for trial 5 February 2024 in Superior Court, Jackson County. At the close of the State's evidence, Defendant moved to dismiss due to insufficiency of the evidence. The trial court denied Defendant's motion to dismiss and four days later, the jury found Defendant guilty of four counts of discharging a firearm into an occupied dwelling. Based on the jury's guilty verdicts, the trial court sentenced Defendant to, *inter alia*, consecutive terms of fifty-one to seventy-four months for Counts I and II; the trial court then consolidated Counts III and IV into a suspended term of

fifty-one to seventy-four months served consecutively with the sentence in Counts I and II. From these judgments, Defendant entered timely written notice of appeal.

II. Discussion

On appeal, Defendant argues that the trial court erred by denying his motion to dismiss and further violated his "Fifth and Sixth Amendment rights by engaging in judicial fact-finding in order to determine that the offenses were committed on separate occasions." We address each argument in turn.

A. Standard of Review

A motion to dismiss due to insufficiency of the evidence "presents a question of law and is reviewed *de novo* on appeal." *State v. Norton*, 213 N.C. App. 75, 78, 712 S.E.2d 387, 390 (2011) (citation omitted).

B. Motion to Dismiss

[1] First, Defendant argues that the trial court erred in denying his motion to dismiss at the close of the State's evidence because "the statute requires the State to prove that [D]efendant had actual knowledge that the premises were [sic] occupied." We disagree.

"[T]o overcome a motion to dismiss, the State must introduce more than a scintilla of evidence of each essential element of the offense and that the defendant was the perpetrator of the offense." *State v. Davy*, 100 N.C. App. 551, 556, 397 S.E.2d 634, 636-37 (1990) (citation omitted). "In making its determination, the trial court must consider all evidence admitted, whether competent or incompetent, in the light most favorable to the State, giving the State the benefit of every reasonable inference and resolving any contradictions in its favor." *State v. Rose*, 339 N.C. 172, 192, 451 S.E.2d 211, 223 (1994) (citation omitted).

North Carolina General Statute Section 14-34.1 defines the offense of discharging a firearm into occupied property:

> (a) Any person who willfully or wantonly discharges or attempts to discharge any firearm or barreled weapon capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second into any building, structure, vehicle, aircraft, watercraft, or other conveyance, device, equipment, erection, or enclosure while it is occupied is guilty of a Class E felony.
>
> (b) A person who willfully or wantonly discharges a weapon described in subsection (a) of this section into an

> occupied dwelling or into any occupied vehicle, aircraft, watercraft, or other conveyance that is in operation is guilty of a Class D felony.

N.C. Gen. Stat. § 14-34.1(a)-(b) (2023).

On appeal, Defendant seemingly contends that actual knowledge is required to be criminally culpable *for any criminal offense in the United States*, asserting that "the [United States] Supreme Court recognizes that a criminal defendant must 'know the facts that make his conduct fit the definition of the offense' " and that "[t]he [United States] Supreme Court has repeatedly affirmed the scienter requirement." Defendant further contends that a criminal statute, absent the "scienter" requirement, violates United States Supreme Court precedent, because "[i]n the intervening half of a century since the *Williams* case was decided, a number of United States Supreme Court decisions have made clear that actual knowledge is required." This argument seems to overlook the existence of statutes imposing tiers of criminal culpability based upon differing mental states.

In making this argument, Defendant cites a list of cases from the Supreme Court of the United States where actual knowledge *was* determined to be an element of the criminal offenses at issue in those cases.[1] As the State notes in its brief, however, "[t]he line of cases [cited] by Defendant involve federal specific intent crimes, not state law crimes as are involved in this case[.]" None of those cases from the United States Supreme Court interpret North Carolina General Statute Section 14-34.1(b), the crime in this case.

In *State v. James*, our Supreme Court was tasked with interpreting North Carolina General Statute Section 14-34.1(b) and the defendant's argument that "there [wa]s no evidence [the defendant] shot into the automobiles *knowing* they were occupied." 342 N.C. 589, 597, 466 S.E.2d 710, 715 (1996) (emphasis added). Our Supreme Court disagreed, reasoning that the defendant "clearly had reasonable grounds to believe that the automobiles might be occupied by one or more persons[, and t]hat is all the statute requires." *Id.* A violation of North Carolina General Statute Section 14-34.1(b) "does not require that the State prove any specific intent but only that the defendant perform the act which is forbidden by statute. It is a general intent crime." *State v. Jones*, 339 N.C. 114, 148, 451 S.E.2d 826, 844 (1994) (citation omitted); *see also State*

1. We observe that *none* of the cases cited by Defendant interpret North Carolina General Statute Section 14-34.1.

v. Miller, 267 N.C. App. 639, 643, 833 S.E.2d 644, 647 (2019) (observing that "[t]he protection of the occupant(s) of the building was the primary concern and objective of the General Assembly when it enacted [North Carolina General Statute Section] 14-34.1" (citation omitted)); *State v. Williams*, 284 N.C. 67, 73, 199 S.E.2d 409, 412 (1973) (holding that "a person is guilty of the felony created by [North Carolina General Statute Section] 14-34.1 if he intentionally, without legal justification or excuse, discharges a firearm into an occupied building with knowledge that the building is then occupied by one or more persons or when he has reasonable grounds to believe that the building might be occupied by one or more persons").

After careful review, we observe that the State satisfied its burden to overcome Defendant's motion to dismiss by presenting evidence of each element of the offense of discharging a firearm into an occupied dwelling under Section 14-34.1(b). At trial, the State presented evidence that Nicholson was using the gun range on his property just under an hour before shots were fired into his home, and that Defendant had seen Nicholson using the shooting range and called the police to complain about Nicholson just under an hour before the shooting.

As the State notes, "[n]o reason was given why Defendant would not have noticed that his neighbor was no longer outside shooting his gun in his yard." Defendant had been a next-door neighbor of Nicholson for about twelve years before the incident. Testimony offered at trial showed that lights were on in the kitchen, and visible from Defendant's porch, at the time of the shooting. Finally, evidence was presented that the firearm allegedly used in the shooting, an AR-10, fires bullets at over 2000 feet per second, consistent with the definition of a firearm for purposes of North Carolina General Statute Section 14-34.1(b).

Based on this evidence, Defendant had reasonable grounds to believe that Nicholson's residence might be occupied by one or more persons. Viewing this evidence in the light most favorable to the State, we conclude that the trial court did not err in denying Defendant's motion to dismiss due to insufficiency of the evidence, as the State presented evidence of each element of the offense charged and that Defendant was the perpetrator of the offense.

C. Jury Instructions

[2] On appeal, Defendant makes an ancillary argument that "the jury instructions herein create the substantial possibility that [Defendant] was convicted without proof that he had actual knowledge that the dwelling was occupied" despite "acknowledg[ing] that the jury herein was

instructed pursuant to the pattern instructions." However, Defendant did not object to the jury instructions at trial and did not request any additional instructions. Nor has Defendant argued the trial court committed plain error in the jury instructions.

"[T]o preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context." N.C. R. App. P. 10(a)(1). Here, no such objection was made, nor did Defendant request a special jury instruction despite the trial court's explicit inquiry if there were "[a]ny requests for special instructions . . . [f]or [D]efendant?" Defense Counsel responded, "[n]o special instructions, Your Honor." Shortly thereafter, the trial court observed that "[c]ounsel have had an opportunity to review the proposed instructions and the verdict sheets [setting out four separate instructions on Section 14-34.1(b)]. Are there any objections, corrections to the instructions or modifications of the instructions or anything either side believes necessary to deliver correct instruction to the jury?" Defense counsel replied, "[n]o, Your Honor."

In the absence of an objection at trial, jury instructions may be challenged on appeal only for plain error, and the defendant must "specifically and distinctly" argue plain error on appeal. *See State v. Lawrence*, 365 N.C. 506, 516, 723 S.E.2d 326, 333 (2012) ("Like federal plain error review, the North Carolina plain error standard of review applies only when the alleged error is unpreserved, and it requires the defendant to bear the heavier burden of showing that the error rises to the level of plain error." (citation omitted)). Again, to have an alleged error reviewed under the plain error standard, the defendant must "specifically and distinctly" contend that the alleged error constitutes plain error. N.C. R. App. P. 10(a)(4). Defendant's brief on appeal does not argue plain error. Consequently, we consider any argument regarding the jury instructions in this case abandoned.

D. Multiple offenses

[3] Next, Defendant argues that "the trial court violated [Defendant]'s Fifth and Sixth Amendment rights by engaging in judicial fact finding to determine that multiple shots constituted multiple offenses."

Defendant first contends that the trial court's submission of four charges to the jury instead of one meant that the trial court erroneously engaged in "judicial fact finding" that four separate incidents occurred. Thus, he argues the trial court violated the constitutional principles of *Apprendi* and *Blakely*, as more recently addressed in *Erlinger*, that

"[v]irtually 'any fact' that 'increases the prescribed range of penalties to which a criminal defendant is exposed' must be resolved by a unanimous jury beyond a reasonable doubt (or freely admitted in a guilty plea)." *Erlinger v. United States*, 602 U.S. 821, 834, 219 L. Ed. 2d 451, 464 (2024) (brackets omitted) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 455 (2000)). Defendant notes that "[t]he operative constitutional issue is whether judicial fact-finding increased the possible sentence, regardless of the actual sentence imposed."[2]

Defendant's argument is a creative but misguided challenge to the trial court's denial of his motion to dismiss. If there was sufficient evidence, viewed in the light most favorable to the State, to support submitting each of the four charges to the jury, then the trial court did not err by submitted all four charges to the jury. The trial court did not engage in "judicial fact-finding" by determining which charges are supported by sufficient evidence to submit to the jury. Ultimately, the jury, as the finder of fact, determined whether the State proved beyond a reasonable doubt that Defendant committed each of the four offenses.

Defendant's primary argument is that the evidence shows that the gunshots were in quick succession and should be treated as just one shot and one crime, not four. In *State v. Morrison*, it was contested whether the defendant had used an automatic or semi-automatic weapon when he fired into an occupied vehicle. *See* 272 N.C. App. 656, 666-67, 847 S.E.2d 238, 245-46 (2020). There, the defendant argued that "if he did use an automatic weapon, then all seven projectiles that hit the truck were likely the result of a single pull of the rifle's trigger, and therefore constituted a single act, not seven distinct acts." *Id.* at 666, 847 S.E.2d at 246 (citations omitted).

This Court disagreed, noting that under the caselaw, "because the weapon [the d]efendant used was not 'a machine gun or other automatic weapon,' . . . it was a weapon that required [the d]efendant to pull and release the trigger each time he decided to shoot" and the "[d]efendant's use of the semi-automatic rifle 'required that defendant employ

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2. Defendant also argues briefly that the submission of four charges to the jury and the jury instructions were in violation of his constitutional rights under the Fifth and Sixth Amendments. As noted above, at trial Defendant did not raise any constitutional objection to the issues submitted to the jury. "[T]he existence of a constitutional protection does not obviate the requirement that arguments rooted in the Constitution be preserved for appellate review. Our appellate courts have consistently found that unpreserved constitutional arguments are waived on appeal." *In re J.N.*, 381 N.C. 131, 133, 871 S.E.2d 495, 497 (2022) (citations omitted).

his thought processes each time he fired the weapon.' " *Id.* at 669, 847 S.E.2d at 247 (citations omitted). Critically, "[a] semi-automatic rifle requires the person using it to pull the trigger each and every time that person wants to shoot the rifle at a target." *Id.* at 667, 847 S.E.2d at 246. This Court ultimately concluded that "the trial court did not err in denying [the d]efendant's motion to dismiss and correctly left it to the jury to determine whether the evidence proved beyond a reasonable doubt [whether the d]efendant committed seven 'separate acts' supporting convictions for" violating Section 14-34.1. *Id.* at 670-71, 847 S.E.2d at 248.

Here, at trial, defense counsel argued that "as to each and every charge for each incident in connection with this occurrence, it should be one occurrence for this operation, not four different occurrences, as far as the charge for each bullet." However, it is undisputed that the weapon at issue is a *semi-automatic weapon*, meaning it requires one trigger pull per shot, in other words, "distinct and separate acts." *Id.* at 667, 847 S.E.2d at 246.

Upon our careful review of the evidence regarding bullet holes in the home, shell casings recovered at the scene, as well as testimony from eyewitnesses and experts, we conclude the evidence was sufficient to instruct the jury on four separate counts of violating North Carolina General Statutes Section 14-34.1(b). The trial court did not engage in "judicial fact-finding" by submitting all four charges to the jury since the evidence supported all four charges and did not err by denying Defendant's motion to dismiss.

III. Conclusion

We conclude that the trial court did not err in denying Defendant's motion to dismiss at the close of the State's evidence because the State satisfied its burden of presenting evidence of each element of each charged offense and that Defendant was the perpetrator of the offenses.

NO ERROR.

Judges STADING and MURRY concur.

STATE OF NORTH CAROLINA
v.
CLARENCE STEVENS, JR., DEFENDANT

No. COA24-584

Filed 6 August 2025

1. Appeal and Error—preservation of issues—partial denial of motion to suppress—notice of intent to appeal—given before guilty plea negotiations finalized

In a prosecution for charges of trafficking in fentanyl and possession of a firearm by a felon, where defendant decided to plead guilty in an *Alford* plea shortly after his jury trial had begun, defendant preserved for appellate review his argument challenging the trial court's order partially denying his motion to suppress evidence seized from his house, where the plea transcript—which was signed by the prosecutor and the trial judge—showed that defendant expressly reserved his right to appeal the order. Since defendant's appeal did not challenge the presentation of the seized evidence to the jury, defendant's failure to object to the evidence's admission at trial was not a failure to preserve his argument regarding the suppression issue; rather, it was sufficient that defendant filed a timely motion to suppress and notified the State and the trial court of his intention to appeal its denial before plea negotiations were finalized.

2. Search and Seizure—probable cause—search warrant—supporting affidavit—sufficiency

In a prosecution for charges of trafficking in fentanyl and possession of a firearm by a felon, where, while attempting to arrest defendant for shooting into an occupied vehicle about eight days earlier, officers observed defendant leaving his house in a white SUV, the trial court properly denied the portion of defendant's motion seeking to suppress evidence (including multiple firearms and suspected narcotics) seized from his house pursuant to a search warrant, which was supported by an affidavit from a lead detective in the case. The affidavit included sufficient information showing probable cause to suspect that incriminating items would be found inside defendant's home, including that the detective: saw video footage of defendant kicking the door of the victim's house days before defendant's arrest; saw footage of defendant, a convicted felon, carrying what resembled a shotgun; interviewed the victim's wife, who was dating defendant and knew him to maintain firearms

inside his home; and interviewed the victim, who gave a first-hand account of defendant shooting at him while driving the white SUV. Since the detective had investigated the case throughout the eight days following the shooting incident, the facts included in his affidavit were not too stale. Further, the affidavit sufficiently established that the victim and his wife were reliable informants by mentioning video footage, independent eyewitness testimony, and other evidence corroborating their testimonies.

Appeal by defendant from judgments entered 14 September 2023 by Judge Carla Archie in Superior Court, Mecklenburg County. Heard in the Court of Appeals 27 February 2025.

Attorney General Jeff Jackson, by Special Deputy Attorney General John A. Payne, for the State.

Arnold & Smith, PLLC, by Pamela L. Williams and Paul A. Tharp, for defendant-appellant.

STROUD, Judge.

Defendant appeals from judgments convicting him of trafficking in fentanyl and possession of a firearm by a felon after entering an *Alford* plea. Defendant asserts the trial court should have granted his motion to suppress as the affidavit supporting the search warrant "failed to establish a nexus between any alleged criminal activity and the residence in question" and was "unsupported by any facts which tend to make the informant's statements credible." We affirm the trial court's order granting in part and denying in part Defendant's motion to suppress.

I. Background

On or about 24 February 2022, Detective J.A. Garcia of the Charlotte-Mecklenburg Police Department applied for a search warrant for Defendant's house and two vehicles owned by Defendant, a white Range Rover and a red Corvette.

Detective Garcia's "probable cause affidavit" stated the following information: On 15 February 2022 at about 2:14 am, Charles Mills "was spending the night at his wife's residence[.]" While Mr. Mills and his wife were separated, he was staying at her house that night "due to a recent break-up she had with her ex-boyfriend," Defendant. Defendant arrived at Mr. Mills's wife's house and "began banging on the door, demanding [Mr.] Mills and his wife open the door." They refused to open the door,

and Defendant left. Mr. Mills left the house shortly after and he noticed Defendant driving a white Range Rover behind him. Defendant fired a gun at Mr. Mills's vehicle three times and Mr. Mills heard a bullet strike his car. Mr. Mills continued driving and Defendant went the other way after leaving the neighborhood. Mr. Mills texted his wife what happened after the incident.

Mr. Mills's wife showed detectives "surveillance footage of [Defendant] violently kicking her front door on the morning of the incident just prior to the shooting" but the shooting was not captured on video. Mr. Mills's wife showed detectives footage that "appeared" to show Defendant with a black shotgun and she told detectives Defendant "is known to have a black 12-gauge Mossberg shotgun and usually carries a black .40 caliber handgun[.]" The projectile that hit Mr. Mills's car could not be retrieved since it was "buried in the trunk liner." Detective Garcia also noted that Defendant was a convicted felon at the time of this incident.

On 24 February 2022, "officers observed [Defendant] leaving his residence . . . in his White Range Rover. [Defendant] was in the passenger seat of the Range Rover." Defendant's son was the driver. Defendant was dropped off and the officers arrested him but the firearm was not in Defendant's possession. The Range Rover, which Defendant's son was driving, returned to Defendant's house and an officer "observed [it] pull into the garage and the garage door close" and officers then "knocked on the door and secured the [house] to wait for a search warrant."

That same day a magistrate judge signed the search warrant authorizing officers to search Defendant's house, Range Rover, and Corvette. The warrant also allowed officers to seize property. Officers recovered a handgun, shotgun, 3 rifles, suspected narcotics, plastic baggies, a digital scale, a "baggie with white powder[,]" and some mail with Defendant's name on it from the house.

Defendant was indicted on or about 7 March 2022 for possession of a firearm by a felon, trafficking in drugs, and possession with intent to sell or deliver a controlled substance ("PWISD"). Defendant was indicted by superseding indictment on 3 July 2023 for possession of a firearm by a felon, trafficking in drugs, and PWISD. Defendant filed a motion to suppress the search of his house on 19 June 2023 "because the facts in th[e] case do not give rise to probable cause to search Defendant's residence" in violation of the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Sections 19, 20, and 21 of the North Carolina Constitution. Defendant filed an amended motion to suppress

the search on 11 September 2023 to include the red Corvette listed in the search warrant.

The trial court heard Defendant's motion on 11 September 2023. The court rendered findings of fact at the close of the hearing and denied Defendant's motion to suppress as to the house and the Range Rover but granted the motion as to the Corvette. The trial court entered a written Order on 19 September 2023 concluding there "was probable cause to believe a crime had occurred[,]" Defendant committed the crime, and "evidence of the crime would be inside [Defendant's house] or in the White Range Rover."

On 14 September 2023, Defendant pled guilty in an *Alford* plea to trafficking in fentanyl by possession and possession of a firearm by a felon. The State dismissed the PWISD charge as a part of the agreement. Defendant specifically pled "preserving his right to appeal the motion to suppress the search and seizure of the residence pursuant to the search warrant[.]" The trial court entered judgments that same day and Defendant filed written notice of appeal on 25 September 2023.

II. Preservation

[1] We must first address whether Defendant preserved his argument regarding the denial of his motion to suppress for appellate review. The State contends he did not, and while Defendant presents this issue last in his brief, we will address it first because if Defendant did not preserve the issue for full review, we must use a different standard of review. *See State v. Williams*, 291 N.C. App. 497, 501, 895 S.E.2d 912, 916 (2023) ("[O]ur standard of review changes when a motion-to-suppress issue is not preserved." (citation omitted)). Defendant contends the issue is preserved as he filed a timely motion to suppress and preserved his right to appeal the Order in his plea agreement. The State acknowledges Defendant preserved his right to appeal the Order in his plea but contends the issue is not preserved since "the record and transcript do[es] not demonstrate that Defendant objected to the evidence in the search warrant at trial or to the final ruling from the trial court."

Rule 10(a)(1) of the North Carolina Rules of Appellate Procedure states:

> In order to preserve an issue for appellate review, a party must have presented to the trial court a timely request, objection, or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also

> necessary for the complaining party to obtain a ruling upon the party's request, objection, or motion.

N.C. R. App. P. 10(a)(1). North Carolina General Statute Section 15A-979(b) states "[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty." N.C. Gen. Stat. § 15A-929(b) (2023).

> This Court has held that when a defendant intends to appeal from the denial of a suppression motion pursuant to this section, he must give notice of his intention to the prosecutor and to the court before plea negotiations are finalized; otherwise, he will waive the appeal of right provisions of the statute.

State v. Tew, 326 N.C. 732, 735, 392 S.E.2d 603, 605 (1990) (citation omitted).

Here, Defendant filed his motion to suppress evidence from the search of the house and Range Rover on 19 June 2023. The trial court denied Defendant's motion on 11 September 2023 and then Defendant's jury trial began. However, on 14 September 2023, Defendant decided to accept the State's plea offer and the jury trial ceased. In the transcript of the plea entered on 14 September 2023, Defendant "pleads preserving his right to appeal the motion to suppress the search and seizure of the residence pursuant to the search warrant." The transcript of the plea was signed by the deputy clerk of superior court, Defendant's attorney, the State, and the trial judge. The State acknowledges this but contends the issue is still not preserved, based on *State v. Golphin*, 352 N.C. 364, 405-06, 533 S.E.2d 168, 198-99 (2000), since Defendant did not object "to the evidence in the search warrant at trial or to the final ruling from the trial court." This Court concluded in *Golphin* that the defendant's "pretrial motion to suppress is not sufficient to preserve for appeal the question of the admissibility of his statement because he did not object at the time the statement was offered into evidence." *Id.* at 405, 533 S.E.2d at 198 (citation omitted).

But *Golphin* is inapposite to this case as *Golphin* involved a verdict and judgment entered after a jury trial and not a guilty plea. *See id.* at 379, 533 S.E.2d at 183. In *Golphin*, the trial court denied the defendant's motion to suppress before the jury trial and then the evidence the defendant had requested to be suppressed was presented at the jury trial without objection from the defendant. *See id.* at 405, 533 S.E.2d at 198-99. The jury then returned a verdict and on appeal the defendant in *Golphin* argued the evidence he sought to suppress was admitted

and considered by the jury in error. *See id.* Here, trial did begin on 11 September 2023, but Defendant decided to plead guilty on 14 September 2023, so on appeal we are not considering any issues of evidence admitted at the trial. Instead, Defendant properly filed a motion to suppress the evidence and "g[a]ve notice of his intention to the prosecutor and to the court before plea negotiations [were] finalized[,]" demonstrated by Defendant's preservation of his right to appeal in the transcript of the plea. *Tew*, 326 N.C. at 735, 392 S.E.2d at 605 (citations omitted). In this appeal, we are not considering any argument regarding evidence being improperly presented to the jury or trier of fact so whether Defendant objected to evidence during the beginning of the jury trial is not relevant.[1] This argument is properly preserved for appellate review and we will thus address the merits of the appeal.

III. Motion to Suppress

[2] Defendant argues "the trial court erred in partially denying Defendant's motion to suppress where the search warrant for Defendant's residence was unsupported by probable cause." (Capitalization altered.) Specifically, Defendant argues "Detective Garcia's affidavit was conclusory because it failed to establish a nexus between any alleged criminal activity and the residence in question" and "Detective Garcia's affidavit is unsupported by any facts which tend to make the informant's statements credible." We disagree and affirm the trial court's Order.

A. Standard of Review

> The scope of appellate review of a ruling upon a motion to suppress is strictly limited to determining whether the trial judge's underlying findings of fact are supported by competent evidence, in which event they are conclusively binding on appeal, and whether those factual findings in turn support the judge's ultimate conclusions of law.
>
> The trial court's conclusions of law are fully reviewable on appeal. An appellate court accords great deference to the trial court's ruling on a motion to suppress because the trial court is entrusted with the duty to hear testimony

1. Because Defendant's appeal is based only on the trial court's denial of the motion to suppress and his legal argument that the warrant application did not provide sufficient information to support probable cause for issuance of the search warrant, our record includes only the hearing on the motion to suppress. The transcript filed with this Court covers only the hearing on the motion to suppress and the guilty plea colloquy.

> (thereby observing the demeanor of the witnesses) and to weigh and resolve any conflicts in the evidence.

State v. Brown, 248 N.C. App. 72, 74, 787 S.E.2d 81, 84 (2016) (citations, quotation marks, and ellipses omitted).

Here, Defendant does not challenge any of the findings of fact as unsupported by the evidence, so we must determine if the trial court's findings of fact support its conclusions of law that:

> 1. There was probable cause to believe a crime had occurred (shooting into occupied vehicle).
>
> 2. There was probable cause to believe that . . . [D]efendant had committed the crime.
>
> 3. There was probable cause to believe that evidence of the crime would be inside the Hubbard Road residence or in the white Range Rover.

The trial court's order includes the following findings of fact which are not challenged on appeal as unsupported by the evidence, so these facts are binding for purpose of appellate review, *see State v. Ashworth*, 248 N.C. App. 649, 651, 790 S.E.2d 173, 176 (2016) ("Findings of fact that are not challenged on appeal are binding and deemed to be supported by competent evidence." (citation omitted)):

> 1. On February 24, 2022, Charlotte-Mecklenburg Police Department (CMPD) Detective Joseph Garcia applied for and obtained a search warrant from Magistrate F. Wilson to search a residence located at 4402 Hubbard Road in Charlotte, North Carolina.
>
> 2. In addition to the residence, the search warrant also included a 2005 white Range Rover and a 1994 red Chevrolet Corvette, both of which were registered to . . . [D]efendant Clarence Stevens, Jr., date of birth [redacted], at the Hubbard Road address.
>
> 3. The search warrant was supported by an affidavit that included evidence of a crime that occurred on February 15, 2022. The evidence was that Charles Mills was spending the night at his wife's house because she had recently broken up with . . . [D]efendant. When Mills left the house, he observed . . . [D]efendant in a White Range Rover. . . . [D]efendant drove up behind Mills and fired a gun at Mills' car three times. According to Mills' wife, . . . [D]efendant

was known to carry a black 12-gauge shotgun and a .40-caliber handgun with an extended magazine that he kept on his person or inside his vehicle.

4. An arrest warrant was issued for . . . [D]efendant for shooting into an occupied vehicle based on the incident that occurred on February 15, 2022.

5. In an attempt to serve the arrest warrant on February 24, 2022, CMPD officers were conducting surveillance at 4402 Hubbard Road and observed . . . [D]efendant leave the residence in a white Range Rover. CMPD officers arrested . . . [D]efendant when he exited the Range Rover at an auto body shop located at 2514 Sugar Creek Road in Charlotte and did not find any weapons on . . . [D]efendant.

B. Nexus Between the House and Criminal Activity

As stated above, Defendant's argument is that the affidavit in support of the application of the search warrant of his house and car was not sufficient for issuance of the search warrant. This Court has explained the proper role of the trial court conducting a suppression hearing in the case of a search after a warrant was issued:

The question for a trial court

> reviewing the issuance of a search warrant is whether there is substantial evidence in the record supporting the judicial officer's decision to issue the warrant. North Carolina employs the totality of the circumstances approach for determining the existence of probable cause. Thus, the task of the issuing judicial officer is to make a common-sense decision based on all the circumstances that there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Because its duty in ruling on a motion to suppress based upon an alleged lack of probable cause for a search warrant involves an evaluation of the judicial officer's decision to issue the warrant, the trial court should consider only the information before the issuing officer. Thus, although our appellate courts have held that the scope of the court's review of the judicial officer's determination of probable cause is not confined to the affidavit alone, additional information can only be considered where

> the evidence shows that the judicial officer made his notes on the exhibit contemporaneously from information supplied by the affiant under oath, that the paper was not attached to the warrant in order to protect the identity of the informant, that the notes were kept in the magistrate's own office drawer, and that the paper was in the same condition as it was at the time of the issuance of the search warrant.
>
> *State v. Hicks*, 60 N.C. App. 116, 119, 120-21, 298 S.E.2d 180, 183 (1982) (internal quotation marks omitted; emphasis added), *disc. review denied*, 307 N.C. 579, 578, 300 S.E.2d 553 (1983). In such circumstances, an appellate court may consider whether probable cause can be supported by the affidavit in conjunction with the aforementioned notes. *Id.* at 121, 298 S.E.2d at 183; *see also* N.C. Gen. Stat. § 15A-245(a) (2015) ("Before acting on the application, the issuing official may examine on oath the applicant or any other person who may possess pertinent information, but information other than that contained in the affidavit may not be considered by the issuing official in determining whether probable cause exists for the issuance of the warrant unless the information is either recorded or contemporaneously summarized in the record or on the face of the warrant by the issuing official.") (emphasis added). Outside of such contemporaneously recorded information in the record, however, it is error for a reviewing court to rely upon facts elicited at the suppression hearing that go beyond the four corners of the warrant.

Brown, 248 N.C. App. at 74-76, 787 S.E.2d at 85 (citations, quotation marks, brackets, ellipses, and emphasis omitted).

Defendant first contends "Detective Garcia's affidavit was conclusory because it failed to establish a nexus between any alleged criminal activity and the residence in question." Defendant mostly argues the information in the affidavit was stale since the shooting occurred eight to nine days before and "Mr. Mills' statement that Defendant shot at him while driving a white Range Rover does not establish probable cause to search Defendant's purported residence." We disagree.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall

> issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. "Probable cause means that there must exist a reasonable ground to believe that the proposed search will reveal the presence *upon the premises to be searched* of the objects sought and that those objects will aid in the apprehension or conviction of the offender." *State v. Lindsey*, 58 N.C. App. 564, 565, 293 S.E.2d 833, 834 (1982) (emphasis in original) (citations and quotation marks omitted).

> Before a search warrant may be issued, proof of probable cause must be established by facts so closely related to the time of issuance of the warrant so as to justify a finding of probable cause at that time. The general rule is that no more than a "reasonable" time may have elapsed. The test for "staleness" of information on which a search warrant is based is whether the facts indicate that probable cause exists at the time the warrant is issued.

Id.

Defendant cites *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85, to assert "where the alleged criminal activity has been observed within a day or two of the affidavit and application, the information is generally not held to be stale." But *Brown* also states "[a]s a general rule, an interval of two or more months between the alleged criminal activity and the affidavit has been held to be such an unreasonably long delay as to vitiate the search warrant." *Id.* (citation omitted). In *Brown*, the affidavit stated, in part,

> [i]n the past 48 hours, Det. Putnam spoke with a person whose name cannot be revealed. This person has concern for their [sic] safety, and Det. Putnam feels this person would be of no further value to law enforcement if their [sic] true identity was revealed. For the remainder of this application Det. Putnam will refer to this person as "CRI # 1095." CRI # 1095 has been in contact with Don Brown and has provided Det. Putnam with a counterfeit $100 bill that came from 1232 N. Ransom St. Det. Putnam verified that this is the addess [sic] of Don Newton Brown. Don Brown resides at this residence with a black female by the name of Kisha Harris. The house is also frequented by Paquito Brown and Don Brown. Don Brown is known

> to have firearms and the CRI stated that Don Brown has been seen with a handgun.

Id. at 76-77, 787 S.E.2d at 86 (ellipses omitted). We noted

> [a]t the suppression hearing, Putnam testified that what he *meant* to say in the first paragraph of the affidavit was both (1) that the CRI told Putnam the information about Brown within 48 hours of applying for the warrant and also (2) that the CRI had obtained the counterfeit money within that time period.

Id. at 77, 787 S.E.2d at 86 (emphasis in original). Citing *State v. Newcomb*, 84 N.C. App. 92, 93, 351 S.E.2d 565, 566 (1987), we stated "[a]s did Putnam here, the officer in *Newcomb* 'failed to state the time the informant's observations were made.' " *Id.* at 80, 787 S.E.2d at 87 (ellipses omitted). We concluded "[w]e cannot distinguish the staleness of the CRI's information contained in Putnam's affidavit from that in *Newcomb*" and vacated the judgments. *Id.* at 80, 787 S.E.2d at 88.

Just as in *Brown*, Defendant also heavily relies on *Newcomb*, where the affidavit was based on information obtained from a confidential informant who supplied "sparse" information which "g[a]ve[ ] no details from which one could conclude that he had current knowledge of details or that he had even been inside the defendant's premises recently." *Id.* at 95, 351 S.E.2d at 567. The officer who obtained the search warrant testified that he " 'unintentionally and inadvertently' failed to state the reason the informant was reliable and the time the informant's observations were made." *Id.* at 93-94, 351 S.E.2d at 566. He also made no "investigation of [the] defendant or his residence" before applying for the search warrant. *Id.* at 94, 351 S.E.2d at 566. "The affidavit contain[ed] a mere naked assertion that the informant at some time saw a 'room full of marijuana' growing in [the] defendant's house" and "Officer Cockman made no attempt to corroborate the informant's story. He did nothing more than verify that [the] defendant lived in the house." *Id.* at 95, 351 S.E.2d at 567. We noted

> the officer fail[ed] to provide the magistrate with sufficient information from which to find probable cause, fail[ed] to conduct any independent investigation, provide[d] a bare-bones affidavit, and a warrant [was] issued by a Magistrate who, according to the record, assert[ed] that her job is "to find probable cause," and has found probable cause in each of the approximately 300 warrant applications[.]

Id. at 96, 351 S.E.2d at 567.

Neither *Brown* nor *Newcomb* are similar to this case. In *Brown*, the problem was that the affidavit did not include sufficient information and the trial court improperly considered testimony at the hearing which added to the affidavit:

> The suppression order clearly indicate[d] that the trial court *did* consider [Detective] Putnam's hearing testimony about what he intended the affidavit to mean—evidence outside the four corners of the affidavit and not recorded contemporaneously with the magistrate's consideration of the application—in determining whether a substantial basis existed for the magistrate's finding of probable cause.

Brown, 248 N.C. App. at 79, 787 S.E.2d at 87 (emphasis in original). Thus, the magistrate would have had no way of knowing those additional facts when the warrant was issued. Here, Defendant does not contend that there is any substantial difference between the information in the affidavit and testimony at the hearing, nor that the trial court improperly considered testimony or facts that were not included in the affidavit.

In *Newcomb*, the warrant was issued based on information provided by a confidential informant, and the affidavit omitted any statement regarding the informant's reliability or the timing of the informant's observations. *See Newcomb*, 84 N.C. App. at 93, 351 S.E.2d at 565-66. The officer did not investigate the informant's reports before requesting the search warrant, so the only information available in the affidavit was from the confidential informant.

This case differs dramatically from both *Brown* and *Newcomb*. "Common sense is the ultimate criterion in determining the degree of evaporation of probable cause." *State v. Teague*, 259 N.C. App. 904, 911, 817 S.E.2d 239, 244 (2018) (citations, quotation marks, and brackets omitted). Here, Detective Garcia thoroughly investigated the shooting on 15 February 2022, leading up to Defendant's arrest on 24 February 2022 for the shooting. Upon Defendant's arrest, the officers did not find a gun on him, so they believed his gun may be located in either his house or his vehicle. These few days are much less than the "two or three more months between the alleged criminal activity and the affidavit [that] has been held to be such an unreasonably long delay as to vitiate the search warrant." *Brown*, 248 N.C. App. at 76, 787 S.E.2d at 85 (citations omitted). The affidavit in support of the search warrant outlined that Detective Garcia interviewed two separate witnesses who saw Defendant kicking at the door just before shooting at Mr. Mills's vehicle and Detective Garcia watched video footage showing Defendant trying

to kick in the door, corroborating the version of events from Mr. Mills and his wife. Detective Garcia also saw footage of Defendant "possessing what appeared to be a black shotgun" and "[d]etectives observed [Defendant] in possession of what appeared to be a shotgun on surveillance footage on the day of the incident." Further, the affidavit stated "Mills' wife was in a dating relationship with [Defendant] and advised detectives [Defendant] maintains firearms on his person and/or in his vehicle/home." And Detective Garcia included in the affidavit that Mr. Mills observed Defendant using a firearm to shoot at his car the day of the incident.

Defendant focuses on the statements in the search warrant that Mr. Mills's wife stated Defendant was known to carry firearms but

> [i]t is unclear from Detective Garcia's affidavit when and to whom [Mr. Mills's wife] said Defendant kept firearms in his home, and her statements on their face fail to raise a reasonable inference that firearms would be found in . . . Defendant's home. Detective Garcia's affidavit is completely devoid of any evidence as to if or when [Mr. Mills's wife] observed any firearm ever in Defendant's home.

But Mr. Mills's wife's statements about Defendant's ownership of firearms was only one relevant fact – although its relevance may be higher since Defendant was also a convicted felon who was violating the law by merely possessing the firearms. Defendant's argument overlooks the fact that *Mr. Mills* saw Defendant with a gun and ended up with a bullet hole in his car when Defendant shot at his vehicle on 15 February. We must consider the " 'totality of the circumstances' test to assess whether probable cause exists for the issuance of a search warrant[,]" as this Court noted in *State v. Boyd*:

> In the present case, the unchallenged statements in the affidavit show that 20 different sources contacted police over a six-month period to complain about criminal activity occurring in the Wilson Street residence; two months' surveillance of the residence revealed substantial coming and going by individuals who stayed at the house only for very short periods of time; a confidential informant submitted to a full search by officers, made a controlled buy of cocaine at 809 Wilson Street, and returned with cocaine that he promptly gave to the police; and the confidential informant identified [the] defendant as the individual who had sold him the cocaine. Taken as a whole, this information, set forth in the challenged affidavit, is sufficient

> to support the conclusion that probable cause existed to search [the] defendant and the Wilson Street residence.
>
> While the unusual traffic at the residence was not sufficient, by itself, to constitute probable cause, the additional evidence regarding the controlled buy by an informant under surveillance of the officers was sufficient to support issuance of the search warrant. . . . Contrary to [the] defendant's argument, it was unnecessary, under these facts, for the State to make any showing addressing the credibility and reliability of the informant.

State v. Boyd, 177 N.C. App. 165, 169-70, 628 S.E.2d 796, 801 (2006) (citations omitted).

Here, according to the affidavit in support of the search warrant, Detective Garcia saw footage of the incident which occurred days before the affidavit and saw footage of Defendant, a convicted felon, as was also noted in the affidavit, with a shotgun on video; and Mr. Mills's first-hand account of Defendant shooting at him from Defendant's car was corroborated by the text message sent shortly after the incident from Mr. Mills to his wife and by the bullet hole in his car. Thus, there was sufficient information in the affidavit to conclude there was probable cause incriminating items may be found in Defendant's house or the Range Rover he was driving when he shot at Mr. Mills. Defendant was known to "have a black 12-gauge Mossberg shotgun" and he "usually carrie[d] a black .40 caliber handgun[.]" It was reliably reported that he used a firearm to shoot at Mr. Mills's car, and the house searched belonged to Defendant. Under a "common sense" reading of the entire affidavit, there was probable cause to believe items involved in the crime could be found in Defendant's house. *Teague*, 259 N.C. App. at 911, 817 S.E.2d at 244 (citations, quotation marks, and brackets omitted). Unlike *Brown*, Detective Garcia did not "fail[ ] to state the time the informant's observations were made." *Brown*, 248 N.C. App. at 80, 787 S.E.2d at 87 (ellipses omitted). And unlike *Newcomb*, Detective Garcia did not "fail[ ] to provide the magistrate with sufficient information from which to find probable cause, fail[ ] to conduct any independent investigation, [or] provide[ ] a bare-bones affidavit[.]" *Newcomb*, 84 N.C. App. at 96, 351 S.E.2d at 567. This argument is overruled.

C. Facts Supporting the Affidavit

Defendant next argues "Detective Garcia's affidavit lacked information to establish that he relied on information from known and reliable informants" and "Detective Garcia's affidavit lacked information that the informants' information was independently verified." We disagree.

1. Known and Reliable Informants

Defendant first contends "Detective Garcia's affidavit lacked information to establish that he relied on information from known and reliable informants."

> Probable cause can be established through the use of informants. In utilizing an informant's tip, probable cause is determined using a 'totality-of-the circumstances' analysis which 'permits a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant's tip. A known informant's information may establish probable cause based on a reliable track record, or an anonymous informant's information may provide probable cause if the caller's information can be independently verified.

State v. Chadwick, 149 N.C. App. 200, 203, 560 S.E.2d 207, 209 (2002) (citations omitted). "Even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *State v. Smothers*, 108 N.C. App. 315, 318, 423 S.E.2d 824, 826 (1992) (citation, quotation marks, and brackets omitted).

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a substantial basis for concluding that probable cause existed.

Id. (citations, quotation marks, brackets, and ellipses omitted).

Defendant relies on cases dealing with anonymous or confidential informants, and those cases are simply not applicable to this case. He relies on *State v. Benters*, 367 N.C. 660, 766 S.E.2d 593 (2014), to assert Mr. Mills and his wife "could not be considered confidential and reliable informants." However, *Benters* differs from this case since in *Benters* the information in the affidavit was from an anonymous tip and "the officers' corroborative investigation was qualitatively and quantitatively deficient, and the affidavit's material allegations were uniformly conclusory." *Id.* at 661, 766 S.E.2d at 595.

Here, the tip was not anonymous; the tip was a complaint from Mr. Mills, who reported that he was the victim of the crime of shooting into an occupied vehicle. He provided his identity and his wife gave police video footage from the incident. Detective Garcia investigated the report and obtained an arrest warrant for Defendant for shooting into an occupied vehicle on 15 February 2022. Unlike *Benters*, Detective Garcia was able to assess the reliability of both Mr. Mills and his wife as they were not anonymous tipsters. *See id.* There was also a bullet hole in Mr. Mills's vehicle and a contemporaneous text message from Mr. Mills to his wife explaining Defendant had just shot at his car, which corroborates the information given to Detective Garcia by Mr. Mills and his wife. Detective Garcia included this information in his affidavit. The affidavit established sufficient reliability and corroboration of the information and this argument is overruled.

2. Verification of the Information

Finally, Defendant argues "Detective Garcia's affidavit lacked information that the informants' information was independently verified." Defendant contends "[t]he alleged shooting was not captured on camera, no video surveillance footage showed Defendant driving a white Range Rover or following Mr. Mills['] vehicle, and when Mr. Mills' vehicle was processed by law enforcement, no projectile was found." We disagree.

Defendant's characterization that a projectile was not found is misleading. Our record includes a picture of a bullet hole in the back of Mr. Mills's car, and the affidavit stated investigators "processed [Mr.] Mills' vehicle but were unable to retrieve the projectile due to it being buried in the trunk liner." The affidavit also expressly states there was video footage from before the shooting that showed Defendant on camera "violently kicking [Mr. Mills's wife's] front door." The affidavit states Mr. Mills "observed [Defendant] appear in his White Range Rover behind him" and Defendant "fired at his vehicle approximately 3 times from behind[.]" Detective Garcia also stated in the affidavit that detectives viewed the video footage themselves and thus Detective Garcia did not solely rely on either Mr. Mills or his wife for an account of what the video footage showed.

Defendant essentially argues that if there isn't video footage of him following Mr. Mills or shooting at him, there isn't sufficient verification of the information from the informants. But there is no such requirement for video verification of an informant's report of a crime, nor could there be. In fact, video footage is not necessary in any criminal case and is not part of the evidence in most cases. The shooting was not captured on camera and there was no video surveillance of Defendant

in a white Range Rover, but there was video surveillance of Defendant kicking in Mr. Mills's wife's front door "just prior to the shooting." This video corroborates Mr. Mills's wife's report that Defendant was at her home at this particular time and that he was inclined to violence toward anyone in the home. Mr. Mills identified Defendant as driving the white Range Rover behind him during the shooting. Mr. Mills sent a text message to his wife right after the shooting explaining what occurred. Police did not recover the projectile, but they found a bullet hole in Mr. Mills's car. Defendant argues "[n]o evidence from law enforcement set forth in Detective Garcia's affidavit corroborated Mr. Mills' statements[,]" but the evidence discussed above does corroborate Mr. Mills's statements; thus, there was sufficient information verified by Detective Garcia to support probable cause. *See State v. Sinapi*, 359 N.C. 394, 399, 610 S.E.2d 362, 365 (2005) ("*Probable cause is a flexible, common-sense standard*. It does not demand any showing that such a belief be correct or more likely true than false. A practical, nontechnical probability is all that is required." (emphasis in original) (citations and quotation marks omitted)). This argument is overruled.

IV. Conclusion

Defendant has failed to establish the affidavit submitted by Detective Garcia did not contain sufficient information showing probable cause to search the Range Rover and Defendant's house. We affirm the trial court's Order.

AFFIRMED.

Judges GRIFFIN and FLOOD concur.

STATE OF NORTH CAROLINA
v.
LAMONT ALEXANDER WAGNER, DEFENDANT

No. COA24-852

Filed 6 August 2025

Assault—with a deadly weapon inflicting serious injury—lesser-included offense of misdemeanor assault—jury instruction—not warranted

In a prosecution for felonious assault with a deadly weapon inflicting serious injury—arising from defendant stabbing another man twice in the back, once under the arm, and once in the stomach—the trial court properly refused defendant's request to instruct the jury on the lesser included offense of misdemeanor assault with a deadly weapon (and instead gave a peremptory instruction that the stab wounds were serious injuries per se) where there was no evidence that would have supported a determination by the jury that the victim's injuries from the stabbings were not serious. Specifically, the evidence tended to show that the victim was hospitalized for three months due to his injuries, was initially placed in the intensive care unit, and required a breathing tube for a period of that time.

Appeal by defendant from order entered 4 October 2023 by Judge John Michael Morris in Forsyth County District Court. Heard in the Court of Appeals 23 April 2025.

Attorney General Jeff Jackson, by Assistant Attorney General Laura S. Jenkins, for the State.

William D. Spence for defendant-appellant.

DILLON, Chief Judge.

Defendant Lamont A. Wagner seeks review of the judgment entered by the trial court upon a jury's verdict convicting him of assault with a deadly weapon inflicting serious injury ("AWDWISI") based on an altercation he had with another person. He argues that the trial court erred in failing to instruct the jury on a lesser-included offense of misdemeanor assault with a deadly weapon (where no serious injury has been

proven). For the reasoning below, we conclude Defendant received a fair trial, free of reversible error.

I. Background

Defendant and the victim engaged in an altercation in May 2022. The victim testified that Defendant had stabbed him twice in his back, once under his arm, and once in his stomach and that he was hospitalized for approximately three months because of these injuries. The victim testified that he was initially placed in the ICU and had a breathing tube, which was removed at a later date.

At the charge conference, Defendant requested that the jury be provided an instruction on the lesser included offense of misdemeanor assault with a deadly weapon to let the jury decide whether the victim's injury was serious. The trial court did not instruct the jury on the lesser offense and made a peremptory instruction that the stab wound was a serious injury *per se*. The jury found Defendant guilty of assault with a deadly weapon inflicting serious injury. Defendant filed a timely, but defective, notice of appeal.

II. Appellate Jurisdiction

Defendant's notice of appeal was defective and insufficient to confer jurisdiction on our Court to consider his arguments. Defendant, though, has petitioned our Court for a writ of *certiorari* to permit appellate review of the judgments. N.C. R. App. P. 21(a)(1) (2021).

It appears Defendant has lost his right to appeal his conviction through no fault of his own. He had instructed his attorney to notice an appeal; however, his attorney inadvertently failed to attach to the notice a certificate of service showing service on the district attorney. The notice was, otherwise, timely filed; and the State was aware of the notice. *See Bradley v. Cumberland Cnty.*, 262 N.C. App. 376, 381 (2018) (holding a failure to include a certificate of service with his notice of appeal in violation of Rule 4 did not warrant dismissal of the appeal as the parties had actual notice of the appeal as indicated by their participation in the appeal). Accordingly, in our discretion, we grant Defendant's petition.

III. Analysis

On appeal, Defendant contends the trial court erred by failing to include a jury instruction for the lesser included offense of misdemeanor assault with a deadly weapon.

"A trial court's decision not to give a requested lesser-included offense instruction is reviewed *de novo* on appeal." *State v. Matsoake*,

243 N.C. App. 651, 657 (2015) (citation omitted). Our Supreme Court has instructed that we are to view the evidence in the light most favorable to the defendant in determining whether there is sufficient evidence for submission of a lesser included offense to the jury:

> In order to be granted a new trial for the trial court's failure to instruct the jury on a lesser-included offense, a criminal defendant must demonstrate that there was evidence presented at trial that, viewed in the light most favorable to the defendant, would permit a rational jury to acquit the accused of the greater charge and convict him or her of the lesser offense.

State v. Brichikov, 383 N.C. 543, 553 (2022).

"Failure to submit a requested jury instruction on a lesser-included offense when one is warranted is generally reversible error." *Id.* at 556. "Our law states that when the court improperly fails to submit a lesser included offense of the offense charged, and the jury had only two options in reaching a verdict—guilty of the offense charged and not guilty—then a verdict of guilty of the offense charged is not reliable, and a new trial must be granted." *State v. Price*, 344 N.C. 583, 589 (1996).

An error may require reversal to the trial court if the error is prejudicial under the analysis provided by N.C.G.S. § 15A-1443. "A defendant is prejudiced by errors . . . when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C.G.S. § 15A-1443(a) (2023). Additionally, it is the defendant's burden to show the error is prejudicial. *Id.*

Regarding the crime of assault with a deadly weapon inflicting serious injury, "[s]erious injury is 'physical or bodily injury resulting from an assault with a deadly weapon.' " *State v. Bagley*, 183 N.C. App. 514, 526 (2007) (internal citation omitted). Serious injury is not defined with specificity for this crime because whether an injury is serious is usually a factual determination for the jury to decide. *See State v. Woods*, 126 N.C. App. 581, 592 (1997); *see also State v. Hedgepeth*, 330 N.C. 38, 53 (1991). However, a trial court may remove the element of serious injury from consideration by the jury by peremptorily declaring the injury to be serious when the evidence is not conflicting and where reasonable minds could not differ as to the serious nature of the injuries. *Hedgepeth*, 330 N.C. at 53-54.

We hold the trial court did not err in instructing the jury, as there was no evidence before the jury to indicate the victim's injuries were *not*

serious. It could be argued the instruction on a lesser included offense is warranted anyway, as the jury could have found that the State failed to meet its burden on the "serious injury" element while meeting its burden as to the other elements. However, our Supreme Court has been clear that "[t]he trial court may refrain from submitting the lesser included offense to the jury [ ] where the evidence is clear and positive as to each element of the offense charged and *no evidence supports a lesser included offense*," *State v. Lawrence*, 352 N.C. 1, 19 (2000) (emphasis added) (internal marks omitted), and that "the trial court need not submit lesser included degrees of a crime to the jury when the State's evidence is positive as to each and every element of the crime charged *and there is no conflicting evidence relating to any element of the crime charged*," *State v. Millsaps*, 356 N.C. 556, 562 (2002) (emphasis in the original) (internal marks omitted). That is, there must be conflicts in the evidence, which may arise from other evidence introduced by the State or from evidence introduced by the defendant to warrant an instruction on a lesser included offense. *Id.*

Accordingly, since the sole evidence offered concerning the victim's injuries, if believed, could only lead a reasonable jury to find that said injuries were serious, we conclude the trial court did not err.

NO ERROR.

Judges WOOD and STADING concur.

STATE OF NORTH CAROLINA
v.
ANTHONY EDWARD WRIGHT, JR.

No. COA24-863

Filed 6 August 2025

1. Criminal Law—defenses—justification—possession of a firearm by a felon—no entitlement to jury instruction

The trial court properly refused to instruct the jury on the affirmative defense of justification to the offense of possession of a firearm by a felon where the evidence at trial did not establish the first of four factors required to entitle defendant to such an instruction: that defendant was under imminent and impending threat of death or serious bodily injury at the time he took possession of the firearm. To the contrary, the evidence tended to show that defendant possessed the gun with which he killed a man during an altercation well before the fight took place; just before the shooting, defendant was seen retrieving the gun from his van, which had been parked outside the building he was helping to remodel for several hours while defendant worked inside.

2. Criminal Law—prosecutor's arguments—insinuations that defendant was a liar and gave false testimony—prejudicial error not shown

In a prosecution that resulted in defendant being convicted of voluntary manslaughter and possession of a firearm by a felon, remarks by the prosecutor during closing arguments—insinuating that defendant was a liar and injecting the prosecutor's opinion about the falsity of defendant's testimony—were improper, but not so grossly improper that they prejudiced defendant by depriving him of a fair trial. The improper remarks comprised only a brief portion of the State's closing argument, the jury convicted defendant of voluntary manslaughter although he had been charged with first-degree murder, and the evidence of defendant's guilt of voluntary manslaughter (committing an intentional and unlawful act that proximately causes the victim's death) was overwhelming: defendant admitted that he shot the victim, a witness testified that defendant shot and stabbed the victim, and uncontroverted expert testimony was that the victim died from blood loss as the result of gunshot and stab wounds.

Judge GRIFFIN concurring in result only.

Appeal by Defendant from judgments entered 15 December 2023 by Judge Richard Kent Harrell in Columbus County Superior Court. Heard in the Court of Appeals 21 May 2025.

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

William D. Spence for Defendant-Appellant.

COLLINS, Judge.

Defendant Anthony Edward Wright, Jr., appeals from jury verdicts finding him guilty of voluntary manslaughter and possession of a firearm by a felon. Defendant argues on appeal that the trial court (1) "prejudicially erred by failing to charge the jury on justification as an affirmative defense to the charge of possession of a firearm by a felon" and (2) "erred in allowing the [State] to characterize Defendant as a liar and perjurer in [its] closing argument." We find no prejudicial error.

I. Background

Defendant was indicted for first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, and possession of a firearm by a felon, all stemming from events that took place on 8 June 2020. Defendant's case came on for jury trial on 11 December 2023. The evidence presented at trial tended to show the following:

A. Jonathan Peppers' Testimony

On 8 June 2020, Defendant was working with Jonathan Peppers, a family friend, helping to remodel a Time Saver service station ("store") in Brunswick, North Carolina. Peppers' uncle had raised Defendant and, while he and Defendant were not actually family, they had "somewhat of a family relationship[.]" That afternoon, after Defendant walked out of the store, Defendant and Brandon Baldwin engaged in a verbal argument in front of the store. The two men were "having words back and forth," and Baldwin told Defendant, "I just want my ones. I just want my ones. I came here to fight. I want my ones."

Peppers asked the two men "not to . . . get into it up there" because this was Peppers' first remodeling job. Baldwin pulled up his shirt and said, "I ain't got no gun. I just want my ones." This meant that "[Baldwin]

just wanted to fight." Peppers helped de-escalate the situation, and the two men walked away from each other at the same time.

Baldwin walked away, got into his car, and started to drive off while Defendant walked back towards the store. Baldwin then drove by the front of the store, stopped, and got out of his car while repeating that he "ain't got no gun" and that he wanted "his ones." Defendant went to his van, opened the door, and grabbed a pistol from inside. Peppers "looked up . . . and saw [Defendant] come around [Baldwin's] car, and [Defendant] was shooting at [Baldwin]."

Defendant aimed at and shot Baldwin from behind multiple times. Baldwin fell to the ground, got up, and ran around the outside of the store; Defendant chased Baldwin while still holding the pistol. Peppers followed the two men and saw them "tussling back and forth." Defendant choked Baldwin and stabbed him with a large knife.

Peppers turned around and told the store owner to call the police. Peppers went back to where the two men were fighting and saw Defendant "standing behind [Baldwin], and it was bloody. There was blood everywhere. . . . [Defendant] had a knife in his hand, and that's when he got up. He started walking, like, towards going to leave. And I turned around and left." Peppers never saw Baldwin with a gun or knife, but he did see Defendant holding a "large knife" as he "went to his van" and "drove off."

B. Officers' Testimony

Officers with the Columbus County Sheriff's Office received a "shots fired call" and arrived at the store to find Baldwin "totally engulfed in blood." Baldwin's "injuries were so intense that it was just impossible to do anything for him." Baldwin was alive when officers arrived on scene, but he was "just sitting there gasping for – for air. He wasn't able to say anything. He tried to open his mouth once and speak, and saliva and blood mixture came out of his mouth." Officers saw Baldwin's "red frothy blood" and "brain matter on the cement" before witnessing Baldwin "t[a]k[e] his last breath" outside the store. The officers never saw Baldwin with a gun or knife or did not find any weapons at the scene.

C. Dr. Michelle Aurelius' Testimony

Dr. Michelle Aurelius, the North Carolina Chief Medical Examiner, performed an autopsy on Baldwin's body and testified at trial as an expert in forensic, anatomic, and clinical pathology. Baldwin's injuries included "multiple gunshot wounds, multiple sharp force injuries and multiple

blunt force injuries." Baldwin suffered three gunshot wounds: one to the back of his right lower leg, which shattered his tibia and fibula; one to the back of his right thigh; and one to his right upper back. Baldwin suffered multiple "sharp force injuries, including stab wounds," to his face, forehead, hands, upper extremities, and trunk, including a stab wound to his neck that went 3.5 inches deep and sliced his left carotid artery "caus[ing] a significant amount of blood loss" that "alone in and of itself can cause death." Baldwin also suffered blunt force trauma to his head and abrasions to his hands and upper and lower extremities. Baldwin died from blood loss caused by "multiple sharp, blunt and gunshot injuries."

D. Defendant's Testimony

Defendant testified in his own defense. Defendant drove his van to the store on the morning of 8 June 2020 and did not encounter Baldwin until sometime after lunch. Baldwin purportedly told him, "I'm gonna f[*]ck you up today" and threatened to kill Defendant and his family. Defendant watched Baldwin pull up his shirt and saw "the handle" of a weapon on Baldwin's hip. Defendant "kind of snapped" and "went into a rage" when Baldwin threatened him and his family, but Defendant "felt like [he] was just defending [him]self" because he knew "what type of person [Baldwin] was from the streets" and that Baldwin "had a reputation for violence." Baldwin "had his blade in his hand" and "[i]t was upside down on his -- up -- laying up against his arm." Defendant saw the "handle" of the weapon "on [Baldwin's] side or whatever" so he "reacted to it" and "fire[d] a shot at him." Baldwin then cut Defendant with the knife, so Defendant fought back while he "was in a murderous rage."

Defendant left the scene before the police arrived and took the knife and pistol with him. He left because he was afraid, and he "went straight to the police station" where he informed Columbus County law enforcement officers of "the event that took place," but they "told [him] they didn't have nothing" and told him that he "could leave." He returned to the police station later that night when he "received the report that they had a warrant for [his] arrest." He sought medical attention for his injuries while he was in custody, and law enforcement officers transported him to the hospital. He suffered from "[s]tab wounds to [his] hand, cuts to [his] shoulder, elbow, and forearm."

Defendant admitted that his medical records showed that he had "[a]brasions on the left shoulder and the right hand" and did not show that he suffered any stab wounds or lacerations to his shoulders, hands, or arms; the records did indicate that Defendant had a "face laceration

measuring about three centimeters[.]" Defendant admitted multiple times to possessing the pistol and admitted to shooting Baldwin.

E. Jury's Verdict

The trial court dismissed the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The jury found Defendant guilty of voluntary manslaughter, a lesser-included offense of first-degree murder, and possession of a firearm by a felon. The trial court sentenced Defendant to 84-113 months in prison for the voluntary manslaughter conviction and a consecutive sentence of 17-30 months in prison for the possession of a firearm by a felon conviction. Defendant gave proper notice of appeal.

II. Discussion

Defendant argues that the trial court: (1) "prejudicially erred by failing to charge the jury on justification as an affirmative defense to the charge of possession of a firearm by a felon" and (2) "erred in allowing the [State] to characterize Defendant as a liar and perjurer in [its] closing argument."

A. Jury Instruction

[1] Defendant first argues that the trial court either erred or plainly erred by failing to charge the jury on justification as an affirmative defense to the charge of possession of a firearm by a felon. The parties address in various ways whether the issue was properly preserved for our review and the applicable standard of review. Our review of the record and transcripts shows that: Defendant filed a "Notice of Defense: Justification" prior to trial; Defendant requested the instruction on defense of justification during the charge conference; the trial court refused to give the requested instruction because it determined that the evidence was insufficient to charge the jury on justification; Defendant renewed the request prior to closing arguments and the trial court noted the renewed request; and Defendant, at the close of the trial court's jury instructions and after being asked by the trial court whether he had "any additions, corrections, or modifications to the instructions," again renewed "the motions previously made as part of the record." This issue was properly preserved for this Court's review.

This Court reviews properly preserved challenges to jury instructions de novo. *See State v. Mash*, 323 N.C. 339, 348 (1988). In order to determine "whether a defendant is entitled to a requested instruction, we review de novo whether each element of the defense is supported by the evidence, when taken in the light most favorable to defendant."

State v. Swindell, 382 N.C. 602, 606 (2022) (quotation marks and citations omitted). The trial court must give the requested jury instruction only if it "is correct in itself *and supported by evidence* . . . ." *Id.* (quotation marks and citations omitted).

It is unlawful for "any person who has been convicted of a felony to . . . possess, or have in his custody, care, or control any firearm . . . ." N.C. Gen. Stat. § 14-415.1(a) (2023). "The offense of possession of a firearm by a convicted felon has two essential elements: (1) the defendant has been convicted of a felony, and (2) the defendant subsequently possessed a firearm." *State v. Floyd*, 369 N.C. 329, 333 (2016) (citation omitted). Here, Defendant stipulated that he was a convicted felon for the purposes of N.C. Gen. Stat. § 14-415.1(a) and admitted multiple times while testifying to possessing a firearm. Defendant does not challenge the sufficiency of the evidence of this charge; rather, he argues that he was entitled to a jury instruction on justification as an affirmative defense to this charge.

Our Supreme Court has held that, "in narrow and extraordinary circumstances," the affirmative defense of justification may be available as a defense to a charge of possession of a firearm by a convicted felon. *State v. Mercer*, 373 N.C. 459, 463 (2020). The affirmative defense of justification "does not negate any element" of the offense charged, and "serves only as a legal excuse for the criminal act and is based on additional facts and circumstances that are distinct from the conduct constituting the underlying offense." *Id.* (quotation marks and citations omitted). "Thus, like other affirmative defenses, a defendant has the burden to prove his or her justification defense to the satisfaction of the jury." *Id.* (citations omitted). The Court in *Mercer* set forth four elements that a defendant must show to establish justification as a defense to a charge under N.C. Gen. Stat. § 14-415.1:

> (1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Id. at 464 (quotation marks and citation omitted). A defendant is thus entitled to a justification instruction only when "each . . . factor is supported by evidence taken in the light most favorable to defendant" based on "the specific facts of the case at hand." *Id.* (citation omitted).

The critical inquiry under the first element in *Mercer* is whether a defendant was under "imminent and impending threat of death or serious bodily injury at the time he took possession of the firearm" and not at the time that he used the firearm. *State v. Monroe*, 233 N.C. App. 563, 570 (2014) (cleaned up). Evidence showing that a convicted felon possessed a firearm prior to an altercation precludes an instruction on the defense of justification. *See State v. Boston*, 165 N.C. App. 214, 222 (2004) (no error in failing to charge the jury on justification where the defendant was seen carrying a pistol the same day that he got into a fight with and shot the victim); *State v. Napier*, 149 N.C. App. 462, 465 (2002) (evidence did not support a conclusion that defendant was under an imminent threat of death or injury where it showed that defendant possessed a gun "for several hours" before a fight ensued). Moreover, a convicted felon loses entitlement to the defense of justification where the evidence shows that he continued to possess a firearm after the threat had passed. *See State v. Craig*, 167 N.C. App. 793, 796-97 (2005) (the defendant was not entitled to the defense of justification where the evidence showed that he "kept the gun and took it with him" after a fight because he was "not under any imminent threat of harm" or impending threat of death or bodily injury).

Here, the evidence tends to show that Defendant possessed the pistol hours before the fight with Baldwin and continued to possess the pistol after the altercation had concluded. Defendant testified that he drove his van to the store, arriving at approximately 8:00 a.m. on 8 June 2020, and worked there the entire morning until he took "a small break" for lunch at the store. After his break, he resumed his work and remained at the store until Baldwin arrived sometime in the afternoon. Shortly after Baldwin's arrival, Peppers watched Defendant "go to his van, and come out with a pistol and shoot" Baldwin. When asked if he saw Defendant reach into his van to get the pistol, Peppers testified, "Yes." As in *Boston* and *Napier*, this evidence supports that Defendant possessed the firearm prior to his encounter with Baldwin.

Additionally, Defendant testified that he took the pistol with him after the altercation with Baldwin. After the fight was over, he closed the trunk to his van, got into the driver's seat, drove away from the scene, and "took the gun" with him. When asked if he got rid of the gun, Defendant replied, "I wouldn't say, no, I got rid of [it]. I really didn't know what to do with [it]. . . . I just put [it] away." As in *Craig*, this evidence tends to show that Defendant continued to possess the firearm after the altercation with Baldwin had ended and he was "not under any imminent threat of harm" or impending threat of death or bodily injury. 167 N.C. App. at 796-97. The uncontroverted evidence here supports that

Defendant possessed the firearm both before and after his encounter with Baldwin, and Defendant cannot satisfy the first element of *Mercer*. *See Monroe*, 233 N.C. App. at 570.

Because Defendant "bears the burden to establish each element of the justification defense, and because we conclude that [D]efendant failed to meet his burden as to the [first] element, we need not analyze the [remaining] element[s]." *Swindell*, 382 N.C. at 607. "Thus, the evidence at trial, taken in the light most favorable to [D]efendant, fail[s] to support each element of the requested jury instruction on justification as a defense to the charge of possession of a firearm by a felon[,]" *id.*, and the trial court did not err in denying Defendant's requested instruction.

B. Closing Argument

[2] Defendant next argues that the trial court erred by failing to intervene ex mero motu during the State's closing argument when it "characterize[d] Defendant as a liar and perjurer."

This Court's standard of review for assessing alleged improper closing arguments that failed to provoke timely objection from opposing counsel is

> whether the remarks were so grossly improper that the trial court committed reversible error by failing to intervene *ex mero motu*. In other words, the reviewing court must determine whether the argument in question strayed far enough from the parameters of propriety that the trial court, in order to protect the rights of the parties and the sanctity of the proceedings, should have intervened on its own accord . . . .

State v. Jones, 355 N.C. 117, 133 (2002) (citation omitted). Thus, "the standard of review requires a two-step analytical inquiry: (1) whether the argument was improper; and, if so, (2) whether the argument was so grossly improper as to impede the defendant's right to a fair trial." *State v. Huey*, 370 N.C. 174, 179 (2017) (citations omitted). Only when we find "both an improper argument and prejudice" will we "conclude that the error merits appropriate relief." *Id.* (citation omitted).

"A prosecutor must be allowed wide latitude in the argument of hotly contested cases and may argue all the facts in evidence and any reasonable inferences that can be drawn therefrom." *State v. Alford*, 339 N.C. 562, 571 (1995) (citation omitted). However, a prosecutor may not express his "personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant . . . ." *Huey*, 370 N.C.

at 180 (citation omitted). "The prosecutor may not determine matters of credibility and announce the result in open court – that is the jury's prerogative." *State v. Locklear*, 294 N.C. 210, 218 (1978). Additionally, a prosecutor may "address a defendant's multiple accounts of the events at issue to suggest that the defendant had not told the truth[,]" but he may not "insinuate[] that defendant lied" or "directly call[] defendant a liar." *Huey*, 370 N.C. at 182 (cleaned up); *see State v. Miller*, 271 N.C. 646, 659 (1967) ("[A prosecutor] can argue to the jury that they should not believe a witness, but he should not call him a liar.").

In determining whether the remarks were grossly improper, we consider "the context in which the remarks were made, as well as their brevity relative to the closing argument as a whole[.]" *State v. Taylor*, 362 N.C. 514, 536 (2008) (cleaned up). "[T]he impropriety of the argument must be gross indeed" in order for this Court to hold that the trial court "abused [its] discretion in not recognizing and correcting [e]x mero motu an argument which defense counsel apparently did not believe was prejudicial when he heard it." *State v. Johnson*, 298 N.C. 355, 369 (1979) (citation omitted). "When this Court has found the existence of overwhelming evidence against a defendant, we have not found statements that are improper to amount to prejudice and reversible error." *Huey*, 370 N.C. at 181 (citations omitted).

Defendant objects to two portions of the State's closing argument. Defendant first objects to the State's remark asserting that "[Defendant] elected to testify and tell you this story that it took him three years to come up with . . . ." He next objects to the bolded portions of the State's remark that:

> **[Defendant] comes up with this story** that he went and turned himself in and that law enforcement said, "Don't worry about it," and then comes back hours later. **Defense would have you believe that the first thing he did, the very first thing he did was go turn himself in. Not true**. That's not his testimony. The very first thing he did was get rid of those weapons, the gun and the knife. . . .

We agree that the challenged remarks are improper, as the State impermissibly "insinuated" that Defendant was a liar and "inject[ed] [its] opinion as to the truth or falsity of" Defendant's testimony. *Huey*, 370 N.C. at 182. Here, the State did not "allow[] the jury to come to its own conclusion regarding [D]efendant's credibility," but instead "attack[ed] [D]efendant's credibility through the prosecutor's personal opinion," which it could not do. *Id.* We admonish counsel and the State to avoid such comments at risk of a mistrial or new trial. *Id.*

Despite the remarks being improper, they were not so grossly improper that they prejudiced Defendant by depriving him of his right to a fair trial. First, we consider the "brevity [of the remarks] relative to the closing argument as a whole," *Taylor*, 362 N.C. at 536, and note that they comprise only a few lines of the State's thirteen-page transcribed closing argument and that the rest of the closing argument was not challenged. Additionally, "the evidence supporting [D]efendant's voluntary manslaughter conviction is overwhelming[.]" *Huey*, 370 N.C. at 183.

Although Defendant was charged with first-degree murder, he was convicted of voluntary manslaughter. "Voluntary manslaughter is the unlawful killing of a human being without malice and without premeditation and deliberation." *State v. Norris*, 303 N.C. 526, 529 (1981) (citation omitted). Voluntary manslaughter requires the State to prove two elements: "(1) Defendant killed [the victim] by an intentional and unlawful act[,] and (2) Defendant's act was the proximate cause of [the victim's] death." *State v. English*, 241 N.C. App. 98, 105 (2015) (quotation marks omitted); *see also* N.C.P.I.–Crim. 206.13 (2018).

Here, Defendant testified that he shot Baldwin. Peppers testified that he witnessed Defendant shoot and stab Baldwin. Dr. Aurelius testified that Baldwin died from blood loss resulting from the gunshot wounds and stab wounds. The uncontroverted evidence tends to show that Defendant intentionally shot and stabbed Baldwin to death—the only elements necessary to prove voluntary manslaughter. Given this evidence, there is "no reasonable possibility that, had the errors in question not been committed, a different result would have been reached at the trial." *Huey*, 370 N.C. at 185 (brackets and citation omitted). We thus determine that the State's remarks were not so grossly improper as to deprive Defendant of his right to a fair trial, and the trial court did not abuse its discretion by failing to intervene ex mero motu during the State's closing argument. *Id.* at 186.

III. Conclusion

Because the evidence at trial, taken in the light most favorable to Defendant, "fail[s] to support each element of the requested jury instruction on justification as a defense to the charge of possession of a firearm by felon[,]" the trial court did not err by refusing to instruct the jury on the defense of justification. *See Swindell*, 382 N.C. at 607.

And, while the challenged remarks made during the State's closing argument were improper and admonished, they were not so grossly improper as to deprive Defendant of his right to a fair trial; the trial

court thus did not abuse its discretion by failing to intervene ex mero motu during the State's closing argument. *See Huey*, 370 N.C. at 186.

NO PREJUDICIAL ERROR.

Judge TYSON concurs.

Judge GRIFFIN concurs in the result only.

CASES REPORTED WITHOUT PUBLISHED OPINIONS

(FILED 6 AUGUST 2025)

ARMISTEAD v. SHAW No. 24-481	Cabarrus (22CVS001248-120)	Affirmed
BALD HEAD ISLAND LTD., LLC v. VILL. OF BALD HEAD ISLAND No. 24-937	Brunswick (23CVS000098-090)	Affirmed
BOONE v. GREEN No. 24-63	Wake (23CVS8762-910)	Affirmed in Part, Vacated in Part, and Remanded
IN RE B.I.C.M. No. 24-973	Forsyth (20JA000121-330)	Affirmed
IN RE J.C. No. 25-91	Forsyth (23JT000076-330)	Affirmed
IN RE T.J.S. No. 25-85	Davidson (22JT000185-280) (22JT000184-280)	Affirmed
SCHOLL v. SCHOLL No. 24-969	Iredell (22CVD002874)	Vacated and Remanded
STATE v. CANTY No. 24-716	Davidson (21CRS052560-62) (22CRS000040)	NO ERROR IN PART; NO PREJUDICIAL ERROR IN PART.
STATE v. CHAMBERS No. 22-1063-2	Wake (18CR215678-910) (18CR215679-910)	No Error
STATE v. FAIR No. 24-507	Guilford (18CRS069912) (18CRS069913)	No prejudicial error.
STATE v. GOODE No. 24-697	Rutherford (20CRS053136)	No Error
STATE v. GOODSON No. 24-813	Vance (22CRS051272) (22CRS051274)	No Error
STATE v. HUNTLEY No. 24-1015	Union (21CRS000422) (21CRS051670) (21CRS051671) (21CRS051672)	Dismissed

STATE v. NUNNALLY No. 24-550	Durham (21CRS053976) (21CRS054031)	Remanded
STATE v. SIMMONS No. 24-260	Guilford (18CRS81427-28) (18CRS81567-68) (18CRS90475) (22CRS26017)	No Error
STATE v. TILLMAN No. 24-817	Duplin (20CRS050582) (20CRS050583) (20CRS050611)	No Error
WOODRUFF v. WOODRUFF No. 24-789	Robeson (20CVD001209-770)	Affirmed

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